THE WHITE HOUSE

PRESIDENT'S COMMISSION ON MODEL STATE DRUG LAWS

Economic Remedies

December 1993

President's Commission on Model State Drug Laws

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OFFICE OF NATIONAL DRUG CONTROL POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
Washington, D.C. 20500

December 1, 1993

Dear Colleague:

Drug use and drug trafficking have affected virtually every town, city, and State in America. Nearly every family has been touched in some way by illegal drug use and the violence it spawns.

The drug problem pervades all aspects of American life. In response, the President's National Drug Control Strategy calls for a broad-based crusade to reduce the demand for drugs, restrict their availability, and deter drug-related crime and violence. A fundamental principle of this Strategy is the idea that the most effective drug control programs are those designed and carried out at the State and community levels.

In recent years States and localities have responded creatively and energetically to the threat posed by illicit drugs, in part by enacting a broad range of codes and statutes. The President's Commission on Model State Drug Laws, a bipartisan group of distinguished Americans with extensive experience in law enforcement, drug treatment, and prevention, has spent the past year reviewing these codes and statutes.

Based on this review, the Commission has developed a comprehensive package of legislative initiatives, with specific recommendations that address not only the need for more effective criminal laws but also, and just as important, the need for legislation to empower and mobilize communities to confront the drug problem. In addition, the Commission's recommendations provide innovative civil remedies to supplement our criminal codes; facilitate the development of comprehensive educational and prevention tools by which to teach our children to resist the temptation of drugs; encourage businesses and their employees to work cooperatively by establishing effective workplace initiatives and employee assistance programs; and enhance our ability to provide drug treatment to those who need it.

The package of State legislative initiatives compiled by the President's Commission is a valuable resource for State legislators, local officials, and other concerned citizens who are seeking additional ways to confront and overcome the problems created by drug trafficking and drug use. I encourage your careful review of these initiatives.

Lee P. Brown
Director

Executive Director's Preface

Alcohol and other drug addiction erodes the vitality of our nation in ways we do not even realize. Drug-trafficking crimes and crack babies grab headlines, but as a society we fail to acknowledge, and public policy fails to reflect, that many of the other major problems of our day have their roots in widespread substance abuse.

Health care costs, for example, are driven up dramatically by untreated addiction; the average alcoholic or other drug addict is conservatively estimated to be using ten times the medical services of a non-addict. The disease of addiction destroys the body in many ways not commonly known, and all of us pay the costs of treating this physical breakdown through higher taxes or higher insurance premiums. Until the health care system provides sufficient access to effective treatment, as recommended in the Commission's model legislation, health care costs will remain unacceptably high no matter how the health care system is redesigned.

Crime and prison overcrowding is another example. Sixty to eighty percent of criminal defendants are addicted. Those who are convicted and jailed continue their habits in prison, where alcohol and drugs are readily available despite regulations and enforcement to keep them out. Offenders not imprisoned for life or executed will ultimately be released into society, still addicted and still dangerous. It is hardly surprising that crime rates remain high even though the number of people imprisoned in America has increased 168 percent since 1980.

Offenders entering the criminal justice system are in the perfect place at the perfect time to be assessed for addiction and referred to treatment. The burglaries, assaults, thefts, rapes and murders committed by that addicted sixty to eighty percent are closely connected to their alcohol and drug problems. Crime and prison overcrowding will not diminish to an acceptable level until the criminal justice and treatment systems are integrated, as recommended in the Commission's Model Criminal Justice and Treatment Act. It will take years before every person arrested is assessed for substance addiction and where appropriate referred into treatment, but our country cannot afford to do anything but begin this transition.

Productivity in the workplace (which affects our global economic competitiveness) is another area where substance abuse has tremendous impact. Untreated addictions cost American businesses from $50 billion to $100 billion each year in increased medical claims and disability costs from illness and injuries, theft, absenteeism, and decreased productivity. These costs are comprehensible when one considers that fully two-thirds of all drug abusers in America are in the workplace.

The workplace is also a highly effective point of intervention for adult abusers. While much of the attention to drug-free workplaces in recent years has focused on drug testing, testing is only one tool to address the problem. A comprehensive drug-free workplace program is essential: written

policy statements, employees assistance programs and rehabilitation resources, employee education programs, supervisor training programs, testing, and confidentiality protections. Employers consistently report that these bring tremendous cost savings.

As staggering as are the obvious economic costs of alcohol and other drug abuse, the costs in human suffering are even greater. Millions of American babies are born into families ruined by the disease of addiction. The neglect, the cruelty and the abuse they suffer rob them of their innate innocence, hope, spontaneity and enjoyment of life. The bewilderment of children who can't count on a rational, nurturing, secure framework to grow up in causes incalculable emotional and spiritual damage.

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Those who offer solutions for our country's drug problems have traditionally misunderstood each other. Many law enforcement officials, for example, have been suspicious of those advocating treatment for criminal offenders. They believe that treatment advocates do not care about making criminals pay for their crimes, that they are cavalier about protecting public safety, and that treatment is just a "soft," easy alternative to the hard prison time that serious offenders should be serving. Many treatment advocates, on the other hand, have countervailing suspicions. They believe the law enforcement community is myopically focused on punishment without looking at the broader picture of how to create a safer society by changing addicted offenders' lives.

The President's Commission on Model State Drug Laws was a microcosm of the diverse viewpoints on the drug crisis. The law enforcement perspective was well represented, with three state attorneys general, five big city prosecutors, and two police chiefs. Those representing the treatment and prevention disciplines, though fewer in number, were not deterred from persuasively championing their own perspectives.

The challenge of reaching consensus initially seemed insurmountable to many of us. But after hundreds of hours of frank, honest exchanges about goals, priorities, concerns and doubts, both during formal meetings and hearings, and informally during off hours, something remarkable happened. Virtually every Commissioner learned that the "other" perspectives were not in opposition to his or her own.

Law enforcement Commissioners learned that treatment providers actually need the support of tough law enforcement; that instead of "special breaks," addicted offenders have to be held responsible for their actions like everyone else. Indeed, some treatment providers complained that the criminal justice system too often is not tough enough, and undermines treatment programs by not carrying out their recommendations to jail criminal justice clients who are not cooperating with the course of treatment.

Similarly, the treatment Commissioners found that prosecutors and police are not opposed to treatment per se. They learned that prosecutors' hesitations have sprung primarily from the public misperception that treatment does not work. When presented with compelling evidence that treatment can be effective in substantially reducing both recidivism and relapse, and thereby protects public safety, law enforcement Commissioners unanimously supported the expansion of treatment resources within both the criminal justice system and the public and private health care systems.

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The model legislation this Commission created integrates an unprecedented diversity of credible approaches into a single, comprehensive proposal. Bringing together leading professionals from different fields to address a common problem, and seeking to broaden the understanding of each by all the others, is itself a model for effective change.

By opening their minds to the broad picture of drug problems and solutions, these Commissioners were able to contribute to a richer whole than any of us thought possible in the beginning. By sincerely striving to understand approaches and perspectives they weren't always familiar with, they helped to create a package of legislation that will finally, and truly, make a difference.

Gary Tennis
Executive Director

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Introduction

The 1988 Anti-Drug Abuse Amendments created a six month bipartisan presidential commission to develop state legislative responses to the drug problem. Funded in 1991, the 23 member Commission was sworn in on November 16, 1992. Twelve Democrats and eleven Republicans, the Commissioners included an urban mayor, a superior court judge, state legislators, a child advocate, a housing specialist, state attorneys general, police chiefs, treatment providers, district attorneys and private practice lawyers. The Commission's mission was:

> to develop comprehensive model state laws to significantly reduce, with the goal to eliminate, alcohol and other drug abuse in America through effective use and coordination of prevention, education, treatment, enforcement, and corrections.

To facilitate its mission, the Commission held public hearings around the country to gather information on five broad topics:

- Economic remedies against drug traffickers
- Community mobilization and coordinated state drug planning mechanisms
- Crimes code enforcement against drug offenders
- Alcohol and other drug treatment
- Drug-free families, schools, and workplaces

The economic remedies hearing was held on January 6, 1993 at the University of San Diego Law School. Oral and written testimony was received from prosecutors, defense attorneys, prosecutorial organizations, defense organizations, mayors, police, law professors, the General Accounting Office (GAO) and state regulatory officials. Witnesses discussed asset seizure and forfeiture procedures, distribution of forfeiture proceeds, economic analysis of forfeiture, status of state anti-money laundering efforts, financial transactions reports, money transmitter regulation, Racketeer Influenced Corrupt Organizations (RICO) laws, and Continuing Criminal Enterprise (CCE) statutes.

Six months of review, analysis and drafting have culminated in the following model economic remedies acts recommended by the Commission and discussed in Volume I of the Commission's Final Report:

- Commission Forfeiture Reform Act (CFRA)
- Model Demand Reduction Assessment Act
- Model Money Laundering Act
- Model Financial Transaction Reporting Act
- Model Money Transmitter Licensing and Regulation Act
- Model Ongoing Criminal Conduct Act

Economic Remedies Policy Statement

For every minute spent reading this report, drug dealers earn over $100,000 in profits[1]. This means drug dealers net more money in one minute than 98.8% of working Americans received in gross income for 1991[2]. U.S. financial institutions are believed to launder $40 billion to $80 billion annually in illegal drug proceeds[3]. As one Houston police lieutenant declared, "Drug dealers no longer count their money, they weigh it."[4]

Money and property fuel the creation and perpetuation of the illegal drug industry. The promise of enormous profits motivates criminal entrepreneurs to engage in drug trafficking. Profit seekers repeatedly come together to undertake the clandestine production, manufacture, transportation, and distribution of illegal drugs. A person's ability to share in illegal drug proceeds depends on that person's ability to access money and property needed to accomplish trafficking activities. The continuous flow of money and property into illegal drug uses requires a veil of legitimacy to avoid arousing suspicion. The apparent legitimacy is provided through money laundering efforts of financial advisors, lawyers, and others drawn to the illegal drug trade by the allure of quick, easy wealth.

Criminal sanctions alone are unable to stop or seriously impair the conduct of the illegal drug industry. Incarceration is intended to physically remove and isolate individuals from the criminal activity. However, the money and property which are the economic forces driving the illegal drug business remain relatively undisturbed. Drug proceeds are still available to anyone capable of successful participation in a drug venture. One convicted drug dealer is quickly replaced by another equally eager to reap large sums of money. The convicted dealer's property is often still available for illegal drug use through operation of the dealer's enterprise.

A fight which only targets individuals involved in drug trafficking is doomed to failure. Application of legal remedies which remove the illegal drug industry's economic lifeblood, money and property, is critical to a successful attack on the industry. Volume I of the Commission's report presents an array of economic remedies designed (1) to seize and forfeit illegal drug money and property; (2) to require strict reporting of financial transactions to prevent and detect money laundering attempts; (3) to require licensing and regulation of businesses susceptible to money laundering efforts; and (4) to prohibit participation in money laundering and other financial crimes which assist drug traffickers.

[1] American Prosecutors Research Institute, STATE DRUG LAWS FOR THE '90s, *Overview* 4 (1991).

[2] Census Bureau.

[3] Holmes, Arizona Attorney General's Office, *Combating Money Laundering* 1.

[4] American Prosecutors Research Institute, *supra* note 1 at 5.

Commission Forfeiture Reform Act (CFRA)

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Commission Forfeiture Reform Act (CFRA)

Policy Statement

HISTORY OF FORFEITURE

Exodus 21:28 states that "[i]f an ox gore a man or woman, that they die, then the ox shall be surely stoned; and his flesh shall not be eaten." So began the history of civil forfeiture.

The doctrine was continued during feudal times as the deodand. The object causing death to one of the King's subjects was forfeited to the Crown. Initially the object was sold and the proceeds used to pay Masses for the victim. Later in the Middle Ages the proceeds served as a source of revenue for the King.[1]

In the seventeenth century England enacted the Navigation Acts, the forerunners of modern civil forfeiture. The Acts required all goods and commodities shipped to the American colonies to be transported in English owned, built, and manned ships.[2] Violations resulted in forfeiture of the goods and the ship. Drawing upon the Navigation Acts, the First Continental Congress enacted legislation to forfeit vessels involved in customs offenses.[3] Since that time, Congress has enacted hundreds of federal forfeiture statutes. Every state has an in rem forfeiture statute, meaning the suit is brought against the illegally used property. Some jurisdictions have supplemented their in rem laws with forfeiture authority to sue the individual who committed the unlawful conduct, commonly known as in personam forfeiture.

Criminal forfeiture at common law was an automatic consequence of a felony conviction. The felony offended the King's peace and thus justified denial of the right to own property. Criminal forfeiture fell into great disfavor in the American colonies. In 1790, the first Congress abolished forfeiture of estate. Criminal forfeiture did not surface again in the United States until Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970. [4]

For many years state and local enforcement focused on apprehending and punishing street level criminals. These were the criminals they commonly faced at that time. Drug abuse had yet to reach epidemic proportions. State civil forfeiture laws were dormant in many jurisdictions.

With the burgeoning of the drug problem came a new type of criminal - the mid-level drug dealer. The criminal who used drug money to expand a drug operation like any CEO. Criminal sanctions proved ineffective so law enforcement began to use civil forfeiture to fight the drug industry. Some states began to amend their forfeiture statutes to keep pace with the increasingly sophisticated and complex evasive techniques of drug dealers. The result was a wide disparity among state forfeiture provisions. Some were comprehensively tailored to economically attack the drug problem. Others remained simple statutes aimed at a simple drug problem reminiscent of the 1970s.

MODEL/UNIFORM ACTS

Against the backdrop of such diversity, the Commission was charged with the responsibility of developing a model state forfeiture statute. There currently exist two forfeiture acts intended to guide states. The first is the forfeiture article of the Uniform Controlled Substances Act (UCSA) being drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). NCCUSL began development of its forfeiture statute in 1988 and continues to draft and modify its language. The second is the Model Asset Seizure and Forfeiture Act (MASFA). MASFA is a product of a task force of prosecutors representing the National District Attorneys Association (NDAA), National Association of Attorneys General (NAAG), and the U.S. Department of Justice. Based on Arizona law, MASFA was promulgated in 1991 and has been enacted in various forms in Arkansas, Georgia, Hawaii, Louisiana, and Oregon.

The Commission examined MASFA and the NCCUSL article, and heard from these statutes' respective drafters. The NCCUSL language has changed frequently with no plan of its finality in the near future. The Commission therefore chose to use MASFA as the foundation from which to craft its model act. Throughout the development process, the Commission remained mindful of the deeply felt concerns surrounding the implementation of forfeiture. Several months of review, discussion, and redrafting culminated in the "Commission Forfeiture Reform Act (CFRA)". CFRA incorporates statutory principles which (1) guide the exercise of discretion; (2) minimize opportunities for abuse; (3) close loopholes which permit escape from forfeiture; (4) provide timely, efficient procedures; and (5) safeguard the legitimate interests of third parties. CFRA's provisions reflecting these principles are a combination of language from existing state and model or uniform forfeiture acts; recommendations of those testifying before the Commission; and the Economic Remedies Task Force proposals responding to concerns about the application of forfeiture.

KEY POLICY ISSUES

During the drafting of CFRA, the Commission addressed several key policy issues involving forfeiture. The following discussion identifies those issues and explains the Commission's rationale and resolution of each one.

I. CRIMINAL VS. CIVIL FORFEITURE

Commission Recommendation: Civil in rem (against the property) forfeiture.

Commission Recommendation: Civil in personam (against the person) forfeiture.

Forfeiture operates in the context of existing legal principles. A criminal action fixes moral culpability and penalizes an individual for breaking society's rules. Punishment is imposed in accordance with a person's determined degree of badness (guilt). The many gradations of badness (guilt) are assigned corresponding punishment options. Triggering the appropriate level of punishment requires identification of a person's level of goodness (innocence) or badness (guilt). A criminal verdict is designed to provide that identification. Because criminal law is punitive, the Constitution guarantees a criminal defendant certain rights. Among these are the right to counsel; the right against self-incrimination; and the right to cross-examine witnesses.

While a civil action may apply to the same conduct, its purpose is remedial. Civil law attaches financial liability for the economic damage suffered due to the conduct. The individuals held liable are in the best position to know about and/or deter the activity.

Criminal and civil actions are complementary yet neither depends on the pursuit or outcome of the other in order to proceed. The good or bad label in a criminal proceeding is of little or no value in deciding a person's economic liability. A very bad person, e.g., a murderer, can cause negligible financial damage. The adverse economic impact caused by a good person, one acquitted of criminal charges, may be significant. Often the result is the attachment of financial responsibility in circumstances where there is no criminal accountability. For example, a manufacturer of a defective product can be held financially liable even though there is no conviction. A landlord who knowingly hires, as a security guard, a parolee who has a history of violence cannot be held criminally liable to tenants harmed by the guard. However, he may be held financially liable. Exxon was found financially liable for the economic damage caused by the oil spill in Alaska even though the captain was acquitted of the criminal charges.

This criminal-civil distinction also exists in forfeiture law. Criminal forfeiture punishes an individual for illegal conduct while civil forfeiture addresses the attendant economic consequences.

Some people argue that civil forfeiture in drug cases is actually a penalty cloaked in remedial language. They contend that, unlike other civil actions, a civil drug forfeiture proceeding compensates no victim. They further state that a person whose property is forfeited recognizes the forfeiture action as a penalty.

It is true there is no one particular individual who receives compensation in a forfeiture proceeding. This is because more than one individual suffers economically from a drug offense. We all suffer when a junkie robs a store to get enough cash for his next hit; a woman smokes crack during her pregnancy; or a bus driver snorts cocaine before work. The costs of the resulting increase in crime and violence; increase in necessary care for drug-affected infants; and decrease in safety and productivity in the workplace must be borne by all of us. The American people are collectively the victims who seek financial redress through civil forfeiture.

It is also undoubtedly true that any individual whose car is seized, whose home has a lien placed on it, or whose bank account is frozen will feel he is being punished. However, the purpose of civil forfeiture is not defined by the subjective reaction of a single person but the legitimate, rational goals of society. Those goals are threefold. First, to remove the financial incentive to engage in drug activity. Second, to restore economic integrity to the marketplace. Third, to compensate society for economic damages by rededicating forfeited property to socially beneficial uses. All of these goals are remedial goals.

While civil forfeiture is sound in theory its application has generated claims of abuse. The National Association of Criminal Defense Lawyers (NACDL) testified that there is a tide of abuse sweeping the nation. In support of this allegation the NACDL representative cited television and newspaper articles, most notably a series of articles published by the Pittsburgh Press in August, 1991. Shortly after the articles ran, several newspapers across the country reported portions of the series. The public is understandably alarmed at what they have read. The Pittsburgh Press series claimed there is a nationwide movement by enforcement officials to routinely deprive people of their property rights. Upon closer scrutiny, however, the articles fail to support this contention.

At a minimum the reliability of the information reported by the Pittsburgh Press is questionable. For example, the authors reported that forfeiture has "surfaced only twice in the United States."[5] In fact, there are over 200 federal statutes that authorize forfeiture.[6] The authors further claimed that 80% of the people whose property was forfeited by the federal government are never charged with an offense.[7] The correct information is that 80% of federal seizures are processed through civil forfeiture. Many of the owners are criminally prosecuted independent of the civil case.[8] These are but a few of the misleading statements made by the authors of the series. Moreover, the case descriptions as reported were often incomplete, omitting key facts used to determine the appropriateness of forfeiture in a specific case.[9]

Even assuming the information is credible, a tide of abuse fails to emerge. The authors reviewed a Drug Enforcement Administration (DEA) printout which summarized the facts of 25,000 seizures.[10] Of these, the authors examined court documents of 510 cases, 2% of the total, which they claimed involved innocent people or people possessing a small amount of drugs.[11] Notably the authors failed to define their use of "innocent" or "small amount". As a result it is impossible to determine whether reasonable minds would agree with the categorization of the 510 cases. This alleged 2% of abuses, they argue, is an impermissible cost to society which justifies the requirement of a conviction in all forfeiture cases.

Such a requirement, however, carries with it countervailing costs which often go unspoken but are nonetheless real. A drug dealer who flees the country can continue to run his operation from abroad. A fugitive cannot be prosecuted while out of the country. Reaching high level leaders in the illegal drug industry requires plea bargaining with lower level employees. To obtain testimony against drug bosses, the state sometimes drops the charges against a boss' employee. In this situation there is no conviction so the employee can keep his property even though admitting it was all obtained through drug dealing. Juveniles in the criminal justice system are adjudged delinquent which does not equate with a conviction. Because juveniles are immune from forfeiture, drug traffickers increase recruitment of minors as drug dealers.

The Commission is asked to destroy an effective enforcement weapon and place our children at greater risk of involvement in drugs to possibly avoid an alleged 2% of abuses. This tradeoff is unsound and the Commission recommends civil forfeiture as one of its model financial remedies laws.

The Commission makes no guarantee that the Act it proposes will never be abused. The only law with no risk of abuse is one which is never enforced. The Commission clearly hopes that its model laws will be used to dismantle the economic foundation of the drug industry and drive away its service providers. Civil forfeiture is an important tool designed to help accomplish that objective. The Commission has drafted CFRA's language to create a balance between its law enforcement objectives and protections for third party interests. This balance preserves civil forfeiture's effectiveness and eliminates the unnecessary risk of unfair forfeitures.

II. RELATION BACK DOCTRINE

Commission Recommendation: Inclusion of relation back with an explicit statement that the doctrine is inapplicable to interests found exempt under the Act.

Relation back is a historical but sometimes controversial doctrine regarding the state's title to for-

feited property. Upon the issuance of a forfeiture order, the title vests as of time of the commission of the offense. The "offending" property at that time is deemed the property of the government. From the moment of the illegal conduct, the offender had no legal authority over the property. Any subsequent sale or other transfer of the property by the offender is void.

The doctrine is intended to prevent collusive or fraudulent transfers commonly used to escape forfeiture. Drug dealers typically retitle their property in the names of friends, relatives, or colleagues when an investigation or forfeiture proceeding comes to light. With relation back the illegitimate transfers are set aside and the state can reach the unlawfully used or obtained property.

Critics argue that relation back wreaks havoc with the commercial world, replacing the normal predictability of transactions with uncertainty. They claim that individuals who purchase in good faith and without knowledge of the drug activity acquire nothing because the title vested earlier in the state. A purchaser, they argue, can only speculate about the conduct of a former owner which may subject the property to forfeiture and give the state a priority interest.

Through careful drafting, CFRA has eliminated the specter of commercial disruption while retaining the effectiveness of the doctrine. CFRA incorporates relation back but explicitly makes the doctrine inapplicable to interests found exempt under the Act. The recommended language comports with the recent Supreme Court holding that the federal government's retroactive vesting of title to drug proceeds under 21 U.S.C. 881(h) applies only to property which does not satisfy an innocent owner defense.[22]

III. PROPORTIONALITY

Commission Recommendation: Exclusion of the criminal law doctrine of proportionality in civil remedial forfeiture actions.

Critics of civil forfeiture law urge the Commission to include a proportionality requirement in its model act. Proportionality is embodied in the Eighth Amendment guarantee against excessive fines and cruel and unusual punishment. Most people recognize the theory as the adage "let the punishment fit the crime." The Eighth Amendment was originally enacted to prohibit the type of barbaric punishments inflicted on the colonists by English officials. Courts have historically applied the Eighth Amendment to criminal prosecutions to ensure a rational relationship exists between the term of imprisonment and/or fine and the underlying offense. Concomitantly, the Eighth Amendment has been consistently held inapplicable to remedial actions.[13]

As noted earlier, civil forfeiture statutes serve remedial goals. They provide disincentives to engage in criminal activity; restore market integrity; and compensate the public for economic damages attributable to illegal property use by returning the property to public uses. CFRA's provisions effectively implement these remedial goals. The forfeiture of property authorized under CFRA creates an economic loss for the wrongdoer which discourages further criminal activity. Removal of the property prevents future harmful use and thereby helps restore market integrity. The proceeds from the sale of forfeited property can used to pay for drug enforcement efforts, and in some instances, drug treatment and education services.

The gravity of an offense as determined by sentencing schemes bears no rational relationship to CFRA's remedial purposes. It is therefore an inappropriate measure against which to judge the

reasonableness of a civil forfeiture action. With civil forfeitures in drug cases, the analysis is whether the value of the property forfeited is rationally related to the amount of the economic harm resulting from the unlawful conduct. As discussed previously, the seriousness of the offense is an unreliable indicator of the financial damages caused by the offense.

The exact amount of damage attributable to a specific drug offense is difficult to calculate. For example, a drug dealer sells crack to a pregnant woman. She also buys from other dealers. The baby is born addicted. Which crack dealer is financially responsible for which portion of the baby's hospital and long-term care costs?

To resolve this issue, CFRA applies a version of the well-established contractual doctrine of liquidated damages. Liquidated damages is a sum certain which is to be paid upon the breach of a contractual promise. The sum is agreed to upfront and cannot be unilaterally changed. Contracts include a liquidated amount when damages will be difficult to quantify. The amount must be reasonable in light of the anticipated or actual harm; difficulties of proof; and the inconvenience or nonfeasiblity of otherwise obtaining an adequate remedy.

In CFRA the "liquidated damages" is the value of the property derived from or used, or intended to be used, to commit or facilitate an offense. This defined sum may be an underassessment of the actual damages caused by an offense. For example, proceeds of the sale of drugs may be seized from a drug dealer today, but the social and medical costs associated with the drug affected infant may not be ascertained for years after that dealer sold the mother crack. However, the sum represents a reasonable measure of damages which can be immediately established. It also contains an automatic limitation on the amount of property which may be forfeited, an amount controlled by the offender through the choice of property used to perpetuate or profit from drug activity.

CFRA's built-in rational relationship between the statute's remedial goals and the value of property subject to forfeiture renders a proportionality requirement unnecessary.

IV. USE/SIMPLE POSSESSION CASES

Commission recommendation: Exclusion of real property from forfeiture.

Commission recommendation: Forfeiture of personal property in facilitation cases only through in personam actions.

Some individuals criticize the forfeiture of property for personal use amounts of drugs. Forfeiture appears to these critics as an unduly harsh and economically ineffective remedy for what they perceive are trivial offenses. Their recommendation is the preclusion of forfeiture in all simple possession cases.

In the 1960s and 1970s drug use often was viewed merely as a means of unleashing creative juices and broadening horizons. Now we realize use is the heart of the entire drug problem. Americans spend millions of dollars on education and treatment services to reduce the demand for illicit substances. Can possession forfeitures play an effective role in a demand reduction strategy? The Commission received testimony which indicates the answer is yes. Dr. Michael Block of the University of Arizona stated that:

> [a]s a demand side strategy, asset forfeiture, in the form of vehicle forfeiture, is potentially a very powerful deterrent...the sanction is much larger than the

> benefit of the crime and the individual is much worse off having committed the crime (possession) and gotten caught than he/she would have been if he/she had not committed the crime.[14]

Forfeiture can create a powerful financial disincentive to continued drug use. The reduction in use can have an impact far beyond the individual purchaser. Inner city open air drug markets thrive on the business of suburban users. For example, in a 1990 economic study of drug dealing in Washington, D.C, the Rand Corporation noted that 42% of the persons charged with drug possession were non-residents.[15] Forfeiture of users' transportation to and from distribution points can disrupt these markets.

Mayor Elihu Mason Harris of Oakland, California discovered the beneficial role of possession forfeiture as part of a comprehensive plan to clean up an inner city neighborhood. "Operation Toehold" began on August 5, 1992 with the goal of eliminating the demand for drugs in a 20 square block area in East Oakland which was the number one marketplace for the sale of marijuana in the Bay Area. At the commencement of the project, the targeted area experienced two to three hundred drug transactions per day. In the preceding 18 months, 7 deaths were directly related to the drug activity. Police estimated that 50% - 60% of the buyers resided outside the city, particularly in affluent communities.[16]

"Operation Toehold" pooled the resources of federal, state, and local officials who implemented a drug nuisance abatement project, community policing, and a "Bust-the-Buyer" program. For 120 days, weekend drug buyers were cited and the FBI forfeited 82 buyers' cars, 50% of which were from outside of Oakland. Buyers were warned by hand-outs and newspaper articles about the hazards of buying drugs in the area, including the seizure of cars.[17]

At the termination of "Operation Toehold" on January 3, 1993, open street drug dealing had virtually stopped. Drug arrests dropped dramatically. Drug Hotline and Radio Calls reporting drug activity dropped from 40 to 50 per month to 8 to 10 per month. There were no shootings assaults or serious crimes against persons in the area since the project began. The neighborhood once ravaged by drugs has become stabilized and ready for positive growth.[18]

Forfeiture in simple possession cases can be a meaningful option for jurisdictions struggling to control a burgeoning drug problem. Concern about the fairness of possession forfeiture sometimes arises from media stories describing two types of situations. The first situation is forfeiture of significant amounts of real property, such as a home or a farm. The second is forfeiture of a parent's car which a son or daughter has driven to obtain drugs.

Both areas of concern can be easily addressed without the drastic elimination of a potentially effective demand reduction tool. First, CFRA excludes real property from forfeiture in all simple possession cases. Second, under CFRA, use of a car to facilitate a mere possession offense constitutes conduct giving rise to forfeiture. CFRA forfeits the interest of the individual involved in the wrongful conduct. In the second situation described above, the son or daughter who drove the parent's car is the wrongdoer. In several instances the parent would have had no knowledge or notice of the son or daughter's illegal activity. Therefore, only the interest of the son or daughter, not the interest of the parent, in the car is forfeitable.

CFRA requires that personal property used to facilitate a possession case be forfeited in an in personam proceeding. A forfeiture judgment is issued in an amount equal to the value of the illegally

used property. When the forfeitable asset is unavailable due to an exempt ownership interest, the judgment can be executed against a substitute asset of the wrongdoer pursuant to Section 18 and Section 7(f). The car is returned to the parent and the son or daughter remains economically liable for the illegal use of the asset.

V. BURDEN OF PROOF

Commission Recommendation: Preponderance of the evidence standard for the state and claimant in contested in rem and in personam cases.

Commission Recommendation: Inclusion of nonjudicial forfeiture authority.

In Rem and In Personam Forfeiture

Civil in rem forfeiture statutes are frequently criticized for imposing a different burden of proof on the government than on the claimant. Different standards of proof has existed in federal law for hundreds of years and have been adopted by some states. The government must initially prove probable cause for the forfeiture of the property. This means there must be a reasonable ground for belief that there is conduct giving rise to forfeiture. If the government meets this burden, the claimant must prove by a preponderance of the evidence that the claimant's property interest is exempt from forfeiture. A preponderance means that given all the evidence, it is more probable than not that an exemption exists. The preponderance standard is sometimes defined as 50.1% or 51% of the evidence. The state has an opportunity to present rebuttal evidence which must at least weigh equally with the claimant's evidence to prevent successful establishment of an exemption. Translated into percentages, at least a 50%-50% split of the evidence is needed to defeat the claimant's exemption.

CFRA requires that the state as well as the claimant in an in rem action satisfy a preponderance standard. Preponderance of the evidence is the same burden of proof already imposed in other civil actions, including civil in personam forfeitures. The requirement simply places the state in an in rem action in the same position as any other civil plaintiff. CFRA's law enforcement objectives remain in tact. More importantly, a preponderance standard alleviates concern that the state may have an unfair evidentiary advantage through the use of hearsay in a probable cause determination.

NonJudical Forfeiture

CFRA contains a nonjudicial forfeiture provision based on California law which streamlines uncontested forfeitures. Personal property of a value equal to or less than $15,000, or the jurisdictional amount of the justice of the peace, small claims, police, municipal, or other designated court, is subject to the procedure. California's maximum non judicial forfeiture of personal property amount is $100,000. The Commission's limit is substantially lower to guide states which have still to enact an uncontested forfeiture provision. Many are rural jurisdictions where property values do not involve such high dollar figures. The amount language is bracketed to signal it is only an example for states to follow in deciding their own amounts.

If no one files a timely claim after notice of pending forfeiture, the attorney for the state can declare the subject property forfeited. Failure to properly serve notice may be the basis of a petition to have the declaration of forfeiture set aside. Elimination of the court order requirement avoids unnecessary expenditure of time and resources by the state and the courts. Many of the cases which fall within the purview of a nonjudicial forfeiture procedure are uncontested. Over the last five years, 60% to 80% of California forfeiture actions involving personal property with an estimated value of less than $100,000 were administered as nonjudicial forfeitures because they were uncontested.[19]

Uncontested cases involving personal property with values higher than $15,000 or the designated amount require a judicial finding of probable cause under Section 19. When there is no opposition to the forfeiture, CFRA retains probable cause as the burden of proof so the state can summarize its evidence.

VI. SUBSTANTIAL NEXUS

Commission Recommendation: Exclusion of any requirement that the nexus between forfeitable property and conduct giving rise to forfeiture be "substantial".

Property is subject to forfeiture under CFRA if the state proves the property is proceeds or was used or intended to be used to facilitate an offense. The National Association of Criminal Defense Lawyers (NACDL) urges the Commission to require a substantial nexus, or connection, between the unlawful activity and seized property. However, no one understands exactly what that requirement means in forfeiture cases. Courts are split on the need for and definition of the word "substantial". Rather than arbitrarily throwing the statute into a legal morass, the Commission has chosen to rely on CFRA's existing rational relationship between the wrongful conduct and the forfeitable property.

VII. PROTECTION OF LEGITIMATE THIRD PARTY INTERESTS

Commission Recommendation: Exemption of interests when forfeiture is too commercially disruptive.

Commission Recommendation: No exemption of attorney's fees.

Commission Recommendation: Provision of property management methods to avoid waste and deterioration of seized assets.

Commission Recommendation: Provision of access to and use of seized assets pending final judgment.

Commission Recommendation: Inclusion of procedures for expeditious determination and release of interests.

Commission Recommendation: Incorporation of safeguards for privacy interests.

Civil forfeiture seeks to protect legitimate economic interests from the detrimental impact of drug activity. Drug dealers need goods and services to conduct business and conceal the illegal source of drug profits. They use the allure of quick, easy money to divert trucks, airplanes, warehouses, financial and legal expertise from the legal marketplace. Resources customarily used to spark legit-

imate commercial growth are now dedicated to the drug industry. Businesses which exist solely to launder drug proceeds compete unfairly against their lawful counterparts. Drug funded businesses can undercut their competitors because profit margins are irrelevant. Drug dealers don't rely on the business to make a living. Moreover, the businesses have a steady stream of capital so poor financial decisions have a minimal impact.

Forfeiture of drug property restores economic integrity to the marketplace and protects legitimate commercial interests.

Exemptions

An individual sometimes obtains an interest while unaware of the property's illegal use or derivation. The interest holder transacts business as usual. Removal of the property economically harms the third party. To avoid this undesirable result, CFRA exempts a property interest when forfeiture is too commercially disruptive.

The two overall categories of exemptions are divided according to the point in time when an interest attaches. The first category applies to interests acquired before or during the conduct giving rise to forfeiture. The interest is exempt if the interest holder had no knowledge or reason to know of the unlawful conduct or its likelihood of occurrence. For example, a bank financed the purchase of a building and acquired a lien on the property. The building later became a stashhouse for the debtor's drug distribution ring. The bank's interest is exempt if the bank had no knowledge or reason to know of the drug dealing or its likelihood of occurrence.

The presence of knowledge does not automatically defeat an exemption from forfeiture. If the person took reasonable steps to prevent the wrongful activity, the interest is not subject to forfeiture. For example, a business person leased a plane to a customer and later discovered the plane is being used to transport drugs. Cancellation of the lease or notification of the authorities preserves the business person's exemption.

The second category applies to interests acquired after the conduct giving rise to forfeiture. The interest is exempt if the individual obtained the interest for value, in good faith and without knowing participation in the illegal conduct. This is commonly referred to as the good faith purchaser for value (GFP) exemption. For example, a person distributed drugs from his house over a period of time. The dealer subsequently sold the house for $500,000 to a buyer who recently moved to the area. The buyer had no knowledge or notice of the seller's drug activity. The purchaser's ownership interest is exempt. If the house was a gift, it would remain forfeitable. The donee paid no value and made no economic investment. Lawful commerce does not suffer from forfeiture of the property.

Innocence is generally a sufficient basis for an exemption. As with all general rules, there are exceptions. When an innocent person is held liable in commercial law, there is no exemption from forfeiture. Individuals are sometimes financially responsible for the acts of each other because of the legal relationship which binds them. For example, in partnerships, a general partner is liable for the acts of other partners. One who voluntarily enters such a relationship is deemed to have assumed the risk of the other's judgment choices, wise or foolish. CFRA incorporates this commercial concept into its exemption provision.

Attorney's Fees

Some lawyers argue that fee forfeiture creates a disincentive for an attorney to represent drug defendants. They claim that members of the private bar will refuse drug cases and accept cases in which payment is more certain. They protest that defendants will be left in the hands of public defenders who are less skilled in drug defense work than their private colleagues, and that when this shift in counsel occurs, the scales of justice unfairly tilt in favor of the government. They say the check and balance on government authority provided by evenly matched adversaries weakens or disappears altogether, resulting in a simultaneous increase in state costs for additional public defender services and reduction in the quality of defense available to drug defendants. Their suggested solution is a separate exemption for attorney's fees in drug cases.

The Commission, however, adopts the policy choice that drug proceeds should not be used to gain any advantage. CFRA therefore contains no special exemption for seized property a person wants to pay an attorney for criminal defense services. CFRA treats lawyers who represent drug defendants like all other people who provide services to drug defendants. They can avail themselves of the good faith purchaser for value (GFP) exemption. To the extent an attorney accepts a fee in good faith, for value, and without knowledge the fee was drug proceeds, the fee is exempt. If the attorney knew of the money's illegal source, the payment is forfeitable.

The Commission heard testimony that there is no drug exception to the Constitution so a drug defendant deserves no less protection than any other defendant. The lack of a drug exception also means that a drug defendant deserves no greater protection than any other defendant. Every citizen accused of a crime is entitled to certain constitutional rights which remain the same regardless of a person's financial resources. The presumption of innocence is an entitlement afforded equally to all defendants. An individual's presumption does not grow stronger just because drug proceeds are available to hire a high-priced lawyer.

Moreover, the Supreme Court has held that there is no Constitutional right to use drug proceeds to pay for an attorney. The Sixth Amendment guarantees only the right to retain counsel of choice with legal funds.

> The Supreme Court reasoned that:
>
> Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of...counsel. ...A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the government does not violate the Sixth Amendment if it seizes the robbery proceeds, and refuses to permit the defendant to use them to pay for his defense. '[N]o lawyer, in any case,... has the right to accept stolen property, or ... ransom money, in payment of a fee...The privilege to practice law is not a license to steal.'[20]

Forfeiture leaves a drug defendant's rights unimpaired. It simply removes access to ill-gotten gains and thereby establishes more equality among defendants in obtaining counsel.

The threat of fee forfeiture will allegedly cause the private bar to refuse en masse to represent drug defendants. This argument implies that private counsel handle a substantial number of all drug cases, and that forfeiture will result in a major shift from private to public drug defense work.

A recent study by the National Center for State Courts (NCSC) examined indigent defense systems in nine general jurisdiction courts across the country. The NCSC study found that 70% to 90% of all felony dispositions in those jurisdictions, including drug cases, are already handled by publicly appointed counsel.[21] The NCSC study suggests that public representation in drug cases is the norm, not the exception. Of the remaining drug defendants represented by private attorneys, not all will be rendered indigent by forfeiture. Some will have legitimate employment or other avenues by which to acquire legal funds. They can use those funds to hire the most expensive attorneys they can afford. Only the individuals who devote all their efforts and resources to drug activity will be rendered indigent. Professional drug traffickers will therefore be the defendants most in need of publicly appointed counsel.

Public representation is far from being an automatic step towards a conviction. A more expensive defense does not necessarily mean a better defense. There is no evidence to support the contention that public defenders are generally less capable than private attorneys to represent drug defendants.

In its review of felony dispositions in the specified jurisdictions, the NCSC found that "[d]efendants are no worse off with one type of defense attorney than another, which means that defendants with privately retained counsel do no better, or worse, on average, than do indigent defendants with a publicly appointed attorney."[22] This was found to be true even when publicly appointed counsel were compared with privately retained counsel for each of four broad offense categories: crimes against the person, drug sale/possession, burglary/theft, and other types of felonies. The study results indicated that "there are no statistically significant differences between the conviction rates of public and private defense counsel for any of the offense categories."[23] A review of charge reduction rates, incarceration rates, and lengths of prison sentences also revealed that indigent defenders generally perform as well as privately retained counsel in obtaining favorable outcomes for their clients.[24]

Logic also supports the notion that publicly appointed counsel are perfectly capable of mounting a defense. Indigent defenders are routinely entrusted with death penalty cases. An attorney who is competent to fight for someone's life is surely competent to defend that person's liberty interest in avoiding incarceration.

CFRA does faciliate a defense attorney's determination of whether a potential fee is forfeitable. The Act allows a criminal defendant to apply for an expedited hearing to specifically ascertain whether there is probable cause for forfeiture of the potential fee. This hearing opportunity is provided in addition to the quick probable cause hearing afforded to all interest holders. The attorney's fee hearing is held if the defendant establishes he has had no opportunity to participate in a prior adversarial judicial determination of probable cause; he has no access to other monies; and the forfeiture is the only claim to the property. If the court finds no probable cause, a reasonable amount of property is released to pay for criminal defense costs. To the extent the funds are used to

pay for legal services actually rendered, the funds are exempt from forfeiture. The state cannot recapture the money even if the state is able to prove probable cause at the time of trial.

Procedural Safeguards

In addition to exemptions, CFRA includes several procedural safeguards to protect lawful third party interests.

Property management options available to the government ensure preservation of property values. Seized property sitting in inventory lots wastes away and seized businesses and houses deteriorate. The state can enter into a custodianship agreement with an owner or interest holder to maintain the property. In the case of residences, the owner is often the designated custodian. Law enforcement spends less on property maintenance and courts less time deciding property management and liability issues. The custodianship agreement offers the added benefit of use of the property during pendency of the forfeiture proceeding.

Other mechanisms as well provide access to seized property. An owner may obtain release of the property by posting a bond equal to the property's fair market value. The bond is forfeited in lieu of the property. Failure of the state to adhere to strict time limits for filing judicial actions releases the property to an owner or interest holder pending a final judgment. A quick hearing, after five days notice to the state, is available to determine whether probable cause exists for forfeiture of the property. An owner or interest holder merely files an application with the court within ten days from notice or actual knowledge of seizure. If the court finds no probable cause, the property is released pending further forfeiture activity. When property is seized without a warrant, the quick hearing assures that there can be an immediate judicial review of probable cause.

Expedited determination and release of legitimate interests proves useful to both the state and third parties. Interest holders know their interests are protected without incurring costly legal expenses. The state expends scarce resources only on claims truly in dispute. With this in mind, CFRA allows a rapid exit from a forfeiture action.

An owner or interest holder may file, prior to a court action, a petition with the state requesting recognition of an exempt interest. This provides an opportunity for early identification and resolution of lawful interests. If the state disagrees that the interest is exempt, the petitioner has recourse to the courts. Filing a claim will trigger a judicial proceeding to ultimately decide the exemption issue. The initial time limit for filing a claim is 30 days from the notice of pending forfeiture, three times longer than the federal deadline. The petition process stops the running of the time period until the state issues a statement of exemption or non-exemption. The petitioner has 30 days from the date of issuance to file a claim.

Seized property is sometimes liable to perish, waste, be foreclosed, or significantly reduced in value before a final judgment. Where this potential exists, CFRA authorizes certain interest holders with uncontroverted interests to apply for an interlocutory sale. The qualified applicants are those with a recognized exemption or permission to do business in the state under the jurisdiction of a banking, real estate, or other regulatory agency. CFRA refers to these latter interest holders as regulated interest holders. They have a presumption of legitimacy because another state agency monitors their activities to prevent illegal transactions. The property is sold by commercially reasonable public sale. The proceeds are first applied to the sale costs and then to pay exempt interests. The balance of the proceeds becomes the subject of the litigation.

Privacy interests receive protection throughout CFRA. Use of liens and constructive seizure, the posting of a notice, allows the state to establish its interest without displacing residents. Ousting people from their homes to physically seize the property becomes unnecessary in many instances. Eviction occurs, except in emergencies, only after a probable cause finding in an adversarial judicial hearing.

Finally, CFRA explicitly retains the validity of possessory liens. These liens, such as a car mechanics lien, are valid as long as the lien holder maintains possession of the property. Under CFRA the divestiture of possession through seizure does not destroy the lien.

VIII. DISTRIBUTION OF PROCEEDS

Commission Recommendation: Independent funding bases for enforcement, prosecution, treatment, education, and prevention.

	Option One	Option Two
Forfeiture proceeds		
enforcement and prosecution	**100%**	**90%**
treatment, education, prevention	**0%**	**10%**
Drug (including alcohol) assessment collections		
enforcement and prosecution	**0%**	**10%**
treatment, education, prevention	**100%**	**90%**

Independent Funding Bases

No one has sufficient resources to cope with crushing system-wide needs caused by the drug problem. Smaller budgets and reduced spending make forfeiture proceeds an attractive new source of money for continued funding of services. Requests by treatment, education, and prevention groups for the use of forfeiture proceeds generally allocated to enforcement and prosecution agencies sometimes cause conflict among these constituencies.

CFRA avoids this conflict through the creation of independent funding bases for enforcement, prosecution, treatment, education, and prevention. Dividing a single fund into increasingly more and smaller percentages to accommodate numerous demands for resources results in each percentage becoming increasingly inadequate to satisfy the corresponding demand. Therefore, the Commission has focused on increasing the pots of money available to satisfy legitimate funding needs. CFRA's distribution options allocate all or 90% of forfeiture proceeds to enforcement and prosecutorial agencies. Treatment, education and prevention agencies receive all or 90% of the collections from a mandatory drug assessment, or user fee. In some jurisdictions these constituencies interact positively with one another; in others contact is more strained and uncooperative. To encourage better working relations between enforcement, treatment, and education, one option deposits 10% of proceeds with treatment and education programs and 10% of assessment collec-

tions with enforcement and prosecution agencies. The 10% option provides additional incentive for all the constituencies to support both forfeiture and enforcement of the drug assessment.

Forfeiture Proceeds

Dedication of forfeiture proceeds to law enforcement and prosecution agencies recognizes the serious resource allocation issue involved in the decision to pursue forfeiture. The acquisition of large amounts of forfeiture proceeds sparks interest in dividing the monies among numerous constituencies. However, such acquisition depends on an agency's capacity to undertake forfeiture activity. An agency's ability to pursue substantial forfeitures depends on its ability to commit substantial resources over long periods of time. Civil forfeiture is intended to help cripple or at least dent the economic foundation of a drug enterprise. Drug dealers set up complex trails of sham transactions and front companies to conceal the true source and ownership of the property. Unraveling the enterprise's sophisticated financial workings and connecting the assets to the drug dealer can take years. Investigators must be trained in net worth analysis and the tracing of assets. Costly wiretaps are often necessary to gather information.

Without authority to rededicate proceeds to forfeiture activity, monies for forfeiture and related enforcement actions must come from appropriated funds. This drain severely reduces the funds available for traditional public safety services such as apprehension and prosecution of violent criminals. Reprioritization of activities to be financed with scarce resources is inevitable. When compared with the need to apprehend a rapist or a murderer, forfeiture falls far down the list of priorities. Forfeiture activity dwindles to zero. Non-enforcement groups statutorily entitled to the proceeds have only the paper on which the statute is written. Sixty, seventy, eighty percent of nothing is still nothing.

The open avenue for state and local law enforcement to obtain resources for forfeiture-related cases is participation with federal officials in federal forfeiture actions. The guidelines for federally adopted seizures returns 80% to 85% of the proceeds to participating state and local agencies.[25] When a state forfeiture statute returns a lower percentage to enforcement, the statute historically remains unused while enforcement pursues federal forfeiture. The critically important united economic attack against drug dealers at the local, state, and federal levels is nonexistent. Drug dealers use the lack of activity under the state act as an opportunity to grow stronger.

CFRA's distribution options provide law enforcement the means to pay for protracted forfeiture cases and enhance their ability to dismantle drug enterprises. Knowledge that forfeiture efforts can be paid for without sacrificing responsiveness to traditional crimes encourages further forfeiture activity. To the extent an agency has proceeds available for non-enforcement uses, CFRA specifically authorizes the agency to allocate the funds for treatment, education and prevention purposes.

Drug Assessment

In addition to enforcement's need for forfeiture proceeds, the incessant need for drug treatment and education services requires a more stable, consistent funding source than forfeiture. The Commission found that reliability in a drug assessment, or user fee. Every jurisdiction convicts drug offenders so there will always be a source from which to try and collect payment which often comes in a steady stream of installments. New Jersey successfully pioneered the user fee idea with

its Drug Education and Demand Reduction (DEDR) fee in 1987. New Jersey assesses convicted drug offenders, offenders placed on probation for a drug offense, and offenders involved in pretrial intervention, a fee in addition to other fines or penalties. The fee ranges from $500 to $3,000 depending on the gravity of the offense. With a collection rate of approximately 35%, the program collects approximately $9 million dollars per year. Since its inception the DEDR program has raised over $36 million, every dollar having been expended for treatment and education purposes.

The National Commission on Drug Free Schools and National Conference of Commissioners on Uniform State Laws (NCCUSL) have promoted the user fee concept. The Commission joins these bodies in their support of assessments to fund treatment, education, and prevention programs. Building on the New Jersey legislation, the Commission has crafted an assessment which applies to offenses involving alcohol as well as controlled substances. This expansion widens the potential pool of funds accessible to treatment and education and signals that serious consequences will flow from alcohol abuse. Demand reduction alternatives to payment are built into the statute in the case of indigents. Individuals unable to pay the assessment may perform community or reformative service, such as attendance in a treatment, education, or employment training program. Offenders who financially contribute to their rehabilitation may request an offset of their assessment amount equal to the amount of their out-of-pocket expenditures.

1. American Prosecutors Research Institute, *History of Forfeiture,* STATE DRUG LAWS FOR THE '90s 1 (1991).

2. *Id.*; American Bar Association, *Forfeiture Status: A Brief Survey and History,* SECOND NATIONAL INSTITUTE ON FORFEITURE AND ASSET FREEZES 2 (1992).

3. American Bar Association, *supra* note 2.

4. *Id.*

5. Schneider and Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs,* Pittsburgh Press, August 11, 1991, at A8.

6. U.S. Department of Justice, Points in Response to Presumed Guilty Series (1991).

7. Schneider and Flaherty, *supra* note 5.

8. Copeland, *Presumed Guilty: A Rebuttal,* CIVIL REMEDIES IN DRUG ENFORCEMENT REPORT 19 (October/November 1991).

9. U.S. Department of Justice, Summaries of Federal Cases Cited in Presumed Guilty Series (1991).

10. U.S. Department of Justice, *supra* note 6.

11. Schneider and Flaherty, *supra* note 5.

12. *U.S. v. A Parcel of Land,* No. 97-781, 61 U.S.L.W. 5189 (Feb 24, 1993).

13. The Supreme Court has granted *certiorari* in the case of *Austin v. United States,* No. 92-6073, to review whether

the Eighth Amendment concept of proportionality should be applied to instrumentality forfeitures.

14. Block, Prepared Statement Regarding the Economics of Drug Control and Asset Forfeiture for President's Commission on Model State Drug Laws, Economic Remedies Hearing, San Diego, California (Jan. 6, 1993).

15. Reuter P., MacCoun, R., Murphy, P. MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C. 108 (June, 1990).

16. Operation Toehold: Final Report, Office of the Mayor , Oakland, California.

17. *Id.*

18. *Id.*

19. Office of the Attorney General, San Diego, California.

20. *Caplin & Drysdale, Chartered v. United States,* 109 S. Ct. 2652-2653 (1989).

21. National Center for State Courts, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL 12-13 (May, 1992).

22. *Id.* at 53.

23. *Id.* at 55.

24. *Id.* at 103.

25. U.S. Department of Justice, The Attorney General's Guide to Equitable Sharing.

26. Union County Prosecutor's Office, New Jersey.

27. National Commission on Drug-Free Schools, FINAL REPORT TOWARD A DRUG-FREE GENERATION: A NATION'S RESPONSIBILITY 56 (Sept. 1990); National Conference of Commissioners on Uniform State Laws, AMENDMENTS TO THE UNIFORM CONTROLLED SUBSTANCES ACT (UCSA), SECTION 416 (1990).

Highlights of the Commission Forfeiture Reform Act (CFRA)

REMEDIAL GOALS

- Removes financial incentive to engage in illegal activity.
- Restores economic integrity to the marketplace.
- Compensates society for economic damages suffered due to illegal activity by rededicating forfeited property to socially beneficial uses.

REACHING ILLEGAL ASSETS OF A MULTI-JURISDICTIONAL DRUG ENTERPRISE

- Provides civil in personam procedures so the state can obtain a personal forfeiture judgment against the dealer which can be satisfied from in-state or out-of-state assets.
- Defines conduct triggering forfeiture to include:

  (1) out-of-state conduct which would be a targeted felony in the state initiating the action; and

  (2) conduct committed in furtherance of a targeted felony (e.g., conspiracy to distribute illegal drugs; murder of a rival drug dealer).

SUBJECTING PROPERTY TO FORFEITURE

- Defines forfeitable property to include:

  (1) real or personal property furnished or intended to be furnished in exchange for the unlawful conduct, or used or intended to be used to facilitate the illegal activity. The Act:

  (A) excludes real property from forfeiture in simple possession cases.

  (B) requires personal property used to facilitate simple possession cases to be forfeited in an in personam action.

  A forfeiture judgment is issued in an amount equal to the illegally used property. When the property is returned to an owner with an exempt interest, the judgment can be executed on a substitute asset of the wrongdoer.

  (2) profits derived from illegal activity;

  (3) enterprise interests: interests affording a source of influence over an enterprise established, controlled or participated in through illegal activity (e.g., corporate stocks); and

  (4) substitute assets if the original forfeitable property is subject to an exempt interest or otherwise unavailable. The substitute asset is forfeitable up to the value of property:

  (A) that was owned or possessed for the purpose of facilitating illegal activity; or

  (B) that is proceeds of illegal activity or for which the wrongdoer is criminally responsible.

  A seizure warrant is required to seize a substitute asset.

- Requires the state as well as the claimant in contested in rem and in personam cases to meet a preponderance of the evidence standard.

  The preponderance standard precludes the use of inadmissible hearsay by either party.

- Creates rebuttable presumptions that:

  (1) property is forfeitable if it was acquired during a person's conduct giving rise to forfeiture or within a reasonable time thereafter; and there is no other likely source for the property; or

  (2) money or a negotiable instrument found in close proximity to contraband or an instrumentality is proceeds of, or was used or intended to be used to further, conduct giving rise to forfeiture.

PROTECTING LEGITIMATE INTERESTS OF THIRD PARTIES

Exempting Interests from Commercially Disruptive Forfeitures

- Exempts an interest if:

  (1) the owner or interest holder either:

  (A) obtained the interest prior to or during the illegal activity without knowledge or reason to know of the illegal activity or its likelihood of occurrence; or

  (B) obtained the interest prior to or during the illegal activity with knowledge, or reason to know of the offense or its likelihood of occurrence, but took reasonable steps to prevent the offense (e.g., notification of authorities or cancellation of a lease); or

  (C) purchased the interest in good faith and without knowledge of the unlawful conduct; and

  (2) the owner or interest holder:

  (A) is not criminally responsible for the wrongdoer's conduct (e.g., not a co-conspirator); and

  (B) was not in a relationship with the wrongdoer that permitted the wrongdoer to convey the property to a good faith purchaser for value; and

  (C) had no notice of the seizure or reason to believe the property was forfeitable.

Expeditiously Determining and Releasing Legitimate Interests

- Allows release of seized property if the state deems retention unnecessary because a case is weak or forfeiture would not serve justice.
- Allows an owner or interest holder to file a petition with the state requesting recognition of an exempt interest.

  If the state denies the request, the petitioner has recourse to the courts. The procedure protects third parties' interests without their incurring costly legal expenses.
- Affords defendants an opportunity to apply for a probable cause hearing specifically to request the release of seized property to pay criminal defense costs.

  This hearing opportunity is in addition to the expedited probable cause determination available to all interest holders. The hearing is held if the defendant establishes: (1) he has not had an opportunity to participate in a previous adversarial judicial determination of probable cause; (2) he has access to no other monies adequate to pay for criminal defense counsel; and (3) the forfeiture is the only claim to the property interest. Property released and paid for defense services actually rendered is exempt from forfeiture.
- Permits interlocutory sale, lease, or operation by interest holders with uncontroverted or presumptively legitimate interests when property will be foreclosed or significantly reduced in value before final judgment.

  If the property is sold, the proceeds are used to pay sale costs and satisfy exempt interests. Any remaining balance is deposited into an interest-bearing account and becomes the subject of the litigation.

Safeguarding Privacy Rights

- Permits the filing of a lien or constructive seizure (posting notice) to establish the state's interest and avoid unnecessarily displacing residents.
- Requires an adversarial judicial finding of probable cause to evict residents, except in emergencies.

Providing Access to and Use of Seized Assets

- Releases property to an owner or interest holder pending final judgment if:

  (1) the state fails to file judicial proceedings within specified time limits.

  (2) the owner posts a bond or cash equal to the fair market value of the property. The bond or cash is forfeited in lieu of the property.

  (3) the court finds no probable cause for the forfeiture of the property in an expedited hearing on that issue. The hearing is available upon application by an owner or interest holder.

Avoiding Waste and Deterioration of Seized Assets

- Authorizes state to enter into a custodian agreement with an owner or interest holder to maintain the property pending final judgment.
- Authorizes the court to create a receivership or appoint a conservator, custodian or trustee to preserve the property's value.

- Permits the deposit of seized monies or negotiable instruments into an interest bearing account.
- Allows an interlocutory sale by interest holders with uncontroverted or presumptively legitimate interests to avoid spoilage or waste of perishable assets.

PREVENTING SHAM OR FRAUDULENT TRANSFERS OF PROPERTY

- Provides that state's title to forfeited property is vested from the time of the commission of the offense.

  Explicitly excludes exempted property from application of the relation back doctrine consistent with the U.S. Supreme Court holding in *U.S. v. A Parcel of Land*, No. 91-781, 61 U.S.L.W. 4189 (February 24, 1993).
- Designates anyone receiving non-exempt property which is subject to forfeiture as a constructive trustee for the benefit of the state.
- Requires a trustee with notice of the forfeiture action to provide the state with specified information about the person for whose benefit the forfeitable property is held.

REDUCING COSTLY EXPENDITURE OF TIME AND RESOURCES BY COURTS AND THE STATE

- Authorizes the state, in uncontested cases, to declare the forfeiture of personal property of a value up to $15,000 or other designated amount.
- Provides probable cause is the state's burden of proof in unopposed cases requiring a judicial order so the state can summarize its evidence.

FUNDING ENFORCEMENT, PROSECUTION, TREATMENT, EDUCATION, AND PREVENTION PROGRAMS

- Provides two options that create independent funding bases for enforcement, prosecution, treatment, education, and prevention. Both options increase the monies available to pay for needed services:

	Option (1)	Option (2)
Forfeiture proceeds		
enforcement and prosecution	100%	90%
treatment, education, prevention	0%	10%
Drug (including alcohol) assessment collections		
enforcement and prosecution	0%	10%
treatment, education, prevention	100%	90%

Option 2 is intended to encourage better working relations between enforcement, prosecution, treatment, education, and prevention agencies in jurisdictions where existing relationships are strained and uncooperative. The 10% option provides additional incentive for all the constituencies to support both forfeiture and enforcement of the drug assessment.

Commission Forfeiture Reform Act (CFRA)

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Commission Forfeiture Reform Act (CFRA)".

Section 2. Legislative Findings.

(a) Criminal activity and the networks that characterize criminal industries divert millions of dollars from the legitimate commerce of this state each year through the provision of illicit goods and services, force, fraud, and corruption.

(b) Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.

(c) Money and power generated by criminal activity are being used to obtain control of legitimate enterprises, to invest in legitimate commerce, and to control the resources which facilitate ongoing criminal activity.

(d) Criminal activity and proceeds of criminal activity subvert the basic goals of a free democracy by expropriating the government's monopoly of the legitimate use of force, by undermining the monetary medium of exchange and by subverting the judicial and law enforcement processes that are necessary for the preservation of social justice and equal opportunity.

(e) Criminal activity impedes free competition, weakens the economy, harms in-state and out-of-state investors, diverts taxable funds, threatens the domestic security, endangers the health, safety, and welfare of the public and debases the quality of life of the citizens of this state.

(f) Criminal activity becomes entrenched and powerful when the social sanctions employed to combat it are unnecessarily limited in their vision of the goals that may be achieved, in their legal tools or in their procedural approach.

(g) Societal strategies and techniques that emphasize bringing criminal remedies to bear on individual offenders for the commission of specific offenses are inadequate to reach the economic incentive supporting the criminal network and are costly in terms of the loss of personal freedom of low-level participants in criminal networks. Comprehensive strategies are required to complement the criminal enforcement strategies by focusing on the financial components and motivations of criminal networks; enlisting the assistance of private victims; empowering courts with financially oriented tools; and developing new substantive, procedural and evidentiary laws creating effective financial remedies for criminal activity.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Section 3. Purposes.

The purposes of this [Act] are:

(a) to defend legitimate commerce from criminal conduct;

(b) to provide economic disincentives for criminal activity;

(c) to remedy the economic effects of criminal activity; and

(d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new remedial, preventative measures through civil remedies. These remedies reduce the economic incentive to engage in criminal conduct, and reallocate property used in or produced through conduct giving rise to forfeiture to the public for law enforcement purposes, including the

investigation and prosecution of criminal activity as well as drug treatment, education and prevention.

Section 4. Definitions.

As used in this [Act]:

(a) "Attorney for the state" means any [appropriate reference, e.g., attorney general, district attorney, state's attorney, county attorney] authorized to investigate, commence and prosecute an action under this [Act].

(b) "Conveyance" includes any vehicle, trailer, vessel, aircraft or other means of transportation.

(c) "Interest holder" means a secured party within the meaning of [reference to state equivalent of Section 9-105 of the Uniform Commercial Code], a mortgagee, lien creditor, or the beneficiary of a security interest or encumbrance pertaining to an interest in property, whose interest would be perfected against a good faith purchaser for value. A person who holds property for the benefit of or as an agent or nominee for another person, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value, is not an interest holder.

(d) "Omission" means the failure to perform an act that is required by law.

(e) "Owner" means a person, other than an interest holder, who has an interest in property. A person who holds property for the benefit of or as an agent or nominee for another person, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value, is not an owner.

(f) "Proceeds" means property acquired directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind without reduction for expenses incurred for acquisition, maintenance, production, or any other purpose.

(g) "Property" means anything of value, and includes any interest in property, including any benefit, privilege, claim, or right with respect to anything of value, whether real or personal, tangible or intangible.

(h) "Regulated interest holder" means an interest holder that is a business authorized to do business in this state and is under the jurisdiction of the [reference to appropriate state and federal regulatory agencies relating to banking, securities, insurance and real estate].

(i) "Seizing agency" means any department or agency of this state or its political subdivisions that regularly employs law enforcement officers, and that employs the law enforcement officer who seizes property for forfeiture, or such other agency as the agency or department may designate by its chief executive officer or their designee.

(j) "Seizure for forfeiture" means seizure of property by a law enforcement officer, including a constructive seizure, accompanied by an assertion by the seizing agency or by an attorney for the state that the property is seized for forfeiture, in accordance with Section 9.

COMMENT

"Attorney for the state" invites states to consider which of the various governmental attorneys should be empowered to bring forfeiture actions, such as attorneys general, district/county/state's attorneys, city attorneys and legal representatives of law enforcement agencies.

"Conveyance" simply draws attention to the fact that this [Act] deals with this word in reference to vehicles rather than in reference to a commercial transaction.

"Interest holder" defines a special set of commercial interest holders, whose interest is perfected or would prevail over a good faith purchaser for value. The definition is designed to mirror the same projections in the context of forfeiture as exist in the commercial world.

"Omission" is defined in its penal code sense to prevent an inference that lesser omissions would qualify as conduct giving rise to forfeiture. Omissions to perform an act required only by a sense of moral or ethical propriety explicitly do not constitute conduct giving rise to forfeiture.

"Proceeds" follows federal precedent that does not allow deduction for expenses, making "proceeds" the gross proceeds. 21 U.S.C. Section 881(a)(6). Deductions are designed to promote and encourage business activity. Through the use of deductions the business has more available capital because less income is taxable. Allowing offenders to take deductions for expenses incurred during criminal activity is contrary to the purpose of destroying criminal industries rather than taxing them.

"Property" is deliberately all-inclusive, sweeping in real and personal property, tangible and intangible.

"Seizing agency" invites each state to consider which categories of law enforcement agencies or personnel will be empowered to seize property for forfeiture.

"Seizing for forfeiture" is defined to distinguish seizures for forfeiture from seizures for other purposes, such as safekeeping or evidence, which do not implicate the property rights of the owner. The definition operates with Section 9 and requires that a seizure for forfeiture be accompanied by an assertion that the property is subject to forfeiture. If a seizure is made but it is not a seizure for forfeiture, the owner remains free to sell the property.

Section 5. Jurisdiction and Venue.

Jurisdiction

(a) The [reference to court] has jurisdiction under this [Act] over:

(1) all interests in property if the property for which forfeiture is sought is within this state at the time the action is filed; and

(2) the interest of an owner or interest holder in the property if the owner or interest holder is subject to personal jurisdiction in this state.

Venue

(b) In addition to the venue provided for under [the appropriate state law] or any other provision of law, a proceeding for forfeiture under this [Act] may be maintained in the [judicial district] in which any part of the property is found or in the [judicial district] in which a civil or criminal action could be maintained against an owner or interest holder for the conduct alleged to give rise to the forfeiture. A claimant or defendant may obtain a change of venue if there exists so great a prejudice against the party that they cannot obtain a fair and impartial trial.

COMMENT

Subsection (a) is intended to take full advantage of either in rem jurisdiction, as in 28 U.S.C. Section 1395, (venue based on the presence of the thing), or in personam jurisdiction, as in 21 U.S.C. Section 881 (j) (venue based on criminal case against owner). It is based on minimum contacts with the forum state. It would allow a county prosecutor to consolidate actions against property seized in several counties, states or even countries. In personam jurisdiction underlies the in personam forfeiture procedures in Sections 17 and 18. Therefore, proceeds of drug dealing in State A may be forfeited in State B, into which they have been brought, and an in personam defendant may be ordered to surrender title to a load-vehicle van titled in State A to a court in State B, into which his drug enterprise spread, but in which state the van itself had not been used.

Subsection (b)'s permissive venue allows expeditious adjudication of forfeitures even though items of property or defendants are scattered over several counties/districts within a state. It reflects the same concerns as 18 U.S.C. Section 881 (j). For example, a county prosecutor of a populous or centrally located county, or an attorney general, could litigate forfeiture cases involving property of drug enterprises ranging around the state. Practical considerations of resources, investigative support, attorney expertise and location of evidence often have major impact on venue selection. Flexibility will tend to encourage efficiently consolidated cases. A consolidated case is less expensive for claimants than a set or series of fragmented cases spread over several counties.

Section 6. Conduct Giving Rise To Forfeiture.

The following conduct gives rise to forfeiture whether or not there is a prosecution or conviction related to the conduct:

Felony Offenses

(a) an act or omission punishable [as a felony] [by confinement for more than one year] under [specified portions of the criminal code, e.g. drugs, organized crime];

Out-of-State Felony Offenses

(b) an act or omission occurring outside this state, that would be punishable [as a felony] [by confinement for more than one year] in the place of occurrence and would be described in subsection (a) of this section if the act or omission occurred in this state; or

Felony Offenses in Furtherance of (a) or (b)

(c) an act or omission committed in furtherance of any act or omission described in subsection (a) of this section and is punishable [as a felony] [by confinement for more than one year] including any inchoate or preparatory offense.

HYPOTHETICAL

A cocaine dealer distributes cocaine in State A. The cocaine dealer also has distribution outlets in State B. In both states distribution of cocaine is a felony punish-

able by confinement for more than one year. In addition to actual sales of cocaine, the dealer also engages in attempted sales of cocaine which are also felonies. To ensure his dominance over his distributors and over competitors in the cocaine market, the dealer uses violence to collect debts and to discourage competition. These acts of violence include assaults, murders and threats of violence, all of which are felonies.

COMMENT

Forfeiture occurs only if conduct giving rise to forfeiture has taken place. When conduct giving rise to forfeiture does take place, conduct may give rise to forfeiture even if the conduct occurred outside of the forum state (assuming proper jurisdiction), as long as it would be subject to prosecution where it occurred and meets the required degree of seriousness (felony/punishable by more than a year in custody). Thus, in the hypothetical, State A could bring a civil forfeiture action based on the drug dealer's conduct in both states. No criminal prosecution is necessary for a forfeiture to occur; however, minimum contacts are required with the forfeiting state for the forfeiture to be sustained. The civil effects of conduct giving rise to forfeiture are distinct from and not dependent on criminal prosecution or conviction. *LaVengeance*, 3 U.S. 297 (1796), *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Civil forfeiture reaches the tools and proceeds of the trade; criminal prosecution reaches the tradesman.

An inchoate or preparatory offense that is punishable by more than a year in prison gives rise to forfeiture if it is done in furtherance of a violation that has been included in the targeted portions of the criminal code. The draft leaves this selection to the individual states. The selection process will be similar to the process of selecting offenses that trigger state racketeering remedies, so if the state is among the 29 states that have such statutes, that list would be a useful guide. If the state does have a racketeering/profiteering offense, that offense should also be listed, of course, or, alternatively, this entire Act could be engrafted into the civil remedies portion of the state racketeering statutes.

An attempt to sell narcotics, for example, would give rise to forfeiture. If the dealer conspires with others, the conspiracy to sell narcotics would also be conduct giving rise to forfeiture.

Subsection (c) also reaches felony acts that are done in furtherance of a targeted offense even though the act is not one of the targeted violations. The murders and assaults done as part of the above hypothetical drug conspiracy would be conduct giving rise to forfeiture. If the dealer bribed his distributors in order to buy their silence before judicial proceedings, the bribery would also be conduct giving rise to forfeiture. A formulation that would only reach conduct giving rise that constitutes targeted offenses would ignore the supporting offenses that further the targeted criminal industries. The success of the drug trafficker, for example, depends not only on his ability to sell drugs, but also his ability to launder money, eliminate competition, obstruct investigations and subvert the court process, among other ancillary objectives.

Section 7. Property Subject To Forfeiture.

The following property is subject to seizure and forfeiture:

Contraband

(a) all controlled substances, raw materials, controlled substance analogs, counterfeit substances, imitation controlled substances, [insert reference to chemicals subject to regulation under state law], that have been manufactured, distributed, dispensed, possessed, or acquired in violation of the laws of this state;

Real and Personal Property

(b) (1) all property, except as provided in paragraph (2) of this subsection, including the whole of any lot or tract of land and any appurtenances or improvements to real property that is either:

(A) furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or

(B) used or intended to be used in any manner or part to facilitate conduct giving rise to forfeiture;

(2) if the only conduct giving rise to forfeiture is a violation of [reference to state laws relating to possession of controlled substances solely for personal consumption]:

(A) real property is not subject to forfeiture; and

(B) other property subject to forfeiture pursuant to Section 7(b)(1)(B) may be forfeited only pursuant to Section 17 of this [Act];

Proceeds

(c) all proceeds of any conduct giving rise to forfeiture;

Weapons

(d) all weapons possessed, used, or available for use in any manner to facilitate conduct giving rise to forfeiture;

Enterprise Interests

(e) any interest or security in, claim against, or property or contractual right of any kind affording a source of control over any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct of through conduct giving rise to forfeiture; and

Substitute Assets

(f) any property of a person up to the value of property either:

(1) described in subsection (b) that the person owned or possessed for the purpose of a use described in subsection (b); or

(2) described in subsection (c) and is proceeds of conduct engaged in by the person or for which the person is criminally responsible.

Property described in this subsection may be seized for forfeiture pursuant to a constructive seizure or an actual seizure pursuant to Section 9. Actual seizure may only be done pursuant to a seizure warrant issued on showings, in addition to the showing of probable cause for the forfeiture of the subject property, that the subject property is not available for seizure for reasons described in Section 18(a), and that the value of the property to be seized is not greater than the total value of the subject property, or pursuant to a constructive seizure. If property of a defendant up to the total value of all interests in the subject property is not seized prior to final judgment in an action under this section, the remaining balance shall be ordered forfeited as a personal judgment against the defendant.

COMMENT

This section of the [Act] creates five separate causes of action for forfeiture, one or more of which the state must allege and show as to each item of property to be forfeited. Each of the five categories of circumstances subject property to forfeiture.

In subsection (a) controlled substance analogs and counterfeit drugs, or imitation or regulated chemicals manufactured, sold or possessed in violation of state drug laws are explicitly added to the forfeiture of drugs that are themselves forfeited as contraband or because of their connection to violations of the [Act].

The introductory language of subsection (b), "all property" and "including the whole of" real property, incorporates the federal concept of the whole of any lot or tract of land. 21 U. S. C. Section 881(a)(7). This precludes the argument that only the trunk of a car is forfeitable because that was the only portion of the property used to transport contraband. In real property forfeitures the entire tract of land in forfeitable even though the entire property was not dedicated to the illicit use. *United States v. Reynolds*, 856 F. 2d 675 (4th Cir. 1988).

Assume a drug dealer uses only 40 acres out of a total of 160 acres of farm land to grow marijuana. This marijuana growing plot is located in the center of the ranch. The statute provides for the forfeiture of the entire 160 acres. This provision avoids the absurd result that only the 40 acres is forfeitable thereby leaving the owner or interest holder a piece of property consisting of 120 acres surrounding a 40-acre hole in the middle.

This policy is adopted in 21 U.S.C. Section 881(a)(7), the model for Section 7, which provides for the forfeiture of the whole of any lot or tract of land used or intended to be used in any manner or part to facilitate a drug offense. The same policy is contained in 21 U.S.C. Section 853(a)(2) which provides for forfeiture of property of those convicted of a continuing criminal enterprise. Federal courts are unanimous that if property is subject to forfeiture, then the entire tract of land is subject to forfeiture. *United States v. The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2nd Cir. 1989); *United States v. A Parcel of Land with a Building (etc.) at 40 Moon Hill Road*, 884 F. 2d 41 (1st. Cir. 1989); *United States v. Tax Lot 1500*, 861 F. 2d 232 (9th Cir. 1988); *United States v. Santoro*, 866 F. 2d 1538 (4th Cir. 1989).

This result reflects practical considerations as well as policy considerations. A partitioned lot may not be marketable, and partitioning will often destroy the marketability of both parcels. For example, ingress to the contained lot would be necessary, but would damage the surrounding land's value. It may not be possible as a practical matter. Utilities would also be required, with similar problems. Partitioning may, for example, violate subdivision statutes. In a residential setting, subdivision deed restrictions would generally be implicated, and utility access and hook-ups would often be impossible, illegal or impractical. Subdivisions to create one "hole" is difficult enough, but the method of creating such islands could easily result in manly islands within a single parcel, each with the same set of difficulties. Finally, who would want to buy a parcel of

land, large or small, surrounded by the land of a drug dealer with every reason to be hostile and bitter towards their new neighbor?

Subsection (b)(1) is the familiar "used or intended to be used" theory found in 21 U.S.C. Section 881(a)(6) and the existing drug-related forfeiture statutes of most states.

Some individuals criticize the use of language such as that in subsection b(1) to forfeit property for personal use of drugs. Forfeiture appears to these critics as an unduly harsh and economically ineffective remedy for what they perceive are trivial offenses. Their recommendation is the preclusion of forfeiture in all possession cases.

However, forfeiture in simple possession cases can be a meaningful option for jurisdictions struggling to control a burgeoning drug problem. Dr. Michael Block of the University of Arizona testified that vehicle forfeiture, as a demand reduction strategy, is potentially a very powerful deterrent. According to Dr. Block, "[w]hat makes forfeiture so powerful in these circumstances is the fact that the potential loss is so out of proportion to the benefit of the activity (drug consumption) and that for many individuals their automobile is a substantial portion of their net worth..."

Moreover, possession forfeiture can play a beneficial role in a comprehensive plan to clean up inner cities. "Operation Toehold" was a 120 day project targeting a 20 square block area of East Oakland, California. Federal, state, and local officials implemented a nuisance abatement, community policing and Bust-the-Buyer program. During the project, weekend drug buyers were cited and the FBI forfeited 82 buyer's cars, 50% of which were from outside of Oakland. Buyers were warned about the hazards of buying drugs in the area, including the seizure of cars.

At the commencement of "Operation Toehold", the targeted area experienced two to three hundred drug transactions per day. In the preceding 18 months, 7 deaths were directly related to the drug activity. At the termination of the project open street drug dealing had virtually stopped. Drug arrests dropped dramatically. Drug Hotline and Radio Calls reporting drug activity dropped from 40 to 50 per month to 8 to 10 per month. There were no shootings, assaults or serious crimes against persons in the area since the project began. The neighborhood once ravaged by drugs became stabilized and ready for positive growth.

Concern about the fairness of forfeiture in simple possession cases generally focuses on the forfeiture of real property, and the forfeiture of a parent's car used by a son or daughter to purchase drugs.

CFRA easily addresses these areas of concern without drastically eliminating a potentially effective demand reduction tool. First, under subsection (b)(2), CFRA excludes all real property from forfeiture for personal use amounts of drugs. Second, CFRA forfeits the interest of the individual involved in conduct giving rise to forfeiture. The son or daughter who used the car to make a drug purchase is the wrongdoer. The parent generally would have had no knowledge or notice of the son or daughter's illegal activity. Therefore, the interest of the son or daughter, not the interest of the parent, in the car is forfeitable.

Subsection (b)(2) requires that personal property used to facilitate a possession case be forfeited in an in personam proceeding. A forfeiture judgment is issued in an amount equal to the value of the illegally used property. When the forfeitable asset is unavailable due to an exempt ownership interest, the judgment can be executed against a substitute asset of the wrongdoer pursuant to subsection (f) and Section 18. The car is returned to the parent and the son or daughter remains economically liable for the illegal use of the asset.

The proceeds of targeted violations are forfeited under subsection (c), as in federal law, 21 U.S.C. Section 881 (a) (6), 21 U.S.C. Section 853 (a) (1) (CCE), 18 U.S.C. Section 1963 (a) (1.) (RICO). This forfeiture effectuates the policy of money laundering provisions that the proceeds of crime are contraband, a concept that dates to Biblical times. When Judas repented his betrayal of Jesus and returned the thirty pieces of silver that he had been given, the chief priests recognized it as "the price of blood" and not lawful tender. Matthew 27:5-8.

If a dealer makes $100,000 and buys a house, the house is forfeitable as proceeds. *United States v. Real Estate at 116 Villa Rella Rd.*, 675 F. Supp. 645 (S.D. Fla. 1987). If a dealer buys stock which appreciates, the appreciation is also proceeds. Restatement, Restitution, Section 205.

Weapons are subject to forfeiture under subsection (d) in the additional circumstances of their being "available for use" to facilitate conduct giving rise to forfeiture, even though there is no actual use or intent to use. The availability of a weapon to facilitate targeted offenses is sufficient to overcome its offender-owner's possessory right in it.

The language of subsection (e) is modified to improve the awkward phrasing of 18 U.S.C. Section 1963 (a) (2) (RICO). It reaches enterprise assets of corrupt enterprises, in addition to those actually used or intended for use to facilitate conduct giving rise to forfeiture. For example, in *United States v. Cauble*, 706 F. 2d 1322 (5th Cir. 1983) cert. denied 104 S. Ct. 996 (1984), a Texas rancher's entire partnership interest in a partnership was forfeited, including land and personal property that was not individually used to import drugs in his massive drug smuggling activity. He had used the enterprise as a whole in his drug smuggling conduct.

Subsection (f) clarifies the relationship among in rem forfeiture, in personam forfeiture and the forfeiture of substitute assets. Seizure warrants are authorized for both in rem and in personam forfeitures. In cases involving the actual seizure of substitute assets, seizure warrants are required to guarantee that assets seized are not of greater value than the property originally subject to forfeiture. If the seizure is constructive, as opposed to actual, no warrant is needed. A substitute asset is forfeitable if a person owned or exercised dominion and control over the original property for the purpose of facilitating conduct giving rise to forfeiture, or the original property was illegal proceeds. Because CFRA is to be interpreted broadly to effectuate its remedial purposes, subsection (b) includes weapons and enterprise interests used for facilitation purposes.

Section 8. Exemptions.

(a) All property, including all interests in property, described in Section 7 is subject to forfeiture, except that property is exempt from forfeiture:

Interests Acquired Before or During Conduct

(1) if the owner or interest holder acquired the property before or during the conduct giving rise to its forfeiture, and:

(A) did not know and could not reasonably have known of the act or omission or that it was likely to occur; or

(B) acted reasonably to prevent the conduct giving rise to forfeiture; or

Interests Acquired After Conduct

(2) if the owner or interest holder acquired the property after the conduct giving rise to its forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and acquired the property in good faith, for value and did not knowingly take part in an illegal transaction.

Nonexempt Interests

(b) Notwithstanding subsection (a) of this section, property is not exempt from forfeiture, even though the owner or interest holder lacked knowledge or reason to know that the conduct giving rise to its forfeiture had occurred or was likely to occur, if:

Authority to Convey Interest

(1) the person whose conduct gave rise to its forfeiture had the authority to convey the property of the person claiming the exemption to a good faith purchaser for value at the time of the conduct;

Criminally Responsible for Conduct

(2) the owner or interest holder is criminally responsible for the conduct giving rise to its forfeiture, whether or not there is a prosecution or conviction; or

Notice of Seizure for Forfeiture

(3) the owner or interest holder acquired the property with notice of its actual or constructive seizure for forfeiture under Section 9 of this [Act], or with reason to believe that it was subject to forfeiture under this [Act].

COMMENT

The exemptions are a comprehensive formulation of those interests whose confiscation would, in most cases, cause more commercial disruption than overall benefit to the integrity of the economy. Subsection (a) (1) deals with situations in which the state of mind with respect to the particular property is relevant. It provides essential protection for legitimate commercial interest holders. It exempts non-negligent owners, carving out the exemption that the U.S. Supreme Court declined to carve out in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). It also exempts a claimant who acted knowing of the risk that the property would be used unlawfully but acting reasonably to prevent the unlawful use. Thus, a person who learns that his airplane's lessee has been involved in drug smuggling may avoid forfeiture of the plane based on the lessee's subsequent drug flights by taking whatever steps are reasonable in the circumstances to prevent the illegal use, e.g. notifying authorities, acting to rescind the lease, etc. Subsection (2) exempts good faith purchasers for value. This

exemption is a very significant expansion of exemptions available in the traditional forfeiture, under which all intervening interests, including those of a bona fide purchaser, are subject to forfeiture. *United States v. Stowell*, 133 U.S. 1 (1890).

Subsection (b) negates exemption from forfeiture under selected circumstances in which forfeiture is appropriate without consideration of the intent of the claimant with regard to the conduct giving rise to forfeiture. The claimant's property will remain subject to forfeiture if the claimant:

> (1) was so negligent in their entrustment that the person whose conduct gave rise to forfeiture had the power to convey the interest of the claimant;
>
> (2) is a co-conspirator or otherwise criminally responsible for the conduct giving rise to forfeiture; and
>
> (3) is speculating in property subject to forfeiture, or participating, knowingly or with notice, in a transaction that may have the effect of defeating the government's title but for the provision.

An example will illustrate the exemption provision's operation. X is a drug dealer who has moderately prepared himself for a government attempt at the forfeiture of his assets. He has a trans-shipment building, (called a "stash house"), that he has mortgaged, several vans used to transport drugs held in the names of family member nominees, and bank accounts holding proceeds. After seizure, he assigns his interest in the bank accounts to a friend out of state under their mutual agreement to avoid forfeiture.

The mortgagee of the stash house passes each condition of exemption, and is exempt. The state will therefore take X's equity interest in the stash house subject to the mortgage. The family members' claims to the vans may succeed on (b)(1) depending on the facts of the case. Subsection (b)(1) does not exempt from forfeiture the interest of an owner or interest holder which is held in joint ownership with the person whose conduct gave rise to forfeiture where the joint owner has equal authority to convey the property to a good faith purchaser for value. There are many circumstances where property is held jointly or in common with others. In those cases where the joint owner does not have equal power to convey the property as the joint owner whose conduct gave rise to forfeiture, that interest is not forfeitable. Where the innocent joint owner and the joint owner whose conduct gave rise to forfeiture both have equal power to convey the property, each is bound by the actions of the other. The family members's claims will certainly founder on the definition of "owner," designed to address nominees. The friend to whom X assigned his bank accounts will fail the test of (b)(3).

CFRA contains no exemption for attorney's fees. The Sixth Amendment right to counsel of choice protects a person's right to retain the best legal counsel that a person can afford with his or her legitimate assets and there is nothing the government can do to impair or limit that right.

"The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2652 (1989).

Any attorney who wishes to avoid forfeiture of his fee need only satisfy himself that his fee is paid from legitimate assets. In such cases, the attorney will have nothing to fear from asset forfeiture and the threat of forfeiture cannot impair the attorney/client relationship.

Only with respect to use of drug proceeds to pay attorney's fees or any other form of expense does the specter of forfeiture arise. Forfeiture in this context does nothing to impair a person's right to counsel of choice under the Sixth Amendment — a right which is limited to the retention of counsel with legitimate assets.

"Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of... counsel. " ... A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the government does not violate the Sixth Amendment if it seizes the robbery proceeds, and refuses to permit the defendant to use them to pay for his defense. No lawyer, in any case, ... has the right to accept stolen property, or ... ransom money, in payment of a fee... The privilege to practice law is not a license to steal." (citations omitted). *Id.* at 2652-2653.

Just as a trustee who converts trust funds to his personal account has no right to use those funds to pay for his defense, a drug trafficker has no right to use the fruits of a crime, which properly belong to the government, to pay for his defense.

For that same reason, the seizure and forfeiture of drug proceeds does nothing to impair the presumption of innocence. Every defendant in our society is entitled to the same presumption of innocence, and this presumption does not vary with respect to whether the defendant is indigent or wealthy. Drug traffickers are not entitled to a different or "stronger" presumption of innocence than other defendants accused of crime simply because drug proceeds are available to hire more expensive defense attorneys. They are entitled to the same presumption of innocence as anyone else. It is not this presumption that is affected by seizure and forfeiture; it is the ability to mount a more expensive defense.

Forfeiture acts as a "great equalizer" in that it puts drug traffickers in the same position as any member of legitimate society who stands accused of a crime. "The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money ... entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense." (citation omitted). *Id.* at 2655.

It is also untrue that the unrestricted forfeiture of drug proceeds will mean that all — or even most— drug defendants will receive appointed counsel. As noted earlier, persons accused of drug crimes who have legitimate assets or income or access to legitimate assets through loans from families, friends, or financial institutions will be entitled to retain the most expensive attorneys that they can afford with those assets. This will include the vast majority of drug defendants in state courts who stand accused of simple possession or minor distribution offenses but who also have legitimate employment or access to legitimate assets. It is only the truly "professional" drug traffickers who have rejected legitimate society and any thought of legitimate employment to devote their life to drug trafficking who would be rendered indigent by the pretrial seizure and restraint of their ill-gotten gains and thus be eligible for appointed counsel. Creating an exemption protecting <u>all</u> drug dealers in order to protect only the <u>worst</u> drug dealers makes no sense at all.

Creating a statutory exemption for drug proceeds used to pay attorney's fees will undermine the important social values served by a strong forfeiture statute. The Supreme Court has identified three such values that are reflected in the CFRA.

"First, the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets, for such assets are deposited in a Fund that supports law enforcement efforts in a variety of important and useful ways. See 28 U.S.C. 524(c), which establishes the Department of Justice Assets Forfeiture Fund. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted." *Id.* at 2654.

Similarly, Section 20(b) of CFRA distributes forfeited drug proceeds to law enforcement and prosecutorial agencies.

"Second, the statute permits 'rightful owners' of forfeited assets to make claims for forfeited assets before they are retained by the government. See 21 U.S.C. 853(n)(6)(A). The Government's interests in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim. " *Id.*

Section 8 of the CFRA guarantees that all exempt interests, including all those of all innocent lienholders, are protected and will be made whole from any forfeited assets.

"Finally, as we have recognized previously, a major purpose motivating congressional adoption and continued refinement of the federal forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises. See *Russell v. United States,* 464 U.S. 16, 27-28 (1983). This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: 'Congress has already underscored the compelling public interest in stripping criminals such

as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent. " 837 F.2d, at 649." *Id.* at 2655.

The CFRA serves the same compelling interest of stripping drug traffickers of their undeserved economic basis.

Creating a statutory exemption for attorney's fees would disserve these important social values. First, such an exemption would leave drug traffickers as a "protected class" relative to all other criminals with respect to their abilities to pay their attorneys. Second, an exemption would provide an incentive to other criminals to enter into drug trafficking in order to afford the more expensive attorneys. Third, an exemption serving the interests of such a small segment of the criminal defense bar would tarnish the image of all lawyers by sanctioning their knowing acceptance of "blood money."

Allowing forfeiture of drug proceeds which might be used to pay attorney's fees will not diminish the quality of the defense bar. Certainly, there is nothing in the historical record to suggest that the quality of the defense bar was in any way unacceptable prior to the widespread availability of drug proceeds or that the widespread availability of such proceeds has resulted in a substantial improvement of the defense bar. Indeed, implicit in any such claim is the premise that the continued influx of such proceeds is essential to subsidize the quality of the bar. This premise is unacceptable both to the larger body of attorneys and to the vast majority of the American public.

Section 15(f) and (g) address concerns regarding recapture of fees which surfaced subsequent to the *Caplin and Drysdale* holding. They provide a procedure for the payment of attorney's fees from seized property in limited circumstances.

Section 9. Seizure of Property.

Seizure Warrant

(a) Property may be seized for forfeiture by [appropriate person/agencies] upon process issued by any [appropriate court]. The court may issue a seizure warrant on an affidavit under oath demonstrating that probable cause exists for its forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of any state or of the United States. The court may order that the property be seized on such terms and conditions as are reasonable in the discretion of the court. The order may be made on or in connection with a search warrant.

Warrantless Seizure

(b) Property may be seized for forfeiture by appropriate persons/agencies] without process on probable cause to believe that the property is subject to forfeiture under this [Act] .

Occupied Real Estate

(c) The seizure of inhabited residential real property for forfeiture which is accompanied by removing or excluding its residents shall be done pursuant to a preseizure adversarial judicial determination of probable cause, except that this determination may be done ex parte when the attorney for the state has demonstrated exigent circumstances.

Constructive Seizure

(d) Property may be seized constructively by:

(1) posting notice of seizure for forfeiture or notice of pending forfeiture on the property.

(2) giving notice pursuant to Section 11.

(3) filing or recording in the public records relating to that type of property notice of seizure for forfeiture, notice of pending forfeiture, a forfeiture lien or a lis pendens.

Filings or recordings made pursuant to this subsection are not subject to a filing fee or other charge.

Notice of Seizure

(e) The seizing agency, or the attorney for the state, shall make a reasonable effort to provide notice of the seizure to the person from whose possession or control the property was seized. If no person is in possession or control, the seizing agency may attach the notice to the property or to the place of its seizure or may make a reasonable effort to deliver it to the owner of the property. The notice shall contain a general description of the property seized, the date and place of seizure, the name of the seizing agency and the address and telephone number of the seizing officer or other person or agency from whom information about the seizure may be obtained.

Third Party Immunity for Reasonable Compliance

(f) A person who acts in good faith and in a reasonable manner to comply with an order of the court or a

request of a law enforcement officer is not liable to any person for acts done in reasonable compliance with the order or request. In addition, no inference of guilt may be drawn from the fact that a person refuses a law enforcement officer's request to deliver the property.

Possessory Lien

(g) A possessory lien of a person from whose possession property is seized is not affected by the seizure.

COMMENT

The language of Section 9 is adapted from 21 U.S. C. Section 881. It has been modified to address two related concerns. First, it provides specific authorization for a seizure warrant, to augment state search warrant statutes. State search warrant statutes generally have no provisions for seizure of property that is not necessarily evidence of a crime. Second, it makes clear that it does not impose a statutory warrant requirement in addition to the requirements imposed by the Fourth Amendment.

A seizure for forfeiture may be made without a warrant, but authorization to seize without a warrant does not include authorization to search. Only where no invasion of a protected privacy interest, i.e. no search, is necessary to accomplish the seizure may the warrantless seizure for forfeiture be made. If a search is necessary, a search warrant is required in the same circumstances that a warrant is required for all searches. *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Texas v. Brown*, 460 U.S. 730 (1983). The definition of a search here is the same as in Fourth Amendment law.

Subsection (c) contains statutory limitations on forfeiture seizures of inhabited residential real property designed to recognize the special privacy interests involved in such seizures. It assures that no removal or exclusion of residents will occur prior to an adversarial judicial hearing. A constructive seizure, done by filing notices, has no such privacy implication. Seizures of a residence may be done under an ex parte judicial order if the court is satisfied that exigent circumstances exist, e.g. a pending transfer to a bona fide purchaser or an immediate safety hazard such as an operating methamphetamine lab.

Subsection (d) encourages constructive seizure, by which the jurisdiction of the court is established without displacing the owner or disrupting the production of income. Constructive seizure is particularly useful in seizures of residences and ongoing businesses. Subsection (d) also provides assurance that the owners and interest holders will learn of the seizure, whether it is a seizure of real or personal property.

Subsections (f) and (g) protect third persons from civil liability or loss due to compliance with court orders or law enforcement officers' requests. If, for example, a bank customer claims that a business transaction was prevented by the seizure of his account, the bank's compliance with the seizure would not support an action for damages. A bank should not be subject to suit by the customer in these circumstances, nor should its possessory lien be affected, for example, when accounts and other collateral are pledged.

Section 10. Property Management And Preservation.

Unauthorized Encumbrance

(a) Property seized for forfeiture under this [Act] is not subject to alienation, conveyance, sequestration, attachment, or a motion or order under [reference to state statute relating to return of property seized as evidence]

Release Due to Unnecessary Forfeiture

(b) The seizing agency or the attorney for the state may authorize the release of the seizure for forfeiture on the property if forfeiture or retention of actual custody is unnecessary.

Transfer of Action

(c) The attorney for the state may discontinue forfeiture proceedings and transfer the action to another state or federal agency or attorney for the state who has initiated forfeiture proceedings.

Custody of Property

(d) The property is deemed to be in the custody of the [appropriate court] subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings and to the acts of the seizing agency or the attorney for the state pursuant to this [Act].

Substitution of Surety Bond or Cash

(e) An owner of property seized pursuant to this [Act] may obtain release of the property by posting with the attorney for the state a surety bond or cash in an amount equal to the full fair market value of the property as determined by the attorney for the state. The state may refuse to release the property if:

(1) the bond tendered is inadequate; or

(2) the property is retained as contraband or as evidence; or

(3) it is particularly altered or designed for use in conduct giving rise to forfeiture.

If a surety bond or cash is posted and the property is forfeited, the court shall forfeit the surety bond or cash in lieu of the property.

Disposition Pending Forfeiture

(f) If property is seized under this [Act], the attorney for the state or his designee, subject to any need to retain the property as evidence, may:

(1) remove the property to an appropriate place designated by the [appropriate court, person or agency] or his designee;

(2) place the property under constructive seizure;

(3) remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, deposit it in an interest bearing account;

(4) provide for another agency or custodian, including an owner, secured party, mortgagee, or lienholder, to take custody of the property and service, maintain and operate it as reasonably necessary to maintain its value, in any appropriate location within the jurisdiction of the court; or

(5) require the [appropriate agency] to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

Inventory

(g) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct a written inventory and estimate the value of the property seized.

Interlocutory Sale or Lease

(h) The court may order property which has been seized for forfeiture sold, leased, rented or operated to satisfy a specified interest of any interest holder, or to preserve the interests of any party on motion of such party. The court may enter orders under this subsection after notice to persons known to have an interest in the property, and an opportunity for a hearing, if the interest holder:

(1) has timely filed a proper claim and is a regulated interest holder; or

(2) has an interest which the attorney for the state has stipulated is exempt from forfeiture.

(i) A sale may be ordered under subsection (h) when the property is liable to perish, to waste, or to be foreclosed or significantly reduced in value, or when the expenses of maintaining the property are disproportionate to its value. A third party designated by the court shall dispose of the property by commercially reasonable public sale and distribute the proceeds in the following order of priority:

(1) for the payment of reasonable expenses incurred in connection with the sale or disposal;

(2) for the satisfaction of exempt interests in the order of their priority; and

(3) any balance of the proceeds shall be preserved in the actual or constructive custody of the court, in an interest bearing account, subject to further proceedings under this [Act].

COMMENT

Subsections (a)-(d) allow the attorney for the state to release the seizure for forfeiture on the property if the forfeiture or retention is unnecessary. They clarify that a motion for release of property seized as evidence is not applicable. This follows the federal practice. *United States v. United States Currency $83,310.78*, 851 F. 2d 1231 (9th Cir. 1988).

They also allow transfer of the action to another attorney for the state, or the federal government, for example to consolidate in one county or to allow an office with greater resources to handle it.

Subsection (e) allows an owner of property seized under this section to obtain a release of the property by posting a surety bond or cash in an amount equal to the fair market value of the property. The state may refuse to release the property if it is contraband, evidence of a violation of law or particularly altered or designed for use in illegal activities, e.g. a boat with a secret compartment installed in the hull. If the state prevails in the forfeiture, it obtains the bond amount as a substitute res. This benefits the claimant by allowing his free use and alienation of his property, and also because it prevents deterioration of the property during litigation. It benefits the state because it eliminates the cost of storage, creates an interest bearing and therefore increasing fund rather than deteriorating or depreciating property, and eliminates the discount effect of government sale.

An example illustrates the several benefits. A vehicle is worth $20,000, fair market value, at the time it is seized for forfeiture. Its owner does not bond it out. A year later it has depreciated to $15,000 in value, and has accumulated $500 in maintenance, storage and insurance expenses. Its net proceeds are $14,500. Now, if the owner of a second identical vehicle bonds it out for $20,000 the owner may keep it and use it or sell it for $20,000. The bond is deposited and earns 10 percent interest for one year. There are no expenses. The net proceeds are $22,000. The owner suffers no loss of vehicle use or interest (other than foreseeable depreciation). The government nets an additional $7,500, over 35 percent of the original fair market value of the vehicle. The longer the litigation and the more susceptible the property is to depreciation, the greater the benefit shared by the parties.

Subsection (f) sets out the state's powers and duties with respect to seized property. The property can be removed to a place designated by the court, retained as evidence, removed to a storage area for safe keeping or deposited in an interest bearing account.

Paragraph (4) allows for a custodian, including an owner or interest holder, to take custody of the property. Authorized private persons may take custody of the property as well as government agencies. Often, the person most familiar with the property and most willing and able to manage it is the owner, an interest holder, or an agent for one of them. Custodianship agreements with private custodians may also be done on a contract basis for the state. Agreements may be made on a specific case, on a particular class of assets (e.g. vehicles) or on an across-the-board basis. Custodianship agreements greatly reduce and simplify the role of law enforcement officers in property maintenance, prevent unnecessary deprivations of property in the event that the owner prevails, and reduce judicial and administrative time and anxiety expended over property management and liability issues. Without these statutory additions, seizures of ongoing businesses and seizures of wasting assets would have to be done through cumbersome and expensive procedures to the detriment of all concerned.

Subsection (g) requires a prompt written inventory and estimate of value, for the protection of both owners and the government from misunderstandings or false claims. The estimate here is not an appraisal and contemplates no expertise beyond that of the seizing agent. The resulting figures are subject to substantial revision, but are a necessary starting point for attorneys and the court.

Subsection (h) gives broad judicial authority to order property sold, leased, rented or operated pending forfeiture. It allows an interest holder whose ability to collect is in jeopardy to salvage all that is possible from the situation. Major criminal defendants with substantial assets often rely on illicit income to make payments on vehicles, mortgages, etc. When this income stops, due to arrest, flight or civil suit, creditors face a scramble for available assets. This provision provides a mechanism for all parties to address such situations.

Subsection (i) allows the court to sell property seized for a forfeiture but not yet the subject of a judgment to satisfy a specified interest of any interest holder. However, by reference to subsection (h), the interest holder must 1) have properly filed a claim, or 2) have an interest stipulated as exempt from forfeiture. The section contemplates that the interest holder, or a person designated by the court, would then dispose of the property by commercially reasonable/public sale. The proceeds would be first applied to expenses incurred in connection with the sale and then applied to satisfy exempt interests in the order of their priority. If there are any proceeds left over, after satisfying interest holders' interests, the excess proceeds, i.e. the owner's equity, would be returned to the court. This will assure timely foreclosures and prevent waste while protecting owner's equity for the owner or the state.

Section 11. Commencement of Forfeiture Proceedings; Property Release Requirements.

(a) Forfeiture proceedings shall be commenced as follows:

Temporary Release for Failure to Commence

(1) Property seized for forfeiture shall be released on the request of an owner or interest holder to their custody, as custodian for the court, pending further proceedings pursuant to this [Act] if the attorney for the state fails:

(A) to file a notice of pending forfeiture against the property within ninety (90) days after seizure; or

(B) to file a judicial forfeiture proceeding within ninety (90) days after notice of pending forfeiture of property upon which a proper claim has been timely filed.

Filing Deadline for Claim or Petition For Recognition of Exemption

(2) Within thirty (30) days after the effective date of the notice of pending forfeiture, an owner of or interest holder in the property may elect to file with the attorney for the state:

(A) a claim pursuant to Section 14; or

(B) a petition for recognition of exemption pursuant to Section 14, except that no petition may be filed after the state commences a court action.

(3) No extension of time for the filing of a claim shall be granted.

Procedures for Timely Filed Petition

(4) If a petition is timely filed, the attorney for the state may delay filing a judicial forfeiture proceeding for one hundred and eighty (180) days after the notice of pending forfeiture, and the following procedures shall apply:

(A) The attorney for the state shall provide the seizing agency and the petitioning party with a written recognition of exemption and statement of nonexempt interests relating to any or all interests in the property in response to each petitioning party:

(i) within sixty (60) days after the effective date of the notice of pending forfeiture if the petitioner is a regulated interest holder. The recognition of exemption shall recognize the interest of the petitioner to the extent of documented outstanding principal plus interest at the contract rate until paid; or

(ii) within one hundred and twenty (120) days after the effective date of the notice of pending forfeiture for all other petitioners.

(B) An owner or interest holder in any property declared nonexempt may file a claim pursuant to Section 14 within thirty (30) days after the effective date of the notice of the recognition of exemption and statement of nonexempt interest.

(C) If no petitioning party timely files a proper claim under paragraph (4), the recognition of exemption and statement of nonexempt interests becomes final, and the attorney for the state shall proceed as provided in Sections 19 and 20 of this [Act].

(D) The attorney for the state may elect to proceed herein for judicial forfeiture at any time.

(E) If a judicial forfeiture proceeding follows the application of procedures in this paragraph:

(i) No duplicate or repetitive notice is required. If a proper claim has been timely filed pursuant to paragraph (4)(B) of this subsection, the claim shall be determined in a judicial forfeiture proceeding after the commencement of such a proceeding under Sections 16, 17, and 18 of this [Act].

(ii) The proposed recognition of exemption and statement of nonexempt interests responsive to all petitioning parties who subsequently filed claims are void and will be regarded as rejected offers to compromise.

Failure to File Petition or Claim

(5) If no proper petition for recognition of exemption or proper claim is timely filed, the attorney for the state shall proceed as provided in Sections 19 and 20 of this [Act].

Notice

(b) (1) Notice of pending forfeiture, service of an in rem complaint or notice of a recognition of exemption and statement of nonexempt interests required under this [Act], shall be given in accordance with one of the following:

(A) If the owner's or interest holder's name and current address are known, by either personal service by any person qualified to serve process or by any law enforcement officer or by mailing a copy of the notice by certified mail, return receipt requested, to that address.

(B) If the owner's or interest holder's name and address are required by law to be on record with the [appropriate reference, e.g. county recorder, secretary of state, the motor vehicle division] or another state or federal agency to perfect an interest in the property, and the owner's or interest holder's current address is not known, by mailing a copy of the notice by certified mail, return receipt requested, to any address of record with any of the described agencies.

(C) If the owner's or interest holder's address is not known and is not on record as provided in subparagraph (D) of this paragraph, or the owner or interest holder's interest is not known, by publication in one issue of a newspaper of general circulation in the county in which the seizure occurred.

(2) Notice is effective upon the earlier of personal service, publication, or the mailing of a written notice, except that notice of pending forfeiture of real property is not effective until it is recorded. Notice of pending forfeiture shall include a description of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

COMMENT

Section 11 specifies a time period in which the state must act to maintain a forfeiture action. Most current state statutes specify no time restrictions. These proposed time limits will require a much stricter standard than permitted under Due Process analysis. The Due Process limits were defined in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983). The Court applied a four-factor test borrowed from Barker v. Wingo, 407 U.S. 514 (1972), turning on the length of the prehearing delay, the reasons for the delay, the claimant's assertion of the right to a judicial hearing and the prejudice caused to the claimant's case by the delay. Paragraph (1) of subsection (a) clarifies that failure to pursue forfeiture within the statutory time limit is not jurisdictional and therefore does not result in dismissal. Failure to pursue timely forfeiture results only in the release of the property pending further proceedings. Those proceedings may be within the case, if one has been filed, or may be a new case. The proceedings may be commenced at any time within the seven-year statute of limitations set in Section 23.

Subsection (a)(2) allows an owner or interest holder to elect to either file a claim against the property or a petition for recognition of exemption of the property.

Subsection (a)(4) sets forth the procedure and time limitations, if in fact, an owner or interest holder timely petitions for recognition of exemption. Early informal recognition of exemption will allow rapid exit from forfeiture actions for commercial interests, saving them expenses and eliminating uncertainty over their exemption as early as possible. Financial institutions benefit from this provision by being able to eliminate referrals of forfeiture matters to outside counsel. When property that the financial institution has an interest in is served forfeiture, an in-house clerk routinely responds, saving time and expense. The rare complex case may be referred, if necessary.

Subsection (a)(5) provides the procedure if no proper petitions for exemption are timely filed.

Subparagraphs (b)(1)(A)-(C) set forth the state's method of providing the notice of pending forfeiture to owners/interest holders whose address or interest is not known or reasonably ascertainable. Even though it appears that all possible claimants have received personal notice, it is prudent to provide notice by publication as well to avoid any doubt about whether the judgment will bind all subsequent claimants. Paragraph (2) creates a general "mail box rule" for the effective date of notice and of other service of a complaint by the notice method. This conforms to the standard rules in civil practice. This is designed to prevent different due dates for claims, stipulations, answers, motions, etc. By making a single mailing or publication the state may greatly simplify the timekeeping necessary to track multiple claims and/or stipulations.

Section 12. Liens.

Filing Authority

(a) The attorney for the state may file, without a filing fee, a lien for the forfeiture of property:

(1) upon the initiation of any civil or criminal proceeding relating to conduct giving rise to forfeiture under this [Act];

(2) upon seizure for forfeiture; or

(3) in connection with a proceeding or seizure for forfeiture in any other state under a state or federal statute substantially similar to the relevant provisions of this [Act]. The filing constitutes notice to any person claiming an interest in the seized property or in property owned by the named person.

Notice of Lien Filing

(b) The lienor, as soon as practical after filing a lien, shall furnish to any person named in the lien a notice of the filing of the lien. Failure to furnish notice under this subsection shall not invalidate or otherwise affect the lien.

Contents of Lien Notice

(c) The lien notice shall set forth:

(1) the name of the person and, in the discretion of the lienor, any alias, or the name of any corporation, partnership, trust, or other entity, including nominees, that are owned entirely or in part, or controlled by the person;

(2) the description of the seized property or the criminal or civil proceeding that has been brought relating to conduct giving rise to forfeiture under this [Act];

(3) the amount claimed by the lienor;

(4) the name of the [reference to court] where the proceeding or action has been brought; and

(5) the case number of the proceeding or action if known at the time of filing.

Priority

(d) The notice of forfeiture lien shall be filed in accordance with the provisions of the laws of this state relating to the type of property that is subject to the lien. The validity and priority of the forfeiture lien shall be determined in accordance with applicable law pertaining to liens.

Scope

(e) A lien filed pursuant to this subsection applies to the described seized property or to one named person, any aliases, fictitious names, or other names, including the names of any corporation, partnership, trust, or other entity, owned entirely or in part, or controlled by the named person, and any interest in real property owned or controlled by the named person. A separate forfeiture lien shall be filed for each named person.

Amount Secured

(f) The notice of lien creates, upon filing, a lien in favor of the lienor as it relates to the seized property or the named person or related entities. The lien secures the amount of potential liability for civil judgment, and, if applicable, the fair market value of seized property relating to all proceedings under this [Act] enforcing the lien.

Modification

(g) The lienor may amend or release, in whole or in part, a lien filed under this subsection at any time by filing, without a filing fee, an amended lien.

Execution

(h) Upon entry of judgment in its favor, the state may proceed to execute on the lien as provided by law.

COMMENT

Section 12 allows the attorney for the state to file a lien for forfeiture of property upon the initiation of any proceeding under this Act. The lien secures the amount of potential liability for civil judgment and, if applicable, the fair market value of property seized for forfeiture. The filing of the lien constitutes notice to any person claiming an interest in the seized property or on property owned by the named person. The availability of this lien has the effect of allowing and therefore encouraging the government to leave property, particularly real property, in the hands of its owner during litigation.

Section 13. Trustees.

Disclosure Requirement

(a) Except as provided in subsection (b), a trustee, constructive or otherwise, who has notice that a notice of forfeiture lien, or a notice of pending forfeiture, or a civil forfeiture proceeding has been filed against the property or against any person or entity for whom the person holds title or appears as record owner, shall furnish within fifteen (15) days, to the seizing agency or the attorney for the state:

(1) the name and address of each person or entity for whom the property is held;

(2) the description of all other property whose legal title is held for the benefit of the named person; and

(3) a copy of the applicable trust agreement or other instrument, if any, under which the trustee or other person holds legal title or appears as record owner of the property.

Exemption From Disclosure Requirement

(b) Subsection (a) is inapplicable if:

(1) a trustee is acting under a recorded subdivision trust agreement or a recorded deed of trust; or

(2) all of the information is of record in the public records giving notice of liens on that type of property.

Criminal Penalty

(c) A trustee with notice who knowingly fails to comply with the provisions of this subsection shall be guilty of violating such provision and may, upon conviction, be sentenced to imprisonment for not less than [two] nor more than [five] years, and shall be fined not less than [ten thousand dollars] per day for each day compliance was not made.

Civil Penalty

(d) A trustee with notice who fails to comply with subsection (a) is subject to a civil penalty of [three hundred dollars] for each day of noncompliance. The court shall enter judgment ordering payment of [three hundred dollars] for each day of noncompliance from the effective date of the notice until the required information is furnished or the state executes its judgment lien under this section.

Application of Nondisclosure Laws

(e) To the extent permitted by the Constitution of the United States, the duty to comply with subsection (a) shall not be excused by any privilege or provision of law of this state or any other state or country which authorizes or directs that testimony or records required to be furnished pursuant to subsection (a) are privileged or confidential or otherwise may not be disclosed.

Immunity

(f) A trustee who furnishes information pursuant to subsection (a) is immune from civil liability for the release of the information.

Unauthorized Release of Information

(g) An employee of the seizing agency or the attorney for the state who releases the information obtained pursuant to subsection (a), except in the proper discharge of official duties, is guilty of a [reference to state classification] misdemeanor.

Sealing of Records

(h) If any information furnished pursuant to subsection (a) is offered in evidence, the court may seal that portion of the record or may order that the information be disclosed in a designated way.

Judgment Lien

(i) A judgment or an order of payment entered pursuant to this section becomes a judgment lien against the property alleged to be subject to forfeiture.

COMMENT

Section 13 requires a trustee with notice of a forfeiture lien or action to provide the name and address of the person for whom the property is held and a copy of the trust agreement. Knowing failure to comply is made a criminal offense.

Subsections (d)-(i) create a civil enforcement mechanism. It is modeled loosely on Florida statutes designed to defeat the use of off-shore company ownership to thwart investigation and forfeiture, Section 607.325 Florida Statutes and Section 620.192 Florida Statutes as amended by Laws of 1988 Ch. 88-264. This provision is designed to pierce the straw or front owner in order to determine who is the true owner of the property. The duty of the trustee is to disclose the true owners. This section is not intended or suggested to be universally applicable, but will be useful in states in which land ownership through such devices is sufficiently common to justify this response. States on international borders, states in which criminal proceeds are being laundered, and states with attractive real estate investment potential should consider Florida's success in using this statute. This provision strips from the drug dealer or racketeer another barrier he erects to protect and hide his investments and his operating property. Under the civil sanction, if the information is not supplied, a civil penalty accrues daily. The penalty becomes a judgment lien against the property, so eventually the property comes under the lien amount and passes to the state. Legitimate commercial interest in keeping disclosures from becoming generally public are protected so that the court may preserve them where they are recognized by state law.

Section 14. Claims; Petitions for Recognition of Exemption.

Standing to File Claims

(a) Only an owner of or interest holder in property seized for forfeiture may file a claim, and shall do so in the manner provided in this section. The claim shall be mailed to the seizing agency and to the attorney for the state by certified mail, return receipt requested, within thirty (30) days after the effective date of notice of pending forfeiture. No extension of time for the filing of a claim shall be granted.

Availability of Petition for Recognition of Exemption

(b) The attorney for the state may make an opportuni-

ty to file a petition for recognition of exemption available by so indicating in the notice of pending forfeiture described in subsection (a) of Section 11 of this [Act].

Contents of Claim or Petition

(c) The claim or petition and all supporting documents shall be in affidavit form, signed by the claimant under oath, and sworn to by the affiant before one who has authority to administer the oath, under penalty of perjury and shall set forth:

(1) the caption of the proceedings and identifying number, if any, as set forth on the notice of pending forfeiture or complaint, the name of the claimant, and the name of the attorney for the state who authorized the notice of pending forfeiture or complaint;

(2) the address where the claimant will accept mail;

(3) the nature and extent of the claimant's interest in the property;

(4) the date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property;

(5) the specific provision of this [Act] relied on in asserting that the property is not subject to forfeiture;

(6) all essential facts supporting each assertion; and

(7) the specific relief sought.

COMMENT

Section 14 sets forth how an owner of or interest holder in property seized for forfeiture files a claim to assert an interest in property. Subsection (a) states that the claims must be delivered or mailed to the seizing agency and to the attorney for the state. The claim and petition must be signed by the owner or interest holder under penalty of perjury and must set forth the items listed in paragraphs (e) (1)-(7). Subsection (b) allows the attorney for the state to make an opportunity for recognition of exemption from forfeiture available to owners and interest holders in property seized for forfeiture. An unverified claim or petition is not sufficient. ***United States v. Fifteen Thousand Five Hundred Dollars ($15,500.00) United States Currency,*** **558 F.2d 1359, 1360 (9th Cir. 1977);** ***accord, United States v. One 1978 Piper Navajo PA-31 Aircraft,*** **748 F.2d 316 (5th Cir. 1984);** ***United States v. U.S. Currency Amounting to Sum of Thirty Thousand Eight Hundred dollars ($30,800.00),*** **555 F. Supp. 280, 283 (E.D.N.Y.), aff'd mem., 742 F.2d 1444 (2nd Cir. 1983).**

The failure of the claimant to comply with Section 14 is not a failure that can be cured by subsequent discovery mechanisms. The claim is necessary to alert the government that a person with standing asserts an interest. Failure to file a claim triggers an application for an order of forfeiture, or a declaration of forfeiture by the attorney for the state under Sections 19 and 20. A timely filed claim forces the government to proceed with judicial action, either in rem or in personam or both.

Section 15. Judicial Proceedings Generally.

(a) A judicial forfeiture proceeding under this [Act] is subject to the provisions of this section.

Preservation of Property Subject to Forfeiture

(b) The court, before or after the filing of a notice of pending forfeiture or complaint and on application of the attorney for the state, may:

(1) enter any restraining order or injunction;

(2) require the execution of satisfactory performance bonds;

(3) create receiverships;

(4) appoint conservators, custodians, appraisers, accountants, or trustees; or

(5) take any other action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this [Act], including a writ of attachment or a warrant for its seizure.

Expedited Probable Cause Hearing

(c) The court, after five (5) days notice to the attorney for the state, may issue an order to show cause to the seizing agency, for a hearing on the sole issue of whether probable cause for forfeiture of the property then exists if:

(1) property is seized for forfeiture or a forfeiture lien is filed without a previous judicial determination of probable cause, order of forfeiture, or a hearing under subsection (d) of Section 17 of this [Act];

(2) an owner of or interest holder in the property files an application within ten (10) days after notice of its seizure for forfeiture or lien, or actual knowledge of it, whichever is earlier; and

(3) the owner of or interest holder in the property complies with the requirements for claims in Section 14 of this [Act]. The hearing shall be held within thirty (30) days of the order to show cause unless continued for good cause on motion of either party.

(d) If the court finds in a hearing under subsection (c) that there is no probable cause for forfeiture of the property, or if the state elects not to contest the issue, the property shall be released to the custody of the applicant, as custodian for the court, or from the lien pending the outcome of a judicial proceeding pursuant to this [Act]. If the court finds that probable cause for the forfeiture of the property exists, the court shall not order the property released.

Consolidation of Applications

(e) All applications filed within the ten (10) day period prescribed by subsection (c) of this section shall be consolidated for a single hearing relating to each applicant's interest in the property seized for forfeiture.

Release of Property to Pay Criminal/Defense Costs

(f) A person charged with a criminal offense may apply to the court where the forfeiture proceeding is pending for the release of property seized for forfeiture, to pay necessary expenses of the person's criminal defense. The application may be filed at any time before final judgment and shall satisfy the requirements under subsection (c) of Section 14. The court shall hold a probable cause hearing if the applicant establishes that:

(1) he has not had an opportunity to participate in a previous adversarial judicial determination of probable cause;

(2) he has no access to other monies adequate for the payment of criminal defense counsel; and

(3) the interest in property to be released is not subject to any claim other than the forfeiture.

(g) If the court finds in a hearing under subsection (f) that there is no probable cause for forfeiture of the property, the court shall order the property released pursuant to subsection (d) of this section. If the state does not contest the hearing, the court may release a reasonable amount of property for the payment of the applicant's criminal defense costs. Property that has been released by the court and that has been paid for criminal defense services actually rendered is exempt under this [Act].

Collateral Estoppel

(h) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this section. For the purposes of this section, a conviction results from a verdict or plea of guilty, including a plea of [reference to other available pleas, e.g. no contest, nolo contendere].

Burden of Proving Exemption

(i) In any proceeding under this [Act], if a claim is based on an exemption provided for in this [Act], the burden of proving the existence of the exemption is on the claimant, and it is not necessary for the state to negate the exemption in any application or complaint.

Admissibility of Hearsay

(j) In hearings and determinations pursuant to this section, the court may receive and consider, in making any determination of probable cause or reasonable cause, all evidence admissible in determining probable cause at a preliminary hearing or by a judge pursuant to [state statute or rule relating to search warrants] together with inferences there from.

Close Proximity Presumption

(k) The fact that money or a negotiable instrument was found in close proximity to contraband or an instrumentality of conduct giving rise to forfeiture shall give rise to the rebuttable presumption that the money or negotiable instrument was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct.

Net Worth Presumption

(1) There shall be a rebuttable presumption that any property of a person is subject to forfeiture under this [Act] if the state establishes, by the standard of proof applicable to that proceeding, that:

(1) the person has engaged in conduct giving rise to forfeiture;

(2) the property was acquired by the person during that period of the conduct giving rise to forfeiture or within a reasonable time after that period; and

(3) there was no likely source for the property other than the conduct giving rise to forfeiture.

Tracing to Specific Transaction Unnecessary

(m) A finding that property is the proceeds of conduct giving rise to forfeiture does not require proof that the property is the proceeds of any particular exchange or transaction.

Constructive Trustees and Commingled Property

(n) A person who acquires any property subject to forfeiture is a constructive trustee of the property, and its fruits, for the benefit of the state, to the extent that their interest is not exempt from forfeiture. If property subject to forfeiture has been commingled with other property, the court shall order the forfeiture of the mingled property and of any fruits of the mingled property, to the extent of the property subject to forfeiture, unless an owner or interest holder proves that specified property does not contain property subject to forfeiture, or that their interest in specified property is exempt from forfeiture.

Relation Back

(o) Title to all property declared forfeited under this [Act] vests in this state on the commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time. Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing under the provisions of the [Act] that the transferee's interest is exempt under Section 8 of this [Act].

Effect of Prior Acquittal or Dismissal

(p) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this [Act].

Stay of Civil Discovery

(q) For good cause shown, on motion by the attorney for the state, the court may stay discovery against the criminal defendant and against the state in civil forfeiture proceedings during a criminal trial for a related criminal indictment or information alleging the same conduct, after making provision to prevent loss to any party resulting from the delay. Such a stay shall not be available pending an appeal.

Application of Rules of Civil Procedure

(r) Except as otherwise provided by this [Act], all proceedings hereunder shall be governed by the Rules of Civil Procedure.

Consolidation of Claims on the Same Property

(s) An action pursuant to this [Act] shall be consolidated with any other action or proceeding pursuant to this [Act] or to [reference to foreclosure and/or trustee sale proceedings] relating to the same property on motion of the attorney for the state, and may be consolidated on motion of an owner or interest holder.

COMMENT

This section refers to general procedures in judicial forfeiture proceedings that are applicable to both in rem and in personam actions.

Subsection (b) details procedures that may be ordered by the court to preserve the value of the property. The court may enter its orders at any time, whether before or after the seizure, to seize, secure, maintain, or preserve the property or the availability of property subject to seizure.

Subsection (c) creates a new and additional probable cause hearing that may be demanded by a claimant on five days notice. A quick probable cause hearing is not required by Due Process and is not supplied by federal law. A delay of 18 months between seizure and hearing was approved by the U.S. Supreme Court in *United States v. Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555 (1983). Substantially longer delays have been approved in Circuit Court decisions. The purpose of this statutorily created hearing is to correct manifest error immediately. If no probable cause is found, the property is to be released to the custody of the applicant pending the outcome of forfeiture proceedings.

Either an owner or an interest holder may apply for this hearing. They can apply for this hearing within 10 days of the notice of seizure for forfeiture or lien or knowledge of the seizure or lien. The only issue at this hearing is whether probable cause exists for the forfeiture. Issues as to exemptions, defenses, or the manner of seizure are not relevant. This parallels other probable cause hearings such as grand jury proceedings or preliminary hearing proceedings.

Subsection (d) provides that if no probable cause is found to exist, the property must be released to the custody of the applicant, or the property shall be released from the forfeiture lien. The release does not deprive the court of jurisdiction.

Subsection (e) provides that all the applicants' interests in property must be consolidated for a single hearing.

This is designed to protect against multiple hearings arising from the same seizure for forfeiture or forfeiture lien. Otherwise, a set of claimants could stagger their requests for hearings and force the state to show probable cause in each of many successive hearings.

Subsection (f) allows the release of property under certain circumstances for payment of defense attorney's fees. It exempts property released from its seizure from forfeiture under these provisions. Therefore, a defense attorney who accepts payment after prevailing at the hearing provided for in this section and who provides services in exchange for value is not in jeopardy of having their payment recaptured from them by the government. These provisions are responses to the U.S. Supreme Court's holding in *Caplin and Drysdale,* which allowed the recapture of already expended funds, holding recapture is appropriate when the recipient had notice that the funds were subject to forfeiture.

It is not necessary that the criminal charge be related to the forfeiture proceedings. The criminal charge could be any criminal charge. The right to counsel in criminal proceedings is the right to counsel in any criminal proceeding, not just related criminal proceedings. The applicant must make an application by complying with the requirements for claims.

The hearing is divided into two stages. The first stage requires the applicant to establish he has had no previous adversarial judicial determination of probable cause, that he has no access to other sources of funds, and that the property is not subject to the claim of another, e.g., the bank he allegedly robbed.

If there has been a non-adversarial finding of probable cause, the person may still apply for a hearing. For example, if a seizure warrant had been issued based upon probable cause, the applicant could request a hearing under subsection (f) as the finding of probable cause for the seizure warrant was nonadversarial. It is only when the applicant has already had an adversarial determination of probable cause that the applicant cannot move for release of funds under this subsection.

If the applicant, does not establish these three preliminary elements, there is no hearing on probable cause and the property is not releasable. If the applicant does establish the preliminary elements, the second stage of the procedure is triggered, which is the probable cause hearing. If no probable cause is found, property can be released to pay for legal services. Under subsection (g), once the property is released and has been paid for legal services actually rendered, that property is not later forfeitable even if the state can subsequently establish probable cause for the property's forfeiture, i.e. that it was the proceeds of drug offenses.

Subsection (h), preclusion, is borrowed from 18 U.S.C. Section 1964 (D), but adds the victim estoppel provision of 18 U.S.C. Section 3580 (e). See *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558, 568 (1951). Orders short of conviction may also have a collateral estoppel effect. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

Subsection (i) clarifies that the state need not negate exemptions in its applications or complaints.

Subsection (j) states that the court may receive and consider all evidence generally admissible in such situations in making any determinations of probable cause. This includes hearsay, *United States v. One 56-Foot Motor Yacht named the Tahuna,* 702 F. 2d 1276 (9th Cir. 1983).

Subsection (k) allows the court to presume that any money found in close proximity to contraband, or instrumentalities of conduct giving rise to forfeiture was proceeds of the conduct or was used or intended to be used to facilitate the conduct giving rise to forfeiture. The inference is found in case law and is modified in various state statutes, such as Arizona's A.R.S. Section 13-4305 (B).

Subsection (l) creates a rebuttable presumption based on common sense and economic analysis. If, for example, a drug dealer trafficks in cocaine between 1988 and 1990 and acquires an expensive residence, a luxury car and top of the line speedboat during that same period of time, it is presumed that these acquired items have been purchased with drug proceeds if, and only if, there was no other likely source of income. The statute provides that if the state establishes by the standard of proof applicable to that proceeding that 1) the person has engaged in conduct giving rise to forfeiture (most frequently drug dealing), 2) the property was acquired by the person during or soon after the conduct giving rise to forfeiture, and 3) there was no likely source for the property other than the conduct, then a rebuttable presumption exists for forfeiture of the property. This is patterned on 21 U.S.C. Section 853 (d), the federal Continuing Criminal Enterprise statute. It is significant that the federal provision is a criminal provision where the government's proof is beyond a reasonable doubt. This model statute is a civil proceeding.

Subsection (m) modifies the case law that states that tracing proceeds to conduct giving rise to forfeiture is

sufficient without tracing to a specific transaction. *United States v. $4,255,000,* 762 F. 2d 895 (llth Cir. 1985).

Subsection (n) imposes a constructive trust on property subject to forfeiture, and draws the consequence in the context of tracing. The same analogy was made with the same result in a drug proceeds forfeiture case, *United States v. Banco Cafetero Panama,* 797 F. 2d 1154 (2d Cir. 1986.) The constructive trust is a feature of the civil racketeering statutes of Arizona, A.R.S. Section 13-2314 (E). The constructive trustee provision is designed to recapture forfeitable property which will be disruptive of legitimate commercial transactions. For example, an arsonist uses arson proceeds to purchase a car from a legitimate dealership. He also buys a mink coat which he gives to his wife. Both the car dealership and the wife are constructive trustees; however, the car dealership is exempt under Section 8. The wife's interest is not exempt because she did not give fair market value for the mink. It does no economic injustice to retrieve "gifts," but if fair market value was exchanged for an item it would be too disruptive to retrieve criminal proceeds in the hands of third parties. In such a case, the arsonist is liable to repay the value of the sold item, which is accomplished through the substitute asset provision of Section 18.

Subsection (o) vests all property declared forfeited to the state at the time of the conduct giving rise to forfeiture. This is known as the "relation back doctrine" because the government's title relates back to the time of the offense. It is consistently applied in federal law, *United States v. Stowell,* 133 U.S. 1 (1890) (collecting cases), *United States v. $5,644,540 in United States Currency,* 799 F 2d 1357 (9th Cir. 1986), and has been added to federal and state statutes. 21 U. S. C. Section 881 (h) (added by Pub. L. 98-473, 1984). In its most recent interpretation of 881(h), the Supreme Court held that the federal government's retroactive vesting of title to drug proceeds applies only to property which does not satisfy an innocent owner defense. *U.S. v. A Parcel of Land,* No. 91-781, 61 U.S.L.W. 4189 (Feb. 24, 1993). Consistent with the Supreme Court's holding, subsection (o) excludes interests deemed exempt under Section 8 from the application of relation back.

Subsection (p) states that an acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this act. The reason is based on the differences in the burden of proof as well as the difference in interests litigated in each forum. The prior acquittal of a defendant in a parallel criminal case does not bar his subsequent loss of property in a civil forfeiture case, since it is not a criminal case. *United States v. One Assortment of 89 Firearms,* 104 S. Ct. 1099 (1984).

Subsection (q) allows a stay of civil forfeiture proceedings. Stays are often sought by the government to prevent civil discovery of its criminal case and by the claimant to prevent civil discovery beyond the shelter of the Fifth Amendment that is provided in the claimant's criminal prosecution. This provision does not require a complete stay of civil proceedings; partial stays often meet all parties needs better than complete stays.

Subsection (r) directs that the rules of civil procedure apply to all proceedings under this Act unless a different procedure is provided for. In rem procedures and a desire for expedition are two primary causes of needed variances from the usual rules of civil procedure.

Subsection (s) allows for consolidation of various forfeiture actions by an owner or interest holder and by the state.

Section 16. In Rem Proceedings.

Availability

(a) A judicial in rem forfeiture proceeding may be brought by the attorney for the state in addition to, or in lieu of, civil in personam forfeiture procedures and is also subject to the provisions of this section. If a forfeiture is authorized by this [Act], it shall be ordered by the court in the in rem action.

Commencement

(b) An action in rem may be brought by the attorney for the state pursuant to a notice of pending forfeiture or verified complaint for forfeiture. The state may serve the complaint in the manner provided by subsection (3) of Section 11 of this [Act], or as provided by the rules of civil procedure.

Standing to File Answer

(c) Only an owner of or an interest holder in the property who has timely filed a proper claim may file an answer in an action in rem. For the purposes of this section, an owner of or interest holder in property who has filed a claim and answer shall be referred to as a claimant.

Contents of Answer

(d) The answer shall be signed by the owner or interest holder under penalty of perjury and shall be in

accordance with [rule of civil procedure on answers] and shall also set forth all of the following:

(1) the caption of the proceedings and identifying number, if any, as set forth on the notice of pending forfeiture or complaint and the name of the claimant;

(2) the address where the claimant will accept mail;

(3) the nature and extent of the claimant's interest in the property;

(4) the date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property;

(5) the specific provision of this [Act] relied on in asserting that it is not subject to forfeiture;

(6) all essential facts supporting each assertion;

(7) the specific relief sought.

Cost Bond

(e) The answer, accompanied by a bond to the court, shall be filed within twenty (20) days after service of the civil in rem complaint. The bond amount shall be the greater of twenty-five hundred dollars ($2,500) or ten percent (10%) of the estimated value of the property as alleged in the complaint, or up to a maximum of two hundred and fifty thousand dollars ($250,000). In lieu of a cost bond, a claimant may under penalty of perjury move the court to proceed in forma pauperis. Any funds received by the [sheriff, court] as cost bonds shall be placed in an interest-bearing account pending final disposition of the case. The court shall approve sureties upon condition that the claimant shall pay all costs and expenses of the forfeiture proceedings as provided in Section 19 of this [Act].

Discovery

(f) The state and any claimant who has timely answered the complaint may serve discovery requests on any other party at the time of filing its pleadings or at any other time not less than thirty (30) days prior to the hearing. Answers or responses to the requests are due within twenty (20) days of service. Depositions may be taken after the expiration of fifteen (15) days after the filing and service of the complaint. Any party may move for a summary judgment after service of an answer or responsive pleading but not less than thirty (30) days prior to the hearing.

Burden of Proof

(g) The forfeiture hearing shall be held without a jury and within sixty (60) days after service of the complaint unless continued for good cause. The attorney for the state shall have the initial burden of proving the property is subject to forfeiture by a preponderance of the evidence. If the state proves the property is subject to forfeiture, the claimant has the burden of proving that the claimant has an interest in the property which is exempt from forfeiture under section of this [Act] by a preponderance of the evidence.

(h) The court shall order the interest in the property returned or conveyed to the claimant if the attorney for the state fails to meet the state's burden or the claimant establishes by a preponderance of the evidence that the claimant has an interest that is exempt from forfeiture. The court shall order all other property forfeited to this state and conduct further proceedings pursuant to Sections 19 and 20 of this [Act].

COMMENT

Subsections (a) and (b) state that if a forfeiture is authorized by law, it must be ordered by a court on an action in rem brought by the state. The in rem action may be brought in addition to or in lieu of in personam forfeiture procedures. The state brings the action pursuant to a notice of pending forfeiture or a verified complaint.

Subsection (c) allows only an owner of or an interest holder in the property to file an answer asserting a claim against the property in an in rem action. Subsection (c) interfaces with the definition of owner in Section 4. If interests are required to be recorded, then only those interests that are in compliance with the recording statutes can be asserted in forfeiture actions. No protection is given to hidden ownerships for it would only encourage racketeers to put assets in the names of others and disguise their ownership interests. Section (c) also interfaces with the definition of interest holder in Section 1 in that only those interests which would be perfected as against a bona fide purchaser can be asserted in forfeiture actions.

Subsection (d) sets forth what the owner or interest holder's answer must contain. It requires that the answer be signed by the owner or interest holder under penalty of perjury to discourage frivolous claims. It requires the answer to bear the caption of the proceedings to avoid different answers on the same property being assigned separate case numbers and separate judges. It requires the owners or interest holders to

state the nature and extent of their acquisition of the interest in the property, the date and circumstances of their acquisition of the interest in the property, and the precise relief sought. This is based on Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims (28 U.S.C. Appendix F.R.C.P.).

Subsection (e) states that the answer must be filed with the court within 20 days after service of the civil in rem complaint, the common requirement of rules of civil procedure. Subsection (e) also requires that a cost bond must accompany the answer in case the claimant is ordered to pay costs and expenses of the proceeding. Funds received will be placed in an interest bearing account pending final disposition of the case. The hearing must be held by the court without a jury within 60 days after service of the complaint, unless continued for good cause, under subsection (g). Cost bonds are required federally. See 21 C.F.R. Section 1316.76. The concept of requiring civil litigant to place bonds to secure their litigation rights is a common one. Losing civil litigants must, for example, post a supersedeas bond in order to appeal. In lieu of a cost bond, a claimant may file an in pauperis bond.

Subsection (f) makes several procedural adjustments that are necessary because of the in rem nature of the proceeding and because of the short time available before the 60 day hearing.

Subsection (g) describes the burdens of proof in forfeiture hearings under CFRA. The state has the burden of going forward, and must show that the property is subject to forfeiture by a preponderance of the evidence. Only if the state satisfies its burden does the burden of proof shift to the claimant. The claimant must show, by a preponderance of the evidence, that his interest is exempt from forfeiture. These standards apply in all contested forfeiture proceedings. In this respect, CFRA departs from federal and some state laws which require the state in an in rem action to meet a probable cause standard in proving forfeitability. Preponderance of the evidence is the same level of proof already required in other civil actions, including civil in personam forfeitures. The burden simply places the state in an in rem action in the same position as any other civil plaintiff. CFRA's law enforcement objectives remain intact. More importantly, a preponderance standard alleviates concern that the state may have an unfair evidentiary advantage through the use of hearsay in a probable cause determination. Where the forfeiture is uncontested, the state's burden of proof is probable cause.

Subsection (h) requires the court to order the seized property to be returned to the claimant if the state does not show by a preponderance that the property is subject to forfeiture or if the claimant establishes that his interest is exempt from forfeiture.

Section 17. In Personam Proceedings.

Availability

(a) A judicial in personam forfeiture proceeding brought by the attorney for the state pursuant to an in personam civil action alleging conduct giving rise to forfeiture is also subject to the provisions of this section. If a forfeiture is authorized by this [Act], it shall be ordered by the court in the in personam action. This action shall be in addition to or in lieu of in rem forfeiture procedures.

Preservation of Property Forfeited or Subject to Forfeiture

(b) The court, on application of the attorney for the state, may enter any order authorized by Section 15 of this [Act], or any other appropriate order to protect the state's interest in property forfeited or subject to forfeiture.

Temporary Restraining Order

(c) The court may issue a temporary restraining order (TRO) on application of the attorney for the state, if the state demonstrates that:

(1) there is probable cause to believe that in the event of a final judgment, the property involved would be subject to forfeiture under the provisions of this [Act]; and

(2) provision of notice would jeopardize the availability of the property for forfeiture.

(d) Notice of the issuance of a temporary restraining order (TRO) and an opportunity for a hearing shall be given to persons known to have an interest in the property. A hearing shall be held at the earliest possible date in accordance with [the applicable civil rule] and shall be limited to the issues of whether:

(1) there is a probability that the state will prevail on the issue of forfeiture;

(2) the failure to enter the order will result in the property being destroyed, conveyed, encumbered, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(3) the need to preserve the availability of property outweighs the hardship on any owner or interest holder against whom the order is to be entered.

Judgment and Execution

(e) On a determination of liability of a person for conduct giving rise to forfeiture under this [Act], the court shall:

(1) enter a judgment of forfeiture of the property found to be subject to forfeiture described in the complaint;

(2) and authorize the attorney for the state or his designee or any law enforcement officer to seize all property ordered forfeited which was not previously seized or is not then under seizure.

Intervention

(f) Except as provided in Section 15 of this [Act], no person claiming an interest in property subject to forfeiture under this [Act] may intervene in a trial or appeal of a criminal action or in an in personam civil action involving the forfeiture of the property.

Resolution of Remaining Interests

(g) Following the entry of an in personam forfeiture order, the attorney for the state may proceed with an in rem action to resolve the remaining interests in the property. The following procedures shall apply:

(1) The attorney for the state may give notice of pending forfeiture, in the manner provided in Section 11 of this [Act], to all owners and interest holders who have not previously been given notice.

(2) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim as described in Section 14 of this [Act] within thirty (30) days after initial notice of pending forfeiture or after notice under subsection (g)(1), whichever is earlier.

(3) If the state does not recognize the claimed exemption, the attorney for the state shall file a complaint and the court shall hold an in rem forfeiture hearing as provided for in Section 16 of this [Act].

(4) In accordance with findings made at the hearing, the court may amend the order of forfeiture if it determines that any claimant has established by a preponderance of the evidence that the claimant has an interest in the property which is exempt under the provision of Section 8 of this [Act].

COMMENT

Subsection (a) provides for civil in personam proceedings. Subsection (c) allows the state to obtain a temporary restraining ordering, without notice or an opportunity for a hearing, if the state demonstrates that 1) there is probable cause to believe that the property would be subject to forfeiture, and 2) notice of the temporary restraining order would jeopardize the availability of the property for forfeiture. The special statutory treatment of the temporary restraining order in this context arises from the 1984 amendments to the Federal Continuing Criminal Enterprise and RICO statutes. There is no need for the government to show irreparable injury.

Subsection (d) requires that notice and opportunity for a hearing must be afforded to persons known to have an interest in the property once the restraining order is entered. The hearing must be held at the earliest possible date, and is limited to the issues of whether failure to enter the order will result in the property being destroyed, conveyed, encumbered, etc., and whether the need to preserve the availability of the property outweighs the hardship on any owner or interest holder.

Under subsection (e), once the court determines the liability of a person for conduct giving rise to forfeiture, the court must enter judgment of forfeiture of the property and must also authorize the state to seize all property ordered forfeited which was not previously seized.

Subsection (f) provides that except as provided in Section 15 no person claiming an interest in property subject to forfeiture may intervene in a trial or appeal of a criminal action or in an in personam civil action involving forfeiture of the property.

Subsection (g) details the procedures subsequent to the in personam finding of liability and order of forfeiture. Essentially, the judgment in personam relating to the defendant's interest is followed by an in rem proceeding to deal with the potential interests of the rest of the world. The statute directs the state to give notice of pending forfeiture to all owners and interest holders who have not previously been given notice. It allows an owner or interest holder to file a claim to the property ordered forfeited if his claim is not precluded. If the claims are not resolved, the attorney for the state shall proceed to file a forfeiture complaint, and the court shall hold a hearing to determine the claim without a jury. The court, in accordance with its findings at the hear-

ing, may amend its order of forfeiture if the claimant establishes that he has an interest and that his interest is exempt from forfeiture. In the in personam proceeding, the only interests forfeited are those of persons who are liable for the conduct giving rise to forfeiture. The subsequent in rem proceeding determines all third party rights. The third party is prevented from intervention by subsection (f), but need not wait for this proceeding to have his interest determined. The third party may move for a quick release hearing pursuant to Section 15, or the third party may apply for a stipulation of exemption pursuant to Section 14.

Section 18. Substituted Assets; Supplemental Remedies.

Substitute Assets

(a) The court shall order the forfeiture of any other property of a person, including a claimant, up to the value of that person's property found by the court to be subject to forfeiture under this [Act], if any of the person's forfeitable property:

(1) cannot be located;

(2) has been transferred or conveyed to, sold to, or deposited with a third party;

(3) is beyond the jurisdiction of the court;

(4) has been substantially diminished in value while not in the actual physical custody of the court, the seizing agency, the attorney for the state, or their designee;

(5) has been commingled with other property that cannot be divided without difficulty; or

(6) is subject to any interest of another person which is exempt from forfeiture under this [Act].

Action for Rendering Property Unavailable

(b) (1) The attorney for the state may institute a civil action in [appropriate reference] court against any person with notice or actual knowledge who destroys, conveys, encumbers, removes from the jurisdiction of the court, conceals, or otherwise renders unavailable property alleged to be subject to forfeiture if:

(A) a forfeiture lien or notice of pending forfeiture has been filed and notice given pursuant to Section 11 of this [Act]; or

(B) a complaint alleging conduct giving rise to forfeiture has been filed and notice given pursuant to such Section 11 or [applicable rule of civil procedure].

(2) The court shall enter a final judgment in an amount equal to the value of the lien not to exceed the fair market value of the property, or if there is no lien, in an amount equal to the fair market value of the property, together with reasonable investigative expenses and attorney's fees.

(3) If a civil proceeding under this [Act] is pending in court, the action shall be heard by that court.

COMMENT

Subsection (a) allows the court to order the forfeiture of any other property of a person, including a claimant, up to the value of the property found by the court to be subject to forfeiture if any of the forfeitable property cannot be located, has been transferred, conveyed or sold to a third party, is beyond the jurisdiction of the court, has been substantially diminished in value, has been commingled or is subject to an exempt interest. This provision is modeled on 21 U.S.C. Section 853 (p) (Continuing Criminal Enterprise) and is to be read in conjunction with Section 7(f). Its intent is to provide a method of effectuating forfeitures in the face of avoidance methods used by today's sophisticated offenders. For example, assume a stolen car "chop shop" operator liens the real property on which his chop shop is located to insulate it from forfeiture. Under this section, a court could order the forfeiture of other property of the operator equal in value to the liened property. Or if the operator leased cutting and mechanical equipment in order to avoid the consequences of forfeiture, the court could order forfeiture of property of the operator equal in value to the leased equipment. Its net effect is the creation of a publicly enforced tort of using property to empower criminal enterprises, setting the measure of damages as the value of the property used for this purpose.

Subsection (b) allows the state to institute a civil action, after notice, to recover judgment in an amount equal to the value of the forfeiture lien, or if there is no lien, in an amount not to exceed the fair market value of the property, together with reasonable investigative expenses and attorney fees, if, in fact, property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture.

Section 19. Disposition of Property.

Nonjudicial Forfeiture

(a) If notice of pending forfeiture is properly served in an action in rem or in personam in which personal property, having an estimated value of $15,000 or less [the jurisdictional amount of the justice of the peace, small claims, police, municipal, or other appropriate court.], is seized, and no claim opposing forfeiture is filed within [30] days of service of such notice, the attorney for the state shall prepare a written declaration of forfeiture of the subject property to the state and allocate the property according to the provisions of Section 20 of this [Act].

Failure to Serve Proper Notice

(b) Within 180 days of the date of a declaration of forfeiture, an owner or interest holder in property declared forfeited pursuant to subsection 19(a) may, petition the court to have the declaration of forfeiture set aside, after making a prima facie showing that the state failed to serve proper notice as provided by subsection 19(a). Upon said showing the court shall allow the state to demonstrate by a preponderance of the evidence that notice was properly served. If the state fails to meet its burden of proof, the court may order the declaration of forfeiture set aside. The state may then proceed with judicial proceedings pursuant to this [Act].

Failure to File Claim or Answer

(c) Except as provided in subsection (a), if no proper claims are timely filed in an action in rem, or if no proper answer is timely filed in response to a complaint, the attorney for the state may apply for an order of forfeiture and allocation of forfeited property pursuant to Section 20 of this [Act]. Upon a determination by the court that the state's written application established the court's jurisdiction, the giving of proper notice, and facts sufficient to show probable cause for forfeiture, the court shall order the property forfeited to the state.

Relation Back

(d) After final disposition of all claims timely filed in an action in rem, or after final judgment and disposition of all claims timely filed in an action in personam, the court shall enter an order that the state has clear title to the forfeited property interest. Title to the forfeited property interest and its proceeds shall be deemed to have vested in the state on the commission of the conduct giving rise to the forfeiture under this [Act].

Release of Forfeited Personal Property

(e) The court, on application of the attorney for the state, may release or convey forfeited personal property to a regulated interest holder if:

(1) the attorney for the state, in his discretion, has recognized in writing that the interest holder has an interest that is exempt from forfeiture;

(2) the interest holder's interest was acquired in the regular course of business as a regulated interest holder;

(3) the amount of the interest holder's encumbrance is readily determinable and it has been reasonably established by proof made available by the attorney for the state to the court; and

(4) the encumbrance held by the interest holder seeking possession is the only interest exempted from forfeiture and the order forfeiting the property to the state transferred all of the rights of the owner prior to forfeiture, including rights to redemption, to the state.

(f) After the court's release or conveyance under subsection (c), the interest holder shall dispose of the property by a commercially reasonable public sale. Within ten (10) days of disposition the interest holder shall tender to the state the amount received at disposition less the amount of the interest holder's encumbrance and reasonable expenses incurred by the interest holder in connection with the sale or disposal. For the purposes of this section "commercially reasonable" shall be a sale or disposal that would be commercially reasonable under [state equivalent of uniform commercial code definition].

Transfer of Good Title

(g) On order of the court or declaration of forfeiture forfeiting the subject property, the state may transfer good and sufficient title to any subsequent purchaser or transferee. The title shall be recognized by all courts and agencies of this state, and any political subdivision. On entry of judgment in favor of a person claiming an interest in the property that is subject to forfeiture proceedings under this [Act], the court shall enter an order that the property or interest in property shall be released or delivered promptly to that person free of liens and encumbrances under this [Act], and that the person's cost bond shall be discharged.

No Claimant Award of Costs Against State If Reasonable Cause Exists

(h) Upon motion by the attorney for the state, if it appears after, a hearing that there was reasonable cause for the seizure for forfeiture or for the filing of the notice of pending forfeiture or complaint, the court shall find that:

(1) reasonable cause existed, or that any such action was taken under a reasonable good faith belief that it was proper;

(2) the claimant is not entitled to costs or damages; and

(3) the person or seizing agency who made the seizure and the attorney for the state are not liable to suit or judgment for the the seizure, suit or prosecution.

Claimant Award of Costs Against Other Claimant

(i) The court shall order a claimant who fails to establish that a substantial portion of the claimant's interest is exempt from forfeiture under Section 8 of this [Act] to pay the reasonable costs and expenses:

(1) of any claimant who established that his entire interest is exempt from forfeiture under Section 8 of this [Act]; and

(2) of the state for the investigation and prosecution of the matter, including reasonable attorney's fees, in connection with that claimant.

COMMENT

Subsections (a) and (b) provide a nonjudicial forfeiture mechanism. Simply stated, nonjudicial forfeiture is the exercise of the forfeiture police power by the state without the sanction of a court in those cases where forfeiture is not contested. The purpose of these proceedings is to avoid the time-consuming and resource-wasting necessity of obtaining default judgments in uncontested cases. (See, *United States v. $8,850 In U.S. Currency* (1985) 461 U.S. 555; *United States v. U.S. Currency in amount of $2,857* (7th cir. 1985) 754 F.2D 208.) The Commission's recommended provision is based on California law. In California, administrative or nonjudicial forfeiture has been authorized by its civil asset forfeiture statute (Health and Safety Code Sections 11470 et seq.) since January of 1989. Over the last five years, 60 to 80 percent of forfeiture actions involving personal property of an estimated value of less than $100,000 have been administered as nonjudicial forfeitures because they are uncontested.

The valuation of property for terms of this section is based on wholesale market price. Items of property seized together may be valued separately or in the aggregate depending on the circumstances of the particular case. (See, *United States v. Walker* (4th cir. 1989) 889 F.2d 1317.)

Clearly, full and proper notice is critical to a proper nonjudicial proceeding. (See, *Glup v. United States* (8th cir. 1975) 523 F.2D 557; *Gutt v. United States* (W.D. Va. 1986) 641 F. Supp. 603; *State v. 1978 Ltd ii* (Mont. 1985) 701 P.2D 1365.) Notice of pending forfeiture is served in accordance with the requirements of Section 11. Failure to properly serve notice may be the basis of a petition to have the declaration of forfeiture set aside under subsection (b).

If a timely and proper claim is not filed within the statutory time period, the attorney for the state should prepare and execute a declaration of forfeiture which describes the property and refers to the date of service of notice of pending forfeiture. If the property is to be titled to a law enforcement agency, the declaration should reflect this.

A copy of the declaration of forfeiture should be provided to any person who is served with notice of pending forfeiture. The declaration of forfeiture need not be formally served; mailing to the last known address is sufficient.

Subsection (c) allows the attorney for the state to apply for an order of forfeiture and allocation of forfeited property if no claim or answer is timely filed in an in rem action or if no answer is filed in response to a complaint. The subsection applies in uncontested cases involving real property or personalty with a value greater than the maximum amount which triggers nonjudicial forfeiture under subsection (a). The state's application must show jurisdiction, proper notice and sufficient facts to demonstrate probable cause for forfeiture, in order for the court to order the property forfeited to the state.

Subsection (d) gives the state title to the forfeited property interest which vests with the state on the commission of the conduct giving rise to forfeiture.

Subsections (e) & (f) create a special disposal provision to accommodate regulated interest holders who would prefer to dispose of the asset themselves. This is often the case with banks and other lenders who have established auctions that may be superior to a sheriff's sale in some instances.

Subsection (g) allows the state to transfer good and sufficient title to any subsequent purchaser or transferee. This provision is extremely important to the state because the ability to pass good title is critical to the price that the state will get for the property. Indeed, real property may not be saleable at all if the title insurance cannot be obtained.

Subsection (h) protects the state from judgment in cases in which it had reasonable cause for the seizure or for the filing of the notice or complaint. In rem seizures inherently impact the interests of persons who are exempt, since the seizure of property is required for judicial jurisdiction and property often has exempt as well as non-exempt interest holders. Forfeiture cases are also particularly susceptible to failure of the evidence at the ultimate hearing because they become stale waiting for the resolution of the companion criminal case. Drug cases, especially, tend to grow stale due to the transient and unstable nature of the witnesses that are available to the government, and due to potential witnesses' fear and intimidation.

Subsection (i) gives the court power to order a claimant who fails to establish that a substantial portion of his interest is exempt from forfeiture to pay reasonable costs incurred by the state or any other claimant relating to disproving the claim, costs of investigation and costs of prosecution, including attorneys' fees.

Section 20. Allocation of Forfeited Property; Special Asset Forfeiture Fund.

Disposition After Forfeiture

(a) When property is forfeited under this [Act] the attorney for the state may:

(1) upon agreement with the seizing agency, retain it for official use or transfer the custody or ownership of any forfeited property to any appropriate law enforcement or prosecutorial agency. A decision to distribute the property is not subject to review.;

(2) upon the written approval of the attorney for the state, destroy or use for investigative purposes, any illegal or controlled substances or other contraband, after not less than twenty (20) days after the seizure, provided that materials necessary as evidence shall be preserved; or

(3) authorize a public or otherwise commercially reasonable sale of that which is not required by law to be destroyed and which is not harmful to the public. The proceeds of any sale and any monies forfeited or obtained by judgment or settlement under this section shall be deposited in the Special Asset Forfeiture Fund as established herein until disposed of pursuant to court order.

Special Asset Forfeiture Fund

(b) (1) A Special Asset Forfeiture Fund (Fund) is hereby established within the [appropriate fiscal depository]. All monies obtained pursuant to this [Act] shall be deposited in the Fund.

(2) The office of the [appropriate reference, e.g. attorney general, district attorney] shall administer the Fund and distribute monies in the following order of priority:

(A) the satisfaction of any exempt security interest or lien;

(B) the payment of all proper expenses of the proceedings for forfeiture and disposition, including expenses of seizure, inventory, appraisal, maintenance of custody, preservation of availability, advertising, sale and court costs; and

Option 1 [(C) the equitable distribution of the balance to the appropriate law enforcement or prosecutorial agency. The distribution should reflect generally the contribution of each agency's participation in any of the activity that led to the seizure or forfeiture of the property or deposit of monies in the Fund. Each agency shall use monies from the Fund for law enforcement purposes, including drug treatment, education or prevention services.]

Option 2 [(C) the distribution of ten percent (10%) of the balance to the [single state authority on alcohol and other drugs] for deposit in the Demand Reduction Assessment Fund (DRAF) established pursuant to the [Model Demand Reduction Assessment Act]. Moneys from the DRAF that are dedicated to the provision of drug education, prevention and treatment services are to be distributed to programs licensed by the [single state authority on alcohol and other drugs]; and

(D) the remainder of the balance to be equitably distributed to the appropriate law enforcement or prosecutorial agency. The dis-

tribution should reflect generally the contribution of each agency's participation in any of the activity that led to the seizure or forfeiture of the property or deposit of monies in the Fund. Each agency shall use monies from the Fund for law enforcement purposes, including drug treatment, education, and prevention services.]

(3) Moneys in the Fund are appropriated on a continuing basis and are not subject to [state lapsing and related fiscal and appropriations restraints].

(4) Moneys from the Fund may not supplant other local, state, or federal funds.

(5) The Fund is subject to public audit.

Transfer of Contraband to DEA

(c) The attorney for the state may require the appropriate administrative agency to take custody of the property and remove it for disposition in accordance with law, and to forward controlled substances to the United States Drug Enforcement Administration (DEA) for disposition.

COMMENT

Paragraphs (1) - (3) of subsection (a) describe what the state can do with forfeited property. For example, the state can retain it for official use, transfer it, sell it, or destroy it. The state can require another agency to take custody of the property and can dispose of it by sale. Subsection (b) provides for a special assets forfeiture fund into which all moneys obtained under this section must be deposited. The fund is subject to audit and must be distributed initially to satisfy any bona fide security interest or lien, and to pay expenses of forfeiture and disposition.

CFRA provides two options for distribution of the balance of the fund. Both options are part of a comprehensive plan to create independent funding bases for enforcement, prosecution, treatment, education, and prevention. This path avoids the conflict sometimes generated by treatment, education, and prevention groups requesting use of forfeiture proceeds generally allocated to enforcement and prosecution agencies. Dividing a single fund into increasingly smaller percentages to accommodate numerous demands for resources results in each percentage becoming increasingly inadequate to satisfy the corresponding demand. Therefore, the Commission has focused on increasing the pots of money available to satisfy legitimate funding needs. CFRA's distribution options allocate all or 90% of forfeiture proceeds to local, state, federal, and international enforcement and prosecutorial agencies. Treatment, education and prevention agencies receive all or 90% of the collections from a mandatory drug assessment, or user fee. In some jurisdictions these constituencies interact positively with one another; in others contact is more strained and uncooperative. To encourage better working relations between these constituencies, option two deposits 10% of forfeiture proceeds with treatment and education programs and 10% of assessment collections with enforcement and prosecution agencies. The 10% option provides additional incentive for all the constituencies to support both forfeiture and enforcement of the drug assessment.

CFRA's distribution options provide law enforcement and prosecution the means to pay for protracted forfeiture cases and enhance their ability to dismantle drug enterprises. Knowledge that forfeiture efforts can be paid for without using appropriated funds needed to maintain responsiveness to traditional crimes encourages further forfeiture activity. To the extent an agency has proceeds available for non-enforcement uses, CFRA specifically authorizes the agency to allocate the funds for treatment, education and prevention purposes.

The incessant need for drug treatment and education services requires a more stable, consistent funding source than forfeiture. The Commission found that reliability in a drug assessment, or user fee. Every jurisdiction convicts drug offenders so there will always be a source from which to try and collect payment which often comes in a steady stream of installments. New Jersey successfully pioneered the user fee idea with its Drug Education and Demand Reduction (DEDR) fee in 1987. New Jersey assesses convicted drug offenders, offenders placed on probation for a drug offense, and offenders involved in pretrial intervention, a fee in addition to other fines or penalties. The fee ranges from $ 500 to $3,000 depending on the gravity of the offense. With a collection rate of approximately 35%, the program collects approximately $9 million dollars per year. Since its inception the DEDR program has raised over $36 million, every dollar of which is expended for treatment and education purposes.

Building on the New Jersey legislation, the Commission has crafted an assessment which applies to offenses involving alcohol as well as illegal controlled substances. This expansion widens the potential pool of funds accessible to treatment, prevention and education and signals that serious consequences will flow from alcohol abuse.

Section 21. Powers of Enforcement Personnel.

Fact-finding Powers

(a) An attorney for the state may conduct an investigation of any conduct that gives rise to forfeiture under this [Act]. The attorney for the state is authorized, before the commencement of any proceeding or action under this [Act], to subpoena witnesses; compel their attendance; examine them under oath; and require the production of documentary evidence for inspection, reproducing, or copying. Except as otherwise provided by this section, the attorney for the state shall proceed under this subsection with the same powers and limitations, and judicial oversight and enforcement, and in the manner provided by this [Act] and by [reference to state civil procedure or Fed. R. Civ. P. 45]. Any person compelled to appear under a demand for oral testimony under this Section may be accompanied, represented, and advised by counsel.

Witness Examination

(b) The examination of all witnesses under this section shall be conducted by the attorney for the state before an officer authorized to administer oaths. The testimony shall be taken stenographically or by a sound recording device and shall be transcribed or otherwise preserved. The attorney for the state may exclude from the examination all persons except the witness, his counsel, the officer before whom the testimony is to be taken, law enforcement officials, and a stenographer. Prior to oral examination, the person shall be advised of his right to refuse to answer any questions on the basis of the privilege against self-incrimination. The examination shall be conducted in a manner consistent with the [reference to general statute or court rules dealing with the taking of depositions, e.g. Fed. R. Civ. P. 26(b)].

Confidentiality of Information

(c) Except as otherwise provided in this Section, prior to the filing of a civil or criminal proceeding or action relating to it, no documentary material, or transcripts, or oral testimony, in the possession of the attorney for the state shall be available, for examination by any individual other than a law enforcement official or agent of such official without the consent of the person who produced the material or transcripts.

Obstruction of Compliance with Subpoena

(d) No person shall knowingly remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any documentary material that is the subject of a subpoena, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part by any person with any duly served subpoena of the attorney for the state under this section. A violation of this subsection is [appropriate existing criminal classification]. The attorney for the state shall investigate and prosecute suspected violations of this subsection.

Immunity of Attorneys for the State

(e) Acts or omissions by the attorneys for the state in the course of their duties in the enforcement of any of the provisions of this [Act], including provision of any legal services prior to charging, complaint or seizure, are prosecutorial and shall not subject the attorneys or their principals to civil liability.

COMMENT

Section 21 is intended to provide prosecutors with powers to investigate illegal industries comparable to those of state regulatory agencies' powers to investigate regulated industries. One of the most bitter ironies of civil remedies enforcement is that prosecutors do not have the necessary fact-finding powers at their disposal to deal with the illegal drug industry when dozens of regulatory boards and commissions have these powers at their disposal to deal with all aspects of legal industries from cosmetology licenses to utility rates.

Section 22. Immunity Orders.

Orders to Compel Evidence

(a) If a person is or may be called to produce evidence at a deposition, hearing or trial under this [Act] or at an investigation brought by the attorney for the state under Section 21, the [appropriate court] for the [appropriate judicial district] in which the deposition, hearing, trial, or investigation is or may be held shall, upon certification in writing of a request of the [prosecutorial authority] for the [judicial district], issue an order, ex parte or after a hearing, requiring the person to produce evidence, notwithstanding that person's refusal to do so on the basis of the privilege against self-incrimination.

Certification for Ex Parte Order

(b) The [prosecutorial authority] may certify in writing a request for an ex parte order under subsection (a) if in their judgment:

(1) the production of the evidence may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to produce evidence on the basis of their privilege against self-incrimination.

Application of Self-Incrimination Privilege

(c) A person may not refuse to comply with an order issued under subsection (a) on the basis of a self-incrimination privilege. If the person refuses to comply with the order after being informed of its existence by the presiding officer, the person may be compelled or punished by the [appropriate court] issuing an order for civil or criminal contempt.

Use Immunity

(d) The production of evidence compelled by order issued under subsection (a), and any information directly or indirectly derived from it, may not be used against the person in a subsequent criminal case, except in a prosecution for perjury, false swearing, or an offense otherwise involving a failure to comply with the order.

COMMENT

This provision was proposed to assure that the appropriate law enforcement authorities would have adequate power to accomplish their lawful objectives.

The immunity provided by this section is use immunity, under which the prosecution for an offense related to the testimony is possible. The prosecutor may not use the immunized testimony or evidence derived directly or indirectly from that testimony against the witness if the witness becomes a defendant in a later criminal trial. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). This provision is modeled on 18 U.S.C. Section 6001-6005, enacted as part of the Organized Crime Control Act of 1970, 84 Stat. 926, and the laws of a number of states. It is particularly helpful in investigations with both civil and criminal goals, as immunized testimony may be used in civil cases. *United States v. Cappetto*, 502 F 2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (civil RICO gambling context).

Section 23. Statute of Limitations.

A civil action under this [Act] shall be commenced within seven (7) years after the last conduct giving rise to forfeiture or the cause of action becomes known or should have become known, excluding any time during which either the property or defendant is out of the state or in confinement, or during which criminal proceedings relating to the same conduct are pending.

COMMENT

This section sets the statute of limitations at seven years, consistent with a number of state civil racketeering statutes. The long time period is necessary because of the complexity and geographical diversity of modern criminal enterprises. The money laundering portion of such an investigation alone can take several years because of the difficulty and delay involved in assembling records from foreign countries.

Section 24. Summary Forfeiture of Controlled Substances.

Controlled substances included in [reference to state controlled substance provisions, e.g., Schedule I of the Uniform Controlled Substances Act] which are contraband and any controlled substance whose owners are unknown are summarily forfeited to the state. The court may include in any judgment under this [Act] an order forfeiting any controlled substance involved in the offense to the extent of the defendant's interest.

COMMENT

Section 24 allows for all controlled substances included in Schedule I of the Uniform Controlled Substances Act which are contraband and any controlled substances whose owners are unknown to be summarily forfeited to the state. It is a feature of UCSA and of federal law. 21 U.S. C. Section 881 (f), (9) (1).

Section 25. Bar to Collateral Action.

No person claiming an interest in property subject to forfeiture may commence or maintain any action against the state concerning the validity of the alleged interest other than as provided in this [Act].

COMMENT

Section 25 prevents procedural complexity created by potential claimants electing to file separate lawsuits under causes of action such as replevin or trespass.

Section 26. Statutory Construction.

The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under

this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

COMMENT

Section 26 states that this [Act] must be liberally construed to effectuate its remedial purpose. It is modeled on a similar provision in federal RICO. See, *United States v. Turkette*, 452 U.S. 576 (1981). Many states have general provisions in their state codes to the same effect.

Section 27. Uniformity of Application.

(a) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(b) The attorney general is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

COMMENT

This section expresses the legislative policy of encouraging uniform enforcement. As criminal enterprises are often multi-state, interstate cooperation is essential to effective enforcement. Cooperative agreements may be as simple as sharing resources in individual cases or as formal as long-term joint projects or policies on such things as liens, collections and executions of search or seizure warrants.

Section 28. Severability.

If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

COMMENT

This or other saving language is standard.

Section 29. Effective Date.

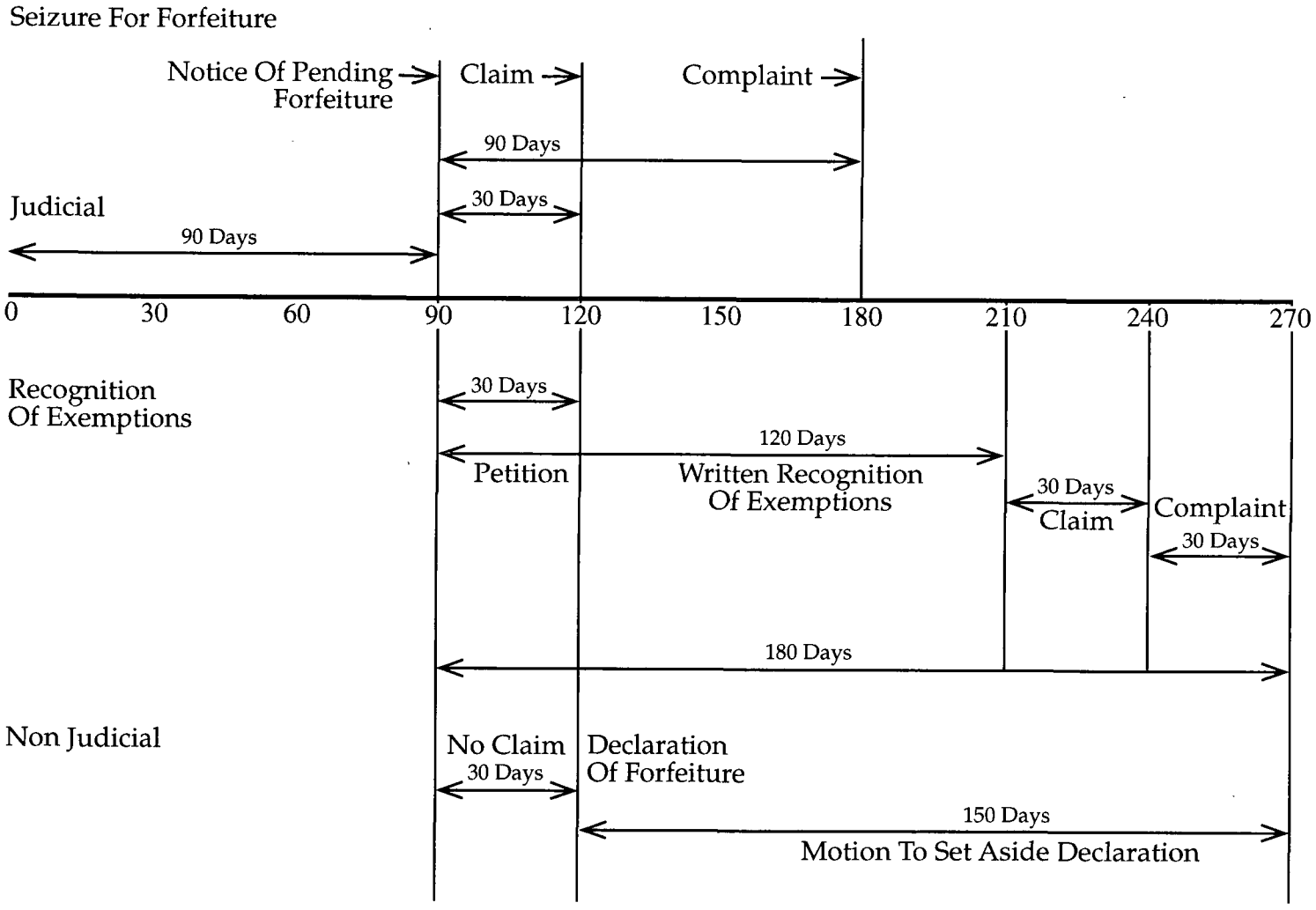
This [Act] takes effect on [date or method of calculating date].

COMMENT

This is supplied for those states that include such provisions in individual acts.

Appendix A

Commission Forfeiture Reform Act (CFRA) Timeline



State Asset Forfeiture Statutes[1] Used in Drug Cases

	STATE	CITATION[2]
1.	Alabama	Ala.Code §§20-2-93 and 28-4-286 to 28-4-290 (Supp.1992)
2.	Alaska	Ak.Stat. §§ 17.30.110 to 17.30.126 (Supp.1992)
3.	Arizona	Ariz.Rev.Stat.Ann. §§ 13-4301 to 13-4315 (Supp.1992)
4.	Arkansas	Ark.Code Ann. §§ 5-64-505 to 5-64-509 (Supp.1991)
5.	California	Cal.Health & Safety Code §§ 11470 to 11498 (Supp.1993)
6.	Colorado	Col.Rev.Stat. §§ 16-13-501 to 16-13-511 (Supp.1992
7.	Connecticut	Con.Gen.Stat.Ann. §§ 54-36a to 54-36i (Supp.1992)
8.	Delaware	Del.Code Ann.tit. 16 § 4784 (Supp.1992
9.	District of Columbia	D.C.Code Ann. §§ 33-501 to 33-572 (Supp.1991)
10.	Florida	Fla.Stat.Ann. §§ 932.701 to 932.707 (Supp.1993)
11.	Georgia	Ga.Code Ann. § 16-13-49 (1992)
12.	Hawaii	Hawaii Rev.Stat. §§ 712A-1 to 712A-20 (Supp.1992)
13.	Idaho	Idaho Code §§ 37-2741A to 37-2744B (Supp.1992)
14.	Illinois	Ill.Stat.Ann.ch.56 1/2 §§ 1505 and 1671 to 1683 (Supp.1992)
15.	Indiana	Ind.Code Ann. §§ 34-4-30.1 to 34-4-30.1-7 (Supp.1992)
16.	Iowa	Iowa Code Ann. §§ 809.1 to 809.21 (Supp.1992)
17.	Kansas	Kan.Stat.Ann. §§ 65-4135 to 65-4175 (1992)

[1] Citation information current through April 10, 1993.
Citation list prepared by American Prosecutors Research Institute.

[2] The statute citations refer to either whole forfeiture acts or relevant sections of Controlled Substances Acts.

	STATE	CITATION[3]
18.	Kentucky	Ky.Rev.Stat.Ann. §§ 218A.405 to 218A.460 (Supp.1992)
19.	Louisiana	La.Rev.Stat.Ann. §§ 40:2601 to 40:2622 (Supp.1993) and §§ 32:1550 to 32:1553 (Supp.1993)
20.	Maine	Me.Rev.Stat.Ann.tit.15 §§ 5821 to 5828 (Supp.1992)
21.	Maryland	Md.Ann.Code art.27 §§ 294 to 297 (Supp.1992)
22.	Massachusetts	Mass.Ann.Laws ch.94C § 47 (Supp.1992)
23.	Michigan	Mich.Stat.Ann. §§ 14.15 (7521) to 14.15 (7524a) (Supp.1992)
24.	Minnesota	Minn.Stat.Ann. §§ 609.531 to 609.532 (Supp.1993)
25.	Mississippi	Miss.Code Ann. §§ 41-29-153 to 41-29-185 (Supp.1992)
26.	Missouri	Mo.Ann.Stat. §§ 513.600 to 513.645 (Supp.1992)
27.	Montana	Mont.Code Ann. §§ 44-12-101 to 44-12-206 (Supp.1992)
28.	Nebraska	Neb.Rev.Stat. §§ 28-431 (1989) and 28-1439.02 to 28-1439.05 (Supp.1992)
29.	Nevada	Nev.Rev.Stat. §§ 179.1156 to 179.121 (Supp.1992)
30.	New Hampshire	N.H.Rev.Stat.Ann. §§ 318-B:17 to 318-B:22 (Supp.1992)
31.	New Jersey	N.J.Stat.Ann. §§ 2C:64-1 to 2C:64-9 (Supp.1992)
32.	New Mexico	N.M.Code Ann. §§ 30-31-31 to 30-31-37 (Supp.1992)
33a.	New York Criminal	N.Y.Penal Law §§ 480.00 to 480.35 (Supp.1993)
33b.	New York Civil	N.Y. Civil Practice Law §§ 1310 to 1352 (Supp.1993)
34.	North Carolina	N.C.Gen.Stat. §§ 14-2.3 and 90-112 to 90-113.1 (Supp.1992
35.	North Dakota	N.D.Cent.Code §§ 54-12-14 (Supp.1991) and §§ 19-03.1-32 to 19.03.1-37 (Supp.1992)
36.	Ohio	Ohio Rev.Code Ann. §§ 2925.42 to 2925.45 and §§ 2933.241 to 2933.43 (1993)

[3] The statute citations refer to either whole forfeiture acts or relevant sections of Controlled Substances Acts.

	STATE	CITATION[4]
37.	Oklahoma	Okla.Stat.Ann.tit.63 §§ 2-501 to 2-508 (Supp.1993)
38.	Oregon[5]	Ore.Rev.Stat.Ann.ch.166 Temporary Provisions on Forfeiture (Supp.1992)
39.	Pennsylvania	Pa.Consol.Stat.Ann.tit.42 §§ 6801 to 6802 (Supp.1992) and tit.35 §§ 831.1 to 831.5 (Supp.1992)
40.	Rhode Island	R.I.Gen.Laws §§ 21-28-5.02 to 21-28-5.08 (Supp.1992)
41.	South Carolina	S.C.Code Ann. §§ 44053-480 to 44-53-586 (Supp.1992)
42.	South Dakota	S.D.Codified Laws Ann. §§ 34-20B-64 to 34-20B-90 (Supp.1992)
43.	Tennessee	Tenn.Code Ann. §§ 39-17-420 and 39-17-429 (Supp.1992) and §§ 53-11-201 to 53-11-452 (Supp.1992)
44.	Texas	Tx.Code of Crim.Procedure Ann. §§ 59.01 to 59.11 (Supp.1993) Tx.Health & Safety Code §§ 481.152 and 481.153 (Supp.1993)
45.	Utah	Utah Code Ann. §§ 58-37-10 to 58-37-19 (Supp.1992)
46.	Vermont	Vt.Stat.Ann.tit.18 §§ 4241 to 4248 (Supp.1992)
47.	Virginia	Va.Code Ann. §§ 19.2-386.1 to 19.2-386.14 (Supp.1992) and §§ 18.2-249 to 18.2-253.1 (Supp.1992)
48.	Washington	Wash.Rev.Code Ann. §§ 69.50.500 to 69.50.520 (Supp.1993)
49.	West Virginia	W.Va.Code §§ 60A-5-501 to 60A-7-707 (Supp.1992)
50.	Wisconsin	Wis.Stat.Ann. §§ 161.52 to 161.565 (Supp.1992) and §§ 973.075 to 973.076 (Supp.1992)
51.	Wyoming	Wyo.Stat. §§ 35-7-1045 to 35-7-1053 (Supp.1992)

[4] The statute citations refer to either whole forfeiture acts or relevant sections of Controlled Substances Acts.

[5] The Oregon forfeiture provisions are scheduled to be repealed December 31, 1993.

Resolution of the Board of Directors National District Attorneys Association

WHEREAS, crime in America is multi-billion dollar industry that has a devastating effect on legitimate economic enterprise by diverting money from lawful commerce while rewarding and financing on-going illegal activity; and

WHEREAS, asset forfeiture destroys the money base necessary for the continuation of illegal enterprises and attacks the economic incentive to engage in organized criminal activity; and

WHEREAS, asset forfeiture also deters individuals from using their property to facilitate criminal activity; and

WHEREAS, the National District Attorneys Association strongly believes that law enforcement agencies and prosecutors should aggressively pursue forfeiture actions to eliminate the instrumentalities of crime and to confiscate the proceeds from criminal acts;

NOW, THEREFORE, BE IT RESOLVED that the National District Attorneys Association adopts the attached "Guidelines for Civil Asset Forfeiture" as the official policy of the National District Attorneys Association.

Adopted March 6, 1993
Colorado Springs, Colorado

National District Attorneys Association Guidelines for Civil Asset Forfeiture

Crimes in America is a multi-billion dollar industry that has a devastating effect on legitimate economic enterprise by diverting money from lawful commerce wile rewarding and financing ongoing illegal activity. Asset forfeiture destroys the money base necessary for the continuation of illegal enterprises and attacks the economic incentive to engage in to facilitate criminal activity. Asset forfeiture programs then rededicate the money from illegal activity to the public good. the National District Attorneys Association strongly believes that law enforcement agencies and prosecutors should aggressively pursue forfeiture actions to eliminate the instrumentalities of crime and to confiscate the proceeds from criminal acts. To encourage such efforts it is important that forfeiture laws continue to allow most of the proceeds from forfeitures to be returned to the law enforcement community responsible for initiating these actions to be used to further their law enforcement efforts. these guidelines are designed to assist in the exercise of prosecutorial discretion in administering and enforcing statutorily forfeiture programs.

Goals

1. The removal of unlawfully obtained proceeds of criminal activity and the elimination of the instrumentalities used to commit crimes are the principal goals of asset forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation of prosecution of criminal offenses.

Comment: this guideline applies when the forfeiture occurs in a civil context aimed at remedial economic objectives. Law enforcement's ability to protect the community is enhanced by remedying the effects of criminal activity and reducing the incentive for that activity.

General Standards

2. Where multiple agencies in a geographic region have jurisdiction to pursue asset forfeiture every effort should be made to cooperate to advance the public interest.

Comment: Choice of forum for asset forfeiture should be governed by a law enforcement goals of asset forfeiture. Federal "adoption" of local forfeitures provides an important additional capacity to local law enforcement when state legislatures have failed to enact effective statutes or state and local prosecution resources are not available to pursue forfeiture opportunities. In other areas, effective state statutes are in place and state and local prosecutors have allocated

sufficient resources to respond to the needs of local law enforcement. The prosecutor should ensure the equitable distribution of any forfeited property or proceeds to the appropriates agencies. The distribution should generally reflect the contribution of any agency's participation in any of the activity that led to the seizure or forfeiture of an asset. Agencies should strive to achieve agreement on the law enforcement goals within a region in order to promote effective and efficient asset forfeiture strategies.

3. Every government entity with the authority to seize property should ensure that its asset forfeiture program provides for:

a) prompt prosecutorial review of the circumstances, and propriety of the seizure;

b) timely notice of seizure to interest holders of seized property; and

c) expeditions resolution of ownership claims and a rapid release of property to those entitled to the return of the property.

Comment: Asset forfeiture is a powerful tool. Each agency should establish internal procedures to promote fairness, accountability, and awareness of policy, legal and other considerations.

Procedures

4. Absent exigent circumstances a judicial order is advisable for all seizures of real property. When real estate in residential use is sought to be forfeited, the least intrusive means that will preserve the property for forfeiture and protect the public should be employed. A notice of lis pendens or an order restraining alienation should suffice to preserve the government's interest in forfeiture pending final judicial determination of the forfeiture action.

Comment: In real property forfeitures the use of judicial orders enhances public confidence in the forfeiture process and insulates seizing officers from allegations of improper conduct. This policy recognizes that immediate dispossession from a residence may effect innocent individuals and that dispossession is not always required a to preserve real property for forfeiture while providing for exigencies wherein the public is in immediate danger. Many street level enforcement seizures will necessarily present circumstances which prelude officers from obtaining pre-seizure judicial orders.

5. Every entity retaining forfeited property for official law enforcement use should ensure that the property is subject to controls consistent with those applicable to property acquired through the moral appropriations process.

Comment: Forfeited properties should be used in a fiscally responsible manner and should be subject to the same controls applicable to other agency property, e.g., if officials are not entitled to use agency vehicle for such travel.

6. No seized property should be used without judicial authorization and/or supervision. A use order may be obtained from the court in appropriate circumstances, otherwise the property should not be used unless the forfeiture action has been completed and title to the property has vested in the receiving agency. Forfeited property not used in an under cover capacity

should be used and disposed of in a manner consistent with the use and disposition of similar property by that agency.

7. The disposition of forfeited property retained by the agency should not be determined by any person who supervised or exercised discretion in its forfeiture.

Comment: Assignment of property for use by law enforcement saves tax dollars that would otherwise have been necessary to purchase that property. However, public confidence and support require that the possibility that discretionary decisions may be influenced by the prospect of personal gain or enjoyment be avoided.

8. Forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.

Comment: Public confidence in asset forfeiture requires that officials properly manage and account for the proceeds of an asset forfeiture program. Forfeiture proceeds should be audited and controlled to prevent waste, fraud, abuse. Every transaction into or out of the fund should be documented and the records maintained for regular audit. This practice will also protect against the diversion of forfeiture proceeds to non-law enforcement purposes.

9. Every seizing agency should maintain seized property to preserve its value for successful claimants as well as the taxpayers.

Comment: Seizure of property gives rise to a duty to care for the property, whether the ultimate beneficiary is a successful claimant or the government. Seizing agencies should arrange for proper maintenance and sale of all assets, and should pursue management strategies that reduce the amount of time that property spends in inactive storage. Such strategies could include bond-out provisions, "substitute res" orders custodianship arrangements, interlocutory sales, and other similar measures.

10. To extent possible, civil forfeiture actions should be initiated as independent cases which are not controlled or influenced by the criminal prosecution. Prosecutors should avoid plea agreements in a criminal case which involve agreements to dismiss forfeiture proceedings. The converse is also true, prosecutors should avoid settlements in a forfeiture case which involve concessions in a criminal proceedings.

11. Every prosecutor should establish procedures to insure expeditious resolution of ownership claims if challenges to the asset forfeiture proceeding are made and timely return of the property to the known owner or interest holders if the forfeiture action is dismissed or is unsuccessful.

12. Salaries and personal benefits of any person influencing or controlling the selection, investigation, or prosecution of forfeiture cases must be managed in such a way that employment or salary does not depend upon the level of seizures of forfeitures in which they participate.

Comment: Personal performance standards should not be based upon dollar amounts of seizures. Salaries and benefits of personal involved in the exercise of discretion in forfeiture cases are managed in many different ways, involving various federal, state, local grant, task force and contract mechanisms.

13. Agency employees and their families should be prohibited from purchasing forfeited property directly from the agency, or any property forfeited by any other agency, if the employee participated in any aspect of the investigation or litigation involving property.

Comment: Whenever any employee of a forfeiting agency purchases property forfeited by that agency, the agency is open to changes that the employee possessed inside information that placed them in an unfair position in comparison with other bidders.

14. Agencies receiving forfeiture funds should make annual budget requests based on agency funding needs without regard for anticipated or projected asset forfeiture revenues.

Comment: Taxpayers benefit when forfeited property can be placed into official use, thus reducing tax dollars spent on law enforcement equipment. Forfeited property retained for law enforcement should not be used to supplant the budget of that agency. By adding resources to law enforcement, greater resources are available to investigate and prosecute targeted criminal offenses. This ultimately benefits the public through increased law enforcement. Budgeting decisions based on anticipated forfeiture revenues subject the budgetary process to unhealthy pressure and unpredictability.

15. Prosecutors should pursue forfeiture actions to further the remedial goals set forth above. A prosecutor should not consider any personal or political advantages or disadvantages, or gains or losses that the initiation of a forfeiture action may bring to the prosecutor or the prosecutor's office in deciding whether to initiate or dismiss a forfeiture proceeding. Nor should a prosecutor improperly consider the race, gender, social or economic status of any person in deciding whether to initiate or dismiss a forfeiture proceeding. This guideline should not be read to preclude the initiation of forfeiture proceedings which contribute to the fulfillment of the official mission of the prosecutor's office.

Adopted by Resolution of the Board of Directors
National District Attorneys Association
March 6, 1992
Colorado Springs, Colorado

U.S. Department of Justice
Executive Office for Asset Forfeiture
National Code of Professional Conduct for Asset Forfeiture

I. Law enforcement is the principal objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.

II. No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures of forfeiture he or she achieves.

III. Whenever practicable, and in all cases involving real property, a judicial finding of probable cause shall be secured when property is seized for forfeiture. Seizing agencies shall strictly comply with all applicable legal requirements governing seizure practice and procedure.

IV. If no judicial finding of probable cause is secured, the seizure shall be approved in writing by a prosecuting or agency attorney or by a supervisory-level official.

V. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures.

VI. The manual shall include procedures for prompt notice to interest holders, the expeditious release of seized property when appropriate, and the prompt resolution of claims of innocent ownership.

VII. Seizing entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.

VIII. Unless otherwise provided by law, forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.

IX. Seizing agencies shall strive to ensure that seized property is protected and its value preserved.

X. Seizing entities shall avoid any appearance of impropriety in the sale or acquisition of forfeited property.

Operation Toehold: Final Report

Honorable Elihu Mason Harris
Office of the Mayor
Oakland, California

On March 17, 1992, Oakland had seven homicides in one day. This record number in a 24 hour period focused attention on the escalating rate of violence in our neighborhoods. As a result, Oakland officials organized federal, state and local criminal justice leaders who committed themselves to support programs to end the violence.

In one of the efforts, a site of 20 square blocks in East Oakland was identified as the number one marketplace for the sale of marijuana in the Bay Area. This neighborhood had seen five homicides in the preceding eighteen months that were related to the business of drugs. Later, it was determined that two of the March 17th homicides were related to drug activity in this area. This brought the total to seven.

Two to three hundred drug transactions per day occurred in this area. Police estimated that 50 - 60% of the buyers resided in other areas, including many from more affluent communities.

The police began an extensive protocol of drug nuisance abatement activity, litigation pursuant to Section 11570 of the California Health and Safety Code and intelligence gathering surveillance.

Once assured of citizen support, a "Bust-the-Buyer" program was implemented. For the following 120 days, weekend drug buyers were cited and on two occasions the Federal Bureau of Investigation assisted by seizing buyers' cars under existing federal asset forfeiture laws. In all, 537 people were cited and 82 vehicles were taken. Half were from outside Oakland.

"Operation Toehold" began on August 5, 1992. The purpose was to get a toehold in a neighborhood that had been ravaged by open drug dealing for over twenty years. It is a program where the 20 square block, 530 residential unit area is patrolled by a sergeant of police and a small number of two officer marked units during the premium selling time (daylight hours especially when people are not working), seven days a week.

The goal of Toehold was to eliminate the drug market. Experience taught us that sellers who are arrested are replaced by others, as long as the market remains. Toehold was designed to eliminate the demand for drugs in that neighborhood. The method was to warn buyers with informational hand-outs and newspaper clippings describing the hazards of buying drugs in this area (citations, car seizures and the effects on the neighborhood). Sellers who attempted to gather on corners were encouraged to move on. The officers walking the blocks developed rapport with the residents. The residents were invited to join in a community meeting.

On September 10, 1992, the first community meeting of residents in over 35 years was held in a nearby church. Twenty-four residents attended. On October 21st, a block party was held with the Mayor and other officials. During the months of November and December community meetings were held and attendance improved, as did the hope of the people that their neighborhood could remain drug free even as the intense police presence subsided.

The open street drug dealing was virtually stopped. Drug Hotline and Radio Calls reporting drug activity have dropped from 40 to 50 a month down to 8 to 10. Drug arrests have dropped dramatically. The "No Drug Buyer Signs" that the Mayor and citizen groups placed on the corner on August 4th have remained untouched. Hundreds of comments are made by residents to the officers about the marked improvement in the neighborhood. People continue to clean up their properties.

Phase two of the program reduced the police presence to two officers and on sergeant during the week and four officers and a sergeant on the weekend. Patrol hours were reduced due to the end of daylight saving time. The area was expanded to include the remainder of Beat 30 (less OHA's Coliseum Gardens). A "designated beat officer" has been assigned to Beat 30. He changed his hours and days off for this project. Phase two lasted four weeks to enable the designated beat officer to gain as much knowledge about the area as possible. He will continue the effort and call for support immediately when drug dealers try to return.

Phase three of the program, initiated on November 23, further reduced police patrols to weekends only. Officers are assigned from 10:00 am to 6:00 pm in keeping with the likely hours for drug sales. The designated beat officer continues to work as one of the officers assigned.

As of December 15th, Police Department records show that the drug activity within this area has almost disappeared. On occasion, a dealer will attempt to set up. Unlike in the past, residents will call the police because illegal activities are now seen as "out of place" for the neighborhood. The drug calls have increased slightly because some of the sellers arrested earlier in the program have been released after serving ninety days in the county jail. The calls are encouraging because in the past, residents would not call to report "minor" activities.

There have been no shootings, assaults or serious crimes against persons in the area since the project began. The "Toehold" operation has been slowly reduced as the citizen confidence returns.

Toehold ended on Sunday, January 3, 1993. The neighborhood has enjoyed peace and quiet for nearly 150 days. Now stabilized, this neighborhood has begun to flourish again.

Cash Recovered

$24,467.00

Guns Recovered

6 Handguns

Other Contacts and Activity:

Field Contact Reports Completed:	159
Vehicles towed:	26
Stolen Vehicles recovered:	3
Contacts with known suspected sellers (repeated)	288
Contacts with suspected buyers:	
Oakland Residents:	67
Outside Oakland Residents:	201
	268 Total
Advisory contacts with area residents:	173

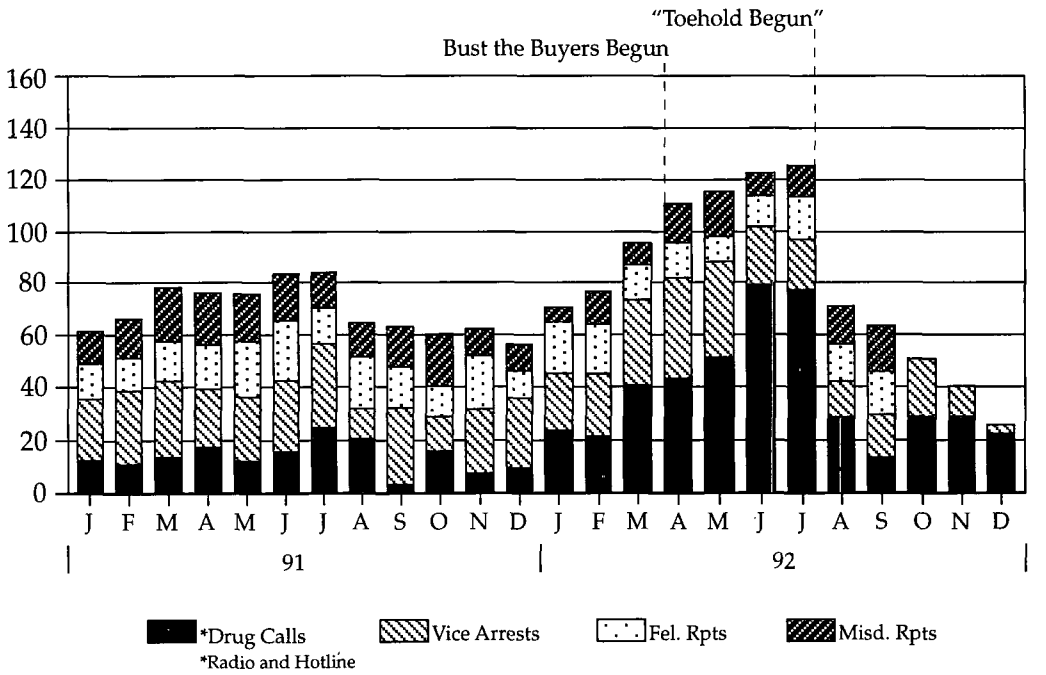
Overtime Costs:

Bust the Buyer & FBI Seizure projects:	$61,461.56[1]
Toehold: (averaged at PERS top step):	$107,119.29[2]

[1] 537 citations were issued that generated a minimum fine of $154. Country records (CASP) indicates all but 7 citations were paid. This indicates that $81,620 was generated. Of the 82 vehicles seized by the FBI six met the $2400 criteria, thus a minimum of $15,000 was recovered.

[2] 3 weekend days were paid from ACNTF Oakland Drug Violence Project ($7,145.28 of this figure).

Operation Toehold
71st and Hamilton



Stats 1/91 - 1/93

Statistical Summary[3]
August 4 - December 20, 1992

Arrests

Non-Drug:	32 Felony	37 Misdemeanor	
Drug:	57 Felony	28 Misdemeanor	
Total:	89 Felony	65 Misdemeanor	**154 Total**

Traffic Citations: **124 Total**

Parole & Probation Violated: **14 Total**

Drugs Recovered

66 Rocks of Cocaine
102 Baggies of Marijuana
2 Lbs of Bulk Marijuana
1 Gram of Heroine

[3] These statistics are compiled from supplemental reports, arrest reports, citation, FC report, and crime report filed each day by officers working the project.

Model Demand Reduction Assessment Act

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Model Demand Reduction Assessment Act

Policy Statement

Users of alcohol and other drugs contribute significantly to the personal and societal harm resulting from this nation's drug abuse problem. Approximately 50% of alcohol related motor vehicle accidents result in deaths.[1] Fifty-four percent (54%) of state prison inmates in 1986 were under the influence of alcohol, illegal drugs, or both at the time they committed the offense for which they are currently sentenced.[2] A U.S. Chamber of Commerce study found that "recreational" illegal drug users are 3.6 times more likely than average employees to injure themselves or another person in a work-place accident.[3] An estimated 25% of all hospitalized persons have alcohol-related problems.[4]

Demand reduction sanctions are critical to any effective anti-drug strategy. These sanctions must hold users accountable and help to address an offender's education or treatment needs. However, scarce prison space should be reserved for offenders committing the most serious offenses or failing to demonstrate a willingness to alter their criminal conduct. Disincentives other than incarceration and rehabilitation programs must be made available to courts sentencing drug users. The Model Act imposes a fee on individuals convicted of offenses involving controlled substances, precursor chemicals, and driving under the influence of alcohol. Fees collected are dedicated almost exclusively to the funding of education, prevention, and treatment programs. Indigent offenders do not escape the deterrent or rehabilitative thrust of the law because courts may require community or reformative service in lieu of cash payment of the fee. Offsets against the fee amount are available to the extent of an offender's out-of-pocket expenditures for his or her own treatment or education program.

[1] Healthy People 2000, the National Health Promotion and Disease Prevention Objectives.

[2] Bureau of Justice Statistics, DRUGS, CRIME, AND THE JUSTICE SYSTEM 7 (1992).

[3] U.S. Chamber of Commerce, Statement on The Impact of the Drug Problem on American Business before The House Select Committee on Narcotics Abuse and Control 4 (October 3, 1990)

[4] Healthy People 2000, *supra* note 1.

Highlights of the Model Demand Reduction Assessment Act

- Imposes a fee on all individuals convicted of offenses involving controlled substances, precursor chemicals, and driving under the influence of alcohol.
- Deposits collections into a Demand Reduction Assessment Fund administered by the single state authority on alcohol and other drugs.
- Requires Fund expenditures to be used almost exclusively for education, prevention, and treatment services.
- Allows courts to offset an offender's out-of-pocket expenditures for his or her own treatment or education program against the assessment amount.
- Allows courts to order indigent offenders to perform community or reformative service in lieu of paying a specified portion of the assessment.

Model Demand Reduction Assessment Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Demand Reduction Assessment Act."

Section 2. Legislative Findings.

(a) Alcohol abuse in the United States is a leading cause of motor vehicle accidents; is implicated in many fatal intentional injuries such as suicides and homicides; is related to drowning and boating deaths; and is a significant cause of birth defects and other health problems.

(b) Illegal drug use creates a profitable market for drug dealers. Through their constant demand for illegal drugs, users contribute to the growth of the illegal drug trade and its associated violence, crime, and social devastation.

(b) Illegal drug users commit many of the robberies and burglaries that threaten and sometimes take our lives and those of our families; sap the strength of the American economy through decreased productivity, increased use of sick leave, and on-the-job accidents; abuse their children, spouses, and other family members; and flood our emergency rooms.

(c) To be effective a comprehensive state and local anti-drug strategy should seek to create disincentives to alcohol and illegal drug use through imposition of cost-effective sanctions, such as user fees or assessments. Drug and alcohol offenders should share the financial burden of eliminating a societal problem which they have helped create and perpetuate. Assessments can hold users accountable for their illegal conduct without exacerbating current prison and jail overcrowding. The monies collected can positively impact the offender and other users by paying for badly needed alcohol and other drug-related programs.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and in publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Section 3. Purpose.

The purpose of this [Act] is to reduce the demand for alcohol and illegal drugs through deterrence of continued use and the funding of education, prevention, and treatment services.

Section 4. Demand Reduction Assessment.

(a) Every person convicted [or adjudicated delinquent] for a violation of [state controlled substances act, Model State Chemical Control Act or similar legislation, and laws which involve driving under the influence or while intoxicated] shall be assessed for each such offense a sum of [$500.00] in the case of a misdemeanor, or in the case of a felony an amount not less than [$750.00] nor more than [$3,000.00.]

(b) Every person who applies for a conditional discharge pursuant to [citation to appropriate conditional discharge provision under state law] shall be assessed a sum as prescribed in subsection (a), except that the court shall impose only one such assessment regardless of the number of offenses charged which are subject to conditional discharge pursuant to [citation to appropriate conditional discharge provisions under state law].

(c) All assessments made pursuant to this [Act] shall be in addition to and not in lieu of any fines, restitution costs, other assessments, or forfeitures authorized or required by law.

COMMENT

The assessment in Section 4 is based on New Jersey's Drug Education and Demand Reduction (DEDR) fee which was successfully pioneered in 1987. New Jersey assesses convicted drug offenders, including juveniles,

offenders placed on probation, and offenders involved in pretrial intervention, a fee in addition to other fines, penalties, or forfeitures. Building on the New Jersey legislation, Section 4 expands the assessment to driving while intoxicated offenses. This expansion signals that serious consequences will flow from alcohol abuse and widens the potential pool of funds available for treatment and education services under Section 7. Because some state laws prohibit the imposition of such a fee on juveniles, the reference to juvenile offenders in subsection (a) has been bracketed.

New Jersey's fee ranges from $500 to $3,000 depending on the gravity of the offense. Subsection (a) brackets this range as an example for states to follow in arriving at appropriate assessment amounts for their jurisdictions. This section clarifies that an assessment must be imposed for each separate offense and cannot be waived because fines or penalties have been imposed, or property has been seized for forfeiture.

Section 5. Collection of Demand Reduction Assessments.

All assessments provided for in this [Act] shall be collected as provided for the collection of [insert appropriate term, e.g., fines, restitution, etc.] and shall be forwarded to the [single state authority on alcohol and other drugs] as provided in Section 6.

Section 6. Deposit in Demand Reduction Fund.

All monies collected under this [Act] shall be forwarded to the [single state authority on alcohol and other drugs] for deposit in a non-lapsing revolving fund to be known as the "Demand Reduction Assessment Fund." Monies in the Fund shall be appropriated on a continuing basis and shall not be subject to [insert citation to applicable state lapsing and related fiscal restraint provisions of law].

Section 7. Administration of Demand Reduction Fund.

Option 1 [The [single state authority on alcohol and other drugs] shall administer all expenditures from the Fund. Monies from the Fund are to be distributed to programs licensed by the [single state authority on alcohol and other drugs] and used for drug education, prevention, and treatment services. Monies from the Fund may not supplant other local, state, or federal funds.]

Option 2 [The [single state authority on alcohol and other drugs] shall administer the Fund and distribute monies as follows:

(a) ten percent (10%) of the monies shall be distributed to the office of the [attorney general, district attorney or other appropriate reference] for deposit in the Special Asset Forfeiture Fund. Monies from the Forfeiture Fund shall be distributed in accordance with [option 2 of the Commission Forfeiture Reform Act.]

(b) the balance of the monies shall be distributed to programs licensed by the [single state authority on alcohol and other drugs] and used for drug education, prevention, and treatment services.

Monies from the Fund may not supplant other local, state, or federal funds.]

COMMENT

Sections 6 and 7 create a procedure by which assessment collections become a stable funding source for education, prevention, and treatment services. Assessment collections can be both consistent and substantial. Every jurisdiction convicts drug and Driving Under the Influence (DUI) offenders so there will always be a source from which to try and collect payment which often comes in a steady stream of installments. With a collection rate of approximately 35%, New Jersey's DEDR program collects approximately $9 million dollars per year from drug (excluding alcohol) offenders. Since its inception the DEDR program has raised over $36 million, every dollar having been expended for treatment and education purposes.

Section 6 creates a new Demand Reduction Assessment Fund into which all assessment collections are deposited. This mechanism ensures that the monies are not returned to the general treasury and diverted to uses other than those specified in this section. Section 7 provides two distribution options which correspond to the two distribution options for forfeiture proceeds in the Commission Forfeiture Reform Act (CFRA). Option 1 requires that 100% of Fund monies be used for education, prevention, and treatment purposes. The section clarifies that monies are to pay for actual services and not overhead or other administrative expenses. To ensure that monies are allocated to qualified programs,

the single state authority on alcohol and drugs is responsible for administering and making allocation from the Fund. Concomitantly, Option 1 in CFRA deposits 100% of forfeiture proceeds in a Special Asset Forfeiture Fund. The proceeds are to be used for law enforcement purposes which is defined to include education, prevention, and treatment services.

Option 2 deposits 10% of assessment collections in CFRA's Special Asset Forfeiture Fund. Option 2 in CFRA deposits 10% of forfeiture proceeds in the Demand Reduction Assessment Fund. The 10% options are offered for states that wish to encourage better working relations between enforcement, prosecution, treatment, and education. In some jurisdictions these constituencies interact positively with one another; in others contact is more strained and uncooperative. Option 2 provides additional incentive for all the constituencies to support both forfeiture and enforcement of the drug assessment.

States may also wish to consider expressly authorizing the principal collection agency to retain a percentage of successful collections. Such a provisions might enhance collection efforts and thus result in a net increase in revenues generated pursuant to this [Act].

Section 8. Paying Rehabilitation Costs in Lieu of Assessment.

(a) The court may suspend the collection of an assessment imposed pursuant to this [Act] during a defendant's [or juvenile's] participation in a court approved alcohol or other drug treatment or education program if the defendant [or juvenile] agrees to pay all or some of the costs associated with the program.

(b) Upon application by the defendant [or juvenile] and a finding by the court that the defendant [or juvenile] has successfully completed the program, the court may reduce the assessment imposed pursuant to this [Act] by any amount actually paid by the defendant [or juvenile] for participation in the program.

(c) If the defendant's [or juvenile's] participation is terminated before successful completion of the program because of the defendant's [or juvenile's] failure to constructively participate in the program, collection of the entire assessment imposed pursuant to this [Act] shall be enforced.

(d) Nothing in this section shall be construed to authorize a court to reduce the penalty imposed pursuant to this section by reason of payments or expenditures made by any form of public or private insurance program.

COMMENT

An offender's payment of his or her participation in a court-ordered education or treatment program accomplishes the same goals as payment of the assessment. Agreed upon payments to the program which are monitored by the court provide the same financial disincentive to continued use and accountability as the assessment. The offender is reducing alcohol or illegal drug demand by funding his or her own treatment or education. Therefore, it is appropriate to offset the offender's actual out-of-pocket expenditures for a court-ordered treatment or education program against the drug assessment amount.

Section 9. Performing Community or Reformative Service in Lieu of Paying the Demand Reduction Assessment Entirely in Cash.

(a) Authority of Court to Suspend Collection of Assessment. The court shall require a defendant [or juvenile] to pay immediately or within a specified period of time and in specified installments the maximum amount of the assessment imposed under this [Act] which the courts finds to be consistent with the defendant's [or juvenile's] ability to pay. The court may order a defendant [or juvenile] to perform community or reformative service, as defined in subsection (b), in lieu of payment of a specified portion of an assessment imposed pursuant to this [Act] if the court finds the defendant [or juvenile] is indigent as defined in subsection (c).

(b) Definition. For the purposes of this section, the term "reformative service" means supervised activities or participation in a publicly or privately operated program of supervision, which the court finds will help the defendant [or juvenile] to correct a dependence on alcohol or other drugs or enhance the defendant's [or juvenile's] vocational, educational or social skills. Reformative service may include documented participation

(1) in or attendance at an alcohol or other drug abuse evaluation, counseling, treatment, aftercare or support program, including meetings conducted by Alcoholics Anonymous or Narcotics Anonymous; or

(2) in a job skills, specific employment training, high school diploma equivalency program, other program of vocational or academic instruction, or program emphasizing self-reliance such as an intensive outdoor program teaching survival skills.

(c) Determination of Indigency.

(1) In determining inability to pay under subsection (a), the court shall consider the amount and sources of the defendant's [or juvenile's] income, employment status and assets, including all real and personal property and bank accounts. The court shall also consider the possibility of the assessment to be paid in specified installments within a specified period of time and the court's authority to order the defendant [or juvenile] to obtain and continue in gainful employment. The court's specific findings as to the facts set forth in this paragraph shall be placed on the record. The prosecutor shall be afforded an opportunity to be heard and to provide information concerning the defendant's [or juvenile's] assets, financial condition or prospects for finding or continuing in gainful employment.

(2) The court shall take judicial notice of any information concerning the defendant's [or juvenile's] employment status and financial condition which was provided or obtained in the course of determining the defendant's [or juvenile's] eligibility for the services of a court-appointed defense attorney. However, the fact the person was found to be eligible for the services of a court-appointed defense attorney shall not in and of itself constitute sufficient grounds for the court to order the defendant [or juvenile] to perform community or reformative service in lieu of payment of a specified portion of the assessment imposed under this [Act].

(3) If the defendant [or juvenile] has not applied for representation by a court-appointed defense attorney, the court shall not order the defendant [or juvenile] to perform community or reformative service in lieu of cash payment pursuant to this subsection unless the defendant [or juvenile] completes and files with the court an appropriate affidavit or form as may be prescribed by [insert designation of appropriate judicial or executive agency], which shall be made under oath and which shall fully describe the defendant's [or juvenile's] employment status and financial condition.

(4) The court or a designated court support office may require the defendant[, juvenile or member of the juvenile's family] to execute and deliver such written requests or authorizations as may be required under applicable law to provide the court or office with access to records of public or private sources, otherwise confidential, as may be of aid to the court or office in evaluating the defendant's [or juvenile's] financial condition. The court or court support office is also authorized to obtain information from any public record office of the state or any subdivision or agency thereof on request and without payment of the fees ordinarily required by law.

(d) Community or Reformative Service Plan. A defendant [or juvenile] ordered to perform community or reformative service pursuant to subsection (c) shall present to the court a proposed community or reformative service plan. The plan may require the defendant [or juvenile] to perform, attend or participate in any combination of work, education, training or non-residential or residential alcohol or other drug abuse counseling programs or any other activities authorized pursuant to this [Act]. If the defendant [or juvenile] is unable to develop and propose a suitable plan, a plan shall be developed by the [appropriate probation agency or other court support office]. Any proposed plan under this subsection is subject to the approval of or modification by the court or [appropriate probation agency or other court support office].

(e) Credit for Community or Reformative Service Satisfactorily Performed. If the agency or person designated by the court to supervise the defendant's [or juvenile's] community or reformative service certifies that the defendant [or juvenile] satisfactorily performed the service, the defendant [or juvenile] shall be entitled to credit towards the satisfaction of the outstanding balance of any assessment imposed pursuant to this [Act]. The credit shall occur at the rate or rates fixed by [appropriate judicial or executive agency] for each hour or day of community or reformative service actually completed. Nothing in this section entitles a defendant [or juvenile] to reimbursement in cash for any type of community or reformative service completed pursuant to this section.

(f) Option to Satisfy Assessment Debt in Cash. The defendant [or juvenile] may at any time, after giving notice to the court or [insert designation of appropriate probation agency or court support office], terminate participation in a community or reformative service program and instead pay entirely in cash the outstand-

ing balance of any assessment imposed pursuant to this [Act]. The court shall thereupon fix a schedule for payment of the outstanding balance of the assessment in accordance with the provisions of [general fine collection law].

(g) Non-Exclusivity of Court's Authority to Order Community or Reformative Service. Any community or reformative service ordered pursuant to this section shall be in addition to and not in lieu of any community service required by any other law, or which ordered by the court pursuant to any other law. Nothing in this section precludes the court from ordering a defendant [or juvenile] who is able to pay the entire assessment imposed pursuant to this [Act] to participate in beneficial activities or programs.

COMMENT

Certain offenders are unable to pay the entire amount of the assessment in cash, even when provided an opportunity to pay in installments. Because collection efforts against such indigents are cost-ineffective, Section 9 provides community or reformative service options in lieu of cash payment. These options ensure that an offender does not escape the deterrent and accountability thrust of the [Act] because of economic status. They also provide courts an opportunity to require individuals who would not otherwise do so to participate in socially beneficial programs. However, courts should only impose community or reformative service when all other collection methods have been exhausted without success.

Section 10. Collection of Assessment Against Inmates.

If a defendant [or juvenile] at the time of sentence [or adjudication] has not paid the entire assessment imposed pursuant to this [Act], any order committing the defendant [or juvenile] to a correctional institution shall express require that the assessment be deducted from any income the defendant [or juvenile] may receive as a result of labor performed at the institution or any type of work release program.

Section 11. Annual Report.

The [insert designation of appropriate judicial or executive agency] shall file annually a report to the governor and the legislature concerning the collection of demand reduction assessments and the use and implementation of the provisions of this section which authorize courts to allow defendants [or juveniles] to perform community or reformative service in lieu of paying their assessments entirely in cash.

Section 12. Severability.

If any provisions of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 13. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date].

Table of Contents

Model Money Laundering Act Policy Statement

Illegal drug industries are composed of a network of interdependent activities, generally including production, processing, transportation, sales and money laundering. The successful elimination of a necessary component activity will stop the flow of drugs through the network. This is true even if other components are still capable of functioning well. Federal, state, and local authorities agree that money laundering is both critical to the perpetuation of a drug enterprise and susceptible to disruption.

Money laundering is the process by which illegally derived property is converted into income which has the appearance of legitimacy. Money laundering can be complex, such as setting up sham companies, or simple, such as purchasing luxury items. Without the capacity to conceal the illegality of drug money so it can be reinvested in the drug enterprise and used to support a luxurious lifestyle, the profit motive on which the drug business thrives disappears.

Money laundering is as vulnerable as it is necessary for several reasons. First, it is generally dominated by professional people, such as attorneys, bankers, and accountants, who are responsive to deterrence. Second, money launderers who become state witnesses are valuable and effective because they are likely to be educated, articulate, sophisticated, and have no criminal records. Also, their testimony is likely to be corroborated by plentiful records and documents. Third, the money launderer's records must surface and interface with those of legitimate business creating a paper trail which can be investigated. Four, the professional launderer with specialized skills is difficult to replace. Concentration on the removal of money launderers will create a bottleneck in the flow of illicit funds.

Money laundering's combination of necessity and vulnerability makes it a prime target for enforcement efforts to dismantle the economic foundation of a drug enterprise.

The purpose of the Model Money Laundering Act is twofold. First, to make the flow of money and property which is important for the continuation of criminal enterprises more difficult. Second, to provide disincentives for the facilitation of criminal activity. The Model Act draws upon the money laundering language in the Uniform Controlled Substances Act (UCSA), and incorporates improvements to the UCSA provision recommended by a working group of local, state, and federal prosecutors. The Model Act is similar to several existing state money laundering laws. It is also compatible with the federal money laundering statute in structure and vocabulary, though shorter and simpler in form. The terms used and the definitions of the operative terms are taken from federal law. The Model Act provides for both criminal and civil remedies, meshing with the Commission Forfeiture Reform Act (CFRA), the Model Ongoing Criminal Conduct Act, and the Model Financial Transaction Reporting Act.

Highlights of the Model Money Laundering Act

- Provides legislative findings on the economic rationale for financial remedies.
- Guides the application of financial remedies and allows reciprocal agreements encouraging interstate cooperation and uniformity through special purpose and uniformity sections.
- Creates the following four violations:

  (1) knowingly dealing in the proceeds of unlawful activity;

  (2) making property available to another for the purpose of furthering specified unlawful activity;

  (3) knowingly conducting transactions that conceal or disguise illegal proceeds or avoid transaction reporting requirements; and

  (4) engaging in money laundering as a business. This violation carries with it an enhanced penalty.
- Imposes a civil treble damages sanction in addition to criminal penalties to deter individuals who provide services to the drug industry for profit.
- Provides that money laundering is conduct giving rise to forfeiture and integrates the [Act] with the Commission Forfeiture Reform Act (CFRA).

Section by Section Summary of the Model Money Laundering Act

Section 1.
Provides short title.

Section 2.
Provides legislative findings on the economics of ongoing criminal activity and provides an economic-based rationale for financial remedies.

Section 3.
Sets out the goals of the [Act], defending legitimate commerce from criminal activity and remedying the economic effects of crime.

Section 4.
Defines key phrases including "proceeds", "property", "specified unlawful activity", and "unlawful activity".

Section 5.

(a) Describes money laundering in three circumstances, and adds an enhancement provision in a fourth. Knowing participation in the finances of crime is made unlawful.

(1) Deals with the character of "dirty money" itself, and prohibits any knowing control of it. Dirty money in this paragraph must be the proceeds of specified unlawful activity, SUA, defined in Section 4, paragraph (3) of this [Act].

(2) Complements (a)(1) by prohibiting the capitalization of SUA by knowingly providing property to facilitate such conduct.

(3) Focuses on transactions, a term defined in Section 4, paragraph (4) of this [Act]. It prohibits knowingly conducting a transaction involving the proceeds of any unlawful activity if the transaction is for the purpose of concealment or disguise or done with the intent to avoid a reporting requirement.

(4) Prohibits knowingly engaging in transactions involving the proceeds of unlawful activity as a business.

(b) Grades the prohibitions in (a) as degrees of felony; provides for an enhanced sentence for engaging in money laundering as a business; and provides for fines of the greater of a set amount or twice the value of the property involved.

(c) Provides for treble damages, setting the value of the property involved as the social damage. It also provides a location for reference to the state racketeering statutes, if any, to assure that money laundering is made a predicate offense and, separately, that money laundering is made conduct giving rise to forfeiture under state forfeiture statutes.

Section 6.
Encourages uniformity in the application, liberal construction and interstate employment of the [Act].

Section 7.
States that the provisions of the [Act] are severable so the invalidity of one does not affect the validity of the others.

Section 8.
Makes the [Act] effective on a date to be specified.

Model Money Laundering Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Money Laundering Act".

Section 2. Legislative Findings.

(a) Criminal activity and the networks that characterize criminal industries divert millions of dollars from the legitimate commerce of this state each year through the provision of illicit goods and services, force, fraud, and corruption.

(b) Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.

(c) Money and power generated by criminal activity are being used to obtain control of legitimate enterprises, to invest in legitimate commerce, and to control the resources of facilitating ongoing criminal activity.

(d) Criminal activity and proceeds of criminal activity subvert the basic goals of a free democracy by expropriating the government's monopoly of the legitimate use of force, by undermining the monetary medium of exchange and by subverting the judicial and law enforcement processes that are necessary for the preservation of social justice and equal opportunity.

(e) Criminal activity impedes free competition, weakens the economy, harms in-state and out-of-state investors, diverts taxable funds, threatens the domestic security, endangers the health, safety, and welfare of the public and debases the quality of life of the citizens of this state.

(f) Criminal activity becomes entrenched and powerful when the social sanctions employed to combat it are unnecessarily limited in their vision of the goals that may be achieved, in their legal tools or in their procedural approach.

(g) Societal strategies and techniques that emphasize bringing criminal remedies to bear on individual offenders for the commission of specific offenses are inadequate to reach the economic incentive supporting the criminal network, are expensive to implement, and are costly in terms of the loss of personal freedom of low-level participants in criminal networks. Comprehensive strategies are required to complement the criminal enforcement strategies by focusing on the financial components and motivations of criminal networks; enlisting the assistance of private victims; empowering courts with financially oriented tools; and developing new substantive, procedural and evidentiary laws creating effective financial remedies for criminal activity.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect")

Section 3. Purposes.

The purposes of this [Act] are:

(a) to defend legitimate commerce from criminal activity;

(b) to provide economic disincentives for criminal activity;

(c) to remedy the economic effects of criminal activity; and

(d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new preventive measures through criminal sanctions and civil remedies.

Section 4. Definitions.

In this [Act], unless the context otherwise requires:

(a) "Proceeds" means property acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind.

(b) "Property" means anything of value, and includes any interest in property, including any benefit, privilege, claim or right with respect to anything of value, whether real or personal, tangible or intangible.

(c) "Specified unlawful activity" means any act, including any preparatory or completed offense, committed for financial gain, that is punishable [as a felony] [by confinement for more than one year] under the laws of this state, or, if the act occurred outside this state, would be punishable [as a felony] [by confinement for more than one year] under the laws of the state in which it occurred and under the laws of this state, involving:

(1) [trafficking in controlled substances, homicide, robbery, extortion, extortionate extensions of credit, trafficking in explosives or weapons, trafficking in stolen property, or obstruction of justice,] [a reference to those acts or offenses described in 18 U.S.C. 1956(c)(7)].

(2) [reference to grades of offenses, such as "any first degree misdemeanor or higher," or "any felony," and/or to other appropriate specified state offenses].

(3) [for states with state racketeering or criminal profiteering statutes, reference to "predicates" to the racketeering offenses and to the racketeering offenses, e.g., Illegal investment in an enterprise, illegal control of an enterprise, illegal conduct of an enterprise].

(d) "Transaction" includes a purchase, sale, trade, loan, pledge, investment, gift, transfer, transmission, delivery, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, purchase or sale of any monetary instrument, use of a safe deposit box, or any other acquisition or disposition of property by whatever means effected.

(e) "Unlawful activity" means any act which is chargeable or indictable as [an offense] [a crime] of any [degree] [classification] under the laws of the state in which the act occurred [or under federal law] and, if the act occurred in a state other than this state, would be chargeable or indictable as [an offense] [a crime] of any [degree] [classification] under the laws of this state [or under federal law].

COMMENT

Key terms are defined. The definitions of "proceeds" and "property" also appear in the Commission Forfeiture Reform Act (CFRA). If they are enacted together, the CFRA definition of "proceeds" should be retained because its additional clause has meaning in the context of forfeiture of proceeds. The CFRA definition of property should be deleted as duplicative.

"Specified unlawful activity" the so-called predicate offenses, should incorporate and build on the definition of racketeering if any exists. It should include state offenses that represent the key components of ongoing criminal networks. They should include not only the core offenses, such as offenses related to the provision of illicit goods and services such as drugs, fraud, theft, gambling, prostitution, child pornography, etc. but also offenses related to support services such as violence, corruption, obstruction of justice, money laundering and fencing. Civil remedies may be most effective preventing support service providers from participating by increasing the risk of economic loss to offset the opportunity for disproportionate gain. The definition is self-limiting to offenses committed for financial gain. Inclusion of a type of offense that is often committed for other reasons, such as murder, may therefore be safely done without including the inappropriate occurrences of that offense, such as family-related homicides. The definition should also include intentional environmental crimes that involve danger to human life or threaten vital resources.

The three subparagraphs are a guided menu of choices. If the key concept is to be given adequate reach, one choice should be selected from each of (1), (2) and (3).

The references to federal law are recommended if permitted under state constitutional limitations on the delegation of legislative authority.

Section 5. Penalty; Civil Remedies.

(a) It is unlawful for any person:

(1) who knows that the property involved is the proceeds of some form of unlawful activity, to knowingly transport, receive or acquire the property or to conduct a transaction involving the property, when, in fact, the property is the proceeds of

specified unlawful activity;

(2) to make property available to another, by transaction, transportation or otherwise, knowing that it is intended to be used for the purpose of committing or furthering the commission of specified unlawful activity;

(3) to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the intent to conceal or disguise the nature, location, source, ownership, or control of the property or the intent to avoid a transaction reporting requirement under [Model Financial Transaction Reporting Act] [or federal law]; or

(4) knowing that the property involved in the transaction is the proceeds of some form of unlawful activity, to knowingly engage in the business of conducting, directing, planning, organizing, initiating, financing, managing, supervising, or facilitating transactions involving property that, in fact, is the proceeds of specified unlawful activity.

(b) A person who violates:

(1) paragraph (1), (2) or (3) of subsection (a) of this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ] or twice the value of the property involved, whichever is greater, or both.

(2) paragraph (4) of subsection (a) of this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ] or twice the value of the property involved, whichever is greater, or both.

(c) A person who violates any subsection of this section is subject to a civil penalty of three times the value of the property involved in the transaction, in addition to any criminal sanction imposed.

(d) [reference to state racketeering statutes, if any, making money laundering a predicate offense and incorporating civil forfeiture remedies.]

COMMENT

This section is the engine that drives the rest of the financial remedies package. It prohibits knowing participation in the finances of crime in each of its manifestations. The prohibition of money laundering defines the core conduct that regulatory and reporting measures seek to prevent, give early warning of, and remedy.

Criminal sanctions for money laundering should be at the top of the state classification system except for homicide and similar offenses. Money laundering makes ongoing criminal conduct possible. A system that imprisons the drug dealers, robbers, burglars and other racket operatives cannot conscientiously allow the providers of the most essential activity in the racket to take advantage of their superior social station, education or professional credentials to escape punishment. Indeed, imprisoning a relatively small number of money launderers can be expected to allow a far larger number of would-be operatives to remain free.

Civil remedies for money laundering, including civil racketeering and forfeiture remedies are the most important portion of this [Act]. Civil remedies are better suited to deter profit-seeking conduct of facilitators because they can be employed in regulatory and reporting contexts, because they can include injunctive and other equitable relief, and because economic sanctions remove economic incentive and attack the financial superstructure of ongoing criminal enterprises.

Section 6. Uniformity of Construction and Application.

(a) The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

(b) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(c) The attorney general is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

COMMENT

Uniformity of statutory provisions and cooperative enforcement mechanisms are important goals in the development of effective state enforcement mechanisms. Cooperation between sister states becomes increasingly necessary as travel, communications and wide-spread criminal networks "shrink" the country.

Section 7. Severability.

If any provision of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 8. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date].

Appendix C

States With Money Laundering or Related Statutes

SOURCE: American Prosecutors Research Institute

Money Laundering and Related Laws[1]

	STATE	CITATION[2]
1.	Arizona	Ariz. Rev. Stat. §13-2317 (Supp. 1992)
2.	California	A. Cal. Penal Code §§186.9 to 186.10 (Deering Supp. 1993)
		B. Cal. Health & Safety Code §11370.9 (Deering Supp. 1993)
3.	Connecticut	Conn. Gen Stat. Ann. §§53a-275 to 53a-282 (Supp. 1992)
4.	Florida	Fla. Stat. Ann. §896.101 (West Supp. 1993)
5.	Georgia	Ga. Code Ann. §7-1-911 to 7-1-916 (1989, Supp. 1992)
6.	Hawaii	Haw. Rev. Stat. §708-8120 (Supp. 1992)
7.	Idaho	Idaho Code §18-8201 (Supp. 1992)
8.	Illinois	Ill. Ann. Stat. ch. 38 §29B-1 (Smith-Hurd Supp. 1992)
9.	Louisiana	La. Rev. Stat. Ann. §40:1049 (West Supp. 1992)
10.	Maryland	Md. Ann. Code art. 27 §297B (Supp. 1992)
11.	Minnesota	Minn. Stat. Ann. §§609.496 to 609.497 (West Supp. 1993)
12.	Nevada	Nev. Rev. Stat. §207.195 (1992)
13.	New York	N.Y. Penal Law §§470.00 to 470.20 (Supp. 1993)
14.	Oklahoma	Okla. Stat. Ann. tit. 63 §2-503.1 (West Supp. 1993)
15.	Pennsylvania	Pa. Stat. Ann. tit. 18 §5111 (Purdon Supp. 1992)
16.	Rhode Island	R.I. Gen. Laws §11-9.1-15 (Supp. 1992)
17.	South Carolina	S.C. Code Ann. §44-53-475 (Law Co-op. Supp. 1992)
18.	Texas	Tx. Health & Safety Code Ann. §481.126 (Vernon Supp. 1993)
19.	Utah	Utah Code Ann. §§76-10-1901 to 76-10-1908 (1990) as amended by S. B. 151 (1993)
20.	Virginia	Va. Code Ann. §18-2-248.7 (Supp. 1992)
21.	Washington	Wash. Rev. Code §§9A.83.010 to 9A.83.040 (West Supp. 1993)

[1] Citation information current through April 10, 1993. Citation list prepared by the American Prosecutors Research Institute.

[2] Includes statutes which are not titles "money laundering" but serve the same purpose as and are applied similarly to money laundering laws. See CA, FL, GA, LA, MD, MN, NV, OK, PA, TX.

Money Laundering and Related Laws Survey[1] of State Statutes[2]

ARIZONA [1985][3]

Money Laundering; classifications; definitions. Ariz. Rev. Stat. §13-2317 (Supp. 1992)

A person is guilty of money laundering in the 2nd degree who:

(1) acquires or maintains an interest in, transacts, transfers, transports, receives or conceals racketeering proceeds knowing or having reason to know they are proceeds of an offense.

(2) makes property available by transaction, transportation or otherwise knowing it is intended to facilitate racketeering.

(3) conducts a transaction knowing or having reason to know the property is proceeds of an offense and with the intent:

(A) to conceal or disguise the nature, location, source, ownership, or control of the property; or

(B) to avoid a state transaction reporting requirement.

Penalty: Class 3 felony

A person who knowingly initiates, organizes, plans, finances, directs, manages, supervises or is in the business of money laundering is guilty of 1st degree money laundering.

Penalty: Class 2 felony

[1] Survey information current through April 10, 1993. Analysis includes only statutory language and was prepared under a grant from the Bureau of Justice Assistance.

[2] Survey includes statutes which are not titled "money laundering" but serve the same purpose as and are applied similarly to money laundering laws. See CA, FL, GA, LA, MD, MN, NV, OK, PA, TX.

[3] Bracketed numbers represent effective or enactment date.

CALIFORNIA [1986]

Money Laundering. Cal. Penal Code §186.9-186.10 (Deering Supp. 1993)

A person who conducts or attempts to conduct through a financial institution a transaction or more than one transaction within a 24 hour period involving over $5,000 in monetary instruments with:

(1) intent to promote or otherwise facilitate any criminal activity; or

(2) knowing the instrument represents or is derived from proceeds of criminal activity,

is guilty of money laundering.

"Criminal activity" means an offense punishable by death or imprisonment in state prison, or an offense in another jurisdiction punishable by death or imprisonment for more than one year.

The prosecution shall additionally prove an attorney providing criminal defense services accepted money to intentionally disguise or help disguise the source of the funds or the nature of the criminal activity.

Penalty: 1st offense - Imprisonment for not more than 1 year, a fine of not more than the greater of $250,000 or twice the value of the property involved, or both.

2nd offense - Imprisonment for not more than 1 year, a fine of not more than the greater of $500,000 or 5 times the value of the property involved, or both.

CALIFORNIA [1992]

Concealment or disguise of nature, location, ownership, control, or source of proceeds of offense; Avoidance of transaction report. Cal. Health & Safety Code §11370.9 (Deering Supp. 1993)

It is unlawful for any person to knowingly:

(a) receive or acquire proceeds, or engage in a transaction involving proceeds known to be derived from a drug violation with the intent:

(1) to conceal or disguise or aid in concealing or disguising the nature, location, ownership,control, or source of the proceeds; or

(2) to avoid a state or federal transaction reporting requirement.

(b) give, sell, transfer, trade, invest, conceal, transport, or maintain an interest in, or otherwise make available, anything of value known to be used to commit or further the commission of a drug violation with the intent:

(1) to conceal or disguise or aid in concealing or disguising the nature, location, ownership, control, or source of the proceeds; or

(2) to avoid a state or federal transaction reporting requirement.

(c) direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of proceeds known to be derived from a drug violation with the intent:

(1) to conceal or disguise or aid in concealing or disguising the nature, location, ownership, control, or source of the proceeds; or

(2) to avoid a state or federal transaction reporting requirement.

(d) conduct a transaction involving proceeds derived from a drug violation designed to conceal or disguise the nature, location, source, ownership or, control of proceeds known to be derived from a drug violation with the intent:

(1) to conceal or disguise or aid in concealing or disguising the nature, location, ownership, control, or source of the proceeds; or

(2) to avoid a state or federal transaction reporting requirement.

The Act excludes transactions necessary to preserve an individuals right to counsel under the federal and state constitutions in a criminal investigation or prosecution.

The Act only applies to a transaction, or series of related transactions within a 30-day period, involving over $25,000 or to proceeds of a value exceeding $25,000.

Penalty: Imprisonment in county jail for not more than 1 year or in the state prison for 2 to 4 years, a fine of not more than the greater of $250,000 or twice the value of the proceeds or property involved, or both.

CONNECTICUT [1987]

Money Laundering. Conn. Gen. Stat. Ann. §§53a-275 to 53a-282 (Supp. 1992)

A person who exchanges or receives in exchange over $10,000 in monetary instruments derived from a felony with intent:

(1) to conceal that the instrument is derived from a criminal drug sale; or

(2) to help a person commit or benefit from a drug sale,

is guilty of 1st degree money laundering.

Penalty: Class B felony

A person who exchanges or receives in exchange over $10,000 in monetary instruments derived from a felony with intent:

(1) to conceal that the instrument was derived from any criminal activity; or

(2) to help a person commit or benefit from a crime.

is guilty of 2nd degree money laundering.

Penalty: Class C felony

A person who exchanges or receives in exchange over $10,000 in monetary instruments derived from a felony with knowledge the exchange:

(1) will conceal that the instrument is derived from any criminal activity; or

(2) will help a person engage in or benefit from any criminal activity,

is guilty of 3rd degree money laundering.

Penalty: Class D felony

A person who exchanges or receives in exchange monetary instruments (no amount limit) derived from a felony with knowledge that the exchange:

(1) will conceal that the instrument is derived from any criminal activity; or

(2) will help a person engage in or benefit from any criminal activity,

is guilty of 4th degree money laundering.

Penalty: Class A misdemeanor

A person is presumed to know the monetary instruments are derived from criminal activity if the person:

(1) pays or receives substantially less than face value; or

(2) knows or believes the instruments bear fictitious names; or

(3) fails to record or report a transaction as required by law or in the ordinary course of business; or

(4) knows the physical condition or form of the instruments indicates they are not the product of bona fide business or financial transactions.

In lieu or in addition to any other fine, a person shall be fined:

1st offense - Not more than the greater of $250,000 or twice the value of the instruments.

2nd or subsequent offense - Not more than the greater of $500,000 or five times the value of the instruments.

A corporation shall be fined:

1st offense - Not more than the greater of $250,000 or twice the value of the instruments.

2nd or subsequent offense - Not more than the greater of $500,000 or five times the value of the instruments.

FLORIDA [1987]

Offense of conduct of financial transaction involving proceeds of unlawful activities. Fla. Stat. Ann. §896.101 (West Supp. 1993)

A person commits an offense if:

(a) the person, knowing property represents proceeds of some form of unlawful activity, conducts or attempts to conduct a financial transaction involving proceeds of specified unlawful activity:

(1) with intent to promote the specified unlawful activity; or

(2) knowing the transaction will:

(A) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(B) avoid a state transaction reporting requirement.

(b) the person transports or attempts to transport monetary instruments or funds:

(1) with intent to promote specified unlawful activity; or

(2) knowing the instruments or funds represent proceeds from some form of unlawful activity and that the transaction will:

(A) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(B) avoid a state transaction reporting requirement.

(c) the person conducts or attempts to conduct a transaction involving property or proceeds which a state or federal enforcement officer, or someone acting under the officer's direction, represents as being derived from or used to conduct or facilitate specified unlawful activity, and the person intends:

(1) to promote specified unlawful activity; or

(2) to conceal or disguise the nature, location, source, ownership, or control of the represented proceeds or property; or

(3) to avoid a state transaction reporting requirement.

"Specified unlawful activity" means any racketeering activity.

Penalty: **2nd degree felony**

Civil Penalty: **Not more than the greater of the value of property or instruments involved, or $10,000.**

GEORGIA [1989]

Records and Reports of Currency Transactions. Ga. Code Ann. §§7-1-911 to 7-1-916 (1989, Supp. 1992)

(a) It is a felony to willfully violate Article 11:

(1) to further any other violation of state law; or

(2) as part of a pattern of illegal activity involving transactions exceeding $100,000 in a 12 month period.

(b) It is unlawful for a person, knowing moneys represent proceeds of some unlawful activity, to conduct or attempt to conduct a transaction involving proceeds of specified unlawful activity:

(1) with intent to promote the specified unlawful activity; or

(2) knowing the transaction will:

(A) conceal or disguise the nature, location, source, ownership, or control of the proceeds or specified unlawful activity; or

(B) avoid a transaction reporting requirement.

"Specified unlawful activity" means any felony or acts constituting a pattern of racketeering.

Penalty: **Subsection (a) - Imprisonment for not more than 5 years, or a fine of not more than $500,000, or both. Subsection (b) - Imprisonment for not more than 20 years, or a fine the greater of twice the amount of money involved or not more than $500,000.**

Civil Penalty: Willful violation - $1,000 maximum penalty may be assessed upon financial institution, director, officer, or employee. Subsection (b) -Not more than the greater of amount of funds involved or $10,000.

HAWAII [1987]

Monetary Laundering. **Haw. Rev. Stat. §708-8120 (Supp. 1991)**

A person who conducts or attempts to conduct through a financial institution a financial transaction involving over $5,000 in instruments with:

(a) intent to promote, conceal, disguise, or otherwise facilitate any criminal activity; or

(b) knowing the instruments represent or are derived from proceeds of criminal activity,

is guilty of money laundering.

Penalty: Class C felony

IDAHO [1992]

Money Laundering and Illegal Investment. **Idaho Code §18-8201 (Supp. 1992)**

It is unlawful for any person knowingly or intentionally:

(a) to give, sell, transfer, trade, invest, conceal, transport, or make available anything of value known to be for the purpose of committing or furthering a racketeering or drug violation;

(b) to direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of proceeds known to be derived from a racketeering or drug violation; or

(c) to conduct a financial transaction involving proceeds known to be derived from a racketeering or drug violation which is designed to (1) conceal or disguise the nature, location, source, ownership, or control of the proceeds or (2) to avoid a state or federal transaction reporting requirement.

Penalty: Imprisonment for not more than 10 years, fine of not more than the greater of $250,000 or twice the value of the property involved, or both.

ILLINOIS [1987-1988]

Money Laundering. **Ill. Ann. Stat. Ch. 38 §29B-1 (Smith-Hurd Supp. 1992)**

A person is guilty of money laundering if he knowingly engages or attempts to engage in a financial transaction in criminally derived property with:

(a) intent to promote the unlawful activity from which the property was obtained; or

(b) knowledge the transaction will conceal or disguise the nature, location, source, ownership or control of the property.

"Criminally derived property" means any property representing or derived from proceeds of a violation of the Controlled Substance Act or Cannabis Control Act.

"Financial transaction" excludes receipt by an attorney of bona fide fees for legal representation.

Penalty: Class 3 felony - $10,000 or less
Class 2 felony - More than $10,000 but no more than $100,000.
Class 1 felony - More than $100,000.

LOUISIANA [1989]

Transactions Involving Proceeds from Controlled Dangerous Substances Activity. **La. Rev. Stat. Ann §40:1049 (West Supp. 1992)**

It is unlawful for a person knowingly or intentionally:

(a) to conduct a financial transaction involving proceeds known to be derived from a drug violation which is designed to (1) conceal or disguise the nature, location, source, ownership, or control of the proceeds or (2) to avoid a state or federal transaction reporting requirement;

(b) to give, sell, transfer, trade, invest, conceal, transport, maintain an interest in, or otherwise make available anything of value known to be for the purpose of committing or furthering a drug violation;

(c) to direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of proceeds known to be derived from a drug violation; or

(d) to receive, acquire, or engage in any transaction involving proceeds derived from drug violations.

The Act excludes transactions necessary to preserve an individual's right to counsel under the federal and state constitutions. However, the state retains the right to forfeit drug-related proceeds.

Penalty: Imprisonment for not more than 10 years, fine of not more than $10,000, or both.

MARYLAND [1990]

Proceeds from Controlled Dangerous Substances Offenses. **Md. Ann. Code art. 27 §297B (Supp. 1992)**

A person knowing that proceeds are derived from a drug offense and with intent :

(a) to conceal or disguise the nature, location, source, ownership, or control of drug proceeds; or

(b) to promote a drug offense,may not:

(c) receive or acquire the proceeds;

(d) engage in a financial transaction involving the proceeds;

(e) give, sell, transfer, trade, invest, conceal, transport or maintain an interest in the proceeds;

(f) direct, promote, plan, organize, initiate, finance, manage, supervise or facilitate the transportation or transfer of the proceeds; or

(g) conduct a financial transaction involving the proceeds.

Proceeds means money or other property with a value greater than $10,000.

The Act excludes transactions necessary to preserve an individuals right to counsel under the federal and state constitutions.

Penalty: 1st felony conviction - Fine not exceeding the greater of $250,000 or twice the value of the proceeds, or imprisonment not exceeding 5 years, or both.

2nd felony conviction - Fine not exceeding the greater of $500,000 or 5 times the value of the proceeds, or imprisonment not exceeding 10 years, or both.

MINNESOTA [1989]

Concealing Criminal Proceeds. Minn. Stat. Ann. §§609.496 to 609.497 (West Supp. 1993)

It is a felony for a person who knows or has reason to know that monetary instruments represent or are derived from proceeds of a felony to conduct a transaction involving over $5,000 in monetary instruments.

The provision excludes payment or receipt of reasonable attorney fees.

Penalty: Imprisonment for not more than 10 years, a fine of not more than $100,000 or both.

It is a felony for a person to knowingly initiate, organize, plan, finance, direct, manage, supervise, or otherwise engage in a business that has as a primary or secondary purpose concealing property derived from a felony.

Penalty: Imprisonment for not more than 20 years, a fine of not more than $1,000,000 or both.

NEVADA [1991]

Use of Monetary Instrument Proceeding or Derived From Unlawful Activity, Nev. Rev. Stat. §207.195 (1992)

It is unlawful for a person, knowing monetary instruments represent or are derived from proceeds of unlawful activity:

(a) to conduct or attempt to conduct a financial transaction:

  (1) with intent to further unlawful activity;

  (2) with knowledge the transaction conceals the location, source, ownership or control of the instruments;

  (3) with knowledge the transaction evades a federal or state transaction reporting requirement;

(b) to transport or attempt to transport the monetary instrument:

  (1) with intent to further unlawful activity;

  (2) with knowledge the transportation conceals the location, source, ownership or control of the proceeds;

  (3) with knowledge the transportation evades a federal or state transaction reporting requirement.

"Financial transaction and "monetary instrument" exclude the payment of counsel for criminal defense services. "Unlawful activity" includes any racketeering crime or felony.

Penalty: Imprisonment for not less than 1 year nor more than 10 years, a fine of not more than $50,000 or both.

NEW YORK [1988]

Money Laundering. N.Y. Penal Law §§470.00 to 470.20 (McKinney 1990, Supp. 1993)

It is 3rd degree money laundering if a person exchanges or receives in exchange over $10,000 in monetary instruments or equivalent property derived from specified criminal conduct when the person knows the instruments are from any criminal conduct and the transaction will:

(a) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(b) aid in the commission of criminal conduct.

It is 2nd degree money laundering if a person exchanges or receives in exchange over $10,000 in monetary instruments or equivalent property derived from specified criminal conduct when the person knows the instruments are from any criminal conduct and:

(a) intends or knows the exchange will conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(b) intends to help a person commit or benefit from specified criminal conduct.

It is 1st degree money laundering if a person exchanges or receives in exchange over $10,000 in monetary instruments or equivalent property derived from a criminal drug sale when the person knows the instruments are from a drug sale and intends the exchange:

(a) to conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(b) to help a person commit or benefit from a criminal drug sale.

It remains lawful to return escrow funds held as part of a purchase price for real property or for tax or other lawful obligations of the person holding the escrow funds.

"Equivalent Property" excludes personal services and real property.

"Specified criminal conduct" means a felony listed as a criminal act under the Organized Crime Control Act, or enterprise corruption.

Penalty: 3rd degree - class A misdemeanor
2nd degree - class E felony
1st degree - class D felony

OKLAHOMA [1990]

Transactions involving proceeds derived from illegal drug activity prohibited. Okla. Stat. Ann. tit. 63, §2-503.1 (West Supp. 1993)

It is unlawful for any person, knowing proceeds are derived from a drug offense, knowingly or intentionally:

(a) to receive, acquire, conceal or engage in transactions involving the proceeds;

(b) to direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of the proceeds; or

(c) to conduct a financial transaction involving the proceeds which is designed to conceal or disguise the nature, location, source, ownership or control of the proceeds, or to avoid a state or federal transaction reporting requirement.

It is unlawful for any person knowingly or intentionally to give, sell, transfer, trade, invest, conceal, transport, or maintain an interest in or otherwise make available anything of value which

the person knows is intended to be used for the purpose of committing or furthering commission of a drug offense.

The Act excludes transactions necessary to preserve an individual's right to counsel under the federal and state constitutions. However, the state retains the right to forfeit drug-related proceeds.

Penalty: Felony - Imprisonment for not less than 2 years or more than 10 years, fine of not more than $50,000 or both.

PENNSYLVANIA [1989]

Dealing in proceeds of unlawful activities. Pa. Stat. Ann. tit. 18 §5111 (Purdon Supp. 1992)

It is a 1st degree felony if a person, knowing property represents proceeds of unlawful activity, conducts a financial transaction involving the proceeds:

(a) with intent to promote the unlawful activity; or

(b) knowing the transaction will:

(1) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(2) avoid a state or federal transaction reporting requirement.

"Unlawful activity" means a 1st degree misdemeanor or higher graded offense under federal or state law.

Penalty: Imprisonment for not more than 20 years, a fine the greater of $100,000 or twice the value of the property, or both.

Civil Penalty: Greater of the value of the property or $10,000.

RHODE ISLAND [1991]

Laundering of monetary instruments. R.I. Gen. Laws §11-9.1-15 (Supp. 1992)

A person commits an offense if the person conducts or attempts to conduct a financial transaction:

(1) intending to promote specified unlawful activity;

(2) intending and knowing the transaction will:

(A) conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(B) avoid a state transaction reporting requirement;

(3) knowing the property represents the proceeds of some form of unlawful activity or has been or is being used to conduct or facilitate some form of unlawful activity; or

(4) involving property represented to be proceeds of some form of unlawful activity by a law enforcement officer or other person working at the direction of an investigative or prosecutorial officer.

Penalty: **Felony- Imprisonment for not more than 20 years, a fine of not more than the greater of $500,000 or twice the value of the property involved.**

Civil Penalty: **Not more than the greater of the value of the property, funds, or Penalty: instruments involved; or $10,000.**

"Specified unlawful activity" means a felony under titles 11 and 19, or chapter 28 of title 21, and racketeering activities.

SOUTH CAROLINA [1990]

Financial transactions, monetary instruments, or financial institutions involving property or proceeds of unlawful activities in narcotic drugs or controlled substances; penalties. S.C. Code Ann. §44-53-475 (Law Co-op. Supp. 1992)

A person commits an offense if the person:

(1) conducts or attempts to conduct a financial transaction, knowing the property involved represents or is derived from a drug offense; and:

(A) intends to promote a drug offense or;

(B) knows the transaction will conceal or disguise the nature, location, source, ownership, or control of the proceeds.

(2) transports, transmits, or transfers monetary instruments or funds, or attempts to do so, from South Carolina to or through a place outside the United States or to South Carolina from or through a place outside the United States and:

(A) intends to promote a drug offense; or

(B) knows the instrument or funds represent the proceeds of unlawful activity and will conceal or disguise the nature, location, source, ownership, or control of the proceeds.

(3) conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be proceeds of unlawful activity or used to conduct or facilitate the unlawful activity and intends:

(A) to promote a drug offense; or

(B) to conceal or disguise the nature, location, source, ownership, or control of property.

Penalty: **Felony- Imprisonment for not more than 20 years, a fine of the greater $500,00 or twice the value of property involved.**

Civil Penalty: **Not more than the greater of the value of the property, funds, or monetary instruments involved, or $10,000.**

TEXAS [1989]

Offense: Illegal Expenditure or Investment. Tex. Health & Safety Code Ann. §481.126 (Vernon Supp.1993)

It is unlawful knowingly or intentionally:

(a) to expend funds the person knows are derived from a drug offense; or

(b) to finance or invest funds the person knows or believes are intended to further the commission of a drug offense.

Penalty: Imprisonment for life or a term not more than 99 years or less than 5 years, and a fine of not more than $1,000,000 or less than $50,000.

UTAH [1989]

Money Laundering and Currency Transaction Reporting. Utah Code Ann §§76-10-1901 to 76-10-1908 (1990) as amended by S. B. 151 (1993)

A person commits an offense if the person:

(a) knowing property represents proceeds of some unlawful activity, conducts or attempts to conduct a financial transaction involving proceeds of specified unlawful activity:

(1) with intent to promote specified unlawful activity; or

(2) knowing the transaction will:

(A) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or

(B) avoid a transaction reporting requirement; or

(b) transports or attempts to transport a monetary instrument:

(1) with intent to promote specified unlawful activity; or

(2) knowing the instruments represent proceeds of some unlawful activity and the transportation will:

(A) conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity; or

(B) avoid a transaction reporting requirement.

"Specified unlawful activity" means any racketeering activity.

Penalty: 2nd degree felony

VIRGINIA [1989]

Money Laundering. Va. Code Ann. §18-2-248.7 (Supp. 1992)

It is unlawful for a person, knowing that proceeds are derived from a felony, to conduct or attempt to conduct a financial transaction:

(a) with intent to promote a felony; or

(b) knowing the transaction will conceal or disguise the nature, location, source, ownership, or control of proceeds derived from a felony.

Penalty: Imprisonment for not more than 40 years, fine for not more than the greater of $500,000 or twice the value of the property, or both.

WASHINGTON [1992]

Money Laundering. Wash. Rev. Code §§9A.82.010 to 9A.82.040 (West Supp. 1993)

A person is guilty of money laundering if he conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and:

(a) knows the property is proceeds of specified unlawful activity; or

(b) knows that the transaction is designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds, and acts recklessly as to whether the property is proceeds of specified unlawful activity; or

(c) knows that the transaction is designed to avoid a transaction reporting requirement under federal law.

The Act imposes additional proof requirements in the case of a licensed attorney who accepts legal fees and cases involving a financial institution and one or more of its employees.

The Act also incorporates provisions for the seizure and forfeiture of property involved in a money laundering violation.

"Specified unlawful activity" includes class A or B felonies under Washington law, offenses included under the Washington RICO statute (RCW 9A.82.010(14)),offenses committed out of state that are punishable under the laws of that state by more than one year in prison and offenses punishable under federal law by more than one year in prison.

Penalty: Class B felony

Civil Penalty: Costs of the suit, including reasonable investigative and attorneys' fees, and twice the value of the proceeds involved.

Model Financial Transaction Reporting Act

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Model Financial Transaction Reporting Act

Policy Statement

Transaction reporting requirements are essential to an effective anti-money laundering strategy. The U.S. Senate Permanent Subcommittee on Investigations and the General Accounting Office, through separate investigations, concluded that access to financial data could assist states in fighting money laundering. The requirement that all businesses create records of significant cash and other suspicious transactions forces money movement into the open and exposes the people and property involved. The existence of the reports and law enforcement's attention to them have a stifling effect on the use of large amounts of illegally derived cash.

Federal law mandates the creation of a battery of reports by financial institutions and others. These reports are designed to expose the "underground economy" by creating a paper trail; of large cash transactions — generally those over $10,000. Federal laws, however, do not provide state and local law enforcement access to these reports on a broad basis. Some reports are obtainable from federal agencies on specific request. Others are not available to state and local authorities at all. The Model Financial Transaction Reporting Act serves the narrow and specific purpose of assuring that state and local authorities have comprehensive access to financial transaction reports.

The counterbalance of reporting, of course, is the expense involved in the creation and submission of the reports. This Model Act minimizes expenses by providing for piggy-back compliance with federal requirements whenever possible and by assuring that the state requirements are the same as the federal. This eliminates dual compliance expenses as much as possible and obviates the need for non-identical training of business employees.

Highlights of the Model Financial Transaction Reporting Act

- Provides legislative findings on the economic rationale for financial remedies.
- Guides the application of financial remedies and allows reciprocal agreements encouraging interstate cooperation and uniformity through special purpose and uniformity sections.
- Parallels current federal transaction reporting requirements for who must make reports, the contents of the reports and the circumstances that trigger the obligation to report.
- Designs the reports to provide data from which law enforcement may make general resource decisions; improve geographic and business sector targeting; focus on specific individuals and businesses; and assist in the proof of cases under investigation. The reports under the [Act] are:

(1) Suspicious Transaction Reports (STRs)

This obligation to report applies to all money transmitters including all financial institutions as defined by federal law and several additional categories of businesses. The form of the report is within the discretion of the attorney general.

(2) Currency and Foreign Transactions Reporting Act Reports

These requirements apply only to money transmitters and only impose a duty to report if the transmitter is required to file under 31 U.S.C. 5311-26 and the relevant federal regulations.

(A) Cash Transaction Reports (CTRs)

A money transmitter must file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to the transmitter if the transaction involves more than $10,000 in currency. Under various circumstances, multiple transactions are to be totalled and treated as a single transaction ("aggregated") for the purpose of reporting.

(B) Casino Reports (CTRCs)

Casinos are required to file forms similar to the general CTR by federal law. Since casinos are not legal in most states, this will have limited application.

(C) Currency or Monetary Instrument Reports (CMIRs)

Federal law requires that each person who physically transports (including mails or ships) or causes to be transported or attempts to transport, into or out of the United States, currency or other monetary instruments in an aggregate amount of over $10,000 at one time or receives such currency or monetary instruments from abroad, must make a report of that event. The report is called a Currency or Monetary Instrument Report or CMIR. Federal requirements contain numerous exemptions for legitimate commercial entities, only the model state statute automatically incorporates all of these exemptions. Individuals and businesses who are not money transmitters are not required to make a state CMIR report.

(D) Foreign Bank Account Reports (FBARs)

Under federal law, each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) that has an interest in or authority over a bank account, securities or other financial account in a foreign country must report that relationship each year. These are

called Foreign Bank Account Reports or FBARs. As with CMIRs, the requirement applies only to money transmitters, and not to all persons. These reports have great significance despite their limited application, since non-bank money transmitters such as casa de cambios must disclose Mexican accounts.

(3) Reports of Receipt of More Than $10,000 in a Trade or Business (8300s)

All persons (not just money transmitters) engaged in a trade or business who receive more than $10,000 in cash or a cash equivalent in one transaction (or in two or more related transactions) must file a report of the transaction. The report is to contain the information contained in the federal IRS Form 8300.

(4) $3,000 Logs

All money transmitters who are required by federal law to keep so-called "$3,000 logs" must keep them for the state attorney general as well. These logs are required whenever a financial institution sells a bank check or draft, cashier's check, money order or traveler's check for $3,000 or more in currency (including contemporaneous purchases totaling $3,000). If the purchaser has a deposit account with the financial institution his or her identity must be verified and basic data about the transaction noted including: name, account number, date, branch, type of instrument, serial number, and dollar amount. If the purchaser does not have a deposit account, his or her identity must be verified by identification provided, any person for whom they are dealing must be identified, and the same data collected and logged. The logs must be available for inspection at any time.

(5) Targeting Projects

The banking superintendent or other appropriate official may require additional recordkeeping in a specified geographic area for a sixty day period. Modeled on 31 U.S.C. 5326, this provision is intended to allow gathering of financial report data on a more comprehensive basis than allowed by the other financial reporting requirements, and to address specific localized money laundering problems.

Section by Section Summary of the Model Financial Transaction Reporting Act

Section 1.
Provides short title.

Section 2.
Provides legislative findings on the economics of ongoing criminal activity and provides an economic-based rationale for financial remedies.

Section 3.
Sets out the goals of the [Act], defending legitimate commerce from criminal activity and remedying the economic effects of crime.

Section 4.
Defines key phrases, including "money transmitter", "conduct the business" and "transaction."

Section 5.
Parallels current federal transaction reporting requirements on the issues of who must make reports, the contents of the reports and the circumstances that trigger the obligation to report. The reports are designed to provide law enforcement with data from which law enforcement may make general resource decisions, improve geographic and business sector targeting, focus on specific individuals and businesses in order to head off trouble at the first sign of unsound business or illegal conduct, and assist in the proof of cases under investigation. The reports are:

(a) Suspicious Transaction Reports (STRs)

The suspicious transaction report is a state analog of federal regulatory reporting of suspicious financial transactions. The obligation is on all money transmitters. The form of the report is within the discretion of the attorney general. FinCEN is now in the process of creating a single form for federally regulated institutions by synthesizing the various forms now in use by different federal agencies. The form approved by the attorney general under this subsection may follow the final FinCEN form.

(b) Currency and Foreign Transactions Reporting Act Reports

This subsection also applies to all money transmitters, but, unlike (a) only imposes a duty to report if the transmitter is required to file under 31 U.S.C. 5311-26 and the relevant federal regulations. It therefore does not impose a reporting duty on non-transmitters or on any person who is not presently obliged to file under federal law. These criteria have different effects on different reports. The reports required under (b) are:

(1) Cash Transaction Reports (CTRs)

(2) Casino Reports (CTRCs

(3) Currency or Monetary Instruments Reports (CMIRs)

(4) Foreign Bank Account Reports (FBARs)

(c) Reports of Receipt of More Than $10,000 in a Trade or Business (8300s)

Each trade or business that receives over $10,000 in one or more related transactions in cash or certain monetary instruments must report the event to the IRS on Form 8300. The state report is to contain the information contained in the federal IRS Form 8300.

(d) $3,000 Logs

All money transmitters who are required by federal law to keep so-called "$3,000 logs" must keep them for the state attorney general as well.

(e) Targeting Orders

This provision is modeled on 31 U.S.C. 5326. It it intended to allow gathering of financial report data on a more comprehensive, targeted basis than allowed by the other financial reporting requirements, and will address specific money laundering problems. It is somewhat more limited than federal law in that it does not require reports on transactions under $500.

(f) Non-Duplication of Reports

The financial transaction reports required by the [Act] are of four types: CTRs (including casino reports), CMIRs, FBARs, and 8300s. Some states have been operating under a Memorandum of Understanding (MOU) with the U.S. Department of Treasury for access to state-related CTRs and CMIRs. These MOUs allow the state to obtain computer tapes containing all of the state-related CTRs and CMIRs on a regular basis from the federal data centers. Access by this method is very inexpensive, since no data entry is required, and is rapid enough to be useful.

The FBARs relating to money transmitters and the 8300s are not covered by any memorandum of understanding.

Section 5(f)(1) recognizes the present MOUs and the possibility that access arrangements may change in the future. It provides that the filing of a report with the appropriate federal agency is deemed to be compliance with the parallel state requirement "unless the attorney general has notified the Superintendent that reports of that type are not regularly and comprehensively transmitted by that federal agency to the attorney general." Therefore, no business filing CTRs or CMIRs in compliance with federal law need file any different or additional report with the state, because a current MOU results in the regular and comprehensive transmittal of those reports to the attorney general. The same is not true of FBARs or 8300s, however. These will have to be separately filed with the state.

Section 5 (f)(2) and (3) provide protection from civil liability for financial institutions that notify law enforcement of possible violations. These provisions cover the broad range of persons involved and cover keeping and filing reports as well as divulgence of information.

(g) Allows dissemination to law enforcement on a "need to know, right to know" basis, but creates a criminal penalty for unauthorized release, similar to the protection of grand jury information.

(h) Creates criminal penalties for the violation of the transaction reporting requirements.

(i) Makes violations punishable on the basis of each separate transaction.

(j) Provides an exception to public records laws for reports etc. obtained under this section.

Section 6.

Provides investigative authority to the attorney general similar to that in securities and other regulation fields.

Section 7.

Encourages uniformity in the application, liberal construction and interstate employment of the [Act].

Section 8.

States that the provisions of the [Act] are severable so the invalidity of one does not affect the validity of the others.

Section 9.

Makes the [Act] effective on a date to be specified.

Model Financial Transaction Reporting Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Financial Transaction Reporting Act."

Section 2. Legislative Findings.

(a) Criminal activity and the networks that characterize criminal industries divert millions of dollars from the legitimate commerce of this state each year through the provision of illicit goods and services, force, fraud, and corruption.

(b) Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.

(c) Money and power generated by criminal activity are being used to obtain control of legitimate enterprises, to invest in legitimate commerce, and to control the resources of facilitating ongoing criminal activity.

(d) Criminal activity and proceeds of criminal activity subvert the basic goals of a free democracy by expropriating the government's monopoly of the legitimate use of force, by undermining the monetary medium of exchange and by subverting the judicial and law enforcement processes that are necessary for the preservation of social justice and equal opportunity.

(e) Criminal activity impedes free competition, weakens the economy, harms in-state and out-of-state investors, diverts taxable funds, threatens the domestic security, endangers the health, safety, and welfare of the public and debases the quality of life of the citizens of this state.

(f) Criminal activity becomes entrenched and powerful when the social sanctions employed to combat it are unnecessarily limited in their vision of the goals that may be achieved, in their legal tools or in their procedural approach.

(g) Societal strategies and techniques that emphasize bringing criminal remedies to bear on individual offenders for the commission of specific offenses are inadequate to reach the economic incentive supporting the criminal network, are expensive to implement, and are costly in terms of the loss of personal freedom of low-level participants in criminal networks. Comprehensive strategies are required to complement the criminal enforcement strategies by focusing on the financial components and motivations of criminal networks; enlisting the assistance of private victims; empowering courts with financially oriented tools; and developing new substantive, procedural and evidentiary laws creating effective financial remedies for criminal activity.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Section 3. Purposes.

The purposes of this [Act] are:

(a) to defend legitimate commerce from criminal activity;

(b) to provide economic disincentives for criminal activity;

(c) to remedy the economic effects of criminal activity and criminal networks; and

(d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new preventive measures through criminal sanctions and civil remedies.

Section 4. Definitions.

In this [Act], unless the context otherwise requires:

(a) "Authorized delegate" means a person designated by the licensee under Section 10 of the [Model Money Transmitter Licensing and Regulation Act].

(b) "Check cashing" means exchanging for compensation a check, draft, money order, traveler's check or a payment instrument of a licensee for money delivered to the presenter at the time and place of the presentation.

(c) "Compensation" means any fee, commission or other benefit.

(d) "Conduct the business" means engaging in activities regulated under the [Model Money Transmitter Licensing and Regulation Act] [more than ten (10) times in any calendar year] for compensation.

(e) "Foreign money exchange" means exchanging for compensation money of the United States government or a foreign government to or from money of another government at a conspicuously posted exchange rate at the time and place of the presentation of the money to be exchanged.

(f) "Licensee" means a person licensed under the [Model Money Transmitter Licensing and Regulation Act].

(g) "Location" means a place of business at which activity regulated by the [Model Money Transmitter Licensing and Regulation Act] occurs.

(h) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency and that is customarily used and accepted as a medium of exchange in the country of issuance.

(i) "Money transmitter" means a person who is located or doing business in this state, including a check casher and a foreign money exchanger, and who:

(1) sells or issues payment instruments;

(2) conducts the business of receiving money for the transmission of or transmitting money;

(3) conducts the business of exchanging payment instruments or money into any form of money or payment instrument;

(4) conducts the business of receiving money for obligors for the purpose of paying that obligor's bills, invoices or accounts; or

(5) meets the definition of a bank, financial agency or financial institution as prescribed by 31 U.S.C. Section 5312 or 31 C.F.R. Section 103.11 [and any successor provisions].

(j) "Payment instrument" means a check, draft, money order, traveler's check or other instrument or order for the transmission or payment of money, sold to one or more persons, whether or not that instrument or order is negotiable. "Payment instrument" does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher or a letter of credit.

(k) "Proceeds" means property acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind.

(l) "Property" means anything of value, and includes any interest in property, including any benefit, privilege, claim or right with respect to anything of value, whether real or personal, tangible or intangible, without reduction for expenses incurred for acquisition, maintenance, production, or any other purpose.

(m) "Superintendent" means the superintendent of banks [insert proper title of official].

(n) "Transaction" includes a purchase, sale, trade, loan, pledge, investment, gift, transfer, transmission, delivery, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, purchase or sale of any monetary instrument, use of a safe deposit box, or any other acquisition or disposition of property by whatever means effected.

(o) "Transmitting money" includes the transmission of money by any means including transmission within this country or to or from locations abroad by payment instrument, wire, facsimile or electronic transfer, courier or otherwise.

(9) "Traveler's check" means an instrument identified as a traveler's check on its face or commonly recognized as traveler's check and issued in a money multiple of United States or foreign currency with a provision for a specimen signature of the purchaser to be completed at the time of purchase and a countersignature of the purchaser to be completed at the time of negotiation.

COMMENT

Key terms are defined. In order to take advantage of the status of being a "foreign money exchange" the business must conspicuously post its exchange rates. Otherwise, it presents a need for licensing.

"Conduct the business" derives its meaning from federal tax law relating to deductions available to persons in the business of various profit-seeking pursuits. Its application to federal gambling legislation, 18 U.S.C. Section 1955, provides useful case law examples.

The central definition, "money transmitter" is compiled from the conduct that requires a license, with persons who meet the federal definitions of "bank," "financial agency" and "financial institution" also included. Reporting obligations fall on "money transmitters," the broadest of the categories by virtue of this definition.

The definitions of "proceeds" and "property" also appear in the Commission Forfeiture Reform Act (CFRA). If they are enacted together, the CFRA definition of "proceeds" should be retained because its additional clause has meaning in the context of forfeiture of proceeds. The CFRA definition of property should be deleted as duplicative.

The term "superintendent" is used throughout the draft for simplicity. The analogous position or title must be substituted to conform with legislative assignment of this regulatory function and with state nomenclature.

Section 5. Reports to the Attorney General.

(a) Each licensee and authorized delegate of a licensee and each money transmitter shall file with the attorney general's office, in a form prescribed by the attorney general, a report of any activity or business conducted by any customer that the licensee, authorized delegate or money transmitter believes may constitute a possible money laundering violation as defined in the [Model Money Laundering Act] or other specified unlawful activity as defined in the [Model Money Laundering Act]. That report shall be filed within fifteen (15) days of the activity.

(b) A licensee, authorized delegate or money transmitter that is required to file any report regarding business conducted in this state pursuant to the Currency and Foreign Transactions Reporting Act, 31 U.S.C. Sections 5311 through 5326 and 31 C.F.R. part 103 or 12 C.F.R. Section 21.11, shall file a duplicate of that report with the attorney general.

(c) All persons engaged in a trade or business who receive more than $10,000 in money in one transaction, or who receive more than $10,000 in money through two or more related transactions, must complete and file with the attorney general the information required by 26 U.S.C. Section 6050i and C.F.R. Section 1.6050I, [and any successor provisions,] concerning returns relating to cash received in trade or business.

(d) A licensee, authorized delegate or money transmitter that is regulated under the Currency and Foreign Transaction Reporting Act, 31 U.S.C. Section 5325 and 31 C.F.R. part 103, and that is required to make available prescribed records to the secretary of the United States Department of Treasury upon request at any time, shall follow the same prescribed procedures and create and maintain the same prescribed records relating to a transaction and shall make these records available to the attorney general on request at any time.

(e) (1) If the [superintendent] finds that reasonable grounds exist for requiring additional recordkeeping and reporting in order to carry out the purposes of this [Act] and prevent evasion of this [Act], the [superintendent] may issue an order requiring any group of licensees, authorized delegates or money transmitters in a geographic area to:

(A) obtain information described by the [superintendent] in the order regarding:

(i) any transactions in which the licensee, authorized delegate, or money transmitter is involved for the payment, receipt or transfer of United States coin or currency or other monetary instruments described by the [superintendent] in the order, involving amounts or denominations of $500 or more, as the [superintendent] may prescribe; and

(ii) any other person participating in those transactions.;

(B) maintain records of that information for five years or less, as the superintendent may prescribe and make those records available to the attorney general and the [superintendent]; and

(C) File a report with the attorney general and the [superintendent] regarding any transaction described in the order in the manner prescribed in the order.

(2) An order issued under subsection (e) of this

section is not effective for more than 60 days unless renewed by the [superintendent] after finding that reasonable grounds exist for continuation of the order.

(f) (1) The timely filing of a report required by this section with the appropriate federal agency shall be deemed compliance with the reporting requirements of this section, unless the attorney general has notified the [superintendent] that reports of that type are not being regularly and comprehensively transmitted by that federal agency to the attorney general.

(2) This [Act] does not preclude a licensee, authorized delegate, money transmitter, financial institution or a person engaged in a trade or business, in their discretion, from instituting contact with, and thereafter communicating with and disclosing customer financial records to appropriate state or local law enforcement agencies if the licensee, authorized delegate, money transmitter, financial institution or person has information that may be relevant to a possible violation of any criminal statute or to the evasion or attempted evasion of any reporting requirement of this [Act].

(3) A licensee, authorized delegate, money transmitter, financial institution, person engaged in a trade or business, or any officer, employee, agent or authorized delegate of any of them or any public official or governmental employee, that keeps or files a record pursuant to this section or that communicates or discloses information or records under paragraph (2) of this subsection, is not liable to its customer, to a state or local agency, or to any person for any loss or damage caused in whole or in part by the making, filing, or governmental use of the report, or any information contained in that report.

(g) The attorney general may report any possible violations indicated by analysis of the reports required by this [Act] to any appropriate law enforcement agency for use in the proper discharge of its official duties. The attorney general shall provide copies of the reports required by this [Act] to any appropriate prosecutorial or law enforcement agency upon being provided with a written request for records relating to a specific individual or entity and stating that the agency has an articulable suspicion that such individual or entity has committed a felony offense or a violation of this [Act] to which the reports are relevant. A person who releases information received pursuant to this subsection except in the proper discharge of their official duties is guilty of a [insert reference to state classification] misdemeanor.

(h) It shall be unlawful for any person:

(1) to knowingly violate any provision of this [Act]; or

(2) with the intent to disguise the fact that money or a payment instrument is the proceeds of criminal conduct; or to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any criminal conduct; to knowingly furnish or provide to a licensee, authorized delegate, money transmitter, financial institution, person engaged in a trade or business, or any officer, employee, agent or authorized delegate of any of them, or to the attorney general, any false, inaccurate, or incomplete information; or to knowingly conceal a material fact in connection with a transaction for which a report is required to be filed pursuant to this section; or

(3) with the intent to disguise the fact that money or a payment instrument is the proceeds of criminal conduct; or to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any criminal conduct; or to evade the making or filing of a report required under this [Act]; or to cause the making or filing of a report that contains a material omission or misstatement of fact; to conduct or structure a transaction or series of transactions by or through one or more licensees, authorized delegates, money transmitters, financial institutions or persons engaged in a trade or business.

(i) A person who violates subsection (h) is guilty of a [reference to appropriate classification] felony and is subject to a civil penalty of three times the value of the property involved in the transaction, or, if no transaction is involved, $5,000.

(j) Notwithstanding any other provision of law, any violation of this section constitutes a separate, punishable offense as to each transaction or exemption.

(k) Any report, record, information, analysis, or request obtained by the attorney general or any agency pursuant to this [Act] is not a public record as defined in [reference to state statute] and is not subject to disclosure.

COMMENT

The state's attorney general has been specified herein as the recipient of financial transaction reports. However, the designated recipient of these transaction reports may vary from state to state. State access to and enforcement of financial transaction reports is necessary wherever the state is experiencing significant money laundering activity, particularly border states, drug importation corridors, and states containing regional or national financial centers. This section takes every available opportunity to minimize the public and private expense of gathering the data, but some expense is unavoidable. States should consider the need for such measures accordingly. In those areas where money laundering is an enforcement priority, reporting is a powerful and effective tool, made especially effective by modern computer capabilities.

The concept of computerized state financial data analysis includes four capabilities. First, the data should be readily retrievable in response to specific queries on, for example, a name, social security number or an address.

Second, the data search should be enhanced, so that a name inquiry, for example, would trigger responses including CTRs, CMIRs or other reports that did not contain the specified name but did contain some data linked to the name. The nature of the link would be defined by "expert rules," criteria that mimic the analysis that an expert would do of the entire database.

For example, the computer could respond to a name query with financial report data containing an address that the subject used, even though a particular CTR/CMIR did not contain the subject's name. It could also link aliases, switched names, or sound-alikes. It could identify networks of names, addresses, social security numbers and other identifiers, and describe the activity of the group. The group's activity may be significant in ways beyond that of a single member, such as the activity of a group of "smurfs" or "mules."

Third, the computer could be fed expert rules for the identification of potential money laundering suspects. Criteria can be posed to the computer so that it can generate lists in response to the criteria. Experimentation with such criteria has advanced for a number of years in the Department of Treasury, most recently under FinCEN, and several states are now building on that foundation and adjusting those nationwide expert rules to the peculiarities of individual states.

Fourth, the agency may pose general statistical questions to the computer for the purpose of generating strategic guidance. The database could then be useful as an empirical check on other trend analyses, intelligence, and economic observations.

States that have access to financial transaction reports have found them extremely useful. As FinCEN capabilities develop, these reports will become even more useful.

(a) The Suspicious Transaction Report, (STR) deserves particular discussion. In a report on money laundering by the American Bankers Association, *Toward a New National Drug Policy - The Banking Industry Strategy; American Bankers Association Money Laundering Task Force,* April 27, 1989, the financial industry adopted a philosophy regarding law enforcement, the financial industry and money laundering. The introduction to that report reads:

> It is as imperative for the banking industry as it is for the law enforcement community to deter drug dealers from using our nation's financial institutions to launder monies derived from illegal activity. To be successful, however, there must be a partnership in this effort . . .Our members strongly believe that the government and the banking industry need to work together as a team, not as adversaries, in pursuing the goal of a drug-free America.

Arizona is a good example of such a team. As of September 20, 1991, each "money transmitter" doing business in Arizona, a classification that includes all banks, financial agencies and financial institutions as defined by 31 U.S.C. 5312 or 31 C.F.R. 103.11, files:

> In a form prescribed by the attorney general a report of any suspicious activity or business conducted by a customer that the . . . money transmitter believes may constitute a possible money laundering . . . [or other "racketeering" offense under the state's RICO laws] violation . . .

The state STR requirement goes beyond the analogous federal Criminal Referral Forms. It applies to all money transmitters, including various walk-in financial services such as check cashers, money exchangers and telegraph services. The Arizona Attorney General sought and received industry assistance in the design of the STR form, and industry representatives designed the form to be brief. A three-part list of possibly suspicious

circumstances is provided on the back of the STR form.

The state STR is intended to tap a different dimension of financial information than the CTR/8300 reports. Those forms are part of a set of statutory barriers erected to channel the cash economy, especially at the point that cash enters the financial system. Because these barriers must be rigid, the form must be completed even though the banker may have known the customer for years and may know exactly the innocent source or purpose of the cash being reported. The STR is designed to elicit the informed judgment of the people who often know the most about the customer and the transaction. The list of possibly suspicious circumstances is provided to help remind involved personnel of some of the circumstances commonly associated with money laundering. The instructions caution, however, that even the presence of several of the listed circumstances in the same transaction may be adequately explained by other facts or circumstances.

The information requested includes: reporting person's identification; customer identification, including date of birth, social security number or employer identification number and occupation; description of transaction; and additional information.

A portion of the form was left blank for comments. The comment section has proven to be the most useful in detecting criminal activity. In contrast with the federal reports, which require only objective information, STRs give the person filling out the report an opportunity to state subjective impressions and observations. Often bank personnel will include information in the comment section that they omit from the federal Criminal Referral Forms and CTRs.

The STR is an open invitation to the financial industry to provide selective information. Reporting is also encouraged by statutory immunity from suit and by restrictions on dissemination of the reported information to prevent dissemination for anything other than bona fide law enforcement purposes. A state STR system is a useful supplement to the federal system and, if properly developed, may provide the basis for scaling back the expensive federal reporting program in the future. Experience with the STR has shown that it is a fairly reliable predictor of criminal activity when used in conjunction with other data.

(b) Currency and Foreign Transactions Reporting Act Reports.

This subsection applies to all money transmitters, but only imposes a duty to report if the transmitter is required to file under 31 U.S.C. 5311-26 and the relevant federal regulations. It therefore does not impose a reporting duty on non-transmitters or on any person who is not presently obliged to file under federal law. The reports required under 28(b) are:

1) Cash Transaction Reports (CTRs)

A money transmitter must file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to the transmitter if the transaction involves more than $10,000 in currency. Under various circumstances, multiple transactions are to be totalled and treated as a single transaction ("aggregated") for the purpose of reporting.

2) Casino Reports (CTRCs)

Casinos are separately required to file forms similar to the CTR by federal law and therefore 28(b).

3) Currency or Monetary Instrument Reports (CMIRs)

Federal law requires that each person who physically transports (including mails or ships) or causes to be transported or attempts to transport currency or other monetary instruments in an aggregate amount of over $10,000 at one time in or out of the United States, or receives such currency or monetary instruments from abroad, must make a report of that event. The report is generally called a "Currency or Monetary Instrument Report" or "CMIR." A monetary instrument includes currency, traveler's checks, and negotiable instruments or securities in bearer form or made to a fictitious payee or in such a form that title passes on delivery. The federal requirements contain numerous exemptions for legitimate commercial entities. The [Act] automatically incorporates all of the federal exemptions. It further reduces its impact by requiring reports only of "money transmitters," not of all "persons." Therefore, individuals and businesses who are not money transmitters are not required to make a state CMIR report.

4) Foreign Bank Account Reports (FBARs)

Under federal law, each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) that has an interest in or authority over a bank, securities or other financial account in a foreign country must report that relationship each year. These are sometimes called "Foreign Bank Account Reports" or "FBARs." As with CMIRs, the requirement applies only to money transmitters, and not to all persons.

(c) Reports of Receipt of More Than $10,000 in a Trade or Business (8300s)

All persons engaged in a trade or business, whether or not they are money transmitters, who receive more than $10,000 in cash or a cash equivalent in one transaction (or in two or more related transactions) must file a report of the transaction. The report is to contain the information contained in the federal IRS Form 8300.

(d) $3,000 Logs

All money transmitters who are required by federal law to keep so-called "$3,000 logs" must keep them for the attorney general as well. These logs are required whenever a financial institution sells a bank check or draft, cashier's check, money order or traveler's check for $3,000 or more in currency (including contemporaneous purchases totalling $3,000). If the purchaser has a deposit account with the financial institution their identity must be verified and the basic information about the transaction noted: name, account number, date, branch, type of instrument, serial number, and dollar amount. If the purchaser does not have a deposit account, their identity must be verified by identification provided, including the identity of any person for whom they are dealing, and the same data collected and logged. The logs must be available for inspection at any time.

(e) Targeting Orders

The banking superintendent may require additional recordkeeping in a specified geographic area for a sixty day period. This provision is modeled on 31 U.S.C. 5326. It is intended to allow the superintendent to gather financial report data on a more comprehensive basis than allowed by the other financial reporting requirements, and to address specific localized money laundering problems.

This [Act] brackets language that would automatically incorporate successor federal statutes into the state requirements. Uniformity between federal and state requirements is vital to cost reduction and ease of compliance. If no state constitutional ban relating to delegation of legislative authority exists, these bracketed provisions should definitely be included. If this is not possible, regular state statute updates will be required to keep up with federal amendments.

Section 6. Investigations.

(a) The attorney general [district/county/state's attorney] may conduct investigations within or outside this state to determine if any licensee, authorized delegate, money transmitter or person engaged in a trade or business has failed to file a report required by this [Act] or has engaged or is engaging in any act, practice or transaction that constitutes a violation of this [Act].

(b) On request of the attorney general [district/county/state's attorney], all licensees, authorized delegates, money transmitters and financial institutions shall make their books and records available to the attorney general [district/county/state's attorney] during normal business hours for inspection and examination in connection with an investigation pursuant to this section.

COMMENT

Authority to conduct investigations is essential to make use of the information being gathered and analyzed. When transaction report data indicates suspicious activity, the attorney general must have authority to gain access to books and records of licensees, delegates, and third persons in order to move rapidly to prevent unsound activity and money laundering.

Section 7. Uniformity of Construction and Application.

(a) The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

(b) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(c) The attorney general is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

COMMENT

Uniformity of statutory provisions and cooperative enforcement mechanisms are important goals in the development of effective state enforcement mechanisms. Cooperation between sister states becomes increasingly necessary as travel, communications and wide-spread criminal networks "shrink" the country.

Section 8. Severability.

If any provision of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 9. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date].

COMMENT

Adequate time must be provided to allow industry members to get notice of the [Act] and prepare for compliance. If the usual effective date is not adequate, a date should be selected in consultation with industry and regulatory representatives.

Appendix D

States With Currency Transaction Reporting Laws

SOURCE: General Accounting Office

Model Money Transmitter Licensing and Regulation Act

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Model Money Transmitter Licensing and Regulation Act

Policy Statement

Institutions which transmit money or sell or issue payment instruments are susceptible to drug dealers' efforts to launder their illegally derived profits. In its 1992 report, Current Trends in Money Laundering, the U.S. Senate Permanent Subcommittee on Investigations concluded that non-bank money transmitters are able to launder billions of dollars each year due to inadequate regulation and supervision at state and federal levels. Urging states to enact laws to license and regulate these institutions, the report singles out Arizona's 1991 money transmitter statute as the best guide for other states. The Arizona statute was the product of over a year of negotiations between national industry representatives, local and small business representatives, regulators and enforcement representatives.

The Model Money Transmitter Licensing and Regulation Act is patterned closely on the Arizona statute with modifications which incorporate the recommendations of the Money Transmitter Regulators Association (MTRA). The Act limits entry into the money transmitter field to qualified persons and sound businesses; provides for regulation of businesses in the field; and allows revocation of business licenses for conduct tolerant of money laundering or dangerous to consumer funds.

Highlights of the Model Money Transmitter Licensing and Regulation Act

- Provides legislative findings on the economic rationale for financial remedies.
- Guides the application of financial remedies and allows reciprocal agreements encouraging interstate cooperation and uniformity through special purpose and uniformity sections.
- Prevents entry into the business by unsuitable corporations.
- Refuses to accept applicants who do not demonstrate suitable "financial condition and responsibility, financial and business experience, character and general fitness."
- Authorizes suspension or revocation of licenses for shortcomings of general competence, experience and integrity, or for insolvency.
- Provides superintendent of banks or other appropriate official broad discretion to remove licenses to protect the public.
- Allows revocation of licenses for failure to comply with the various anti-money laundering provisions or reporting requirements.
- Permits the loss of a license for conduct of an authorized delegate if the authorized delegate violates the [Model Money Laundering Act] or rules adopted under the money transmitter regulation and transaction reporting articles, if the delegate's conduct was the "result of a course of negligent failure to supervise or . . . of the willful misconduct of the licensee."

These provisions are of great practical significance, because major money transmitters have enormous economic incentive to police their own delegates and thereby avoid revocation proceedings. Loss of a license in one state may automatically trigger proceedings in other states against the same licensee, with huge economic risks to the major operator. Law enforcement may therefore rely on licensees to cooperate in the investigation of their own delegates and, more importantly, in their maintenance of internal compliance programs designed to assure strict compliance with required reporting and recordkeeping provisions.

Section by Section Summary of the Model Money Transmitter Licensing and Regulation Act

Section 1.
Provides short title.

Section 2.
Provides legislative findings on the economics of ongoing criminal activity and provides an economic-based rationale for financial remedies.

Section 3.
Sets out the goals of the [Act], defending legitimate commerce from criminal activity and remedying the economic effects of crime.

Section 4.
Defines key phrases including "conduct the business" and "money transmitter."

Section 5.
Requires a license for covered activity and establishes jurisdiction over activity occurring in the state.

Section 6.
Exempts from licensing governmental entities, banks, bank holding companies, credit unions, savings and loans, savings banks and other financial businesses licensed under state law. Also exempts check cashers and foreign money exchangers that do not engage in transactions beyond those two lines of business.

Section 7.
Creates an application process similar to that for other licensed financial businesses. It includes requiring substantial information about the background and personal history of the applicant, including photograph, fingerprints and financial background.

Section 8.
Requires a licensee to submit a financial statement showing net worth and maintain a bond for the protection of people injured by the licensee's default or fraud. The licensee may post alternatives to a bond.

Section 9.
Requires licenses to be granted or denied within 120 days of application, or the application is deemed approved. Provision is made to keep track of the names and addresses of new branch offices and delegates, but they can be added by the licensed business before approval is obtained. Licensees may do business through branch offices.

Section 10.
Permits licensees to do business through delegates, called "authorized delegates." The superintendent of banking or other appropriate official has the power to do examinations and issue orders to prevent abuses by delegates similar to powers over similar financial businesses. Licensees are assured some protection against wrongdoing or default by their delegates, but are responsible to the public for the acts of their delegates. The superintendent may issue cease and desist orders in connection with conduct of authorized delegates.

Section 11.
Gives the superintendent or other appropriate official suspension and revocation powers as in other cases. These include suspension or revocation of a license if the licensee's authorized delegate has violated money laundering prohibitions or failed to make required financial transaction reports if done "as a result of a course of negligent failure to supervise or as a result of the willful misconduct of the licensee." Section 11(f) and (g).

Section 12.
Requires a hearing prior to suspension or revocation. Notice is provided for, and the superintendent's or other official's authority to subpoena witnesses and physical items is made explicit.

Section 13.
Requires submission of quarterly and yearly financial reports. The superintendent or other appropriate official is given authority to make on-site examinations. The examinations may be made with representatives of other agencies, states or the federal government. Efficiency is promoted by allowing the superintendent to accept examination reports of other agencies, states, or federal agencies in lieu of on-site examination.

Section 14.
Requires that licensees be able to cover liabilities representing amounts that their customers have entrusted to them, through secure investments.

Section 15.
Requires regular records to be kept and made available for examinations. The records must demonstrate that any authorized delegate was subjected to a reasonable background investigation. All records must be kept for at least five years, must be maintained at a designated place, and must be made available at the superintendent's office on five business days notice.

Section 16.
Requires licensees to stand behind their money orders. If their delegate becomes insolvent, they must make good on the money orders their delegate sold to customers.

Section 17.
Requires the keeping of transaction records sufficient to give victims of default or investigators a paper trail.

Section 18.
Prevents licensing issues from delaying business deals. A person cannot buy control of a licensee if that person could not have gotten a license himself.

Section 19.
Gives the superintendent specific authority to seek injunctions.

Section 20.
Provides jurisdiction for state courts and the superintendent even if the person failed to get a license.

Section 21.
Precludes people who claim to be delegates of persons who have no license from escaping liability.

Section 22.
Provides criminal penalties. A false statement in connection with licenses and failure to permit lawful investigation are made felony violations, the degrees of which are to be set by the enacting legislature. All violations of the act for which a different penalty is not specifically provided are also made felony violations of a degree to be set.

Section 23.
Creates civil penalties, with the liability set at the amount equal to the gross business conducted in connection with the violation. The attorney general is given authority to bring such actions.

Section 24.
Provides that records of the superintendent are not public but may be disclosed in certain circumstances.

Section 25.
Requires rules promulgated under the [Act] are to be in accordance with state law governing such matters.

Section 26.
Encourages uniformity in the application, liberal construction and interstate employment of the [Act].

Section 27.
States that the provisions of the [Act] are severable so the invalidity of one does not affect the validity of the others.

Section 28.
Makes the [Act] effective on a date to be specified to allow sufficient lead time to allow applications to be filed.

Model Money Transmitter Licensing and Regulation Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Money Transmitter Licensing and Regulation Act."

Section 2. Legislative Findings.

(a) Criminal activity and the networks that characterize criminal industries divert millions of dollars from the legitimate commerce of this state each year through the provision of illicit goods and services, force, fraud, and corruption.

(b) Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.

(c) Money and power generated by criminal activity are being used to obtain control of legitimate enterprises, to invest in legitimate commerce, and to control the resources of facilitating ongoing criminal activity.

(d) Criminal activity and proceeds of criminal activity subvert the basic goals of a free democracy by expropriating the government's monopoly of the legitimate use of force, by undermining the monetary medium of exchange and by subverting the judicial and law enforcement processes that are necessary for the preservation of social justice and equal opportunity.

(e) Criminal activity impedes free competition, weakens the economy, harms in-state and out-of-state investors, diverts taxable funds, threatens the domestic security, endangers the health, safety, and welfare of the public and debases the quality of life of the citizens of this state.

(f) Criminal activity becomes entrenched and powerful when the social sanctions employed to combat it are unnecessarily limited in their vision of the goals that may be achieved, in their legal tools or in their procedural approach.

(g) Societal strategies and techniques that emphasize bringing criminal remedies to bear on individual offenders for the commission of specific offenses are inadequate to reach the economic incentive supporting the criminal network, are expensive to implement, and are costly in terms of the loss of personal freedom of low-level participants in criminal networks. Comprehensive strategies are required to complement the criminal enforcement strategies by focusing on the financial components and motivations of criminal networks; enlisting the assistance of private victims; empowering courts with financially oriented tools; and developing new substantive, procedural and evidentiary laws creating effective financial remedies for criminal activity.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Section 3. Purposes.

The purposes of this [Act] are:

(a) to defend legitimate commerce from criminal activity;

(b) to provide economic disincentives for criminal activity;

(c) to remedy the economic effects of criminal activity; and

(d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new preventive measures through criminal sanctions and civil remedies.

Section 4. Definitions.

In this [Act], unless the context otherwise requires:

(a) "Authorized delegate" means a person designated by the licensee under Section 10.

(b) "Check cashing" means exchanging for compensation a check, draft, money order, traveler's check or a payment instrument of a licensee for money delivered to the presenter at the time and place of the presentation.

(c) "Compensation" means any fee, commission or other benefit.

(d) "Conduct the business" means engaging in activities regulated under this [Act] [more than ten (10) times in any calendar year] for compensation.

(e) "Control" means ownership of fifteen percent or more of a licensee or controlling person, or the power to vote fifteen percent or more of the outstanding voting securities of a licensee or controlling person. For the purpose of determining the percentage controlled by any person, that person's interest shall be aggregated with the interest of any other person controlled by that person or by any officer, partner, or authorized delegate of that person, or by a spouse, parent or child of that person.

(f) "Controlling person" means any person directly or indirectly in control of a licensee.

(g) "Foreign money exchange" means exchanging for compensation money of the United States government or a foreign government to or from money of another government at a conspicuously posted exchange rate at the time and place of the presentation of the money to be exchanged.

(h) "Licensee" means a person licensed under this [Act].

(i) "Location" means a place of business at which activity regulated by this [Act] occurs.

(j) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency and that is customarily used and accepted as a medium of exchange in the country of issuance.

(k) "Money transmitter" means a person who is located or doing business in this state, including a check casher and a foreign money exchanger, and who does any of the following:

(1) sells or issues payment instruments.

(2) conducts the business of receiving money for the transmission of or transmitting money.

(3) conducts the business of exchanging payment instruments or money into any form of money or payment instrument.

(4) conducts the business of receiving money for obligors for the purpose of paying that obligor's bills, invoices or accounts.

(5) meets the definition of a bank, financial agency or financial institution as prescribed by 31 U.S.C 5312 or 31 C.F.R. 103.11 [and any successor provisions].

(l) "Outstanding payment instruments" means unpaid payment instruments whose sale has been reported to a licensee.

(m) "Payment instrument" means a check, draft, money order, traveler's check or other instrument or order for the transmission or payment of money, sold to one or more persons, whether or not that instrument or order is negotiable. "Payment instrument" does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher or a letter of credit.

(n) "Permissible investment" means any of the following:

(1) money on hand or on deposit in the name of the licensee.

(2) certificates of deposit or other debt instruments of a bank, savings and loan association, or credit union.

(3) bills of exchange or time drafts drawn on and accepted by a bank, otherwise known as bankers acceptances, and that are eligible for purchase by member banks of the federal reserve system.

(4) commercial paper bearing a rating of one of the three highest grades as defined by a nationally recognized organization that rates these securities.

(5) securities, obligations or other instruments, whose payment is guaranteed by the general taxing authority of the issuer, of the United States, of any state or by any other local government entity or any political subdivision or instrumentality of a government entity and that bear a rating of one of the three highest grades by a nationally recognized

investment service organization that has been engaged regularly in rating state and municipal issues for at least five years.

(6) stocks, bonds or other obligations of a corporation organized in any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico or the several territories organized by Congress that bear a rating of one of the three highest grades by a nationally recognized investment service organization that has been engaged regularly in rating corporate securities for at least five years.

(7) any receivable that is due to a licensee from its authorized delegate pursuant to a contract between the licensee and the authorized delegate as described in Section 11 if the amount of investment in those receivables does not exceed 80 per cent of the total amount of those receivables that are past due or doubtful of collection.

(8) other investments approved by the superintendent by rule.

(o) "Property" means anything of value, and includes any interest in property, including any benefit, privilege, claim or right with respect to anything of value, whether real or personal, tangible or intangible, without reduction for expenses incurred for acquisition, maintenance, production, or any other purpose.

(p) "Responsible individual" means a person employed by a licensee with principal active management authority over the business of the licensee in this state that is regulated under this [Act].

(q) "Superintendent" means the superintendent of banks. [Insert proper title of official]

(r) "Transaction" includes a purchase, sale, trade, loan, pledge, investment, gift, transfer, transmission, delivery, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, purchase or sale of any monetary instrument, use of a safe deposit box, or any other acquisition or disposition of property by whatever means effected.

(s) "Transmitting money" includes the transmission of money by any means including transmissions within this country or to or from locations abroad by payment instrument, wire, facsimile or electronic transfer, courier or otherwise.

(t) "Traveler's check" means an instrument identified as a traveler's check on its face or commonly recognized as a traveler's check and issued in a money multiple of United States or foreign currency with a provision for a specimen signature of the purchaser to be completed at the time of purchase and a countersignature of the purchaser to be completed at the time of negotiation.

COMMENT

Key terms are defined. In order to take advantage of the status of being a "foreign money exchange" the business must conspicuously post its exchange rates. Otherwise, it presents a need for licensing.

"Conduct the business" derives its meaning from federal tax law relating to deductions available to persons in the business of various profit-seeking pursuits. Its application to federal gambling legislation, 18 U.S.C. 1955, provides useful case law examples.

The central definition, "money transmitter" is compiled from the conduct that requires a license, with persons who meet the federal definitions of "bank," "financial agency" and "financial institution" also included. Reporting obligations fall on "money transmitters," the broadest of the categories by virtue of this definition.

The definition "property" also appears in the Commission Forfeiture Reform Act (CFRA). If they are enacted together, the CFRA definition of property should be deleted as duplicative.

The term "superintendent" is used throughout the draft for simplicity. The analogous position or title must be substituted to conform with legislative assignment of this regulatory function and with state nomenclature.

Section 5. License Required.

(a) A person shall not sell or issue payment instruments, conduct the business of receiving money for transmission or transmitting money, conduct the business of exchanging payment instruments or money into any form of money or payment instrument, or conduct the business of receiving money for obligors for the purpose of paying that obligor's bills, invoices or accounts, advertise, solicit, or hold himself out as conducting the business of selling or issuing payment instruments, or of receiving money for transmission or transmitting money, or of exchanging payment instruments or money into any form of money or payment instrument, or of receiving money for obligors for the purpose of paying that obligor's bills, invoices or accounts without first obtaining a license as provided in this article or becoming an authorized delegate of a

licensee with respect to those activities. A licensee is under the jurisdiction of the [banking department].

(b) No person other than a corporation organized and in good standing under the laws of the state of its incorporation or a corporation organized under the laws of a country other than the United States and in good standing under the laws of the country of its incorporation and authorized to do business in this state, may apply for or be issued a license as provided in this [Act].

(c) A person conducts business activity regulated by this [Act] in this state if:

(1) conduct constituting any element of the regulated activity occurs in this state;

(2) conduct occurs outside this state and constitutes an attempt, offer or conspiracy to engage in the activity within this state and an act in furtherance of the attempt, offer or conspiracy occurs within this state; or

(3) as part of a business activity described by this article a person knowingly transmits money into this state or makes payments in this state without disclosing the identity of each person on whose behalf the money was transmitted or the payment was made.

COMMENT

Licenses are required of those who engage in money transmission. Only corporations may be licensed, so as to simplify the job of regulation. Conduct occurs in the regulating state if it is connected with the state in ways that generally give a state criminal jurisdiction over the conduct. The state editor may wish to substitute state criminal code jurisdictional language for the analogous portion of this model.

Section 6. Exemptions.

(a) This [Act] shall not apply to:

(1) the United States or any department or agency of the United States; or

(2) this state, including any political subdivision of this state.

(b) This [Act] shall not apply to the following when engaged in the regular course of their respective businesses except that each shall be subject to the requirements of the [Model Financial Transaction Reporting Act]:

(1) a bank, financial institution, holding company, credit union, savings and loan association, building and loan association, mutual bank or savings bank, whether organized under the laws of any state or of the United States; provided, however, that the entity does not engage in business regulated under this [Act] through authorized delegates;

(2) a person who engages in check cashing or foreign money exchange and engages in other activity regulated under this [Act] only as an authorized delegate of a licensee acting within the scope of the contract between the authorized delegate and the licensee;

(3) a person licensed to conduct the business of consumer loans;

(4) a person licensed to conduct business as a debt management company;

(5) a person licensed to conduct business as an escrow company;

(6) a person licensed to conduct business as a trust company;

(7) a person licensed to conduct business as a mortgage banker; or

(8) a person licensed to conduct business as a collection agency.

COMMENT

Exemptions are provided liberally to reduce the cost of the act to a minimum both in terms of administration and in terms of regulation. This list should be modified to match the state's existing regulatory categories and terminology.

Section 7. Application for License.

Each application for a license shall be made in writing, under oath, and in the form prescribed by the [superintendent]. The application shall at least contain:

(a) the exact, full name of the applicant, the date of incorporation and the state where incorporated, copies of the articles of incorporation for the applicant, the name and address of the statutory agent, and any fictitious or trade name used for the applicant;

(b) the address of the applicant's principal place of business, the address of each location where the appli-

cant intends to transact business in this state, including any branch offices, and the name and address of each location of any authorized delegates;

(c) for each executive officer and director and each branch manager of the applicant or individual controlling person, and for each officer and director of any controlling person, unless the controlling person is a publicly traded company on a recognized national exchange and has assets in excess of five hundred million dollars ($500,000,000):

(1) a statement of personal history including but not limited to the person's name and any aliases or previous names used, date and place of birth, social security number, record of any criminal convictions, litigation history deemed significant under generally accepted accounting principles for the past ten years, and report of any bankruptcies filed individually or by any entity controlled by that person;

(2) alien registration information, if applicable;

(3) photographs and fingerprints taken by a state law enforcement agency; and if requested by the [superintendent]; and

(4) copies of the most recent tax returns filed and signed waivers for verifying submitted tax returns with the Internal Revenue Service.;

(d) an identification statement for each branch manager and responsible individual including:

(1) name and any aliases or previous names used;

(2) date and place of birth;

(3) social security number;

(4) record of criminal convictions, excluding traffic offenses;

(5) alien registration information, if applicable; and

(6) employment history and residence addresses for the preceding fifteen years.;

(e) the name and address of each authorized delegate;

(f) the identity of any account in any financial institution through which the applicant intends to conduct any business regulated under this article, including the account name, the account number, and the name and address of the financial institution; and

(g) a financial statement audited by a licensed independent certified public accountant.

COMMENT

License applications and the licensing process are described. The superintendent or other appropriate official has the power to prescribe the application form. The application is the first bulwark protecting the legitimate majority of industry members from entry by those who would bring discredit on the industry, and the first source of information for investigators when things go wrong. It should be comprehensive.

Section 8. Fee, Financial Statement and Bond.

(a) Each application for a license shall be accompanied by:

(1) an application fee of $1,000 and a license fee of $3,000. The license fee shall be refunded if the application is denied. No application fee shall be refunded. All application fees collected by the department under this [Act] shall be transmitted to the state treasurer and shall be set aside by the treasurer in a separate fund for the use of the [superintendent] in the administration and enforcement of this [Act];

(2) a financial statement, audited by a licensed independent certified public accountant, showing that the applicant's net worth is not less than one hundred thousand dollars ($100,000) plus ten thousand dollars ($10,000) for each location or authorized delegate, to a maximum of five hundred thousand dollars ($500,000), calculated in accordance with generally accepted accounting principles;

(3) copies of any financial statements that the applicant has filed with the securities exchange commission within the past three years;

(4) if the applicant is a wholly owned subsidiary of a corporation that has filed financial statements with the securities exchange commission in any of the past three years, copies of those filings;

(5) a bond executed by the licensee as principal and a surety company authorized to do business in this state as surety, except that an applicant or licensee who engages in no business regulated by this [Act] other than check cashing or foreign money exchange need not post the bond required by this subsection. The bond shall be in the amount of three hundred thousand dollars ($300,000), said amount to be increased by twenty-

five thousand dollars ($25,000) for each authorized delegate, to a maximum of one million dollars ($1,000,000). The bond shall be conditioned on the faithful compliance of the licensee, including its directors, officers, authorized delegates and employees, with this [Act]. The bond shall be payable to any person injured by the wrongful act, default, fraud or misrepresentation of the licensee, his authorized delegates or his employees, or to the state for the benefit of the person injured. Only one bond is required for any licensee irrespective of the number of officers, directors, employees, locations or authorized delegates of that licensee. The bond shall remain in effect until cancelled by the surety, which cancellation may be had only after thirty (30) days written notice to the [superintendent]. That cancellation does not affect any liability incurred or accrued prior to the termination of that thirty (30) day period.;

(6) a sample of the contract that the applicant proposes to use in its creation of authorized delegates, if any;

(7) a sample form of the payment instrument that the applicant proposes to issue, if any; and

(8) a statement identifying each clearing bank that the applicant intends to use in business regulated under this [Act].

(b) A licensee shall maintain a net worth that satisfies the requirements of subsection (a) of this section.

(c) If a person injured by the wrongful act, default, fraud or misrepresentation of the licensee, his authorized delegates or his employees commences an action for a judgment to collect from the bond, the person shall notify the [superintendent] of the action in writing at the time of the commencement of the action and shall provide copies of all documents relating to the action to the [superintendent] on request.

(d) In lieu of the surety bond prescribed in this section, an applicant for a license or a licensee may deposit with the [superintendent] cash or alternatives to cash in the amount of the required bond.

(e) In lieu of the surety bond prescribed in this section, the applicant or a licensee may make deposits with any federally insured banking institution or savings and loan association in this state designated by the applicant and approved by the [superintendent]. These deposits may include, subject to the approval of the [superintendent], cash, securities, interest-bearing stocks and bonds, notes, debentures or other obligations of the United States or agency or instrumentality of the United States or guaranteed by the United States or of this state or any subdivision of this state, of an aggregate amount at all times of not less than the amount of the required surety bond, based upon principal amount or market value, whichever is lower.

(f) The [superintendent] shall transmit the cash received under this section to the state treasurer. The state treasurer shall hold the cash in the name of this state to guarantee the faithful performance of all legal obligations of the person required to post bond pursuant to this section. The person is entitled to receive any accrued interest earned. The state treasurer may impose a fee to reimburse the state treasurer for its administrative expenses. The fee shall not exceed one hundred dollars ($100) for each cash deposit and shall be paid by the applicant or licensee.

(g) In addition to any other terms and conditions that the [superintendent] prescribes by rule or order, the principal amount of the deposits made under subsections (d) or (e) of this section shall be released only on written authorization of the [superintendent] or on the order of a court of competent jurisdiction. The principal amount of the deposit shall not be released to the licensee before the expiration of five years from the first to occur of:

(1) the date of substitution of a bond for an alternative deposit unless the [superintendent] determines in his discretion that the bond constitutes adequate security for all past, present or future obligations of the licensee. After that determination the cash alternative may be immediately released;

(2) the surrender of the license;

(3) the revocation of the license; or

(4) the expiration of the license.

(h) Notwithstanding subsections (a) through (g) of this section, if the required amount of the bond is reduced, whether by change in the number of authorized delegates or by legislative action, a cash deposit in lieu of that bond shall not be correspondingly reduced but shall be maintained at the higher amount until the expiration of five years from the effective date of the reduction in the required amount of bond, unless the [superintendent] in his discretion determines otherwise.

COMMENT

Fees in the model are set at a level designed to make the regulatory function self-supporting. The net worth statement is set at a relatively modest level, with a capped sliding scale to adjust roughly for licensee size. The bond requirement presents a more formidable barrier to entry by unstable companies. The $1,000,000 cap is substantially below the present requirements of some states. Two alternatives to the bond requirement are provided. The applicant may post cash or alternatives to cash with the superintendent or other appropriate official, or may deposit specified liquid assets in the amount of the bond.

Section 9. Issuance of License; Renewal; Branch Office Licenses; Change in Location.

(a) On the filing of a complete application, the [superintendent] shall investigate the financial condition and responsibility, financial and business experience, character and general fitness of the applicant. In his discretion, the [superintendent] may conduct an on-site investigation of the applicant, the reasonable cost of which shall be borne by the applicant. The [superintendent] shall issue a license to an applicant if the [superintendent] finds that:

(1) the applicant has fulfilled the requirements of Sections 7 and 8;

(2) the applicant has not been convicted of a felony within the past ten (10) years;

(3) no officer, director or controlling person has been convicted of a felony within the past ten (10) years;

(4) the competence, experience, and integrity of the officers, directors, controlling persons and any proposed management personnel indicates that it would be in the interest of the public to permit that person to participate in the affairs of a licensee; and

(5) the applicant has paid the required license fee.

(b) The [superintendent] shall submit to the [appropriate agency, e.g. department of public safety] and to the attorney general the name, fingerprints, and photograph of any applicant or licensee and the name, fingerprints, and photograph of any incorporator, director, officer, member or individual controlling person of any applicant within fourteen (14) days after receipt of any application. The [appropriate agency, e.g. department of public safety] shall report to the [superintendent] and the attorney general the criminal record, if any, of that person within ninety (90) days of receipt of the request of the [superintendent].

(c) The [superintendent] shall approve or deny every application for an original license within one hundred twenty (120) days after the date an application is complete, which period may be extended by the written consent of the applicant. The [superintendent] shall notify the applicant of the date when the application is determined to be complete. In the absence of approval or denial of the application, or the applicant's consent to the extension of the one hundred twenty (120) day period, the application is deemed approved and the [superintendent] shall issue the license effective as of the first business day after that one hundred twenty (120) day period or any extended period.

(d) Licensees shall pay a renewal fee of fifteen hundred dollars ($1,500) on or before the first day of [a month that is selected by the department to fit its yearly work cycle, e.g. November] of each year. The renewal fee shall be accompanied by a renewal application in the form prescribed by the [superintendent]. A license for which no renewal fee and application has been received by the first of [November] shall be suspended. A licensee may renew a suspended license no later than the first of [the month following the month selected for payment, e.g. December] of the year of expiration by paying the renewal fee plus one hundred dollars ($100) for each day the renewal fee and application were not received by the [superintendent]. A license expires on the first day of [the cut-off month, e.g. December] of each year, unless earlier renewed, surrendered or revoked. A license shall not be granted to the holder of an expired license or to an incorporator, director, or officer of that licensee except upon compliance with the requirements provided in this [Act] for an original license, including the payment of the fee.

(e) A licensee shall designate and maintain a principal place of business for the transaction of business regulated by this [Act]. If the licensee maintains one or more places of business in this state, the licensee shall designate a place of business in this state as its principal place of business for purposes of this [Act]. The license shall specify the address of the principal place of business. The licensee shall designate a responsible individual for its principal place of business.

(f) If a licensee maintains one or more locations in this state in addition to a principal place of business, and those locations are to be under the control of the licensee and not under the control of authorized delegates pursuant to section 10, the licensee shall obtain a branch office license from the [superintendent] for each additional location by filing an application as required by the [superintendent] at the time the licensee files its license application. If branch offices are added from time to time by the licensee, the licensee shall file an application for a branch office license with the [superintendent] with the licensee's next quarterly fiscal report, as prescribed in section 13. If the [superintendent] determines that it would be in the interest of the public, the [superintendent] shall issue a branch office license. The license shall indicate on its face the address of the branch office and shall designate a manager for each branch office to oversee that office. The [superintendent] may disapprove the designated manager then or at any later time if the [superintendent] finds that the competence, experience and integrity of the branch manager warrants disapproval. An individual may be designated as the manager for more than one branch. The licensee shall submit a fee of fifteen hundred dollars ($1,500) for each branch office license.

(g) A licensee shall prominently display the money transmitter license in its principal place of business and the branch office license in each branch office. Each authorized delegate shall prominently display at each location a notice, in a form prescribed by the [superintendent], that said authorized delegate is an authorized delegate of a licensee under this [Act].

(h) If the address of the principal place of business or any branch office is changed, the licensee shall immediately notify the [superintendent] in writing of the change.

COMMENT

The licensing process includes a specific list of the requirements for licensure, including lack of criminal records of the applicant and each key person. This section provides for exchange of criminal history data needed for a proper records check. Licenses must be timely processed, and renewed on an annual basis thereafter. Branch offices may be opened without advance permission, but are to be reported quarterly. Licenses are to be prominently displayed, so that any officer in the field will know if a non-licensing violation is occurring.

Section 10. Authorized Delegates of Licensees.

(a) A licensee may conduct the business regulated under this [Act] at one or more locations within this state through authorized delegates designated by the licensee from time to time, if the licensee has a net worth of at least five hundred thousand dollars ($500,000) plus twenty-five thousand dollars ($25,000) for each authorized delegate, not to exceed one million dollars ($1,000,000) according to financial statements calculated in accordance with generally accepted accounting principles audited by a licensed independent certified public accountant.

(b) Each contract between a licensee and an authorized delegate shall require the authorized delegate to operate in full compliance with the law and shall contain as an appendix a current copy of this [Act]. The licensee shall provide each authorized delegate with operating policies and procedures sufficient to permit compliance by the delegate with all applicable laws, rules and regulations. The licensee shall promptly update the policies and procedures to permit compliance with those laws, rules and regulations.

(c) The [superintendent] may issue an order to cease and desist against a licensee or its authorized delegate, including an order requiring the licensee to cease conducting its business through an authorized delegate and to take appropriate affirmative action if the [superintendent] finds that:

(1) the authorized delegate has violated, is violating or is about to violate any applicable law, rule, or regulation or any order of the [superintendent];

(2) the authorized delegate has failed to cooperate with any examination or investigation by the [superintendent] or the attorney general as authorized by this [Act];

(3) the competence, experience, or integrity of the authorized delegate or any controlling person of the authorized delegate indicates that it would not be in the interest of the public to permit that person to participate in business regulated under this [Act];

(4) the financial condition of the authorized delegate might jeopardize the interests of the public in the conduct of business regulated under this article; or

(5) the authorized delegate has engaged, is engaging or is about to engage in any unsafe or unsound

act or practice or transaction or any act, practice or transaction which constitutes a violation of this [Act] or of any rule or any order of the [superintendent].

(d) Any business for which a license is required by this article conducted by an authorized delegate outside the scope of authority conferred in the contract between the authorized delegate and the licensee is unlicensed activity.

(e) An authorized delegate of a licensee holds in trust for the benefit of the licensee all monies received from the sale or delivery of the licensee's payment instruments or monies received for transmission. If an authorized delegate commingles any of those monies with any monies or other property owned or controlled by the authorized delegate, a trust against all commingled proceeds and other monies or property controlled by the delegate is imposed in favor of the licensee in an amount equal to the amount of the proceeds due the licensee.

(f) An authorized delegate is subject to examination by the [superintendent] at the discretion of the [superintendent] pursuant to [reference to general examination authority]. The licensee is responsible for the payment of an assessment for the examination of its authorized delegates only to the extent that the examination relates to the activities conducted by the authorized delegate on behalf of the licensee. The assessment shall be made at the rate set by the [superintendent] for the examination of financial institutions [pursuant to general examination assessments, if any], and payment of that assessment shall be made in accordance with the requirements of [reference to general examination provisions].

COMMENT

Authorized delegates are permitted for licensees with a net worth over $500,000. Notice of the [Act] to delegates is assured, as is provision of each delegate with policies and procedures relating to compliance with all applicable laws, rules and regulations. Cease and desist orders are authorized in connection with the licensee or an authorized delegate. The relationship between the licensee and their authorized delegate is defined, including the imposition of a trust for the benefit of the licensee on monies received by the delegate from the sale of licensee's financial products or services. Examinations of delegates is authorized and costs are assessed to the licensee or delegate.

Section 11. Suspension or Revocation of Licenses.

The [superintendent] may suspend or revoke a license and may order a licensee to revoke the designation of an authorized delegate whose conduct has contributed to the event pursuant to [reference to state administrative procedures provision] if the [superintendent] finds that:

(a) the licensee has made a material misstatement or suppressed or withheld information on the application for license or any document required to be filed with the [superintendent];

(b) any fact or condition exists that, if it had existed or had been known at the time when the licensee applied for its license, would have been grounds for denying the application.;

(c) the licensee's net worth becomes inadequate and the licensee after ten (10) days written notice from the [superintendent] fails to furnish the capital required by this [Act];

(d) the licensee is insolvent or the licensee has suspended payment of its obligations, has made an assignment for the benefit of its creditors, or has admitted in writing its inability to pay its debts as they become due;

(e) the licensee has violated any provision of the [Model Money Laundering Act] or any provision included in the definition of specified unlawful activity in the [Model Money Laundering Act] or has violated any rule, regulation adopted pursuant to this [Act] or any order of the superintendent;

(f) an authorized delegate of the licensee has violated any provision of the [Model Money Laundering Act] or any provision included in the definition of specified unlawful activity in the [Model Money Laundering Act] or has violated any rule or regulation adopted pursuant to this [Act] or any order of the [superintendent] as a result of a course of negligent failure to supervise or as a result of the willful misconduct of the licensee;

(g) the licensee or any authorized delegate of the licensee refuses to permit the [superintendent] or the attorney general to make any examination or investigation authorized by this [Act];

(h) the licensee or any authorized delegate of the licensee knowingly fails to make any report required by this [Act];

(i) the licensee fails to pay a judgment entered in favor of a claimant, plaintiff or creditor in an action arising out of the licensee's business regulated under this [Act], within thirty (30) days after the judgment becomes final or within thirty (30) days after expiration or termination of a stay of execution or other stay of proceedings, whichever is later. If execution on the judgment is stayed by court order, operation of law or otherwise, proceedings to suspend or revoke the license for failure of the licensee to pay that judgment may not be commenced by the [superintendent] under this subsection until thirty (30) days after that stay;

(j) the licensee has been convicted in any state of a felony or of any crime of breach of trust or dishonesty; or

(k) the licensee has exhibited a pattern of failure or refusal to promptly pay lawful and enforceable obligations on payment instruments or transmissions of money.

COMMENT

Suspension or revocation of a license may be done only after a hearing in accordance with the state's general administrative procedures and if a circumstance from a specific list of circumstances is found to exist. Licensee violation of money laundering prohibitions is specified on the list, as is delegate violation of money laundering prohibitions done "as a result of a course of negligent failure to supervise or as a result of the willful misconduct of the licensee." Strict liability for the conduct of delegates would encourage more screening and closer policing of delegates by licensees, but in some cases it could result in dire consequences disproportionate to the social harm involved.

Section 12. Hearings.

No license may be suspended or revoked except after a hearing held by [superintendent]. The [superintendent] shall also hold a hearing when properly requested to do so by an applicant whose application for a license has been denied. The [superintendent] shall give the licensee or applicant at least ten (10) days written notice of the time and place of those hearings by registered or certified mail addressed to the licensee or applicant at its last known address. Any order of the [superintendent] suspending, revoking or denying a license shall state the grounds it is based on and shall not be effective until ten (10) days after written notice of the order has been sent by registered mail or certified mail to the licensee or applicant at its last known address. Any hearing required by this section shall be conducted on the record. Witnesses shall be sworn and evidence presented to the [superintendent] shall be appropriately identified and preserved. The [superintendent] is hereby granted subpoena powers to compel the production of physical items and the attendance of witnesses. Any notice required under this section shall be deemed served on the third business day after the [superintendent] mails it. A licensee may seek court review of the superintendent's findings and order.

COMMENT

Hearing procedures are described. This section will be unnecessary when reference to existing hearing provisions is adequate, or when such provisions can be incorporated.

Section 13. Reports.

(a) The [superintendent] may require reports of any licensee or authorized delegate, under penalty of perjury or otherwise, concerning the licensee's or authorized delegate's business conducted pursuant to the license issued under this [Act], as the [superintendent] may deem necessary for the enforcement of this [Act].

(b) Each licensee shall file with the [superintendent], within forty-five (45) days after the end of each fiscal quarter, a financial statement including a balance sheet, income and expense statements and a current list of all authorized delegates, branch managers, responsible individuals and locations within this state that have been added or terminated by the licensee within the fiscal quarter. Information regarding branch managers and responsible individuals shall include the information prescribed in Section 7, subsection (c) of this [Act]. For locations and authorized delegates, the licensee shall include the name and street address of each location and authorized delegate. The [superintendent] may extend the forty-five (45) day period on application of the licensee.

(c) A licensee who fails to file any report required by this section on or before the day designated for making the report, or fails to include any prescribed matter in the report, shall pay a penalty of one hundred dollars ($100) for every day that the report is delayed or incomplete, unless the [superintendent], for good cause shown, reduces the amount to be paid, or unless the time to file the report was extended in writing by the [superintendent].

(d) (1) The [superintendent] may, in his discretion, conduct an on-site examination of a licensee to determine compliance with this [Act]. The licensee shall pay the reasonable costs of the on-site examination. If the [superintendent] finds, based on the licensee's financial statements and past history of operations in this state, that an on-site examination is unnecessary, the [superintendent] may waive the on-site examination.

(2) The on-site examination may be conducted in conjunction with examinations performed by representatives of agencies of this state or of another state or of the federal government.

(3) The [superintendent], in lieu of an on-site examination, may accept the examination report of an agency of this state or of another state or of the federal government or a report prepared by an independent certified public accountant, and reports so accepted are considered for all purposes as an official report of the department for all purposes.

(e) Each licensee shall file with the [superintendent] within fifteen (15) days of its occurrence, a report of:

(1) filing for bankruptcy or reorganization;

(2) institution of license revocation proceedings; or

(3) a felony indictment or conviction of the licensee or of an officer, director, controlling person, branch manager, responsible individual or authorized delegate related to licensed activity or involving conduct defined as money laundering or specified unlawful activity in the [Model Money Laundering Act].

COMMENT

Reports may be requested of licensees, and some reports are required quarterly. Reports are essential to the regulation of problem delegates or licensees. On-site examinations are authorized, and may be coordinated with examinations by other agencies. This provision is a great cost saver for both regulators and industry members, and is strongly encouraged by such organizations as the Money Transmitter Regulators Association (MTRA), through mutual assistance and information exchange agreements. Certain alarming events must be immediately reported to the [superintendent], including a money laundering allegation against a delegate or key person. Such a charge would trigger an intensive review of the circumstances of the case, the preventive measures in place and their effectiveness to prevent money laundering in the future.

Section 14. Investments.

(a) Every licensee shall maintain at all times permissible investments that comply with either:

(1) a market value, computed in accordance with generally accepted accounting principles, of not less than the aggregate amount of all of its outstanding payment instruments; or

(2) a net carrying value, computed in accordance with generally accepted accounting principles, of not less than the aggregate amount of all of its outstanding payment instruments, provided the market value of these permissible investments is at least ninety-five percent of the net carrying value.

(b) Notwithstanding any provision of this [Act], the [superintendent] shall have, with respect to any particular licensee or all licensees, the authority to limit the extent to which any class of investments defined as permissible in subsection (h) of section 4 may be considered a permissible investment, except for money and certificates of deposit. The [superintendent] may by rule prescribe other types of investments which may be considered a permissible investment under this [Act].

COMMENT

Permissible investments must be sufficient to cover outstanding payment instruments at any given time. They are defined at length in the definitions, and may also include customized categories designated by rule, allowing flexibility to meet special circumstances.

Section 15. Records.

(a) Each licensee shall keep and use in its business books, accounts and records in accordance with generally accepted accounting principles that will enable the [superintendent] to determine whether that licensee is complying with the provisions of this [Act]. Each licensee and authorized delegate shall preserve its records for at least five years after making the final entry on any transaction. Each authorized delegate shall keep records as required by the [superintendent].

(b) For each authorized delegate, the licensee shall maintain records that demonstrate that the licensee conducted a reasonable background investigation of that authorized delegate. A licensee shall preserve those records for at least five years after the most

recent designation of that authorized delegate by the licensee.

(c) The records of the licensee regarding business regulated under this [Act] shall be maintained at its principal place of business or, with notice to the [superintendent], at another location designated by the licensee. If the records are maintained outside this state, the [superintendent] may require that the licensee make those records available to the [superintendent] at his office not more than five business days after demand. The [superintendent] may further require that those records be accompanied by an individual who will be available to answer questions regarding those records and the business regulated under this [Act]. The [superintendent] may require the appearance of a specific individual, or request the licensee to designate an individual knowledgeable with regard to the records and the business. The individual appearing with the records shall be available to the [superintendent] for up to three business days.

(d) For the purpose of enforcing this [Act], the [superintendent], or his designated representative, and the attorney general, shall have and be given free access to the offices and places of business, files, safes and vaults of any licensee or authorized delegate and may require the attendance of any person and examine him under oath about that business or the subject matter of any examination, investigation or hearing.

COMMENT

The creation, preservation and accessibility of records is essential to enforcement action. Records of the background investigation of delegates protect the licensee from charges of negligent supervision and assist investigators if a delegate is suspected of wrongdoing.

Section 16. Liability of Licensees.

Every licensee is liable for the payment of all moneys covered by payment instruments that it sells or issues in any form in this state, whether directly or through an authorized delegate and whether as a maker or a drawer, or money received for obligors or for transmission by any means, whether or not that instrument is a negotiable instrument under the laws of this state.

COMMENT

Liability of licensees for their outstanding paper or services is the foundation of consumer confidence. Consumers cannot be expected to rely on the solvency of authorized delegates.

Section 17. Notice of Source of Instrument; Transaction Records.

(a) Every payment instrument sold by a licensee directly or through an authorized delegate shall bear the name of the licensee and a unique consecutive number clearly stamped or imprinted on it.

(b) For every transaction involving the receipt of money from a customer, the licensee or authorized delegate who receives the money shall maintain written records of the transaction. The records may be reduced to computer or other electronic medium. The records collectively shall contain the name of the licensee, the street address of the location where the money was received, the name and street address of the customer if reported to the licensee or authorized delegate, the approximate date of the transaction, the name or other information from which, together with other contemporaneous records, the [superintendent] can determine the identity of those employees of the licensee or authorized delegate who conducted the transaction and the amount of the transaction. The information required by this section shall be available through the licensee or authorized delegate who received the money for at least five years from the date of the transaction.

COMMENT

Identification of specific payment instruments and receipts for cash transactions assist consumers in identifying the source of the instrument and recipient of their money, and assist investigators following a group or pattern of sales. Care has been taken not to create a receipt requirement that is too burdensome to the industry.

Section 18. Acquisition of Control.

(a) A person shall not directly or indirectly acquire control of a licensee or controlling person without the prior written approval of the [superintendent], except as otherwise provided by this section.

(b) An application for approval to acquire control of a licensee shall be in writing in a form prescribed by the [superintendent] and shall be accompanied by any information, data and records the [superintendent]

requires. The application shall be accompanied by a fee of five hundred dollars ($500). The [superintendent] shall approve or deny every application for approval to acquire control of a licensee within one hundred twenty (120) days after the date on which the application is complete, unless the applicant consents in writing to an extended period. The [superintendent] shall notify the applicant of the date when the application is determined to be complete. Any application not denied or approved within this period shall be deemed approved as of the first business day after the expiration of that period.

(c) The [superintendent] shall deny the application to acquire control of a licensee if he finds the acquisition of control is contrary to law or determines that disapproval is reasonably necessary to protect the interest of the public. In making that determination, the [superintendent] shall consider:

(1) whether the financial condition of the person seeks to control the licensee might jeopardize the financial condition of the licensee or the interests of the public in the conduct of the business regulated under this [Act]; and

(2) whether the competence, experience, and integrity of the person who seeks to control the licensee, or the officers, directors and controlling persons of the person who seeks to control the licensee, indicate that it would not be in the interest of the public to permit that person to control the licensee.

(d) Nothing in this section prohibits a person from negotiating or entering into agreements subject to the condition that the acquisition of control will not be effective until approval of the [superintendent] is obtained.

(e) This section does not apply to:

(1) a registered dealer who acts as an underwriter or member of a selling group in a public offering of the voting securities of a licensee or controlling person of a licensee;

(2) a person who acts as proxy for the sole purpose of voting at a designated meeting of the security holders of a licensee or controlling person of a licensee;

(3) a person who acquires control of a licensee or controlling person of a licensee by devise or descent;

(4) a person who acquires control of a licensee or controlling person as a personal representative, custodian, guardian, conservator, trustee or other officer appointed by a court of competent jurisdiction or by operation of law;

(5) a pledgee of a voting security of a licensee or controlling person who does not have the right, as pledgee, to vote that security; or

(6) a person or transaction that the [superintendent] by rule or order exempts in the public interest.

(f) Before filing an application for approval to acquire control, a person may request in writing a determination from the [superintendent] as to whether that person will be deemed in control, upon consummation of a proposed transaction. If the [superintendent] determines in response to that request that the person will not be in control within the meaning of this [Act], the [superintendent] shall enter an order to that effect and the proposed transaction is not subject to the requirements of this section.

COMMENT

Control and acquisition of a licensed business is a familiar problem in all regulated industries. This provision allows contingent negotiation and agreement, subject to later regulatory approval. It also provides special treatment for certain methods of acquisition, such as inheritance.

Section 19. Injunctions.

If it appears to the [superintendent] that any person has committed or is about to commit a violation of any provision of this [Act] or of any rule or order of the [superintendent], the [superintendent] may apply to the superior court for an order enjoining that person from violating or continuing to violate this [Act] or any rule or order and for injunctive or other relief as the nature of the case may require.

COMMENT

The injunctive powers provided here are essential, but may be granted by reference to more general provisions, making this provision itself unnecessary.

Section 20. Appointment of [Superintendent] as Agent for Service of Process; Forwarding of Process; Consent to Jurisdiction.

(a) A licensee, an authorized delegate, or a person who knowingly engages in business activities that are regulated under this [Act] with or without filing an application, is deemed to have:

(1) consented to the jurisdiction of the courts of this state for all actions arising under this [Act]; and

(2) appointed the [superintendent] as his lawful agent for the purpose of accepting service of process in any action, suit or proceeding that may arise under this [Act].

(b) Within three business days after service of process on the [superintendent] the [superintendent] shall transmit by certified mail copies of all lawful process accepted by the [superintendent] as an agent to that person at its last known address. Service of process shall be considered complete three business days after the [superintendent] deposits the process in the United States mail.

COMMENT

Obtaining judicial and regulatory jurisdiction over persons who have not applied for a license is especially important in light of experience that indicates simple avoidance of licensing is common among money transmitters who would not be in compliance if they attempted to get licensed.

Section 21. Prohibited Transactions.

A person shall not engage in conduct requiring a license under this [Act] as an authorized delegate of a principal if that principal is not licensed under this [Act]. A person who does so shall be deemed to be the principal seller, issuer or actor, and not merely an authorized delegate, and is liable to the holder, remitter or customer as the principal.

COMMENT

The principle of fixing liability to consumers requires that purported delegates whose alleged principal is not in fact licensed be liable as the principal.

Section 22. Criminal Penalties.

(a) A person who directly or through another violates or attempts to violate any provision of this [Act] for which a different penalty is not specifically provided is guilty of a [reference to state classification] felony. Each transaction in violation of this [Act] and each day that a violation continues shall be a separate offense.

(b) Any person who knowingly makes any false statement, misrepresentation or false certification in any application, financial statement, account record, customer receipt, report, or other document filed or required to be maintained or filed under this [Act] or who knowingly makes any false entry or omits a material entry in any such document is guilty of a [reference to state classification] felony.

(c) Any person who refuses to permit any lawful investigation by the [superintendent] or attorney general shall be guilty of a [reference to state classification] felony.

COMMENT

General criminal penalties for all violations are typical of regulatory codes. Reference to a general provision may make this section unnecessary. False statements and other misrepresentations go to the heart of the regulatory process and therefore are treated separately to provide a more severe grade of felony.

Section 23. Civil Penalties.

(a) Any person who knowingly violates any provision of this [Act] shall be assessed a civil penalty in an amount equal to the gross business conducted in connection with the violation plus the state's costs and expenses of the investigation and prosecution of the matter, including reasonable attorney fees.

(b) The attorney general [banking department/regulative agency which will have authority] may bring an action in the superior court of the county in which a violation of this section is alleged to have occurred or in any other county in which venue is permitted under [reference to state venue statutes and rules] in the same manner as the filing of other actions.

COMMENT

Civil penalties are set at amounts that are directly connected to the conduct involved. This automatic sliding scale allows for substantial remedies in appropriate cases, and eliminates the possibility that the civil remedies will be abused by cumulating multiple set penalties or regarded as punishment under *United States v. Halper*, 109 S. Ct. 1892 (1989).

Section 24. Records; Disclosure.

(a) Except as otherwise provided by this [Act], the records of the department relating to financial institutions are not public documents and are not open for inspection by the public and neither the [superintendent] nor any member of his staff shall disclose any information obtained in the discharge of his official duties to any person not connected with the department, except that the [superintendent] may disclose that information:

(1) to representatives of federal agencies insuring accounts in the financial institution;

(2) to representatives of state or federal agencies and foreign countries having regulatory or supervisory authority over the activities of the financial institution or similar financial institutions if those representatives are permitted to and do, upon request of the [superintendent], disclose similar information respecting those financial institutions under their regulation or supervision or to those representatives who state in writing under oath that they shall maintain the confidentiality of that information;

(3) to the attorney general of this state;

(4) to a federal, state or county grand jury in response to a lawful subpoena; or

(5) to the auditor general of this state for the purpose of conducting audits authorized by law.

(b) The [superintendent] may:

(1) disclose the fact of filing of applications with the department pursuant to this [Act], give notice of a hearing, if any, regarding those applications, and announce his action thereon;

(2) disclose final decisions in connection with proceedings for the suspension or revocation of licenses or certificates issued pursuant to this [Act];

(3) prepare and circulate reports reflecting the assets and liabilities of financial institutions, including other information considered pertinent to the purpose of each report for general statistical information; or

(4) prepare and circulate reports provided by law.

(c) Every official report of the department is prima facie evidence of the facts therein stated in any action or proceeding wherein the [superintendent] is a party.

(d) Nothing in this section shall be construed to prevent the disclosure of information that is admissible in evidence in any civil or criminal proceeding brought by or at the request of the [superintendent] or this state to enforce or prosecute violations of this [Act] or the rules, regulations or orders issued or promulgated pursuant to this [Act].

COMMENT

Some of the records created under the [Act] have special privacy and competitive implications. If these concerns are not adequately addressed by the general law applicable to records held by the [superintendent] or other appropriate official, a provision like this will be necessary to balance the needs for confidentiality and information flow.

Section 25. Promulgation of Rules.

All rules promulgated by the [superintendent] pursuant to this [Act] shall be in accordance with [reference to state law]. At the time the [superintendent] files a notice of proposed adoption, amendment or repeal of a rule with the secretary of state, a copy of the notice will be sent by regular United States mail to all then current licensees and applicants for licenses under this [Act].

COMMENT

Care must be taken to mesh this [Act] with existing law relating to promulgation of rules, and to assure licensees of adequate notice of proposed adoption, amendment or repeal of rules, if not already provided for in the general law.

Section 26. Uniformity of Construction and Application.

(a) The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

(b) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(c) The attorney general is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

COMMENT

Uniformity of statutory provisions and cooperative enforcement mechanisms are important goals in the development of effective state enforcement mechanisms. Cooperation between sister states becomes increasingly necessary as travel, communications and wide-spread criminal networks "shrink" the country.

Section 27. Severability.

If any provisions of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 28. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date]. All persons engaged in activities within this state encompassed by this [Act] on the date it becomes effective shall file applications in accordance with Sections 7 and 8 on or before the date this [Act] becomes effective. No person shall be deemed to be in violation of any provision of this [Act] if the application of that person is timely filed unless and until the application is denied.

COMMENT

Adequate time must be provided to allow industry members to get notice of the [Act] and prepare for compliance. If the usual effective date is not adequate, a date should be selected in consultation with industry and regulatory representatives.

Model Ongoing Criminal Conduct Act

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Model Ongoing Criminal Conduct Act

Policy Statement

Ongoing criminal activity tears at the economic and democratic fabric of society each year. Millions of dollars are diverted from the lawful economy through the provision of illegal goods and services. Free competition weakens as legitimate businesses struggle to survive against enterprises bankrolled with an endless source of criminal profits. Illegal money and power are used to take over legitimate businesses; to intimidate or bribe officials and witnesses; and to buy-off service providers. The Model Ongoing Criminal Conduct Act is intended to help prevent and remedy this economic and social damage by deterring and holding financially accountable those persons who knowingly participate in or facilitate the activities of a criminal network.

The Model Act is similar to existing racketeering, criminal syndicate/network and continuing criminal enterprise statutes. It includes several modifications to clarify civil liability and prevent non-specific pleadings that were suggested by reform efforts relating to the federal civil Racketeer Influenced Corrupt Organizations Act (RICO). The Model Act's primary thrust is the creation of civil liability. However, it does provide criminal liability for violations other than its negligent empowerment of specified unlawful activity provision, and money laundering, for which criminal sanctions are provided in the Model Money Laundering Act.

Highlights of the Model Ongoing Criminal Conduct Act

- Provides legislative findings on the economic rationale for financial remedies.
- Guides the application of financial remedies and allows reciprocal agreements encouraging interstate cooperation and uniformity through special purpose and uniformity sections.
- Creates the following five "violations," each a species of economic crime or facilitation of economic crime:

  (1) the infiltration of legitimate commerce through investment of illegal proceeds; the control of an enterprise through crime itself (as by an extortionate takeover); and conducting an enterprise through specified unlawful activity. This violation is based on federal RICO.

  (2) the knowing facilitation of a criminal network by engaging in subsidiary crimes, such as obstruction of justice, extortion, facilitation of the network by providing property or services (other than legal services) and fraud.

  (3) money laundering, by reference to the Model Money Laundering Act.

  (4) the commission of specified unlawful activity under circumstances in which the acts are for financial gain.

  (5) the negligent empowerment of specified unlawful activity. The Model Act provides only civil remedies for this violation. It fixes limited financial responsibility in the nature of a tort remedy for negligently providing property or services that facilitate specified unlawful activity.
- Creates special civil remedies for violations, including private treble damages actions, public parens patriae actions and injunctive relief.
- Defines the scope of civil liability to assure protection of legal entities and clarify the measure of damages and statutory liability for the acts of joint ventures and other persons acting in concert.

Section by Section Summary of the Model Ongoing Criminal Conduct Act

Section 1.
Provides short title.

Section 2.
Provides legislative findings on the economics of ongoing criminal activity and provides an economic rationale for financial remedies.

Section 3.
Sets out the goals of the [Act], defending legitimate commerce from criminal activity and remedying the economic effects of crime.

Section 4.
Defines key phrases including "criminal network," "enterprise," and "specified unlawful activity."

Section 5.
Defines certain forms of ongoing criminal activity that are particularly damaging to the economic health of the state as "violations." Violations include conduct in violation of existing state racketeering laws or a generic version that is supplied in the event the state has no such statute; facilitation of a criminal network; money laundering; and specified unlawful activity ("SUA") as defined in Section 4, paragraph (5) of this act.

Section 6.
Creates several civil causes of action designed to prevent and remedy the civil "violations." The causes of action include private injunctive and treble damages actions, a state action on behalf of injured persons, and a state parens patriae action on behalf of the general economy, resources and welfare of the state. These actions are limited to protect against abuse of this section by mercenary plaintiffs' lawyers and to assure equitable division among victims of the proceeds of suits. Special civil liability provision in Section 6, paragraphs (1)-(3) define the damages and joint liability applicable to the various "violations" proscribed in Section 5.

Section 7.
Creates generic criminal penalty language.

Section 8.
Encourages uniformity in the application, liberal construction and interstate employment of the [Act].

Section 9.
States that the provisions of the [Act] are severable so the invalidity of one does not affect the validity of the others.

Section 10.
Makes the [Act] effective on a date to be specified.

Model Ongoing Criminal Conduct Act (RICO/CCE)

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Ongoing Criminal Conduct Act."

Section 2. Legislative Findings.

(a) Criminal activity and the networks that characterize criminal industries divert millions of dollars from the legitimate commerce of this state each year through the provision of illicit goods and services, force, fraud, and corruption.

(b) Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.

(c) Money and power generated by criminal activity are being used to obtain control of legitimate enterprises, to invest in legitimate commerce, and to control the resources of facilitating ongoing criminal activity.

(d) Criminal activity and proceeds of criminal activity subvert the basic goals of a free democracy by expropriating the government's monopoly of the legitimate use of force, by undermining the monetary medium of exchange and by subverting the judicial and law enforcement processes that are necessary for the preservation of social justice and equal opportunity.

(e) Criminal activity impedes free competition, weakens the economy, harms in-state and out-of-state investors, diverts taxable funds, threatens the domestic security, endangers the health, safety, and welfare of the public and debases the quality of life of the citizens of this state.

(f) Criminal activity becomes entrenched and powerful when the social sanctions employed to combat it are unnecessarily limited in their vision of the goals that may be achieved, in their legal tools or in their procedural approach.

(g) Societal strategies and techniques that emphasize bringing criminal remedies to bear on individual offenders for the commission of specific offenses are inadequate to reach the economic incentive supporting the criminal network, are expensive to implement, and are costly in terms of the loss of personal freedom of low-level participants in criminal networks. Comprehensive strategies are required to complement the criminal enforcement strategies by focusing on the financial components and motivations of criminal networks; enlisting the assistance of private victims; empowering courts with financially oriented tools; and developing new substantive, procedural and evidentiary laws creating effective financial remedies for criminal activity.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Section 3. Purposes.

The purposes of this [Act] are:

(a) to defend legitimate commerce from criminal activity;

(b) to provide economic disincentives for criminal activity;

(c) to remedy the economic effects of criminal activity; and

(d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new preventive measures through criminal sanctions and civil remedies.

Section 4. Definitions.

In this [Act], unless the context otherwise requires:

(a) "Criminal network" means any combination of persons engaging, for financial gain on a continuing basis, in conduct which is chargeable or indictable under the laws of this state and punishable by imprisonment for more than one year, regardless of whether such conduct is charged or indicted. Persons "combine" if they collaborate or act in concert in carrying on or furthering the activities or purposes of a network even though: such persons may not know each other's identity; membership in the network changes from time to time; or one or more members of the network stand in a wholesaler-retailer, service provider or other arm's length relationship with others as to conduct in furtherance of the financial goals of the network.

(b) "Enterprise" includes any sole proprietorship, partnership, corporation, trust or other legal entity, or any unchartered union, association, or group of persons associated in fact although not a legal entity, and includes unlawful as well as lawful enterprises.

(c) "Proceeds" means property acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind.

(d) "Property" means anything of value, and includes any interest in property, including any benefit, privilege, claim or right with respect to anything of value, whether real or personal, tangible or intangible, without reduction for expenses incurred for acquisition, maintenance, production, or any other purpose.

(e) "Specified unlawful activity" means any act, including any preparatory or completed offense, committed for financial gain, that is punishable [as a felony] [by confinement for more than one year] under the laws of this state, or, if the act occurred outside this state, would be punishable [as a felony] [by confinement for more than one year] under the laws of the state in which it occurred and under the laws of this state, involving:

(1) [trafficking in controlled substances, homicide, robbery, extortion, extortionate extensions of credit, trafficking in explosives or weapons, trafficking in stolen property, or obstruction of justice,] [a reference to those acts or offenses described in 18 U.S.C. 1956(c)(7)].

(2) [reference to grades of offenses, such as "any first degree misdemeanor or higher," or "any felony," and/or to other appropriate specified state offenses].

(3) [for states with state racketeering or criminal profiteering statutes, reference to "predicates" to the racketeering offenses and to the racketeering offenses, e.g., illegal investment in an enterprise, illegal control of an enterprise, illegal conduct of an enterprise].

COMMENT

Key terms are defined. The concept of a "criminal network," is somewhat broader than the enterprise concept. It refers to entire criminal industries. A network may be made up of numerous enterprises, and it may contain numerous components, each made up of participants who have no contact with participants in other components. The classic example of a criminal network is the illegal drug industry, with production, transportation, sales, and money laundering as its key components.

The term "enterprise" is adapted from the federal Racketeer Influenced Corrupt Organizations (RICO) Act, but limited by exclusion of one-person enterprises.

The definitions of "proceeds" and "property" also appear in the Commission Forfeiture Reform Act (CFRA). If they are enacted together, the CFRA definition of "proceeds" should be retained because its additional clause has meaning in the context of forfeiture of proceeds. The CFRA definition of property should be deleted as duplicative.

"Specified unlawful activity" the so-called predicate offenses, should incorporate and build on the definition of racketeering if any exists. It should include state offenses that represent the key components of ongoing criminal networks. They should include not only the core offenses, such as offenses related to the provision of illicit goods and services such as drugs, fraud, theft, gambling, prostitution, child pornography, etc. but also offenses related to support services such as violence, corruption, obstruction of justice, money laundering and fencing. Civil remedies may be most effective preventing support service providers from participating by increasing the risk of economic loss to offset the opportunity for disproportionate gain. The definition is self-limiting to offenses committed for financial gain. Inclusion of a type of offense that is often committed for other reasons, such as murder, may therefore be safely done without including the inappropriate occurrences

of that offense, such as family-related homicides. The definition should also include intentional environmental crimes that involve danger to human life or threaten vital resources.

The three subparagraphs are a guided menu of choices. If the key concept is to be given adequate reach, one choice should be selected from each of (1), (2) and (3).

The references to federal law are recommended if permitted under state constitutional limitations on the delegation of legislative authority.

Section 5. Violations.

(a) Specified Unlawful Activity Influenced Enterprises; [Conduct in violation of (reference to the state racketeering influenced and corrupt organization (RICO) statute, if any) is unlawful.]

[(1) It is unlawful for any person who has knowingly received any proceeds of specified unlawful activity to use or invest, directly or indirectly, any part of such proceeds in the acquisition of any interest in any enterprise or any real property, or in the establishment or operation of any enterprise.

(2) It is unlawful for any person to knowingly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through specified unlawful activity.

(3) It is unlawful for any person to knowingly conduct the affairs of any enterprise through specified unlawful activity or to knowingly participate, directly or indirectly, in any enterprise that the person knows is being conducted through specified unlawful activity.

(4) It is unlawful for any person to conspire or attempt to violate or to solicit or facilitate the violations of the provisions of paragraph (1), (2), or (3) of this subsection.]

COMMENT

This subsection incorporates either the existing state RICO statute as a civil violation or, as a bracketed alternative, a version of RICO modeled on federal RICO, 18 U.S.C.A. 1962. This version deletes the pattern requirement to avoid the conflicting and complex case law that has overwhelmed the federal pattern requirement. Since *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985) suggested that the pattern element would be a useful device in limiting the federalization of state fraud actions, the federal courts have pressed it into service as suggested. Unfortunately, they have produced widely divergent rulings on its meaning and effect, hopelessly clouding the concept's function in the statute. The federal goal of reduction of RICO fraud cases in federal courts is inapplicable to the state courts, which will have nowhere to send excluded plaintiffs. It is best to abandon the pattern requirement and its case law baggage entirely.

This subsection also deletes the federal jurisdictional requirement of effect on interstate or foreign commerce and the separate reference to collection of an unlawful debt. The wording of paragraph (1) was changed to reflect its incorporation of the term "proceeds," and adds real estate investment as a violation in addition to investment in an enterprise. The wording of paragraph (3) was substantially amended to make clear that a person may be accountable under paragraph (3) for participation that does not include personally committing an act of specified unlawful activity. It further clarifies that an enterprise may be accountable as a "person" for knowing participation in its own enterprise activities when those activities are being conducted through specified unlawful activity. If the general law of the state does not supply a provision delineating enterprise liability, language similar to that in subsection (h) of Section 6 should be adopted. Arizona Revised Statute 13-305 is a good model.

(b) Facilitation of a Criminal Network. It is unlawful for a person acting with knowledge of the financial goals and criminal objectives of a criminal network to knowingly facilitate criminal objectives of the network by:

(1) engaging in violence or intimidation or inciting or inducing another to engage in violence or intimidation;

(2) inducing or attempting to induce a person believed to have been called or who may be called as a witness to unlawfully withhold any testimony, testify falsely or absent themselves from any official proceeding to which the potential witness has been legally summoned;

(3) attempting by means of bribery, misrepresentation, intimidation or force to obstruct, delay, or prevent the communication of information or testimony relating to a violation of any criminal statute to a peace officer, magistrate, prosecutor or grand jury;

(4) injuring or damaging another person's body or

property because that person or any other person gave information or testimony to a peace officer, magistrate, prosecutor or grand jury;

(5) attempting to suppress by an act of concealment, alteration or destruction any physical evidence that might aid in the discovery, apprehension, prosecution or conviction of any person;

(6) making any property available to a member of the criminal network;

(7) making any service other than legal services available to a member of the criminal network;

(8) inducing or committing any act or omission by a public servant in violation of the public servant's official duty;

(9) obtaining any benefit for a member of a criminal network by means of false or fraudulent pretenses, representation, promises or material omissions;

(10) making a false sworn statement regarding a material issue, believing it to be false, or making any statement, believing it to be false, regarding a material issue to a public servant in connection with an application for any benefit, privilege or license, or in connection with any official investigation or proceeding.

COMMENT

This violation advances the evolution of effective civil remedies for criminal activity by making explicit the duty of each citizen to refrain from facilitating known criminal networks. It creates no duty of care in finding out whether or not a person or transaction is part of such a network, but operates only when the actor already has such knowledge, and knowingly acts to facilitate the criminal objectives of the network. It is based on the accepted criminal prohibition of aiding and abetting a conspiracy or an illicit enterprise, and the related prohibition of facilitation of any offense.

Subsection (b) is structurally modeled on Arizona's Participation in or Assisting a Criminal Syndicate statute, A.R.S. 13-2308, and borrows language from various Arizona and other facilitation and obstruction related statutes and from both Continuing Criminal Enterprise (CCE) and RICO. It is the foundation for civil liability for knowing facilitators of criminal networks under Sections 6 and 7. Criminal networks cannot function without goods and services provided by persons other than the core criminal participants. Services range in independent moral content from contract killings of witnesses to mere financial services, such as money laundering advice. Criminal sanctions are not always appropriate, and civil remedies may be more effective as a deterrent in any event. When the facilitation is done with knowledge of the criminal nature of the criminal network and that the conduct will facilitate its criminal objectives, civil liability is appropriate.

(c) Money Laundering. It is unlawful for a person to commit money laundering as defined in the [Model Money Laundering [Act].

COMMENT

This subsection simply provides the foundation for special civil remedies for money laundering on the dual bases that money laundering, like the other conduct enumerated as violations, is particularly damaging to the economic well-being of society, and is susceptible to deterrence through civil remedies.

(d) Acts of Specified Unlawful Activity. It is unlawful for a person to commit specified unlawful activity as defined in Section 4 of this [Act].

COMMENT

Inclusion of acts of specified unlawful activity here sets up civil remedies for all such conduct as "violations" of this Act. The definition of "specified unlawful activity" limits it to acts committed for financial gain and the conduct constituting a violation here must be continuing and substantial, borrowing the operative language from federal Continuing Criminal Enterprise (CCE), 21 U.S.C. 848.

(e) Negligent Empowerment of Specified Unlawful Activity.

(1) It is unlawful for a person to negligently allow property owned or controlled by that person or services provided by that person, other than legal services, to be used to facilitate specified unlawful activity, whether by entrustment, loan, rent, lease, bailment or otherwise.

(2) Damages for negligent empowerment of specified unlawful activity shall include all reasonably foreseeable damages proximately caused by the specified unlawful activity, including, in a case brought or intervened in by the state, the costs of investigation and criminal and civil litigation of the specified unlawful activity incurred by the government for the prosecution and defense of any person involved in the specified unlawful activity, and

the imprisonment, probation, parole or other expense reasonably necessary to detain, punish, and rehabilitate any person found guilty of the specified unlawful activity, except that:

(A) if the person empowering the specified unlawful activity acted only negligently and was without knowledge of the nature of the activity and could not reasonably have known of the unlawful nature of the activity or that it was likely to occur, damages shall be limited to the greater of:

(i) the cost of the investigation and litigation of the person's own conduct plus the value of the property or service involved as of the time of its use to facilitate the specified unlawful activity, or

(ii) all reasonably foreseeable damages to any person, except any person responsible for the specified unlawful activity, and to the general economy and welfare of the state proximately caused by the person's own conduct.

(B) If the property facilitating the specified unlawful activity was taken from the possession or control of the person without that person's knowledge and against that person's will in violation of the criminal law, damages shall be limited to reasonably foreseeable damages to any person, except persons responsible for the taking or the specified unlawful activity, and to the general economy and welfare of the state proximately caused by their negligence, if any, in failing to prevent its taking.

(C) If the person was aware of the possibility that the property or service would be used to facilitate some form of unlawful activity and acted to prevent the unlawful use, damages shall be limited to reasonably foreseeable damages to any person, except any person responsible for the specified unlawful activity, and to the general economy and welfare of the state proximately caused by their failure, if any, to act reasonably to prevent the unlawful use.

(D) The plaintiff shall carry the burden of proof by a preponderance of the evidence that the specified unlawful activity occurred and was facilitated by the property or services. The defendant shall have the burden of proof by a preponderance of the evidence as to circumstances constituting lack of negligence and on the limitations on damages in this subsection.

COMMENT

This violation allocates some of the financial responsibility for the occurrence of serious financially motivated offenses to those who negligently facilitate such conduct by supplying property and services to the perpetrators. The language is that of tort, and the statute creates a cause of action in persons harmed by the conduct as well as in the state for its damages. The costs of investigating, prosecuting, incarcerating and rehabilitating of offenders are specifically designated as part of the public's damage to avoid potential uncertainty on this issue. This puts potential violators on notice of the substantial social costs of offenses and the fact that failure to act reasonably may place these costs on them. The statute gives a wide berth to legal services to avoid any possible Sixth Amendment issue, and also avoids creating liability to those who are involved in the criminal conduct. The burden of proof is the standard tort burden, as repeated in Section 6, subsection (c). The burden of proof with respect to lack of negligence and evidence of special defenses is placed on the defendant in conformance with the normal rule that "the burden of proving a fact is put on the party who presumably has peculiar means of knowledge enabling him to prove the fact," 9 J. Wigmore, Evidence 2486, at 275 (3d ed. 1940), *G.E.J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749, 751 (9th Cir. 1962) (value of ore in mine); *Selma, Rome and Dalton Railroad Co. v. United States*, 139 U. S. 560, 567, 568, 11 S. Ct. 638, 640, 35 L.Ed.266 (1891) (stating general rule). Setting the damages at the value of the property or services provided is similar to liquidated damages. It is rationally related to the social harm done because, generally speaking, more valuable property or service provides more empowerment. It has the further advantage of spreading the risk of loss to an insurable item while relieving the public, i.e. the taxpayers, of the losses caused by the defendant's negligence. This provision more than any other serves the goal of preventing the necessity of incarceration by providing direct economic disincentives for facilitation of economically motivated criminal conduct. For each person who is helped into prison by a facilitator, even by negligence alone, there should at least be a strong financial remedy for the facilitation.

Section 6. Civil Remedies; Actions.

(a) The [appropriate prosecutorial authority] or any aggrieved person may institute civil proceedings against any person in [appropriate court] seeking relief from conduct constituting a violation of this [Act] or to prevent, restrain or remedy such violation.

(b) The [appropriate court] has jurisdiction to prevent, restrain or remedy such violations by issuing appropriate orders. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or injunctions, requiring the execution of satisfactory performance bonds, creating receiverships, and enforcing constructive trusts in connection with any property or interest subject to damages, forfeiture or other remedies or restraints pursuant to this [Act].

(c) If the plaintiff in such a proceeding proves the alleged violation by a preponderance of the evidence, the [appropriate court] shall, after making due provision for the rights of innocent persons, grant relief by entering any appropriate order or judgment, including:

(1) ordering any defendant to divest himself of any interest in any enterprise, or in any real property;

(2) imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as any enterprise in which he was engaged in violation of this [Act];

(3) ordering the dissolution or reorganization of any enterprise;

(4) ordering the payment of all reasonable costs and expenses of the investigation and prosecution of any violation, civil and criminal, including reasonable attorney fees in the trial and appellate courts. [Such payments received by the state, by judgment, settlement or otherwise, shall be deposited in the Special Asset Forfeiture Fund established by the Commission Forfeiture Reform Act (CFRA)];

(5) ordering the forfeiture of any property subject to forfeiture under CFRA, pursuant to the provisions and procedures of CFRA;

(6) ordering the suspension or revocation of any license, permit, or prior approval granted to any person by any agency of the state; or

(7) ordering the surrender of the charter of any corporation organized under the laws of this state or the revocation of any certificate authorizing a foreign corporation to conduct business within this state, upon finding that for the prevention of future violations, the public interest requires the charter of the corporation to be surrendered and the corporation dissolved or the certificate revoked.

(d) Relief under paragraphs (5), (6) and (7) of subsection (c) shall not be granted in civil proceedings instituted by an aggrieved person unless the [appropriate prosecutorial authority] has instituted the proceedings or intervened. In any action under this section brought by the state or in which the state has intervened, the state may employ any of the powers of seizure and restraint of property as are provided for forfeiture actions under CFRA, or as are provided for the collection of taxes payable and past due, and whose collection has been determined to be in jeopardy.

(e) In a proceeding initiated under this section, injunctive relief shall be granted in conformity with the principles that govern the granting of relief from injury or threatened injury in other civil cases, but no showing of special or irreparable injury shall have to be made. Pending final determination of a proceeding initiated under this section, a temporary restraining order or a preliminary injunction may be issued upon a showing of immediate danger of significant injury, including the possibility that any judgment for money damages might be difficult to execute, and, in a proceeding initiated by a non-governmental aggrieved person, upon the execution of proper bond against injury for an injunction improvidently granted.

(f) Any person who is in possession or control of proceeds of any violation is an involuntary trustee and holds the property in constructive trust for the benefit of persons entitled to remedies under this [Act], unless the holder acquired the property as a bona fide purchaser for value who was not knowingly taking part in an illegal transaction.

(g) Any person whose business or property is directly or indirectly injured by conduct constituting a violation, by any person, may bring a civil action, [subject to the in pari delicto defense] and shall recover threefold the actual damages sustained and the costs and expenses of the investigation and prosecution of the action including reasonable attorney fees in the trial and appellate courts. Damages shall not include pain and suffering. Any person injured shall have a claim to any property against which any fine, or against

which treble damages under subsections (k) or (l) of this section may be imposed, superior to any right or claim of the [state, other authority] to the property, up to the value of actual damages and costs awarded in an action under this subsection. The [state, other authority] shall have a right of subrogation to the extent that an award made to a person so injured is satisfied out of property against which any fine or civil remedy in favor of the state may be imposed.

(h) (1) Whenever liability of a legal entity is based on the conduct of another, through respondeat superior or otherwise, the legal entity shall not be liable for more than actual damages and costs, including a reasonable attorney's fee, if the legal entity affirmatively shows by a preponderance of the evidence that:

(A) the conduct was not engaged in, authorized, solicited, commanded or recklessly tolerated by the legal entity, by the directors of the legal entity or by a high managerial agent of the legal entity acting within the scope of employment; and

(B) the conduct was not engaged in by an agent of the legal entity acting within the scope of employment and in behalf of the legal entity.

(2) For the purposes of this subsection:

(A) "Agent" means any officer, director or employee of the legal entity, or any other person who is authorized to act in behalf of the legal entity.

(B) "High managerial agent" means any officer of the legal entity or, in the case of a partnership, a partner, or any other agent in a position of comparable authority with respect to the formulation of policy of the legal entity.

(C) Notwithstanding any other provision of law, any pleading, motion, or other paper filed by a non-governmental aggrieved party in connection with a proceeding or action under subsection (g) of this section shall be verified. Where such aggrieved person is represented by an attorney, such pleading, motion, or other paper shall be signed by at least one attorney of record in his individual name, whose address shall be stated. Where such pleading, motion, or other paper includes an averment of fraud, coercion, accomplice, respondeat superior, conspiratorial, enterprise or other vicarious accountability, it shall state, insofar as practicable, the circumstances with particularity. The verification and the signature by an attorney required by this subsection shall constitute a certification by the signor that he has carefully read the pleading, motion, or other paper and, based on a reasonable inquiry, believes that:

(i) it is well grounded in fact;

(ii) it is warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law; and

(iii) it is not made for an improper purpose, including to harass, to cause unnecessary delay, or to impose a needless increase in the cost of litigation. The court may, after a hearing and appropriate findings of fact, impose upon any person who verified the complaint, cross-claim or counterclaim, or any attorney who signed it in violation of this subsection, or both, a fit and proper sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the complaint or claim, including reasonable attorney fees. If the court determines that the filing of a complaint or claim under subsection (g) of this section by a non-governmental party was frivolous in whole or in part, it shall award double the actual expenses, including attorney fees, incurred because of the frivolous portion of the complaint or claim.

(j) Upon the filing of a complaint, cross-claim or counterclaim under this section, an aggrieved person shall, as a jurisdictional prerequisite, immediately notify the attorney general of its filing and serve one copy of the pleading on the attorney general. Service of the notice does not limit or otherwise affect the right of the state to maintain an action under this section or intervene in a pending action nor does it authorize the person to name the state or the attorney general as a party to the action. The attorney general may, upon timely application, intervene or appear as amicus curiae in any civil proceeding or action brought under this section if the attorney general certifies that, in the opinion of the attorney general, the proceeding or action is of general public importance. In any proceeding or action brought by an aggrieved person, the state shall be entitled to the same relief as if it had instituted the proceeding or action.

(k) (1) Any [appropriate prosecutorial authority] may bring a civil action on behalf of persons whose business or property is directly or indirectly injured by conduct constituting a violation, and shall recover threefold the damages sustained by such persons and the costs and expenses of the investigation and prosecution of the action, including reasonable attorney fees in the trial and appellate courts. The court shall exclude from the amount of monetary relief awarded any amount of monetary relief:

(A) which duplicates amounts which have been awarded for the same injury; or

(B) which is properly allocable to persons who have excluded their claims under paragraph (3) of this subsection.

(2) In any action brought under this subsection, the [appropriate prosecutorial authority] shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process to any person, the court may direct further notice to such person according to the circumstances of the case.

(3) Any person on whose behalf an action is brought under this subsection may elect to exclude from adjudication the portion of the state claim for monetary relief attributable to that person by filing notice of such election within such time as specified in the notice given under this subsection.

(4) Any final judgment in an action under this subsection shall preclude any claim under this subsection by any person on behalf of whom such action was brought who fails to give notice of exclusion within the time specified in the notice given under paragraph (2) of this subsection.

(5) An action under this subsection on behalf of persons other than the state shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

(l) The attorney general may bring a civil action as parens patriae on behalf of the general economy, resources and welfare of this state, and shall recover threefold the proceeds acquired, maintained, produced or realized by or on behalf of the defendant by reason of a violation, plus the costs and expenses of the investigation and prosecution of the action, including reasonable attorney fees in the trial and appellate courts.

(1) A person who has knowingly conducted or participated in the conduct of an enterprise in violation of paragraph (a)(3) of Section 5 is also jointly and severally liable for the greater of threefold the damage sustained directly or indirectly by the state by reason of conduct in furtherance of the violation or threefold the total of all proceeds acquired, maintained, produced or realized by or on behalf of any person by reason of their participation in the enterprise except that:

(A) a person is not liable for conduct occurring prior to his first knowing participation in or conduct of the enterprise; and

B) if a person shows that, under circumstances manifesting a voluntary and complete renunciation of culpable intent, the person withdrew from the enterprise by giving a complete and timely warning to law enforcement authorities or by otherwise making a reasonable and substantial effort to prevent the conduct or result which is the criminal objective of the enterprise, that person is not liable for conduct occurring after the person's withdrawal.

(2) A person who has facilitated a criminal network in violation of subsection (b) of the [Model Ongoing Criminal Conduct Act] is also jointly and severally liable for:

(A) the damages resulting from the conduct in furtherance of the criminal objectives of the criminal network, to the extent that the person's facilitation was of substantial assistance to the conduct; and

(B) the proceeds of conduct in furtherance of the criminal objectives of the criminal network, to the extent that the person's facilitation was of substantial assistance to the conduct.

(C) A person who has engaged in money laundering in violation of the [Model Money Laundering Act] is also jointly and severally liable for the greater of threefold the damages resulting from their conduct or threefold the property that is the subject of the violation.

COMMENT

Subsection (g) allows for private as well as public recovery of three times the damage done by specified violations.

Subsections (h), (i) and (j) address the concern that treble damages may attract inappropriate plaintiffs seeking windfall returns or attempting to obtain settlement through the threat of treble liability. These subsections provide three disincentives. First, action against legal entities are limited to circumstances in which the entity would be criminally liable. Second, frivolous actions determined by language borrowed from Rule 11, Fed. R. Civ. P., are subject to double damages in favor of the wronged defendant. Third, all actions must be sent to the attorney general, who may intervene. Mercenary counsel will have to advise their clients that there are substantial financial disincentives for misuse of this cause of action.

Subsection (k) is modeled on parens patriae actions in antitrust cases under 15 U.S.C. 15c. It provides a workable procedure for notification of persons on whose behalf the treble damages action is brought, protects them against settlement or dismissal without notice, and protects defendants against duplicate judgments.

Subsection (l) takes antitrust style parens patriae standing another step, authorizing a treble damages action for damage to the commonwealth. See, *Hawaii v. Standard Oil Company of California*, 406 U.S. 251, 92 S. Ct. 885, 31 L.Ed.2d 184 (1972) (action for money damages to general economy not available under Clayton Act). Victims are entitled to damages from this recovery under subsection (g). The measure of damages for this cause of action is actual damages, computed from either the point of view of injury to the State's economy, tax base, resource misallocation and loss, investment potential, programmatic costs of civil and criminal justice, etc. or from the point of view that all proceeds of conduct constituting a violation warps and debases the economy and therefore damages it. Environmental crimes and social victimization crimes such as drug dealing are therefore compensable, as well as more traditional fraud, theft, arson, etc., which are generally based on loss computation of individual victims. The liability of persons who have engaged in violations of the Model Money Laundering Act or the Model Ongoing Criminal Conduct Act is based on concepts similar to those underlying tort liability of persons acting in concert, Persons Acting in Concert, Restatement (Second) of Torts 876 (1977). Liability relating to enterprise membership is generally analogous to that under 876(a), while liability relating to facilitation of a criminal network is more analogous to that under 876(b) and (c). Mandatory trebling is necessary to assure that the state is compensated for actual damage given the uncertainty, expense and difficulty of detecting and investigating the conduct involved, of bringing and collecting on such actions, and of restoring the state to its prior condition with money damages.

Subsection (c)'s reference, in paragraph (4), to a Special Asset Forfeiture Fund is bracketed to flag the need to either create such a fund, as described in CFRA, 20(b), or delete this sentence.

Section 7. Criminal Sanctions.

A person who violates subsections [(a)] (b), or (d) of section 5 of this [Act] is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both.

COMMENT

This Section provides generic criminal penalty language. Subsection (a) is bracketed because if it is currently a crime in the adopting state, the existing criminal sanctions will form the basis of the new treatment, whether it is altered or not. Subsection (c) is deleted because criminal sanctions for money laundering are included in the [Model Money Laundering Act].

Section 8. Uniformity of Construction and Application.

(a) The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

(b) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(c) The attorney general is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

COMMENT

Uniformity of statutory provisions and cooperative enforcement mechanisms are important goals in the development of effective state enforcement mechanisms. Cooperation between sister states becomes increasingly necessary as travel, communications and wide-spread criminal networks "shrink" the country.

Section 9. Severability.

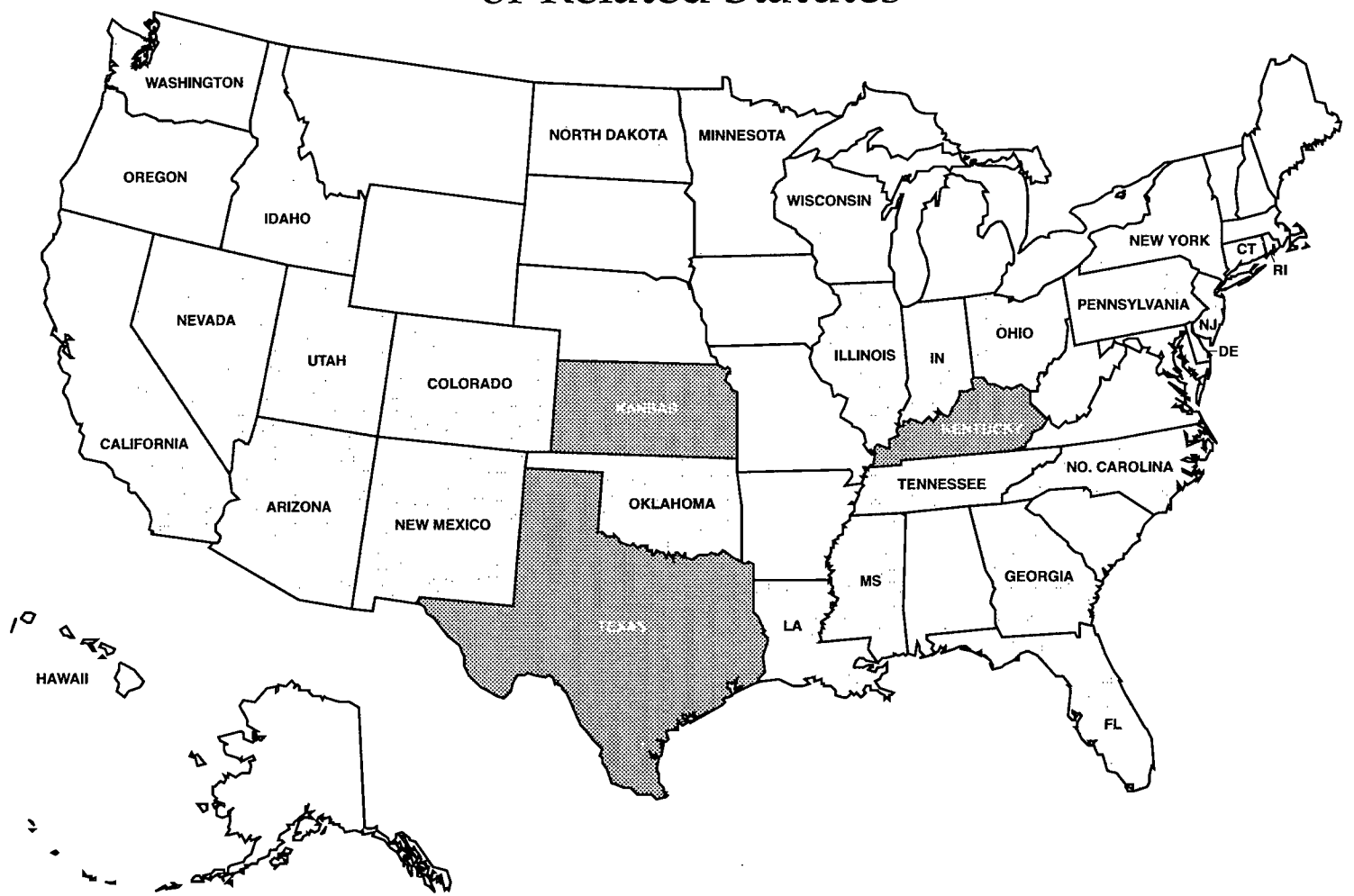
If any provision of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 10. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date].

Appendix F

States With Racketeering (RICO) or Related Statutes



SOURCE: American Prosecutors Research Institute

State Racketeering (RICO) and Related Statutes[1]

	STATE	CITATION[2]
1.	Arizona	Ariz.Rev.Stat.Ann. §§13-2301 to 13-2315 (Supp.1992)
2.	California	Cal.Penal Code §§186 to 186.8 (Supp.1993)
3.	Colorado	Colo.Rev.Stat.Ann. §§18-17-101 to 18-17-109 (Supp.1992)
4.	Connecticut	Conn.Gen.Code Ann. §§53-393 to 53-403 (Supp.1992)
5.	Delaware	Del.Code Ann.tit. 11 §§1501 to 1511 (Supp.1992)
6.	Florida	Fla.Stat.Ann. §§895.01 to 895.09 (Supp.1992)
7.	Georgia	Ga.Code Ann. §§16-14-1 to 16-14-15 (1992)
8.	Hawaii	Hawaii Rev.Stat. §§842-1 to 842-12 (Supp.1992)
9.	Idaho	Idaho Code §§18-7801 to 18-7805 (Supp.1992)
10.	Illinois	Ill.Ann.Stat.Ch.56 1/2, §§1651 to 1660 (Supp.1992)
11.	Indiana	Ind.Code Ann. §§35-45-6-1 to 35-45-6-2(criminal) and §§34-4-30.5-1 to 34-4-30.5-7(civil)(Supp.1992)
12.	Louisiana	La.Rev.Stat.Ann.tit. 15, Ch.11 §§1351 to 1356 (Supp.1993)
13.	Minnesota	Minn.Stat.Ann. §§609.901 to 609.912 (Supp.1993)
14.	Mississippi	Miss.Code Ann. §§97-43-1 to 97-43-11 (Supp.1992)
15.	Nevada	Nev.Rev.Stat. §§207.350 to 207.520 (1992)
16.	New Jersey	N.J.Stat.Ann. §§2C: 41-1 to 2C: 41-6.2 (Supp.1992)
17.	New Mexico	N.M.Stat.Ann. §§30-42-1 to 30-42-6 (Supp.1992)
18.	New York	N.Y.Civ.Prac.Law. §§1353 to 1355 (civil) and N.Y.Penal Law §460.00 to 460.80(criminal)(Supp.1993)
19.	North Carolina	N.C.Gen.Stat. §§75D-1 to 75D-14 (1990)

[1] Citation information current through April 10, 1993.
Citation list prepared by American Prosecutors Research Institute.

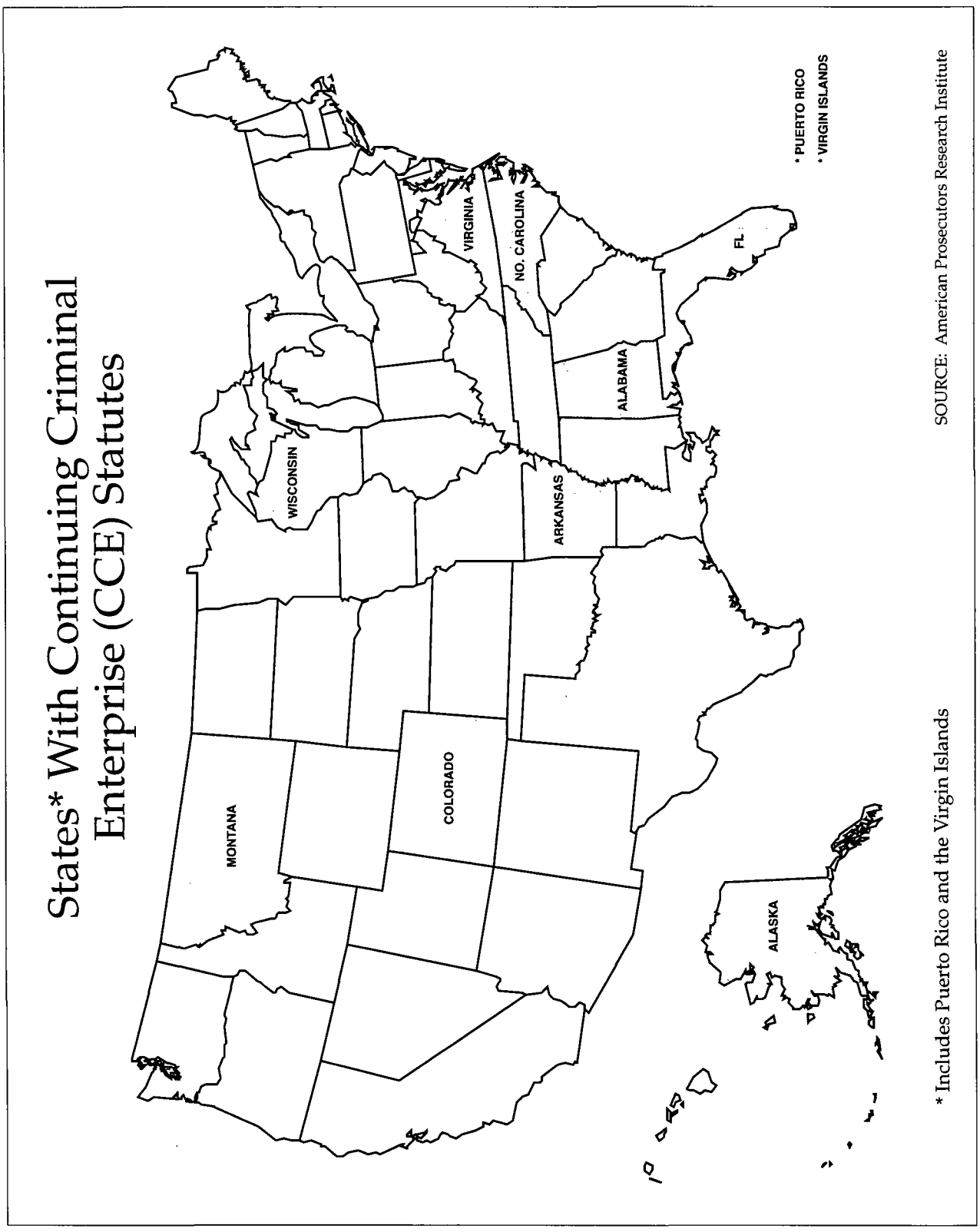
[2] Includes statutes which are not titled "Racketeering" but serve the same purpose as and are applied similarly to racketeering laws. See e.g. California's "Criminal Profiteering" statute.

20.	North Dakota	N.D.Cent.Code §§12.1-06.1-01 to 12.1-06.1-08 (Supp.1991)
21.	Ohio	Ohio Rev.Code Ann. §§2923.31 to 2923.36 (1992)
22.	Oklahoma	Okl.Stat.Ann.tit. 22, §§1401 to 1419 (Supp.1993)
23.	Oregon	Or.Rev.Stat.Ann. §§166.715 to 166.735 (Supp.1992)
24.	Pennsylvania	Pa.Cons.Stat.Ann.tit. 18 §911 (Supp.1992)
25.	Rhode Island	R.I.Gen.Laws §§7-15-1 to 7-15-11 (1992)
26.	Tennessee	Tenn.Code Ann. §§39-12-201 to 39-12-210 (Supp.1992)
27.	Utah	Utah Code Ann. §§76-10-1601 to 76-10-1609 (Supp.1992)
28.	Washington	Wash.Rev.Code Ann. §§9A.82.001 to 9A.82.904 (Supp.1993)
29.	Wisconsin	Wis.Stat.Ann. §§946.80 to 946.88 (Supp.1992)

RELATED STATUTES[3]

1.	Kansas	Kan.Stat.Ann. §21-4401 (Supp.1992)
2.	Kentucky	Ky.Rev.Stat.Ann. §506.120 (Supp.1992)
3.	Texas	Texas Penal Code Ann. §§71.01 to 71.05 (Supp.1993)

[3] These statutes differ substantially from the typical racketeering statute which is based on federal RICO. The Kentucky and Texas laws are primarily sophisticated conspiracy laws Kansas focuses on coercion by threats or intimidation. However, because they do target continuing organized crime activities, they have been included for informational purposes.



8.	Puerto Rico	P.R. Code Ann. tit. 24 §2408 (1992)
9.	Virgin Islands	V.I. Code Ann. tit. 19 ch. 29 §611 (1992)
10.	Virginia	Va. Code §18.2-248 (Supp. 1992)
11.	Wisconsin	Wi. Stat. Ann. §946.85 (Supp. 1992)

[1] Citation information current through April 10, 1993.
Citation list prepared by American Prosecutors Research Institute.

State Continuing Criminal Enterprise Statutes

	AL	AK	AR	CO	FL	MT	NC	PR	VI	VA	WI
I. PREDICATE ACTIVITY											
A. Type of Offense											
1. violation of controlled substances act		X	X	X	X	X	X	X	X	X	
2. drug trafficking	X										
3. violation of racketeering act											X[1]
B. Severity of Offense Required											
1. felony		X	X	X	X	X	X	X	X	X	X
2. unspecified	X										
II. COMMISSION OF PREDICATE ACTIVITY											
A. Series Requirement											
1. specific # of instances		5	2	2	3	2					3
2. undefined "series" of instances											
B. In Concert With Specific # of Others	5	5	5	5	5	5	5	3	5	5	5
C. Position of Organizer or Manager of Others	X	X	X	X	X		X	X	X	X	X
D. Derive Substantial Income or Resources	X[2]	X	X	X	X		X	X	X	X[3]	X[4]
E. Must Have Intent to Commit a Crime											X
III. PENALTIES											
A. First Offense											
1. up to 2x term of imprisonment and fine for the predicate offense			X			X					
2. 10 to 20 yrs. imprisonment plus up to $10,000											X
3. 25 yrs. to life imprisonment plus $50,000 to $500,000	X				X[5]						
4. 30 to 99 yrs. plus $100,000								X			
5. 10 yrs to life plus $100,000									X		
6. felony		X		X[6]			X				
B. Second or Subsequent Offense											
1. up to 3x term of imprisonment and fine for the predicate offense			X			X					
2. 50 to 99 yrs imprisonment plus $200,000								X			
3. 20 yrs to life imprisonment plus $200,000									X	X[7]	
4. life imprisonment plus $150,000 to $1,000,000	X										

 Survey information current through April 10, 1993

	AL	AK	AR	CO	FL	MT	NC	PR	VI	VA	WI
IV. CIVIL ACTION											
A. Party Permitted to Bring Action											
1. prosecuting attorney			X								
2. private party											X
B. Recovery											
1. 2x damages											X
2. 3x proceeds acquired			X								
3. costs of investigation and prosecution			X								X
4. attorneys fees											X
5. punitive damages											X
V. INCORPORATION OF FORFEITURE PROVISIONS	X		X				X	X	X		X
VI. SENTENCING											
A. No Parole, Suspension, or Deferral	X		X		X[8]			X	X	X[9]	
B. Separate Convictions for CCE Violation and Predicates					X	X					

Endnotes

1. The Wisconsin Continuing Criminal Enterprise statute is incorporated into it's Racketeering Act. A person commits a CCE violation if he violates one of the prohibited activities of the Racketeering Act in the manner proscribed by the CCE statute. To establish the commission of such prohibited activity, there must be a "pattern of racketeering activity" as defined in the statute. This consists of 3 felony predicate offenses, the first committed within 7 years of the last. A person must then have invested in an enterprise, gained control of an enterprise or otherwise received proceeds by conducting an enterprise through this "pattern of racketeering activity." Finally, this activity must be conducted in the manner proscribed by the CCE statute. That is, in concert with 5 or more others, etc...

2. "Substantial Income or Resources" is defined as being anything above minimum wage.

3. In Virginia, engaging in a continuing criminal enterprise is a requisite element of a "drug kingpin" violation. The enterprise involved must have received at least 2 million dollars in gross receipts during any 12 month period or engage in the enterprise to intentionally manufacture, sell, give distribute or possess listed drugs in a given quantity.

4. "Substantial Income or Resources" is defined as anything exceeding $25,000.

5. In Florida, the fine is set at $500,000.

6. In Colorado, engaging in a continuing criminal enterprise is an aggravating circumstance in the commission of the predicate activity. The presence of this circumstance designates the defendant a "special offender," which carries a term of imprisonment greater than the presumptive range for a class 2 felony, but not more than twice the maximum term for a class 2 felony.

7. The penalty for a "drug kingpin" conviction is 20 yrs. to life imprisonment plus a fine of up to $1,000,000

8. A person convicted of a CCE violation is eligible for parole only after serving the mandatory minimum of 25 years imprisonment.

9. Parole is available only after serving the mandatory minimum sentence of 20 years imprisonment.

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