

# **The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority And Strict Deadlines Imposed on All Parties**

*STEFAN D. CASSELLA*<sup>\*</sup>

## **I. INTRODUCTION**

On April 25, 2000, President Clinton signed the most comprehensive revision of the civil asset forfeiture laws to be passed by Congress since the first forfeiture statutes were enacted in 1789. The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA")<sup>1</sup> revises centuries old civil forfeiture practice, places new burdens and time limits on the government, creates a uniform "innocent owner" defense, allows claimants to recover interest and attorneys fees, expands forfeiture into new areas, resolves ambiguities and issues that have split the courts, and gives the government new procedural tools that will enhance its ability to use asset forfeiture as a weapon against crime. It applies to all civil forfeiture proceedings commenced on or after August 23, 2000.<sup>2</sup>

The first part of this article traces the legislative history of the new law, describes the scope of the statutes in terms of the offenses and parties to which they apply and the interplay between the new statutes and the old law, and outlines the major provisions of the legislation. The second part discusses, in detail, the procedural changes that impose strict deadlines on both the government and the claimants in administrative and judicial civil forfeiture actions.

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<sup>\*</sup> The author is the Assistant Chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice and was the principal drafter of the Department of Justice's asset forfeiture proposals. He testified twice at the Congressional hearings on the Civil Asset Forfeiture Reform Act, and participated in the negotiations with Members of Congress and their staff from 1996 through 2000. The views expressed in this article, however, are the personal views of the author, and do not represent the official views or policies of the Department of Justice.

1. Pub. L. 106-185, 114 Stat. 202 (2000).

2. Section 21 of CAFRA provides that, with one exception relating to the enactment of 28 U.S.C. § 2466, the "Act and the amendments made by this Act shall apply to any forfeiture proceeding commenced on or after the date that is 120 days after the date of enactment of this act." Section 2466 is the codification of what is popularly known as the "fugitive disentitlement doctrine."

## II. Overview of CAFRA

### A. The Legislative History

The legislative history of CAFRA stretches over four years, from the introduction of competing bills in the House of Representatives in 1996 and 1997 to the floor statements of its sponsors on the day it passed the House in final form in April, 2000. In many cases, provisions ultimately included in CAFRA can be traced directly back to provisions introduced by Rep. Henry J. Hyde (R. Ill.) or drafted by the Department of Justice and introduced by then-Rep. Charles E. Schumer (D. N.Y.) in 1996 and 1997.

The legislative history of those proposals—which includes hearings conducted in 1996 and 1997 and a comprehensive 1997 Committee Report—therefore applies to the provisions that became law. In other cases, provisions ultimately included in CAFRA were not developed until 1999 when the bill moved to the Senate, or not until the final weeks before final passage. In those instances, the legislative history consists only of the statements of witnesses at the 1999 Senate hearing, statements made by the Senate sponsors of the two bills that were ultimately combined to produce CAFRA, or statements of Senators and Representatives placed in the Congressional Record when the bills went to a final vote in the Senate and House, respectively. There is, unfortunately, no Committee Report from either the House of Representatives or the Senate regarding the final version of the bill.

The Department of Justice has published a compilation of the relevant portions of the legislative history.<sup>3</sup> The following is a brief recitation of the key events.

#### *1. Hearings on CAFRA in 1996 and 1997*

In 1996, Rep. Hyde held hearings on H.R. 1916, 104<sup>th</sup> Cong., his original civil asset forfeiture reform bill, and on a counter-proposal drafted by the Department of Justice. To the extent that the provisions in those two bills survived and made it into CAFRA—and many of them did—that hearing record constitutes the first legislative history.<sup>4</sup> The 1996 hearing record includes the full text of H.R. 1916 as well as the Administration's proposal and a section-by-section analysis.

Among the provisions of CAFRA that first appeared in the Administration's proposal were the provision placing the burden of proof on the government in civil forfeiture cases by a preponderance of the evidence,<sup>5</sup> the uniform innocent owner defense,<sup>6</sup> and the requirement that there be a "substantial connection" between the forfeited property and the underlying crime.<sup>7</sup> The Administration bill also contained the subsequently-

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3. See LEGISLATIVE HISTORY: CIVIL ASSET FORFEITURE REFORM ACT (CAFRA) OF 2000 (May 2000) (published by the U.S. Department of Justice (469 pages)) [hereinafter *DOJ EXTRACT*].

4. See *Civil Asset Forfeiture Reform Act, Hearing Before the Committee on the Judiciary, No. 94, 104<sup>th</sup> Cong., 2<sup>nd</sup> Session (July 22, 1996)* [hereinafter *1996 Hearing*]; *DOJ EXTRACT*, *supra* note 3 at 1-192.

5. See 1996 Hearing, *supra* note 4 at 130-31; *DOJ EXTRACT*, *supra* note 3 at 68.

6. See 1996 Hearing, *supra* note 4 at 137-41; *DOJ EXTRACT*, *supra* note 3 at 71-73.

7. 1996 Hearing, *supra* note 4 at 131; *DOJ EXTRACT*, *supra* note 3 at 67.

enacted provisions regarding the payment of pre-judgment interest,<sup>8</sup> the amendment to the Federal Tort Claims Act,<sup>9</sup> the stay of a civil forfeiture case pending the completion of an on-going criminal investigation,<sup>10</sup> and the expansion of forfeiture authority to cover the proceeds of most federal crimes.<sup>11</sup> Finally, CAFRA includes the Administration's proposals making criminal forfeiture available in all cases where civil forfeiture is available,<sup>12</sup> codifying the fugitive disentitlement doctrine,<sup>13</sup> making grand jury information available in civil forfeiture cases,<sup>14</sup> allowing the issuance of out-of-district seizure warrants,<sup>15</sup> expanding forfeiture authority for alien smuggling,<sup>16</sup> allowing forfeited funds to be used to pay restitution to crime victims,<sup>17</sup> and creating procedures for the enforcement of foreign forfeiture judgements<sup>18</sup> and the adjudication of challenges to civil forfeitures under the Excessive Fines Clause of the Eighth Amendment.<sup>19</sup>

Among the provisions of CAFRA that were derived from H.R. 1916 were those abolishing the cost bond, authorizing the release of seized property pending trial to avoid a hardship, and extending the time for filing a claim in an administrative forfeiture action to thirty days.<sup>20</sup> Of course, most if not all of these provisions were amended to some extent before final enactment.

In 1997, Rep. Hyde introduced a more detailed version of his bill as H.R. 1835, 105<sup>th</sup> Cong., and the Administration's bill was introduced by Rep. Schumer as H.R. 1745, 105<sup>th</sup> Cong. A second hearing was held in the House Judiciary Committee on these two bills. Excerpts of that hearing record, as well as the texts of the two bills, are found on Westlaw.<sup>21</sup>

Ultimately, in late 1997, a compromise was reached between the supporters of the Hyde bill and the Schumer bill. The compromise bill, H.R. 1965, 105<sup>th</sup> Congress,<sup>22</sup> combined the provisions of H.R. 1835 and H.R. 1745, and is similar in most respects to what was ultimately enacted in CAFRA three years later. Therefore, the House Report on H.R. 1965 is the most comprehensive legislative history of the provisions of the new law that were included in the 1997 bill.<sup>23</sup> Among the provisions ultimately included in CAFRA, the 1997 Committee Report discusses the burden of proof provision, the "in-

8. See 1996 Hearing, *supra* note 4 at 127; DOJ EXTRACT, *supra* note 3 at 66.

9. See 1996 Hearing, *supra* note 4 at 126; DOJ EXTRACT, *supra* note 3 at 66.

10. See 1996 Hearing, *supra* note 4 at 142; DOJ EXTRACT, *supra* note 3 at 74.

11. See 1996 Hearing, *supra* note 4 at 172; DOJ EXTRACT, *supra* note 3 at 88.

12. See 1996 Hearing, *supra* note 4 at 169; DOJ EXTRACT, *supra* note 3 at 87.

13. See 1996 Hearing, *supra* note 4 at 209; DOJ EXTRACT, *supra* note 3 at 107.

14. See 1996 Hearing, *supra* note 4 at 212; DOJ EXTRACT, *supra* note 3 at 109.

15. See 1996 Hearing, *supra* note 4 at 147-50; DOJ EXTRACT, *supra* note 3 at 76-78.

16. See 1996 Hearing, *supra* note 4 at 177-79; DOJ EXTRACT, *supra* note 3 at 91-92.

17. See 1996 Hearing, *supra* note 4 at 189-91; DOJ EXTRACT, *supra* note 3 at 97-98.

18. See 1996 Hearing, *supra* note 4 at 191-94; DOJ EXTRACT, *supra* note 3 at 98-100.

19. See 1996 Hearing, *supra* note 4 at 134; DOJ EXTRACT, *supra* note 3 at 70.

20. H.R. 1916, 104<sup>th</sup> Congress, §§ 3, 5-6; DOJ EXTRACT, *supra* note 3 at 5-7.

21. See *Civil Asset Forfeiture Reform Act, Hearing Before the Committee on the Judiciary (June 11, 1997)*, 1997 WL 311709 (Statement of Stefan D. Cassella on behalf of the Department of Justice); 1997 WL 11233602 (Statement of Jan P. Blanton on behalf of the Department of the Treasury); 1997 WL 316566 (Statement of Rep. Henry J. Hyde); 1997 WL 11233673 (Statement of David Smith on behalf of the National Association of Criminal Defense Lawyers); H.R. 1835, 104<sup>th</sup> Cong. (1997); H.R. 1745, 104<sup>th</sup> Cong. (1997); DOJ EXTRACT, *supra* note 3 at 193-217.

22. H.R. 1965, 105<sup>th</sup> Cong. (1997).

23. See *Civil Asset Forfeiture Reform Act*, H.R. 105-358, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1997) [hereinafter *1997 Committee Report*]; DOJ EXTRACT, *supra* note 3 at 218-71.

nocent owner" defense, the authority to release property upon the showing of a hardship, the amendment to the Federal Tort Claims Act, the authority to pay pre-judgment interest, the forfeiture of the proceeds of most federal crimes, the definition of "proceeds," and the expanded availability of criminal forfeiture. The Report also describes the procedural deadlines for administrative and judicial forfeiture cases, the procedure for resolving Eighth Amendment challenges, the standard for filing a civil forfeiture complaint, the seizure warrant requirement, and the government's authority to obtain access to bank records in "bank secrecy" jurisdictions. Finally, the Report explains the provisions relating to the disclosure of grand jury information, the use of forfeited funds to pay restitution, the enforcement of foreign forfeiture judgments, and the extension of the statute of limitations in civil forfeiture cases.

## 2. House Passes H.R. 1658 in 1999

The 1997 compromise failed, however, and no legislation was enacted in the 105<sup>th</sup> Congress. In 1999, Mr. Hyde started over by reintroducing a modified version of his original bill as H.R. 1658, 106<sup>th</sup> Congress. No hearings were held on that bill, but the 1999 Committee Report on H.R. 1658 refers to, and incorporates, the testimony presented to the Committee at the 1996 and 1997 hearings.<sup>24</sup> It should be noted that many of the pro-law enforcement provisions that were ultimately enacted as part of CAFRA were deleted from the 1999 Hyde bill and were not restored until the bill reached the Senate. Therefore, the 1999 House Report does not contain the discussion of all of the proposals that appeared in the 1997 Report.

In June 1999, the House passed H.R. 1658 after a lengthy Floor debate and after rejecting a substitute amendment offered by Rep. Asa Hutchinson (R. Ark.) and others. The Floor debate appears in the Congressional Record for June 24, 1999 and on Westlaw.<sup>25</sup>

Following the House passage of the Hyde bill in June 1999, the Senate Subcommittee on Criminal Justice Oversight conducted a hearing. Among those who testified was Deputy Attorney General Eric Holder who inserted into the hearing record an analysis of the Department of Justice's counter proposal, which became the basis for S.1701, a substitute for the House bill introduced in the Senate later in 1999 by Sens. Jeff Sessions (R. Ala.) and Charles E. Schumer (D. N.Y.).<sup>26</sup> The Holder Statement therefore represents a significant portion of the legislative history of the Sessions-Schumer bill. The statements of the other Senate witnesses are also available on Westlaw.<sup>27</sup>

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24. See Civil Asset Forfeiture Reform Act, H.R. 106-192, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999) [hereinafter 1999 Committee Report]; DOJ EXTRACT, *supra* note 3 at 272-91.

25. 145 CONG. REC. H4851 (daily ed. June 24, 1999); DOJ EXTRACT, *supra* note 3 at 292-350.

26. See *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime, Hearing Before the Senate Subcommittee on Criminal Justice Oversight*, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 21, 1999) (statement of Deputy Attorney General Holder); DOJ EXTRACT, *supra* note 3 at 351-78.

27. Statement of Johnny Mack Brown on behalf of the National Sheriffs Association, 1999 WL 20010426; Statement of Samuel J. Buffone on behalf of the National Association of Criminal Defense Lawyers, 1999 WL 20010428; Statement of Roger Pilon on behalf of the Cato Institute, 1999 WL 20010429; DOJ EXTRACT, *supra* note 3 at 378-88.

### 3. Two Senate Bills Introduced

In late 1999, Senators Sessions, Schumer and others introduced S.1701 which, as mentioned, consisted primarily of provisions taken from the Administration bill described by Mr. Holder at the July Senate hearing. The text of S.1701 and Sen. Sessions' statement at the time the bill was introduced appeared in the Congressional Record for October 6, 1999.<sup>28</sup> A number of important provisions of CAFRA, including the provision on payment of attorneys fees now codified at 28 U.S.C. § 2465(b),<sup>29</sup> the provision requiring the judicial forfeiture of real property now codified at 18 U.S.C. § 985,<sup>30</sup> and the amendment to the "fungible property" provision in 18 U.S.C. § 984,<sup>31</sup> appeared for the first time in this bill. S.1701 also contained numerous pro-law enforcement provisions that were included in the 1997 compromise but excluded from the bill passed by the House in 1999.

Also in late 1999, Sens. Orrin Hatch (R. Utah) and Patrick Leahy (D. Vt.) introduced another bill, S.1931, that contained most of the reform provisions that were enacted as part of CAFRA. The text of S.1931 and the statements of Sens. Hatch and Leahy at the time the bill was introduced appeared in the Congressional Record.<sup>32</sup>

In the end, what became law was a concatenation of the reform provisions from the Hatch-Leahy bill and the law enforcement improvements from the Sessions-Schumer bill. That bill was passed by the Senate in March 2000 after Rep. Hyde agreed to accept it in place of the bill passed by the House. In other words, while the bill passed by the Senate was denoted H.R. 1658, the Senate did not act on the House bill but instead substituted the language taken from the two Senate bills, and the House passed the bill as passed by the Senate without further amendment. The only legislative history directly linked to the bill as enacted consists of statements of Sens. Hatch, Leahy and Sessions on March 27, 2000, on the Senate Floor and statements of Rep. Hyde and others on the House Floor on April 11, 2000.<sup>33</sup>

### B. Relationship Between CAFRA and "Old Law" Statutes and Rules

Under the "old law"—i.e., the provisions in effect for civil forfeiture proceedings commenced before August 23, 2000—administrative and civil judicial forfeiture proceedings were governed by statutes and rules found throughout the U.S. Code and the Federal Rules of Civil Procedure. In particular, administrative forfeitures were governed primarily by the customs laws (i.e., the Tariff Act of 1930, 19 U.S.C. § 1602 et seq.), while civil judicial proceedings were governed by the customs laws, the Supplemental Rules for Certain Admiralty and Maritime Claims, chapters 85 and 161 of Title 28, and

28. See 145 CONG. REC. S12101-03, S12108-S12109 (1999) (Sessions' Civil Asset Forfeiture Reform Bill); DOJ EXTRACT, *supra* note 3 at 389-409.

29. See S. 1701, 106<sup>th</sup> Cong. (1999), § 7; DOJ EXTRACT, *supra* note 3 at 395.

30. See S. 1701, 106<sup>th</sup> Cong. (1999), § 8; DOJ EXTRACT, *supra* note 3 at 395.

31. See S. 1701, 106<sup>th</sup> Cong. (1999), § 23; DOJ EXTRACT, *supra* note 3 at 404.

32. See 145 CONG. REC. S14612-05, S14628-S14635 (1999) (Hatch Civil Asset Forfeiture Reform Bill); DOJ EXTRACT, *supra* note 3 at 410-23.

33. See Senate passage of H.R. 1658 as amended, 2000 WL 309749, 146 CONG. REC. S1753 et seq. (March 27, 2000); DOJ EXTRACT, *supra* note 3 at 424-30; House passage of H.R. 1658, as amended, 146 CONG. REC. H2040 et seq., (April 11, 2000); DOJ EXTRACT, *supra* note 3 at 431-63.

the substantive civil forfeiture statutes themselves.<sup>34</sup>

Thus, for example, the provisions governing the publication of notice of administrative forfeitures (also known as “non-judicial forfeitures”), the filing of a claim and cost bond contesting such forfeitures, and the entry of a declaration of forfeiture if no claim is filed, were all found at 19 U.S.C. § 1607-09. Similarly, the provisions governing the burden of proof in judicial forfeiture actions, and the statute of limitations for such actions, were found at 19 U.S.C. §§ 1615 and 1621, respectively, while the procedures governing the filing of a civil judicial complaint and the claimant’s claim and answer were found in Supplemental Rules C and E of the Federal Rules of Civil Procedure. Provisions regarding venue and jurisdiction in civil forfeiture cases were found in a number of places, including 28 U.S.C. §§ 1345 and 1355, 18 U.S.C. § 981(h), and 21 U.S.C. § 881(j). Miscellaneous procedural provisions also were found at 21 U.S.C. § 888 and 18 U.S.C. §§ 984 and 986.

At the same time, the substantive forfeiture statutes—i.e. the statutes that actually authorize civil forfeiture for particular offenses, like Section 981, which contains the substantive forfeiture authority for money laundering and other federal offenses—contained additional procedural provisions applicable only to forfeitures brought under those statutes. For example, § 981 contained provisions regarding the disposal of forfeited property, the entry of a stay pending the resolution of parallel criminal cases, the execution of search warrants, and the innocent owner defense, that were applicable only to money laundering forfeitures and other cases brought under § 981(a).<sup>35</sup> The same was true for other substantive civil forfeiture statutes such as 21 U.S.C. §§ 881 and 888 (drug trafficking), 18 U.S.C. §§ 924(d) (firearms), 1955 (gambling) and 2254 (child pornography) and 8 U.S.C. § 1324(b) (alien smuggling).

One might have thought that CAFRA would have consolidated all of those miscellaneous provisions into one place, creating a uniform and centrally located body of statutory law. But that is not the case.

To be sure, CAFRA amends some of the “old law” provisions. For example, the stay and seizure warrant provisions in §§ 981 and 881 were substantially amended and made uniform, and the innocent owner defenses in those statutes as well as in §§ 2254 and 1324(b) were repealed in favor of a new uniform provision that applies to almost all civil forfeitures in the U.S. Code. The statute of limitations provision in 19 U.S.C. § 1621 was also amended, as was the “fungible property” provision in 18 U.S.C. § 984. But for the most part, CAFRA did not amend or repeal the procedures in the existing law. What CAFRA did was to create three new statutes—18 U.S.C. §§ 983 and 985, and 28 U.S.C. § 2465(b)—that override the older provisions where they are inconsistent, while otherwise leaving the older provisions alone.<sup>36</sup>

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34. See e.g. 18 U.S.C. § 981(d) (1994) (incorporating the customs laws for the purpose of forfeitures under Section 981(a)); 28 U.S.C. § 2461(b) (1994) and 18 U.S.C. § 981(b)(2) (1994) (making the Supplemental Rules for Certain Admiralty and Maritime Claims applicable to civil judicial forfeitures).

35. See 18 U.S.C. § 981(b) (1994) (civil seizure warrants); § 981(g) (stay pending conclusion of criminal case); § 981(e) (disposition of forfeited property); § 981(a)(2) (innocent owner defense).

36. It is evident from the legislative history that Congress expressly intended the provisions in CAFRA to override inconsistent provisions found in the “old law,” except where the specific exemption in § 983(i) applied. See H.Rep. 106-192, 106<sup>th</sup> Cong. (1999) at 21 (“To the extent that these procedures are inconsistent

In other words, CAFRA does not replace, but is superimposed upon, the existing procedures in the customs laws, the Supplemental Rules, and the forfeiture statutes themselves. The danger for the unwary in this arrangement is obvious. We can look at the relationship between CAFRA (i.e., § 983) and the customs laws regarding administrative and judicial forfeitures to see how this works.

As incorporated by 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d), respectively, the customs laws still govern administrative and judicial forfeitures in money laundering and other cases under § 981 and in drug cases under § 881; but to a large extent, those procedures are overridden by new § 983. For example, 19 U.S.C. § 1615 says the burden of proof is on the property owner in any civil forfeiture case brought under a statute incorporating the customs laws. Section 981(d) still incorporates the customs laws and § 1615 has not been amended; but § 983(c) says the burden of proof is on the government in any case brought under any “civil forfeiture statute,” as that term is defined in § 983(i).<sup>37</sup> Which statute applies when a civil forfeiture action is filed under § 981? Because § 983(c) is inconsistent with the customs provision on this issue, it overrides § 1615 and the burden of proof is on the government.

Similarly, 19 U.S.C. § 1608 says that the claimant in an administrative forfeiture has to file a cost bond. Again, § 981(d) incorporates § 1608 as part of the customs laws and § 1608 has not been amended. But § 983(a) says no bond is required. Because § 983(a) is inconsistent with the customs provision on this issue, it overrides § 1608; so no bond is required in § 981 cases.

But a counter example illustrates what happens when nothing in CAFRA is inconsistent with the “old law.” 19 U.S.C. §§ 1607 and 1609 say that property having a value of under \$500,000 (or cash in any amount) can be administratively forfeited, and that the declaration of forfeiture has the same force and effect as an order of forfeiture entered by a court. Section 983 doesn’t say anything about either point; therefore both provisions of the customs laws, as incorporated by §§ 981(d) and 881(d), still apply. The government can still do administrative forfeitures in drug and money laundering cases. Similarly, the pleading provisions of Supplemental Rules C and E still apply, unless inconsistent with §§ 983 and 985, and the procedures relating to venue, seizure, stays, equitable sharing and so forth in §§ 981 and 881 apply as well, because there is nothing inconsistent with the new provisions in those statutes.

In all cases, the rule of thumb will be this: look to Sections 983, 985 and 2465(b) first; if they address an issue, they prevail; but if they are silent on an issue, or do not apply for some reason, the old law still applies.

### C. The “Customs Carve-Out”

The most significant reforms in CAFRA—i.e., those in new section 983—apply to all civil forfeitures under any provision of federal law, except for those explicitly exempted by § 983(i). That is, the procedures governing administrative and civil judicial forfeiture in § 983 apply to even the most obscure civil forfeiture statutes enforced by

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with any preexisting federal law, these procedures apply and supercede preexisting law.”); DOJ EXTRACT, *supra* note 3 at 283.

37. The scope of the definition of “civil forfeiture statute” in Section 983(i) is discussed *infra* in Section C.

the Fish and Wildlife Service, the National Park Service and the National Oceanographic and Atmospheric Administration, but they do not apply to the statutes enforced by the U.S. Customs Service under Title 19, United States Code, or to the statutes enforced by the Internal Revenue Service under Title 26, because those statutes are exempted from the definition of "civil forfeiture statute" in § 983(i).

This is the reason why Congress neither repealed nor amended most of the civil forfeiture provisions in existence under the "old law," but instead superimposed the new provisions codified in § 983. The "old law" was not changed because it still applies to civil forfeitures brought under the statutes exempted by § 983(i). Because the reforms enacted by CAFRA apply only to some civil forfeiture actions, they had to be placed in a new statute, i.e. § 983, that applies to the forfeiture actions covered by CAFRA, and does not apply to others.

The complete list of civil forfeiture provisions exempted from CAFRA by § 983(i) is as follows:

- (A) the Tariff Act of 1930 or any other provision of law codified in title 19;
- (B) the Internal Revenue Code of 1986;
- (C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.);
- (D) the Trading with the Enemy Act (50 U.S.C. App. § 1 et seq.); or
- (E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. § 233; 22 U.S.C. § 401).

Because § 983(i) basically exempts the Customs Service from the application of the CAFRA reforms, that subsection is generally known as the "Customs Carve-Out."<sup>38</sup> But note that it does not exempt all statutes enforced by the Customs Service. The currency reporting offenses in Title 31, United States Code, smuggling offenses under 18 U.S.C. § 545, and other provisions enforced by the Customs Service are not exempted. Moreover, § 983(i) does not exempt only cases investigated by the Customs Service, but cases investigated by the Internal Revenue Service and other federal agencies as well.

Note also that the "Customs Carve-Out" only applies to the provisions of § 983. It does not apply to § 985 regarding the forfeiture of real property, and it does not apply to the attorney fee and interest provisions in § 2465(b). Those provisions apply to *all* civil forfeitures, whether listed in § 983(i) or not.

Of course, as should be obvious, CAFRA applies only to *civil* forfeiture. It has almost nothing to do with criminal forfeiture. In fact, the few provisions in CAFRA that relate to criminal forfeiture are all law enforcement improvements.

#### **D. Highlights of Major Reforms and Expansions of Civil Forfeiture Law**

As mentioned, CAFRA makes enormous changes to the procedures governing administrative and judicial civil forfeiture proceedings.<sup>39</sup> The second half of this article focuses on the due process requirements involving the sending of notice, the deadlines

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38. See 1996 Hearing, *supra* note 4 (statement of Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Department of the Treasury) (explaining the justification for exempting traditional customs enforcement actions from CAFRA); DOJ EXTRACT, *supra* note 3 at 121-23.

39. The terms "administrative forfeiture" and "non-judicial forfeiture" are interchangeable. CAFRA uses "non-judicial forfeiture" in most instances, but this article uses the more common term "administrative forfeiture" except where quoting literally from CAFRA or the legislative history.



for filing claims and complaints, and other procedural requirements codified at § 983(a). This section, however, provides an overview of the major reforms and improvements in the entire Act.

*1. Deadlines (18 U.S.C. § 983(a))*

As discussed at length in Part II, 18 U.S.C. § 983(a) imposes strict deadlines on both the government and the property owner in administrative and judicial forfeiture proceedings. In administrative forfeitures, the seizing agency has sixty days from the date of seizure to send notice of the forfeiture to all persons with an interest in the property,<sup>40</sup> if the agency fails to send notice to the person from whom the property was seized, it must return the property “without prejudice to the right of the government to commence a forfeiture proceeding at a later time.”<sup>41</sup> In adoptive forfeiture cases—i.e., cases in which a federal seizing agency adopts a case from a State or local agency for forfeiture under federal law—the period for sending notice is “ninety days after the date of seizure by the State or local law enforcement agency.”<sup>42</sup>

A “supervisory official in the headquarters office of the seizing agency” can grant a one-time-only extension of thirty days to the period for sending notice,<sup>43</sup> all other extensions of time must be granted by a court for periods of not more than sixty days.<sup>44</sup>

Once notice is sent, claimants have thirty days in which to file a claim.<sup>45</sup> The claim must identify the specific property being claimed and state the claimant’s interest in such property;<sup>46</sup> the cost bond is abolished.<sup>47</sup>

If a claim is filed, the case must be referred by the seizing agency to the U.S. Attorney.<sup>48</sup> The U.S. Attorney then has ninety days from the date the claim was received by the seizing agency to file a civil complaint or to include the property in a criminal indictment, or both.<sup>49</sup> If the deadline is missed, and the property is not returned, civil forfeiture of the property in connection with the particular underlying offense is forever barred.<sup>50</sup> The ninety days, however, may be extended for good cause by the court, or by agreement of the parties.<sup>51</sup>

As was the case under the “old law,” the government must file its civil forfeiture complaint in accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims.<sup>52</sup> In a major change from pre-CAFRA law, at least as it was applied in the Ninth Circuit, however, § 983(a)(3)(D) provides that lack of probable cause for the forfeiture *at the time the complaint is filed* will no longer be a valid basis for a motion to

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40. See 18 U.S.C.A. § 983(a)(1)(A)(i) (West Supp. 2000).

41. 18 U.S.C.A. § 983(a)(1)(F).

42. 18 U.S.C.A. § 983(a)(1)(A)(iv).

43. 18 U.S.C.A. § 983(a)(1)(B).

44. See 18 U.S.C.A. § 983(a)(1)(C).

45. See 18 U.S.C.A. § 983(a)(2)(B).

46. See 18 U.S.C.A. § 983(a)(2)(C).

47. See 18 U.S.C.A. § 983(a)(2)(E).

48. See 18 U.S.C.A. § 1608.

49. See 18 U.S.C.A. § 983(a)(3).

50. See 18 U.S.C.A. § 983(a)(3)(B).

51. See 18 U.S.C.A. § 983(a)(3)(A).

52. See 18 U.S.C.A. § 983(a)(3)(A).

dismiss the complaint.<sup>53</sup>

If the government chooses the criminal forfeiture option, and does not file a civil forfeiture action within the ninety-day period, it must "re-seize" or restrain the property pursuant to the criminal forfeiture statutes,<sup>54</sup> even if the property is already in government custody.<sup>55</sup> The Government can avoid having to re-seize the property, however, if it relied, in part, on the criminal seizure warrant statute,<sup>56</sup> when it seized the property in the first place.

## 2. Hardship Provision; Challenges to Administrative Forfeiture (§§ 983(f) & (e))

Under the "old law," property owners who claimed that being deprived of their property pending trial in a civil forfeiture case caused them a "hardship" had to file a motion for the return of seized property.<sup>57</sup> Relief under that Rule was considered equitable in nature, and was available only if there was no adequate remedy at law.<sup>58</sup> CAFRA makes such a remedy available under § 983(f).<sup>59</sup>

Under § 983(f), a claimant may file a "petition" for the release of seized property with the seizing agency, asserting the grounds on which the property should be released to the claimant pending trial to avoid a "hardship." Among other things, the claimant

53. As discussed in Part II, the Ninth Circuit Court of Appeals, interpreting 19 U.S.C. § 1615, held that a civil forfeiture complaint was subject to a motion to dismiss if the government lacked probable cause to believe the property was subject to forfeiture at the time the complaint was filed, even if the government subsequently obtained irrefutable proof of the forfeitability of the property, such as the property owner's admissions in his guilty plea in a parallel criminal case. *See infra*, Note 226 and accompanying text.

54. *See e.g.* 21 U.S.C. §§ 853(e), (f) (1994).

55. 18 U.S.C.A. § 983(a)(3)(C).

56. *See* 21 U.S.C. § 853(f) (1994).

57. FED. R. CRIM. P. 41(e).

58. *See Matter of the Seizure of One White Jeep Cherokee*, 991 F. Supp. 1077 (S.D. Iowa 1998) (court exercises anomalous jurisdiction because seizure has effectively shut down claimant's business, and delay in instituting civil forfeiture action leaves claimant no remedy at law; but court holds that four-month delay since time of seizure does not violate due process, given the government's need to avoid jeopardizing ongoing criminal investigation); *In re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (seizure of property without filing civil or criminal forfeiture action allows court to exercise anomalous jurisdiction to avoid manifest injustice that would result if the government seized property without probable cause; motion denied upon finding that probable cause was established).

59. 18 U.S.C.A. § 983(f). Because § 983(f) creates a remedy at law for persons asserting that the seizure of their property imposes a hardship, claimants will no longer be able to assert such hardship as a basis for relief under Rule 41(e). However, Rule 41(e) will remain available for persons who seek release of seized property not because of a hardship, but because the government lacked probable cause for the seizure in the first instance. Of course, persons seeking relief under Rule 41(e) will still have to establish that there is no adequate remedy at law for the improper seizure. Pre-CAFRA case law holds that in most instances, contesting the forfeiture action by filing a claim constitutes an adequate remedy. *See United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (once the government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion); *Ibarra v. United States*, 120 F.3d 472 (4th Cir. 1997) (district courts are divested of jurisdiction over a civil forfeiture action once the government initiates administrative forfeiture proceedings, unless the claimant files a claim and cost bond); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *United States v. U.S. Currency in the Amount of \$146,800*, 1997 WL 269583 (E.D.N.Y. Apr. 28, 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where claimant has adequate remedy at law; *i.e.*, contesting the forfeiture in the civil forfeiture case).

must show that he has filed a claim to the property, that he has a possessory interest in the property, and that the government's continued possession of the property will result in a hardship that outweighs the risk that the property will be "destroyed, damaged, lost, concealed or transferred if it is returned to the claimant."<sup>60</sup> If the seizing agency does not grant the petition in 15 days, the claimant may file the petition in the court in the district where the property was seized, or in the district where the seizure warrant was issued.<sup>61</sup> If the court grants the petition, the property is returned to the claimant pending trial on the civil forfeiture action.<sup>62</sup>

Certain types of property are specifically exempted from the "hardship" provision, including contraband, currency (unless it is the property of a business that the government has seized), evidence of a criminal offense, or property designed or likely to be used to commit another criminal offense.<sup>63</sup>

Rule 41(e) has also been the device most frequently used by persons (primarily prisoners) seeking to vacate a declaration of forfeiture issued by a seizing agency after no one filed a claim in an administrative forfeiture proceeding. Again, courts held that Rule 41(e) relief was only available in the absence of an adequate remedy at law, and thus could be employed to seek judicial review of an administrative forfeiture only if the claimant's reason for failing to file a timely claim with the seizing agency was that the government failed to provide notice of the administrative forfeiture as required by the Due Process Clause of the Fifth Amendment.<sup>64</sup>

Section 983(e) codifies that practice, setting forth an exclusive remedy for challenging a closed administrative forfeiture on the ground that the claimant did not receive proper notice.<sup>65</sup> Such challenges must be filed within 5 years of the administrative forfeiture proceeding.<sup>66</sup> If the court grants a motion under § 983(e), the government may

60. 18 U.S.C.A. § 983(f)(1).

61. *See* 18 U.S.C.A. § 983(f)(3).

62. *See* 18 U.S.C.A. § 983(f)(6).

63. *See* 18 U.S.C.A. § 983(f)(8). Section 983(f) is derived from the original Hyde proposal, H.R. 1916, 104<sup>th</sup> Congress, § 6; 1996 *Hearing*, *supra* note 4 at 7-9; DOJ EXTRACT, *supra* note 3 at 6-7. A revised version that was substantially the same as § 983(f) as enacted is included in H.R. 1965, 105<sup>th</sup> Congress, and is described in the 1997 Committee Report; DOJ EXTRACT, *supra* note 3 at 223-24, 245.

64. *See* *United States v. Eubanks*, 169 F.3d 672, 674 (11th Cir. 1999) ("It is inappropriate for a court to exercise equitable jurisdiction to review the merits of a forfeiture matter when the petitioner elected to forego the procedures for pursuing an adequate remedy at law"; because claimant received notice of the administrative forfeiture, the district court lacked jurisdiction to consider his Rule 41(e) motion for the return of the forfeited property); *Linarez v. Department of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) ("A forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not."); *United States v. Woodall*, 12 F.3d 791 (8th Cir. 1993) (court has jurisdiction to determine if the government complied with the statutory notice provisions set forth in § 1607, and if not, to allow the claimant to file a claim in accordance with § 1608 notwithstanding the expiration of the claims period).

65. Section 983(e) was derived from a proposal in the Administration's 1996 proposal, DOJ EXTRACT, *supra* note 3 at 27-28, 125, and was included, in a different form, in H.R. 1965, 105<sup>th</sup> Congress, § 2; DOJ EXTRACT, *supra* note 3 at 219-20 (proposed 18 U.S.C.A. § 983(a)(3)). It is discussed in some detail in the 1997 Committee Report; DOJ EXTRACT, *supra* note 3 at 250-51.

66. *See* 18 U.S.C.A. § 983(e)(3). This ends confusion among the circuits that held, variously, that persons challenging administrative forfeitures under Rule 41(e) and other provisions had as little as two, and as many as eleven, years in which to file a motion seeking to vacate the declaration of forfeiture entered by the seizing agency pursuant to 19 U.S.C. § 1609. *See* *United States v. Minor*, 2000 WL 1288668 (4<sup>th</sup> Cir. Sept. 13, 2000) (statute of limitations on equitable action is 6 years, under § 2401, running from the date defendant was on "reasonable inquiry notice" that his property had been forfeited; earliest date would be date Government

re-file the forfeiture case, notwithstanding the expiration of the statute of limitations.<sup>67</sup>

### 3. Trial Procedure (§§ 983(c) and (g))

Under § 983(c)(1), the burden in civil forfeiture cases will be on the government to establish the forfeitability of the property by a preponderance of the evidence;<sup>68</sup> hearsay

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entered declaration of administrative forfeiture); *United States v. Duke*, 2000 WL 1511692 (7<sup>th</sup> Cir. Oct. 12, 2000) (6-year limitations period under § 2401 runs from date defendant should have discovered that his property was forfeited; in this case, that was when he was convicted of the crime giving rise to the forfeiture); *Polanco v. DEA*, 158 F.3d 647 (2d Cir. 1998) (six-year limitation period runs from date claimant discovered, or had reason to discover, property was forfeited, not from date it was seized; if claimant never received notice, six years runs from end of the five-year period in which the government could have filed a forfeiture action); *Adames v. United States*, 171 F.3d 728 (2d Cir. 1999) (*Polanco* is unclear as to whether the cause of action for return of administratively forfeited property accrues when the five-year limitations period has run, or at an earlier date because the initial seizure put claimant on "inquiry notice" as to the disposition of his property); *Matura v. United States*, 1999 WL 144498 (S.D.N.Y. Mar. 17, 1999) (claimant has eleven years from date that the government's cause of action in forfeiture accrues to file action for return of seized property); *United States v. Lacey*, 1998 WL 982885 (D. Kan. Aug. 18, 1998) (statute of limitations for motion for return of administratively forfeited property is six years, running from the date of the forfeiture); *Demma v. United States*, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (applying six-year statute of limitations to Tucker Act theory); *United States v. McDaniel*, 97 F. Supp.2d 679, 684 n.6 (D.S.C. 2000) (6-yr limitations period runs from date of administrative forfeiture); *Clymore v. United States*, 212 F.3d 370 (5<sup>th</sup> Cir. 2000) (6-yr limit on claimant's challenge to administrative forfeiture may be equitably tolled if claimant first files his action in the wrong court).

67. 18 U.S.C.A. § 983(e)(2)(A). This resolves a split in the circuits. Before CAFRA, the Fifth, Ninth and Tenth Circuits held that if the statute of limitations under 19 U.S.C. § 1621 expired before the government had an opportunity to refile a civil forfeiture action that had been vacated because of improper notice, the forfeiture action was barred. *See Kadonsky v. United States*, 216 F.3d 499 (5<sup>th</sup> Cir. 2000) (administrative forfeiture is void if there was not adequate notice, and no new proceeding may be filed if the statute of limitations has expired); *Clymore v. United States*, 164 F.3d 569 (10<sup>th</sup> Cir. 1999) (if notice was inadequate, administrative forfeiture is void and may not be refiled if statute of limitations has expired); *United States v. Marolf*, 173 F.3d 1213 (9<sup>th</sup> Cir. 1999) (the remedy for inadequate notice of forfeiture proceedings is to void the forfeiture, even if the statute of limitations for forfeiture has expired). The Second and Sixth Circuits held that the government did not need to refile the forfeiture action to give the claimant the opportunity to contest the forfeiture that he claimed to be seeking. Because the original forfeiture was merely voidable, not void, the court could grant the claimant a forfeiture hearing as a continuation of the original case, notwithstanding the expiration of the statute of limitations. *See United States v. Dusenbery*, 201 F.3d 763 (6<sup>th</sup> Cir. 2000) (if notice of the administrative forfeiture was inadequate, the court should grant the claimant the judicial hearing on the merits to which he would have been entitled if he had received proper notice; because the government need not refile the forfeiture action, the expiration of the five-year statute of limitations is irrelevant); *Adames v. United States*, 171 F.3d 728 (2d Cir. 1999) (even if claimant did not get notice, court may proceed directly to merits and dismiss attempt to re-open administrative forfeiture); *Boero v. DEA*, 111 F.3d 856 (2d Cir. 1997) (when district court finds that notice of administrative forfeiture was inadequate it should vacate the forfeiture and proceed directly to the merits of the claim). The Third Circuit reserved judgment on the issue, *see United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (en banc) (expressly reserving judgment on whether expiration of statute of limitations barred reinstitution of forfeiture proceedings).

68. Whether the standard of proof should be a "preponderance of the evidence" or "clear and convincing evidence" was one of the most hotly contested issues as CAFRA moved through Congress. In H.R. 1916, 104<sup>th</sup> Cong., Rep. Hyde proposed the clear and convincing standard. In H.R. 1965, 105<sup>th</sup> Cong., the 1997 compromise introduced by Reps. Hyde and Conyers, the standard was "preponderance of the evidence." In H.R. 1658, 106<sup>th</sup> Cong., Rep. Hyde again proposed the clear and convincing standard. The debate over the Hutchinson Amendment on the House Floor was largely over whether the preponderance standard should be substituted for the clear and convincing standard. *See supra* note 25. The Hutchinson Amendment was defeated in the House, but the arguments made in support of the Amendment prevailed in the Senate—the preponderance standard appears in both S.1701 and S.1931 -- and it was the preponderance standard that became law.

will not be admissible in the government's case. This reverses centuries old practice whereby the government was required only to show that there was probable cause for the forfeiture<sup>69</sup> and could use hearsay to meet its burden. The burden then shifted to the claimant to establish by a preponderance of the evidence that the property was derived from a legitimate source or otherwise was not subject to forfeiture under the applicable statute.<sup>70</sup>

Under the new law, there will no longer be any need for a pre-trial probable cause hearing. Instead, the government will present its evidence first, as in any civil case, and the claimant will respond. Both parties will be limited to the use of admissible evidence. If the forfeiture is uncontested, of course, the seizing agency will still be able to enter a declaration of forfeiture pursuant to 19 U.S.C. 1609 based on probable cause.<sup>71</sup>

Section 983(c)(3) provides that in cases where the government's theory of forfeiture is that the property was used to facilitate a criminal offense, or was "involved in" such offense (i.e., in money laundering cases), the government must prove that there was a "substantial connection between the property and the offense."<sup>72</sup> The substantial connection requirement was proposed by the Department of Justice in 1996 as a way of codifying the majority rule in pre-CAFRA law.<sup>73</sup> Thus, while the shift in the burden of proof to the government under § 983(c)(1) represents a major change in the law, the codification of the "substantial connection" test does not. The government will be required to prove the same nexus between the property and the offense that it was required to prove under the old law, but it must do so by a preponderance of the evidence and may not rely on hearsay.

Section 983(c)(2) explicitly permits the government to use evidence "gathered after the filing of a complaint for forfeiture" to meet its burden of proof at trial.

Section 983(g) authorizes the claimant to challenge the forfeiture on the ground that it is grossly disproportional to the gravity of the offense. This is intended to codify the Supreme Court's ruling in *United States v. Bajakajian*<sup>74</sup> which held that a forfeiture violates the Excessive Fines Clause of the Eighth Amendment if it is "grossly disproportional to the gravity of the offense."<sup>75</sup> Under § 983(g), the challenge would be filed

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69. See 19 U.S.C. § 1615 (1994).

70. *Id.*

71. See 1997 Committee Report, *supra* note 23; DOJ EXTRACT, *supra* note 3 at 243; See also 1999 Committee Report, *supra* note 24; DOJ EXTRACT, *supra* note 3 at 278-79.

72. 18 U.S.C.A. § 983(c)(3).

73. See 1996 Hearing, *supra* note 4 at 56; DOJ EXTRACT, *supra* note 3 at 31 ("when the government's theory of forfeiture is that the property facilitated the commission of a criminal offense . . . the government must establish that there was a substantial connection between the property and the offense. This codifies the majority rule . . ."). See *United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995); *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947 (4th Cir. 1985); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525 (8th Cir. 1985); *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980); *United States v. 100 Chadwick Drive*, 913 F. Supp. 430 (W.D.N.C. 1995); *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064 (D. Md. 1996). The Second, Fifth, and Seventh Circuits required only a "nexus" between the property and the criminal activity. See *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (the government must demonstrate only a "nexus," not a "substantial connection"); *United States v. 1990 Toyota 4Runner*, 9 F.3d 651 (7th Cir. 1993); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982).

74. 524 U.S. 321 (1998).

75. An earlier version of § 983(g) was included in H.R. 1965 and is discussed at length in the 1997 Committee Report. Among other things, the Report states that the statute "is purely procedural in nature. It is

post-trial or in a motion for summary judgment where it would be considered by the court once the court determined that the property was subject to forfeiture.<sup>76</sup> Section 983(g)(3) makes it clear that the burden is on the claimant to establish the Eighth Amendment violation,<sup>77</sup> and that the matter is to be determined by the court, not the jury.<sup>78</sup> If the court finds that there was an Eighth Amendment violation, the remedy is to reduce or eliminate the forfeiture to avoid the violation.<sup>79</sup>

#### 4. Innocent Owner Defense (§ 983(d))

Section 983(d) creates a uniform innocent owner defense, structurally similar to the provision for third party claims in criminal forfeiture cases under § 853(n)(6)(A) & (B).<sup>80</sup> This is an affirmative defense on which the claimant bears the burden of proof.<sup>81</sup>

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not intended to define any standard upon which the excessiveness determination. . . is to be made, nor does it expand the remedies available to the claimant beyond those required by the Eighth Amendment.” DOJ EXTRACT, *supra* note 3 at 252. See Analysis of 1999 Department of Justice proposal; DOJ EXTRACT, *supra* note 3 at 373.

76. This is consistent with pre-CAFRA law holding that Eighth Amendment challenges were premature if raised before the court (or jury) determined that the property was subject to forfeiture. See *United States v. Funds in the Amount of \$170,926.00*, 985 F. Supp. 810 (N.D. Ill. 1997) (motion to dismiss civil complaint on Eighth Amendment grounds denied; court should not address excessive fines challenge until the government has established forfeitability at trial); *United States v. Bulei*, 1998 WL 544958 (E.D. Pa. Aug. 26, 1998) (motion to dismiss criminal forfeiture count denied as premature; government must first establish forfeitability at trial); *United States v. \$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (pretrial determination of yet-to-occur forfeiture would be premature); *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968 (S.D. Fla. 1994) (excessive fines issues is not ripe for review until after judgment of forfeiture has been entered); *United States v. Ziegler Bolt and Parts Company*, 17 I.T.R.D. (BNA) 1009 (1995) (same).

77. See *United States v. Ahmad*, 213 F.3d 805 (4<sup>th</sup> Cir. 2000) (the party challenging the constitutionality of the forfeiture has the burden of demonstrating excessiveness); *United States v. One 1970 36.9' Columbia Sailing Boat*, 91 F.3d 1053 (8<sup>th</sup> Cir. 1996) (claimant's failure to make threshold showing of gross disproportionality between the value of the property and the value of the drugs ends the court's Eighth Amendment inquiry); *United States v. 829 Calle de Madero*, 100 F.3d 734 (10<sup>th</sup> Cir. 1996) (after the government establishes a nexus between the property and the offense, the burden shifts to claimant to demonstrate gross disproportionality).

78. Cf. *United States v. Derman*, 211 F.3d 175 (1<sup>st</sup> Cir. 2000) (trial court did not err in declining to offer defense counsel opportunity to argue Eighth Amendment issue to jury in a criminal case, because Eighth Amendment issue is solely for the court, not the jury).

79. See *United States v. 6380 Little Canyon Road*, 59 F.3d 974 (9<sup>th</sup> Cir. 1995) (the court must limit a civil forfeiture to an appropriate portion of the asset to avoid an Eighth Amendment violation).

80. See 21 U.S.C.S. § 853(n)(6)(A) & (B) (Law. Co-op. 2000). The two-part uniform innocent owner defense was proposed by the Department of Justice as part of the Administration's 1996 proposal. See 1996 Hearing, *supra* note 4 at 61-66, 137-41, 222-27; DOJ EXTRACT, *supra* note 3 at 33-36, 71-73, 114-16 (containing a detailed analysis of the “old law” regarding innocent ownership, the need for uniformity, and the particular problems created by the Supreme Court's ruling in *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993), which held that because the then-existing innocent owner statutes did not contain a counterpart to the “bona fide purchaser” requirement in the criminal statutes, a drug dealer could insulate his property from forfeiture by conveying it as a gift to an innocent third party, such as a minor child or girlfriend). The government's proposal was incorporated in S.1745, 105<sup>th</sup> Congress and was the subject of additional testimony at the 1997 Hearing. DOJ EXTRACT, *supra* note 3 at 205-06. It was then included in H.R. 1965 and was discussed in the 1997 Committee Report; DOJ EXTRACT, *supra* note 3 at 244-45. It was also described in detail at the 1999 Senate Hearing, DOJ EXTRACT, *supra* note 3 at 358-59, 366-69, and was included in S.1701; DOJ EXTRACT, *supra* note 3 at 307-08. See also Stefan D. Cassella, *Forfeiture Reform: A View from the Justice Department*, 21 J. LEGIS. 221 (1995).

81. 18 U.S.C.S. § 983(d)(1) (Law. Co-op. 2000).

Under § 983(d)(2), a person who held a property interest at the time of the offense must show either that he did not know that his property was being used for an illegal purpose,<sup>82</sup> or that upon learning of the illegal use, “did all that reasonably could be expected under the circumstances to terminate such use of the property.”<sup>83</sup> The latter provision essentially codifies the “all reasonable steps” test employed by virtually all courts under pre-CAFRA law.<sup>84</sup> Section 983(d)(2)(B) sets out a two-part illustration of what might constitute taking all reasonable steps in a given situation. Under subsection (d)(2)(B), a person who knows that his property is being used for an illegal purpose may satisfy the “reasonable steps” requirement by calling the police *and* revoking (or making a good faith attempt to revoke) permission to use his property, or taking other steps to “discourage or prevent” the illegal use.<sup>85</sup> In making these requirements conjunctive, the statute codifies pre-CAFRA case law holding that it is not sufficient for a claimant merely to alert law enforcement to the illegal use of his property, but must, in addition, take all other reasonable steps to prevent the continued use of the property for illegal purposes.<sup>86</sup>

Under § 983(d)(3), a person who acquires property after the offense must be a bona fide purchaser for value without reason to know of the illegal use or source of the property. This provision is derived from, and closely tracks, the “bona fide purchaser” provision in the criminal forfeiture statute;<sup>87</sup> consequently, the case law interpreting what it means to be a “purchaser” and to be “reasonably without cause to believe that the property was subject to forfeiture, in the criminal context will carry over to the new statute.”<sup>88</sup> Section 983(d)(3)(B) contains a narrow exception waiving the “purchaser” re-

82. Under pre-CAFRA law, the courts held that “willful blindness” equates with actual knowledge. See *United States v. Real Property 874 Gattel Drive*, 79 F.3d 918 (9th Cir. 1996) (willful blindness equates with “knowledge”); *United States v. \$705,270.00 in U.S. Currency*, 820 F. Supp. 1398 (S.D. Fla. 1993) (deliberate ignorance is equated with knowledge of the illegal activity). That principle will carry over to § 983(d)(2). See Testimony of Eric Holder, 1999 Hearing, DOJ EXTRACT, *supra* note 3 at 368 (“To show lack of knowledge, the owner would have to show that he was not willfully blind to the illegal use of the property.”).

83. 18 U.S.C.A. § 983(d)(2).

84. See *United States v. 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992) (proof of lack of consent requires claimant to show that he “took all reasonable steps to prevent illegal use of his property”); *United States v. 19 and 25 Castle Street*, 31 F.3d 35, 40 (2d Cir. 1994) (parent of adult child consented to illegal use of his property when he did not take every reasonable step to prevent such use); *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998) (charter aircraft operator, and its insurance company, were not innocent owners where neither took reasonable steps to ensure that the aircraft was not used for an unlawful purpose); *United States v. 1813 15th Street, N.W.*, 956 F. Supp. 1029 (D.D.C. 1997) (taking “some” steps to bar drug dealers from property not sufficient; landlady must take *all* reasonable steps, such as evicting tenants convicted of drug offenses); *United States v. 5.382 Acres*, 871 F. Supp. 880, 884 (W.D. Va. 1994) (“Property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property: ‘Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture.’”) (quoting *United States v. 418 57th Street*, 922 F.2d 129, 132 (2nd Cir. 1990)); *United States v. One Parcel Property Located at Lot 22*, 1996 WL 695404 (D. Kan. Nov. 14, 1996) (same).

85. 18 U.S.C.A. § 983 (d)(2)(B).

86. See *United States v. 1813 15th Street, N.W.*, 956 F. Supp. 1029 (D.D.C. 1997).

87. 21 U.S.C. § 853(n)(6)(B). See *United States v. Hooper*, 2000 WL 1509980 (9th Cir. Oct. 12, 2000) (noting that CAFRA applies the same bona fide purchaser requirement to civil forfeiture that previously applied to criminal forfeiture).

88. See *United States v. BCCI Holdings, Luxembourg S.A.*, 69 F. Supp. 2d 36 (D.D.C. 1999) (judgment creditor who obtains a lien on defendant’s property is not a bona fide purchaser because he gave nothing of value in exchange for the lien, irrespective of how the antecedent debt came into existence); *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (wife is not a bona fide purchaser of property husband placed in

quirement, but not the “innocence” requirement, in cases where a claimant acquires a residence from a wrongdoer pursuant to marriage, divorce or inheritance.

Section 983(d)(5) gives the court authority to sever or liquidate property to allow the government to realize its forfeitable interest when the property belongs, in part, to an innocent owner. For example, the court could convert a tenancy by the entireties into a tenancy in common so that one party’s interest could be forfeited; it could physically sever the property into two parts, so that one part could be forfeited; or it could direct the sale of the entire property, and allocate a portion of the sale proceeds to the government and a portion to the innocent owner. As a last resort, the court could allow the innocent owner to retain property subject to a lien in favor of the government.

Section 983(a)(6) defines “owner” to exclude creditors, nominees and bailees (unless the bailor is identified). The existing innocent owner statutes in 21 U.S.C. 881(a)(4),(6) and (7), 18 U.S.C. 981(a)(2) and 2254, and 8 U.S.C. 1324(b), are repealed.

5. *Appointment of Counsel and Attorneys Fees (18 U.S.C. § 983(b) & (h)); 28 U.S.C. § 2465)*

Section 983(b) authorizes pretrial appointment of counsel in cases involving residences, and authorizes CJA attorneys to represent criminal defendants in related civil forfeiture cases. This provision is the remnant of a much broader provision first included in H.R. 1916 in 1996 and ultimately passed by the House in 1999 that would have provided for the appointment of counsel in virtually all civil forfeiture cases upon a showing that the claimant was indigent.<sup>89</sup>

In lieu of the broader appointment of counsel provision passed by the House of Representatives, both Senate bills, S. 1701 and S. 1931, included a provision authorizing the payment of attorneys fees “and other litigation costs” in cases where the claimant “substantially prevails.”<sup>90</sup> As codified in § 2465(b), that provision obligates the government to pay fees and costs (regardless of its justification for bringing the forfeiture action) if the claimant prevails in litigation, as to some portion of the property.<sup>91</sup> No

her name because she gave nothing of value in exchange for the property); *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (wife is not a bona fide purchaser if she gave no value for the property; separation agreement is not giving value; daughter is not a bona fide purchaser because she received property as a gift knowing father had been indicted); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. Jun. 20, 1996) (defendant’s mother, who gave no value for property held in her name, and who understood the currency reporting requirements that defendant violated, was not a bona fide purchaser); *United States v. BCCI Holdings, Luxembourg S.A.*, 961 F. Supp. 287 (D.D.C. 1997) (bank’s exercise of a right of setoff against defendant’s account is not a “purchase”; given extensive public record of defendant’s misconduct, claimant knew or should have known that defendant’s assets were subject to forfeiture; standard is objective reasonableness); *United States v. BCCI Holdings (Luxembourg) S.A.*, 980 F. Supp. 10 (D.D.C. 1997) (same); *In re Moffitt, Zwerling & Kemler*, 846 F. Supp. 463 (E.D. Va. 1994) [hereinafter *Moffitt I*] (claim that third party was without cause to believe property was subject to forfeiture must be “objectively reasonable”); *aff’d*, *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (law firm had reason to know that the fee it received was subject to forfeiture).

89. The appointment of counsel provision was derived from H.R. 1916, DOJ EXTRACT, *supra* note 3 at 6, and was included in the H.R. 1965 in 1997 in greatly revised form, DOJ EXTRACT, *supra* note 3 at 220-21. That version is discussed in the 1997 Committee Report. DOJ EXTRACT, *supra* note 3 at 243-44. Another version was included in H.R. 1658 as it passed the House in 1999 and is discussed in the 1999 Committee Report. DOJ EXTRACT, *supra* note 3 at 279. The final, narrower version was included in S.1931. DOJ EXTRACT, *supra* note 3 at 413-14.

90. DOJ EXTRACT, *supra* note 3 at 395, 417-18.



the claimant prevails in litigation, as to some portion of the property.<sup>91</sup> No attorneys fees are available, however, if the claimant was convicted in a State or federal criminal case, or if multiple claims are filed and the government prevails as to at least one claim while not contesting another.<sup>92</sup>

Section 983(h) imposes a sanction on claimants who file frivolous claims.

#### 6. Seizure Warrants and Pre-Trial Restraining Orders (§ 981(b) and § 983(j))

Under the "old law," the government was permitted in some instances to seize property for forfeiture without a warrant based only on the existence of probable cause.<sup>93</sup> CAFRA limits this authority by amending 18 U.S.C. § 981(b) to permit warrantless seizures only when an "exception to the Fourth Amendment warrant requirement" applies.<sup>94</sup> At the same time, CAFRA amends § 981(b) to authorize "out-of-district" seizure warrants—i.e., warrants issued by a judge or magistrate in one district for the seizure of property in another district.<sup>95</sup>

Section 983(j) authorizes courts to issue civil restraining orders to preserve property for forfeiture pending trial. The statute parallels the criminal restraining order provision in 21 U.S.C. § 853(e), and thus allows restraining orders to be issued before and after a complaint is filed. A restraining order may be used to appoint a trustee or monitor of a business subject to forfeiture.

#### 7. Civil Forfeiture of Real Property (§ 985)

Section 985 codifies the government's pre-CAFRA "post and walk" policy, requiring that all civil forfeitures of real property must be judicial.<sup>96</sup> The statute also codifies the case law following the Supreme Court's decision in *United States v. James Daniel Good*

91. The attorney fee provision does not apply to cases where the United States Attorney declines to file a forfeiture complaint because in such cases there is no "litigation." The legislative history supports this view. See Statement of Rep. Hyde (April 11, 2000), DOJ EXTRACT, *supra* note 3 at 450 ("The bill provides that property owners who substantially prevail in court proceedings challenging the seizure of their property will receive reasonable attorneys fees."); Statement of Sen. Sessions, DOJ EXTRACT, *supra* note 3 at 389 ("If a claimant receives a judgment in his favor, the government will pay the claimant's reasonable attorney's fees."); Statement of Sen. Thurmond, DOJ EXTRACT, *supra* note 3 at 390 ("If the court enters a judgment for the claimant, the government must pay reasonable attorney fees to the claimant."); Statement of Sen. Hatch, DOJ EXTRACT, *supra* note 3 at 412 ("If the government decides to pursue a civil forfeiture action instead of the more difficult to prove criminal forfeiture action, it should be obligated to pay the attorney fees and costs of the property owner when the property owner prevails."); Statement of Sen. Leahy, DOJ EXTRACT, *supra* note 3 at 423 ("the Hatch-Leahy bill allows for the recovery of reasonable attorney fees and costs if they substantially prevail in court.").

92. See 28 U.S.C.A. § 2465(b)(2)(B) and (C) (West Supp. 2000).

93. See 21 U.S.C. § 881(b)(4) (1994) (repealed).

94. 18 U.S.C.A. 981(b)(2)(B)(ii) (West Supp. 2000). This is consistent with the Supreme Court's decision in *Florida v. White*, 526 U.S. 559 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment, where there was probable cause to believe the automobile was subject to forfeiture, and it was found in a public place).

95. What became § 981(b) was derived from the Justice Department's 1996 proposal, DOJ EXTRACT, *supra* note 3 at 38-40, 76-78, which was included in H.R. 1745, H.R. 1965, and ultimately S. 1701; DOJ EXTRACT, *supra* note 3 at 226-27, 254-55. See 1999 Hearing, Testimony of Eric Holder, incorporating Section by Section Analysis of Department of Justice 1999 proposal, § 107; DOJ EXTRACT, *supra* note 3 at 361, 372-73.

96. 18 U.S.C.A. § 985(a) (1994).

*Real Property*,<sup>97</sup> which held that real property may not be seized—except in exigent circumstances—without prior notice and an opportunity to be heard.

Under § 985(c), the government will, in general, commence a civil forfeiture action against real property by filing a complaint, posting notice of the complaint on the property, and serving notice on the property owner. The government will no longer be required to obtain an arrest warrant *in rem* for the property pursuant to the Supplemental Rules.<sup>98</sup> A *Good* hearing is required only if the government seeks possession of the property pre-trial.<sup>99</sup> In that case, the court must issue notice of an application for a seizure warrant for the property and conduct a hearing at which the property owner may be heard.<sup>100</sup> Alternatively, if the government asserts that exigent circumstances justify the seizure of the property without prior notice, the court may conduct the probable cause hearing *ex parte*,<sup>101</sup> but in that case, there must be a prompt post-seizure hearing where the claimant can be heard.<sup>102</sup>

#### 8. Law Enforcement Improvements

CAFRA contains a significant number of law enforcement improvements that were first proposed by the Department of Justice in 1996, were included in the 1997 compromise, H.R. 1965, and in the Sessions-Schumer bill, S.1701, in 1999, and ultimately became part of CAFRA when the two Senate bills were folded into one in March, 2000. The legislative history of these provisions is thus found in the 1996 Hearing, the 1997 Hearing and Committee Report, and the 1999 Hearing. The most important provisions are the following:

18 U.S.C. § 3322 is amended to allow an attorney for the government to use grand jury information in any civil forfeiture case without having to obtain a disclosure order from the court pursuant to Rule 6(e), Federal Rules of Criminal Procedure.<sup>103</sup>

The obstruction of justice statute, 18 U.S.C. § 2232, is amended to make clear that it is an offense to remove or destroy property to avoid civil forfeiture.<sup>104</sup>

Section 981(g) is amended to allow the government to obtain a stay of a civil forfeiture case pending a grand jury investigation. Under the “old law,” most courts held that the government could obtain a stay only after an indictment in a parallel criminal case

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97. 510 U.S. 43 (1993).

98. See 18 U.S.C.A. § 985(c)(3).

99. See 18 U.S.C.A. § 985(d).

100. See 18 U.S.C.A. § 985(d)(1)(B)(i). The only issue at a *Good* hearing is whether there is probable cause for the forfeiture. See *United States v. 194 Quaker Farms Road*, 85 F.3d 985, 988 (2d Cir. 1996) (at a *Good* hearing, the government must demonstrate probable cause to believe that the property is subject to forfeiture); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 78 (1993) (O'Connor, J., concurring) (“At any hearing, adversary or not, the [G]overnment need only show probable cause that the property has been used to facilitate a drug offense in order to seize it; it will be unlikely that giving the property owner an opportunity to respond will affect the probable-cause determination”).

101. 18 U.S.C.A. § 985(d)(1)(B)(ii).

102. See 18 U.S.C.A. § 985(e). Section 985 first appeared in S.1701 and in close to its final form in S.1931, DOJ EXTRACT, *supra* note 3 at 395, 418-19. It is briefly mentioned in Sen. Hatch's analysis of S.1931, DOJ EXTRACT, *supra* note 3 at 421.

103. See DOJ EXTRACT, *supra* note 3 at 61-62, 208, 255, 357, 374.

104. See *id.* at 261, 374-75, 457-58.

had been filed.<sup>105</sup>

Section 981(e) is amended to permit the use of forfeited funds for restitution to victims. Under the "old law," such use of the forfeited funds was permitted only in bank fraud cases.<sup>106</sup>

The statute authorizing the forfeiture of "fungible property" without having to trace the property to the illegal activity<sup>107</sup> is expanded to apply to all civil forfeitures. Previously, the statute applied only in money laundering cases.<sup>108</sup>

The fugitive disentitlement doctrine is reinstated and codified at 28 U.S.C. § 2466. Before the Supreme Court's decision in *Degen v. United States*,<sup>109</sup> courts routinely held that a fugitive in a criminal case could not avail himself of the court to contest a civil forfeiture action directed against his property. In *Degen*, however, the Court held that the application of the disentitlement doctrine exceeded the authority of the courts alone. Thus, it was necessary for Congress to reinstate the doctrine through legislation.<sup>110</sup>

The statute of limitations for civil forfeiture is amended to give the government 5 years from the date of the discovery of the offense *or* two years from the date of the discovery of the involvement of the property in the offense, whichever is longer, to commence a civil forfeiture action.<sup>111</sup> The two-year extension resolves a problem that arose in cases where the government knew, for more than 5 years, that a person had committed an offense, but did not discover, until after the 5 years had expired, what the person had done with the property derived from, or used to commit, the offense.<sup>112</sup>

28 U.S.C. § 2461 is amended to authorize criminal forfeiture (in accordance with the procedures in 21 U.S.C. § 853) whenever civil forfeiture is authorized. This makes it no longer necessary for the government to file a parallel civil forfeiture action in most cases involving gambling, firearms or other matters for which civil, but not criminal, forfeiture was authorized.<sup>113</sup> It also permits the government to seize or restrain property for the purpose of forfeiture pre-trial.<sup>114</sup> The Government remains free to file such a parallel civil case if it wishes to do so, however.

#### 9. *International Cases (28 U.S.C. 2467, et al.)*

CAFRA also contains a number of the Justice Department's proposals designed to encourage international cooperation in asset forfeiture cases. In particular, the courts, on application of the United States, are authorized to enforce foreign civil and criminal forfeiture judgments,<sup>115</sup> and the assets of a person arrested abroad may be restrained upon a showing that the act for which the person has been arrested would give rise to a

105. *See id.* at 369-70.

106. *See id.* at 55, 118, 255, 376.

107. 18 U.S.C.A. § 984.

108. *See* DOJ EXTRACT, *supra* note 3 at 56, 375.

109. 517 U.S. 820 (1996).

110. Pre-*Degen* case law will apply. *See* *United States v. Eng*, 951 F.2d 461, 464 (2d Cir. 1991) ("a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action"). DOJ EXTRACT, *supra* note 3 at 61, 118, 208-09, 357, 376, 428.

111. *See* 19 U.S.C. § 1621.

112. *See* DOJ EXTRACT, *supra* note 3 at 58, 261, 374, 457.

113. *See id.* at 209, 247, 378.

114. *See* 21 U.S.C. § 853(e) and (f); *See also, infra* note 173 and accompanying text.

115. *See* 28 U.S.C. § 2467; *See also* DOJ EXTRACT, *supra* note 3 at 55, 256-57, 377.

civil forfeiture action in the United States.<sup>116</sup> Courts are also authorized to dismiss a claim in a civil forfeiture case, or in the ancillary proceeding in a criminal case, when the claimant refuses to produce records that are in a bank secrecy jurisdiction.<sup>117</sup> Finally, the forfeiture provisions for alien smuggling are amended to authorize the civil forfeiture of proceeds and to correct some erroneous cross-references in the criminal forfeiture statute for alien smuggling that was enacted in 1996, that prevented that statute from having ever been used.<sup>118</sup>

#### 10. Forfeiture of All Proceeds (§ 981(a)(1)(C))

The most far-reaching expansion of forfeiture authority in CAFRA is the amendment to § 981(a)(1)(C) that authorizes the civil forfeiture of the proceeds of any offense defined as "specified unlawful activity" in 18 U.S.C. § 1956(c)(7) (the money laundering statute).<sup>119</sup> Civil forfeiture, of course, is available only when there is a specific statutory provision authorizing forfeiture in connection with a given offense. Before CAFRA, many federal crimes carried forfeiture authority, but a greater number did not. In particular, there was no forfeiture authority for such common crimes as mail and wire fraud, extortion and bribery. By making the proceeds of all crimes denoted as "specified unlawful activity" subject to forfeiture, CAFRA effectively gives the government the authority to seek the forfeiture of the proceeds of virtually all serious federal crimes, and a number of state and foreign crimes as well.<sup>120</sup>

As part of the compromise that permitted the inclusion of the Justice Department's "all proceeds" proposal in CAFRA, the Senate included a definition of "proceeds" in § 981(a)(2). "Proceeds" is defined as gross proceeds if the offense involves "unlawful activity, health care fraud or telemarketing fraud" and as gross proceeds minus "direct costs" if the offense involves "lawful goods or lawful services that are sold or provided in an illegal manner."<sup>121</sup> This definition is similar, but not identical, to the definition that was included in the 1997 compromise bill, H.R. 1965, for the same purpose.<sup>122</sup>

When combined with the provision in 28 U.S.C. § 2461(c) that authorizes criminal forfeiture whenever civil forfeiture is available, the amendment to § 981(a)(1)(C) authorizing civil forfeiture of criminal proceeds means that the government may now in-

116. See U.S.C.A. § 981(b)(4).

117. See U.S.C.A. § 986(d); See also DOJ EXTRACT, *supra* note 3 at 40, 255, 373.

118. See 8 U.S.C. § 1324(b); 18 U.S.C.A. § 982(a)(7); See also DOJ EXTRACT, *supra* note 3 at 262, 375.

119. See *id.* at 50, 117-18, 209, 246, 253, 375.

120. The definition of "specified unlawful activity" includes state crimes designed as "RICO predicates," incorporated by 18 U.S.C. § 1956(c)(7)(A) (1994), as well as the foreign offenses described in § 1956(c)(7)(B) (1994). See 18 U.S.C. § 1961(1) (1994).

121. 18 U.S.C.S. § 981(a)(2) (LEXIS Publishing Supp. July 2000).

122. See DOJ EXTRACT, *supra* note 3 at 253.

A person committing a fraud on a financial institution has no right to recover the money he invested in the fraud scheme; nor does a drug dealer have any right to recover his overhead expenses when ordered to forfeit the proceeds of drug trafficking. However, in an overbilling scheme, where the defendant provided some legitimate goods and services but billed for more than the amount actually provided, the court would be required to exempt from the forfeiture the amount of proceeds that the defendant established was traceable to the legitimate goods and services.

See also Statement of Sen. Leahy, DOJ EXTRACT, *supra* note 3 at 427-28; Statement of Rep. Hyde, DOJ EXTRACT, *supra* note 3 at 450, 457.

clude a forfeiture allegation in virtually every criminal indictment in which one of the offenses listed in 18 U.S.C. § 1956(c)(7) is charged as an offense.<sup>123</sup> This could prove to be the most significant change in the law under CAFRA.

### E. Effective Date of CAFRA

Section 21 of CAFRA provides that all amendments and provisions enacted by CAFRA (with one exception) apply “to any forfeiture proceeding commenced on or after” August 23, 2000.<sup>124</sup> With respect to the changes to civil forfeiture procedure, including the newly enacted §§ 983 and 985, the amendments to §§ 981, 984, 986 and 881, and the attorney fee provision in § 2465(b), that means the new provisions apply to any proceeding commenced after August 23, 2000 *regardless of the date of the offense or the date of the seizure*. But when is a proceeding “commenced”?

The legislative history says that “the date on which a forfeiture proceeding is commenced is *the date on which the first administrative notice of forfeiture relating to the property is sent*.”<sup>125</sup> So if a seizure occurred in July, 2000, and notice was sent August 15, 2000, the “old law” will apply to the case throughout the administrative, judicial and appellate process;<sup>126</sup> but if the seizure occurred in July and notice was not sent until August 30, 2000, the “new law” will apply.

The key point is that the determining factor in deciding whether a case is an “old law” or “new law” case is when the notice of administrative forfeiture was first sent, not when the underlying crime occurred, and not when the seizure took place. Moreover, once a case is determined to be an “old law” case, it remains so throughout the duration of the litigation. So, as long as notice of administrative forfeiture was sent before August 23, 2000, the case remains an “old law” case, even if the claim is filed after that date, or irrespective of when the claim is filed, if the U.S. Attorney does not file the complaint until after that date. Thus, as long as the notice of the administrative forfeiture was sent before August 23, the claimants will be required to file a cost bond in accordance with 19 U.S.C. § 1608, there will be no statutory deadline on the filing of a civil judicial complaint in district court, and the case will be governed by the pre-existing provisions regarding the burden of proof, the innocent owner defense, and many other aspects of civil forfeiture law.<sup>127</sup> For this reason, there are likely to be a number of “old law” cases in the system for some time to come.

On the other hand, what happens if there never was an administrative forfeiture because the U.S. Attorney decided (or was required by law) to proceed directly from the seizure to the filing of a complaint? In that case, the effective date language in § 21 is

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123. See *infra*, note 130 and accompanying text.

124. Civil Asset Forfeiture Act of 2000, Pub. L. No. 106-185, § 21, 114 Stat. 202, 225 (2000). The President signed CAFRA into law on April 25, 2000. Section 21 says that CAFRA applies to proceedings commenced on or after the 120<sup>th</sup> day after the date of enactment of the Act. August 23, 2000 was the 120<sup>th</sup> day.

125. 146 CONG. REC. at H2049 - H2051, 2000 WL 368969 (April 11, 2000); DOJ EXTRACT, *supra* note 3 at 457 (statement of Rep. Hyde) (emphasis added).

126. See *United States v. Ahmad*, 213 F.3d 805 (4<sup>th</sup> Cir. 2000) (CAFRA does not apply to case pending on appeal when the new law was enacted); *United States v. Santiago*, 2000 WL 1337159 (7<sup>th</sup> Cir. Sept. 18, 2000) (same); *United States v. 191 Whitney Place*, 2000 WL 1335748 (W.D.N.Y. Sept. 7, 2000) (new innocent owner defense in CAFRA applies only to proceedings commenced after August 23, 2000).

127. See *infra* Part II.

ambiguous, because there was no notice of administrative forfeiture sent to anyone. It seems likely, however, that if the first government action in a civil forfeiture case is the filing of a complaint after August 23, the "new law" will apply.

Application of the effective date provision in § 21 of CAFRA to some of the other changes in the law is less clear. Only the enactment of the new 28 U.S.C. § 2466 (the Fugitive Disentitlement Doctrine) is made explicitly retroactive so that it applies to pending cases.

### *1. Prisoner Challenges to Closed Administrative Cases*

One ambiguous provision is § 983(e), which creates a procedure whereby a person may seek to re-open a completed administrative forfeiture on the ground that the person did not receive notice of the forfeiture proceeding. Under § 983(e), the person challenging the administrative forfeiture must file a "motion to set aside" the declaration of forfeiture within five years of the final publication of the notice of the forfeiture. Suppose a prisoner serving a lengthy jail sentence decides to file a § 983(e) motion in December 2000, challenging a declaration of forfeiture entered in 1994.<sup>128</sup> Does the new statute, including its five-year statute of limitations, apply to this case because the motion was filed after August 23, 2000? Or is this an "old law" case because the "forfeiture proceeding" at issue took place in 1994?

Prisoners will no doubt argue that the "old law" applies to all administrative forfeitures that took place before August 23, 2000, for at least two reasons: because in some circuits the statute of limitations for challenging an administrative forfeiture under the old law was anywhere from six to eleven years; and because in the Ninth and Tenth Circuits, the government was barred from re-instituting a forfeiture action if the successful challenge was made after the government's statute of limitations under 19 U.S.C. § 1621 expired.<sup>129</sup>

On the other hand, the legislative history indicates that § 983(e) was enacted to resolve uncertainty in the law and to provide a clear mechanism for resolving challenges to completed administrative forfeitures.<sup>130</sup> It would make little sense for Congress to have enacted a provision intended to clarify the law, and to provide a procedure where none previously existed, only to have it not apply for more than a decade while prisoners continued to challenge old cases under the old law. Hence, it seems likely that § 983(e) will be held to apply to any case where the motion to set aside the forfeiture declaration is filed after August 23, 2000, regardless of the age or date of the underlying forfeiture.<sup>131</sup>

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128. Challenges to administrative forfeitures on grounds of lack of notice are almost exclusively filed by prisoners. See DOJ EXTRACT, *supra* note 3 at 370 (Analysis of 1999 Department of Justice proposal).

129. See *supra* notes 60 and 61.

130. DOJ EXTRACT, *supra* note 3 at 370-71.

131. *But see* United States v. Duke, 2000 WL 1511692 (7<sup>th</sup> Cir. Oct. 12, 2000) (dicta) (stating without discussion or briefing that § 983(e) applies only to administrative forfeitures commenced after August 23, 2000; distinguishable on the ground that both the administrative forfeiture and the motion for the return of the forfeited property were filed before August 23, 2000).

## 2. Civil and Criminal Forfeiture of All Proceeds

Equally uncertain, and equally important, is the effective date of the provisions allowing the government to bring civil and criminal forfeiture actions to recover the proceeds of all crimes.

Before CAFRA, there was no global authority to forfeit the proceeds of crime. Criminal proceeds could only be forfeited if there was a specific statute authorizing such forfeiture for a given crime, or if the government sought the forfeiture as part of a money laundering case. When the President signed CAFRA into law on April 25, 2000, however, § 981(a)(1)(C) was amended to read as follows:

The following property is subject to forfeiture to the United States:

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or **any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.**<sup>132</sup>

The reference to “specified unlawful activity” as defined in § 1956(c)(7), of course, is to the long list of money laundering “predicate” offenses, including all “RICO” predicate offenses, that comprise virtually all of the most serious federal crimes, and a number of State and foreign crimes as well.

As § 21 of CAFRA provides, this amendment applies to any forfeiture proceeding commenced on or after August 23, 2000, regardless of when the underlying crime occurred. That means that the United States can now seek civil forfeiture of the proceeds of any of the crimes listed as money laundering predicates in § 1956(c)(7) including the State and foreign crimes. Moreover, as mentioned *supra* in Section D, pursuant to the amendment to 28 U.S.C. § 2461(c), the government can now bring a criminal forfeiture action for any offense for which civil forfeiture is authorized.<sup>133</sup> So the government can now include a criminal forfeiture allegation in virtually every indictment that charges at least one of the offenses listed in the money laundering statute.

The application of this new forfeiture authority will be limited in criminal cases, however, by the *ex post facto* clause of the Constitution.<sup>134</sup> Therefore, notwithstanding the intent of Congress to make CAFRA apply to all cases commenced after August 23, 2000, regardless of the date of the underlying offense, the government will not be able to bring criminal forfeiture actions to recover the proceeds of crimes committed before the date of enactment of the new law.<sup>135</sup>

132. 18 U.S.C.A. § 981(a)(1)(C) (West Supp. 2000) (emphasis added).

133. Section 981(a)(1)(C), which was amended to authorize the forfeiture of the proceeds of any offense denoted as a “specified unlawful activity” in 18 U.S.C. § 1956(c)(7), is a civil forfeiture statute. Standing alone, it does not authorize criminal forfeiture. But 28 U.S.C. § 2461(c) has been amended to authorize the criminal forfeiture of any property for which civil forfeiture is authorized. Therefore, taken together, these two statutes authorize the government to include notice of criminal forfeiture in any criminal indictment filed after August 23, 2000, in which any “specified unlawful activity” is alleged.

134. See *United States v. Colon-Munoz*, 192 F.3d 210 (1<sup>st</sup> Cir. 1999) (application of § 982(a)(2)(A), the criminal forfeiture statute for bank fraud, to a conspiracy that began before the effective date of the statute, violates the *ex post facto* clause where no overt act occurred after that date).

135. It is not clear, however, whether the date of enactment, for purposes of the *ex post facto* clause, is April 25, 2000, the date the President signed the bill, or August 23, 2000, the date the changes made by CAFRA begin to apply to forfeiture proceedings. Section 21 refers to the date the President signed the bill as

There is no *ex post facto* problem with respect to civil forfeiture, however. Civil forfeiture statutes can apply retrospectively if there is evidence that Congress intended them to so apply, or in the absence of the expression of congressional intent, if the statute imposes no new legal consequences for prior conduct.<sup>136</sup> On both grounds, the expansion of civil forfeiture authority in § 981(a)(1)(C) may be applied retrospectively to conduct occurring before August 23, 2000, as long as the forfeiture action is not commenced until that date.

The amendment to § 981(a)(1)(C), of course, authorizes only the forfeiture of criminal proceeds. Courts have been virtually unanimous in holding that the forfeiture of proceeds is a remedial action because it deprives the wrongdoer of property he had no right to possess in the first place.<sup>137</sup> Thus, a statute such as § 981(a)(1)(C) imposes no new judicial consequences on conduct committed before the date the statute took effect.<sup>138</sup>

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the "date of enactment," and refers to August 23 as the "the date that is 120 days after the date of enactment of this Act." CAFRA § 21.

There should be no *ex post facto* problem, however, if before the effective date of CAFRA, there was civil, but not criminal, forfeiture authority for a given offense. For example, because a person committing a gambling violation under 18 U.S.C. § 1955 was subject to civil forfeiture under § 1955(d) at the time of the offense, it should be possible for the government now to include a criminal forfeiture allegation pursuant to §§ 2461(c) and 1955(d) in an indictment charging a gambling offense that occurred before CAFRA was enacted, without violating the *ex post facto* clause. In such a case, § 2461(c) does not increase the penalty for the offense, but merely changes the procedure for imposing the penalty. See *United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991) (refusing to apply *ex post facto* clause in a RICO case where substitute assets provision merely provided "for an alternative method of collecting a forfeiture judgement" and thus did not increase defendant's penalty); *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985) (procedural changes in criminal forfeiture statute do not violate *ex post facto* clause).

136. See *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994) (application of rules of statutory construction regarding the retrospective application of civil statutes comes into play only if the Congressional intent is unclear; if the intent is unclear, the statute applies retrospectively unless it impose new legal consequences on acts committed before the effective date of the legislation); *United States v. Certain Funds (Hong Kong and Shanghai Banking Corporation)*, 96 F.3d 20 (2d Cir. 1996) (civil forfeiture statutes are not penal in nature and therefore may be applied retroactively without violating the *ex post facto* clause; using analysis in *United States v. Ursery*, 518 U.S. 267 (1996), to hold that §§ 981 and 881 may be applied retroactively without violating the *ex post facto* clause).

137. For example, courts consistently hold that the forfeiture of proceeds is not considered punitive for purposes of applying the Excessive Fines Clause of the Eighth Amendment. See *United States v. Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (collecting cases); *United States v. Various Computers*, 82 F.3d 582 (3d Cir. 1996); *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994); *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994), *reaff'd following remand*, 108 F.3d 853 (8th Cir. 1997); *United States v. Wild*, 47 F.3d 669 (4th Cir. 1995); *United States v. 1948 Martin Luther King Drive*, 91 F. Supp. 2d 1228 (C.D. Ill. 2000) (Eighth Amendment does not apply to forfeiture of property purchased with drug proceeds, or if it does, the forfeiture is not excessive); *In re Moffit, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994); *United States v. \$130,052.00 in U.S. Currency*, 909 F. Supp. 1506 (M.D. Ala. 1995) (the Eighth Amendment is not applicable to proceeds); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996) (Excessive Fines Clause does not apply to forfeitures that are purely remedial in nature; forfeiture of proceeds is purely remedial).

138. See *United States v. Waters of Leiper's Creek*, 181 F.3d 104, available in 1999 WL 357773 (6th Cir. 1999) (Table) (enactment of § 881(a)(6) in 1978, authorizing forfeiture drug proceeds, applies retroactively to conduct occurring in 1974 because a person has no right to possess drug proceeds, and so the new law created no additional legal consequences); *United States v. 403 2 Skyline Dr.*, 797 F. Supp. 796 (C.D. Cal. 1992) (FIRREA forfeiture under § 981(a)(1)(C) applies retroactively to offense committed before 1989 effective date because statute is remedial in nature); *United States v. All Monies in Account #42032964*, 1992 WL 301257 (E.D. Pa. Oct. 14, 1992) (same); *but see United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207 (9th Cir.



Moreover, it is clear from the text of § 21 that Congress intended CAFRA and the changes made by CAFRA to apply to pre-August 23, 2000 conduct. If that were not the case, the triggering mechanism for the application of the new law would not be the date the forfeiture proceeding is commenced, but the date of the underlying conduct giving rise to the forfeiture. Evidently, Congress wanted the reforms embodied in CAFRA to apply as soon as possible. The delay in the effective date was imposed only to allow the federal law enforcement agencies time to train their personnel in the requirements of the new law.<sup>139</sup> Given this expression of Congressional intent, there seems little doubt that the proceeds of pre-August 23, 2000 criminal offenses are now subject to forfeiture in civil cases.

## II. DEADLINES FOR ADMINISTRATIVE AND CIVIL FORFEITURE

Title 18, United States Code, § 983(a), sets forth a detailed set of rules governing the commencement of administrative and civil judicial forfeiture proceedings, and the procedure for filing claims in opposition to such actions. As mentioned in Part I, these provisions override the provisions of the customs laws and the Supplemental Rules to the extent that there is any conflict between them.<sup>140</sup> Where there is no conflict, the customs procedures in 19 U.S.C. § 1602 et seq., as incorporated by 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d), still apply to administrative forfeitures, and the Supplemental Rules still apply to civil judicial forfeitures.<sup>141</sup>

The remainder of this article describes the “old law,” beginning with the sending and publication of notice and the filing of a claim in the administrative forfeiture proceeding, and including the filing of the complaint, claim and answer in judicial cases. It then discusses in detail the changes to the law made by § 983(a).

### A. Background

Under pre-CAFRA law, there was no general-purpose statutory requirement that the government commence a civil forfeiture action—either administrative or judicial—within any specific period of time following the seizure of property. The customs laws require only that forfeiture proceedings be commenced “forthwith” and be prosecuted “without delay” once property is seized.<sup>142</sup> Similarly, the statutes and Rules governing publication of notice of administrative and civil judicial forfeiture proceedings, respectively, do not specify when such publication must occur.<sup>143</sup>

The civil forfeiture statutes themselves contained similar provisions requiring the

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1995) (§ 984 does not apply retroactively because it permits forfeiture of property other than the criminal proceeds themselves, and thus imposes a new sanction on conduct committed before the date of enactment).

139. See Statement of Rep. Hyde (April 11, 2000), DOJ EXTRACT, *supra* note 3 at 457 (“The purpose of [§ 21] is to give the Justice Department and the U.S. courts four months from the date of enactment of the bill to educate their employees as to the bill’s changes in forfeiture law.”).

140. See *supra* Note 36.

141. See 28 U.S.C. § 2461(b); 18 U.S.C. § 983(a)(3).

142. 19 U.S.C. § 1604.

143. See 19 U.S.C. § 1607 (requiring publication of notice of administrative forfeiture for three successive weeks in a newspaper of general circulation, without specifying when such publication must occur); Rule C(4), Supplemental Rules for Certain Admiralty and Maritime Claims (requiring the government to “promptly” cause public notice to be published in a newspaper of general circulation).

government to commence administrative forfeiture proceedings "promptly" following the seizure of property.<sup>144</sup> In 1988, Congress used a slightly different formulation in a statute dealing solely with vehicles seized in connection with a drug offense. In such cases, the government was required to send notice of the administrative forfeiture "at the earliest practical opportunity."<sup>145</sup> Occasions when the courts found that the government had failed to comply with these statutory requirements were rare.<sup>146</sup>

There were two situations, however, where Congress did set forth a fixed deadline for the commencement of a civil forfeiture action. Under 21 U.S.C. § 888(c) (1999), the government was required to institute civil judicial proceedings against vehicles seized in connection with drug trafficking offenses "not later than sixty days after a claim and cost bond have been filed."<sup>147</sup> And under 18 U.S.C. § 924(d)(1), the government was (and still is) required to commence an administrative forfeiture action for the forfeiture of firearms or ammunition within 120 days of the seizure of the property.<sup>148</sup>

In 1993, the government adopted a unilateral policy requiring all administrative forfeiture actions to be commenced within sixty days of the seizure,<sup>149</sup> but that policy did not have the force of law, and did not confer any substantive rights on property own-

144. See 21 U.S.C. § 881(b) (1999) (providing that when property is seized for forfeiture, administrative forfeiture proceedings under the customs laws must be "instituted promptly"); 18 U.S.C. § 981(b)(2)(B) (1999) (same).

145. 21 U.S.C. § 888(b) (1999).

146. Compare *Dwyer v. United States*, 716 F. Supp. 1337 (S.D. Cal. 1989) (DEA's sending of notice 62 days after the seizure and 55 days after identifying the car owner was not done "at the earliest practicable opportunity"); *Brantz v. United States*, 724 F. Supp. 767, 769 (S.D. Cal. 1989) (delay of 21 days between seizure and the sending of notice violated the requirement that notice be sent "at the earliest practicable opportunity" where, before the seizure, the government had determined who owned the vehicle and that there were no lienholders); and *United States v. One 1992 Ford Mustang GT*, 73 F. Supp.2d 1131 (C.D. Cal. 1999) (101-day delay from time FBI took custody of property to time it sent notice of administrative forfeiture did not comply with requirement in § 888(b) that proceedings be commenced as soon as practicable); Cf. *Scott v. United States*, 950 F. Supp. 381, 388 (D.D.C. 1996) (delay of 50 days was not undue given that owner was informed of government's intention to seize his vehicle at time of his arrest); *United States v. One 1990 GMC Jimmy*, 972 F. Supp. 1091 (E.D. Mich. 1997) (government is not under any particular time constraint in initiating administrative forfeiture proceedings under § 888(b) or any other civil forfeiture statute).

147. Section 888(c) was construed to apply to vehicles seized for civil forfeiture in drug cases under § 881(a)(4), and in money laundering cases under § 981(a)(1)(A) where the underlying criminal activity was a drug offense. See *United States v. One 1997 Mercedes E420*, 175 F.3d 1129 (9<sup>th</sup> Cir. 1999) (laundering drug money is a "drug-related offense;" complaint filed under § 981 for forfeiture of an automobile purchased with drug proceeds must be filed within sixty days). The courts are divided on whether the statute applied to a vehicle seized as proceeds of a drug trafficking offense. See *United States v. A 1966 Ford Mustang*, 945 F. Supp. 149 (S.D. Ohio 1996) (§ 888 does not apply to vehicle forfeited as drug proceeds under § 881(a)(6)); *United States v. One 1989 Cessna 441 Conquest Aircraft*, 989 F. Supp. 1465 (S.D. Fla. 1997) (same for aircraft); but see *United States v. One 1996 Toyota Camry*, 963 F. Supp. 903 (C.D. Cal. 1997) (§ 888 applies to forfeiture of car as proceeds under § 881(a)(6); collecting cases; remedy for § 888 is return of property to claimant upon payment of bond).

148. See *United States v. Twelve Firearms*, 16 F. Supp. 2d 738 (S.D. Tex. 1998) (requirement in 18 U.S.C. § 924(d)(1) that forfeiture of firearms or ammunition must be commenced within 120 days of seizure is satisfied by commencement of either administrative or judicial forfeiture proceedings within that period); *United States v. Twelve Miscellaneous Firearms*, 816 F. Supp. 1316 (C.D. Ill. 1993) (forfeiture action is timely so long as at least an administrative action is commenced within 120 days of seizure); but see *United States v. Fourteen Various Firearms*, 889 F. Supp. 875, 877 (E.D. Va. 1995) (interpreting "any" to mean the same as "every" and concluding that any administrative forfeiture action and any judicial forfeiture action must be commenced within 120 days of seizure).

149. See *Asset Forfeiture Policy Manual* (1996), Chapter II, § II.A, at p. 2-4 (1996).

ers.<sup>150</sup>

In the absence of any statutory deadlines for the commencement of administrative or civil judicial forfeiture proceedings, the courts ruled that the only protection a property owner had against government delay was the Due Process Clause of the Fifth Amendment, as applied by the Supreme Court in *United States v. \$8,850 in U.S. Currency*.<sup>151</sup> Generally, in those cases, the courts declined to find any due process violation despite delays of as much as 2 years in the filing of a judicial forfeiture complaint.<sup>152</sup>

Thus, as a practical matter, the only way that a claimant could force the government to file a civil forfeiture complaint more promptly was to file a motion for the return of seized property under Rule 41(e) of the Federal Rules of Criminal Procedure.<sup>153</sup>

There were, however, deadlines imposed on persons intending to challenge the administrative or civil judicial forfeiture action. With respect to administrative forfeitures, the customs laws require that a person claiming property seized for forfeiture must file a claim within twenty days "from the date of the first publication of the notice of seizure."<sup>154</sup> Moreover, the claim must be accompanied by a bond—commonly referred to as a "cost bond"—"in the penal sum of \$5,000 or 10 percent of the value of the property, whichever is lower, but not less than \$250,"<sup>155</sup> unless the seizing agency waives the bond requirement for persons filing claims *in forma pauperis*.<sup>156</sup> Courts upheld the cost bond requirement on the ground that it is necessary to deter the filing of frivolous claims.<sup>157</sup>

In civil judicial cases, claimants were required to file a claim to the property ten days after the execution of "process" on the property (generally, the service of an arrest war-

150. See *Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 927 (11th Cir. 1997) (DOJ policy directives create no enforceable rights); *United States v. 101 N. Liberty St.*, 80 F. Supp.2d 1298, 1306 (M.D. Ala. 2000) (policy regarding minimum threshold value of property not enforceable by the claimant).

151. 461 U.S. 555 (1983) (18-month delay in commencement of forfeiture proceedings did not violate due process).

152. See *United States v. \$874,938.00 U.S. Currency*, 999 F.2d 1323 (9th Cir. 1992) (11 month delay from time of seizure not unreasonable); *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (thirty month delay from time of seizure not unreasonable); *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293, 1299 (S.D. Fla. 1999) (23-month delay not unreasonable where first 11 months were attributable to claimant's decision to file remission petition with USCS instead of immediately filing claim and cost bond); *United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997) (8-month delay not unreasonable where government waited until property no longer had evidentiary value in a criminal case); *United States v. Funds in Amount of \$37,760.00*, 1998 WL 42465, at \*4 (N.D. Ill. Jan. 28 1998) (38-month delay justified because government was properly concerned with risk of civil discovery if it commenced forfeiture before conclusion of criminal case; also, claimant took no action to prompt earlier filing and suffered no prejudice); *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp.2d 660 (D.S.C. 1999) (delay in filing judicial forfeiture doesn't violate due process where property was administratively forfeited, claimant waited 2 years to challenge it, and government refiled 2 months after administrative forfeiture was vacated); *United States v. 40 Clark Rd.*, 52 F. Supp. 2d 254 (D. Mass. 1999) (filing civil forfeiture while criminal forfeiture was pending would have been redundant; therefore nothing improper in waiting to file civil forfeiture until defendant's death made it necessary).

153. See Note 55, *supra*, and accompanying text.

154. 19 U.S.C. § 1608 (1994).

155. *Id.*

156. See *Asset Forfeiture Policy Manual* (1996), Chapter II, § II.C, at p. 2-9 (1996).

157. See *Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 927 (11th Cir. 1997) (cost bond serves to deter frivolous claims; customs properly denied *in forma pauperis* petition where claimant refused to explain why his monthly living expenses exceeded his income); *Restrepo v. United States*, 1999 WL 1044359, at \*2 (S.D.N.Y. Nov. 18, 1999) (because of *in forma pauperis* provision, cost bond does not violate due process).

rant *in rem*),<sup>158</sup> and to file an answer within twenty days of filing a claim.<sup>159</sup> The claim must be filed under oath and must state the interest in the property that the claimant is asserting in the forfeiture action.<sup>160</sup>

The courts strictly enforce these filing requirements. If a claimant does not contest an administrative forfeiture action within the specified time period, or does not file the required cost bond, the seizing agency is entitled to enter a declaration of forfeiture by default.<sup>161</sup> Such declarations of forfeiture have the same force and effect as a final judgement of forfeiture in a judicial forfeiture proceeding.<sup>162</sup> Courts will not disturb or review such declarations on the merits, except to determine whether the seizing agency complied with due process by providing timely and sufficient notice to the person asserting an interest in the property.<sup>163</sup>

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158. See *United States v. Approximately 2,538.85 Shares of Stock Certificates*, 988 F.2d 1281, 1286 (1st Cir. 1993) (10-day requirement in Rule C(6) is triggered when "process" is executed; "process" includes both service of notice on owner and arrest of property itself; if publication occurs later, ten days runs from date of personal service, not from date of publication).

159. Rule C(6), Supplemental Rules for Certain Admiralty and Maritime Claims.

160. *Id.*

161. 19 U.S.C. § 1609(a) (1994). See *In re Forfeiture of \$34,905.00 in U.S. Currency*, 96 F. Supp.2d 1116, 1119 (D. Or. 2000) (absent a legally sufficient claim and cost bond, the seizing agency is obligated to forfeit the property administratively, and the court lacks jurisdiction to consider the claim on the merits).

162. 19 U.S.C. § 1609(b) (1994).

163. See *United States v. Eubanks*, 169 F.3d 672, 674 (11<sup>th</sup> Cir. 1999) ("It is inappropriate for a court to exercise equitable jurisdiction to review the merits of a forfeiture matter when the petitioner elected to forego the procedures for pursuing an adequate remedy at law." Because claimant received notice of the administrative forfeiture, the district court lacked jurisdiction to consider his Rule 41(e) motion for the return of the forfeited property); *Linarez v. Department of Justice*, 2 F.3d 208, 213 (7<sup>th</sup> Cir. 1993) ("A forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not."); *United States v. Woodall*, 12 F.3d 791 (8<sup>th</sup> Cir. 1993) (court has jurisdiction to determine if the government complied with the statutory notice provisions set forth in § 1607, and if not, to allow the claimant to file a claim in accordance with § 1608 notwithstanding the expiration of the claims period); *United States v. Giraldo*, 45 F.3d 509 (1<sup>st</sup> Cir. 1995) (court has jurisdiction under 28 U.S.C. § 1331 to entertain due process attack on administrative forfeiture); *Toure v. United States*, 24 F.3d 444 (2<sup>d</sup> Cir. 1994) (court's jurisdiction is limited to reviewing the adequacy of the notice); *United States v. Schinnell*, 80 F.3d 1064, 1069 (5<sup>th</sup> Cir. 1996) ("Once the administrative forfeiture was completed, the district court lacked jurisdiction to review the forfeiture except for failure to comply with procedural requirements or to comport with due process." Defendant cannot, as part of double jeopardy challenge in criminal case, contend that untested forfeiture was not limited to proceeds); *United States v. Deninno*, 103 F.3d 82 (10<sup>th</sup> Cir. 1996) (court agrees that jurisdiction under Rule 41(e) or § 1331 is limited to adequacy of due process in the administrative forfeiture proceeding, but finding record insufficient to establish that forfeiture was procedurally adequate, court moves directly to reject forfeiture challenge on the merits); *United States v. Lacey*, 1998 WL 982885, at \*3 (D. Kan. Aug. 18, 1998) (following *Deninno*; court has no jurisdiction to consider motion for return of forfeited property on the merits if claimant received proper notice of the administrative forfeiture); *United States v. Derenak*, 27 F. Supp. 2d 1300, 1304 (M.D. Fla. 1998) (court has equitable jurisdiction to review administrative forfeiture to make sure it was procedurally adequate, but may not review agency's findings on the merits); *United States v. Schiavo*, 897 F. Supp. 644, 647 (D. Mass. 1995), *aff'd*, 94 F.3d 640 (1<sup>st</sup> Cir. 1996) (court could review adequacy of notice but not Fourth Amendment objection to seizure that claimant could have raised if he had filed a claim); *Concepcion v. United States*, 938 F. Supp. 134, 138 (E.D.N.Y. 1996), *aff'd*, 116 F.3d 465 (2<sup>nd</sup> Cir. 1997) (court lacks jurisdiction to review 8<sup>th</sup> Amendment challenge to administrative forfeiture); *Patino v. United States*, No. 5:99-CV-189-BR(2) (E.D.N.C. Aug. 9, 1999) (DEA properly rejected claim and cost bond that were filed 9 days late; absent a timely claim, court has no jurisdiction to review the forfeiture on the merits); *In re Seizure of \$370,000*, 98 CV 1026 (CBA) (E.D.N.Y. Aug. 12, 1999) (court lacks jurisdiction to review merits of claim where claimant made conscious decision to file a Rule 41(e) motion instead of a claim and cost bond); *but see Gete v. INS*, 121 F.3d 1285, 1292 (9<sup>th</sup> Cir. 1997) (court may

Similarly, if a claimant fails to comply with the filing requirements of Rule C(6), his claim and answer in a civil judicial forfeiture proceeding will almost certainly be dismissed for lack of "statutory standing."<sup>164</sup>

### B. New Procedures for Civil Forfeiture Actions and Filing Claims

The enactment of CAFRA was, in part, a reaction to the perception that there was some inequity in imposing strict deadlines and sanctions on property owners contesting civil forfeiture actions, while not imposing similar deadlines and sanctions on the government. The logic was that if property owners were required to file claims within a fixed period of time, and were made to suffer consequences for failing to do so, the government should face deadlines and suffer consequences as well.

Moreover, there was a sense that the time periods imposed by the customs laws and Supplemental Rules on property owners were too short, and that the requirement of a cost bond had a chilling effect on a property owner's access to the federal courts.<sup>165</sup>

Thus, § 983(a) of title 18, as enacted by § 2 of CAFRA, overrides most of the pre-CAFRA rules regarding the commencement of administrative and civil judicial forfeiture proceedings and the filing of claims. Under § 983(a)(1), notice of administrative forfeiture actions must, in general, be sent to interested persons within sixty days of the seizure of the property. Under § 983(a)(2), property owners, in turn, have thirty days from last date of publication to file a claim, and may do so without having to file a cost bond. If a claim is filed, the United States Attorney has ninety days under § 983(a)(3) to file a civil judicial action (or to include the forfeiture in a related criminal indictment). Finally, if the government files a civil judicial complaint, § 983(a)(4) gives property owners thirty days to file a claim to the property in accordance with the Supplemental Rules, and twenty days from the filing of the claim to file an answer.

The provisions in § 983(a), of course, override contrary provisions in pre-CAFRA law, even though the corresponding provisions of the customs laws and the Supplemental Rules were neither amended nor repealed. Those provisions will continue to apply to forfeitures exempted from CAFRA by § 983(i). Moreover, as mentioned in Part I, the provisions in the customs laws and the Supplemental Rules that do not conflict with § 983(a) will continue to apply to administrative and civil judicial forfeitures under the

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review alleged 4th, 5th and 8th Amendment violations in the administrative forfeiture if claimants were not on notice that they waived those rights by failing to file claim and cost bond).

164. See *United States v. Commodity Account No. 54954930 at Saul Stone & Co.*, 219 F.3d 595 (7<sup>th</sup> Cir. 2000) (verification forces the claimant to place himself at risk of perjury for false claims; failure to verify the claim results in dismissal for lack of statutory standing; claimant who filed claim but waited 2 years to file his answer lacked statutory standing); *United States v. 5145 Golden State Boulevard*, 135 F.3d 1312 (9<sup>th</sup> Cir. 1998) (claimant who received proper notice but failed to file claim in accordance with Rule C, lacked standing to challenge magistrate's authority to enter default judgment); *United States v. \$50,200 In U.S. Currency*, 76 F. Supp.2d 1247 (D. Wyo. 1999) (claimant who filed answer but no claim lacked statutory standing; claim filed in administrative forfeiture proceeding is no substitute for claim required by Rule C(6) in judicial forfeiture proceeding); *United States v. \$68,000 in U.S. Currency*, 1995 WL 871218 (E.D. Mich. Oct. 26, 1995) (claimant filed answer but never filed verified claim); *United States v. Route 2, Box 293*, 46 F. Supp.2d 572 (S.D. Miss. 1998) (claimant who filed claim but no answer, and second claimant who filed answer but unverified claim, both lack statutory standing; courts enforce pleading requirements strictly) (citing cases); but see *United States v. Incline Village*, 976 F. Supp. 1321, 1324 (D. Nev. 1997) (claimant's seven-year delay in filing claim in still-pending case was excusable neglect; claimant did not realize she had any legal interest).

165. See 1997 Committee Report, *supra* note 23, at 34; DOJ EXTRACT, *supra* note 3 at 246.

new Act. However, Congress did repeal the pre-CAFRA versions of 18 U.S.C. § 981(b) and 21 U.S.C. § 881(b), replacing both with new provisions regarding the seizure of property for civil forfeiture, and also repealed § 888 in its entirety.<sup>166</sup>

The provisions of § 983(a) are discussed in detail in the remainder of this article.

### C. Notice of Administrative Forfeiture Proceedings

Section 983(a)(1) sets forth the rules governing the initiation of an administrative forfeiture proceeding, beginning with the seizure of the property by a federal law enforcement agency, or the adoption by such an agency of a seizure undertaken by a state or local agency. It is divided into several parts.

Paragraph (1)(A) provides that, as a general rule, notice of any “nonjudicial”—i.e., administrative—forfeiture proceedings “shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than sixty days after the date of seizure.”<sup>167</sup>

#### 1. “As Soon as Practicable”

The first thing to notice is that although this is generally referred to as the “sixty-day notice requirement,” the statute does not contain a flat sixty-day rule. To the contrary, the government is required to send notice “as soon as practicable” and in no case more than sixty days after the seizure. As mentioned, however, now-repealed § 888(b) also required the government to send notice as soon as practicable, and courts almost never held that notice sent within sixty days was not sent soon enough under that statute.<sup>168</sup>

Moreover, there is no sanction in the statute for failing to send notice “as soon as practicable,” other than the return of the property to the person from whom it was seized

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166. See CAFRA § 2(c)(3). It is important to note that Congress *did not* repeal the provision in 18 U.S.C. § 924(d)(1) requiring administrative forfeiture proceedings in firearms cases to be commenced within 120 days. Thus, that provision remains in effect, giving the government more time to commence an administrative forfeiture action in a firearms case covered by § 924(d)(1) than in other civil forfeiture situations, unless § 983(a)(1) is held to override the older statutes. In any event, the 120-day provision in § 924(d)(1) does not apply to the civil forfeiture of a firearm under the drug laws, i.e. 21 U.S.C. § 881(a)(11).

167. 18 U.S.C. § 983(a)(1)(A)(i) (West Supp. 2000). Section 983(a)(1)(A)(i) reads as follows:

Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than sixty days after the date of the seizure.

Section 983(a)(1)(A)(i) specifies that the notice must be sent in any civil forfeiture proceeding “with respect to which the government is required to send written notice to interested parties.” The government, of course, is required “to send written notice to interested parties” in *all* administrative forfeiture proceedings. If the forfeiture is governed by the customs laws, the written notice is required by § 1607(a), which provides that the government must send “written notice . . . to each person who appears to have an interest in the seized article.” If the forfeiture is governed by a statute that permits administrative forfeiture but does not incorporate the customs laws, the government is nevertheless required to send notice to interested parties in order to comply with the Due Process Clause of the Fifth Amendment; see *United States v. Marolf*, 973 F. Supp. 1139 (C.D. Cal. 1997) (failure to send notice to person appearing to have an interest in the property violates due process under *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950)). Therefore, the quoted language does not really add anything to the statute.

168. See *supra* Note 122.

pursuant to § 983(a)(1)(F). But that sanction applies “without prejudice to the right of the government to commence a forfeiture proceeding at a later time.” So, if the person from whom the property was seized does not complain about the government’s failure to send notice “as soon as practicable” until after the government has sent notice sometime later within the sixty-day period, the point is already moot, for the government, by sending the notice, will already have commenced the forfeiture proceeding. And if the person complains about the lack of notice *within* the sixty day period, but before notice is sent, the government can simply send him notice (though it is hardly necessary to do so, given that such a person is already aware of the forfeiture action) and thus commence the forfeiture proceeding. Accordingly, it is difficult to see what practical effect the “as soon as practicable” requirement in § 983(a)(1)(A) might have.<sup>169</sup>

## 2. Ten Exceptions to the Sixty-Day Requirement

The next thing to notice is that the statute by its own terms is limited to only certain kinds of forfeiture proceedings and that it contains some explicit exceptions. In fact, there are ten exceptions (implicit and explicit) to the sixty-day notice rule.

### a. Civil Forfeiture only

Section 983(a)(1)(A) applies to “any nonjudicial civil forfeiture proceeding under a civil forfeiture statute,” so obviously, it does not apply to criminal forfeiture proceedings. If property is seized not for civil forfeiture, but for criminal forfeiture with a warrant issued pursuant to 21 U.S.C. § 853(f), the sixty-day notice rule does not apply.

### b. Real Property Cases

Again, § 983(a)(1)(A) applies only to *nonjudicial* civil forfeiture proceedings. Under new § 985, all real property forfeitures must be done judicially.<sup>170</sup> Therefore the forfeiture of real property will never be nonjudicial, and the sixty-day notice requirement will never apply to a real property forfeiture

### c. Property Worth More Than \$500,000

Because the sixty-day notice requirement applies only to *nonjudicial* forfeiture proceedings, it does not apply to cases that, under the customs laws, must be handled judicially in the first instance. Under the customs laws, there are four categories of property that may be forfeited administratively. In all other cases, administrative forfeiture is not available, and the property must be referred to the U.S. Attorney for judicial forfeiture

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169. Note also, as discussed *infra*, that the government is exempted from the sixty-day requirement if it files a civil forfeiture action in court within the sixty-day period. Section 983(a)(1)(A)(ii). This strongly suggests that in all but the most unusual cases, the government will have the full sixty days in which to send notice. It would make little sense to provide that the government could satisfy the requirement of § 983(a)(1)(A) by filing a civil judicial complaint within sixty days only to impose a sanction on the government for failing to send notice of an administrative forfeiture in fewer than sixty days because it was “practicable” to do so.

170. 18 U.S.C. § 985(a) (West Supp. 2000).

before any forfeiture proceedings can take place.<sup>171</sup>

Most important, property having a value of more than \$500,000—other than currency or monetary instruments, and cars, boats and airplanes seized in drug cases—cannot be forfeited administratively, and must be transferred directly to the U.S. Attorney.<sup>172</sup> Because such property can never be forfeited in a “nonjudicial” forfeiture proceeding, the sixty-day notice provision in § 983(a)(1) does not apply. Instead, in such cases, the government is required to send notice of the civil judicial proceeding in accordance with Rule C(4) of the Supplemental Rules. CAFRA does not amend or override the provision in Rule C(4) requiring the notice of the civil judicial action to be published “promptly or within such time as may be allowed by the court.” Thus, there is no statutory time limit on the sending of notice, or the filing of a complaint, in most forfeiture cases involving property worth more than \$500,000.

*d. Cases Where the Civil Complaint is Filed Before There is Any Seizure*

Sometimes, the government will file a civil judicial complaint before any property is seized. For example, in an undercover operation, the government might identify numerous bank accounts as being subject to forfeiture, yet to avoid tipping off the targets of the investigation, it will refrain from seizing the accounts until the operation is over. At that time, the government will often file a civil judicial action, taking custody of the property not with a seizure warrant, but with an arrest warrant *in rem* issued pursuant to the Supplemental Rules.<sup>173</sup>

Because in such cases there is never a *nonjudicial* forfeiture proceeding, § 983(a)(1) never comes into play.<sup>174</sup>

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171. 19 U.S.C. § 1610 provides that:

If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to § 1607 of this title, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure was made for the institution of the proper proceedings for the condemnation of such property.

There are four categories of cases in which administrative forfeiture is permitted under § 1607:

(1) where the value of the property does not exceed \$500,000; (2) where the property is merchandise that cannot be imported; (3) where the property is a vessel, vehicle, or aircraft that was used to import, export, transport, or store any controlled substance or listed chemical; or (4) where the property is currency or a monetary instrument of any value.

19 U.S.C. § 1607(a). Thus, most property B other than currency or monetary instruments B having a value of more than \$500,000 cannot be forfeited administratively, and must, pursuant to § 1610, be referred to the U.S. Attorney to be filed as civil judicial forfeitures in the first instance.

172. *Id.* See *Yskamp v. DEA*, 163 F.3d 767 (3rd Cir. 1998) (the \$500,000 threshold in § 1607(a)(1) does not apply to an aircraft seized in connection with a drug violation; therefore the forfeiture may be done administratively).

173. See 18 U.S.C. § 981(b)(2)(A) (exempting property arrested with an arrest warrant *in rem* from the seizure warrant requirement).

174. Cases where the government seizes property *before* a complaint is filed, but with the intent to proceed directly to judicial forfeiture, are covered by § 983(a)(1)(A)(ii), as discussed *infra*.



*e. Seizures for Evidence*

The problematic cases will be those where the government does seize the property prior to filing a civil judicial action, but the seizure was for evidence, and not for the purpose of forfeiture. For example, if a defendant is arrested and a search incident to the arrest reveals \$50,000 in cash on the defendant's person or in his luggage or in his car, the cash may be seized as evidence of the illegal activity, or simply because the arresting officer is not permitted to take a defendant into custody and leave him with \$50,000 in cash in his pocket. Such seizures are lawful and the Government's possession of the property has nothing to do with the forfeiture laws.

In those cases, the sixty-day notice provision does not apply because there is no administrative forfeiture proceeding. Indeed, there is no forfeiture proceeding of any kind; the seizure and continued possession of the property has an independent basis. If the government later decides to institute administrative or judicial forfeiture proceedings against the property, however, property owners will argue that the government had an intent to forfeit all along, and that the property should have been returned when the sixty-day period expired, pursuant to § 983(a)(1)(F).

How will a court determine when the government legitimately seized property for evidence and when it seized the same property for forfeiture? Under CAFRA, the distinction is important, because in the first instance the government is entitled to hold on to the property pending trial, while in the second instance, the government is required to return the property to the person from whom it was seized; if the government failed to send notice of the forfeiture proceeding to that person within sixty days of the seizure. The only exception in the second instance occurs if the government either sends notice of the forfeiture before anyone demands the return of the property or commences a new forfeiture proceeding and re-seizes the property. There is no easy answer to this problem, but the government has several options for dealing with it when it arises.

First, the government may argue that the sixty days for sending notice under § 983(a)(1)(A)(i) does not begin to run until the government decides to commence a forfeiture proceeding. The time between the seizure of the property and the date the Government decides that the property is subject to forfeiture does not count against the sixty-day notice period because there was no forfeiture proceeding underway during that time. If the sixty-day notice period immediately related back to the time of the seizure whenever the Government decides to seek the forfeiture of property seized as evidence, the Government would be in violation of § 983(a)(1)(A)(i) before it had any opportunity to comply with the statute. That cannot be what Congress intended.

Second, even if the sixty-day notice period does relate back to the time of the seizure, the government may argue that it cured whatever problem there was by sending notice as soon as it decided to seek the forfeiture of the property. As the legislative history makes clear, the purpose of the sixty-day rule is to ensure that the forfeiture process is commenced promptly so that the claimant can have his day in court. Once the notice is sent, any problem caused by the delay in sending the notice has been resolved.

Third, instead of sending notice of administrative forfeiture when it belatedly decides to seek the forfeiture of property seized as evidence, the government could commence a civil judicial proceeding directly, and serve the property with an arrest warrant *in rem*, thus mooting out any question of having to return the property under § 983(a)(1)(F). As

mentioned earlier, the sanction in § 983(a)(1)(F) applies “without prejudice” to the commencement of a forfeiture action—including a civil judicial action—at a later date. Once the government commences a civil judicial action by filing a complaint, its right to hold on to the property is established by the service of the arrest warrant.<sup>175</sup>

Fourth, the government may argue that even if the time for sending notice relates back to the seizure, and that § 983(a)(1)(F) therefore seems to require the return of the property, the government cannot do so because it still needs the property as evidence, which is an independent ground for keeping the property.

Finally, the failure to send notice of an administrative forfeiture cannot, in any event, affect the Government’s ability to forfeit the property criminally by including it in a criminal indictment. In that instance, the Government could seek to preserve the property pending trial with a criminal seizure warrant or restraining order pursuant to 21 U.S.C. § 853(f) and (e), respectively; but if the property is already lawfully in Government custody, such additional grounds for retaining possession of the property for criminal forfeiture are probably unnecessary.<sup>176</sup>

*f. When a Civil Judicial Forfeiture is Filed Within the Sixty Days*

The first five exceptions to the sixty-day notice rule are all implicit in § 983(a)(1)(A)(i)’s limitation to “non-judicial civil forfeiture proceedings.” But § 983(a)(1)(A) also contains a number of explicit exceptions to the sixty-day notice requirement.

First, paragraph (A)(ii) provides that no notice of the administrative forfeiture proceeding is required if, before the sixty-day period expires, the government files a civil judicial forfeiture action against the property, and provides notice of that action as required by law.<sup>177</sup> This provision was intended to apply to cases where the government seizes property for forfeiture, but with the intention of by-passing the administrative forfeiture procedure and proceeding directly with a civil judicial forfeiture.

In any case in which the government has commenced a civil judicial forfeiture action the administrative forfeiture proceeding comes to a halt, regardless of whether the government filed the judicial action on its own initiative, or the judicial action was required by the claimant’s filing of a claim contesting the administrative forfeiture. Thus, it might seem unnecessary to provide that notice of the administrative forfeiture is not required once a judicial action is commenced; but the exemption in § 983(a)(1)(A)(ii) was included in the statute to preclude claimants from demanding the return of their property under § 983(a)(1)(F) on the ground that the government had not complied with the literal terms of the statute requiring notice to be sent in sixty days.

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175. 18 U.S.C. § 983(a)(1)(F).

176. As discussed *infra*, if the Government decides to pursue criminal forfeiture in lieu of civil forfeiture, it must “take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.” § 983(a)(1)(A)(iii)(II). That provision only applies, however, if there is no independent basis—*i.e.*, a basis other than seizure for civil forfeiture—for the Government’s continued possession of the property.

177. Section 983(a)(1)(A)(ii) states, “No notice is required if, before the sixty-day period expires, the government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.”

Proceeding directly with a civil judicial forfeiture, of course, does not exempt the government from having to give notice to interested parties. While the notice provisions of § 983(a)(1) will not apply, the clerk of the court will still be required to issue a summons and a warrant for the arrest of the property “forthwith,”<sup>178</sup> and the government will still be required to publish notice of the forfeiture action in a newspaper of general circulation “promptly.”<sup>179</sup> Thus, to avail itself of § 983(a)(1)(A)(ii), what the government must do is file a civil complaint within the sixty day period, ensure that the clerk of the court issues a summons and arrest warrant *in rem* in accordance with Rule C(3), and promptly publish notice of the forfeiture in accordance with Rule C(4). The publication does not have to occur within the sixty day period.

*g. When a Criminal Forfeiture is Filed Within the Sixty Days*

Paragraph (A)(iii) contains a similar, though slightly more complicated, provision dealing with cases in which the government commences a criminal forfeiture proceeding within the sixty-day period following the seizure of the property for administrative forfeiture.<sup>180</sup> Section 983(a)(1)(A)(i) only applies if the seizure was, in the first instance, pursuant to a civil forfeiture statute, such as § 981(b). The sixty-day notice requirement does not apply at all when a seizure is made for the purpose of criminal forfeiture under 21 U.S.C. § 853(f).<sup>181</sup> Thus, the government does not need to resort to § 983(a)(1)(A)(iii) if it commenced the forfeiture action with a seizure pursuant to a criminal seizure warrant.

It is frequently the case, however, that property seized initially for civil forfeiture—either without a warrant or pursuant to § 981(b)—is included in the forfeiture allegation in a criminal indictment.<sup>182</sup> Paragraph (A)(iii) is intended to address the situation that arises when the government takes such action while the administrative forfeiture is pending, but before the sixty-day period for sending notice expires.

Unlike paragraph (A)(ii), the criminal forfeiture provision does not simply exempt the government from sending notice of the administrative forfeiture once the criminal

178. Rule C(3), Supplemental Rules for Certain Admiralty and Maritime Claims.

179. Rule C(4), Supplemental Rules for Certain Admiralty and Maritime Claims.

180. Section 983(a)(1)(A)(iii) says the following:

(iii) If, before the sixty-day period expires, the government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the government shall either:

(I) send notice within the sixty days and continue the nonjudicial civil forfeiture proceeding under this section; or  
(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

181. Section 853(f), which applies, by incorporation, to almost all criminal forfeiture statutes, *see, e.g.* 28 U.S.C. § 2461(c) and 18 U.S.C. § 982(b)(1), authorizes the seizure of property for the purpose of criminal forfeiture with a seizure warrant obtained in accordance with Rule 41 of the Federal Rules of Criminal Procedure.

182. *See United States v. Candelaria-Silva*, 166 F.3d 19 (1<sup>st</sup> Cir. 1999) (there is nothing improper in the government's beginning a forfeiture case with a civil seizure, and switching to criminal forfeiture once an indictment is returned; it is commonplace); *United States v. Lugo*, 63 F. Supp. 2d 896 (N.D. Ill. 1999) (the government may start a forfeiture action as an administrative forfeiture, and then proceed with a criminal forfeiture if the defendant files a claim and cost bond, but in that event it must return the cost bond to the defendant).

indictment is filed. That is because unlike a civil judicial forfeiture, a criminal forfeiture action does not automatically terminate an administrative forfeiture action. It is entirely possible, and is in fact quite common, for the government to continue with the administrative forfeiture to see if anyone files a claim. If no one does so, the property is forfeited by default,<sup>183</sup> and the government can dismiss the forfeiture allegation from the criminal indictment. On the other hand, if someone does file a claim, the government can proceed with the criminal forfeiture action alone, or it can file a parallel civil judicial forfeiture action as well.<sup>184</sup>

What paragraph (A)(iii) does is to require the government to make clear its intentions regarding the continuation or termination of the administrative forfeiture proceeding within the sixty-day period for filing notice. If the government has obtained a criminal indictment containing a forfeiture allegation within that period, it may either terminate the administrative forfeiture or continue it as if the criminal indictment had not been filed. In the former case, once the administrative forfeiture is terminated, the government has no legal basis for holding the property unless it re-seizes the property with a criminal seizure warrant under § 853(f), or obtains a criminal restraining order under § 853(e).<sup>185</sup> This is consistent with pre-CAFRA law.<sup>186</sup>

On the other hand, paragraph (A)(iii) permits the government to continue the administrative forfeiture proceeding notwithstanding the criminal indictment, but, in that instance, the government must send notice of the administrative forfeiture proceeding within the sixty days mandated by paragraph (A)(i). The filing of the criminal forfeiture action does not suffice for the purpose of notice because in criminal cases, notice is provided only to the defendant at the time of the indictment. No third parties are given notice of a criminal forfeiture until the defendant is convicted and the court enters a preliminary order of forfeiture and commences an ancillary proceeding to determine whether any third parties have an interest in the forfeited property.<sup>187</sup>

Suppose the government chooses the second option, and continues with the administrative forfeiture even though an indictment has been filed. What happens then if someone files a claim? As discussed *infra*, once a claim is filed in an administrative forfeiture proceeding, the government is required to return the property, or file a civil complaint or a criminal indictment, within ninety days. In this scenario, however, the government has

183. See 19 U.S.C. § 1609 (1994).

184. See 18 U.S.C.S. § 983(a)(3)(C) (Law Co-op. 2000), authorizing the filing of parallel civil and criminal forfeiture actions.

185. This assumes that the Government has no independent, *i.e.*, non-forfeiture related, basis for continued possession of the property. See note 151, *supra*. Also, it is unnecessary to "re-seize" property pursuant to § 853(f) if the original seizure warrant was based on *both* the civil forfeiture statute, § 981(b), and the criminal statute. See text following note 224, *infra*.

186. See *United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis. 1994) (once government filed criminal forfeiture action, it no longer had authority to retain property seized under § 881 unless it obtained a restraining order under § 853(e) or a seizure warrant under § 853(f); property ordered returned).

187. See 21 U.S.C. § 853(k) and (n); FED. R. CRIM. P. 32.2 (effective December 1, 2000). This is consistent with the notion that in criminal cases only the defendant's property is subject to forfeiture. The ancillary proceeding is only a quiet title action where third parties have an opportunity to advise the court that the order of forfeiture is void to the extent that it relates to the interests of a third party. See *United States v. Henry*, 64 F.3d 664, 1995 WL 478635 (6th Cir. 1995) (Table Case) (explaining the nature of the ancillary proceeding); Stefan D. Cassella, *Third Party Rights in Criminal Forfeiture Cases*, 32 CRIM. L. BULL. 499-540 (1996).

already filed its criminal indictment *before* any claim was filed. Thus, notwithstanding the filing of the claim, the government is not obligated to take any action that it has not already taken, except that the government must do what it would be required to do under § 983(a)(1)(A)(iii)(II) if it had chosen to abandon the administrative forfeiture in the first place. That is, it must restrain or reseize the property with criminal process.<sup>188</sup>

#### *h. Adoptive Forfeitures*

A great many administrative forfeiture proceedings do not begin with any seizure by a federal law enforcement agency at all, but instead begin when a state or local agency seizes property and turns it over to a federal agency for the purpose of forfeiture under federal law. Such proceedings are called adoptive forfeitures.

In drafting CAFRA, Congress recognized that it made little sense to require the government to send notice of an administrative forfeiture within sixty days of a seizure conducted by a non-federal agency, if the property had not even been adopted by the federal agency before the sixty days expired. It was for that reason that the Department of Justice suggested that the sixty-day period should not begin to run in adoptive forfeiture cases until the adoption had actually occurred.<sup>189</sup>

Congress was reluctant, however, to allow state and local law enforcement agencies to hold on to seized property indefinitely without either commencing State forfeiture proceedings or turning the property over to a federal agency for adoption. The compromise that was reached on this issue is reflected in paragraph (A)(iv) which provides that, in the case of adoptive forfeitures, notice of the federal administrative forfeiture proceeding must be sent within *ninety days* of the seizure by the state or local agency.<sup>190</sup> This effectively gives the State and federal agencies thirty days to complete the adoption process so that the federal agency will then have the full sixty days under § 983(a)(1)(A)(i) to send out written notice.<sup>191</sup>

#### *i. Cases Where the Identity of the Interested Party is Not Known*

Paragraph (A)(v) addresses situations in which the identity of a person with an interest in the property is not known to the seizing agency at the time of the seizure, but it is determined before a declaration of forfeiture is entered. In such cases, the sixty-day period begins to run again from the date the government learns of the identity or interest of the party, and the government must send notice to that party within that time period.<sup>192</sup>

188. See *supra* note 160.

189. That suggestion was incorporated in § 3 of S.1701. See DOJ EXTRACT, *supra* note 3 at 392.

190. Section 983(a)(1)(A)(iv) provides as follows:

In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than ninety days after the date of seizure by the State or local law enforcement agency.

191. Before CAFRA was enacted, it was the policy of the federal law enforcement agencies to require state and local agencies to submit property for adoption within thirty days of the seizure. See *Asset Forfeiture Policy Manual*, Chap. 6, § I.G., at 6-4 (1996).

192. Section 983(a)(1)(A)(v) provides as follows:

If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than sixty

For example, suppose the government seizes property, publishes notice as required by § 1607(a), and sends notice to the person from whom the property was seized, all within the prescribed sixty days, but in reality, no one files a claim within the period for doing so.<sup>193</sup> In that case, the government is entitled to enter a declaration of forfeiture pursuant to § 1609. But suppose that before the government enters such a declaration, it learns of the existence of a party with an interest in the property. In that case, § 983(a)(1)(A)(v) provides that the government has another sixty days from the date that it learned the identity of the new party to send written notice in accordance with § 983(a)(1)(A)(i). Obviously, the new sixty-day period gives the newly-identified party an additional period to file a claim,<sup>194</sup> and the government cannot enter a declaration of forfeiture until that period expires.

The additional period for filing a claim, however, only applies to the newly-identified party who is the recipient of the written notice. The discovery of a new party, and the sending of notice to that party under § 983(a)(1)(A)(v), does not reopen the claims period for other persons who either received notice within the first sixty-day period, or who were required to file their claims in response to the notice published pursuant to § 1607(a).

Also, by its terms, paragraph (A)(v) only requires that the government reopen the notice period for newly-identified parties if it discovers the identity or interest of that party "before a declaration of forfeiture is entered." The government has no obligation to reopen an administrative forfeiture *after* a declaration of forfeiture is entered, even if it learns of the identity of another party. If that situation arises, the government may, of course, withdraw the declaration of forfeiture and restart the process for the benefit of the newly-discovered party. But, if the government declines to do so, the newly-discovered party's only remedy is to file a motion to set aside the forfeiture pursuant to § 983(e), on the ground that notice of the administrative forfeiture proceeding was inadequate.

#### *j. Extensions of the Sixty Day Period for Sending Notice*

Under pre-CAFRA law, the federal seizing agencies had adopted a policy of requiring notice of administrative forfeiture proceedings to be sent within sixty days of the seizure. See page 31, *supra*. That same policy allowed "a designated official within the seizing agency" to grant a waiver from the notice requirement, in writing, "in exceptional circumstances."<sup>195</sup> Such exceptional circumstances occur when the premature commencement of an administrative forfeiture proceeding—i.e. the sending of notice to persons the government knows to have an interest in the seized property—may jeopardize an ongoing undercover or grand jury investigation, or endanger the life of a govern-

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days after the determination by the government of the identity of the party or the party's interest.

193. See 18 U.S.C.A. § 983(a)(2)(B) (person contesting an administrative forfeiture has thirty days from the last date of publication in which to file a claim).

194. Section 983(a)(2)(B) gives parties who receive personal notice of the administrative forfeiture proceeding until the deadline set forth in the letter to contest the forfeiture by filing a claim. Such deadline cannot be less than thirty-five days from the date the letter is mailed.

195. See *Asset Forfeiture Policy Manual*, Chapter II, § II.A, at 2-4 (1996).

ment agent or witness.<sup>196</sup>

The Department of Justice proposed that the codification of the sixty-day notice policy should include the codification of the procedure allowing an official within the seizing agency to grant a waiver "in exceptional circumstances." That suggestion was included in the bill introduced by Senators Sessions and Schumer.<sup>197</sup> The bill introduced by Senators Hatch and Leahy, on the other hand, provided that an extension of time could be granted only by a court.<sup>198</sup> The compromise that was agreed to on this issue is reflected in § 983(a)(1)(B) through (F).<sup>199</sup>

Subsection (a)(1)(B) provides that a "supervisory official in the headquarters office of the seizing agency" may extend the period for sending notice for a period of thirty days; this extension may be granted only once. If the seizing agency seeks an additional extension of time, it must apply to a court, which may extend the deadline for additional intervals of sixty-days for as long as it deems necessary.<sup>200</sup> In either event, the "supervisory official" or the court may grant the extension of time only if certain criteria set forth in Subsection (a)(1)(D) are met.<sup>201</sup>

Those criteria include, but are not limited to, a belief that the sending of notice pursuant to § 983(a)(1)(A) will endanger the life or physical safety of an individual, cause flight from prosecution, result in the destruction of evidence or the intimidation of a

196. It is not uncommon in a drug case, for example, for the government to seize drug proceeds from a courier, and to learn from a confidential source that proceeds actually belong to a senior drug trafficker who is the target of an ongoing investigation. In that case, the government would have no problem in initiating the administrative forfeiture proceeding if it meant only that it was required to send notice to the courier from whom the money was seized. But to the extent that the law requires the government also to send notice to the target of the investigation, such notice would likely reveal more to the target than would be prudent regarding what the government knew of the target's involvement in the offense, and could place the government's confidential source in considerable jeopardy.

197. See S.1701, § 3; DOJ EXTRACT, *supra* note 3 at 392 (allowing a person of supervisory rank in the headquarters of the seizing agency to grant a waiver "for good cause").

198. See S.1931, § 2; DOJ EXTRACT, *supra* note 3 at 412-13.

199. Subsections (a)(1)(B)-(F) say the following:

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed thirty days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed sixty days, which period may be further extended by the court for sixty-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including:

- (i) endangering the life or physical safety of an individual;
- (ii) flight from prosecution;
- (iii) destruction of or tampering with evidence;
- (iv) intimidation of potential witnesses; or
- (v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

200. See 18 U.S.C.A. § 983(a)(1)(C).

201. Nothing in either statute precludes the Government from seeking a judicial extension pursuant to § 983(a)(1)(C) without first obtaining an agency extension pursuant to § 983(a)(1)(B).

potential witness, or otherwise seriously jeopardize an investigation or unduly delay a trial.<sup>202</sup> To ensure that the seizing agencies follow these criteria in granting thirty-day extensions under Subsection (a)(1)(B), the statute provides that the agencies “report periodically” to the House and Senate Judiciary Committees on the number of occasions when they grant such extensions.<sup>203</sup>

Given the nature of the showing that the government must make in order to obtain a judicial waiver of the sixty-day time period, the showing will in ordinary cases have to be made *ex parte*. The legislative history supports this view.<sup>204</sup>

#### D. Sanctions for Failure to Provide Notice

Section 983(a)(1)(F) sets forth the consequences for the government for failing to provide the required notice within the specified time period, if no extension of time is obtained.<sup>205</sup> The first sentence of paragraph (1)(F) reads as follows: “If the government does not send notice of a seizure of property in accordance with subparagraph (A) *to the person from whom the property was seized*, and no extension of time is granted, the government shall return the property *to that person* without prejudice to the right of the government to commence a forfeiture proceeding at a later time.”<sup>206</sup>

As made clear by the italicized language, the requirement that the property be returned if notice is not sent pursuant to subparagraph (A) applies only if the government fails to send the notice *to the person from whom the property was seized*. There is no sanction for failure to send the notice to another person who may have an interest in the property, and there is no sanction even for failure to send notice to the person from whom that property was seized if that person had no interest at all in the property, and thus was not a person to whom the government was required to send notice under § 1607.<sup>207</sup>

So, for example, if federal agents seize money and a vehicle from a drug courier, and the seizing agency fails to provide notice to the courier within the prescribed sixty days, the agency must return the money and the vehicle to the courier, subject to the government’s right to commence a new forfeiture proceeding.<sup>208</sup> But if the seizing agency does

202. 18 U.S.C.A. § 983(a)(1)(D)

203. 18 U.S.C.A. § 983(a)(1)(E).

204. See 1997 Committee Report, *supra* note 23, at 42; DOJ EXTRACT, *supra* note 3 at 250 (“Because the request for an extension of time would always arise before any claim was filed, the request would necessarily be made to the court *ex parte*.”)

205. Section 983(a)(1)(F) says the following:

(F) If the government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the government shall return the property to that person without prejudice to the right of the government to commence a forfeiture proceeding at a later time. The government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

206. Section 983(a)(1)(F) (Emphasis added).

207. See *Kadonsky v. United States*, 216 F.3d 499, 503, n.2 (5<sup>th</sup> Cir. 2000) (“Mere possession of an article in and of itself is insufficient to render an individual one ‘who appears to have an interest in the seized article’ for purposes of § 1607(a)”) (citations omitted).

208. As noted *supra* in sections B(2)(f) and (g), these sanctions do not apply if, pursuant to § 983(a)(1)(A)(ii) or (iii)(II), the government commences a civil judicial or criminal forfeiture action within the sixty-day period, or if the property is independently being held as evidence. The government could release the



send notice to the courier, yet fails to send notice to another person that the agency knows to have an interest in the property—such as a lienholder with a lien on the vehicle, the courier's spouse, or the drug dealer who is the true owner of the seized currency—the government *does not* have to return the property. That is because only the person from whom the property was seized has a right of possession: the government cannot “return” property to a person who did not possess the property in the first place, nor would it be appropriate for the government to have to return property to a person who received proper notice—and whose time for filing a claim has begun to run and may in fact have already expired—as a sanction for having failed to send proper notice to a third party.

In any event, the second part of the first sentence in § 983(a)(1)(F) makes it clear that if the government does have to return the seized property to the person from whom it was seized, it does so “without prejudice to the right of the government to commence a forfeiture proceeding at a later time.” The government's concern, of course, is that once the property is returned to the wrongdoer it will disappear; but in the event the property can be located a second time, there is nothing that bars the government from seizing it again and instituting a new administrative forfeiture proceeding.

Finally, § 983(a)(1)(F) provides that the government does not, in any event, have to return “contraband or other property that the person from whom the property was seized may not legally possess.” Obviously, the reference to contraband means that the seizing agency does not have to return drugs seized from a drug trafficker. It also means that the government does not have to return stolen property, if the person from whom the property was seized was a thief who had no right to possess the property. And it means that the seizing agency does not have to return a firearm to a convicted felon who may not lawfully possess such a weapon.<sup>209</sup>

### E. Content of the Notice; Manner in Which Notice Must Be Sent

Section 983(a)(1)(A)(i) is silent as to the content of the notice. An earlier version of CAFRA would have specified that the notice contain “notice of the seizure” and “information on the applicable procedures” for filing a claim.<sup>210</sup> But those provisions were not included in the statute that was ultimately enacted. Consequently, pre-CAFRA case law will continue to govern the content of the notice.<sup>211</sup>

As mentioned, § 983(a)(1)(A)(i) requires that notice “be sent in a manner to achieve proper notice.”<sup>212</sup> Again, the statute is silent as to what this means, but pre-CAFRA case law makes clear that the notice must be sent in accordance with the Supreme Court's

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property and then re-seize it with a new seizure warrant, or simply file a civil judicial forfeiture action and arrest the property before it is released with an arrest warrant in rem. Or if no one has complained about the delay in sending notice, as would generally be the case if no one intended to file a claim, the government may cure any defect by sending out belated notice.

209. See 18 U.S.C. § 922(g).

210. See 1997 Committee Report, *supra* note 23, DOJ EXTRACT, *supra* note 3 at 219.

211. See *Juda v. Nerney*, 149 F.3d 1190, 1998 WL 317474 (10<sup>th</sup> Cir. Jun. 16, 1998) (Table Case) (notice need not detail the illegal acts); *In re Seizure of Certain Property (\$370,000)*, 98 CV 1026 (CBA) (E.D.N.Y. Aug. 12, 1999) (notice need not recite facts supporting probable cause).

212. 18 U.S.C.A. § 983(a)(1)(A)(i).

decision in *Mullane v. Central Hanover Bank & Trust Co.*<sup>213</sup> That is, notice must be reasonably calculated to apprise interested parties of the pendency of the action, and must be sent by means and in a manner that would be employed by one who actually desires to achieve notice.<sup>214</sup> But the government is not required to guarantee that the notice actually be received. If the government does what a reasonable person would do to achieve notice, the notice will be regarded as sufficient, even if the intended recipient does not receive it.<sup>215</sup> On the other hand, a person who does receive actual notice of a forfeiture action has no grounds to complain that the manner employed by the government to achieve notice was somehow inadequate.<sup>216</sup>

Special rules appear to apply to the sending of notice to incarcerated prisoners. Be-

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213. 339 U.S. 306 (1950).

214. 339 U.S. at 315. See *United States v. Rodgers*, 108 F.3d 1247 (10th Cir. 1997) (mailing notice to two of defendant's three residences was not sufficient where government could have learned of the third address with reasonable effort); *Adames v. United States*, 171 F.3d 728 (2nd Cir. 1999) (published notice that lists only the amount seized and not date and location of seizure is not adequate); *United States v. Gambina*, 1998 WL 19975 (E.D.N.Y. Jan. 16, 1998) (notice is inadequate if notice sent to defendant's last known address is returned undelivered, and no effort is made to serve defense counsel or to apprise Assistant United States Attorney handling related criminal case of the administrative forfeiture); *Dunn v. Snider*, No. 91-CV-7349 (W.D.N.Y. Aug. 11, 1999) (notice sent to address claimant gave when arrested is inadequate if notice is returned undelivered, and DEA could have obtained other addresses in state police files by simply calling the police); *United States v. Colon*, 993 F. Supp. 42 (D. Puerto Rico 1998) (sending notice to defendant alone was inadequate where government was on notice that another party's name appeared as the owner of record of the seized bank account).

215. See 1997 Committee Report, *supra* note 23 at 42; DOJ EXTRACT, *supra* note 3 at 250; see also *Al-bajon v. Gugliotta*, 72 F. Supp.2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's ID's, mailed after claimant released from jail, sufficient to satisfy due process, even if claimant never received notice); *United States v. Schiavo*, 897 F. Supp. 644 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not government's fault that notice was not effective); *Owens v. United States*, 1997 WL 177863 (E.D.N.Y. Apr. 3, 1997) (notice sent to defendant's address by certified mail is reasonable if government has no reason to believe it failed to reach defendant; government not responsible if someone forged defendant's name on return receipt card); *Gonzalez v. United States*, 1997 WL 278123, \*1 (S.D.N.Y. May 23, 1997) ("the government is not required to ensure actual receipt of notice that is properly mailed"); *United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997) (mailing certified notice to correct address is sufficient, even if claimant didn't receive it and had his attorney call customs seeking return of his property); *Kreicoch v. United States*, 1998 WL 748333 (N.D. Ill. Oct. 14, 1998) (notice sent to defendant's current home address is adequate where DEA had no way of knowing when it sent the notice that defendant would turn himself in and be incarcerated before the notice arrived); *Chaidez v. U.S. Department of Justice*, 1998 WL 901690 (N.D. Ill. Dec. 17, 1998) (attempts at personal service, and eventual service on counsel, were sufficient); *United States v. 1989 Cadillac Fleetwood*, 1999 WL 732421 (D. Ore. Sept. 20, 1999) (notice to incarcerated prisoner that he had ten days to file claim to judicial forfeiture action satisfied due process).

216. See *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992) (lack of publication did not amount to violation of due process where claimant had actual knowledge of the seizure); *Pena v. United States*, 1999 WL 138243 (E.D.N.Y. Feb. 26, 1999) (prisoner who had actual notice cannot complain that government failed to deliver notice to him in prison); *Lopes v. United States*, 862 F. Supp. 1178 (S.D.N.Y. 1994) (where there is actual notice of an impending forfeiture, there is no violation of due process); *U-Series Int'l Service v. United States*, 1995 WL 649932 (S.D.N.Y. Nov. 7, 1995) (same); *Restrepo v. United States*, 1999 WL 1044359 (S.D.N.Y. Nov. 18, 1999) (person who had actual notice cannot complain that government's effort to provide notice was defective); but see *United States v. \$184,505.01*, 72 F.3d 1160 (3rd Cir. 1995) (actual notice of administrative forfeiture does not suffice where government subsequently files judicial forfeiture); *Ikelionwu v. United States*, 150 F.3d 233 (2d Cir. 1998) (for doctrine of laches to apply, claimant must have actual notice not only of the seizure, but of the fact that he may file a claim); *United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (actual notice does not suffice where government unable to rebut claim that claimant/prisoner was denied access to paper and postage to file claim).

cause the overwhelming majority of administrative forfeiture proceedings involve a person who was arrested in connection with the offense giving rise to the forfeiture, this has been a frequently contested issue.

The courts agree that the government, at the very least, must send written notice of the administrative forfeiture to the place where the prisoner is incarcerated. Notice inadvertently sent to the wrong prison or jail, or sent to the prisoner's home address when the government knows the prisoner is incarcerated, will not do.<sup>217</sup> The courts disagree, however, as to whether the prisoner must receive actual notice of the forfeiture. The majority of courts hold that prisoners are entitled to no special consideration, and that the same rules regarding notice "reasonably calculated" to achieve actual notice under *Mullane* apply to notice sent to incarcerated persons.<sup>218</sup> Other courts, led by the Second Circuit, hold that no notice sent to a prisoner is adequate unless the government can prove that the prisoner actually received it.<sup>219</sup> The Third and Fourth Circuits take a middle view between these two positions.<sup>220</sup>

On the other hand, most courts hold that notice need not be served on the property owner at all if the owner is represented by counsel, and notice is sent to that attorney.<sup>221</sup>

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217. See *United States v. Minor*, 2000 WL 1288668, \*5 (4<sup>th</sup> Cir. Sept. 13, 2000) (publication and mailing notice to home address of incarcerated prisoner is an inadequate "gesture"); *Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998) (notice sent to prisoner's place of incarceration is not adequate if notice is returned undelivered to seizing agency before administrative forfeiture is complete, and agency could have taken steps to locate prisoner); *Lopez v. United States*, 201 F.3d 478 (D.C. Cir. 2000) (parallel notice to prisoner's wife that *her* interest may be forfeited does not cure defective notice); *United States v. Giraldo*, 45 F.3d 509 (1<sup>st</sup> Cir. 1995) (seizing agencies must take steps to locate the prisoner and send him notice in jail); *United States v. McGlory*, 202 F.3d 664 (3<sup>rd</sup> Cir. 2000) (it violates due process for DEA to send notice to USMS, asking USMS to forward to prisoner; DEA must at least send notice to prison where defendant is confined).

218. See *United States v. Clark*, 84 F.3d 378 (10<sup>th</sup> Cir. 1996) (mailing notice to inmate's place of incarceration is sufficient; personal service not necessary); *United States v. 5145 N. Golden State Blvd.*, 135 F.3d 1312 (9<sup>th</sup> Cir. 1998) (same); *United States v. Real Property (Tree Top)*, 129 F.3d 1266 (6<sup>th</sup> Cir. 1997) (Table Case) (same); *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998) (mailing notice to prison was defendant was housed, and to all three of his home addresses, plus publication in *USA Today*, comports with due process, even if defendant did not receive the notice); *Scott v. United States*, 950 F. Supp. 381 (D.D.C. 1996) (publication and sending notice to prison where defendant incarcerated is adequate whether defendant actually receives the notice or not); *United States v. 13 Maplewood Dr.*, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (same, noting that mailing notice to the prison address is mandatory); *Whiting v. United States*, 29 F. Supp. 2d 25 (D. Mass. 1998) (rejecting *Weng*; actual notice to prisoner is not required); *United States v. Dusenberry*, 34 F. Supp. 2d 602 (N.D. Ohio 1999) (holding, based on unpublished opinion, that Sixth Circuit does not require proof that the notice was delivered to the prisoner).

219. See *Weng v. United States*, 137 F.3d 709 (2<sup>nd</sup> Cir. 1998) (proof that prisoner was located in the facility at the time notice was sent there, and that facility signed for the notice, is not sufficient proof that the prisoner actually received the notice); *United States v. \$5,000 in U.S. Currency*, 184 F.3d 958 (8<sup>th</sup> Cir. 1999) (government must show prisoner received actual notice; proof that notice was sent by certified mail and received by prison officials is not sufficient); *United States v. Woodall*, 12 F.3d 791 (8<sup>th</sup> Cir. 1993) (if the government is incarcerating or prosecuting the property owner, fundamental fairness requires that either the defendant or his counsel receive actual notice of the institution of a forfeiture proceeding); *United States v. Cupples*, 112 F.3d 318 (8<sup>th</sup> Cir. 1997) (following *Woodall*); *Aguilar v. United States*, 8 F. Supp. 2d 175 (D. Conn. 1998) (Rule 60(b) motion granted; government required to prove prisoner received actual notice).

220. See *United States v. One Toshiba Color Television*, 213 F.3d 147 (3<sup>d</sup> Cir. 2000) (en banc) (declining to follow *Weng*, 137 F.3d 709, but holding that if the government wishes to rely on direct mail, it bears the burden of demonstrating that procedures at the prison were reasonably calculated to deliver notice to the prisoner); *United States v. Minor*, 2000 WL 1288668 (4<sup>th</sup> Cir. Sept. 13, 2000) (following *Toshiba*; notice must be sent to the jail where incarcerated prisoner is held, and Government must prove process was adequate to assure delivery; but Government does not have to prove prisoner received actual notice).

221. See *Bye v. United States*, 105 F.3d 856 (2<sup>d</sup> Cir. 1997) (notice to attorney representing defendant in

Finally, the courts appear to agree that notice is adequate if sent in English, regardless of whether the intended recipient is a native English-speaker.<sup>222</sup>

### F. Parties to Whom Notice Must Be Sent

As mentioned, 19 U.S.C. § 1607(a) requires that notice of administrative forfeiture be sent "to each party who appears to have an interest in the seized article."<sup>223</sup> Generally, that includes the person from whom the property was seized (who has at least a possessory interest in the property),<sup>224</sup> any person who has made his or her interest in the property known to the government, the titled owner of the property, a lienholder, and any other person known to the government to have an interest.<sup>225</sup> But the government is not required to send written notice to persons who deny ownership of the property.<sup>226</sup>

Also, because they are specifically exempted from the definition of "owner" in § 983(d)(6), the government does not have to send notice of a forfeiture action to unsecured creditors of the person whose criminal act gave rise to the forfeiture.<sup>227</sup>

### G. Procedure for Filing a Claim in the Administrative Forfeiture Proceeding

The procedure for filing a claim in an administrative forfeiture proceeding is set forth in § 983(a)(2)(A) through (E). These provisions substantially override the pre-CAFRA procedures which are set forth in the customs laws at 19 U.S.C. § 1608. To the extent that § 983(a)(2) is silent or ambiguous as to the proper procedure for filing a claim, the

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the criminal case constitutes sufficient notice of administrative forfeiture); *McDonald v. DEA*, 1996 WL 157527 (S.D.N.Y. Apr. 3, 1996) (service on defense counsel during discovery in criminal case was sufficient notice); *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (where there is a parallel administrative forfeiture and criminal prosecution, the government must serve notice of the forfeiture on the defense attorney in the criminal case); *United States v. Cruz*, 1998 WL 326732 (S.D.N.Y. June 19, 1998) (notice sent to attorney in then-pending criminal case is adequate); *United States v. Franklin*, 897 F. Supp. 1301 (D. Or. 1995) (attempts to send notice to defendant's home, attorney and place of confinement were sufficient; failure to receive notice was not government's fault); *Allen v. United States*, 38 F. Supp.2d 436 (D. Md. 1999) (service on attorney sufficient even though notice sent to defendant was sent to wrong jail; declining to follow *Weng*, 137 F.3d 709); *United States v. Watts*, 1999 WL 493786 (E.D. Pa. July 13, 1999) (service on attorney was sufficient); *but see United States v. \$184,505.01*, 72 F.3d 1160 (3rd Cir. 1995) (service on attorney who represented defendant in criminal case not sufficient because until civil action is commenced, defendant has no attorney in the civil case).

222. See *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996) (collecting cases).

223. 19 U.S.C. § 1967(a) (1994).

224. See 19 U.S.C. § 1967 (1994); *But see Kadonsky v. United States*, 216 F.3d 499, 503, n.2 (5th Cir. 2000) ("mere possession of an article in and of itself is insufficient to render an individual one 'who appears to have an interest in the seized article'" for purposes of § 1607(a)).

225. See *Asset Forfeiture Policy Manual*, Chapter II, § A, 2-4 (notice must be sent to "possessors, owners, and other interested parties, including lienholders"). See also *United States v. Colon*, 993 F. Supp. 42 (D.P.R. 1998) (sending notice to defendant alone was inadequate where government was on notice that another party's name appeared as the owner of record of the seized bank account).

226. See *Arango v. United States*, 1998 WL 417601 (N.D. Ill. July 20, 1998) (person who denies ownership of seized currency at the time it is seized cannot seek judicial review of administrative forfeiture on ground that he did not receive personal notice).

227. See § 983(d)(6)(B)(i). See also *United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (even if the government is required to send direct written notice in criminal forfeiture cases—which is not at all certain, given the permissive language in the statute—it does not have to send notice to persons who lack standing to contest the forfeiture).

provisions of § 1608, as incorporated by the applicable civil forfeiture statute, will continue to apply.

### *1. Filing With the "Appropriate Official"*

Paragraph (2)(A) states that a person claiming the seized property "may file a claim with the appropriate official after the seizure."<sup>228</sup> While most claimants will wait until they receive formal notice of the administrative forfeiture proceeding to file a claim, nothing in the statute suggests that they must do so. In fact, interpreting paragraph (2)(A) to permit a person to file a claim without waiting to receive formal written notice is consistent with pre-CAFRA case law which held that a person could file a claim any time after the property was seized.<sup>229</sup>

The term "appropriate official" is undefined, but should be read in light of § 1608.<sup>230</sup> That statute provides that the claim in an administrative forfeiture proceeding must be filed with "the appropriate customs officer."<sup>231</sup> The term "appropriate custom officer" is further defined as:

Such duties as are imposed upon the customs officer . . . with respect to the seizure and forfeiture of property under the customs laws shall be performed . . . by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be.<sup>232</sup>

Thus, the claim in an administrative forfeiture proceeding must be filed with whom-ever the Attorney General, the Secretary of the Treasury or the Postal Service designates for that purpose.

### *2. Time for Filing a Claim*

Paragraph (2)(B) describes the time for filing a claim.<sup>233</sup> With respect to notice by publication, this provision overrides the provision in § 1608 that requires the claimant to file a claim within *twenty days* of the *first* date of publication.<sup>234</sup> Instead, under CAFRA, the claimant has *thirty days* from the *last* date of publication.<sup>235</sup>

With respect to persons who receive written notice from the seizing agency, the claim must be filed, at the latest, by the deadline set forth in the letter. The seizing agency can set the deadline at any time it wishes, as long as it is at least thirty-five days

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228. Section 983(a)(2)(A) says the following: "(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure."

229. See *United States v. \$52,800 in U.S. Currency*, 33 F.3d 1337 (11<sup>th</sup> Cir. 1994).

230. 19 U.S.C.S. § 1608 (1993).

231. See *id.*

232. 18 U.S.C.S. § 981(d) (1996); See 8 U.S.C. § 1324(b)(2) (1994) (defining term under immigration laws); See 21 U.S.C. § 881(d) (1994) (defining term under drug laws).

233. Section 983(a)(2)(B) says the following:

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than thirty-five days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than thirty days after the date of final publication of notice of seizure.

234. See 19 U.S.C.S. § 1608.

235. See 18 U.S.C. § 983(a)(2)(B).

from the time the notice is placed in the mail. The "thirty-five days" was calculated so that persons who get written notice are not placed at a disadvantage *vis a vis* those who get notice by publication if the mail is slow. In other words, all potential claimants get thirty days, but those who get written notice get an extra 5 days to allow for the mail delivery.

Publication of notice and sending direct notice to interested parties, however, often occur independently. Because published notice must appear in a newspaper of general circulation three times on three successive weeks,<sup>236</sup> and because the thirty-day period does not begin to run until the last date of publication, if the seizing agency is prompt in sending written notice, and sets the deadline for filing a claim thirty-five days after such notice is sent, a person receiving written notice will generally face a filing deadline that expires before the deadline expires for those relying on publication.<sup>237</sup>

### 3. Contents of the Claim

Paragraph (2)(C) describes the contents of the claim.<sup>238</sup> It requires the claimant to identify the particular property in which he is asserting an interest, to state the nature of that interest, and to state that the claim is not frivolous. The claim must also be made under oath. Thus, a claim must say whether the claimant is asserting an interest as an owner, a lienholder, a spouse in a community property state, or whatever, and it must include "documentary evidence of such interest, if available," which would include copies of titles to automobiles, deeds to real property, or bank statements.<sup>239</sup> To the extent that this increases the burden that was placed on claimants under the "old law, it represents a response to the government's concern that the elimination of the cost bond would lead to the filing of frivolous claims unless the claimant had to articulate the basis for his claim under oath."<sup>240</sup>

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236. 19 U.S.C. § 1607.

237. A claim is deemed "filed" when it is received by the seizing agency, not when it is post-marked by the claimant. *See* Florez-Perez v. United States, Case No. 3:99-cv-1230-J-20A (M.D. Fla. Sept. 1, 2000) (holding that a claim sent by Federal Express on the last day for filing a claim but not received by the DEA until the next day was not timely filed).

238. Section 983(a)(2)(C) says the following:

(C) A claim shall:

- (i) identify the specific property being claimed;
- (ii) state the claimant's interest in such property (and provide customary documentary evidence of such interest if available) and state that the claim is not frivolous; and
- (iii) be made under oath, subject to penalty of perjury.

239. *See* Statement of Rep. Barr (April 11, 2000); DOJ EXTRACT, *supra* note 3 at 459 (expressing the view that the Claimant is required to present *prima facie* evidence of an interest in the property, supported by "customary documents" such as an automobile title, a loan statement or a note from a bank).

240. *See* Statement of Sen. Hatch on the introduction of S. 1931, DOJ EXTRACT, *supra* note 3 at 423:

The government has strongly defended the "cost bond," not as a device for ensuring that its court costs are covered, but as a way of deterring frivolous claims. Of course, we are all in favor of deterring frivolous claims, but there are ways to deter frivolous claims without offending the fundamental principle of equal and open access to the courts, a bedrock of our American system of justice. The Hatch-Leahy bill provides that a person who challenges a forfeiture must file his claim on oath, under penalty of perjury. Claimants also remain subject to the general sanctions for bad faith in instituting or conducting litigation. Further, most claimants will continue to bear the substantial costs of litigating their claims in court. The additional financial burden of the

If a claim fails to contain all of these points—including the statement of non-frivolousness—it can be rejected by the seizing agency. Following pre-CAFRA policy, the seizing agency would generally inform the claimant of the defect in the claim, and give the claimant additional time to correct it. The important point under CAFRA, however, is that until a corrected claim is filed, the ninety-day period in which the U.S. Attorney is required to act pursuant to § 983(a)(3) does not begin to run.

#### *4. Forms; Elimination of the Cost Bond*

Paragraph (2)(D) says that claims need not be filed in any particular form, but it requires each seizing agency to make forms available.<sup>241</sup> This seems to mean that claimants are free to use forms prepared by the seizing agencies or to ignore them and devise their own.

Paragraph (2)(E) simply eliminates the cost bond requirement in § 1608.<sup>242</sup>

### **H. Filing a Complaint for Forfeiture**

Section 983(a)(3) deals with what happens after a person files a claim in the administrative forfeiture proceeding. The general rule is that the filing of any claim triggers the running of a ninety-day period<sup>243</sup> in which the U.S. Attorney must do one of three things: 1) file a civil forfeiture complaint; 2) file a criminal indictment that includes a forfeiture allegation; or 3) return the property pending forfeiture proceedings at a later date.<sup>244</sup>

The general rule is set out in Paragraph (3)(A):

(A) Not later than ninety days after a claim has been filed, the government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.<sup>245</sup>

#### *1. Starting the Ninety-Day Clock*

The first thing to notice about this provision is that the ninety-day time period is triggered by the filing of *any* claim. The government may anticipate that there will be multiple claims to the property, but as soon as any one claim is filed, the clock begins to run. Moreover, the claim that triggers the ninety-day clock does not have to be filed by the person from who the property was seized, or even by the owner. A claim filed by a

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"cost bond" serves no legitimate purpose.

241. Section 983(a)(2)(D) says the following:

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

242. Section 983(a)(2)(E) says the following:

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

243. See 18 U.S.C.S. § 983(a)(3)(A).

244. See 18 U.S.C.S. § 983(a)(3)(B).

245. 18 U.S.C.S. § 983(a)(3)(A).

lienholder, or anyone else asserting an interest in the property, will start the clock.

As mentioned, however, to trigger the ninety-day period, the "claim" must have been in the proper form, as set forth in § 983(a)(2).<sup>246</sup> Moreover, the ninety days begins to run from the date the claim is *received by the seizing agency*, not the date on which it was mailed by the claimant.<sup>247</sup>

## 2. Returning the Property; Extending the Deadline

If the government, for whatever reason, is not prepared to file either a civil or a criminal action against the property within the ninety-day period prescribed by § 983(a)(3)(A), it has the option of returning the property "pending the filing of a complaint."<sup>248</sup> The return of the property is thus without prejudice to commencing a forfeiture action at a later time. Indeed, if a forfeiture action is in fact commenced after the property is returned, the government may take steps to arrest or re-seize the property subject to an arrest warrant *in rem* or seizure warrant under § 981(b), or restrain the property subject to § 983(j). The notion behind the ninety-day rule simply is to ensure that the government does not retain a person's property for an extended period without commencing a judicial action that will give the claimant his day in court.

Alternatively, the ninety-day period can be extended, either by the court "for good cause," or by agreement of the parties. It may be anticipated that in many cases defense counsel would agree to a waiver of the ninety-day deadline to allow for proper review of the case by the U.S. Attorney. If defense counsel does not agree, however, the government may submit information to the court, *in camera*, if necessary, setting forth the grounds for an extension of time based on "good cause." Among the factors a court might take into account in deciding if an extension of time was warranted would be the affect the premature filing of a complaint might have on an ongoing criminal investigation, on the safety of undercover operatives and witnesses, and on the disclosure of evidence being presented to a grand jury.<sup>249</sup>

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246. See Section G, *supra*.

247. See Testimony of David Smith, National Association of Criminal Defense Lawyers, 1997 WL 11233673; DOJ EXTRACT, *supra* note 3 at 212 ("if a person files a claim letter with the seizing agency, the U.S. Attorney would then have to file a civil forfeiture claim within ninety days of the receipt of the claim letter"); see also note 204, *supra*.

248. See 18 U.S.C.S. § 983(a)(3)(A).

249. An earlier version of this provision was explained in the 1997 Committee Report, DOJ EXTRACT, *supra* note 3 at 251:

Subsection (c) also provides a mechanism whereby the government may request an extension of time from a federal judge or magistrate. In cases where the reason for the delay does not require secrecy, notice of the request for the delay would have to be served on the person filing the claim. But where the reason relates to the government's concern that filing the complaint will jeopardize a criminal investigation or prosecution, the request may be made *ex parte*. In particular, the court should grant an extension of time where the filing of the complaint, which is required to recite the factual basis in some detail, would reveal facts concerning a pending investigation, undercover operation, or court-authorized electronic surveillance, or would jeopardize government witnesses. Also, the court could grant the extension to allow the government to include the forfeiture in a criminal indictment, and thus avoid the necessity of initiating parallel civil and criminal forfeitures. However, an extension should not be granted merely to allow the government additional time to conduct its investigation. In all such cases, when the ninety-day time limit expires, the claimant would be entitled to know that the court granted the government an extension of time, but the claimant would not be entitled to



### 3. Sanctions for Failure to Comply with the Ninety-Day Rule

Section 983(a)(3)(B) sets out the consequences for the government if it fails to file a civil complaint or criminal indictment (or return the property) within the prescribed ninety days.<sup>250</sup> In short, in the event the government misses the deadline, it must “promptly release the property pursuant to regulations promulgated by the Attorney General,” and it “may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.”

The first provision is a study in vagueness. The Department of Justice argued that even if the government missed the ninety-day deadline, it made no sense to require the government to return the property to the person who filed the claim, if that person was not the person in possession of the property at the time it was seized (e.g., a lienholder). Nor did it make sense to return the property to the person from whom it was seized if that person did not file a claim. If a lienholder—or someone else with no possessory interest—is the only claimant, and the government misses the ninety-day deadline, forcing the government to return the property to the person from whom it was seized, would hand a windfall to a person who had asserted no interest in the property. At the same time, the government has no authority to release property to a person with no possessory interest even if that person was the only claimant. Congress’s response to these arguments was to let the Attorney General determine, through regulations, how to release property in these circumstances.

The second provision is referred to as the “death penalty” for civil forfeiture. It means that if the government misses the ninety-day deadline, *civil forfeiture of the particular property* is forever barred, in connection with the *underlying offense*.<sup>251</sup>

The first thing to note is that only civil forfeiture is barred under the “death penalty” provision. Even if the government misses the ninety-day deadline, it can still forfeit the

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know the reasons for the extension.

By granting an extension of time, the court would make it unnecessary for the government, as it often must under current law, to file a complaint and then immediately request a stay under Rule 26, Federal Rules of Civil Procedure, or under other statutory authority, to avoid jeopardizing a criminal case. (Footnotes omitted)

The language ultimately codified at § 983(a)(3)(A) was derived from S.1701, § 5; DOJ EXTRACT, *supra* note 3 at 394, which said the following: “If an extension is sought under this paragraph on the basis that the filing required by paragraph (1) would jeopardize an ongoing criminal investigation or prosecution or court-authorized electronic surveillance, the application under subparagraph (A) may be made *ex parte*.” See also Testimony of Stefan D. Cassella, Department of Justice, 1996 Hearing, *supra* note 4 at 54; DOJ EXTRACT, *supra* note 3 at 30.

250. Section 983(a)(3)(B) says the following:

(B) If the government does not:

- (i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or
- (ii) before the time for filing a complaint has expired:
  - (I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and
  - (II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute, the government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense. 18 U.S.C.S. § 983(a)(3)(B).

251. See *id.*

property criminally. It will have to release the property, of course, if there are no independent grounds for maintaining possession, but it will be entitled to restrain it with a criminal pre-trial restraining order under 21 U.S.C. § 853(e).

Second, note that the “death penalty” only applies to the particular property that the claimant identified in his claim. This underscores the importance of the requirement in § 983(a)(2)(C)(i) that says that claimants must “identify the specific property being claimed.” If other property was seized but not claimed, or was not seized at all but is subject to forfeiture in connection with the underlying offense, nothing in the “death penalty” provision bars the civil forfeiture of that property.

Third, the civil forfeiture is barred only “in connection with the underlying offense.”<sup>252</sup> It is not clear how a court will determine what the underlying offense was, but if the same property is subject to forfeiture in connection with a different offense, the “death penalty” does not bar the forfeiture.

#### 4. Exception to the “Death Penalty”

Paragraph (3)(B) also contains a somewhat convoluted exception to the ninety-day rule for cases where the government files a criminal forfeiture action within the ninety-day period. The provision should be read as follows: The government may retain possession of the property subject to forfeiture, even if it does not file a civil complaint within the ninety days, if before the time for filing a complaint has expired, the government (I) obtains a criminal indictment containing an allegation that the property is subject to forfeiture; and (II) takes the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.<sup>253</sup> In other words, the government can hold on to the property, and preserve its right to file a *civil* forfeiture action at a later date, if it files a criminal forfeiture action within the ninety days, and uses criminal forfeiture process to re-seize or restrain the property.

Assuming the grand jury is ready to indict the case, including a forfeiture allegation in an indictment is a simple matter.<sup>254</sup> The practical obstacle to the government’s availing itself of this alternative to filing a civil complaint within the ninety-day period is that criminal cases often take much longer than ninety days to prepare for indictment. But in those cases where an indictment is obtained within the ninety-day period, the government must remember that to protect itself from the “death penalty” for civil forfeiture, it must re-seize or restrain the property with criminal process.<sup>255</sup>

If the government is already in lawful possession of property seized with a civil seizure warrant pursuant to § 981(b), it seems silly to have to go back to a magistrate or judge for a seizure warrant under § 853(f) to re-seize the same property, or to get a restraining order under § 853(e). Nevertheless, the requirement is plain, and is in fact re-

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252. Section 983 (a)(3)(B).

253. *Id.*

254. See FED. R. CIV. P. 32.2(a) (effective Dec. 1, 2000) (indictment need only provide notice to the defendant that his property will be subject to forfeiture in the event of a conviction).

255. Avoiding the civil forfeiture “death penalty” is important for a number of reasons discussed *infra* in connection with the reasons for filing parallel civil and criminal forfeiture cases.

peated in Section 983(a)(3)(C).<sup>256</sup> It is important to note, however, that only the filing of the indictment has to occur within the ninety-day period. The government does not actually have to obtain the new seizure warrant or criminal restraining order before the ninety days expires; it is required only to “takes steps” toward obtaining the necessary authority within that period.<sup>257</sup>

Alternatively, the government might avoid the necessity of re-seizing property already in its possession when it opts for criminal forfeiture by routinely requesting the issuance of seizure warrants in the first instance under *both* Section 981(b) and Section 853(f). If a seizure is authorized under both provisions, the decision to seek criminal forfeiture, not civil forfeiture, within the ninety days following the filing of a valid claim does not trigger any concern that the Government lacks a valid basis for maintaining possession of the property. Thus, if warrants are routinely issued under both statutes, the conversion of the warrant from one form to another when an indictment is filed becomes unnecessary.

### 5. *Parallel Civil and Criminal Forfeitures*

As the foregoing discussion illustrates, the interplay between civil and criminal forfeiture under CAFRA is less than straightforward. What is clear is that missing the ninety-day deadline never affects the government’s ability to file a *criminal* forfeiture at a later date; there is no “death penalty” for criminal forfeiture. Moreover, it is clear that to avoid the “death penalty” for civil forfeiture, the government need only file *either* a civil complaint *or* a criminal indictment within the ninety-day period (and re-seize the property if it chooses the criminal option).

As Section 983(a)(3)(C) makes plain, the government has the option of pursuing parallel civil and criminal actions against the same property. Parallel civil and criminal forfeiture actions are routine. Indeed, maintaining a parallel civil forfeiture case, or preserving the option of filing such a case in the future, is absolutely necessary in light of the limited nature of criminal forfeiture. Forfeiture in a criminal case, of course, is limited to the property of the defendant, and is available only if the defendant is convicted of the crime giving rise to the forfeiture. If the defendant dies or becomes a fugitive, if he is convicted or pleads guilty to an offense that is not the one that gave rise to the property being forfeited,<sup>258</sup> or if the property that was used to facilitate an offense turns out to belong, in whole or in part, to the defendant’s wife, criminal forfeiture is not an option. In those cases, the government must have the option of pursuing a civil *in rem* action against the property itself.

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256. Section 983(a)(3)(C) says the following:

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the government, the government’s right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

18 U.S.C.A. § 983(a)(3)(C) (West Supp. 2000).

257. This might be accomplished by routinely filing a *pro forma* motion to convert a civil seizure warrant into a criminal seizure warrant at the same time an indictment is returned by a grand jury.

258. For example, if a defendant is convicted of a drug trafficking offense, only the proceeds of the particular transaction that was the basis for the conviction can be forfeited in the criminal case. Other money in the defendant’s possession that was derived from other drug transactions must be forfeited civilly.

### 6. Standard for Filing a Complaint

From the government's perspective, the most significant provision in Section 983(a)(3) may be subparagraph (D), which nullifies a controversial interpretation of pre-CAFRA law by the Ninth Circuit Court of Appeals.

In a series of rulings, the Ninth Circuit interpreted 19 U.S.C. § 1615 to require the government to demonstrate that it had probable cause to believe the property was subject to forfeiture at the time it filed its complaint.<sup>259</sup> Note, this was not an interpretation of the standard for seizing property, which all sides agreed was governed by the probable cause requirement of the Fourth Amendment, but a standard simply for filing a complaint in the district court. Under this standard, the Ninth Circuit overturned a number of forfeiture judgments even though evidence acquired after the complaint was filed, including the claimant's conviction in a parallel criminal case, clearly established the forfeitability of the property. A few district courts in other circuits adopted the same approach.<sup>260</sup>

Virtually all other courts rejected this rule, holding not only that the government was entitled to use after-acquired evidence to meet its burden of proof at trial, but also that the standard for filing a complaint—and hence the standard for adjudicating a motion to dismiss the complaint—was the “particularity” requirement in Supplemental Rule E(2).<sup>261</sup> Thus, in most places outside of the Ninth Circuit, the government did not have

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259. See *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (construing 19 U.S.C. § 1615 to require that the government have probable cause at the time it files its complaint or suffer dismissal); *United States v. \$405,089.23 in U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997) (the government could not rely on drug dealer's conviction or evidence adduced at criminal trial to establish probable cause where forfeiture complaint was filed at the time of indictment); *United States v. 22 Santa Barbara Drive*, 121 F.3d 719, available in 1997 WL 420580 (9th Cir. 1997) (Table) (same); *United States v. 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (applying *\$405,089.23*; because evidence in the government's possession at the time the complaint was filed was suppressed, and because evidence acquired independently after the complaint was filed was inadmissible to show probable cause; the government was unable to forfeit residence drug dealer purchased with drug proceeds).

260. See *United States v. 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (probable cause determination in the First Circuit is made as of the time of the filing of the complaint); *United States v. U.S. Currency Totalling \$14,665*, 33 F. Supp. 2d 47 (D. Mass. 1998) (suggesting that, in the First Circuit, the government must have probable cause at the time it files the complaint); *United States v. 1948 Martin Luther King Drive*, 91 F.3d 1228 (C.D. Ill. 2000) (after-acquired evidence may not be used in the probable cause determination).

261. See *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (probable cause for seizure and probable cause for forfeiture are different concepts; the government does not have to establish probable cause for forfeiture until time of trial; court may not dismiss complaint on ground that the government lacked probable cause for the seizure); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (unless claimant challenges seizure, as in a motion to suppress, the government is not required to establish probable cause until the time of trial); *United States v. 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (when motion to dismiss is filed, court presumed all facts alleged to be true, and will deny motion unless it appears beyond doubt that the government can prove no set of facts in support of its claim that would entitle it to relief); *United States v. Approximately \$25,829,681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. Nov. 30, 1999) (same); *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (same) (the government showed it had reasonable basis to believe it could prove money in bank accounts was sent into the United States to fund the HAMAS terrorist organization, in violation of section 1956(a)(2)(A), even though the financial transactions were complex and layered to conceal the country of origin); *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. Ill. Jun. 22, 1999) (motion to dismiss is intended to test sufficiency of complaint, not its merits; complaint need only set out essential elements of the cause of action); see also Stefan D. Cassella, *Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases*, 34 N.Y.L. SCH. L. REV. 163

to establish that it had probable cause for forfeiture at the time it filed its complaint, and no motion to dismiss the complaint could be granted on that ground. To the contrary, the government only had to show that the complaint alleged "sufficient facts to provide a reasonable belief that the property is subject to forfeiture."<sup>262</sup> This requirement, courts held, was sufficient to "to avoid the due process problems associated with the [G]overnment holding property to which it has no legitimate claim."<sup>263</sup>

From the outset of the debate over CAFRA, the Department of Justice assigned a high priority to codifying the majority rule on this issue, and ultimately Congress agreed. As codified at Section 983(a)(3)(D), CAFRA provides that "No complaint may be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." In addition, Section 983(c) expressly provides that "the government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture."<sup>264</sup>

(1994).

262. *United States v. Two Parcels in Russell County*, 92 F.3d 1123, 1126 (11th Cir. 1996); *see also* *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993); *United States v. Funds in the Amount of \$29,266*, 96 F. Supp.2d 806, 809 (N.D. Ill. 2000) (at pleading stage, Government is not required to present proof of probable cause, but is required only to satisfy pleading requirements of Rule E(2), and establish a reasonable basis to believe it will be able to establish probable cause at trial); *United States v. \$94,010 U.S. Currency*, 1998 WL 567837 (W.D.N.Y. Aug. 21, 1998) (particularity requirement ensures that the government does not "seize and hold," for a substantial period, property to which it has no legitimate claim; but particularity requirement does not require demonstration of probable cause pretrial); *United States v. 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (same); *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same), quoting *U.S. v. Pole No. 3172*, 852 F.2d 636, 628 (1st Cir. 1988).

263. *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999).

264. The 1997 version of this provision is explained in the 1997 Committee Report, *supra* note 23 as follows:

Subsection (I) of section 983 provides that the government need not meet its burden of proving forfeitability by a preponderance of the evidence until the completion of discovery, or until trial (if no discovery is ordered). Of course, pursuant to the Fourth Amendment, the government must have probable cause at the time it seizes property. In a judicial forfeiture action, a claimant may always move to suppress evidence if he believes that the government has violated the Fourth Amendment. However, with the exception of a motion to suppress, the claimant may not move the court for a preliminary hearing on the status of the government's evidence. Additionally, the claimant may not move to dismiss the case for lack of evidence pre-trial. However, the claimant may move to dismiss alleging that the complaint is facially deficient pursuant to Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims. *See e.g.*, *United States v. Two Parcels of Real Property Located in Russell County, Alabama*, 92 F.3d 1123, 1126 (11th Cir. 1996) ("To satisfy this specificity requirement [Rule E(2)(a)], the complaint 'must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture . . .'" (bracketed material added)). Pre-trial dispositive motions are limited to those based on defects in the pleadings, as set forth in Rule 12 of the Federal Rules of Civil Procedure. A claimant may, of course, move for the entry of summary judgment pursuant to Rule 56, Fed. R. Civ. P., once discovery is complete.

The language ultimately codified in Section 983(a)(3)(D) was derived from S.1701, 106<sup>th</sup> Cong. § 5 (1999), which said the following:

(4) MOTION TO DISMISS COMPLAINT FOR FORFEITURE-

§(A) IN GENERAL- If a complaint for forfeiture is filed, a party with standing to challenge the forfeiture may move to dismiss the complaint for failure to comply with rule E(2) of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, or on any other ground set forth in rule 12(b) of the Federal Rules of Civil Procedure.

§(B) INSUFFICIENCY OF EVIDENCE- Notwithstanding section 615 of the Tariff Act of 1930 (19 U.S.C. 1615), a party may not move to dismiss the complaint on the ground that the evidence in the possession of the government at the time the

## I. Procedure for Filing Claim and Answer

Finally, Section 983(a)(4) sets forth the procedure for the filing of a claim and answer in a civil judicial case.<sup>265</sup> Paragraph (4)(A) preserves the current rule that a person who has already filed a claim in the administrative forfeiture proceeding must file a new claim in accordance with the Supplemental Rules. The statute, however, attempts to override the provision in Rule C(6) requiring the claim to be filed within ten days "after process has been executed." Instead, paragraph (4)(A) says that the claim "may be filed not later than thirty days after the date of service of the government's complaint or, as applicable, not later than thirty days after the date of final publication of notice of the filing of the complaint."

Whether Section 983(a)(4)(A) actually trumps the Supplemental Rules, however, is an open question. Clearly, it was Congress's intent to give claimants thirty days in which to file a claim, and a change in a statute does override a contrary provision in the Federal Rules of Civil Procedure. But that is only true if the statute takes effect *after* the effective date of the Rule with which it conflicts.<sup>266</sup> If the Rule in question takes effect after the statute, the Rule prevails.<sup>267</sup>

Section 983(a)(4)(A) took effect on August 23, 2000, and as of that date, it trumped Rule C(6). But on December 1, 2000, a new version of Rule C(6) took effect which changed the deadline for filing a claim in civil forfeiture cases from ten days to twenty days. Hence, unless Congress or the rule-making arm of the judiciary acts to amend either the statute or the Rule, the time for filing a claim after December 1, 2000 will be twenty days.

The last part of § 983(a)(4) reiterates the current rule, i.e. Rule C(6), that the claimant must file an answer twenty days after the filing of the claim.<sup>268</sup>

## III. CONCLUSION

Beyond any doubt, CAFRA makes the most far-reaching changes to civil forfeiture procedure ever enacted. The ambiguities in the statute will keep the federal courts busy for years. But in the end, CAFRA will be seen as an event that marked the coming-of-age of the forfeiture laws—the moment when the laws were updated to reflect twenty-first

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government filed its complaint was insufficient to establish the forfeitability of the property."

18 U.S.C.A. § 983(A)(4) (WEST SUPP. 2000). DOJ EXTRACT, *supra* note 3 at 394-95.

265. Section 983(a)(4) says the following:

(4)(A) In any case in which the government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than thirty days after the date of service of the government's complaint or, as applicable, not later than thirty days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the government's complaint for forfeiture not later than twenty days after the date of the filing of the claim.

266. See 28 U.S.C. § 2072(a) (1994).

267. *Id.*

268. See U.S.C.A. § 983(a)(4)(B) (West Supp. 2000).

century sensibilities regarding due process and the importance of property rights; while recognizing that asset forfeiture is an important, and now permanent, ingredient in the government's arsenal of crime-fighting tools that has been enhanced and made applicable to the vast majority of serious crimes.

