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## Civil Asset Forfeiture Reform Act: Overview of S. 1931 and H.R. 1658, 106<sup>th</sup> Congress

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## **ABSTRACT**

Property owners who contest the federal seizure of their property allegedly linked to criminal activity would be afforded greater safeguards under S. 1931 and H.R. 1658, 106<sup>th</sup> Congress.

# Civil Asset Forfeiture Reform Act: Overview of S. 1931 and H.R. 1658, 106<sup>th</sup> Congress

## **Summary**

Difficulties still persist for the innocent-third-party who tries to justify his/her rights in seized property due to its association with criminal conduct. On May 4, 1999, Representative Henry Hyde introduced H.R. 1658 (Civil Asset Forfeiture Reform Act) which, among other purposes, is designed to provide a more uniform procedure for Federal civil forfeitures. As reported out of the House Committee on the Judiciary on June 18, 1999, the bill's main effect would provide greater safeguards for property owners and make the Government's job of justifying the seizure more difficult. Among other things, it would (1) provide several protections for people at risk of having their assets seized; (2) place the burden of proof in civil forfeiture proceedings upon the government; (3) allow for the provision of counsel to the indigent; (4) allow for the pre-adjudication return of property to owners upon a showing of hardship; (5) eliminate the cost bond requirement; (6) creates a uniform innocent owner defense; (7) allow property owners adequate time to challenge a seizure; and (8) allow property owners to sue the government for the negligent damage or destruction of their property.

On June 24, 1999, the House passed H.R. 1658 (Hyde-Conyers civil forfeiture reform bill) by a vote of 375-48. On June 28, 1999, the measure was referred to the Senate Judiciary Committee.

Following the incorporation of some of the provisions in S. 1701, S. 1931 amended H.R. 1658 which passed the Senate Judiciary Committee by a voice vote on March 23, 2000. The full Senate passed the compromise version of H.R. 1658 by voice vote on March 27, 2000.

## Contents

Background .....	1
H.R. 1658 .....	2
Section 1 .....	2
Section 2 .....	2
Current law: .....	2
Current law: .....	3
Current law: .....	3
Current effect: .....	4
Current law (pursuant to unanswered notice): .....	4
Current law: .....	5
Current law: .....	5
Current law: .....	6
Current law: .....	7
Current law: .....	7
Current law: .....	8
Current law: Requirements for Claim and Answer. ....	8
Section 3: .....	9
Section 4: .....	9
Section 5: .....	9
Section 6: .....	10
The Substitute Amendment (S. 1931) .....	10

# Civil Asset Forfeiture Reform Act: Overview of S. 1931 and H.R. 1658, 106<sup>th</sup> Congress

## Background

As a result of the increased volume of forfeiture, numerous third parties have been drawn into forfeiture litigation. Coupled with the complexities of forfeiture litigation and the inconsistencies in the judicial decisions, it has been difficult for the innocent-third-party to justify his/her rights in the seized property.

Prior to the passage of the Comprehensive Forfeiture Act of 1984, “all third parties, whether asserting a legal or equitable basis for relief from an order of criminal forfeiture, [were required to] pursue the remedy of petitioning the Attorney General for remission or mitigation of forfeiture.”<sup>1</sup> The determination of these petitions was left entirely to the discretion of the Attorney General and was not subject to judicial review.<sup>2</sup> However, Congress and the Department of Justice were not comfortable with this practice and they agreed to create a limited exception which is as follows: “[I]f a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party’s claim renders that portion of the order of forfeiture reaching his interest invalid. The [Senate Judiciary] Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.”<sup>3</sup> As a result, Congress provided two categories of third party, standing to petition the courts to determine the validity of their claims to forfeited assets. A third party standing to petition the courts exists: “first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchaser for value and had no reason to believe that the property was subject to forfeiture.”<sup>4</sup> However, for the majority of third parties who assert an equitable, rather than a legal basis for relief, petitioning the Attorney General for remission and mitigation remains the exclusive remedy.<sup>5</sup>

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<sup>1</sup>S.Rept. 98-225, 98<sup>th</sup> Cong. 1<sup>st</sup> Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 3182, at 3390.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* at 3391.

<sup>4</sup>*Id.* at 3392.

<sup>5</sup>*Id.* at 3391.

Similar to H.R. 1965, which was introduced in the 105<sup>th</sup> Congress, H.R. 1658 was created to make federal civil forfeiture procedures more equitable for property owners in general and in addition give innocent property owners a process for recovering their property and make themselves whole.<sup>6</sup>

On June 24, 1999, the House passed H.R. 1658 by a vote of 375-48.<sup>7</sup> The Senate passed an amended version of H.R. 1658 on March 27, 2000. This report sets forth the provisions of H.R. 1658 and then describes the amendments which formed the compromise.

## **H.R. 1658**

**Section 1** States its title: Civil Asset Forfeiture Reform Act.

**Section 2** *Creation of General Rules Relating to Civil Forfeiture Proceedings.* This section in general sets out an extensive addition to Title 18 of the United States Code<sup>8</sup> regarding the creation of general rules relating to civil forfeiture proceedings.

Section 981 of Title 18 of the United States Code would be amended “by inserting after subsection (i) the following: (j)(1)(A) In any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must give written notice to interested parties, such notice shall be given as soon as practicable and in no case more than 60 days after the later of the date of the seizure or the date the identity of the interested party is first known or discovered by the agency, except that the court may extend the period for filing a notice for good cause shown. (B) A person entitled to written notice in such proceeding to whom written notice is not given may on motion void the forfeiture with respect to that person’s interest in the property, unless the agency shows—(i) good cause for the failure to give notice to that person; or (ii) that the person otherwise had actual notice of the seizure. (C) If the government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property and may not take any further action to effect the forfeiture of such property.

**Current law:** Once the decision has been made with regard to proceeding with the administrative forfeiture, an unjustified delay by the seizing agency may later be the basis for a finding that a claimant has been denied his/her due process right to a hearing within a reasonable time on the forfeitability of the seized property.<sup>9</sup>

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<sup>6</sup>See H.Rept. 98-358, 105<sup>th</sup> Cong. 1<sup>st</sup> Sess. 27 (1997).

<sup>7</sup>145 Cong. Rec. H4878 (daily ed. June 24, 1999).

<sup>8</sup>Title 18 of the United States Code concerns crimes and criminal procedure.

<sup>9</sup>See *United States v. Certificate of Deposit No. 8101730026, First National Bank of Omaha*, 84 F.3d 1034 (8<sup>th</sup> Cir. 1996); *United States v. \$52,800.00 in U.S. Currency*, 33 F.3d 1337, 1339 (11<sup>th</sup> Cir. 1994); *United States v. \$23,407.69 in U.S. Currency*, 715 F.2d 162, 165 (5<sup>th</sup> Cir. 1985).

(2)(A) Any person claiming property seized in a nonjudicial forfeiture proceeding may file a claim with the appropriate official after the seizure. (B) A claim under subparagraph (A) may not be filed later than 30 days after—(i) the date of final publication of notice of seizure; or (ii) in the case of a person entitled to written notice, the date that notice is received. (C) The claim shall state the claimant’s interest in the property.

**Current law:** A claim in a civil forfeiture action must be filed within ten days after the execution of process, and an answer must be filed within twenty days after the filing of a claim.<sup>10</sup>

(D) Not later than 90 days after a claim has been filed, the Attorney General shall file a complaint for forfeiture in the appropriate court or return the property, 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.

**Current law:** Formal judicial forfeiture proceedings are initiated by the filing of a complaint against the property pursuant to the Federal Rules of Civil Procedure Supplemental Rule C(2). Rule C(2) provides that complaints in civil forfeiture actions must be verified. The purpose of the verification requirement is to cause an authorized government official to satisfy himself that the allegations in the complaint are true, based either on personal knowledge or on information and belief.<sup>11</sup> A complaint for civil forfeiture should consist of the following facts, statements, and allegations:<sup>12</sup> (1) the basis for the court’s jurisdiction;<sup>13</sup> (2) a description of the property that is the subject of the forfeiture proceeding, including its appraised value, and, if the action began as an administrative, a statement that a claim and cost bond were filed; (3) a statement that the property is or will be within the judicial district during the pendency of the action; (4) the place of seizure and whether it took place on land or navigable water; (5) the date of seizure and the identity of the seizing agency; (6) the circumstances from which the forfeiture claim arises; (7) an allegation that the property has been forfeited to the United States; and (8) a request for such relief as the court deems proper.

Claimants must file claims with the clerk of the court on or before a date named in the notice. For cause shown, the court may enlarge the time within which claims may be filed.

(E) If the government does not file a complaint for forfeiture of property in accordance with subparagraph (D), it shall return the property and may not take any further action to effect the forfeiture of such property.

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<sup>10</sup>Supplemental Rules For Certain Admiralty And Maritime Claims, Federal Rules of Civil Procedure (Supplemental Rule C(6)).

<sup>11</sup>See *United States v. Banco Cafetero International*, 608 F. Supp. 1394, 1400 (S.D.N.Y. 1985).

<sup>12</sup>F.R.C.P., Supplemental Rules C(2) and E(2)(a).

<sup>13</sup>28 U.S.C. §§ 1345, 1355, 1395 (1994).

**Current effect:** The government’s reasons for postponing judicial forfeiture proceedings is generally the critical factor in the determination of whether the claimant has been denied the right to due process. The reason most often offered and found acceptable are based on related criminal investigations and proceedings<sup>14</sup>

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

*(3)(A) In any case where 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 within 30 days of service of the Government complaint or, where applicable, within 30 days of alternative publication notice.*

*(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 within 20 days of the filing of the claim.*

**Current law (pursuant to unanswered notice):** If no one claims the seized property and files the necessary cost bond within twenty days, the seizing agency may declare the property forfeited administratively to the United States and dispose of it according to law.<sup>15</sup>

*(4)(A) If the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim.*

*(B) In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account such factors as—*

*(i) the claimant’s standing to contest the forfeiture; and*

*(ii) whether the claim appears to be made in good faith or to be frivolous.*

*(C) The court shall set the compensation for that representation, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title, and to pay such cost [that] are authorized to be appropriated [and] such sums as are necessary as an addition to the funds otherwise appropriated for the appointment of counsel under such section.*

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<sup>14</sup>*United States v. One Rural Lot*, 739 F.Supp. 74, 77 (D. Puerto Rico (1990) (Both civil forfeiture proceedings and criminal actions can proceed simultaneously or consecutively because a criminal case is an entirely separate action from a civil forfeiture proceeding); *United States v. U.S. Treasury Bills Totaling \$160,916.25 and U.S. Currency Totaling \$2,378.75*, 750 F.2d 900, 902 (11<sup>th</sup> Cir. 1985) (*per curiam*)(holding that a 14-month delay was not unreasonable because of the government’s “diligent pursuit” of the pending criminal proceeding); *United States v. Eighteen Thousand Five Hundred and Five Dollars and Ten Cents*, 739 F.2d 354, 356 (8<sup>th</sup> Cir. 1984)(holding that the delay was justified because the property was being held as evidence for a state criminal proceeding).

<sup>15</sup>19 U.S.C. § 1609 (1994).



**Current law:** Indigents are entitled to appoint counsel to assist them in criminal forfeiture cases<sup>16</sup>, but not in civil forfeiture cases.<sup>17</sup>

*(5) In all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the United States Government to establish by clear and convincing evidence, that the property is subject to forfeiture.*

**Current law:** Reasonable grounds to believe that property constitutes proceeds derived from an illegal activity may be based upon the government's showing of probable cause. Probable cause for forfeiture is generally defined as a reasonable ground for belief of guilt, supported by less than *prima facie* proof but more than mere suspicion.<sup>18</sup>

Probable cause for forfeiture may be shown by *direct evidence*, such as eyewitness testimony or a claimant's admission against interest.<sup>19</sup>

*Circumstantial evidence* may also be used to satisfy the probable cause requirement in civil forfeiture cases.<sup>20</sup> For example probable cause to believe that cash was or would have been used in exchange for illegal drugs<sup>21</sup> may be established by a showing that it was discovered in large amounts along with drug paraphernalia and other indications of drug activity or dealing.<sup>22</sup> Also, reasonable grounds to believe that property constitutes proceeds derived from an illegal drug transaction<sup>23</sup> may be proved by a showing that the subject items were purchased (usually in cash) when the buyer had no known source of income except drug trafficking.<sup>24</sup> Disclosure

<sup>16</sup>18 U.S.C. § 3006A(c) (1994); *Lewis v. Casey*, 518 U.S. 343, 371 (1996)(Thomas, J. concurring); *United States v. Martinson*, 809 F.2d 1364, 1370 (9<sup>th</sup> Cir. 1987).

<sup>17</sup>*United States v. Sardone*, 94 F.3d 1233, 1236 (9<sup>th</sup> Cir. 1996) *see also United States v. Michelle's Lounge*, 39 F.3d 684, 698 (7<sup>th</sup> Cir. 1994).

<sup>18</sup>*See United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1434 (9<sup>th</sup> Cir. 1985); *United States v. Four Million Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 903 (11<sup>th</sup> Cir. 1985); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 n.3 (5<sup>th</sup> Cir. 1982).

<sup>19</sup>*See United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425, 427 (9<sup>th</sup> Cir. 1997); *Ted's Motors v. United States*, 217 F.2d 777, 780 (8<sup>th</sup> Cir. 1954).

<sup>20</sup>*See, e.g., United States v. \$93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9<sup>th</sup> Cir. 1984), *cert. denied*, 469 U.S. 831 (1984).

<sup>21</sup>21 U.S.C. § 881(a)(6) (1994).

<sup>22</sup>*United States v. \$93,865.61 in U.S. Currency*, 730 F.2d at 572; *United States v. Twenty To Thousand, Two Hundred Eight Seven Dollars (\$22,287) United States Currency*, 709 F.2d 442, 449 (6<sup>th</sup> Cir. 1983).

<sup>23</sup>21 U.S.C. § 881 (a)(6) (1994).

<sup>24</sup>*United States v. Certain Real Property Located at Route 3*, 568 F.Supp. 434, 436 (W.D. Ark. 1983); *United States v. \$131,602.00 in U.S. Currency*, 563 F.Supp. 921, 923 (S.D.N.Y.

of the taxpayer's (wrongdoer) recent tax returns pursuant to 26 U.S.C. § 6103(i)(4)(A) (1994) may be useful under these circumstances.

*(6)(A) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.*

*(B) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term 'innocent owner' means an owner who—*

*(i) did not know of the conduct giving rise to forfeiture; or*

*(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.*

*(C) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property, was--*

*(i)(I) a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); or*

*(II) a person who acquired an interest in property through probate or inheritance; and*

*(ii) at the time of the purchase or acquisition reasonably without cause to believe that the property was subject to forfeiture.*

*(7) For the purpose of paragraph (6)--*

*(A) ways in which a person may show that such person did all that reasonably can be expected may include demonstrating that such person, to the extent permitted by law--*

*(i) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and*

*(ii) in a timely fashion revoked or attempted to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property; and*

*(B) in order to do all that can reasonably be expected, a person is not required to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.*

**Current law:** Congress crafted an "innocent owner" defense to forfeiture in 21 U.S.C. §§ 881(a)(4), (a)(6), and (a)(7) (1994). The "innocent owner" defense under (a)(6) and (7) are the same: no owner's interest in property may be forfeited "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."<sup>25</sup> Congress later added the innocent owner defense of subsection 881(a)(4), which is somewhat different: no owner's interest in a "conveyance" shall be forfeited "by reason of any act or omission

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<sup>24</sup>(...continued)

1982); cf. 21 U.S.C. § 853(d) (1994)(rebuttable presumption as to forfeitable drug proceeds in a criminal forfeiture trial).

<sup>25</sup>21 U.S.C. §§ 881(a)(6) and (a)(7) (1994).

established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."<sup>26</sup> Paragraphs (6) and (7) specifically recognize an owner's innocence as a defense to the forfeiture of his interest in the property if he did not know of or consent to the illegal conduct. The statutory defense, which is available to "any person with a recognizable legal or equitable interest in the property seized,"<sup>27</sup> must be established by the owner.<sup>28</sup> These statutory provisions appear to offer broader protection than the *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>29</sup> claimant's defense because it does not require the owner to show that he/she "... did all that [he/she] reasonably could to avoid having [his/her] property put to an unlawful use."<sup>30</sup>

(8) *As used in this subsection:*

(1) *The term civil forfeiture statute means any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.*

**Current law:** Forfeiture procedures apply to any civil forfeiture action brought under title 18 U.S.C. § 1 et seq., the Controlled Substances Act, or the Immigration and Naturalization Act.

(2) *The term 'owner' means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security device, or valid assignment of an ownership interest. Such term does not include— (i) a person with only a general unsecured interest in, or claim against, the property or estate of another; (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or (iii) a nominee who exercises no dominion or control over the property.*

**Current law:** No comparable provision found.

(k)(1) *A claimant under subsection (j) is entitled to immediate release of seized property if-- (A) the claimant has a possessory interest in the property; (B) the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as*

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<sup>26</sup>21 U.S.C. § 881(a)(4)(C) (1994). Judicial interpretations of these statutory (§§ 881(a)(4), (a)(6), and (a)(7) defenses have not been consistent (*see* CRS Report 96-869, "Crime and Forfeiture: The Innocent Third Party", by P. Wallace): one notable difference in the proposed bill is that it would create an *automatic* "innocent owner" defense for people who took reasonable measures to make sure their property was not used illegally.

<sup>27</sup>Joint Explanatory Statement of Titles II and III, H.Rept. 95-1193, 95<sup>th</sup> Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 9522.

<sup>28</sup>21 U.S.C. § 881 (a)(6) and (a)(7) (requiring the owner to establish his/her lack of awareness or involvement) *see also* 21 U.S.C. § 885 (a)(1) (1994).

<sup>29</sup>416 U.S. 663, 690 (1974).

<sup>30</sup>*Id.*

*preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless; and (C) the claimant's likely hardship from the continued possession by the United States Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding.*

**Current law:** For property owners to get their property back, they must overcome tremendous procedural impediments such as posting a cost bond of \$5,000 or ten percent of the value of the property seized, whichever is less, but in no case less than \$250<sup>31</sup> and proving that their property is "innocent" after probable cause has been shown. If no one claims the seized property and files the necessary cost bond within twenty days, the seizing agency may declare the property forfeited administratively to the United States and dispose of it according to law.<sup>32</sup>

*(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.*

*(3) If within 10 days after the date of the request the property has not been released, the claimant may file a motion or complaint in any district court that would have jurisdiction of forfeiture proceedings relating to the property setting forth--(A) the basis on which the requirements of paragraph (1) are met; and (B) the steps the claimant has taken to secure release of the property from the appropriate official.*

*(4) If a motion or complaint is filed under paragraph (3), the district court shall order that the property be returned to the claimant, pending completion of proceedings by the United States Government to obtain forfeiture of the property, if the claimant shows that the requirements of paragraph (1) have been met. The court may place such conditions on release of the property as it finds are appropriate to preserve the availability of the property or its equivalent for forfeiture. (5) The district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause.*

**Current law: Requirements for Claim and Answer.** The requirements for a claim<sup>33</sup> in a civil forfeiture action, like the complaint, must be verified on oath or solemn affirmation.<sup>34</sup> It must set forth the interest in the property by virtue of which the claimant seeks its restitution and asserts the right to defend the forfeiture action.<sup>35</sup> If the claim is made on behalf of the claimant by agent, bailee, or attorney,

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<sup>31</sup>See 19 U.S.C. § 1608 (1994).

<sup>32</sup>See 19 U.S.C. § 1609 (1994).

<sup>33</sup>Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure (Supplemental Rule C(6)).

<sup>34</sup>The Supreme Court has noted that, whenever possible, it should be the principal who verifies the claim, rather than an agent, who may "... from his want of knowledge, be the dupe of cunning and fraud." *The Schooner Adeline and Cargo*, 13 U.S.(9 Cranch) 244, 285 (1815).

<sup>35</sup>Supplemental Rule C (6).

it must also contain a statement indicating that he/she has authority to act for the claimant.<sup>36</sup>

The Supplemental Rules do not establish any particular requirement as to content of the answer in a civil forfeiture case, and therefore the matter is generally determined by Rule 8 of the Federal Rules of Civil Procedure.<sup>37</sup>

**Section 3:** *Section 3 would repeal 21 U.S.C. § 888. This statute, which contains a filing deadline in forfeiture cases involving automobiles used to facilitate drug trafficking offenses, would be rendered unnecessary by the general purpose filing deadline included in 18 U.S.C. § 983.*

**Section 4:** *Provides compensation for damage to seized property. If claims for damage or loss to seized property caused by a law enforcement officer cannot be settled under the Federal Tort Claims Act, the Attorney General may settle the claim for not more than \$50,000.<sup>38</sup>*

**Section 5:** *Upon entry of a judgment for the claimant in a proceeding to condemn or forfeit seized property, the United States shall be liable for postjudgment interest pursuant to 28 U.S.C. § 1961 (Interest).<sup>39</sup>*

*The United States would not be liable for prejudgment interest, except in cases involving currency, proceeds of an interlocutory sale or other negotiable*

<sup>36</sup>*Id.*

<sup>37</sup>*See* Supplemental Rule A. One difference between forfeiture proceedings and other civil actions is that no one has the right to answer a forfeiture complaint unless he/she has first put himself/herself in the position of a claimant. *See The Antoinetta*, 49 F. Supp. 148, 151 (E.D. Pa. 1943), *aff'd*, 153 F.2d 138 (3d Cir. 1945), *cert. Denied*, 328 U.S. 863 (1946).

<sup>38</sup>The Federal Tort Claims Act is a waiver of sovereign immunity, providing general authority for tort suits against the government. Section 2680, however, creates several exceptions to this broad waiver of sovereign immunity, including one for damages resulting from the detention of goods. *See Bazuaye v. United States*, 83 F.3d 482, 486-87 (D.C. Cir. 1996) (suit could be brought under the Federal Tort Claims Act to seek money damages for alleged negligence and intentional interference with rights concerning government's seizure of bail money); *Kurinsky v. United States*, 33 F.3d 594, 598 (6<sup>th</sup> Cir. 1994) (the exception to waiver of statutory immunity of the United States for claims arising from seizure of property by F.B.I. agents were not related to the collection of taxes or custom duties which 28 U.S.C. § 2680(c) is limited to); *But see Haverson v. United States*, 972 F.2d 654 (972 F.2d 654 (5<sup>th</sup> Cir. 1992) (§ 2680(c) exception is not limited to losses resulting from detention of goods and merchandise by customs or tax officers). T. Wright, Discussion of historical background of "other law-enforcement officer" and federal court rulings concerning the exception of section 2680(c), "Any other Law-Enforcement Officer": *Federal Tort Claims Act § 2680(c)*, 83 Ky. L. J. 707 (1994-1995).

<sup>39</sup>*Calabro v. United States*, 830 F. Supp. 175, 179 (E.D. New York 1993) (claimant was entitled to the return of money and interest from the date of judgment entered ten years earlier).

*instruments.*<sup>40</sup> *The United States would surrender to the claimant any funds representing: (A) interest paid to the United States from the date of seizure of the property that resulted from the investment of the property in an interest-bearing account; and (B) any period during which no interest was paid, but would be paid based upon an imputed amount of interest that the currency, proceeds, or instruments would have earned.*

**Section 6:** *Provides that in general, the applicability of these amendments would apply to forfeiture proceedings commenced on or after the date of the enactment of this Act.*

### **The Substitute Amendment (S. 1931)**

On March 23, 2000, Senators Hatch, Leahy, Sessions, and Schumer offered a substitute amendment to H.R. 1658 which the Senate Judiciary Committee approved by a voice vote. In essence, S. 1931 (Hatch/Leahy) was combined with suggestions from Senators Sessions/Schumer (S. 1701) to form the new compromise measure (H.R. 1658) which the full Senate passed by voice vote on March 27, 2000.<sup>41</sup> The new measure will go back to the House for floor action. Among the most significant changes made by the Hatch/Leahy/Sessions/Schumer substitute amendment are as follows:<sup>42</sup>

1. **Burden of Proof.** The substitute amendment puts the burden of proof on the government to prove that the property to be seized was connected to a crime by a preponderance of the evidence. H.R. 1658 establishes a *clear and convincing evidence* burden of proof for the government. Under the substitute amendment, the burden of proof for the government and the claimant would be the same.<sup>43</sup>
2. **Cost Board.** The substitute amendment and H.R. 1658 provide for the elimination of the “cost bond”. If the court finds that the claimant’s assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than \$250 or greater than \$5,000. Under the current law, a property owner who seeks

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<sup>40</sup>*See United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1492 (9<sup>th</sup> Cir.1995); *United States v. Giovanelli*, 853 F. Supp. 88, 93 (S.D. New York 1994) (petitioner was entitled prejudgment interest at prime interest rate and postjudgment interest to compensate for any additional costs incurred following judgment).

<sup>41</sup>146 Cong. Rec. S 1762 (daily ed. March 27, 2000).

<sup>42</sup>*Id.* at 1761.

<sup>43</sup>The claimant would have the burden of proving that he/she is an innocent owner by a preponderance of the evidence.

to recover his property after it has been seized by the government must pay for the privilege by posting a bond with the court.<sup>44</sup>

3. **Legal Assistance and Attorney Fees.** The substitute amendment permits courts to authorize counsel to represent an indigent claimant only if the claimant is already represented by a court-appointed attorney in connection with a related federal criminal case. Under H.R. 1658, if the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim. For claimants who are not provided with counsel, the substitute amendment allows for the recovery of reasonable attorney fees and other costs if they substantially prevail on their claim.
4. **Filing Deadlines.** Under the current law, a claim in a civil forfeiture action must be filed within ten days after the execution of process, and an answer must be filed within twenty days after the filing of a claim. Under H.R. 1658 and the substitute amendment, the current law is retained but both extend the claimant's time to file a claim following the commencement of an administrative or judicial forfeiture action to 30 days. The amendment also codifies current Department of Justice policy with respect to the time period for sending notice of seizure, and establishes a 90-day period for filing a complaint.
5. **Release of Property for Hardship.** The amendment would allow the property owner to hold on to his property pending the final disposition of the case, if he can show that continued possession by the government will cause the owner substantial hardship, such as preventing him from working, and this hardship outweighs the risk that the property will be destroyed or concealed if returned to the owner during the pendency of the case. H.R. 1658 has a similar provision, however unlike H.R. 1658, the substitute adopts the primary safeguards that property owners must have significant ties to the community to provide assurance that the property will not disappear, and if certain property, such as currency and property particularly suited for use in illegal activities are involved, the hardship provision would not apply and the property would not be returned.
6. **Criminal Proceeds.** In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" is defined in the amendment to mean the amount of money acquired through the illegal transaction resulting in the forfeiture, less the direct costs incurred in providing the goods or services. An exception is made for cases involving certain health care fraud schemes, since it would allow those who provide unnecessary services to deduct the cost of those unnecessary services. The amendment extends the government's authority to forfeit criminal proceeds under the civil asset forfeiture laws.

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<sup>44</sup>19 U.S.C. § 1608 (1994).

7. Fugitive Disentitlement. The substitute amendment provides a basis for the judge to disallow a civil asset forfeiture claim by a fugitive, while leaving discretion to allow such claim in the interest of justice. There is no comparable provision in H.R. 1658.