Civil Asset Forfeiture Reform
The Act ends the practice of civil forfeiture but preserves criminal forfeiture, in which property is subject to forfeit if the owner is convicted of a crime. It requires proceeds to go to the state’s general fund, not to individual law enforcement agencies. The Act amends and revises forfeiture procedures when the State seeks to administer pecuniary punishment on a person convicted of a crime in instances where the State can also prove that property was used in or acquired from criminal activity.

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New Mexico
HB 560
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Suggested State Legislation

(Title, enacting clause, etc.)

Section 1. [Purpose.]
A. The purposes of the [Forfeiture] Act are to:
   1) make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture;
   2) protect the constitutional rights of persons whose property is subject to forfeiture and of innocent owners holding interests in property subject to forfeiture;
   3) deter criminal activity by reducing its economic incentives;
   4) increase the pecuniary loss from criminal activity;
   5) protect against the wrongful forfeiture of property; and
   6) ensure that only criminal forfeiture is allowed in this state.
B. The [Forfeiture] Act:
   1) applies to seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply the [Forfeiture] Act; and
   2) does not apply to contraband, which is subject to seizure pursuant to applicable state laws, but is not subject to forfeiture pursuant to the [Forfeiture] Act.

Section 2. [Definitions]
A. “abandoned property”:
   1) means personal property the rights to which and the control of which an owner has intentionally relinquished; and
   1) does not mean real property;
B. “actual knowledge” means a direct and clear awareness of information, a fact or a condition;
C. “contraband” means goods that may not be lawfully imported, exported or possessed, including drugs that are listed in Schedule I, II, III, IV or V of the Controlled Substances Act and that are possessed without a valid prescription;
D. “conveyance” means a device used for transportation and:
   1) includes a motor vehicle, trailer, snowmobile, airplane, vessel and any equipment attached to the conveyance; but
   2) does not include property that is stolen or taken in violation of a law;
E. “conviction” or “convicted” means that a person has been found guilty of a crime in a trial court whether by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended;

F. “crime” means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

G. “instrumentality” means all property that is otherwise lawful to possess that is used in the furtherance or commission of an offense to which forfeiture applies and includes land, a building, a container, a conveyance, equipment, materials, a product, a computer, computer software, a telecommunications device, a firearm, ammunition, a tool, money, a security and a negotiable instrument and other devices used for exchange of property;

H. “law enforcement agency” means the employer of a law enforcement officer that is authorized to seize or has seized property pursuant to the [Forfeiture] Act;

I. “law enforcement officer” means:
   (1) a state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes; but
   (2) does not mean a correctional officer;

J. “owner” means a person who has a legal or equitable ownership interest in property;

K. “property” means tangible or intangible personal property or real property;

L. “property subject to forfeiture” means property or an instrumentality described and declared to be subject to forfeiture by the [Forfeiture] Act or a state law outside of the [Forfeiture] Act; and

M. “secured party” means a person with a security or other protected interest in property, whether the interest arose by mortgage, security agreement, lien, lease or otherwise; the purpose of which interest is to secure the payment of a debt or protect a potential debt owed to the secured party.

Section 3 [Forfeiture—Conviction Required—Seizure of Property—With Process—Without Process]

A. A person’s property is subject to forfeiture if:
   (1) the person was arrested for an offense to which forfeiture applies;
   (2) the person is convicted by a criminal court of the offense; and
   (3) the state establishes by clear and convincing evidence that the property is subject to forfeiture as provided in Subsection B of this section.

B. Following a person’s conviction for an offense to which forfeiture applies, a court may order the person to forfeit:
   (1) property the person acquired through commission of the offense;
   (2) property directly traceable to property acquired through the commission of the offense; and
   (3) any instrumentality the person used in the commission of the offense.

C. Nothing in this section shall prevent property from being forfeited by the terms of a plea agreement that is approved by a court or by other agreement of the parties to a criminal proceeding.

D. Subject to the provisions of [Insert citation], at any time, at the request of the state, a court may issue an ex parte preliminary order to seize property that is subject to forfeiture and for which forfeiture is sought and to provide for the custody of the property. The execution on
the order to seize the property and the return of the property, if applicable, are subject to the
[Forfeiture] Act and other applicable state laws. Before issuing an order pursuant to this
subsection, the court shall make a determination that:

(1) there is a substantial probability that:
(a) the property is subject to forfeiture;
(b) the state will prevail on the issue of forfeiture; and
(c) failure to enter the order will result in the property being destroyed, removed from the
   state or otherwise made unavailable for forfeiture; and
(2) the need to preserve the availability of the property through the entry of the requested
   order outweighs the hardship to the owner and other parties known to be claiming
   interests in the property.

E. Property subject to forfeiture may be seized at any time, without a prior court order, if:
(1) the seizure is incident to a lawful arrest for a crime or a search lawfully conducted
   pursuant to a search warrant and the law enforcement officer making the arrest or
   executing the search has probable cause to believe the property is subject to forfeiture and
   that the subject of the arrest or search warrant is an owner of the property;
(2) the property subject to seizure is the subject of a previous judgment in favor of the state;
   or
(3) the law enforcement officer making the seizure has probable cause to believe the property
   is subject to forfeiture and that the delay occasioned by the need to obtain a court order
   would result in the removal or destruction of the property or otherwise frustrate the
   seizure.

Section 4. [Receipt for Seized Property—Replevin Hearing]
A. When a law enforcement officer seizes property that is subject to forfeiture, the officer shall
provide an itemized receipt to the person possessing the property or, in the absence of a
person to whom the receipt could be given, shall leave the receipt in the place where the
property was found, if possible.

B. Following the seizure of property, the defendant in the related criminal matter or another
person who claims an interest in seized property may, at any time before sixty days prior to a
related criminal trial, claim an interest in seized property by a motion to the court to issue a
writ of replevin. A motion filed pursuant to this section shall include facts to support the
person's alleged interest in the property.

C. A person who makes a timely motion pursuant to this section shall have a right to a hearing
on the motion before the resolution of any related criminal matter or forfeiture proceeding
and within thirty days of the date on which the motion is filed.

D. At least ten days before a hearing on a motion filed pursuant to this section, the state shall
file an answer or responsive motion that shows probable cause for the seizure.

E. A court shall grant a claimant's motion if the court finds that:
(1) it is likely that the final judgment will require the state to return the property to the
   claimant;
(2) the property is not reasonably required to be held for investigatory reasons; or
(3) the property is the only reasonable means for a defendant to pay for legal representation
   in a related criminal or forfeiture proceeding.

F. In its discretion, the court may order the return of funds or property sufficient to obtain legal
counsel but less than the total amount seized, and it may require an accounting.
G. In lieu of ordering the issuance of the writ of replevin, a court may order:
   1. the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in a related forfeiture action; or
   2. any other relief the court deems to be just.

Section 5. [Complaint of Forfeiture—Service of Process.]
A. Within thirty days of making a seizure of property or simultaneously upon filing a related criminal indictment, the state shall file a complaint of ancillary forfeiture proceedings or return the property to the person from whom it was seized. A complaint of ancillary forfeiture proceedings shall include:
   1. a description of the property seized;
   2. the date and place of seizure of the property;
   3. the name and address of the law enforcement agency making the seizure;
   4. the specific statutory and factual grounds for the seizure;
   5. whether the property was seized pursuant to an order of seizure, and if the property was seized without an order of seizure, an affidavit from a law enforcement officer stating the legal and factual grounds why an order of seizure was not required; and
   6. in the complaint caption and in the complaint, the names of persons known to the state who may claim an interest in the property and the basis for each person's alleged interest.
B. The complaint shall be served upon the person from whom the property was seized, the person's attorney of record and all persons known or reasonably believed by the state to claim an interest in the property. A copy of the complaint shall also be published at least three times in a newspaper of general circulation in the district of the court having jurisdiction or on the sunshine portal until the forfeiture proceeding is resolved.

Section 6. [Forfeiture Proceedings—Determination—Substitution of Property—Constitutionality—Appeal.]
A. A person who claims an interest in seized property shall file an answer to the complaint of forfeiture within thirty days of the date of service of the complaint. The answer shall include facts to support the claimant's alleged interest in the property.
B. The district courts have jurisdiction over forfeiture proceedings, and venue for a forfeiture proceeding is in the same court in which venue lies for the criminal matter related to the seized property.
C. The forfeiture proceeding shall begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding that relates to a defendant's property before the same judge and jury, if applicable, and the court, and the jury, if applicable, may consider the forfeiture of property seized from other persons at the same time or in a later proceeding. If the criminal defendant in the related criminal matter is represented by the public defender department, the chief public defender or the district public defender may authorize department representation of the defendant in the forfeiture proceeding.
D. Discovery conducted in an ancillary forfeiture proceeding is subject to the rules of criminal procedure.
E. An ancillary forfeiture proceeding that relates to the forfeiture of property valued at less than twenty thousand dollars ($20,000) shall be held before a judge only.
F. If the state fails to prove, by clear and convincing evidence, that a person whose property is alleged to be subject to forfeiture is an owner of the property:
(1) the forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless the owner’s possession of the property is illegal; and
(2) the owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

G. The court shall enter a judgment of forfeiture and the seized property shall be forfeited to the state if the state proves by clear and convincing evidence that:
(1) the property is subject to forfeiture;
(2) the criminal prosecution of the owner of the seized property resulted in a conviction; and
(3) the value of the property to be forfeited does not unreasonably exceed:
   (a) the pecuniary gain derived or sought to be derived by the crime;
   (b) the pecuniary loss caused or sought to be caused by the crime; or
   (c) the value of the convicted owner’s interest in the property.

H. A court shall not accept a plea agreement or other arrangement by which a defendant contributes or donates property to a person, charity or other organization in full or partial fulfillment of responsibility established in the court’s proceeding.

I. Following a person’s conviction, the state may make a motion for forfeiture of substitute property owned by the person that is equal to but does not exceed the value of property that is subject to forfeiture but that the state is unable to seize. The court shall order the forfeiture of substitute property only if the state proves by a preponderance of the evidence that the person intentionally transferred, sold or deposited property with a third party to avoid the court’s jurisdiction and the forfeiture of the property.

J. A person is not jointly and severally liable for orders for forfeiture of another person’s property. When ownership of property is unclear, a court may order each person to forfeit the person’s property on a pro rata basis or by another means the court deems equitable.

K. At any time following the conclusion of a forfeiture proceeding, the person whose property was forfeited may petition the court to determine whether the forfeiture was unconstitutionally excessive pursuant to the state or federal constitution.

L. At a non-jury hearing on the petition, the petitioner has the burden of establishing by a preponderance of the evidence that the forfeiture was grossly disproportional to the seriousness of the criminal offense for which the person was convicted.

M. In determining whether the forfeiture is unconstitutionally excessive, the court may consider all relevant factors, including:
(1) the seriousness of the criminal offense and its impact on the community, the duration of the criminal activity and the harm caused by the defendant;
(2) the extent to which the defendant participated in the offense;
(3) the extent to which the property was used in committing the offense;
(4) the sentence imposed for the commission of the crime that relates to the property that is subject to forfeiture; and
(5) whether the criminal offense was completed or attempted.

N. In determining the value of the property subject to forfeiture, the court may consider relevant factors, including the:
(1) fair market value of the property;
(2) value of the property to the defendant, including hardship that the defendant will suffer if the forfeiture is realized; and hardship from the loss of a primary residence, motor vehicle or other property to the defendant’s family members or others if the property is forfeited.
O. The court shall not consider the value of the property to the state when it determines whether
the forfeiture of property is constitutionally excessive.

P. A party to a forfeiture proceeding may appeal a district court's decision regarding the seizure,
forfeiture and distribution of property pursuant to the [Forfeiture] Act.

Section 7, [Title to Seized Property—Disposition of Forfeited Property and Proceeds.]
A. The state acquires provisional title to seized property at the time the property was used or
acquired in connection with an offense that subjects the property to forfeiture. Provisional
title authorizes the state to hold and protect the property. Title to the property shall vest with
the state when a trier of fact renders a final forfeiture verdict and the title relates back to the
time when the state acquired provisional title; provided that the title is subject to claims by
third parties that are adjudicated pursuant to the [Forfeiture] Act.
B. Unless possession of the property is illegal or a different disposition is specifically provided
for by law and except as provided in this section, forfeited property that is not currency shall
be delivered along with any abandoned property to the state treasurer for disposition at a
public auction. Forfeited currency and all sale proceeds of the sale of forfeited or abandoned
property shall be deposited in the general fund.
C. Proceeds from the sale of forfeited property received by the state from another jurisdiction
shall be deposited in the general fund.
D. A property interest forfeited to the state pursuant to the [Forfeiture] Act is subject to the
interest of a secured party unless, in the forfeiture proceeding, the state proves by clear and
convincing evidence that the secured party had actual knowledge of the crime that relates to
the seizure of the property.

Section 8. [Innocent Owners.]
A. The property of an innocent owner, as provided in this section, shall not be forfeited.
B. A person who claims to be an innocent owner has the burden of production to show that the
person:
   (1) holds a legal right, title or interest in the property seized; and
   (2) held an ownership interest in the seized property at the time the illegal conduct that gave
rise to the seizure of the property occurred or was a bona fide purchaser for fair value.
C. The state shall immediately return property to an established innocent owner who has an
interest in homesteaded property, a motor vehicle valued at less than ten thousand dollars
($10,000) or a conveyance that is encumbered by a security interest that was perfected
pursuant to state law or that is subject to a lease or rental agreement, unless the secured party
or lessor had actual knowledge of the criminal act upon which the forfeiture was based.
D. If a person establishes that the person is an innocent owner pursuant to [Insert citation] and
the state pursues a forfeiture proceeding with respect to that person's property, other than
property described in [Insert citation], to successfully forfeit the property, the state shall
prove by clear and convincing evidence that the innocent owner had actual knowledge of the
underlying crime giving rise to the forfeiture.
E. A person who acquired an ownership interest in property subject to forfeiture after the
commission of a crime that gave rise to the forfeiture and who claims to be an innocent
owner has the burden of production to show that the person has legal right, title or interest in
the property seized under this section.
F. If a person establishes that the person is an innocent owner as provided in Subsection B of this section and the state pursues a forfeiture proceeding against the person's property, to successfully forfeit the property, the state shall prove by clear and convincing evidence that at the time the person acquired the property, the person:
   (1) had actual knowledge that the property was subject to forfeiture; or
   (2) was not a bona fide purchaser who was without notice of any defect in title and who gave valuable consideration.

G. If the state fails to meet its burdens as provided in Subsections C and D of this section, the court shall find that the person is an innocent owner and shall order the state to relinquish all claims of title to the innocent owner's property.

Section 9. [Safekeeping of Seized Property Pending Disposition—Selling or Retaining Seized Property Prohibited.]
A. Seized currency alleged to be subject to forfeiture shall be deposited with the clerk of the district court in an interest-bearing account.
B. Seized property other than currency or real property, not required by federal or state law to be destroyed, shall be:
   (1) placed under seal; and
   (2) removed to a place designated by the district court; or
   (3) held in the custody of a law enforcement agency.
C. Seized property shall be kept by the custodian in a manner to protect it from theft or damage and, if ordered by the district court, insured against those risks.
D. A law enforcement agency shall not retain forfeited or abandoned property.

Section 10. [Reporting.]
A. Every law enforcement agency shall prepare an annual report of the agency's seizures and forfeitures conducted pursuant to the [Forfeiture] Act, and seizures and forfeitures conducted pursuant to federal forfeiture law, and the report shall include:
   (1) the total number of seizures of currency and the total amount of currency seized in each seizure;
   (2) the total number of seizures of property and the number and types of items seized in each seizure;
   (3) the market value of each item of property seized; and
   (4) the total number of occurrences of each class of crime that resulted in the agency's seizure of property.
B. A law enforcement agency shall submit its annual reports to the department of public safety and to the district attorney's office in the agency's district. An agency that did not engage in seizure or forfeiture pursuant to the [Forfeiture] Act or federal forfeiture law, or both, shall report that fact in its annual report.
C. The department of public safety shall compile the reports submitted by each law enforcement agency and issue an aggregate report of all forfeitures in the state.
D. By April 1 of each year, the department of public safety shall publish on its web site the department's aggregate report and individual law enforcement agency reports submitted for the previous year.
Section 11. [Return of Property—Damages—Costs.]

A. A law enforcement agency that holds seized property shall return the seized property to the owner of the property within a reasonable period of time that does not exceed five days after:
   (1) a court finds that a person had a bona fide security interest in the property;
   (2) a court finds that the owner was an innocent owner;
   (3) the acquittal of or dismissal of related criminal charges against the owner of the property; or
   (4) the disposal of the criminal charge that was the basis of the forfeiture proceedings by nolle prosequi.

B. A law enforcement agency that holds seized property is responsible for any damages, storage fees and related costs applicable to property that is returned to an owner pursuant to this section.

Section 12. [Transfer of Forfeitable Property to the Federal Government.]

A. A law enforcement agency shall not directly or indirectly transfer seized property to a federal law enforcement authority or other federal agency unless:
   (1) the value of the seized property exceeds fifty thousand dollars ($50,000), excluding the potential value of the sale of contraband; and
   (2) the law enforcement agency determines that the criminal conduct that gave rise to the seizure is interstate in nature and sufficiently complex to justify the transfer of the property; or
   (3) the seized property may only be forfeited under federal law.

B. The law enforcement agency shall not transfer property to the federal government if the transfer would circumvent the protections of the [Forfeiture] Act that would otherwise be available to a putative interest holder in the property.