

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 220

INTRODUCER: Senator Bean

SUBJECT: Civil Forfeiture of Contraband

DATE: January 22, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Pre-meeting
2.			ACJ	
3.			FP	

I. Summary:

SB 220 amends s. 932.704(11), F.S., by adding the following additional requirements to the guidelines under the Florida Contraband Forfeiture Act:

- The seizing agency must perform a specified review of its seizures, settlements, and forfeitures at least annually and if there are deficiencies, it must promptly take action to comply with the act;
- The employment, salary, or other compensation of a law enforcement officer may not be dependent upon the officer's ability to meet seizure quotas;
- The seizing agency shall adopt and implement written policies, procedures, and training to ensure compliance with applicable legal requirements regarding seizing, maintaining, and forfeiting property;
- The seizing agency's legal counsel must be notified promptly of all seizures and review them for legal sufficiency, and supervisory personnel must promptly review all seizures for probable cause;
- The seizing agency must adopt and implement written policies and procedures promoting the prompt release of seized property when there is no legitimate basis for holding it, as well as adopt written policies and procedures ensuring that all asserted claims of interest are promptly reviewed;
- Any forfeiture action settlement must be consistent with the act and the agency's policy; and
- The seizing agency must maintain records showing every law enforcement officer's compliance with the required forfeiture training, including the legal aspects of forfeiture, search and seizure, and other constitutional considerations.

It also creates s. 932.7061, F.S., requiring every seizing agency to complete an annual report indicating whether it has received or forfeited property. The report must be maintained by the seizing agency and made available to the public.

II. Present Situation:

The Florida Contraband Forfeiture Act, ss. 932.701-932.706, F.S., prescribes procedures and guidelines for law enforcement agencies to follow when seizing, forfeiting, and disposing of property under the act.¹ Currently, under s. 932.703, F.S., any contraband article², vessel, motor vehicle, aircraft, other personal property, or real property used in violation of the act, or in, upon, or by means of which any violation of the act has taken or is taking place, may be seized and forfeited subject to the provisions of the act.³ All rights to, interest in, and title to contraband articles used in violation of the act immediately vest in the seizing law enforcement agency upon seizure.⁴

Seizure Process

Personal property may be seized at the time of the violation or subsequent to the violation based upon a law enforcement officer's determination that probable cause exists to believe the property is being used in violation of the act. The person entitled to notice (the owner, entity, bona fide lienholder, or person in possession of the property)⁵ must be given notice, at the time of seizure or within 5 days of the seizure by certified mail, of his or her right to have a court review such determination in a postseizure adversarial preliminary hearing.⁶

When a court review is desired, the person entitled to notice must request it in writing by certified mail. The agency must hold a hearing within 10 days (or as soon as practicable thereafter) after receiving the request. (Unlike personal property, seizure of real property may not occur until the person entitled to notice has the opportunity to attend a preseizure adversarial hearing at which time the court determines whether or not probable cause exists to justify the seizure.)⁷ The seizing agency must make a diligent effort to notify persons entitled to notice of the seizure.⁸ If after reviewing the evidence at the adversarial preliminary hearing, the court finds probable cause that the property was used in violation of the act, it must authorize the seizure or continued seizure of the contraband article.⁹

¹ The act provides for civil forfeiture, an action taken against the property or assets, also known as an action in rem. Civil forfeiture, unlike criminal forfeiture, does not require a nexus between the criminal activity of the property owner and the property. The constitutionality of the act was upheld by the Florida Supreme Court in *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991).

² "Contraband article" includes but is not limited to any real property or personal property which was used or attempted to be used as an "instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the act." Section 932.701(2)(a)5. and 6., F.S.

³ Section 932.703(1), F.S.

⁴ Section 932.703(1)(c), F.S.

⁵ Interests of bona fide lienholders, property held jointly by a husband and wife, interests in property held jointly, and rental cars may not be forfeited under s. 932.703, F.S.

⁶ The court review must occur within 15 days after the notice is received. Section 932.703(2), F.S.

⁷ The hearing must occur within 10 days of the filing of the lis pendens or as soon as practicable. Section 932.703(2)(b), F.S.

⁸ Section 932.703(2), F.S.

⁹ Section 932.703(2)(c), F.S.

Forfeiture Proceedings

If the person entitled to notice does not request an adversarial preliminary hearing, the seizing law enforcement agency must promptly proceed against the contraband article. It does so by filing a complaint in the civil division of the circuit court within 45 days after the seizure, requesting the court to issue a judgment of forfeiture. The Florida Rules of Civil Procedure apply to forfeiture proceedings under the act.¹⁰ The court must enter an order showing a finding of probable cause before a complaint can be served upon the claimant.¹¹ A claimant contesting the forfeiture has 20 days after receiving the complaint and the probable cause finding to file any responsive pleadings.¹²

Under the act, the civil forfeiture trial must be decided by a jury unless that right is waived by the claimant.¹³ At trial, the seizing agency must prove that the contraband article was being used in violation of the act by clear and convincing evidence. Property may not be forfeited under the act unless the seizing agency shows by the preponderance of the evidence that the owner or any co-owner knew or should have known after reasonable inquiry, that the property was being used in criminal activity. Bona fide lienholders must have actual knowledge. The act also provides that it is an affirmative defense to forfeiture that the nexus between the property and the underlying violation was incidental or entirely accidental.¹⁴

The act also authorizes the claimant and the seizing law enforcement agency to settle the forfeiture action prior to the conclusion of the forfeiture proceeding. A settlement agreement must be reviewed by the court or a mediator (unless the claimant signs a written waiver). If the claimant is not represented by an attorney, the agreement must specify that the claimant has freely and voluntarily agreed to the settlement without the benefit of counsel.¹⁵

If the court orders that the property be forfeited to the seizing law enforcement agency, the final order of forfeiture perfects in the agency right, title, and interest in and to the property, subject only to the rights and interests of bona fide lienholders, and relates back to the date of seizure.¹⁶

The act requires the seizing agency to pay claimants the reasonable loss of value of the property or loss of income when the claimant prevails. It prohibits the agency from assessing fees and costs against a successful claimant. The seizing agency is also required to pay reasonable attorney's fees and costs up to \$1,000 if the claimant prevails at the adversarial preliminary hearing.¹⁷

¹⁰ Section 932.701(2)(c) and (d), and 932.704(2), F.S.

¹¹ A "claimant" is any party who has proprietary interest in the seized property who has standing to challenge the forfeiture, including owners, registered owners, bona fide lienholders, and title-holders. Section 932.701(2)(h), F.S.

¹² Section 932.704(5), F.S.

¹³ *Id.*

¹⁴ Section 932.703, F.S.

¹⁵ Section 932.704, F.S.

¹⁶ Section 932.704(8), F.S.

¹⁷ Section 932.704(9) and (10), F.S.

Guidelines and Training Procedures

Section 932.704, F.S., requires the Florida Department of Law Enforcement (FDLE), in consultation with the Florida Sheriffs Association and the Florida Police Chiefs Association, to develop guidelines and training procedures to be used by state and local law enforcement agencies and state attorneys in implementing the act.¹⁸ For instance, each agency that seizes property must periodically review its seizures, settlements, and forfeiture proceedings to determine whether they comply with the act and the adopted guidelines. The determination of whether an agency will file a forfeiture action must be the sole responsibility of the head of the agency or his or her designee. The determination of whether to seize currency must be made by supervisory personnel. The agency's legal counsel must be notified as soon as possible.¹⁹

Section 932.706, F.S., requires the Criminal Justice Standards and Training Commission to develop a standardized course of training which is designed to develop proficiency in the seizure and forfeiture of property under the act. The curriculum must include racial and ethnic sensitivity, search and seizure case law, the use of drug-courier profiles, and the use of an order to stop based on a pretext.

Disposition of Forfeited Property

Section 932.7055, F.S., provides for the disposition of liens and forfeited property under the act. The seizing agency may do any of the following when a final judgment of forfeiture is granted:

- Retain the property for the agency's use;
- Sell the property at a public auction or by sealed bid to the highest bidder; or
- Salvage, trade, or transfer the property to any public or nonprofit organization.²⁰

If the property has a lien attached and the agency sells the property, the proceeds of the sale are to be distributed in this order:

- Payment of the balance due on any lien preserved by the court in the forfeiture proceedings.
- Payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security, and forfeiture of such property.
- Payment of court costs incurred in the forfeiture proceeding.²¹

The proceeds which remain after all liens and debts against the forfeited property are paid are then deposited into a special law enforcement trust fund and may be used to fund school resource officers, crime prevention, safe neighborhood, drug abuse education and prevention programs, or other law enforcement purposes, including defraying the cost of protracted or complex investigations, providing additional equipment or expertise, purchasing automated external defibrillators for law enforcement vehicles, and providing matching funds to obtain federal grants. These proceeds and interest may not be used to meet normal operation expenses.²²

¹⁸ Section 932.704(11), F.S.

¹⁹ *Id.*

²⁰ Section 932.7055(1), F.S.

²¹ Sections 932.7055(3) and (4), F.S.

²² Section 932.7055(5), F.S.

Additionally, any local law enforcement agency that acquires at least \$15,000 under the act within a fiscal year must expend or donate no less than 15 percent of these proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program. The agency has discretion to determine which program receives the funds.²³

An agency or organization, other than the seizing agency, that wishes to receive such funds shall apply to the sheriff or chief of police for an appropriation. If the agency or organization receives funding under the act, it must provide an accounting, indicating that the funds were only used for the above stated purposes.²⁴

If the seizing agency is a local law enforcement agency, the proceeds are deposited into a special law enforcement trust fund established by the governing body of a county or municipality. The funds may be appropriated only to the sheriff's office by the board of county commissioners or to the police department by the governing body of the municipality when the sheriff or police chief has certified that the request for funds will be used in compliance with the act.²⁵

If the seizing agency is a state agency, the remaining proceeds are deposited into the General Revenue Fund, except that the following agencies have their own forfeiture trust fund:

- FDLE;
- Division of Alcoholic Beverages and Tobacco;
- Department of Highway Safety and Motor Vehicles;
- Fish and Wildlife Conservation Commission;
- State Attorney Offices;
- School Board Security Agencies;
- State University System Police Departments;
- Department of Agriculture and Consumer Services;
- Department of Military Affairs;
- Medicaid Fraud Control Unit of the Department of Legal Affairs;
- Division of State Fire Marshal of the Department of Financial Services; and
- Division of Insurance Fraud of the Department of Financial Services.²⁶

III. Effect of Proposed Changes:

The bill amends s. 932.704(11), F.S., by adding the following additional requirements to the guidelines under the Florida Contraband Forfeiture Act:

- The seizing agency must perform a specified review of its seizures, settlements, and forfeitures at least annually and if there are deficiencies, it must promptly take action to comply with the act;
- The employment, salary, or other compensation of a law enforcement officer may not be dependent upon the officer's ability to meet seizure quotas;

²³ Section 932.7055(5)(c)3., F.S.

²⁴ Section 932.7055(5)(c), F.S.

²⁵ Section 932.7055(5), F.S.

²⁶ Section 932.7055(6), F.S.

- The seizing agency shall adopt and implement written policies, procedures, and training to ensure compliance with applicable legal requirements regarding seizing, maintaining, and forfeiting property;
- The seizing agency's legal counsel must be notified promptly of all seizures and review them for legal sufficiency, and supervisory personnel must promptly review all seizures for probable cause;
- The seizing agency must adopt and implement written policies and procedures promoting the prompt release of seized property when there is no legitimate basis for holding it, as well as adopt written policies and procedures ensuring that all asserted claims of interest are promptly reviewed;
- Any forfeiture action settlement must be consistent with the act and the agency's policy; and
- The seizing agency must maintain records showing every law enforcement officer's compliance with the required forfeiture training, including the legal aspects of forfeiture, search and seizure, and other constitutional considerations.

The bill also creates s. 932.7061, F.S., requiring every seizing agency to complete an annual report indicating whether it has received or forfeited property. The report must be maintained by the seizing agency and made available to the public. The report must specify the following:

- The type of property;
- The property's approximate value;
- The court case number;
- The type of offense for which the property was seized;
- The disposition of the property, and
- The dollar amount of the proceeds received or expended.

The effective date of the bill is July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Any fiscal impact upon a seizing agency because of the bill's new requirements is unknown but likely minimal.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Office of Program Policy Analysis and Government Accountability (OPPAGA) recently reviewed Florida's current civil asset forfeiture practices by local law enforcement agencies and released its findings in a report entitled *Civil Asset Forfeiture in Florida: Policies and Practices*.²⁷ Some of the findings in the report included the following:

- There is no current requirement for law enforcement agencies to report seizures and forfeitures under the act and without statewide information, the Legislature does not know the extent of civil asset forfeiture practices in Florida.²⁸
- Vehicles and currency were the most commonly seized assets, related primarily to drug offenses.²⁹
- An arrest was made in conjunction with most seizures during FY 2013-14.³⁰
- Many assets were returned to the owners, either in whole or in part.³¹
- Sixteen percent of seizure actions were contested by an adversarial hearing request, and 1% resulted in a civil trial.³²
- Responding agencies reported spending over \$12 million in forfeited assets during FY 2013-14.³³

Also included in the report were the following options that could be considered by the Legislature when making changes to the Florida Contraband Forfeiture Act:

²⁷ Office of Program Policy Analysis and Gov't Accountability, Florida Legislature, Report No. 15-10 (November 2015), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1510rpt.pdf> (last visited Jan. 15, 2016).

²⁸ *Id.* at 11.

²⁹ *Id.* at 4.

³⁰ *Id.* at 5. Responding agencies gave the following examples of when an arrest is not possible to make at the time of seizure: an arrest is premature because the officer was unable to positively identify the owner of the cash and illegal drugs; an arrest is premature during an ongoing economic crime investigation but the seizure of currency is ripe; and an arrest is premature when owners of property subject to seizure are willing to give information on higher level crimes leading to later related arrests.

³¹ *Id.* at 7 and 8.

³² *Id.* at 7.

³³ *Id.* at 9. Responding agencies indicated they used forfeiture money primarily for supporting substance abuse and crime prevention programs, buying additional equipment, defraying costs of complex investigations, providing additional expertise, providing matching funds to obtain federal grants, and buying automatic external defibrillators. *Id.* at 10.

- Require law enforcement agencies to report seizure actions and forfeitures to the state at least annually;³⁴
- Require a criminal conviction before forfeiture;³⁵
- Increase the evidentiary standard of proof from clear and convincing to beyond a reasonable doubt;³⁶ and
- Restrict the use of civil asset forfeiture proceeds.³⁷

SB 220 codifies the option of requiring law enforcement agencies to annually report seizure actions and forfeitures to the state.

VIII. Statutes Affected:

This bill substantially amends section 932.704 of the Florida Statutes.

The bill creates section 932.7061 of the Florida Statutes.

The bill makes technical and conforming changes to the following sections of the Florida Statutes: 932.701, 322.34, 323.001, 328.07, 817.625, 27.3451, and 874.08.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³⁴ Thirty-three states have some sort of reporting requirement. *Id.* at 11.

³⁵ Several states, including Minnesota, Montana, Nevada, New Mexico, and North Carolina have this requirement. *Id.* at 12.

³⁶ Florida is one of 11 states that has a clear and convincing proof standard, which is higher than most other states. Nebraska, North Carolina, and Wisconsin use the criminal standard of proof, beyond a reasonable doubt. *Id.* at 12.

³⁷ *Id.* at 13.