

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 161

(Senator Hough, *et al.*)

Judicial Proceedings

Judiciary

Criminal Procedure - Seizure and Forfeiture

This bill makes several changes to statutes pertaining to seizure and forfeiture of property in connection with violations of the State's controlled dangerous substances laws. Specifically, the bill (1) alters the type of property that is subject to forfeiture; (2) establishes procedural requirements for the forfeiture of property under State law; (3) prohibits State and local entities from transferring or referring seized property to the federal government for forfeiture under federal law unless specified requirements are met; (4) requires the transfer of specified funds to the Department of Health and Mental Hygiene (DHMH) for specified programs; and (5) establishes reporting requirements for seizing authorities, the Maryland Statistical Analysis Center (MSAC), and the Governor's Office of Crime Control and Prevention (GOCCP).

Fiscal Summary

State Effect: Minimal decrease in general fund revenues due to the bill's alteration of the types of property eligible for forfeiture; otherwise, the bill's changes to the seizure and forfeiture process are not expected to have a material impact on State finances, as discussed below. Minimal increase in general fund expenditures for DHMH for drug treatment and education programs. GOCCP and seizing authorities can comply with the bill's reporting requirements with existing resources.

Local Effect: Potential significant decrease in local revenues from forfeitures in drug possession cases. Local expenditures may increase for local law enforcement agencies and State's Attorneys' offices to comply with the bill's procedural and reporting requirements.

Small Business Effect: None.

Analysis

Bill Summary:

Property Eligible for Forfeiture: The bill removes weapons and money of more than \$300 used or intended to be used in connection with the unlawful possession of a controlled dangerous substance or controlled paraphernalia from the statutory list of property eligible for forfeiture. The bill establishes that any amount of money or weapons used or intended to be used in connection with the unlawful manufacture, distribution, or dispensing of a controlled dangerous substance is subject to forfeiture.

Receipts and Required Written Information: At the time of seizure, a seizing authority must provide a receipt to the person from whom the property was seized. The receipt must include (1) a detailed description of the property; (2) a case number, property inventory number, or any other reference number used by the seizing authority to connect the property to the circumstances of the seizure; (3) the name and contact information of an individual or office within the seizing authority that can provide information concerning the seized property; (4) notice that the owner of the property may make a written request for return of the seized property; and (5) notice that within 60 days after receipt of a written request for return of the seized property, the seizing authority will decide whether to return the property and notify the owner of the decision.

If the person who received a receipt is not the owner of the property, the seizing authority must send written information containing specified information regarding the location and description of the property and relevant contact information to the owner of the seized property, if known, within 15 days after the seizure of the property.

Return of Seized Property to Owner: The bill repeals the statutory specification that property seized under specified provisions is not repleviable. The bill authorizes the owner of seized property to make a written request to the seizing authority for the return of the seized property. Within 60 days after receipt of a written request, the seizing authority must make a decision as to the disposition of the seized property and must notify the owner that (1) the seizing authority does not have custody of the property and must provide contact information for the law enforcement agency that does have custody of the property; (2) the seizing authority has custody of the property and will file a complaint for forfeiture; (3) the seizing authority has custody of the property and will retain it for evidentiary purposes until after the conclusion of a criminal case; or (4) the seizing authority has custody of the property and will promptly return the property to the owner.

Transfers of Seized Property to Federal Government: In addition to other exceptions under existing statute, the bill prohibits a seizing authority or forfeiting authority from directly or indirectly transferring seized property to a federal law enforcement authority or agency

unless (1) the seizing authority transfers the property to a federal authority under a federal seizure warrant issued to take custody of assets originally seized under State law or (2) the property is cash of at least \$50,000.

Failure to File a Timely Complaint: If the State or a political subdivision of the State does not file a timely complaint seeking forfeiture of property (other than money), the property must be promptly released to the owner, if known.

Admissibility of Statements: Except for purposes of impeachment, a statement made by a person regarding ownership of seized property during the course of a forfeiture proceeding is not admissible in a related criminal prosecution.

Transfer of Funds to DHMH: The Governor must appropriate 20% of the proceeds deposited into the State's general fund from forfeited property under Title 12, Subtitle 4 of the Criminal Procedure Article to DHMH for the purpose of funding drug treatment and education programs.

Reporting Requirements: The bill requires (1) seizing authorities to report specified seizure and forfeiture information; (2) MSAC, which is within GOCCP, to compile information submitted by seizing authorities; and (3) GOCCP to submit an annual report on the submitted information.

More specifically, on an annual basis, each seizing authority, in consultation with the corresponding forfeiting authority, must report specified information about each individual seizure and forfeiture completed by the agency under Title 12 of the Criminal Procedure Article and how any funds appropriated to the authority as a result of forfeiture were spent in the preceding fiscal year. The following information must be reported: (1) the date that currency, vehicles, houses, or other types of property were seized; (2) the type of property seized; (3) the outcome of related criminal action (including whether charges were brought, a plea bargain was reached, a conviction was obtained, or an acquittal was issued); (4) whether a unit of federal government took custody of the seized property and the name of the unit; (5) for property other than money, the market value of the property; (6) if money was seized, the amount of money; (7) the amount the seizing authority received in the prior year from the federal government as part of an equitable sharing agreement; (8) the race and gender of the person(s) from whom the property was seized, if known; and (9) whether the property was returned to the owner.

MSAC may require a seizing authority to provide additional relevant information not specified in the bill. Each seizing authority must file the required report with MSAC for the seizing authority and the corresponding forfeiting authority. A "null" report must be filed when a seizing authority did not engage in seizures or forfeitures under Title 12 during the reporting period.

MSAC must develop a standard form, a process, and deadlines for electronic data entry for annual submission of forfeiture data by seizing authorities. MSAC must compile the submissions and issue an aggregate report of all forfeitures under Title 12 in the State. By March 1 of each year, MSAC must make available on MSAC's website the reports submitted by seizing authorities and MSAC's aggregate report.

GOCCP must submit the aggregate report to the Governor, the General Assembly, and each seizing authority before September 1 of each year. GOCCP may include, with MSAC's aggregate report, recommendations to the legislature to improve forfeiture statutes to better ensure that forfeiture proceedings are reported and handled in a manner that is fair to crime victims, innocent property owners, secured interest holders, citizens, and taxpayers.

If a seizing authority fails to comply with the bill's reporting provisions, GOCCP must report the noncompliance to the Police Training Commission (PTC). PTC must contact the seizing authority and request that the agency comply with the required reporting provisions. If the seizing authority fails to comply with the required reporting provisions within 30 days after being contacted by PTC, GOCCP and PTC jointly must report the noncompliance to the Governor and the Legislative Policy Committee.

MSAC may recoup its costs by charging a fee to each seizing authority that engages in seizures or forfeitures during the reporting period. A seizing authority may use forfeiture proceeds to pay the cost of compiling and reporting data, including any fee imposed by MSAC.

Current Law: While several provisions of State law may authorize the seizure and forfeiture of property under certain circumstances, one primary example of property that is subject to forfeiture is property seized in connection with a violation of the Controlled Dangerous Substances law. Seizures and forfeitures are subject to extensive procedural requirements, as specified in statute.

Property Subject to Seizure: A Schedule I substance must be seized and summarily forfeited to the State if the substance is (1) possessed, transferred, sold, or offered for sale in violation of the law or (2) possessed by the State and its owner is not known. A plant may be seized and summarily forfeited if it is one from which a Schedule I or Schedule II substance may be derived and it (1) has been planted or cultivated in violation of the law; (2) has an unknown owner or cultivator; or (3) is a wild growth.

Property Subject to Forfeiture: The following are subject to forfeiture:

- (1) controlled dangerous substances manufactured, distributed, dispensed, acquired, or possessed in violation of the Controlled Dangerous Substances law;
- (2) raw materials, products, and equipment used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting a controlled dangerous substance in violation of the Controlled Dangerous Substances law;
- (3) property used or intended for use as a container for property described above;
- (4) conveyances, including aircraft, vehicles, or vessels used or intended to be used to transport, or facilitate the transportation, sale, receipt, possession, or concealment of property described items (1) or (2);
- (5) books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of the Controlled Dangerous Substances law;
- (6) money of more than \$300 or weapons used or intended to be used in connection with the unlawful manufacture, distribution, dispensing, or possession of a controlled dangerous substance or controlled paraphernalia;
- (7) any amount of money that is directly connected to the unlawful distribution of a controlled dangerous substance;
- (8) drug paraphernalia;
- (9) controlled paraphernalia;
- (10) the remaining balance of the proceeds of a sale by a holder of an installment sale agreement of goods seized;
- (11) real property; and
- (12) everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of the Controlled Dangerous Substances law, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate any violation of the Controlled Dangerous Substances law.

Conditions Excluding Property from Forfeiture: Property or an interest in conveyances, real property, everything of value furnished or intended to be furnished in exchange for a controlled dangerous substance, all proceeds traceable to the exchange, and all applicable negotiable instruments and securities used or intended to be used to facilitate a controlled dangerous substances violation may not be forfeited unless the State establishes by a preponderance of the evidence that the violation of the Controlled Dangerous Substances law was committed with the owner's actual knowledge. Additional exclusions apply to conveyances used as a common carrier or vehicle for hire, conveyances forfeited when a person other than the owner illegally possessed the conveyance, real property associated with specified controlled dangerous substance violations, and property used as the principal family residence.

Notification Requirements: Within 30 days after the seizure of property, a seizing authority must send written information via first-class mail to the owner of seized property, if known, providing (1) the location and description of the seized property and (2) the name and contact information of an individual or office within the seizing authority that can provide further information concerning the seized property, including information on how the property may be returned to the owner. The written information must contain a disclaimer that the document does not constitute legal advice.

Transfers of Seized Property to the Federal Government: A seizing authority or prosecuting authority may not directly or indirectly transfer seized property to a federal law enforcement authority or agency unless a criminal case related to the seizure is prosecuted in the federal court system under federal law or the property owner consents to the forfeiture.

Procedural Timelines for Forfeitures of Property: A complaint seeking forfeiture of property, other than a motor vehicle or money, must be filed within the earlier of 90 days after the seizure or one year after the final disposition of the criminal charge for the violation giving rise to the forfeiture. A complaint for the forfeiture of a motor vehicle must be filed within 45 days after the motor vehicle is seized. A proceeding about money must be filed within 90 days after the final disposition of criminal proceedings that arise out of the Controlled Dangerous Substances law.

Return of Seized Money to Owner: If the State or a political subdivision of the State does not file proceeding about money within the 90-day period, the seized money must be returned to the owner on request by the owner. If the owner fails to ask for the return of the money within one year after the final disposition of criminal proceedings, the money must revert to the political subdivision in which the money was seized or to the State, if the money was seized by the State.

Forfeiture of Ownership Interest in Property: Property or part of a property in which a person has an ownership interest is subject to forfeiture as proceeds, if the State establishes by clear and convincing evidence that:

- the person has violated specified statutory provisions pertaining to controlled dangerous substances or has attempted or conspired to violate State controlled dangerous substances laws;
- the property was acquired by the person during the violation or within a reasonable time after the violation; and
- there was no other likely source for the property.

Real property used as the principal family residence may not be forfeited unless an owner of the real property (1) was convicted of one of a list of specified crimes or (2) was not
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convicted, but failed to appear for a required court appearance and failed to surrender to the jurisdiction of the court within 180 days after the required court appearance.

Background: Asset forfeiture programs exist nationwide at the federal, State, and local levels. Forfeitures typically fall into two categories – criminal forfeiture and civil forfeiture.

Criminal forfeiture actions are brought against a criminal defendant. In criminal forfeiture, the government “indicts” the seized property and must prove beyond a reasonable doubt that the property in question was used for or derived from the underlying crime. Criminal forfeitures occur after an individual has been convicted; an action is then brought against the individual, to which civil liberty protections apply. Furthermore, the criminal forfeiture is part of the defendant’s sentence and is generally limited to property involved in the specific counts for which the defendant was convicted. Maryland does not have a criminal forfeiture process.

Civil forfeiture actions are brought against property, not people. Civil forfeitures occur irrespective of a conviction; an action is brought against an individual’s property, to which civil liberty protections do not apply. The standard of proof for civil forfeiture is lower than the criminal standard, in that the government must prove by a preponderance of the evidence, rather than beyond a reasonable doubt, that the property in question was used or obtained illegally.

Forfeiture programs, particularly civil forfeiture, have received increased scrutiny in recent years, with news reports of individuals facing the loss of a home or property without ever being charged with a crime, while fighting to keep their property in a system they claim is stacked against them. Challenging civil forfeiture can be costly and time-consuming, which can discourage citizens from initiating the process to retrieve their property.

Proponents of forfeiture programs claim asset forfeiture is an important law enforcement tool that assists in dismantling criminal organizations and offsets the cost of criminal investigations. Opponents of these programs argue that they lead to potential corruption, improper usage, and civil liberty violations.

While the laws in some jurisdictions allow a seizing agency to retain the proceeds from forfeited property, Maryland law requires that the proceeds from forfeitures processed under State law be deposited into the general fund of the State or the appropriate local government.

Federal Asset Forfeiture Program: The U.S. Department of Justice (DOJ) Asset Forfeiture Program (AFP) was established by the Comprehensive Crime Control Act of 1984. The program’s objective is the seizure and forfeiture of assets that represent the proceeds

of, or were used to facilitate, federal crimes. The U.S. Marshals Service, under DOJ, is responsible for the management and disposal of forfeited property. Other components of DOJ involved in AFP include the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Drug Enforcement Administration; the Federal Bureau of Investigation; and the U.S. Attorneys' Offices. Participating components outside of DOJ include the U.S. Department of Agriculture (Office of Inspector General), the U.S. Department of Defense (Criminal Investigative Service), the U.S. Department of State (Bureau of Diplomatic Security), the U.S. Food and Drug Administration (Office of Criminal Investigations), and the U.S. Postal Inspection Service. Under the federal Equitable Sharing Program, the net proceeds from sales of forfeited assets are shared with the state and local law enforcement agencies that participated in the seizure. There are two options for state and local forfeitures: joint investigative and adoptive. Joint investigative forfeitures occur when federal law enforcement agencies cooperate with state or local law enforcement agencies to seize assets; adoptive forfeitures occur when state and local law enforcement agencies forfeit assets from state crimes to be processed at the federal level.

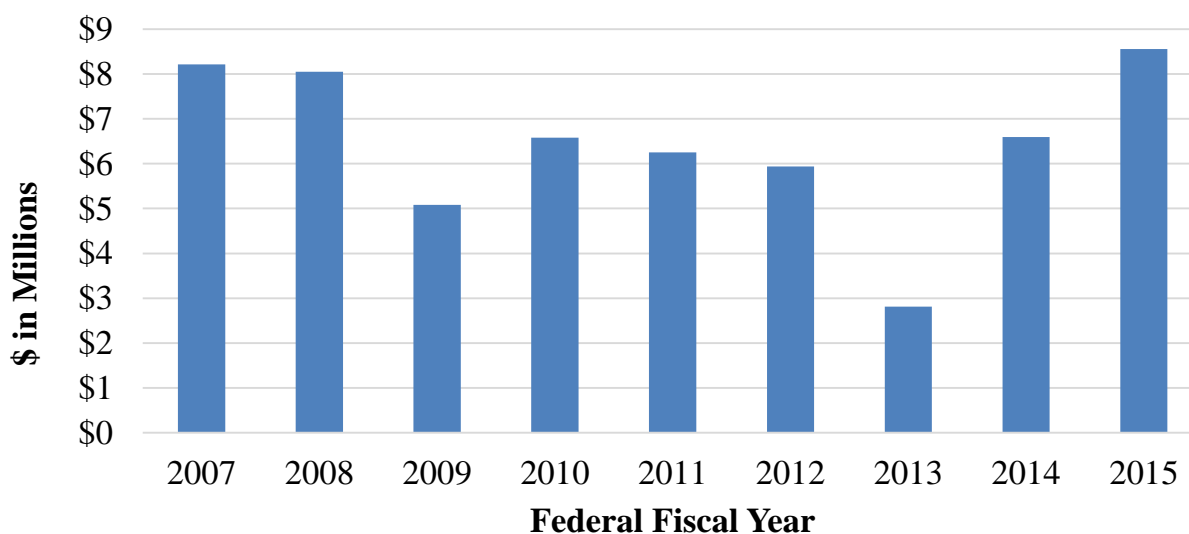
On January 16, 2015, however, then-U.S. Attorney General Eric Holder issued an order, effective immediately, prohibiting federal agencies from "adopting" assets seized by state and local law enforcement agencies. However, the order contains an exception for property that directly relates to public safety concerns (*e.g.*, firearms, ammunition, explosives, and property associated with child pornography). Examples of property subject to the order include vehicles, valuables, cash, and other monetary instruments.

The order does not apply to (1) seizures by state and local authorities working together with federal authorities in a joint task force; (2) seizures by state and local authorities that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations; or (3) seizures pursuant to federal seizure warrants, obtained from federal courts to take custody of assets originally seized under state law.

The U.S. Department of the Treasury issued a similar policy for its forfeiture programs.

In federal fiscal 2014, State and local law enforcement agencies in Maryland received \$8.6 million in Equitable Sharing payments from the DOJ Asset Forfeiture Fund (AFF). **Exhibit 1** shows the amount Maryland received from AFF from federal fiscal 2007 to 2015. According to the Equitable Sharing Program, AFF money may only be used for specific law enforcement purposes, such as investigative support, training, equipment, facility upgrades, and educational programs. Funding is usually used for one-time purposes and is meant to supplement, not supplant, law enforcement agencies' budgets.

Exhibit 1
U.S. Department of Justice Assets Forfeiture Fund
Amount Shared with Maryland Law Enforcement Agencies
Federal Fiscal Years 2007-2015



Source: U.S. Department of Justice and National Conference of State Legislatures

State Revenues:

General Fund Revenues

General fund revenues decrease minimally from the bill's alterations to the seizure and forfeitures statutes. The magnitude of this decrease depends on the extent to which the bill's provisions reduce the amount of property forfeited to State agencies; however, it is not anticipated to be significant.

The bill alters the types of property eligible for forfeiture and requires State and local entities to meet specified requirements to transfer or refer seized property to the federal government for forfeiture under federal law. This analysis assumes that (1) the Department of State Police (DSP) is the primary depositor of forfeiture proceeds from controlled dangerous substances cases into the State's general fund; (2) forfeitures of property seized in cases in which a defendant is charged with drug-related offenses other than possession may still be forfeited even if the defendant ends up pleading down to a possession offense; (3) the bill's reinstatement of statutory provisions that existed prior to February 20, 2016, does not materially affect State finances; and (4) the bill's provisions regarding transfers of property do not materially affect State and local transfers, as discussed below.

Property Eligible for Forfeiture: Other than the removal of weapons and money of more than \$300 used or intended to be used with the possession of a controlled dangerous substance or controlled paraphernalia, the bill's alterations to the statutory list of property eligible for forfeiture reinstate statutory provisions that existed prior to Chapter 5 of 2016. Since Chapter 5 of 2016 took effect on February 20, 2016, and this bill takes effect on October 1, 2016, this analysis assumes that any changes in general fund revenues from forfeitures during this approximately seven-month period do not materially affect State finances, since law enforcement authorities are still adapting to the changes to State forfeiture laws required under Chapter 5. However, to the extent that the provisions of this bill and Chapter 5 of 2016 shift activity from federal level to State level forfeitures, general fund revenues may increase, but the occurrence and magnitude of any such shift cannot be reliably determined at this time.

The bill's removal of money or weapons used in or intended to be used in connection with possession of a controlled dangerous substance or controlled paraphernalia reduces the pool of forfeiture-eligible property. DSP advises that it has written policies not to seize property for forfeiture if a person is charged only with possession offenses. Thus, the bill's alteration of the types of property that is forfeitable is not expected to materially affect general fund revenues from DSP forfeitures.

DSP advises that it deposits no more than \$100,000 into the State's general fund from forfeitures under State law during a typical year. DSP typically handles forfeitures under federal law or through multi-jurisdictional local task forces where the forfeiting authority is a local State's Attorney and the proceeds are deposited with the local jurisdiction/task force.

MSAC Fees: The bill authorizes MSAC to recoup whatever costs are incurred for establishing a framework for reporting by charging a fee to seizing authorities during the reporting period. Because the bill does not require MSAC to set a fee, and the number of seizing authorities that may be subject to a fee in any given year is unknown, any general fund revenues generated as a result of the fee cannot be reliably quantified. However, as discussed below, GOCCP advises that it can implement the bill's reporting requirements with existing resources; thus, it is unclear if the agency will impose any such fees.

Federal Fund Revenues (Federal Transfers)

In addition to exceptions under existing statute, the bill prohibits a seizing authority or forfeiting authority from directly or indirectly transferring seized property to a federal law enforcement authority or agency unless (1) the seizing authority transfers the property to a federal authority under a federal seizure warrant issued to take custody of assets originally seized under State law or (2) the property is cash of at least \$50,000.

As previously noted, the U.S. Attorney General's order prohibiting the adoption of assets seized by State and local law enforcement authorities does not apply to (1) seizures by state and local authorities working together with federal authorities in a joint task force; (2) seizures by state and local authorities that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations; or (3) seizures pursuant to federal seizure warrants, obtained from federal courts to take custody of assets originally seized under state law.

The federal seizure warrant exception under the bill essentially codifies one of the exceptions under the U.S. Attorney General's order. However, the \$50,000 minimum requirement in item (2) is not contained in the Attorney General's order.

The remaining exceptions to the U.S. Attorney General's order pertain to seizures by or under joint task forces and joint investigations. According to information provided by DOJ, seizures conducted through joint investigations and joint federal task forces are considered federal seizures from the outset and are not considered to be transfers. Thus, this analysis assumes that seizures by State entities under those circumstances are not likely to be affected by the bill's provisions. It is unclear to what extent a State law prohibiting the transfer of property to the federal government unless a specified monetary threshold is met when that property was seized under federal law/authority can even be enforced. State or local law enforcement officers who seize property under these circumstances are often deputized federal agents/officers. However, to the extent that such a provision is enforceable, federal fund revenues for State law enforcement agencies may decrease significantly. Data is not readily available on the percentage/amount of federal transfer transactions by State law enforcement agencies that do not meet the bill's \$50,000 threshold.

State Expenditures: General fund expenditures increase minimally for DHMH drug treatment and education programs. This analysis assumes that (1) State law enforcement agencies can meet the bill's receipt and notification requirements with existing budgeted resources and (2) the bill's provisions do not significantly change the amount of funds deposited into the State's general fund from forfeitures under State law (as discussed above).

DHMH – Drug Treatment and Education Programs

General fund expenditures increase minimally for DHMH substance abuse treatment and education programs. The bill requires the Governor to appropriate 20% of money deposited into the State's general fund from forfeitures from controlled dangerous substances forfeitures to DHMH for the funding of drug treatment and education programs.

This analysis assumes that (1) the amount of money deposited into the general fund from applicable forfeitures remains constant and (2) funds transferred to DHMH are used to supplement, not supplant current funding. To the extent that the provisions of this bill and Chapter 5 of 2016 shift activity from federal level to State level forfeitures, and general fund revenues increase accordingly, then the funding appropriated for DHMH substance abuse treatment and education programs increases.

Data is not available on the total amount deposited into the State's general fund from forfeitures in controlled dangerous substances cases. However, DSP advises that it deposits no more than \$100,000 into the State's general fund from forfeitures under State law during a typical year. DSP typically handles forfeitures under federal law or through multi-jurisdictional local task forces where the forfeiting authority is a local State's Attorney and the proceeds are deposited with the local jurisdiction/task force. The Natural Resources Police within the Department of Natural Resources (DNR) advises that it handles a few controlled dangerous substances forfeitures each year.

Costs to Comply with the Bill's Reporting Requirements

GOCCP advises that it can comply with the bill's reporting requirements with existing resources. DSP, DNR, PTC, and police units within the Maryland Department of Transportation can all meet the bill's requirements with existing budgeted resources. This analysis does not reflect any costs for State law enforcement agencies to pay any fees established by MSAC.

In any event, under the bill, a State law enforcement agency that is affected may use forfeiture proceeds to pay for the cost of compiling and reporting the required data, including the costs of any fee imposed by MSAC. However, it should be noted that agencies may not use forfeiture proceeds from the federal Equitable Sharing Program to pay for personnel, since the program prohibits the use of Equitable Sharing funds to pay the salaries and benefits of sworn or nonsworn law enforcement personnel, except under specified circumstances.

Local Revenues: Local revenues decrease, perhaps significantly, as a result of the bill's changes to the State's forfeiture laws. The magnitude of this decrease depends on the extent to which the bill's provisions reduce the amount of property forfeited to local law enforcement agencies. Data is not available on the extent to which local authorities pursue forfeitures from persons charged with possession offenses only.

Baltimore and Montgomery counties advise that it is not uncommon for a possession of controlled dangerous substances case to result in the forfeiture of property.

Local Expenditures: Local law enforcement agencies and State’s Attorney’s offices may incur additional expenditures to meet the bill’s procedural and reporting requirements.

Additional Information

Prior Introductions: None.

Cross File: Although HB 336 (Delegate Vallario, *et al.* – Judiciary) is designated as a cross file, it is not identical.

Information Source(s): Baltimore, Carroll, Harford, Montgomery, Queen Anne’s, and St. Mary’s counties; City of Takoma Park; Department of State Police; Governor’s Office of Crime Control and Prevention; Department of Natural Resources; Maryland Department of Transportation; Treasurer’s Office; U.S. Department of Justice; U.S. Office of the Attorney General; Department of Legislative Services

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