Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 764 (Senator Smith)
Judicial Proceedings

Criminal Procedure - Forfeiture - Equitable Sharing of Proceeds

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This bill prohibits a forfeiting or seizing authority from receiving the proceeds of or entering into an equitable sharing agreement with a federal agency to receive the proceeds of property subject to forfeiture under § 12-202 of the Criminal Procedure Article (property subject to forfeiture in controlled dangerous substances cases) that is forfeited under federal law. The bill alters the annual reporting requirements for a seizing authority by removing the amount the seizing authority received in the prior year from the federal government as part of an equitable sharing agreement from the list of items these authorities must report to the Maryland Statistical Analysis Center (MSAC) each year.

Fiscal Summary

State Effect: Potential significant decrease in federal fund revenues, as discussed below. Potential increase in general fund, special fund, and/or nonbudgeted expenditures if affected State agencies choose to fund efforts that would otherwise be funded by federal proceeds.

Local Effect: Significant loss of revenues for local jurisdictions. Local expenditures may increase to fund efforts that would otherwise be supported by federal forfeiture proceeds.

Small Business Effect: None.

Analysis

Current Law: A seizing authority or prosecuting authority may not directly or indirectly transfer seized property to a federal law enforcement authority or agency unless (1) a criminal case related to the seizure is prosecuted in the federal court system under federal law; (2) the property owner consents to the forfeiture; (3) 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 (4) the property is cash of at least $50,000.

Chapters 619 and 658 of 2016 establish annual reporting requirements for seizing authorities and specified State entities by requiring (1) seizing authorities to report specified seizure and forfeiture information; (2) MSAC, which is within the Governor's Office of Crime Control and Prevention (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.

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.

Background:

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 (DEA); and the Federal Bureau of Investigation. Participating components outside of DOJ include the U.S. Department of Agriculture (Office of Inspector General), the U.S. Department of Defense (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 participate 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. According to DOJ, with respect to joint investigations and adoptions, the percentage of funds shared is based on the level of participation/effort of each agency and is determined on a case-by-case basis. Joint task forces often determine sharing percentages based on prearranged written sharing agreements. In adoption cases, the federal government retains at least 20% of the net proceeds from the sale of an adopted asset. This 20% minimum typically applies to cases in which the state/local law enforcement agency performed all of the preseizure activity and the federal government merely processed the forfeiture.

On January 16, 2015, however, 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 contained 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 included vehicles, valuables, cash, and other monetary instruments. The order did 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 were the result of joint federal-state investigations or that were 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.

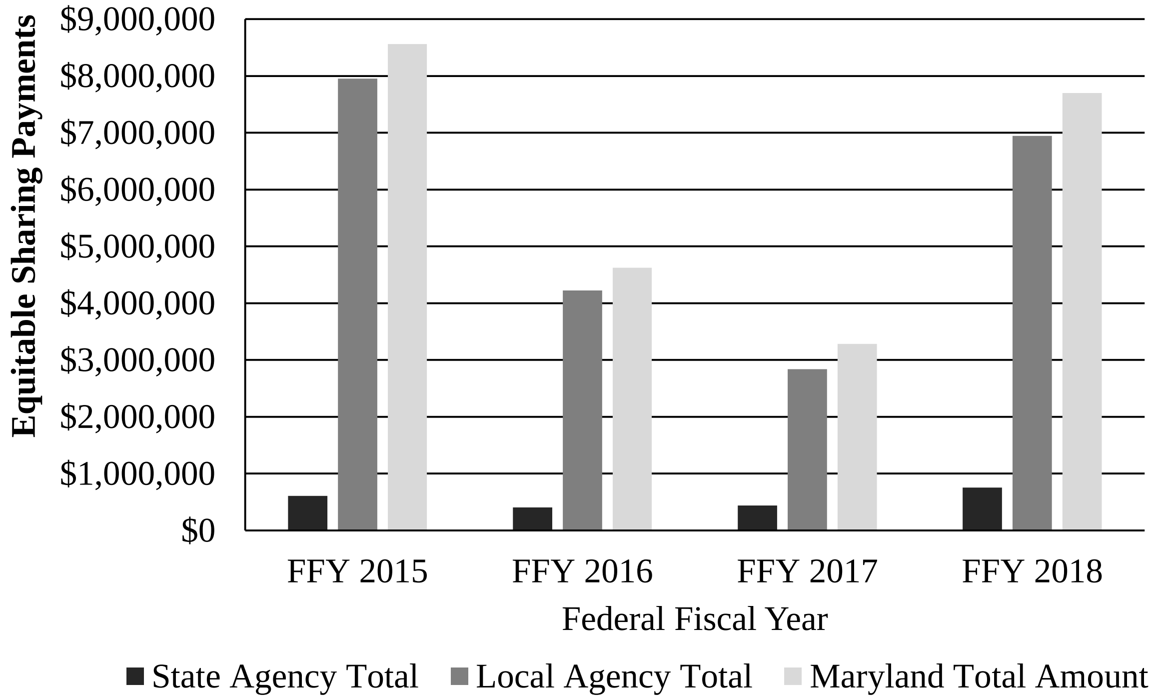
On July 19, 2017, U.S. Attorney General Jeff Sessions revoked Attorney General Holder's order and essentially reinstated the program, including federal adoptions of assets, with additional procedural requirements and some limitations. The U.S. Department of the Treasury issued a similar policy for its forfeiture programs.

In federal fiscal 2018, State and local law enforcement agencies in Maryland received $7.7 million in Equitable Sharing payments from the DOJ Asset Forfeiture Fund (AFF). **Exhibit 1** shows the amount Maryland agencies received from AFF from federal fiscal 2015 to 2018. The DOJ data did not include information on the types of cases involved with these forfeiture proceeds.

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. According to the DOJ's *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies (July 2018)*, recipient agencies may not budget or commit to spending anticipated funds.

Exhibit 1

U.S. Department of Justice – Asset Forfeiture Program
Equitable Sharing Payments of Cash and Sale Proceeds
Maryland Recipient Agencies
Federal Fiscal 2015-2018*



*Based on reports by the U.S. Department of Justice – Asset Forfeiture Program with modifications to reflect and create State and local designations.

Source: U.S. Department of Justice, Department of Legislative Services

GOCCP Report on Seizures and Forfeitures

GOCCP published the first seizure and forfeiture report required under § 12-602 of the Criminal Procedure Article on September 1, 2018. The report covers seizures and forfeitures from September 1, 2017, through December 31, 2017.

Recent Supreme Court Decision

In an opinion dated February 20, 2019, the U.S. Supreme Court held that the prohibitions on excessive fines under the Eighth Amendment to the U.S. Constitution apply to the states through the Due Process Clause of the Fourteenth Amendment. *Timbs v. Indiana*, 586 U.S. __ (2019). The case involved Tyson Timbs, an Indiana man who pleaded guilty to dealing heroin and conspiracy to commit theft. Mr. Timbs was eventually sentenced to one year of home detention and five years of probation, including participation in a substance abuse treatment program. He was also ordered to pay $1,203 in fees and costs.

At the time of his arrest in 2015, police seized a 2012 Land Rover Mr. Timbs had recently purchased for $42,000 using proceeds from his father's life insurance policy. After Mr. Timbs's guilty plea, the State of Indiana, claiming that the vehicle had been used to transport drugs, sought civil forfeiture of the Land Rover. The trial court denied the state's request, determining that the forfeiture violated the prohibition on excessive fines under the Eighth Amendment because the vehicle was worth nearly four times the maximum fine ($10,000) applicable to Mr. Timbs's drug conviction. According to the trial court, the forfeiture was "grossly disproportionate to the gravity" of Mr. Timbs's offense.

The Court of Appeals of Indiana upheld the trial court's decision, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause of the Eighth Amendment only applies to federal actions, not state impositions of fines.

In its opinion, the U.S. Supreme Court noted that the protections against excessive fines is a key part of the nation's idea of liberty, and has deep roots in American history. Thus, according to the court, "…the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming." The State of Indiana argued that the Excessive Fines Clause does not apply to civil forfeitures of property. However, the court did not consider that argument, since that question was not presented to the Indiana Supreme Court and was not addressed by that court.

State Revenues: Federal fund revenues from forfeitures for State law enforcement agencies decrease, perhaps significantly, as a result of the bill. Federal grant funds for the Department of Natural Resources (DNR) may also decrease significantly, as discussed below. Based on information reported by DOJ for federal fiscal 2015 through 2018, State agencies receive an average of $552,207 in Equitable Sharing payments each year.

According to DOJ, the following State agencies received Equitable Sharing payments in federal fiscal 2018: The Department of State Police (DSP); the Natural Resources Police (NRP); and the Maryland Transportation Authority (MDTA) Police.

DSP has resource sharing agreements with the federal government. DSP advises that it does have troopers authorized as federal officers depending on the work being performed. According to DSP, federal resource sharing agreements allow the department to turn criminal cases (which may include cash or other assets) over to the federal government and allow federal authorities to return or give new cases to the State because the cases do not meet federal thresholds.

DSP advises that the elimination of resource sharing agreements results in the loss of additional resources to support law enforcement activities and reimbursement for resources loaned to federal authorities for an operation. According to DSP, prohibiting these agreements will not stop State and local authorities from turning cases over to the federal government, since State and local police agencies cannot always handle every case that comes their way. However, it does prevent State and local agencies from receiving resources from these cases. DSP advises that it received the following amounts from federal Equitable Sharing: $709,389.23 in 2016; $234,059.06 in 2017; and $114,910.31 in 2018. These totals include currency and proceeds from vehicles, real property, and miscellaneous property.

According to DNR, NRP participates in three Equitable Sharing Agreements and has one officer each assigned to the DEA Hagerstown, Baltimore-Washington High Intensity Drug Trafficking (HIDTA), and Homeland Security Investigation Ocean City task forces. As a result of participation in these Equitable Sharing Agreements, over the past five years, NRP has received $686,696.11 in proceeds, and has additional pending requests for proceeds from $257,797.60 in cash seizures and an undetermined amount from the sale value of eight forfeited vehicles.

DNR advises that the bill has impacts reaching beyond the direct loss of forfeiture proceeds. Since fiscal 2012, NRP has utilized proceeds from Equitable Sharing Agreements as matching funds for Department of Homeland Security (DHS) grants. The grants are competitive, and with one exception, NRP has received some federal grant funding through this program every year since 2006. One of the conditions for application for most grant projects is that the applicant must be able to provide funds that equate to 25% of the total project costs (matching funds). Under these terms, the agency receives federal funds at a 3:1 ratio. According to DNR, matching funds are not a line item in the agency’s budget, so for many years the agency has relied exclusively on funds provided through Equitable Sharing Agreements to provide the 25% match for federal grant applications. NRP advises that if these funds are not available, the agency will be forced to forego application for Port Security grants, as the operating budget does not include sufficient funds to reprogram for matching funds.

Proceeds from these grants have enabled NRP to leverage $2,492,399 in DHS Port Security grant funding. This funding has been used to purchase specialized patrol vessels, patrol vehicles, communications interoperability equipment, specialized maritime equipment, specialized maritime vessel operations training and towers, radars, cameras and maintenance for the Maritime Law Enforcement Information Network. According to DNR, none of these acquisitions would have been possible without proceeds from Equitable Sharing Agreements. Outside of the matching funds, NRP has used proceeds to purchase training and equipment that were beyond State budget appropriations and would have been unattainable otherwise. Using these figures, DNR estimates that the bill results in reduced federal fund revenues of $137,339 per year and potential reduced federal grant revenues of $412,017 each year.

As DNR notes, law enforcement agencies often receive AFF payments as a result of participation in joint task forces. State and local law enforcement officers often function as deputized federal agents/officers when they participate in task force operations. This estimate assumes that (1) a State law can prohibit a State or local law enforcement agency from accepting funds earned while State and local law enforcement were acting under federal authority; (2) the majority of forfeitures by State and local law enforcement are related to drug crimes; and (3) forfeitures pursued through Equitable Sharing will not be pursued through other mechanisms, such as forfeitures under State law. Forfeitures processed through Equitable Sharing allow a law enforcement agency to retain funds from forfeitures; State law requires proceeds from forfeitures be deposited into State or local general funds.

State Expenditures: General fund, special fund, and/or nonbudgeted expenditures may increase to the extent that the State expends additional funds to provide resources to or maintain existing operations of affected law enforcement agencies that are being funded using federal proceeds. As previously stated, Equitable Sharing payments must be used to supplement the recipient agency, not supplant appropriated resources of the agency. As noted above, the following State agencies received Equitable Sharing payments in federal fiscal 2018: DSP; NRP; and MDTA. Other State entities with law enforcement agencies, such as the Comptroller and the Maryland Transit Administration, have received proceeds in the past.

Local Revenues: Local revenues decrease significantly as a result of the bill's provisions. Based on information reported by DOJ, of the $7.7 million in equitable sharing payments made to Maryland agencies in federal fiscal 2018, approximately $6.9 million are attributable to local agencies.

Montgomery County advises that the bill has a major impact on the county's police department, Health and Human Services (HHS) programs, and other county programs. According to the county, the vast majority of asset forfeitures come in by way of major drug-related cases in which the county officers are typically involved as a federal task force member. These cases involve major drug organizations and operations, and drug proceeds are seized pursuant to the federal criminal investigation. The funds are then split depending upon agreement between the agencies, based on the level of participation of each agency. The county advises that the funds are then used to support Drug Court, HHS drug treatment programs, and drug enforcement efforts (*e.g.*, training for officers on how best to handle and investigate drug crimes, funding for drug enforcement tools and devices, funds to use in undercover drug purchases, etc.).

Anne Arundel County advises that the bill has a significant fiscal impact on the county. According to county staff, while forfeiture revenues fluctuate from year to year and are contingent on case volume, proceeds in prior years have ranged from $170,000 to $1.1 million, with an average of approximately $600,000.

The City of Laurel advises that the bill results in the loss of funding that pays for critical equipment and supplies for enhanced law enforcement operations by the Laurel Police Department. Based on amounts received over the past three years, the city expects a decrease in revenue of approximately $29,000 per year.

Garrett County does not anticipate a fiscal impact from the bill.

Local Expenditures: Local expenditures increase to the extent that local governments decide to use local funds for the types of purchases that are currently supported by AFF funding.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Anne Arundel, Garrett, and Montgomery counties; City of Laurel; Maryland Municipal League; Maryland State's Attorneys' Association; University System of Maryland; Department of General Services; Department of Natural Resources; Department of State Police; National Public Radio; U.S. Department of Justice; U.S Department of Treasury; U.S. Marshals Service; U.S. Supreme Court; SCOTUSblog.com; Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2019
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