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FISCAL AND POLICY NOTE
First Reader

House Bill 1138
Judiciary

(Delegate Toles, *et al.*)

Criminal Law - Maryland RICO (Racketeer Influenced and Corrupt
Organizations) Act

This bill (1) establishes the Maryland Racketeer Influenced and Corrupt Organizations Act (RICO) Act; (2) establishes criminal penalties for RICO violations; (3) authorizes and establishes procedures for civil actions arising out of RICO violations; and (4) establishes procedures for the forfeiture of property connected to RICO violations.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures due to the bill's incarceration penalty. General fund revenues increase to the extent State entities collect net proceeds from the sale of forfeited property in accordance with the bill. As discussed below, the bill is expected to have a minimal impact on *overall* general fund expenditures and operations of the Judiciary.

Local Effect: Potential minimal increase in local revenues from fines imposed in the circuit courts. Local revenues increase to the extent local entities collect net proceeds from the sale of forfeited property in accordance with the bill. Potential minimal increase in overall expenditures and operations of the circuit courts.

Small Business Effect: Minimal.

Analysis

Bill Summary:

Criminal Prohibitions on Racketeering Activity – § 9-902 of the Criminal Law Article

A person may not directly or indirectly acquire or maintain an interest in or control of any enterprise, real property, or personal property (including money) through a pattern of racketeering activity or proceeds derived from racketeering activity. A person employed by or associated with an enterprise may not directly or indirectly conduct or participate in the enterprise through a pattern of racketeering activity. A person is also prohibited from conspiring or attempting to commit any of these acts.

Violators are guilty of a felony and subject to imprisonment for at least 5 years and up to 20 years and/or a fine not exceeding the greater of \$25,000 or three times the amount of pecuniary value gained by the person from the violation.

“Racketeering activity” means to commit, attempt to commit, or solicit, coerce, or intimidate another person to commit a crime under State law that is chargeable by indictment involving specified crimes under State law, an act or threat involving specified crimes that is chargeable and punishable by imprisonment for more than one year, or specified federal offenses.

“Pattern of racketeering activity” means engaging in (1) at least two acts of racketeering activity within a four-year period in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents or (2) one or more acts of domestic terrorism or of attempting, soliciting, or conspiring to commit domestic terrorism.

Racketeering (§ 9-902) Violations – Venue

For the purposes of venue, a racketeering violation is considered to have been committed in any county in which (1) an incident of racketeering occurred or (2) an interest or control of an enterprise or real or personal property is acquired or maintained.

Civil Cause of Action for Damages

A person who is injured as a result of a § 9-902 violation (1) has a civil cause of action against the violator for three times the actual damages sustained and punitive damages and (2) is entitled to recover attorney’s fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred.

A civil action for damages resulting from a pattern of racketeering activity must be brought within five years after the conduct in violation of § 9-902 terminates. The plaintiff or defendant may demand a jury trial in a civil action for a racketeering violation under § 9-902.

A criminal conviction under § 9-902 must estop the defendant in any subsequent civil action or civil forfeiture proceeding as to all matters proved in the criminal proceeding.

Injunctions

An aggrieved person or the State may file a complaint in circuit court to enjoin a racketeering violation. After making due provisions for the rights of innocent persons, a court may grant a complaint by issuing appropriate orders and judgments, including:

- ordering a defendant to divest any interest in an enterprise, real property, or personal property;
- imposing reasonable restrictions on the future activities or investments of a defendant, including prohibiting the defendant from engaging in the same type of endeavor as the enterprise in which the defendant was engaged in violation of § 9-902;
- ordering the dissolution or reorganization of an enterprise;
- ordering the suspension or revocation of a license, permit, or prior approval granted to an enterprise by a State agency; and
- ordering the forfeiture of the charter of a corporation organized under State law, or the revocation of authorization for a foreign corporation to conduct business in the State if specified findings are made.

The court must grant relief in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases if no showing of special or irreparable damage to the plaintiff is made.

On the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, the court may issue a temporary restraining order and a preliminary injunction before a final determination on the merits of the claim.

The application of one civil remedy does not preclude the application of any other civil or criminal remedy for a violation of § 9-902. The aforementioned civil remedies are supplemental and not mutually exclusive.

Case of Public Importance

In a civil action for a RICO violation, the State may file with the clerk of the court a certificate stating that the case is of special public importance. The clerk of the court must immediately furnish a copy of the certificate to the Chief Justice of the Supreme Court of Maryland or the Chief Justice's designee. On receipt of a certificate, the Chief Justice or the Chief Justice's designee must immediately designate a judge to hear and determine the case. The judge designated must promptly assign the case for hearing, participate in the hearings and determination, and cause the case to be expedited.

Out-of-state Judgments

A valid judgment rendered by a court of a state having a law substantially similar to Maryland's RICO Act must be recognized and enforced by the courts of the State to the extent that a judgment rendered by a court of the State would be enforced in the other state.

The Attorney General may enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state with a substantially similar racketeering statute.

Racketeering Activity – Property Subject to Forfeiture

All property used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture in accordance with the bill's provisions. With specified exceptions, this includes (1) a motor vehicle; (2) money used in connection with a violation of and a conviction under the RICO law, found in close proximity to or at the scene of the arrest a for a violation of the RICO law; and (3) real property used in connection with a violation of § 9-902 of the Criminal Law Article.

An owner's interest in real property may be forfeited if the owner is convicted under § 9-902 or attempting or conspiring to violate § 9-902. However, real property used as the principal family residence *may not* be forfeited unless one of the owners of the real property was convicted under § 9-902 or of an attempt or conspiracy to violate § 9-902. Also, real property used as the principal family residence by spouses and held by the spouses as tenants by the entirety *may not* be forfeited unless (1) the property was used in connection with a violation of § 9-902 or with an attempt or conspiracy to violate § 9-902 and (2) both spouses are convicted of a violation of § 9-902 or with an attempt or conspiracy to violate § 9-902. If an owner of real property used as the principal family residence is convicted under § 9-902 or of an attempt or conspiracy to violate § 9-902, and the owner files an appeal of the conviction, the court *must* stay forfeiture proceedings against the real property during the pendency of the appeal.

Property or an interest in property, not including money, *may not* be forfeited if the owner establishes by a preponderance of the evidence that the violation of the RICO law was committed without the owner's actual knowledge.

A motor vehicle for hire in the transaction of business as a common carrier or a motor vehicle for hire *may not* be seized or forfeited unless it appears that the owner or other person in charge of the motor vehicle was a consenting party or privy to a violation of the RICO law. A motor vehicle *may not* be forfeited for an act or omission that the owner shows was committed or omitted by a person other than the owner while the person other than the owner possessed the motor vehicle in criminal violation of federal law or the law of any state.

Seized Property – Procedural Provisions

Personal property subject to forfeiture may be seized:

- on a warrant issued by a court that has jurisdiction over the property; and
- without a warrant when:
 - the seizure is incident to an arrest or a search under a search warrant;
 - the seizure is incident to an inspection under an administrative inspection warrant;
 - the property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under the RICO law; or
 - there is probable cause to believe that the property is directly or indirectly dangerous to health or safety.

Seized property is not repleviable, but is in the custody of the seizing authority, subject to the orders, judgments, and decrees of the court or the official having jurisdiction over the property. A seizing authority may place seized property under seal and remove the property to a place designated by the court.

With specified exceptions described below, an owner of seized property who wishes to obtain possession of the property, to convey an interest in real property, or to remove a building or fixture from real property must notify the clerk of the proper court, as specified.

Subject to the rights of a lienholder, an owner or an owner's tenant may remain in possession of seized real property until forfeiture is ordered. The forfeiting authority may apply to the court for the appointment of a receiver to apply income from income-producing property. If a person who is an owner or an owner's tenant remains in possession of the real property and the person's interest in the real property is forfeited, the

person must immediately surrender the real property to the seizing authority in substantially the same condition as when it was seized.

Until a court enters judgment in favor of the owner, an owner may not attempt to convey or encumber an interest in seized real property or remove a building or fixture on seized real property. This *does not* apply if an act is agreed to by a forfeiting authority or is ordered by the court or if an owner posts a bond.

Processing of Seized Property and Recommendations of Forfeiture

A seizing authority may seize a motor vehicle and recommend forfeiture to the forfeiting authority if the total circumstances of the case dictate that seizure and forfeiture are justified. The chief law enforcement officer of the seizing authority that seizes a motor vehicle for a RICO violation may recommend to the appropriate forfeiting authority in writing that the motor vehicle be forfeited only if specified requirements, including a personal review of the underlying facts and circumstances, are satisfied. A sworn affidavit by the chief law enforcement officer that the officer followed the requirements is admissible in evidence in a proceeding.

The forfeiting authority must surrender a seized motor vehicle on request to the owner if the forfeiting authority determines, independent of the decision of the seizing authority, that the total circumstances of the cases do not justify forfeiture. The court may determine whether the seizing authority or forfeiting authority abused its discretion or was clearly erroneous in recommending the forfeiture of a motor vehicle or in not surrendering on request a motor vehicle to an owner.

Appraisals and Bonds

Unless the forfeiting authority and the owner agree to a bond in another amount, if a motor vehicle is not needed for evidentiary purposes in a judicial proceeding (1) the court must appraise the value of the motor vehicle as specified or (2) if the owner shows that a lien is on the motor vehicle and the owner agrees to make the required payments to the lienholder, the court must require a bond in an amount that complies with specified provisions. An appraisal of a motor vehicle must be provided by the court to the clerk of the court in writing.

If property other than a motor vehicle is not needed for evidentiary purposes in a judicial proceeding, the clerk of court must obtain an independent appraisal of the value of the property. The sheriff or other person responsible for an appraisal must promptly (1) inspect and appraise the value of the property and (2) return the appraisal in writing under oath to the clerk of the court. Notice of the appraisal must be sent to all lienholders shown in the records required by law for notice or the perfection of the lien.

On the filing of an appraisal, the owner may give bond payable to the clerk of the court in an amount equal to the greater of (1) the appraised value of the property plus any accrued costs or (2) the aggregate amount of the liens on the property, as specified. The bill contains procedural requirements regarding these bonds. If the court orders that property or an interest or equity in the property or proceeds be forfeited, the court must enter judgment in the amount of the bond against the obligors on the bond without further proceedings.

Seizures and Forfeitures of Real Property

Seizure of real property occurs on the earlier of the filing of a complaint for forfeiture or a notice of pending litigation in the circuit court of the county where the real property is located. Forfeiture proceedings for real property may be brought in the jurisdiction where (1) the criminal charges are pending; (2) the owner resides; or (3) the real property is located. If forfeiture proceedings for real property are brought in a jurisdiction other than where the real property is located, a notice of pending litigation must be filed in the jurisdiction where the property is located.

Complaints for Forfeiture

To apply for the forfeiture of money, the appropriate local financial authority or the Attorney General must file a complaint and an affidavit in the District Court or the circuit court for the county in which the money was seized. For other forms of property, the appropriate forfeiting authority must file proceedings in the circuit court.

A complaint seeking forfeiture must contain specified information and an oath or affirmation by the forfeiting authority that the contents of the complaint are true to the best of the forfeiting authority's knowledge, information, and belief. The complaint and affidavit must be served in accordance with the Maryland Rules of Civil Procedure.

The bill specifies the time by which a complaint seeking forfeiture must generally be filed. If property is seized because there is probable cause to believe that the property is directly or indirectly dangerous to health or safety and that the property was or will be used to violate § 9-902, forfeiture proceedings must be filed promptly.

If the State or a political subdivision does not file proceedings about money within 90 days after the final disposition of criminal proceedings that arise out of the RICO law, the money seized must be returned to the owner on request. If the owner fails to ask for the return of the money within one year after the final disposition, the money must revert to the political subdivision in which the money was seized or the State, if the money was seized by State authorities.

Within 20 days after the filing of the complaint (1) copies of the summons and complaint must be sent to all known owners and lienholders whose identities are reasonably subject to discovery, as specified and (2) a notice signed by the clerk containing specified information regarding the case, the property subject to forfeiture, and where to file a response or obtain more information must be posted by the sheriff and published in a newspaper of general circulation, as specified.

Answer to a Complaint for Forfeiture

The answer to a complaint must (1) comply with the Maryland Rules; (2) state the nature and extent of the person's right in, title to, or interest in the property; (3) state how and when the person acquired a right in, title to, or interest in the property; and (4) contain a request for relief and a request for a prompt hearing.

If an answer has been filed on time, the court must set a hearing on the forfeiture claim within 60 days after the later of the posting of the notice or the final publication of the notice. The court may, without a hearing, order forfeiture of the property interest of a person who fails to timely file an answer.

There is a rebuttable presumption that 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 (1) the person was convicted of violating § 9-902 or of an attempt or conspiracy to violate § 9-902; (2) the property was acquired by the person during the § 9-902 violation or within a reasonable time after the violation; and (3) there was no other likely source for the property. A claimant of the property has the burden of proof to rebut the presumption.

Forfeiture Proceedings – Dispositions

If, after a full hearing, the court determines that the property should not be forfeited, the court must order that the property be released. If the court determines that the property should be forfeited, the court must order that the property be forfeited to the appropriate governing body.

Forfeiture Proceedings – Abilities of the Court

The court may order the forfeiture of other property of the owner up to the value of any property seized, with the exception of real property, if as a result of an act or omission of the owner the property to be forfeited cannot be located after the exercise of due diligence; has been transferred to, sold to, or deposited with a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value; or has been commingled with other property and cannot be divided without difficulty.

If property has been placed beyond the jurisdiction of the court, the court may order the owner to return the property to the jurisdiction of the court.

A court may (1) grant requests for mitigation or remission of forfeiture or take other action that protects the rights of innocent persons, is consistent with the provisions of the bill, and is in the interest of justice; (2) resolve claims arising under the RICO law; and (3) take appropriate measures to safeguard and maintain property forfeited pending the disposition of the property.

Seized and Forfeited Property Subject to Liens

If the court determines that the forfeited property is subject to a valid lien created without actual knowledge of the lienholder that the property was being or was to be used in violation of § 9-902, the court must order that the property be released within five days to the first priority lienholder. The lienholder must sell the property in a commercially reasonable manner; the bill specifies the manner in which the proceeds must be applied.

In general, the law governing the sale of collateral securing an obligation in default governs a lienholder's repossession and sale of property that has been seized. The bill includes additional provisions regarding the rights and responsibilities of lienholders with respect to seized and forfeited property and the procedures under which the seizing and the forfeiting authority may then proceed with the forfeiture of the property or the proceeds from the sale of the property.

Proceeds from Sale

Any part of the proceeds from a sale of property that has been seized that would be paid to an owner of the property under the applicable law relating to distribution of proceeds must be paid to the seizing authority and must be property subject to forfeiture. If an order of forfeiture is not entered, the State must return the part of the proceeds and any costs of the forfeiture proceedings paid from the proceeds of the sale to the owner.

Disposition of Forfeited Property – Governing Bodies

If the property is forfeited, the governing body where the property was seized may (1) keep the property for official use; (2) require an appropriate unit to take custody of the property and destroy or otherwise dispose of it; or (3) sell the property if the law does not require the property to be destroyed and the property is not harmful to the public. The proceeds from a sale or the retention of property declared to be forfeited and any interest accrued shall be applied first to the proper expenses of the forfeiture proceeding and the resulting sale, including the expense of seizing and maintain custody of the property and advertising.

Any remaining balance must be distributed to the general fund of the State or the general fund of seizing political subdivision.

Current Law: The federal RICO statute was enacted as a part of the Organized Crime Control Act of 1970. The Act's provisions do not exclusively apply to members of organized crime; instead, the Act applies to activities that are characteristic of organized crime. RICO does not criminalize behavior that is not otherwise criminally prohibited. However, it does allow for significant criminal and civil consequences for engaging in independent criminal acts with a common objective or as part of an enterprise.

Maryland does not have a RICO statute. However, Title 9, Subtitle 8 of the Criminal Law Article contains several prohibitions on engaging in activities as part of a criminal organization. For example, under § 9-804 of the Criminal Law Article, a person may not (1) participate in a criminal organization knowing that the members of the criminal organization engage in a pattern of organized crime activity and (2) knowingly and willfully direct or participate in an underlying crime (as defined in statute) or an act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal organization. The statute further prohibits a criminal organization or an individual belonging to a criminal organization from (1) receiving proceeds known to have been derived directly or indirectly from an underlying crime and (2) using or investing, directly or indirectly, an aggregate of \$10,000 or more of the proceeds from an underlying crime in the acquisition of real property or the establishment or operation of any enterprise. Finally, a criminal organization is prohibited from acquiring or maintaining, directly or indirectly, any interest in or control of any enterprise or real property through an underlying crime. A person may not conspire or attempt to violate these prohibitions.

In general, violators are guilty of a felony, punishable by imprisonment for up to 15 years and/or a \$1 million maximum fine. However, if the person's participation in the criminal organization or an underlying crime on behalf of the organization resulted in the death of a victim, the person is guilty of a felony, punishable by imprisonment for up to 25 years and/or a \$5 million fine. Sentences may or must be consecutive to other sentences imposed as specified. In addition, the court may order a person or criminal organization to be divested of any interest in an enterprise or real property; order the dissolution or reorganization of an enterprise; and order the suspension or revocation of any license, permit, or prior approval granted to the enterprise or person by a unit of the State or a political subdivision of the State. The statute contains additional provisions regarding divested assets connected to drug offenses and the Attorney's General's authority to prosecute a violation or act establishing a violation of the statute.

State Revenues: General fund revenues increase to the extent State entities collect net proceeds from the sale of forfeited property in accordance with the bill. The magnitude of

this increase cannot be reliably determined at this time and depends on various factors that can only be determined with actual experience under the bill, such as frequency of use of the RICO statute and its forfeiture provisions, the value of forfeited items, and costs associated with the forfeiture (*e.g.*, maintenance and processing of the seized property).

State Expenditures:

Department of Public Safety and Correctional Services

General fund expenditures for the Department of Public Safety and Correctional Services may increase minimally as a result of the bill's incarceration penalty due to more people being committed to State correctional facilities. The number of people convicted of this proposed crime is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$4,970 per month.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Judiciary

General fund expenditures increase for the Judiciary to implement the bill. While RICO cases and related proceedings appear to require more court resources than other types of cases (as discussed below), this analysis assumes that the bill's provisions will be used infrequently compared to other types of cases/proceedings, which is unlikely to result in a significant *overall* impact on the Judiciary.

The Judiciary advises that the bill may have a major and significant operational impact on civil caseloads and court operations, which is difficult to estimate due to uncertainty of the number of RICO violations and additional cases or forfeitures that will be filed. Regardless, the Judiciary advises that the procedures involved are labor and time intensive and impose additional and new administrative tasks on clerks and staff.

According to the Judiciary, the legislation imposes a new duty on the clerks, requiring a clerk to potentially obtain independent appraisals of property to set a bond amount. Clerks would be required to such services pursuant to Judiciary procurement policies; depending on the services, this process can take at least several weeks but can last up to a year. Moreover, it is unclear who would be responsible for paying for such an appraisal, and if

it is the clerks, their offices would be responsible for absorbing those costs. Additional provisions, including those related to cases of special public importance and notices for applications of forfeited money, may also affect court operations.

Office of the Attorney General

The Office of the Attorney General does not anticipate a fiscal or operational impact from the bill.

Local Revenues: Local revenues may increase minimally from fines imposed in circuit court cases. Local revenues increase to the extent local entities collect net proceeds from the sale of forfeited property in accordance with the bill. The magnitude of this increase cannot be reliably determined at this time and depends on various factors that can only be determined with actual experience under the bill, such as frequency of use of the RICO statute and its forfeiture provisions, the value of forfeited items, and costs associated with the forfeiture (*e.g.*, maintenance and processing of the seized property).

Local Expenditures: The procedural requirements of the bill may result in additional expenditures for the circuit courts, as discussed above. Neither Baltimore City nor Montgomery County anticipate a material fiscal impact from the bill.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Baltimore City; Montgomery County; Office of the Attorney General; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Department of State Police; Office of the Public Defender; Department of Public Safety and Correctional Services; Maryland State's Attorneys' Association; Department of Legislative Services

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