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## FISCAL IMPACT REPORT

SPONSOR Ivey-Soto ORIGINAL DATE 2/08/17  
 LAST UPDATED 2/17/17 HB \_\_\_\_\_

SHORT TITLE Forfeiture Changes SB 202/aSPAC/aSJC

ANALYST Rogers

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate	Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Municipal League (NMML)  
 Administrative Office of the Courts (AOC)  
 Regulation and Licensing Department (RLD)  
 Public Regulation Commission (PRC)  
 New Mexico Association of Counties (NMAC)  
 Department of Public Safety (DPS)

#### Responses Not Received From

Taxation and Revenue Department (TRD)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 202 strikes the word “Act” on page 22, line 18, and removes the brackets. The amendment also removes the brackets and “the

Forfeiture Act” on page 23, lines 16 and 17. Finally, the SJC amendment inserts the word “applicable” before the word “local”, strikes the comma after “local” and inserts the word “or” and inserts the word “laws” after “state”.

The amendment is not a significant change.

#### Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 202 makes technical changes and corrections:

- Section 1: removes “purpose” from the title and removes from the reconfigured bill those provisions related to purpose, while leaving intact those provisions relating to applicability.
- Section 2: removes property that a law enforcement officer has reasonable cause to believe is subject to forfeiture from the definition of “disclaimed property.”
- Section 7: removes “disclaimed property” from that which is required to be delivered with forfeited property that is not currency to the state treasurer or designee for disposition at a public auction and the proceeds of the sale of which shall be distributed by the state treasurer as specified.
- Provides that disclaimed property is subject to the provisions of Section 29-1-14 NMSA 1978 and shall be disposed of in the same manner as provided in Section 29-1-15 NMSA 1978.

#### Synopsis of Bill

Senate Bill 202, containing an emergency clause, extends provisions of the Forfeiture Act to apply to all seizures, forfeitures and dispositions of property subject to forfeiture in the state (except contraband, controlled substances and deadly weapons). “Property subject to forfeiture” means property declared to be subject to forfeiture by the act, a state law outside of the act, or a local ordinance. Expands the authority of state and local law enforcement agencies to seize and dispose of forfeited property. Deletes the prohibition of retention of the forfeited property by a law enforcement agency.

The AOC submits the following detailed analysis of changes proposed by the bill:

SB 202 amends statutory sections in the Forfeiture Act, Section 31-27-1 NMSA 1978 *et seq.*, as follows:

- Section 2: replaces definitions for “abandoned property” and “actual knowledge” with definitions for “disclaimed property” and “knowledge,” respectively. Amends definition of “law enforcement agency” to include an entity authorized by law to file a forfeiture action.
- Section 3: requires a “law enforcement agency” rather than the state to establish by clear and convincing evidence that the property is subject to forfeiture pursuant to the Forfeiture Act.
- Section 4: changes the time period during which the defendant or another person may claim an interest in the property by a motion requesting the court to issue a writ of replevin from 60 days prior to the related criminal trial to before the 120<sup>th</sup> day following the filing of the forfeiture action in court. A court shall grant a claimant’s

motion if the court finds that the property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding and the law enforcement agency did not make a prima facie showing that the property was stolen or proceeds from or an instrumentality of a crime. If the court orders a return of funds or property, it shall require an accounting.

- Section 5: publication of the complaint in a newspaper is no longer required.
- Section 7: provides for the distribution of “disclaimed property,” defined as property: “(a) that a law enforcement officer has reasonable cause to believe is subject to forfeiture; (b) the ownership of which has been disclaimed by the person in possession of the property at the time the property is seized; and (c) that is not otherwise subject to forfeiture; and (2) is otherwise subject to the provisions of Section 29-1-14 NMSA 1978, except that it shall be disposed of pursuant to Subsection B of Section 31-27-7 NMSA 1978.”
- Section 8: provides that in order to forfeit an innocent owner’s property, the law enforcement agency is required to prove, by clear and convincing evidence, that at the time the person acquired the property, the person had knowledge that the property was subject to forfeiture or was not a bona fide purchaser without notice of any defect in title. Section 8 also provides that seized firearms, ammunition or explosives not returned to an innocent owner may be destroyed upon a motion by the law enforcement agency and an order of the court.
- Section 9: removes the prohibition against a law enforcement agency retaining forfeited or abandoned property.
- Section 10: requires the preparation of an annual report within 60 days following the conclusion of each fiscal year regarding seizures and forfeitures conducted pursuant to “applicable state law and local ordinance” rather than the Forfeiture Act. Reporting requirements of costs have been expanded.
- Section 11: removes the requirement that the criminal conduct that gave rise to the seizure is interstate in nature and sufficiently complex to justify the transfer of the property to a federal law enforcement authority or other federal agency. Also permits the transfer of seized property when the federal government has filed criminal charges against the owner of the seized property, there is no innocent owner and the seized property is required as evidence in the federal prosecution. Permits information sharing with the federal government under limited circumstances. Limits equitable sharing proceeds to be accepted by a law enforcement agency to instances where an owner of the property is convicted in federal court.

SB 202 provides that abandoned property in the possession of a law enforcement agency or the state treasurer on the effective date of the Act shall be disposed of pursuant to Section 29-1-14 NMSA 1978, governing unclaimed property. SB 202 also provides that the provisions of the Act apply to seized and disclaimed property in the possession of a law enforcement agency or the state treasurer on and after the effective day of this act.

This bill continues to require forfeitures made pursuant to the forfeiture act occur subsequent to a criminal conviction. Law enforcement must continue to submit annual seizure/forfeiture reports to DPS who will continue to provide a statewide annual report through the DPS website which summarizes the seizures/forfeitures statewide for the previous calendar year. This bill explains that law enforcement agencies may participate in equitable sharing programs with the federal government as authorized by Section 29-1-10.1 NMSA 1978, and permitted within that statutory section.

The bill provides financial reimbursement, through forfeiture proceeds, for costs associated with the forfeiture, storage and associated seizure processes. The bill adds a definition for disclaimed property and requires forfeiture processes for disclaimed property to follow the state forfeiture law. The bill adds language that the Forfeiture Act applies to seizures forfeitures and dispositions of property subject to the forfeiture act. The bill does not allow for proceeds of forfeited property, abandoned property or disclaimed property to be deposited into the general fund of the governing body of the seizing law enforcement agency.

### **FISCAL IMPLICATIONS**

Currently, all state forfeiture related proceeds must be deposited in the general fund. This bill now allows for federal asset sharing with the associated or participating law enforcement agencies only after a federal criminal conviction. Since the bill extends statute to apply to all state seizures, forfeitures and dispositions, there is potential the bill could generate an indeterminate amount of additional revenue to the general fund in future years if agencies and district attorney's choose to participate in the seizure processes that also require a criminal conviction to receive the forfeited or a portion of the property. Additionally, when depositing proceeds in the general fund, it disqualifies local law enforcement agencies from being able to receive any funding for operational needs.

DPS states "the bill will continue to require that assets, in certain cases, be deposited in the general fund which will continue to restrict law enforcement agencies from being able to participate, to the fullest extent, in the federal asset sharing program."

The AOC states there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law, new requirements, hearings and accountings, and challenges to the seizure and forfeiture of property. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

RLD states the new language proposed by SB 202 will have a slight impact on how much and when the money from the sale of forfeited property is deposited into the general fund. Currency and proceeds from seizures will first be used to reimburse and cover expenses incurred by the law enforcement agencies in the storage and protection of the property. Any remaining amount will then be deposited to the general fund.

### **SIGNIFICANT ISSUES**

DPS explains the bill "requires a law enforcement agency to file a forfeiture complaint, potentially, prior to the filing of a state indictment, and to prosecute that complaint subsequent to a conviction having been obtained in front of the same judge or jury, and following the rules of criminal procedure." DPS expressed concern a district attorney office may elect to file an indictment long after a summons is required, elect to not file an indictment long after a forfeiture complaint is filed, or dismiss an indictment after a forfeiture complaint is filed. Delays hamper the ability of law enforcement to prosecute forfeiture cases.

The New Mexico Association of Counties (NMAC) explains SB 202 addresses unintended

consequences resulting from 2015 amendments to the Forfeiture Act. The bill corrects the confusion and burden on local law enforcement created when abandoned property became part of the forfeiture act. Limiting application to “disclaimed” property allows for disposal of abandoned property as provided by existing law and does not burden local law enforcement or the state treasurer with storage property that may have little or no value.

NMAC also explains the amendments allow local law enforcement to be reimbursed for reasonable expenses related to the storage, protection and transfer of seized property and authorizes law enforcement to destroy firearms, ammunition, and explosives instead of storing and returning them upon an order of the court. The amendments provide a reasonable deadline for owners to assert their interest in seized property and authorizes a court to order return of funds or property to pay for legal counsel. The amendments contained in the bill also make clear that the Act will apply to all forfeitures - including those done pursuant to local ordinance. The bill allows local law enforcement to share in federal forfeiture proceeds in appropriate cases.

The New Mexico Municipal League response states “the bill enlarges the time to reclaim property that has been forfeited from 60 days to 120 days. In such a case, a writ of replevin will be filed. Upon motion, the court may order return of funds or property sufficient for the defendant to retain an attorney. An accounting report of legal fees held before the resolution of the criminal and forfeiture hearings shall be heard in camera. If the court finds in favor of the law enforcement agency in both proceedings it shall hear arguments as to how much property shall be returned and shall issue an appropriate order. A forfeiture complaint will no longer need to be published in a newspaper, only on the sunshine portal. Seized property that is firearms, ammunition, or explosives subject to forfeiture under the protections of this section and that is not returned to an innocent owner may be destroyed upon a motion by the law enforcement agency and an order of the court. The bill appears to preempt any local DWI forfeiture programs and would require all seizures to follow the Forfeiture Act, thus preempting local forfeiture procedures.”

The AOC submits the following detailed analysis of the bill:

SB 202 removes the definition for “actual knowledge” from the Forfeiture Act, replacing it with the definition for “knowledge,” which is defined to mean actual or constructive awareness that can be proved either through direct or circumstantial evidence of information, a fact, or a condition. SB 202, Section 8 amends Section 31-27-7.1 NMSA 1978, governing innocent owners, to provide that in order to forfeit an innocent owner’s property, the law enforcement agency is required to prove, by clear and convincing evidence, that at the time the person acquired the property, the person had knowledge that the property was subject to forfeiture. The required knowledge to trigger forfeiture is expanded from actual knowledge (a direct and clear awareness) to actual or constructive awareness, proven either through direct or circumstantial evidence. Proving knowledge versus actual knowledge will require additional court time and resources to present both direct and circumstantial evidence and more appeals could arise from people being denied the status of innocent owners.

Section 4(F) provides that if the court orders a return of funds or property, it shall require an accounting, required to be held in camera. SB 202 also amends Section 31-27-4.1(F) NMSA 1978 to require the court to hear arguments as to what portion of the funds or property should pay attorneys fees and what portion should be forfeited, and to issue a distribution order.

In 2015, the HB 560 amendments to the Forfeiture Act abolished civil forfeitures, and effectively took the financial incentive out of police asset forfeiture by forcing all seized money and assets into the state’s general fund. The HB 560 amendment to Section 31-27-8 NMSA 1978 explicitly provided that, “a law enforcement agency shall not retain forfeited or abandoned property.” SB 202 removes this prohibition, arguably opening the door to the incentives and abuses once noted and claimed by forfeiture critics and activists. SB 202 does require that any remaining balance of the proceeds of the sale of forfeited or disclaimed property shall be deposited in the general fund.

The City of Las Cruces submitted the following analysis:

The City of Las Cruces has a municipal ordinance addressing DUI cases and the forfeiture of vehicles as nuisances related to DUI. The city has found the vehicle forfeiture program has been successful as part of its local efforts to reduce DUI. Accordingly the city suggests that the language under 31-27-2 B (1) NMSA 1978 remain as follows: “applies to seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply to the Forfeiture Act.”

By retaining the original language, forfeitures based on nuisances would not be affected. Adoption of the remaining language contained in the bill would correct the initial deficiencies.

## **PERFORMANCE IMPLICATIONS**

DPS explains “the bill does not take into account the interagency working relationships between federal and local law enforcement. Federal and local law enforcement regularly work together on complex criminal and narcotics investigations. This bill, in addition to requiring a conviction prior to receiving any proceeds of forfeited/seized property, also places restrictions on the level of cooperation between federal and local agencies which will ultimately have adverse effects on the quality local participation with the federal agencies.”

The NMML states a law enforcement agency may share information and cooperate with the federal government, provided that the information-sharing and cooperation is not part of a broader pattern, practice, or policy that operates to circumvent the protections of the Forfeiture Act.

The courts are participating in performance-based budgeting. This bill may have an impact on the number of cases disposed of as a percent of cases filed and the percentage change in case filings by case type.

## **TECHNICAL ISSUES**

The AOC states Section 12, p. 25, line 11: the temporary provision refers to “abandoned property,” the definition of which has been removed from Section 2 by the SB 202 amendment.

The AOC recommends substituting “date” for “day” in Section 13, p. 25, line 18.

DPS submits the following analysis:

Instead of adding disclaimed property to 31-27-7 NMSA 1978 as suggested in the bill and trying to create an identity for “disclaimed currency,” or as is suggested in the bill, “the ownership of which has been disclaimed by the person in possession of the property,” the language could be put into existing law, 29-1-15 NMSA 1978, the proceeds of sale statute: “(A.) Any money derived by a peace officer from the sale of unclaimed property or disclaimed currency shall be paid to the general fund of the state, county or municipality.”

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

RLD states forfeiture proceedings will continue as they are. Law enforcement agencies might be inconsistently represented in the proceedings and expenses surrounding them will not be directly reimbursed or covered.

DPS states without the bill, law enforcement, as well as the State of New Mexico, will be unable to participate in Federal Asset Sharing.

TR/sb/jle/al