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## FISCAL IMPACT REPORT

SPONSOR Dodge ORIGINAL DATE 2/08/18  
 LAST UPDATED 2/12/18 HB 233/aHJC/ec

SHORT TITLE Revise Forfeiture Procedures SB \_\_\_\_\_

ANALYST Daly

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		
Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

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

	FY18	FY19	FY20	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

Regulation and Licensing Department (RLD)  
 New Mexico Attorney General (NMAG)  
 New Mexico Municipal League (NMML) (2017)  
 Administrative Office of the Courts (AOC) (2017)  
 New Mexico Association of Counties (NMAC) (2017)  
 Department of Public Safety (DPS) (2017)

### SUMMARY

#### Synopsis of HJC Amendments

The House Judiciary Committee amendments to House Bill 233 make the disposition provisions of Section 7 applicable to forfeited property also apply to disclaimed property, and in Section 11 remove disclaimed property from equitable sharing programs between state law enforcement agencies and the federal government.

Synopsis of Original Bill

House 233 expands the scope of the Forfeiture Act (the Act) to apply to all seizures, forfeitures and dispositions of property subject to forfeiture in the state, subject to limited exemptions. Those exemptions are for: 1) contraband, including controlled substances; 2) animals and real and personal property subject to various actions to address animal welfare or public health and safety concerns, or other compliance or enforcement efforts under state or local law; and 3) forfeitures resulting from liens for charges or assessments under state and local law. Property subject to forfeiture is expanded to include property declared to be subject to forfeiture under a local ordinance as well as by the Act or another state law. The bill grants additional authority to state and local law enforcement agencies to seize and dispose of forfeited property.

It removes the language prohibiting a law enforcement agency from retaining forfeited property. Disposition of forfeited property is primarily by public auction, with proceeds being distributed to reimburse reasonable storage, protection, transfer and reporting costs and reasonable expenses incurred in disposition. The remaining balance is deposited in the general fund.

More specifically, HB 233's amendments to the Act, section by section, include:

- Section 2: replacing 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, which is now included in the definition of that term) 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 hearing must be conducted within 60 (currently 30) days of such a motion. Adds language clarifying that 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 does not make a prima facie showing that the property was stolen or is proceeds from or an instrumentality of a crime. If the court orders a return of funds or property, it shall require an accounting. Also adds language protecting an innocent owner, including a secured lienholder.
- Section 5: provides for a notice of intent to forfeit (rather than a complaint), with service of that notice as required under existing provisions of the Act, but publication is now limited to the state’s sunshine portal (newspaper publication no longer required).
- Section 7: provides for the disposition of both forfeited property and “disclaimed property,” which is defined in Section 2 as property “the ownership of which has been disclaimed by the person in possession of the property at the time the property is seized.” Also deems property subject to forfeiture to be disclaimed property without conviction of the owner (if there is no innocent owner) if criminal prosecution cannot proceed because the owner is a fugitive for one year and one day.
- Section 8: continues 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 or was not a bona fide purchaser without notice of any defect in title. Adds language providing 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 and requires disposition under Section 7.
- 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 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 the property has been disclaimed or an owner of the property has been convicted in federal court.

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. The provisions of HB 233 do 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 Act occur following 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 that summarizes the seizures/forfeitures statewide for the previous calendar year. 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.

The bill contains an emergency clause.

## **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 unless the property was disclaimed. Since the bill broadens the 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 attorneys 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, local law enforcement agencies are not authorized to receive any funding for operational needs other than those clearly

specified in Section 7(B) relating to storage, protection, transfer and the reporting requirements of Section 10.

In its analysis of substantially similar provisions in SB 202, a bill introduced in the 2017 session, DPS stated, “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.”

RLD states the provisions of HB 233 will have a slight impact on how much and when the proceeds of sales of forfeited property are 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**

In its 2017 analysis of substantially similar provisions (in SB 202), DPS explained the bill “requires a law enforcement agency to file a forfeiture complaint (now, in HB 233, a notice of intent to forfeit) potentially prior to the filing of a state indictment, and to prosecute that complaint (notice of intent) 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 (notice of intent) is required, elect to not file an indictment long after a forfeiture complaint (notice of intent) is filed, or dismiss an indictment after a forfeiture complaint (notice of intent) is filed. DPS advised that delays hamper the ability of law enforcement to prosecute forfeiture cases.

In its 2017 analysis of substantially similar provisions in SB 202, New Mexico Association of Counties (NMAC) noted language allowing 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. NMAC commented the revisions provide a reasonable deadline for owners to assert their interests in seized property and authorize a court to order return of funds or property to pay for legal counsel. They also make clear that the Act will apply to all forfeitures - including those done pursuant to local ordinance.

In its 2017 analysis of substantially similar provisions in SB 202, the New Mexico Municipal League (NMML) stated “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 (now notice of intent) 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. NMML also noted that the bill appeared to preempt any local DWI forfeiture programs and would require all seizures to follow the Forfeiture Act, thus preempting local forfeiture procedures.

NMAG expresses concern that the definition of “disclaimed property” lacks clarity, and does not set forth how a person may disclaim ownership in a property.

In its 2017 analysis of substantially similar provisions in SB 202, the AOC submitted this analysis:

SB 202 (now HB 233) 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 (now HB 233), 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 either actual or constructive awareness, proven 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 (now HB 233) also amends NMSA 1978 Section 31-27-4.1(F) 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.

AOC also provided this background relevant to Subsection 9(D), and expressed a concern as to its modification:

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 (now HB 233) removes this prohibition, arguably opening the door to the incentives and abuses once noted and claimed by forfeiture critics and activists. SB 202 (now HB 233) does require that any remaining balance of the proceeds of the sale of forfeited or disclaimed property shall be deposited in the general fund.

In its 2017 analysis of substantially similar provisions in SB 202, the City of Las Cruces commented:

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**

In its 2017 analysis, DPS explained “the bill does not take into account the interagency working relationships between federal and local law enforcement, who 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 of local participation with the federal agencies.”

The NMML’s 2017 analysis stated 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.

## **TECHNICAL ISSUES**

Section 10, page 23, line 9: “abandoned” may more appropriately read “disclaimed”, consistent with the changes made in Section 2 removing the definition of “abandoned property” and replacing it with “disclaimed property”.

Section 14, page 26, line 20: “day” might more appropriately read “date”.

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

In its 2017 analysis, DPS stated without the bill, law enforcement, as well as the State of New Mexico, will be unable to participate in Federal Asset Sharing.

MD/sb/jle/al