

DEPARTMENT OF THE TREASURY  
EXECUTIVE OFFICE FOR ASSET FORFEITURE

DIRECTIVE NO. 3

DATE: March 23, 2017

SUBJECT: Occupied Real Property Subject to Civil or Criminal Forfeiture, and Post-Forfeiture Occupancy

1. **PURPOSE.** This Department of the Treasury Executive Office for Asset Forfeiture (TEOAF) Directive No. 3 establishes Treasury policy for occupied real property subject to civil or criminal forfeiture, including: (a) when the general rule of occupancy applies; (b) when the seizure of real property prior to the entry of a final order of forfeiture is permissible; and (c) the limited circumstances in which the removal of occupants may be sought. This Directive also provides guidance to agencies seeking to obtain occupants post-forfeiture, and establishes preferred methods of eviction when removal is warranted.

2. **SCOPE.** This Directive applies to all seizing agencies participating in the Treasury Forfeiture Fund (TFF) and TEOAF.

3. **POLICY.** Except in limited instances and with judicial approval, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) generally does not allow the seizure of real property prior to the entry of a final order of forfeiture. See 18 U.S.C. § 985(d)(1) and (2). CAFRA mandates that, as a general rule, the United States allow owners or occupants of real property subject to a pending forfeiture action to remain in the property. See 18 U.S.C. § 985(b)(1)(B).

4. **SEIZING AGENCY RESPONSIBILITIES.** The seizing agency is responsible for: arresting property subject to forfeiture; serving notice; filing complaints and *lis pendens* as needed; determining when it is necessary to enter into an occupancy agreement and entering into, and overseeing, such agreements; ensuring that occupants of real property comply with the terms of this Directive and any applicable occupancy agreement; determining non-compliance with any occupancy agreement, and seeking removal of occupants as necessary and/or seizing property upon proper coordination with the applicable United States Attorney's Office (USAO).

5. **GUIDANCE.**

A. **The General Rule of Occupancy in Civil Cases**

(1) **Arresting real property without taking actual possession**

Pursuant to CAFRA, the Government initiates a civil forfeiture of real property by filing a complaint for forfeiture and posting a notice of the complaint on the property. The seizing agency or other authorized officer must also serve the property owner with notice and a copy of the complaint.<sup>1</sup> See 18 U.S.C. § 985(c). This process establishes the jurisdiction of the Court. The simultaneous filing of a complaint and a *lis pendens* should also occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

<sup>1</sup> Per CAFRA, 18 U.S.C. § 985(c)(3), the court does not need to issue an arrest warrant *in rem* if the post and walk process has been followed.

## **(2) Requirements for the general rule of occupancy in civil cases**

As a general rule, existing occupants of real property (occupants who existed prior to the Government's knowledge of, or interest in, the occupied property) subject to forfeiture shall be permitted to remain in the property prior to the entry of a final order of forfeiture. When this general rule applies, the seizing agency shall enter into an occupancy agreement with any existing tenant(s) or owner(s) upon taking custody of the occupied property, which shall be no later than 5 business days from the custody date. (See Attachment A for a sample occupancy agreement.) The terms of an occupancy agreement should specify that occupancy shall cease once the property is finally forfeited. In limited instances and subject to approval by TEOAF's Real Property Team, an occupancy agreement with an existing tenant may be extended beyond the date of entry of a final order of forfeiture if the interests of the Government will be served.

As a general matter, tenants will not be sought post-forfeiture since TEOAF's primary objective is to promptly sell, rather than rent, forfeited property. However, subject to the approval of TEOAF's Real Property Team and in limited instances, a seizing agency may permit post-forfeiture occupancy for new tenants. (See section 5.D. below.)

## **(3) General terms of occupancy agreements**

Whether occupants come into existence before or after real property becomes subject to forfeiture, or after real property has been finally forfeited, all occupants must comply with the following requirements:

- (a) Maintain the property, including but not limited to keeping the premises in a state of good repair or in the same condition as existed at the time of seizure, paying for all utilities or other expenses related to the property incurred while occupying said property, and continuing to make any monthly payments due to lienholders or timely rent payments to the property custodian if the occupants are tenants;
- (b) Refrain from engaging in illegal activity;
- (c) Ensure that continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;
- (d) Ensure that continued occupancy does not adversely affect the ability of the Government to manage the property;
- (e) Allow the Government to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants; and
- (f) Agree to vacate within a reasonable time, usually 30 to 60 sixty days, upon notice from the Government that the property is forfeited by a final order of forfeiture, or some other reasonable date or timeframe to be established by the Government.

## **B. Exception to the General Rule of Occupancy In Civil Cases: Seizure of Real Property Prior to Forfeiture**

Seizure of real property prior to the entry of a final order of forfeiture is permissible only when:

- (1) The Government notifies the court that it intends to seize the property prior to trial and the court conducts a hearing in which the property owner has a meaningful opportunity to be heard. See 18 U.S.C.

§ 985(d)(1)(B)(i). At such a hearing, the Government must establish probable cause to believe that the property is subject to forfeiture; or

(2) The Government can show that exigent circumstances warrant the seizure. See 18 U.S.C. § 985(d)(1)(ii). To establish exigent circumstances, the Government must prove that less restrictive measures such as a lis pendens or restraining order would not protect the Government's interests in preventing the sale, destruction or continued unlawful use of the real property. See 18 U.S.C. § 985(d)(2). If the property is seized under exigent circumstances without a hearing, there must be a prompt post-seizure hearing. See 18 U.S.C. § 985(e).

Agencies shall consult with the USAO prior to seeking seizure of real property. Generally, many of the factors that support seizure of real property prior to forfeiture would also support removal of occupants.

#### **C. Occupancy in Criminal Forfeiture Cases**

In most instances, a seizing agency shall enter into an occupancy agreement in accordance with this Directive upon entry of a preliminary order of forfeiture whenever real property is subject to criminal forfeiture. A separate occupancy agreement is not required, however, if a court has entered a protective order pursuant to 21 U.S.C. § 853(e), and the requirements set forth in the order include those set forth in the sample standard occupancy agreement. (See Attachment A.)

#### **D. Post-Forfeiture Occupancy**

As a general matter, tenants will not be sought post-forfeiture since TEOAF's primary objective is to promptly sell, rather than rent, forfeited property. However, subject to the approval of TEOAF's Real Property Team and in limited instances, a seizing agency may permit post-forfeiture occupancy prior to disposal of the forfeited property.

It is permissible to allow a tenant obtained post-forfeiture to enter into a privately drafted, standard lease agreement. However, if such an agreement is entered into, as opposed to the standard government-drafted occupancy agreement, it is the agency's responsibility to ensure that the interests of the U.S. will be adequately protected, and that any tenant agrees in writing, at a minimum, to comply with the requirements set forth in section 5.A(2)(a) through (f) of this Directive. The agreement may be drafted as an addendum to the privately drafted lease agreement, and should specify both the requirements of this Directive as well as potential penalties for any violation. Specifically, if these requirements are not complied with, a cause of action may arise pursuant to various federal statutes including 18 U.S.C. § 2232, the penalties for which are a \$250,000 fine for individuals and a \$500,000 fine for corporations, a five year term of imprisonment or both.

It is the seizing agency's responsibility to ensure that all tenants acquired post-forfeiture enter into an occupancy agreement prior to such tenants taking physical custody of a forfeited property.

#### **E. Removal of Occupants, Whether or Not the Property Is Seized or Forfeited**

Immediate removal of all occupants (regardless of whether the property is seized or forfeited) should be sought if there is reason to believe that failure to remove the occupants will result in one or more of the following: (1) danger to law enforcement officials or the public health and safety; (2) continuation of illegal activity on the premises; or (3) interference with the Government's ability to manage and preserve the property.

When seeking to remove occupants from seized or forfeited real property, removal should be based, whenever possible, upon Federal court orders or Federal laws such as 18 U.S.C. § 2232 or 18 U.S.C. § 2233. In the event that such orders or laws are either inapplicable or not supported by the USAO, state eviction processes must be instituted and the agencies must comply with all state and/or local laws.

**(1) Danger to the health and safety of the public or to law enforcement**

Reason to believe that leaving occupants in possession will result in danger to the health and safety of the public or to law enforcement may be based upon any of the following factors:

- (a) Nature of the illegal activity;
- (b) Presence of weapons, "booby traps," or barriers on the property;
- (c) Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;
- (d) Presence of serious safety code violations; or
- (e) Contamination by, or presence of, dangerous chemicals.

**(2) Continued use of the property for illegal activities**

Reason to believe that leaving occupants in possession will result in continued use of the property for illegal activities may be based upon any of the following factors:

- (a) Nature of the illegal activity (e.g., repetitive drug sales; hide-out for persons at the property violating probation, parole, or bail pending trial on other criminal charges);
- (b) History of the property's and/or occupant's involvement in illegal activities;
- (c) Evidence that all occupants have been involved in the illegal activity;
- (d) Inability of non-participating occupants to prevent continued illegal activity; or
- (e) Failure of other sanctions to stop illegal activity.

**(3) Interference with the Government's ability to manage and preserve the property**

Reason to believe that leaving occupants in possession might undermine the Government's ability to manage or preserve the property may be based upon the factors set out above or information that the occupants intend to waste or destroy the property.

Note: The above list of circumstances is not intended to be exclusive. Investigative agencies, their counsel, or the USAO may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

Where real property is not yet forfeited, and tenants are to be removed in accordance with this Directive, consideration should be given to executing an interlocutory sale of the property if it is in the best interest of the Government. Any outstanding liens and mortgages should be considered in this determination.

## F. Rental Income

If rental income is being generated prior to entry of a final order of forfeiture, such income shall be forwarded to the National Finance Center (NFC) through TEOAF's national seized real property contractor from the time the contractor takes custody of the property, absent any court order to the contrary. TFF participating agencies shall consult with the USAO to determine when a court order to the contrary has been entered, and should promptly notify TEOAF counsel and the contractor to ensure proper disposition of funds.

Rental income generated after the entry of a final order of forfeiture shall also be forwarded to the NFC through TEOAF's national seized real property contractor. Except as noted in F(1) below, whether generated pre- or post-forfeiture, generally, any rental income received by the NFC will be treated as "forfeited miscellaneous property" for accounting purposes, absent a court order to the contrary. The proper accounting class codes to be used are IRS CC 881, USSS CC 882 and ICE CC 897.

### (1) Exception for Rental Proceeds Cases Subject to Transfer to the Fund for U.S. Victims of State Sponsored Terrorism (USVSST Fund)

Pursuant to 42 U.S.C. § 10609, forfeitures from certain offenses involving state sponsors of terrorism must be deposited into the USVSST Fund, not the TFF. Accordingly, rental income collected, whether pre- or post-forfeiture, for real properties that were forfeited pursuant to such a violation shall NOT be deposited into the TFF. Rather, such funds shall remain in the Treasury Suspense Account (TSA) until a determination is made concerning whether they must be deposited to the USVSST Fund.

- i. Rental income maintained in the TSA pursuant to this section will be held in class code 773. This is the same class code for interlocutory sales and the rental income can be separately identified within this class code.
- ii. Agencies should consult with their agency counsel and TEOAF as soon as possible if they are working on a case for which the forfeited proceeds or rental income may be required to be deposited to the USVSST Fund, i.e. any case involving a state-sponsor of terrorism.

6. **AUTHORITY.** 18 U.S.C. § 985; 31 U.S.C. § 9705; Treasury Directive 27-03, "Organizations and Function of the Office of the Assistant Secretary (Enforcement)"; Delegation Memorandum dated May 19, 1995, "Technical Correction to EOAF Delegation of Authority"; and Treasury Order 102-14, March 24, 2007, "Delegation of Authority with Respect to the Department of the Treasury Forfeiture Fund" (or their successor documents); 42 U.S.C. § 10609.

7. **INFORMATION CONTACT.** Any inquiries pertaining to this Directive should be directed to TEOAF's Real Property Team at (202) 622-9600.

8. **CANCELLATION.** TEOAF Directive No. 3, "Seizure of Occupied Real Property," issued on May 30, 2014, is hereby superseded.

9. **EFFECTIVE DATE.** March 23, 2017.

/S/

John Farley

Director, TEOAF

ATTACHMENT A – Occupancy Agreement