

DEPARTMENT OF THE TREASURY
EXECUTIVE OFFICE FOR ASSET FORFEITURE

DIRECTIVE NO. 37

DATE: November 23, 2015

SUBJECT: Payment of Interest on Cash Deposits to the TFF or Suspense Account

1. **PURPOSE.** This Department of the Treasury Executive Office for Asset Forfeiture (TEOAF) Directive No. 37 provides guidance on TEOAF's and the agency's responsibilities regarding for the payment of interest on cash deposits to the TFF or suspense account.

2. **SCOPE.** This Directive applies to all seizure and forfeiture cases conducted by agencies participating in the Treasury Forfeiture Fund (TFF).

3. **POLICY.** Generally, the TFF enabling legislation, 31 U.S.C. § 9705, does not specifically authorize the payment of interest. However, where there is a written settlement agreement or a court order requiring that interest be paid, TEOAF will pay interest pursuant to that settlement agreement or court order. Further, pursuant to case law in the Sixth and Ninth Circuits, interest shall be paid, even without a court order or written agreement, when returning seized currency to a claimant in administrative or judicial cases.¹ This includes all "declination cases."² All requests for payments of interest must be submitted by the seizing agency to TEOAF for processing.

4. **GUIDANCE.**

A. **Situations Where Interest is Payable**

i. **Court Order or Written Agreement, Any Circuit, Mandating the Interest Be Paid**

TEOAF will honor a written agreement relating to interest provided such agreement is memorialized appropriately, either by court order or other reliable documentation, such as a signed stipulation between the parties with an executed release and hold harmless agreement in favor of the government. Unless otherwise indicated by such court order or agreement, TEOAF will refund interest only on the portion of the currency that is being returned. The TFF does not have legal authority to pay interest at a rate that is greater than the rate earned on funds invested by the TFF during the relevant period.

Should an agreement or order require the United States to pay interest at a rate that is greater than what the TFF earned, TEOAF will tender interest to the claimant at the earned rate and will submit the excess to the Judgment Fund for payment in accordance with 31 U.S.C. § 1304. The Judgment Fund is managed independently of TEOAF, and TEOAF is not in any way responsible for any approval or denial of any request made to the Judgment Fund.

¹ The Sixth Circuit encompasses Kentucky, Michigan, Ohio, and Tennessee. The Ninth Circuit encompasses Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii.

² Declination cases are those instances whereby a seizure has occurred and a claim has been subsequently filed and referred by the seizing agency to the USAO, but the USAO declines to file any action or seek a pre-complaint settlement. The assets that were seized must then be returned without further action. See *Carvajal v. United States*, 521 F.3d 1242 (9th Cir. 2008).

ii. Case-Law Mandated Interest Payments in the Sixth and Ninth Circuits

In cases arising out of the Sixth and Ninth Circuits, including declinations, unless interest is expressly *waived* in writing, interest shall be paid for all refunds. Accordingly, TFF participating agencies must request that TEOAF pay interest when processing refunds of seized currency to claimants in the Sixth and Ninth Circuits.³ This is especially important for declinations in those circuits where the seized funds are refunded directly from the Treasury Suspense Account by Fines, Penalties & Forfeiture (FP&F) Officers of Customs and Border Protection (CBP). See section C.2. Special Procedures for FP&F, are described more fully below in Section 4.C.ii.

a. Legal Basis for the Policy in the Sixth and Ninth Circuit

In 1998, to reflect case law in the Sixth and Ninth Circuits, TEOAF advised that it would pay interest to claimants on refunds issued in those circuits without requiring a court order. The relevant cases are United States v. \$277,000 in U.S. Currency, 69 F.3d 1491 (9th Cir. 1995) and United States v. \$515,060 in U.S. Currency, 152 F.3d 491 (6th Cir. 1998). In essence, those cases held that when returning seized funds to a claimant, the government must also disgorge the benefit the government earned from holding the funds. Practically speaking, that benefit is interest. However, in order to avoid invoking the well-settled legal doctrine that "interest cannot be recovered...against the government in the absence of an express waiver of sovereign immunity" espoused in Library of Congress v. Shaw, 478 U.S. 310,311 (1986), the Ninth and Sixth Circuits relied upon a disgorgement theory, which classified interest as part of the seized res itself.

b. Declinations

On April 11, 2008, the Ninth Circuit held in Carvajal that when a United States Attorney's Office (USAO) declines to file a forfeiture proceeding and returns seized currency to a claimant, the interest must also be returned. The court in Carvajal relied upon the disgorgement theory espoused in the \$277,000 decision. Further, with respect to the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), specifically 28 U.S.C. § 2465, which is deemed a waiver of sovereign immunity and sets forth a uniform rule for paying interest to substantially prevailing parties in civil forfeiture cases, the Carvajal court ruled that CAFRA's interest provision did not apply because there was no judicial proceeding in which there could have been a prevailing party; indeed, the USAO in Carvajal's case had declined to file a judicial proceeding. Thus, the Carvajal court held that in the absence of a forfeiture proceeding (administrative or judicial), CAFRA's interest provision does not apply, and the disgorgement theory espoused in \$277,000 does. The Carvajal court reaffirmed that \$277,000 remains good law. 521 F.3d at 1249.

³ AUSAs often include in their declination letters a request that interest be returned, but even if such request is absent, interest must be returned in a declination in the Sixth or Ninth Circuit.

B. Situations Where Interest is Not Payable

i. Generally

Interest is not payable in any circuit, other than the Sixth or Ninth, where interest is not expressly included in the written agreement or court order.

ii. Petitions for Remission

Interest is not payable to a party whose petition for remission in a judicial forfeiture case was granted by the Department of Justice's Asset Forfeiture and Money Laundering Section. See 31 U.S.C. §§ 9705(a)(1)(E) and (b)(1) (amounts paid for remission must not exceed the value of the property at the time of the seizure). Because petitioners for remission of judicially forfeited property are generally not considered claimants or prevailing parties, the TFF is not authorized to pay interest to such parties under case law or statute.

iii. Jurisdictional Bar

Further, generally, the United States is not liable for interest if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law. See 28 U.S.C. § 2465(b)(2)(B). Thus, for example, in a declination case in which the claimant was convicted of a crime for which federal forfeiture was available, even where no forfeiture was actually attained, interest is not payable to that claimant/convicted defendant. See United States v. Khan, 497 F.3d 204, 209 n.6 (2d Cir. 2007).

C. PROCEDURES TO REQUEST THAT TEOAF PAY INTEREST

i. Generally

To request payment of interest on a refund, the seizing agency must complete Form 7a (Request for Payment of Interest) and Form 7 (Request for Refund From Forfeiture Fund) or Form 2 (Disposition Instructions for Currency Held in Suspense Account). The forms must be submitted to TEOAF together with the necessary supporting documentation (i.e., settlement agreements, court orders, declination letters, or, if applicable, simply indicate that interest is due pursuant to case law). The payee must also complete a W9 form. TEOAF will calculate the amount of interest to be paid, and transmit the requests to the National Finance Center (NFC) for payment. Depending upon the specific circumstance, principal and interest may be paid in a single check or separately.

ii. Special Procedures for FP&F Officers of CBP

FP&F officers, on behalf of CBP and Immigration and Customs Enforcement (ICE), may directly instruct the NFC to issue refunds of seized currency from the Treasury Suspense Account. However, FP&F officers do not have the capability to issue interest payments. For refunds from the suspense account for which interest is payable under this policy (particularly for declinations in the Ninth or Sixth Circuit), request to pay interest must be forwarded to TEOAF using TEOAF Form 7a, Request for Payment of Interest, as directed in Section C.1 above.

5. **AUTHORITY.** 31 U.S.C. § 9705; 28 U.S.C. § 2465; various case law.

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

7. **CANCELLATION.** None. This directive incorporates the guidance provided in TEOAF Memorandum, "U.S. v. \$515,060.42 (Hurst), No. 95-6579, etc., (6th Cir. May 26, 1998)," July 17, 1998, TEOAF Memorandum, "The Payment of Interest," May 12, 2000, and TEOAF Memorandum, "Payment of Interest required in the Sixth and Ninth Circuits on all Returns of Seized Currency; Interest Policy Generally," December 2, 2009.

8. **EFFECTIVE DATE.** November 23, 2015

/S/

John Farley
Acting Director
TEOAF

Attachment A – TEOAF Form 7a, Request for Payment of Interest – CBP
Attachment B – TEOAF Form 7a, Request for Payment of Interest – IRS-CI
Attachment C – TEOAF Form 7a, Request for Payment of Interest – U.S. Secret Service
Attachment D – TEOAF Form 7a, Request for Payment of interest - ICE