

## INTERNAL REVENUE SERVICE

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### MEMORANDUM FOR ASSISTANT CHIEF COUNSEL (CRIMINAL TAX)

FROM: Kelly Davidson

SUBJECT: Proposed Amendments to the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence

The purpose of this memorandum is to summarize the proposed amendments to the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. These proposed amendments were approved by the U.S. Supreme Court on April 17, 2000 and have been transmitted to Congress for approval. Unless altered by Congress, the proposed amendments will take effect on December 1, 2000.

#### **Proposed Amendments to the Federal Rules of Criminal Procedure**

The amendments to the Federal Rules of Criminal Procedure relate entirely to criminal forfeiture procedure. Most of the amendments are organizational in nature and do not involve any substantive legal changes. A few of the amendments do involve substantive legal changes for the purpose of bringing the forfeiture procedure in line with changes in case law or changes in other parts of the Federal Rules of Criminal Procedure. The substantive legal changes shift the determination of the defendant's and third parties' interests in property subject to forfeiture from during trial to *after* the trial. This change is designed to bring the provisions of the Federal Rules of Criminal Procedure relating to forfeiture into line with Libretti v. United States, 516 U.S. 29 (1995), which provided that criminal forfeiture is a part of the sentencing process and that a defendant has no constitutional right to have a jury determine any part of the forfeiture.

#### **Rule 7**

Current Rule 7, subparagraph (c)(2) relates to the contents of an indictment where criminal forfeiture is sought. The current Rule provides, indictments where criminal forfeiture is sought must "allege the extent of the interest or property subject to forfeiture."

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The proposed amendment eliminates the requirement that the extent of the property subject to forfeiture be alleged in the indictment, and replaces it with a requirement that the indictment “provide notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.”

### **Rule 31**

Current Rule 31, subparagraph (e) provides, “a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.”

The proposed amendment strikes this entire current provision in order to bring Rule 31 into compliance with proposed Rule 32.2 which provides for determination of the extent of the interest or property subject to forfeiture after the trial, rather than during trial with a verdict.

### **Rule 32**

Current Rule 32, subparagraph (d)(2) provides that the court may enter a preliminary order of forfeiture authorizing seizure of the property after a guilty plea or a verdict containing a finding that the property is subject to forfeiture. The proposed amendment strikes this entire current provision and replaces it with the following directive: “Forfeiture procedures are governed by Rule 32.2.”

### **Rule 32.2**

Rule 32.2 is an entirely new provision replacing the forfeiture procedure currently provided in Rules 31(e) and 32(d).

#### **Rule 32.2(a) Notice to the Defendant**

Rule 32.2, subparagraph (a) requires the indictment or information to provide notice to the defendant that the government intends to seek forfeiture of property as part of any sentence.

#### **Rule 32.2(b) Entry of Preliminary Order of Forfeiture; Post Verdict Hearing**

Rule 32.2, subparagraph (b) deals with the preliminary order of forfeiture. The preliminary order of forfeiture is entered pursuant to a post verdict hearing which occurs after the plea or guilty verdict and is separate from the trial. At the post verdict hearing, if the government seeks a money judgment, the court determines the amount of money the defendant will be ordered to pay. If the government seeks forfeiture of specific property, the court determines whether the government has established a nexus between the specific property sought and the defendant's offense. If the defendant's guilt was established by jury trial, rather than by plea, the parties are given the choice of

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having the jury determine whether the government has established the requisite nexus between the property sought and the defendant's offense.

After the conclusion of the post verdict hearing, the court may enter the preliminary order of forfeiture. The preliminary order of forfeiture directs forfeiture of the money or property without regard to any third parties' interests in it. The preliminary order of forfeiture authorizes seizure of the property and may include any conditions necessary to preserve the value of the property pending appeal. If the preliminary order of forfeiture is not contested by third parties, it becomes final and shall be made part of the sentence.

#### Rule 32.2(c) Ancillary Proceeding; Final Order of Forfeiture

Rule 32.2, subparagraph (c) deals with the final order of forfeiture. If a third party asserts an interest in the property, by filing a petition, the court must conduct an ancillary proceeding to determine the third party's interest in the property. The ancillary proceeding is not required if no third party asserts an interest. Also, the ancillary proceeding is not required if the forfeiture consists of a money judgement.

The ancillary proceeding is conducted in accordance with the Federal Rules of Civil Procedure, and may involve dismissal, motion practice, discovery, and summary judgement as in any civil proceeding. Once the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order of forfeiture as necessary to account for any third party rights. Neither the defendant, nor any third party, may object to entry of the final order of forfeiture on the ground that the property does not belong to the defendant.

The ancillary proceeding is not part of the sentencing.

#### Rule 32.2(d) Stay Pending Appeal

Rule 32.2, subparagraph (d) deals with the effect of a defendant's appeal on the post verdict process of determining property subject to forfeiture and third parties' rights in that property. The rule provides, the court may stay an order of forfeiture on terms sufficient to preserve the value of the property pending appeal. If a stay is granted, it will not affect ancillary proceedings and finalization of the order of forfeiture. Ancillary proceedings and finalization of the order of forfeiture will proceed without regard to the stay and the only effect of the stay is that property will not be transferred until the conclusion of the appeal.

#### Rule 32.2(e) Subsequently Located Property; Substitute Property

Rule 32.2, subparagraph (e) deals with subsequently located property and substitute property. On the government's motion, the court may at any time amend an existing

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order of forfeiture or enter a new order of forfeiture to include property that either was subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered, or is property that is substitute for property subject to forfeiture under an existing order of forfeiture. The defendant has no right to a jury trial for the determination of nexus between the property sought and the defendant's offense. If a third party asserts an interest in the subsequently located or substitute property, the court shall conduct an ancillary proceeding exactly as described in Rule 32.2(c).

### **Rule 38**

Current Rule 38 relates to stays of execution of judgement pending appeal. Current Rule 38, subparagraph (e), entitled, "Criminal Forfeiture, Notice to Victims, and Restitution," provides that orders of criminal forfeiture (18 U.S.C. § 3554), orders of restitution (18 U.S.C. § 3556), and orders that a defendant found guilty of a fraud offense give notice by mail or other means to his victims of his conviction (18 U.S.C. §3555), may be stayed pending an appeal on any terms the court finds necessary to preserve the value of the property pending appeal. The proposed amendment strikes all references to orders of criminal forfeiture, both in the title and the body of this rule.

## **Proposed Amendments to the Federal Rules of Civil Procedure**

The amendments to the Federal Rules of Civil Procedure relate entirely to civil forfeiture procedure. The amendments are made to Rule 14 and to the Admiralty Rules which apply in civil forfeiture proceedings. Most of the amendments are organizational in nature and do not involve any substantive legal changes.

### **Rule 14**

Current Rule 14 relates to third party practice. Current Rule 14, subparagraph (a) provides, a third party complaint, in an action that is not originally *in rem*, may be *in rem* against a vessel or other property, in which case references in Rule 14 to the summons include the warrant of arrest and references to the third party plaintiff or third party defendant include the claimant. Current Rule 14, subparagraph (c) provides third party procedure where the original plaintiff's claim is an *in rem* action. Proposed Rule 14, subparagraph (c) strikes each use of the word "claimant" and replaces it with "a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested." Since Supplemental Rule C(6)(b)(i) defines the requirements for filing an *in rem* forfeiture action, the substitution of the references to Supplemental Rule C(6)(b)(i) for "claimant" makes the references to *in rem* actions more precise.

### **Rule B**

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### Rule B(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process

Current Rule B, subparagraph (1) covers the contents of the complaint, providing, if the complaint contains a prayer for attachment of the defendant's property, it must be verified. The plaintiff may invoke state law remedies for seizure of property. If the defendant is not within the district, the complaint must contain an affidavit stating that, to the plaintiff's belief, the defendant is not within the district.

The court must review the complaint and affidavit and may enter an order authorizing attachment and garnishment. The current rule further provides, the clerk may issue a summons and process of attachment and garnishment without a pre-attachment hearing and review by the court if the plaintiff certifies that exigent circumstances make a pre-attachment hearing and review by the court impracticable. However, the plaintiff has the burden at the post-attachment hearing to show that exigent circumstances existed.

The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. The only substantive change is to add a provision relating to service of process. Proposed Rule B(1)(d) provides, service may be made by a marshal if the property is a vessel or is on board a vessel, but service may be made by any marshal, person under contract with the United States, any person specially appointed for service, or any officer or employee of the United States for all other property.

### Rule B(2) Notice to Defendant

Current Rule B, subparagraph (2) provides, the plaintiff must attempt to give notice of the action to the defendant. Notice must be given by mailing the defendant a copy of the complaint, summons, and process of attachment or garnishment, by serving the defendant in accordance with Rule 4(d), by using a form of mail requiring a return receipt, or by trying diligently to give notice of the action to the defendant. The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. There are no substantive changes to Proposed Rule B(2).

## **Rule C**

### Rule C(2) Complaint

Current Rule C, subparagraph (2) provides for the form of the complaint in civil forfeiture actions. It must be verified, it must describe with particularity the property subject of the action, it must state that it is within the district, it must state the place of seizure, and it must contain such allegations as may be required by the statute pursuant to which the action is brought.

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The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. The only substantive change is to add a provision relating to the requirements of a civil forfeiture complaint. Proposed Rule C(2)(d) provides, the complaint must be verified, the property must be described with particularity, the complaint must state whether the property is within the district and if the property is not within the district the complaint must provide the basis for the court's exercise of jurisdiction over the property, the place of seizure, and the complaint must contain such allegations as may be required by the statute pursuant to which the action is brought.

#### Rule C(3) Judicial Authorization and Process

Current Rule C, subparagraph (3) provides, the court must review the complaint and may enter an order authorizing the clerk to issue a summons and warrant for the arrest of the property. If the plaintiff is the United States, the clerk shall issue a summons and warrant for the arrest of the property without review by the court and without a showing of exigent circumstances. For all other plaintiffs, a certification that exigent circumstances make review by the court impracticable is required for the clerk to issue a summons and warrant and the plaintiff shall have the burden on a post arrest hearing to show that exigent circumstances existed.

If the property is a vessel, or is on board a vessel, a marshal may arrest the property. For all other property any marshal, person under contract with the United States, any person specially appointed for service, or any officer or employee of the United States may arrest the property.

If the subject property consists of proceeds of the property sold, the summons shall direct the person in control of the proceeds to show cause why they should not be paid to the court to abide judgement.

The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. There are no substantive changes to Proposed Rule C(3).

#### Rule C(4) Notice

Current Rule C, subparagraph 4 provides, if the property is not released within ten days of arrest, the plaintiff must publicize notice of the arrest and the time within which an answer is required to be filed in a newspaper of general circulation in the district. The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. There are no substantive changes to Proposed Rule C(4).

#### Rule C(6) Claim and Answer; Interrogatories

Current Rule C, subparagraph 6 provides, any claimant of arrested property shall file a verified claim stating his interest in the property within ten days of arrest and shall serve an answer within twenty days of filing the claim. Interrogatories may be served by

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plaintiff or claimant without the leave of the court.

The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. The only substantive change is to add a provision relating to the filings required of persons asserting claims to the subject property. Proposed Rule C(6)(a) provides, rather than filing a verified claim stating their interest in the property within ten days of arrest and serving an answer within twenty days of filing the claim, claimants must file their verified claims within twenty days after the earlier of receiving actual notice of either receiving actual notice of the arrest or completed publication of notice or within such time as the court allows. Again, a claimant must serve an answer within twenty days of filing a claim.

## **Rule E**

### **Rule E(3) Process**

Current Rule E, subparagraph 3(a) provides that process shall be served only in the district and may be held in abeyance if the plaintiff so requests. The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. The only substantive change is to add a provision relating to service outside of the district. Proposed Rules E(3)(a) and (b) provide, in admiralty and maritime proceedings process may be served only in the district, but in forfeiture cases process may be served within or outside the district as authorized by statute.

### **Rule E(7) Security on Counterclaim**

Current Rule E, subparagraph 7 provides, if a claimant is required to give security before asserting a claim to arrested property, then the plaintiff must also be required to give security before responding to the claimant, however, where the plaintiff is the United States, the United States is not required to give security. The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. There are no substantive changes to Proposed Rule C(4).

### **Rule E(8) Restricted Appearance**

Current Rule E, subparagraph 8 provides, a claimant may make a restricted appearance only for purposes of defense, and such an appearance is not an appearance for purposes of the claim with respect to which process has not been served. The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. There are no substantive changes to Proposed Rule C(4).

### **Rule E(9) Disposition of Property; Sales**

Current Rule E, subparagraph 9 provides, where arrested property is subject to deterioration, decay, or injury, if the expense of keeping the property is excessive, or if

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there is an unreasonable delay in securing release of the property, the court, on application of any party or of the marshal, may order the property sold and the proceeds brought to court to await further orders of the court.

The proposed amendment strikes this entire provision and replaces it for the purpose of organization and clarity. The only substantive change is to add a provision relating to delivery of perishable property to a movant upon the movant's giving of security. Proposed Rule E(9)(b)(ii) provides, where arrested property is subject to deterioration, decay, or injury, if the expense of keeping the property is excessive, or if there is an unreasonable delay in securing release of the property, in addition to ordering the property sold, the court may order the property delivered to the movant if he gives security. Proposed Rule E(10) adds, the court, on any party's motion or its own may enter any order necessary for the preservation or prevention of removal of property.

### **Proposed Amendments to the Federal Rules of Evidence**

#### **Rule 103**

Rule 103 provides rules for objections to evidence and rulings thereon. The only change is to 103(a) which provides, once a court makes a ruling, a party need not renew his objection or offer of proof to preserve a claim of error for appeal.

#### **Rule 404**

Rule 404 provides rules relating to character evidence. Rule 404(a)(1), as amended, provides for the admission of character traits of the accused which are the same as previously admitted character traits of the "alleged victim."

#### **Rule 701**

Rule 701 provides rules relating to opinion testimony by lay witnesses. The amendment prohibits witness opinion testimony regarding scientific, technical, or other specialized knowledge.

#### **Rule 702**

Rule 702 provides rules relating to testimony by experts. As amended, Rule 702 provides a new test for whether an expert witness may testify in a case: He may testify if, his testimony is based on sufficient facts or data, his testimony is the product of reliable principles and methods, and he has applied the principles and methods reliably to the facts of the case.

#### **Rule 703**

Rule 703 provides rules relating to the facts of a particular case that an expert witness



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may base his opinion on. Rule 703 provides, if an expert witness bases his testimony on facts which are inadmissible into evidence, those facts may not be disclosed to the jury unless the court determines their probative value in assisting the jury to evaluate the expert witness' opinion substantially outweighs their prejudicial effect.

### **Rule 803**

Rule 803 Provides rules relating to hearsay exceptions. Rule 803(6) concerns the exception from the hearsay rule of records of regularly conducted business activities. The amendment allows records to be introduced by certification complying with Rule 902(11), Rule 902(12), or a statute permitting certification. Rule 902(11) and Rule 902(12) are entirely new provisions that would be added by the proposed amendments.

### **Rule 902**

Rule 902 provides rules relating to self-authentication. Rule 902(11) is an entirely new provision providing, extrinsic evidence of authenticity is not required for the admission of *domestic* records of a regularly conducted activity when the records are accompanied by a written declaration certifying that the record was made near the time of the occurrence by a person with knowledge, was kept in the course of the regularly conducted activity, and was made as a regular practice. A party intending to offer evidence under Rule 902(11) must notify adverse parties in advance and make the record available for their inspection.

Rule 902(12) is another new provision providing, extrinsic evidence of authenticity is not required for the admission of *foreign* records of a regularly conducted activity when the records are accompanied by a written declaration and made available in exactly the same manner as required by Rule 902(11). The only difference between Rule 902(11) and Rule 902(12) is the declaration must be signed in a manner that, if false, would subject the maker to a criminal penalty under the laws of the country where the declaration is signed.

## **Conclusion**

These amendments to the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence were approved by the U.S. Supreme Court on April 17, 2000 and have been transmitted to Congress for approval. Unless altered by Congress, the proposed amendments will take effect on December 1, 2000. Most of the amendments are for the purpose of organization and clarity, with the exception of the amendments to the Federal Rules of Criminal Procedure which shift the determination of the defendant's and third parties' interests in property subject to forfeiture from during the trial to after the trial. If you have any questions regarding this matter, please contact Kelly Davidson of the Criminal Tax Division on (202) 622-7249.

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cc: Assistant Regional Counsel (CT)

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