

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2017 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply: Date 2-5-17  
**Original**     **Amendment**        **Bill No:** SB202  
**Correction**     **Substitute**   

**Sponsor:** Ivey-Soto and Wooley    **Agency Code:** 264  
**Short**    Forfeiture    **Person Writing**    Gail MacQuesten  
**Title:**    Changes    **Phone:** 466-0532    **Email** gailmacquesten@gmail.com

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
unknown	unknown	unknown	recurring	General fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

SB202 amends the Forfeiture Act, NMSA 1978, Section 31-27-1 *et seq.*, substituting “law enforcement agency” for “state” throughout, and making the following substantive changes:

- Applicability. Section 31-27-2 is amended to make the Act applicable to all seizures, forfeitures and dispositions of property subject to forfeiture in this state, including those under municipal and local ordinances.
- Definitions. Section 31-27-3 is amended to eliminate the definitions of “abandoned property” and “actual knowledge” and add two new definitions to replace them. “Disclaimed property” is property that a law enforcement officer has reasonable cause to believe is subject to forfeiture, the ownership of which has been disclaimed by the person in possession of the property. “Knowledge” is actual or constructive awareness that can be proved either through direct or circumstantial evidence of information, a fact or a condition.
- Replevin. Section 31-27-4.1 is amended in several ways. The deadline for claiming an interest in seized property is changed: currently, the claim must be made before sixty days prior to a related criminal trial, but the amendment provides that the claim must be made before the one-hundred-twentieth day following the filing of the forfeiture action in court. A hearing shall take place within ninety (not thirty) days of the date on which the motion is filed. If a court grants a claimant’s motion on the basis that the property is the only reasonable means for a defendant to pay for legal representation, SB202 requires that court also find that 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 issues an order returning funds or property to enable a defendant to obtain counsel, the court shall (not “may”) require an accounting, with an in camera accounting report of reasonable legal fees. If the court finds for the law enforcement agency in both the criminal and forfeiture proceedings, the court shall hear arguments by the parties as to what portion of the funds or property should be paid to the defendant’s counsel and what portion should be forfeited, and issue an order on how the funds or property shall be distributed.
- Forfeiture proceedings. Section 31-27-5 is amended to eliminate the option of publishing copies of complaints claiming an interest in property at least three times in a newspaper of general circulation in the district of the court having jurisdiction. SB202 leaves in place language stating that complaints be published on the sunshine portal. Section 31-27-6 is amended to require a claim that the forfeiture was constitutionally excessive to be filed within the time period for filing an appeal

- following the conclusion of a forfeiture proceeding. Currently there is no time limit. SB202 also removes consideration of the value of the property to the defendant from the list of relevant factors the court may consider in determining the value of the property.
- Disposition. Section 31-27-7 is amended to make its provisions applicable to disclaimed property, as well as forfeited property. SB202 adds a provision regarding how the state treasurer is to make distributions. Proceeds go first to reimburse expenses related to the storage, protection and transfer of the property, and to prepare reports required by other provisions of SB202. Second, they go to pay reasonable expenses incurred to dispose of the property. Third, any remaining balance shall be deposited in the general fund. Property subject to forfeiture that is in a law enforcement agency's possession becomes disclaimed property and may be disposed of as such without a conviction if there is no innocent owner and the criminal prosecution of the owner of the seized property cannot proceed because the owner has been a fugitive for a period in excess of one year and one day.
  - Innocent owners. Section 31-27-7.1, regarding innocent owners, is amended to substitute "knowledge" for "actual knowledge." Under the amendment, the state proves by clear and convincing evidence that the owner "had knowledge" that the property was subject to forfeiture, or was not a bona fide purchaser who was without notice of any defect in title and who gave valuable consideration. Similarly, the state must prove by clear and convincing evidence that a secured party had knowledge of the crime that relates to the seizure. SB202 also amends the provision to add that seized property that is firearms, ammunition or explosives subject to forfeiture 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.
  - Safekeeping. The amendment to Section 31-27-8 deletes the provision that a law enforcement agency shall not retain forfeited or abandoned property.
  - Reporting. Section 31-27-9 is amended to provide that the annual report from law enforcement agencies is due within sixty days following the conclusion of each fiscal year, and shall include: the costs incurred by the agency for storage, maintenance and transportation of seized property; any proceeds received through equitable sharing allowing with the federal case number and the final disposition of the case; and any costs incurred by the agency to prepare its report.
  - Transfers to the federal government. Section 31-27-11 is amended to eliminate transfers to the federal government in what amount to civil forfeiture proceedings, requiring a conviction for a transfer. SB202 provides that a law enforcement agency shall not transfer seized property to a federal law enforcement authority unless the value of the seized property exceeds \$50,000 or the federal government has filed criminal charges against the owner, there is no innocent owner, and the property is required as evidence in the federal prosecution. SB202 amends the section to provide that a law enforcement agency may share information and cooperate with the federal government, provided that it is not part of a broader pattern, practice or policy that operates to circumvent the protections of the Forfeiture Act, and allows law enforcement agencies to participate in equitable sharing programs with the federal government as authorized by Section 29-1-10.1 NMSA 1978, provided that no equitable sharing proceeds shall be accepted by a law enforcement agency unless an owner of the property is convicted in federal court.

## **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SB202 will have minimal fiscal impact on the district attorneys who handle forfeiture cases. But SB202 may increase funds for the general fund, while having a significant negative fiscal impact on the law enforcement agencies and municipalities that rely on forfeitures for revenue. SB202 expands the scope of the forfeiture act to cover local and municipal forfeitures. The revenue from such programs will now go to the general fund, and not to local law enforcement or municipalities. SB202 also limits the scope of federal sharing programs, which will also reduce revenues to law enforcement agencies. On the positive side, SB202 provides that agencies will be reimbursed for reasonable expenses related to the storage, protection and transfer of the property, reasonable expenses incurred to dispose of the property, and reasonable expenses required to prepare the reports required by the act.

## **SIGNIFICANT ISSUES**

In 2015, New Mexico made major changes to its forfeiture act, prohibiting civil forfeiture, in which law enforcement officials can take possession of property they believe is tied to criminal activity without bringing charges or obtaining a conviction. The 2015 law left in place criminal forfeiture, in which assets tied to crime can be forfeited if the owner is convicted. SB202 makes a number of significant changes to the 2015 law.

### Expanding the scope of the forfeiture act

SB202 expands the 2015 law to apply its provisions to all seizures, forfeitures and dispositions of property subject to forfeiture in this state, including under local ordinances. (Some localities have continued to operate civil forfeiture programs, believing the 2015 law applied only to state-wide programs.)

These changes may impact the budgets of law enforcement entities and municipalities that look to forfeiture revenue from local ordinances.

### Impact on federal equitable sharing programs and other federal programs

SB202 recognizes federal equitable sharing programs, in which cooperating state and local law enforcement agencies can share in federal forfeiture proceeds. (Such funds go directly to the law enforcement agency to be used only for law enforcement purposes. They do not go to the general fund under New Mexico's Forfeiture Act.) SB202 removes some restrictions on federal equitable sharing programs by eliminating requirements that the criminal conduct be interstate in nature and sufficiently complex to justify the transfer. But SB202 also limits federal equitable sharing programs, allowing law enforcement to participate only 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. Further, the law enforcement agency may only share in proceeds only when there has been a conviction. SB202 also contains a provision warning that information sharing and cooperation with the federal government must not be part of a broader pattern, practice or policy that operates to circumvent the protections of the forfeiture act.

To the extent SB202 limits federal equitable sharing programs, it will hurt the budgets of law enforcement entities that look to revenue from federal equitable sharing programs.

#### Impact on HIDTA

New Mexico participates in the High Intensity Drug Trafficking Area (HIDTA) program, a federally funded anti-drug program that allows members to request funding for the purposes of conducting supporting investigations into both street level narcotics traffickers and drug trafficking organizations. The New Mexico HIDTA initiatives have a base-line HIDTA budget. One of the terms used in HIDTA is “program income,” which is funded through forfeiture funds. These funds are factored into the budgeting decision.

Because SB202 eliminates local forfeiture programs and puts all forfeiture under the Forfeiture Act, with proceeds (other than expenses) going to the general fund, and because SB202 may impact revenue from federal equitable sharing programs, it will greatly impact “program income” for determining HIDTA budgets.

#### Disposition of property and proceeds

Under SB202, disposition of the property is handled by the state treasurer (or designee) for disposition at a public auction. Currency and proceeds are distributed as follows: first, to reimburse the reasonable expenses related to the storage, protection and transfer of the property and to prepare reports required under the act; second to pay reasonable expenses incurred to dispose of the property; and third, any remaining balance shall go to the general fund. The 2015 law did not provide for expenses: all proceeds went to the general fund.

#### Innocent owners

SB202 decreases the burden of proof for the state in cases involving claims of innocent ownership. Under current law, the state must show clear and convincing evidence that the party had actual knowledge of the crime. Under SB202, the state must show by clear and convincing evidence that the owner had “knowledge” of the crime. Knowledge is defined under SB202 to be actual or constructive awareness that can be proved either through direct or circumstantial evidence of information, a fact or a condition.

#### Retention of property

SB202 eliminates the provision in Section 31-27-8 that states: “A law enforcement agency shall not retain forfeited or abandoned property.” On occasion, law enforcement agencies convert forfeited or disclaimed property, by court order, to use in investigations. Allowing law enforcement to retain property may assist in undercover operations.

### **PERFORMANCE IMPLICATIONS**

There are minimal performance implications for the district attorneys. They will need to comply with the new deadlines and forfeiture procedures set out in SB202.

There will be significant performance implications for law enforcement agencies that rely on forfeiture funds, as discussed above.

### **ADMINISTRATIVE IMPLICATIONS**

See Significant Issues, above.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None found.

## **TECHNICAL ISSUES**

Section 11 of SB202 states that a law enforcement agency shall not transfer seized property to a federal law enforcement authority or other federal agency unless 1) the value exceeds \$50,000 or 2) 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. The “or” should probably be “and.” As the statute is currently written, the value requirement is separate from the other requirements, and must be met in addition to one of the additional requirements. SB202 deletes the other requirements, and in their place adds the requirement of federal criminal charges, etc. This is consistent with New Mexico’s policy against civil forfeitures. Transferring forfeitures to federal agencies without a federal criminal case runs against that policy, and against the statement in new paragraph C of Section 11 that no equitable sharing proceeds shall be accepted by the law enforcement agency unless an owner of the property is convicted in federal court.

## **OTHER SUBSTANTIVE ISSUES**

None found.

## **ALTERNATIVES**

None proposed.

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

New Mexico’s current Forfeiture Act will remain unchanged.

## **AMENDMENTS**

Amend Section 11 at line 16, page 24, to change the “or” to “and:”

(3) ~~the seized property may only be forfeited under federal law;] or and~~  
(2) the federal government has filed criminal charges against the owner of the seized property....