

**MEMORANDUM OF UNDERSTANDING**  
**GOVERNING**  
**FIRREA FORFEITURE CASES**

**Introduction**

The United States Government (Government) is committed to the goals of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the vigorous pursuit of those who steal from financial institutions, and the recovery of the profits and proceeds of financial crimes. To maximize recoupment for the benefit of the American taxpayer, all departments and agencies of the United States must coordinate their efforts in the identification, seizure, and disposition of forfeitable properties. This Memorandum of Understanding is intended to facilitate that coordination. To facilitate the identification of cases in which the use of criminal or civil forfeiture may be appropriate, representatives of the appropriate Department of Justice component, the United States Attorneys' Offices or the Fraud Section, Criminal Division, shall meet periodically with federal law enforcement and federal financial institution regulatory agency<sup>1</sup> representatives through local and regional working groups to prioritize and coordinate investigations. In addition, each regulatory agency shall designate a central contact point at its headquarters office for all purposes of this Memorandum of Understanding.

**1. Minimizing Litigation**

The Government believes that departments and agencies of the United States should not litigate against each other. Therefore, the Department of Justice will not pursue criminal charges against closed financial institutions, absent exceptional circumstances, as to do so would: (1) require regulatory agencies, in their receivership, conservatorship, liquidating agency, or corporate purchaser capacities, or where the regulatory agency has become successor to the interest of a

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<sup>1</sup> For the purposes of this Memorandum of Understanding, the term "federal financial institution regulatory agency(ies)" (hereinafter, "regulatory agency(ies)") means: the Board of Governors of the Federal Reserve System; the Farm Credit Administration; the Farm Credit System Insurance Corporation; the Federal Deposit Insurance Corporation; the National Credit Union Administration; the Office of the Comptroller of the Currency; the Office of Thrift Supervision; and the Resolution Trust Corporation; or their successor agencies.

failed financial institution pursuant to written agreement, to incur defensive costs; (2) needlessly clog already crowded court dockets; and (3) create the spectacle of the Government litigating against itself.

The Government is mindful of its obligation to protect the interests of innocent third parties in property seized for forfeiture. It is the intent of the Senior Interagency Group established by the Crime Control Act of 1990 that, in any FIRREA forfeiture case<sup>2</sup>, and in any forfeiture case in which a regulatory agency asserts a claim of legal title<sup>3</sup> to property

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<sup>2</sup> The term "FIRREA forfeiture" means forfeiture of any property, real or personal, which: (1) is forfeitable under 18 U.S.C. § 981(a)(1)(D), or (2) is forfeitable under 18 U.S.C. § 981(a)(1)(C) as proceeds traceable to a federal financial institution fraud violation and the financial institution affected by the underlying violation has been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity, or where the regulatory agency has become successor to the interest of the failed financial institution pursuant to written agreement (e.g., under 12 U.S.C. § 1729(f)(1)-(4)). This definition includes forfeiture of property which is forfeitable under 18 U.S.C. § 981(a)(1)(C) or (D), regardless of whether forfeiture is actually sought or obtained under 18 U.S.C. § 981(a)(1)(C) or (D), or under some other statute, as long as such designation is made before the property is forfeited.

In administrative forfeitures under other statutory authority, e.g., 18 U.S.C. § 981(a)(1)(A) (forfeiture of property "involved in" money laundering offenses), the agency conducting the forfeiture shall determine whether any or all of the forfeited property is subject to disposition in accordance with section 5 (Disposition of Property in FIRREA Forfeitures) below. In judicial forfeitures under other statutory authority, that determination will be made by the United States Attorney's Office conducting the forfeiture (or, where appropriate, by the Fraud Section). The Department of Justice Executive Office for Asset Forfeiture or the Department of the Treasury Executive Office for Asset Forfeiture will resolve any challenges to these determinations by other entities.

<sup>3</sup> For example, a claim under 21 U.S.C. § 853(n), as incorporated by 18 U.S.C. § 982(b)(1)(B), requires proof of legal ownership exclusive of and superior to the offender's. While the Department of Justice is prepared to recognize such claims when advanced by regulatory agencies, sound policy requires resolution of such claims within the Executive Branch pursuant to the

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seized for forfeiture, that agency's claims of legal title will be determined within the Executive Branch, not through the filing of a claim in the forfeiture proceeding or the filing of a petition for remission.<sup>4</sup> The Department of Justice will assert the recognized legal claims advanced by the regulatory agencies against property subject to forfeiture as necessary to preserve any priority of the interest advanced by the regulatory agency from encroachment by other claims in the forfeiture action.<sup>5</sup> Thus, in all forfeiture cases, the Department of Justice and the Department of the Treasury will give appropriate deference to both the legal and equitable claims of the regulatory agencies and will seek to resolve those claims within the Executive Branch.

## 2. Custody of Seized Assets

Except as set forth in section 4 below, the United States Marshals Service (USMS), designated Treasury component, or other designated custodian of seized assets pending forfeiture shall maintain custody of and assume full responsibility for the preservation and management of all real and personal property (including cash)<sup>6</sup> restrained for FIRREA forfeiture during the pendency of any administrative or judicial forfeiture proceedings.

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<sup>3</sup>(...continued)  
provisions of section 853(h) and (i), as incorporated by 18 U.S.C. § 982(b)(1)(B) [and analogous provisions of other forfeiture laws] rather than through litigation under section 853(n).

<sup>4</sup> In non-FIRREA forfeiture cases, a regulatory agency may, if necessary, file a petition for remission or mitigation of forfeiture to seek recovery of a non-legal interest in seized property (e.g., as a non-owner victim under 28 C.F.R. § 9.8 (proposed)).

<sup>5</sup> Regulatory agencies are authorized to receive forfeited assets pursuant to 18 U.S.C. § 981(e)(1), 19 U.S.C. § 1616a(c)(1)(B)(i), or 21 U.S.C. § 881(e)(1)(A). In forfeiture cases other than FIRREA forfeiture cases (e.g., controlled substance violations), a regulatory agency may file a claim as part of a stipulated settlement pursuant to the Expedited Settlement Policies of the Department of Justice or the Department of the Treasury.

<sup>6</sup> Cash, as defined in the Attorney General's Guidelines on Seized and Forfeited Property (July 1990), means "currency, negotiable instruments or securities."

The policies and procedures established by the Department of Justice or the Department of the Treasury for pre-seizure planning will apply to FIRREA forfeiture cases as well as to all other forfeiture cases.<sup>7</sup> The pertinent regulatory agency<sup>8</sup> will participate in pre-seizure planning for FIRREA forfeitures. The United States Attorney's Office (or, where appropriate, the Fraud Section), the USMS or designated Treasury component, and the seizing agency<sup>9</sup> will consult with the pertinent regulatory agency in determining whether specific assets should be seized for forfeiture. All administrative forfeiture cases, regardless of the seizing agency involved, shall be coordinated closely with the United States Attorney in the judicial district in which any related criminal investigation or civil litigation is either ongoing or contemplated (or, where appropriate, with the Fraud Section).

Regardless of whether the regulatory agency restrains it or the seizing agency seizes it, all FIRREA forfeiture cash shall be tendered to the USMS for deposit into the Department of Justice Seized Asset Deposit Fund (SADF), or to the appropriate Department of the Treasury component for deposit into the relevant Department of Treasury seized asset fund, so that it can be invested in interest-bearing Treasury securities pending final disposition of the forfeiture action and receipt of necessary information and directions for disbursement. USMS or the appropriate Department of the Treasury component shall designate all such cash deposits as seizures related to FIRREA forfeitures.

### **3. Methods of Recovery and Enforcement**

Because a regulatory agency assumes obligations when a victim financial institution has been closed, priority consideration shall be given to maximizing recovery to the Government (including the regulatory agencies) when assessing

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<sup>7</sup> Some aspects of pre-seizure planning may be carried out post-seizure in some cases pursuant to Department of Justice policy.

<sup>8</sup> The "pertinent regulatory agency" will be determined at the pre-seizure planning stage by the U.S. Attorney responsible for pre-seizure planning (or, where appropriate, by the Fraud Section). In cases where pre-seizure planning takes place before the involvement of the United States Attorney or the Fraud Section, this determination will be made by the seizing agency in the first instance.

<sup>9</sup> For the purpose of this Memorandum of Understanding, the term "seizing agency(ies)" means the Federal Bureau of Investigation and the United States Secret Service.

optional methods of recovery and enforcement. The pre-seizure planning referred to in section 2 above should include consideration of the various methods of enforcement and recovery available to the Government and should coordinate the enforcement and recovery actions to be taken by the various agencies involved on behalf of the Government so as to maximize the potential for recovery and minimize the costs. Such coordination should avoid duplications of actions to recover the same property by different Government agencies such that one of the actions eventually will have to be discontinued or become unenforceable.

FIRREA forfeiture will normally be the most effective means of reaching proceeds traceable to the criminal activity. Moreover, use of other methods to recover traceable proceeds will sometimes preclude forfeiture of those proceeds, whereas use of forfeiture will not preclude use of other methods of recovery that reach a more general class of assets.<sup>10</sup>

In addition to forfeiture, however, consideration will be given to the use of other statutory and regulatory remedies available to the Government in FIRREA cases. For example, remedies available pursuant to the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3001 et seq., the Federal Credit Union Act, 12 U.S.C. § 1786(e), and the Federal Deposit Insurance Act, 12 U.S.C. §§ 1818(i)(4) and 1818(b)(6)(A), will be fully considered as they may be more effective than forfeiture in recouping losses in some cases.

When a FIRREA forfeiture has been commenced, regulatory agencies will not pursue alternative methods of recovery against the assets subject to the FIRREA forfeiture action. A FIRREA forfeiture will not be pursued, however, when an alternative method of recovery has resulted in an order or judgment in favor of the Government or a regulatory agency that is capable of execution only against assets otherwise subject to FIRREA forfeiture.

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<sup>10</sup> The set-off provision in 18 U.S.C. § 981(e)(4) requires that any future award of compensatory damages to a victim financial institution will be reduced by the value of the forfeited property transferred to it as restitution under section 981(e)(4). The set-off provision does not affect the disposition of forfeited proceeds. For example, the amount to be transferred to such institution as restitution to make it whole will be reduced by any amount of compensatory damages already obtained by the institution. Similarly, 18 U.S.C. § 3663(e)(2) requires that any future award of compensatory damages be reduced by the amount of any restitution paid to a victim under the Victim and Witness Protection Act.

4. Retention of Forfeited Property by Federal, State, and Local Agencies

No property or proceeds within the scope of footnote 2 of this Memorandum of Understanding will be transferred to State or local agencies. Seizing agencies may retain for official use from FIRREA forfeitures office and electronic communications equipment having an aggregate appraised value in any given investigation of less than One Thousand Dollars (\$1,000) and motor vehicles having an appraised value of less than Twenty-five Thousand Dollars (\$25,000) pursuant to the policies and procedures set forth in Part IV of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990). The seizing agencies shall not retain motor vehicles having an aggregate appraised value exceeding 5 percent of the total appraised value of all the assets seized or restrained for forfeiture in any investigation. If the foregoing 5 percent limitation produces results that any affected party deems inequitable, this limitation shall be subject to renegotiation based on actual experience under this section. The total appraised value of motor vehicles to be retained in any investigation shall not exceed \$100,000. Exceptions to these limitations and any other issues regarding the retention of motor vehicles for official use will be referred to and resolved by the designated central contact points of the agencies involved. Where the pertinent regulatory agency has any lien interest in any forfeited motor vehicle to be retained for official use by a seizing agency, that lien interest must be recognized and paid by the seizing agency. No other property or proceeds from FIRREA forfeitures may be retained for official use by a federal agency.

5. Disposition of Property in FIRREA Forfeitures

(a) The Department of Justice and the Department of the Treasury shall dispose of all FIRREA forfeiture proceeds in a manner consistent with the provisions of 18 U.S.C. § 981(e). Executive branch ruling officials in FIRREA forfeiture cases may decline to grant petitions filed by non-owner victims pursuant to [proposed] 28 C.F.R. § 9.8 when the ruling official determines that granting such petitions would result in insufficient proceeds remaining for satisfaction of regulatory agency interests pursuant to 18 U.S.C. § 981(e)(3), (6), or (7). Under these circumstances, so as to ensure that the ruling official possesses adequate information to make an informed decision, the relevant ruling official(s) shall notify those regulatory agencies of the pendency of such petitions, and the regulatory agencies shall submit to the relevant ruling official(s) all documentation supporting the regulatory agencies' interest in the FIRREA proceeds or property, and a brief but specific summary thereof. Should additional information be necessary, the ruling

official shall request in writing such information from the regulatory agencies. The regulatory agencies shall respond to the request in writing in a timely manner and provide the requested information. Upon receipt, the ruling official shall give due consideration to the information submitted by the regulatory agencies in reaching a decision under the applicable regulations.

(b) The regulatory agencies shall develop among themselves a mechanism for assuring that each of them is given adequate notice of every FIRREA forfeiture in which it has an interest. The regulatory agencies shall resolve any competing inter-agency interests and submit joint recommendations to the ruling officials for disposition of the proceeds of FIRREA forfeitures.

(c) Forfeited cash and cash proceeds from the sale of forfeited property shall be deposited in the Department of Justice Assets Forfeiture Fund administered by the USMS or in the Department of the Treasury Forfeiture Fund. Interest earnings allocable to the deposit of cash in the Funds will be transferred to the regulatory agencies at the end of each fiscal year in accordance with determinations to be made by the Executive Offices for Asset Forfeiture. The Department of Justice and the Department of the Treasury shall distribute forfeited cash and cash proceeds from the sale of forfeited property deposited in their respective forfeiture funds and shall direct the disposition of non-cash property in accordance with the following priorities, unless compelling circumstances dictate otherwise:

(i) First, as provided by any Order or Declaration of Forfeiture, or any order or declaration amending an Order or Declaration of Forfeiture, or any ruling granting a petition for remission or mitigation that specifies the disposition of assets or the distribution of proceeds including any expenses necessary to effect a ruling for remission or mitigation.

(ii) Second, to any federal agency (including any regulatory agency) that incurred expenses incident to the seizure, forfeiture, or sale of the property, as appropriate, and consistent with the decisions of a ruling official in granting remission or mitigation of the forfeiture of the property.

(iii) Third, to any regulatory agency that acted or is acting as receiver, conservator, liquidating agent, or corporate purchaser of the financial institution affected by the underlying violation, or to any regulatory agency that has become successor to the interest of the failed financial institution pursuant to written agreement, to reimburse the agency for payments to claimants or creditors of the institution and to reimburse the appropriate insurance fund for losses suffered by the fund as a

result of the receivership or liquidation pursuant to 18 U.S.C. § 981(e)(3) or (7).

(iv) Fourth, as provided by any outstanding order issued by any regulatory agency pursuant to 18 U.S.C. § 981(e)(4).

(v) Fifth, to the extent that there are any proceeds remaining in FIRREA forfeiture cases after disposition of such proceeds has been made in accordance with the provisions of 18 U.S.C. § 981(e)(3), (4), or (7), such proceeds may be distributed to any eligible victims pursuant to 18 U.S.C. § 981(e)(6), and then to the Department of Justice Assets Forfeiture Fund or the Department of the Treasury Forfeiture Fund. If a regulatory agency is entitled to a share of such net proceeds pursuant to the provisions of 18 U.S.C. § 981(e)(5), it shall make a request to obtain such a share. The decision to make such transfer pursuant to § 981(e)(5) shall be made by the official entitled to make transfer decisions for equitable sharing purposes in such cases under the Attorney General's Guidelines for Seized and Forfeited Property, or other applicable guidelines, or at such higher level as may be required by the Department of Justice Executive Office for Asset Forfeiture or by the Department of the Treasury Executive Office for Asset Forfeiture. Requests for such transfers shall be made in writing to the appropriate official. Decisions granting or denying such requests shall also be made in writing.

(d) Where a regulatory agency obtains forfeitable proceeds pursuant to 18 U.S.C. § 981(e)(5), the proceeds shall be authorized to be expended only for the purposes authorized under the statute governing the Department of Justice Assets Forfeiture Fund (28 U.S.C. § 524(c)) or the statute governing the Department of the Treasury Forfeiture Fund (31 U.S.C. § 9703). The regulatory agency shall not transfer any such proceeds to another entity except with the consent of the pertinent Executive Office for Asset Forfeiture.

## 6. Other Financial Institution Forfeiture Cases

(a) In cases involving the forfeiture of property which is forfeitable under the provisions of 18 U.S.C. § 981(a)(1)(C) but which are not classified under this Memorandum of Understanding as FIRREA forfeiture cases,<sup>11</sup> the USMS, designated Treasury

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<sup>11</sup> This provision applies to those cases involving a financial institution that has not been under the supervision of a regulatory agency in its receivership, conservatorship, liquidating agency, or corporate purchaser capacity, and no regulatory agency has become successor to the interest of a



component, or other designated custodian will maintain custody of seized assets pending forfeiture and will be responsible for their disposition after forfeiture to the same extent it would in forfeitures under other statutes. The net proceeds from such forfeitures will be deposited into the Department of Justice Assets Forfeiture Fund, the Department of the Treasury Forfeiture Fund, or into such other Funds as provided by statute or by separate memoranda of understanding between either department and other agencies or departments.

(b) In such cases, where a regulatory agency:

(i) is entitled to remission or mitigation of forfeited assets to it because of an interest which is recognizable under the regulations governing petitions for remission or mitigation of forfeiture or is eligible for such transfer pursuant to 18 U.S.C. § 981(e)(6), the decision to make such transfer shall be made in writing by the official entitled to make transfer decisions for remission or mitigation purposes in such cases under 28 CFR 9 or other regulations applicable to petitions for remission or mitigation of forfeiture, after receiving a request in writing for such transfer from a regulatory agency which contains the information required for such petitions under the regulations;

(ii) is eligible for transfer of forfeited assets to it pursuant to the provisions of 18 U.S.C. § 981(e)(1) or (5), the procedures set forth in subsections 5(c)(v) and 5(d) above for transfers pursuant to section 981(e)(5) shall apply to transfers pursuant to 18 U.S.C. § 981(e)(1) or (5).

## 7. Statistical Data on FIRREA Cases

(a) Reporting

In order to develop accurate statistical data on property recovered by the Government in FIRREA cases, the regulatory agencies will regularly provide to the Priority Programs Team ("PPT"), Executive Office for United States Attorneys, Department of Justice, information they possess on recoveries obtained through enforcement and liquidation activities, including civil penalties, restitution, fines, and forfeitures realized from criminal and civil litigation and administrative proceedings. The USMS and designated Treasury component shall periodically report to the PPT on the extent of the inventory (tangible property and cash) seized and tendered for FIRREA forfeiture.

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failed financial institution pursuant to written agreement.

(b) Statistical Data Sources

Through the Department of Justice Executive Office for Asset Forfeiture and the Department of the Treasury Executive Office for Asset Forfeiture, the Consolidated Asset Tracking System (CATS) will provide to the Executive Office for United States Attorneys statistical information about administrative and judicial forfeitures provided that:

(i) the forfeiture follows a seizure by one of the seizing agencies participating in CATS; and

(ii) the seizing agency or United States Attorney's Office which determines that it is a FIRREA forfeiture in accordance with footnote 2 above also ensures that the appropriate assets are identified in CATS as part of the FIRREA forfeiture.

Statistics on FIRREA forfeitures that do not originate as seizures by one of the CATS participating agencies will be provided by the other seizing agencies, the United States Attorneys' Offices, and the Fraud Section.

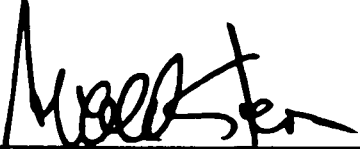
8. Effective Date and Retroactive Application by Consent


This Memorandum of Understanding shall become effective on August 1, 1994, and shall be applicable to forfeiture actions commenced on or after that date. Additionally, this Memorandum of Understanding may be applied by the consent of the affected parties to uncompleted forfeitures that are pending on that date.

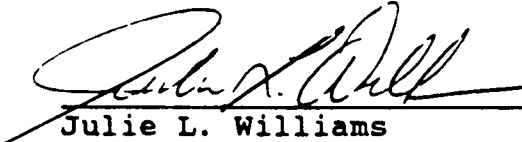
Application of this Memorandum of Understanding to forfeitures involving agencies that become signatories after the effective date shall be to forfeiture actions commenced on or after the date such agency signs this Memorandum of Understanding except that this Memorandum of Understanding may be applied by

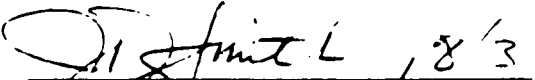
the consent of the affected parties to uncompleted forfeitures that are pending on that date.


Approved and hereby adopted by the undersigned.


  
Gerald M. Stern /Date 7/20/94  
Special Counsel for  
Financial Institution Fraud  
Department of Justice


  
Ronald K. Noble /Date 7/15/94  
Under Secretary for  
Enforcement  
Department of the  
Treasury

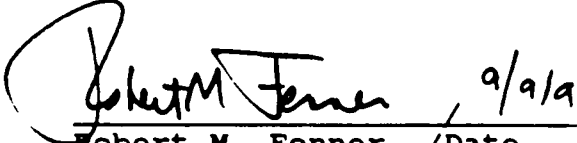
  
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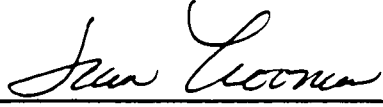
  
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