

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 312

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

Pursuant to House Rule 24-1, this document incorporates amendments that have been adopted prior to consideration of this measure by the House. It is a tool to show the amendments in context and is not to be used for the purpose of amendments.

AN ACT

RELATING TO FORFEITURE; REVISING DEFINITIONS; REVISING PROCEDURES RELATED TO FORFEITURE PROCEEDINGS; PROVIDING FOR DISTRIBUTION OF PROCEEDS FROM THE SALE OF FORFEITED OR ABANDONED PROPERTY; PROVIDING FOR DESTRUCTION OF CERTAIN SEIZED PROPERTY; REVISING PROCEDURES RELATED TO STORAGE, TRANSFER AND DESTRUCTION OF SEIZED PROPERTY; REVISING REPORTING REQUIREMENTS; MAKING AN APPROPRIATION; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 31-27-2 NMSA 1978 (being Laws 2002,

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Chapter 4, Section 2, as amended) is amended to read:

"31-27-2. PURPOSE OF ACT--APPLICABILITY--NO ADDITIONAL REMEDIES.--

A. The purposes of the Forfeiture Act are to:

(1) make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture;

(2) protect the constitutional rights of persons whose property is subject to forfeiture and of innocent owners holding interests in property subject to forfeiture;

(3) deter criminal activity by reducing its economic incentives;

(4) increase the pecuniary loss from criminal activity;

(5) protect against the wrongful forfeiture of property; and

(6) ensure that only criminal forfeiture is allowed in this state and only pursuant to state law.

B. The Forfeiture Act:

(1) applies to all seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply the Forfeiture Act in this state; and

(2) does not apply to:

(a) contraband, which is subject to seizure pursuant to applicable state laws, but is not subject

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to forfeiture pursuant to the Forfeiture Act;

(b) animals that are subject to seizure, impoundment, alteration, permanent removal from custody or destruction for animal welfare, public health and safety or compliance and enforcement purposes pursuant to applicable state and local laws;

(c) real property or personal property that is located on that real property that is subject to destruction pursuant to state and local laws to protect public health and safety; and

(d) forfeiture that results from a lien for charges or assessments that are provided for or fixed by state or local laws."

SECTION 2. Section 31-27-3 NMSA 1978 (being Laws 2002, Chapter 4, Section 3, as amended) is amended to read:

"31-27-3. DEFINITIONS.--As used in the Forfeiture Act:

A. "abandoned property":

(1) is not subject to the provisions of Section 29-1-14 NMSA 1978;

~~(1)~~ (2) means personal property the rights to which and the control of which an owner has intentionally relinquished; and

~~(2)~~ (3) does not mean real property;

B. "actual knowledge" means a direct and clear awareness of information, a fact or a condition;

C. "contraband" means goods that may not be lawfully imported, exported or possessed, including drugs that are listed in Schedule I, II, III, IV or V of the Controlled

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Substances Act and that are possessed without a valid prescription;

D. "conveyance" means a device used for transportation and:

(1) includes a motor vehicle, trailer, snowmobile, airplane, vessel and any equipment attached to the conveyance; but

(2) does not include property that is stolen or taken in violation of a law;

E. "conviction" or "convicted" means that a person has been found guilty of a crime in a trial court whether by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended;

F. "crime" means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

G. "instrumentality" means all property that is otherwise lawful to possess that is used in the furtherance or commission of an offense to which forfeiture applies and includes land, a building, a container, a conveyance, equipment, materials, a product, a computer, computer software, a telecommunications device, a firearm, ammunition, a tool, money, a security and a negotiable instrument and other devices used for exchange of property;

H. "law enforcement agency" means the employer of a

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law enforcement officer [~~that~~] who is authorized to seize or has seized property pursuant to the Forfeiture Act;

I. "law enforcement officer" [~~means~~]:

(1) means a state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes; but

(2) does not mean a correctional officer;

J. "owner" means a person who has a legal or equitable ownership interest in property;

K. "property" means tangible or intangible personal property or real property;

L. "property subject to forfeiture" means property or an instrumentality [~~described and~~] declared to be subject to forfeiture by the Forfeiture Act or a state law outside of the Forfeiture Act; and

M. "secured party" means a person with a security or other protected interest in property, whether the interest arose by mortgage, security agreement, lien, lease or otherwise; the purpose of which interest is to secure the payment of a debt or protect a potential debt owed to the secured party."

SECTION 3. Section 31-27-4 NMSA 1978 (being Laws 2002, Chapter 4, Section 4, as amended) is amended to read:

"31-27-4. FORFEITURE--CONVICTION REQUIRED--SEIZURE OF PROPERTY--WITH PROCESS--WITHOUT PROCESS.--

A. A person's property is subject to forfeiture pursuant to state law if:

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(1) the person was arrested for an offense to which forfeiture applies;

(2) the person is convicted by a criminal court of the offense; and

(3) the state establishes by clear and convincing evidence that the property is subject to forfeiture as provided in Subsection B of this section.

B. Following a person's conviction for an offense to which forfeiture applies, a court may order the person to forfeit:

(1) property the person acquired through commission of the offense;

(2) property directly traceable to property acquired through the commission of the offense; and

(3) any instrumentality the person used in the commission of the offense.

C. Nothing in this section shall prevent property from being forfeited by the terms of a plea agreement to a felony that is approved by a court or by other agreement of the parties to a criminal proceeding.

D. Subject to the provisions of Section 31-27-5 NMSA 1978, at any time, at the request of the state, a court may issue an ex parte preliminary order to seize property that is subject to forfeiture and for which forfeiture is sought and to provide for the custody of the property. The execution on

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the order to seize the property and the return of the property, if applicable, are subject to the Forfeiture Act and other applicable state laws. Before issuing an order pursuant to this subsection, the court shall make a determination that:

- (1) there is a substantial probability that:
 - (a) the property is subject to forfeiture;
 - (b) the state will prevail on the issue of forfeiture; and
 - (c) failure to enter the order will result in the property being destroyed, removed from the state or otherwise made unavailable for forfeiture; and
- (2) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship to the owner and other parties known to be claiming interests in the property.

E. Property subject to forfeiture may be seized at any time, without a prior court order, if:

- (1) the seizure is incident to a lawful arrest for a crime or a search lawfully conducted pursuant to a search warrant and the law enforcement officer making the arrest or executing the search has probable cause to believe the property is subject to forfeiture and that the subject of the arrest or search warrant is an owner of the property;
- (2) the property subject to seizure is the subject of a previous judgment in favor of the state; or
- (3) the law enforcement officer making the seizure has probable cause to believe the property is subject

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to forfeiture and that the delay occasioned by the need to obtain a court order would result in the removal or destruction of the property or otherwise frustrate the seizure."

SECTION 4. Section 31-27-4.1 NMSA 1978 (being Laws 2015, Chapter 152, Section 5) is amended to read:

"31-27-4.1. RECEIPT FOR SEIZED PROPERTY--REPLEVIN HEARING.--

A. When a law enforcement officer seizes property that is subject to forfeiture, the officer shall provide an itemized receipt to the person possessing the property or, in the absence of a person to whom the receipt could be given, shall leave the receipt in the place where the property was found, if possible.

B. Within five business days of the seizure, the law enforcement officer shall provide notice by personal service or first class mail to all owners of record of the seized property.

~~[B.]~~ C. Following the seizure of property, the defendant in the related criminal matter or another person who claims an interest in the seized property may, at any time before ~~[sixty days prior to a related criminal trial]~~ the one-hundred-twentieth day following the filing of the forfeiture action in court, claim an interest in the seized property by a motion ~~[to]~~ requesting the court to issue a writ of replevin. A motion filed pursuant to this section shall include facts to

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support the person's alleged interest in the seized property.

[G.] D. A person who makes a timely motion pursuant to this section shall have a right to a hearing on the motion before the resolution of any related criminal matter or forfeiture proceeding and within [~~thirty~~] sixty days of the date on which the motion is filed.

[D.] E. At least ten days before a hearing on a motion filed pursuant to this section, the state shall file an answer or responsive motion that shows probable cause for the seizure.

[E.] F. A court shall grant a claimant's motion if the court finds that:

(1) it is likely that the final judgment will require the state to return the property to the claimant;

(2) the property is not reasonably required to be held for investigatory reasons; or

(3) the property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding and the law enforcement agency did not make a prima facie showing that the property was stolen or proceeds from or is an instrumentality of a crime.

[F.] G. In its discretion, the court may order the return of funds or property sufficient for a defendant to obtain legal counsel but less than the total amount seized [~~and it may~~]. If the court makes such an order, it shall require an accounting. An accounting report of reasonable legal fees held before the resolution of the relevant criminal and forfeiture proceedings shall be held in camera. If the court finds in

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favor of the state in both the criminal and forfeiture proceedings, the court shall:

(1) 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

(2) issue an order on how the funds or property shall be distributed.

[G-] H. In lieu of ordering the issuance of [~~the~~] a writ of replevin, a court may order:

(1) the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in a related forfeiture action; or

(2) any other relief the court deems to be just; provided that the relief does not prejudice an innocent owner, including a secured lienholder."

SECTION 5. Section 31-27-5 NMSA 1978 (being Laws 2002, Chapter 4, Section 5, as amended) is amended to read:

"31-27-5. [~~COMPLAINT OF FORFEITURE~~] NOTICE OF INTENT TO FORFEIT--SERVICE OF PROCESS.--

A. Within thirty days of making a seizure of property or simultaneously upon filing a related criminal indictment, the state shall file a [~~complaint of ancillary forfeiture proceedings~~] notice of intent to forfeit or return the property to the person from whom it was seized. [~~A complaint of ancillary forfeiture proceedings~~] The notice shall

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include:

- (1) a description of the property seized;
- (2) the date and place of seizure of the property;
- (3) the name and address of the law enforcement agency making the seizure;
- (4) the specific statutory and factual grounds for the seizure;
- (5) whether the property was seized pursuant to an order of seizure, and if the property was seized without an order of seizure, an affidavit from a law enforcement officer stating the legal and factual grounds why an order of seizure was not required; and
- (6) in the [~~complaint caption and in the complaint~~] notice, the names of persons known to the state who may claim an interest in the property and the basis for each person's alleged interest.

B. The [~~complaint~~] notice shall be served upon the person from whom the property was seized, the person's attorney of record and all persons known or reasonably believed by the state to claim an interest in the property. A copy of the [~~complaint~~] notice shall also be published [~~at least three times in a newspaper of general circulation in the district of the court having jurisdiction or~~] on the sunshine portal until the forfeiture proceeding is resolved."

SECTION 6. Section 31-27-6 NMSA 1978 (being Laws 2002, Chapter 4, Section 6, as amended) is amended to read:

"31-27-6. FORFEITURE PROCEEDINGS--DETERMINATION--

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SUBSTITUTION OF PROPERTY--CONSTITUTIONALITY--APPEAL.--

A. A person who claims an interest in seized property shall file ~~[an answer to the complaint of forfeiture]~~ a response within thirty days of the date of service of the ~~[complaint]~~ notice of intent to forfeit. The ~~[answer]~~ response shall include facts to support the claimant's alleged interest in the property.

B. The district courts have jurisdiction over forfeiture proceedings, and venue for a forfeiture proceeding is in the same court in which venue lies for the criminal matter related to the seized property.

C. The forfeiture proceeding shall begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding that relates to a defendant's property before the same judge and jury, if applicable, and the court, and the jury, if applicable, may consider the forfeiture of property seized from other persons at the same time or in a later proceeding. If the criminal defendant in the related criminal matter is represented by the public defender department, the chief public defender or the district public defender may authorize department representation of the defendant in the forfeiture proceeding.

D. Discovery conducted in an ancillary forfeiture proceeding is subject to the rules of criminal procedure.

E. An ancillary forfeiture proceeding that relates

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to the forfeiture of property valued at less than twenty thousand dollars (\$20,000) shall be held before a judge only.

F. If the state fails to prove, by clear and convincing evidence, that a person whose property is alleged to be subject to forfeiture is an owner of the property:

(1) the forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless the owner's possession of the property is illegal; and

(2) the owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

G. The court shall enter a judgment of forfeiture and the seized property shall be forfeited to the state if the state proves by clear and convincing evidence that:

(1) the seized property is subject to forfeiture;

(2) the criminal prosecution of the owner of the seized property resulted in a conviction; and

(3) the value of the property to be forfeited does not unreasonably exceed:

(a) the pecuniary gain derived or sought to be derived by the crime;

(b) the pecuniary loss caused or sought to be caused by the crime; or

(c) the value of the convicted owner's interest in the property.

H. A court shall not accept a plea agreement or other arrangement by which a defendant contributes or donates

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property to a person, charity or other organization in full or partial fulfillment of responsibility established in the court's proceeding.

I. Following a person's conviction, the state may make a motion for forfeiture of substitute property owned by the person that is equal to but does not exceed the value of the property that is subject to forfeiture but that the state is unable to seize. The court shall order the forfeiture of substitute property only if the state proves by a preponderance of the evidence that the person intentionally transferred, sold or deposited property with a third party to avoid the court's jurisdiction and the forfeiture of the property.

J. A person is not jointly and severally liable for orders for forfeiture of another person's property. When ownership of property is unclear, a court may order each person to forfeit the person's property on a pro rata basis or by another means the court deems equitable.

K. ~~[At any time]~~ Within the time period for filing an appeal following the conclusion of a forfeiture proceeding, the person whose property was forfeited may petition the court to determine whether the forfeiture was unconstitutionally excessive pursuant to the state or federal constitution.

L. At a non-jury hearing on the petition, the petitioner has the burden of establishing by a preponderance of the evidence that the forfeiture was grossly disproportional to

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the seriousness of the criminal offense for which the person was convicted.

M. In determining whether the forfeiture is unconstitutionally excessive, the court may consider all relevant factors, including:

- (1) the seriousness of the criminal offense and its impact on the community, the duration of the criminal activity and the harm caused by the defendant;
- (2) the extent to which the defendant participated in the offense;
- (3) the extent to which the property was used in committing the offense;
- (4) the sentence imposed for the commission of the crime that relates to the property that is subject to forfeiture; and
- (5) whether the criminal offense was completed or attempted.

N. In determining the value of the property subject to forfeiture, the court may consider relevant factors, including the [←+] fair market value of the property

~~[(2) value of the property to the defendant, including hardship that the defendant will suffer if the forfeiture is realized; and~~

~~(3)] and the hardship from the loss of a primary residence, motor vehicle or other property to the defendant's family members or others if the property is forfeited, in addition to any non-monetary intrinsic value of property that would cause the defendant to suffer if the~~

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forfeiture is realized.

O. The court shall not consider the value of the property to the state when it determines whether the forfeiture of the property is constitutionally excessive.

P. A party to a forfeiture proceeding may appeal a district court's decision regarding the seizure, forfeiture and distribution of property [~~pursuant to the Forfeiture Act~~]."

SECTION 7. Section 31-27-7 NMSA 1978 (being Laws 2002, Chapter 4, Section 7, as amended) is amended to read:

"31-27-7. TITLE TO SEIZED PROPERTY--DISPOSITION OF FORFEITED PROPERTY AND ABANDONED PROPERTY--PROCEEDS.--

A. The state acquires provisional title to seized property at the time the property was used or acquired in connection with an offense that subjects the property to forfeiture. Provisional title authorizes the state to hold and protect the property. Title to the property shall vest with the state when a trier of fact renders a final forfeiture verdict and the title relates back to the time when the state acquired provisional title; provided that the title is not subject to claims by third parties that are adjudicated pursuant to the Forfeiture Act.

B. Unless possession of the property is illegal or a different disposition is specifically provided for by law and except as provided in this section, forfeited property that is not currency shall be delivered along with any abandoned

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property to the state treasurer or the state treasurer's designee for disposition at a public auction. Forfeited currency and all [~~sale~~] proceeds of the sale of forfeited or abandoned property shall be distributed by the state treasurer as follows:

(1) first, to reimburse the reasonable expenses related to the storage, protection and transfer of the property incurred by a law enforcement agency or the state treasurer;

(2) second, to pay any reasonable expenses incurred to dispose of the property by a law enforcement agency or the state treasurer; and

(3) third, any remaining balance shall be deposited in the general fund.

C. Proceeds from the sale of forfeited property received by the state from another jurisdiction shall be deposited in the general fund.

D. A law enforcement agency or public body that receives reimbursement pursuant to Subsection B of this section shall inform the state auditor of that fact at the time of the agency's or body's annual audit.

[D.] E. A forfeited property interest [~~forfeited to the state pursuant to the Forfeiture Act~~] is subject to the interest of a secured party unless, in the forfeiture proceeding, the state proves by clear and convincing evidence that the secured party had actual knowledge of the crime that relates to the seizure of the property.

F. Abandoned property shall be disposed of in the

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same manner as provided in Subsection B of this section.

G. Property subject to forfeiture that is in a law enforcement agency's possession becomes abandoned property and may be disposed of as such without a conviction if:

(1) there is no innocent owner; and

(2) the criminal prosecution of the owner of the seized property cannot proceed because for a period in excess of one year and one day:

(a) a bench warrant has been pending as a result of the defendant failing to appear; or

(b) the owner fugitates."

SECTION 8. Section 31-27-7.1 NMSA 1978 (being Laws 2015, Chapter 152, Section 9) is amended to read:

"31-27-7.1. INNOCENT OWNERS.--

A. The property of an innocent owner, as provided in this section, shall not be forfeited.

B. A person who claims to be an innocent owner has the burden of production to show that the person:

(1) holds a legal right, title or interest in the property seized; and

(2) held an ownership interest in the seized property at the time the illegal conduct that gave rise to the seizure of the property occurred or was a bona fide purchaser for fair value.

C. The state shall immediately return property to

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an established innocent owner who has an interest in homesteaded property, a motor vehicle valued at less than ten thousand dollars (\$10,000) or a conveyance that is encumbered by a security interest that was perfected pursuant to state law or that is subject to a lease or rental agreement, unless the secured party or lessor had actual knowledge of the criminal act upon which the forfeiture was based.

D. If a person establishes that the person is an innocent owner pursuant to Subsection B of this section [~~31-27-7.1 NMSA 1978~~] and the state pursues a forfeiture proceeding with respect to that person's property, other than property described in Subsection D of Section 31-27-7 NMSA 1978, to successfully forfeit the property, the state shall prove by clear and convincing evidence that the innocent owner had actual knowledge of the underlying crime giving rise to the forfeiture.

E. A person who acquired an ownership interest in property subject to forfeiture after the commission of a crime that gave rise to the forfeiture and who claims to be an innocent owner has the burden of production to show that the person has legal right, title or interest in the property seized under this section.

F. If a person establishes that the person is an innocent owner as provided in Subsection B of this section and the state pursues a forfeiture proceeding against the person's property, to successfully forfeit the property, the state shall prove by clear and convincing evidence that at the time the person acquired the property or an interest in the property,

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the person:

(1) had actual knowledge that the property was subject to forfeiture; or

(2) was not a bona fide purchaser who was without notice of any defect in title and who gave valuable consideration.

G. If the state fails to meet its burdens as provided in Subsections C and D of this section, the court shall find that the person is an innocent owner and shall order the state to relinquish all claims of title to the innocent owner's property without delay and the property shall be released without assessment of fees or costs.

H. Seized property that is firearms, ammunition or explosives subject to forfeiture under the protections of this section and that is not returned to an innocent owner Sfl→~~may~~ shall←Sfl be destroyed upon a motion by the law enforcement agency and an order of the court."

SECTION 9. Section 31-27-8 NMSA 1978 (being Laws 2002, Chapter 4, Section 8, as amended) is amended to read:

"31-27-8. SAFEKEEPING OF SEIZED PROPERTY PENDING DISPOSITION [~~SELLING OR RETAINING SEIZED PROPERTY PROHIBITED~~].--With regard to seized property in the state courts:

A. seized currency alleged to be subject to forfeiture shall be deposited with the clerk of the district

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court in an interest-bearing account;

B. seized property other than currency or real property, not required by federal or state law to be destroyed, shall be [~~(1)~~] placed under seal [~~and~~

~~(2) removed to~~] at a place designated by the district court; [~~or~~

~~(3) held in the custody of a law enforcement agency;~~]

C. seized property shall be kept by the custodian in a manner to protect it from theft or damage and, if ordered by the district court, insured against those risks; and

D. unless it is returned to an owner, a law enforcement agency shall [~~not retain~~] dispose of forfeited or abandoned property as provided in Section 31-27-7 NMSA 1978."

SECTION 10. Section 31-27-9 NMSA 1978 (being Laws 2015, Chapter 152, Section 11) is amended to read:

"31-27-9. REPORTING.--

A. Within sixty days following the conclusion of each fiscal year, every law enforcement agency shall prepare on a form approved by the department of public safety an annual report of the agency's seizures and forfeitures conducted pursuant to [~~the Forfeiture Act~~] applicable state law, and seizures and forfeitures conducted pursuant to federal forfeiture law, and the report shall include:

(1) the total number of seizures of currency and the total amount of currency seized in each seizure;

(2) the total number of seizures of property and the number and types of items seized in each seizure;

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(3) the market value of each item of property seized; ~~and~~

(4) the total number of occurrences of each class of crime that resulted in the agency's seizure of property;

(5) the costs incurred by the agency for storage, maintenance and transportation of seized property; and

(6) any proceeds received through equitable sharing, along with the federal case number and the final disposition of the case.

B. A law enforcement agency shall submit its annual reports to the department of public safety and to the district attorney's office in the agency's district. An agency that did not engage in seizure or forfeiture pursuant to the Forfeiture Act or local, state or federal forfeiture law ~~or both~~ shall report that fact in its annual report.

C. The department of public safety shall compile the reports submitted by each law enforcement agency and issue an aggregate report of all forfeitures in the state.

D. By ~~April~~ November 1 of each year, the department of public safety shall publish on its ~~web site~~ website the department's aggregate report and individual law enforcement agency reports submitted for the previous fiscal year."

SECTION 11. TEMPORARY PROVISION.--The New Mexico supreme

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court shall issue procedural court rules to implement the provisions of this act.

SECTION 12. TEMPORARY PROVISION.--Abandoned property in the possession of a law enforcement agency or the state treasurer on the effective date of this act shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

SECTION 13. APPLICABILITY.--The provisions of this act apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after the effective date of this act.

SECTION 14. EMERGENCY.--It is necessary for the public peace, health and safety that this act take effect immediately.