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MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (CRIMINAL TAX)

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SUBJECT: Federal Rules of Criminal Procedure - New Rule 32.2 Approved

This memorandum provides a review of new Rule 32.2 of the Federal Rules of Criminal Procedure approved by the U.S. Judicial Conference and sent for approval to the U.S. Supreme Court. The new rule creates a comprehensive guide for criminal forfeiture cases, replaces current Rules 7(c)(2), 31(e) and 32(d)(2), and strikes the forfeiture related provisions of Rule 38(e). Unless the Supreme Court disapproves, or Congress provides otherwise, the new rule is set to take effect on December 1, 1999.

Rule 32.2 was originally proposed by the Department of Justice in 1996 in response to the Supreme Court's decision in Libretti v. United States, 516 U.S. 29 (1995), which held that forfeiture is part of the sentence in a criminal case and not a substantive offense. The new rule codifies the notion that a criminal forfeiture judgment may include a personal money judgment. It also reserves to the ancillary proceeding any determination of the defendant's interest in the forfeited property *vis a vis* third parties, and it sets forth a procedure for amending the order of forfeiture to include later-discovered property traceable to the offense and any substitute assets. In addition, the rule sets forth procedures governing motion practice and discovery in the ancillary proceeding. The committee notes explained the rule and the reasoning behind its formulation. Much of the information provided herein is based on the committee's notes.

Subdivision (a) is derived from Rule 7(c)(2) and reflects the trend in case law interpreting the present rule requiring the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. The rule does not require that an itemized list of the property to be forfeited appear in the indictment or information, nor must a substantive allegation in which the property, or the defendant's interest in such property, be described in detail.

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Subdivision (b) replaces Rule 31(e) which provides a jury in a criminal case must return a special verdict “as to the extent of the interest or property subject to forfeiture.” Under the new rule, an ancillary proceeding becomes the forum for determining the extent of the defendant’s forfeitable interest in the property. The court is now able to conduct a proceeding in which all third party claimants can participate and ensure the property forfeited is only that which actually belongs to the defendant. Thus, if third parties assert interests in all or part of the property, those interests may be adjudicated at one time in the ancillary proceeding. Consequently, this process enables the court to simply order the forfeiture of whatever interest the defendant may have in the property, without having to determine exactly what that interest is.

Subdivision (b)(1) requires the court, as soon as practicable after the verdict or finding of guilt, to determine whether the property is subject to forfeiture in accordance with the applicable statute; e.g., whether the property represents the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. Subdivision (b)(1) recognizes there are different kinds of forfeiture judgments in criminal cases. One type is a personal judgment for a sum of money and another is a judgment forfeiting specific property. If forfeiture of specific property is sought, the court determines whether the government has established the requisite nexus between the property and the offense. If, however, a personal money judgment is sought, the court determines what amount the defendant will be ordered to pay.

Subdivision (b)(2) works in conjunction with (b)(1) by providing it is not necessary for the court to determine, during the defendant’s trial, what interest the defendant may have in the property. Instead, if the court finds the property forfeitable, the court promptly enters a preliminary order of forfeiture. The preliminary order takes into account potential third party interests by deferring any determination, if a timely claim is filed, of those interests until an ancillary proceeding is held as specified in subdivision (c).

Subdivision (b)(3) replaces Rule 32(d)(2) and provides, “[t]he entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating or disposing of the property; and to commence [ancillary] proceedings that comply with any statutes governing third-party rights.” In addition, if no third party files a claim, the court at the time of sentencing, enters a final order forfeiting the property in accordance with subdivision (c)(2). Further, the order of forfeiture becomes final as to the defendant at the time of sentencing or at any time prior to sentencing if the defendant consents, regardless of any third party claims. This process provides for possible postponements or delays in sentencing and results in the order becoming immediately appealable. If a third party files a claim, the order remains subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding. In addition, the court may place reasonable conditions on the order to preserve the property’s value pending appeal.

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In subdivision (b)(4), either party is granted the right to request, in a trial by jury, the jury make the determination of whether any property is subject to forfeiture. This determination takes place in a bifurcated proceeding, after the jury's guilty verdict. The jury hears evidence and returns a special verdict only with respect to whether the government established the requisite nexus between the offense and the property to be forfeited. The jury is not involved, however, in determining whether the defendant had an interest in the property to be forfeited as that is a matter for the ancillary proceeding.

In general, subdivision (c) sets forth a set of rules governing the conduct of the ancillary proceeding. Subdivision (c)(1) states the court shall conduct an ancillary proceeding if a third party files a petition claiming an interest in the property to be forfeited. No ancillary proceeding is required, however, to the extent the order of forfeiture consists of a money judgment and not an order directed at specific assets in which a third party may have an interest. This subsection also describes several fundamental areas in which procedures analogous to those in the Federal Rules of Civil Procedure may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim pursuant to a motion for summary judgment, and appealing a final disposition of a claim. Additionally, before conducting a hearing on any third party petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines discovery is necessary or desirable to resolve factual issues.

Subdivision (c)(2) provides for the entry of a final order of forfeiture at the conclusion of the ancillary proceeding. Under this provision, if no third party files a claim of interest in the ancillary proceeding, the court must nonetheless determine if the defendant (or any one defendant in a multiple defendant case) had an interest in the property and if so, the preliminary order becomes the final order of forfeiture. In making the determination, the court may rely upon reasonable inferences. Further, criminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense. Consequently, the conviction of any one defendant is sufficient to support the forfeiture of the entire proceeds of the offense even if the defendants divided the money among themselves. The rule makes clear untimely petitions claiming an interest in the property to be forfeited will not be considered.

Subdivision (c)(3) informs third parties, if multiple third party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions unless, the court determines there is no just reason for delay. As subsection (c)(4) recognizes the ancillary proceeding is not part of sentencing, the Federal Rules of Evidence apply in all cases.

Subdivision (d) replaces the forfeiture provisions of Rule 38(c) and provides the court may stay an order of forfeiture pending a defendant's appeal from a conviction or forfeiture order. The purpose of this provision is to ensure the property remains intact and unencumbered so it may be returned to the defendant in the event the defendant

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prevails on appeal. Further, the subdivision notes the district court is not divested of jurisdiction over the ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appellate court considers the defendant's appeal.

Subdivision (d) also provides, if the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the defendant's appeal is decided, unless the defendant consents in writing or on the record. Thus, the court's determination is final only with respect to the government's alleged interest. Should the defendant prevail on appeal, he or she then recovers the property as if no conviction or forfeiture ever occurred. If the defendant does not prevail on appeal, then the order of forfeiture is affirmed and any amendment to the forfeiture order in favor of the third party becomes effective.

Finally, subdivision (e) covers subsequently located and substitute property. Specifically, subdivision (e)(1) makes clear the court retains jurisdiction to amend the order of forfeiture at any time to include subsequently located but previously unidentified property originally included in the forfeiture order and any substitute property. Subdivision (e)(2) provides, if the government establishes the property is subject to forfeiture under subdivision (e)(1), the court enters an order of forfeiture or amends an existing preliminary or final order to include such property. Also, it allows third parties, if they filed a petition, to contest the forfeiture in an ancillary proceeding. Subdivision (e)(3) makes clear the right to a bifurcated jury trial to determine whether the government has established the requisite nexus as in subdivision (b)(4), is inapplicable in cases of newly discovered or substitute assets.