Asset forfeiture-1.

Sponsored by: Joint Judiciary Interim Committee

A BILL

for

AN ACT relating to the Wyoming Controlled Substances Act; amending procedures and requirements for forfeiting and seizing property; providing definitions; conforming provisions; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 35-7-1049 is repealed and recreated to read:

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STAFF COMMENT
This draft shows changes to existing law in strike and underline. If introduced, the bill will show the entire section as newly created

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35-7-1049. Forfeitures and seizures generally; property subject to forfeiture.

(a) The following are subject to forfeiture:

(i) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of this act;

(ii) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substances in violation of this act;

(iii) All property which is used as a container for property described in paragraph (i) or (ii) of this subsection;
(iv) All books, records, and research products and materials, including formulas, microfilm, tapes, and data, which are used, or intended for use, in violation of this act;

(v) All conveyances including aircraft, vehicles or vessels, knowingly used or intended for use to transport or in any manner to knowingly facilitate the transportation for the sale or receipt of property described in paragraph (a)(i) or (ii) of this section may be seized by the commissioner and forfeited to the state pursuant to subsection (e) of this section:

(A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or corporate officer is a consenting party or privy to a violation of this act;

(B) No conveyance is subject to forfeiture under this section by reason of any act committed without the knowledge or consent of the owner;
(C) A conveyance is not subject to forfeiture for a violation of W.S. 35-7-1031(c);

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act.

(vi) All "drug paraphernalia" as defined by W.S. 35-7-1002(a)(xxvii);

(vii) All buildings knowingly used or intended for use to store, manufacture or distribute property described under paragraphs (a)(i) or (ii) of this section if the owner has knowledge of or gives consent to the act of violation. A forfeiture of property encumbered by a bona fide security interest is subject to the interest of the secured party if he did not have knowledge of or give consent to the act;

(viii) Any property or other thing of pecuniary value furnished in exchange for a controlled substance in
violation of this act including any proceeds, assets or other property of any kind traceable to the exchange and any money, securities or other negotiable instruments used to facilitate a violation of this act. Property used or furnished without the consent or knowledge of the owner is not forfeitable under this section to the extent of his interest.

(b) Property subject to forfeiture under this act may be seized by any law enforcement officer of the state upon process issued by any district court or district court commissioner having jurisdiction over the property. Seizure without process may be made if:

(i) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(ii) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal, injunction or forfeiture proceeding based upon this act;
(iii) The board or commissioner has probable cause to believe that the property was used or is intended to be used in violation of this act. Prior to property being seized by any law enforcement officer of the state pursuant to this paragraph, the following procedures shall be followed:

(A) The law enforcement officer shall communicate with the commissioner or the commissioner's designee regarding the facts and circumstances involving the property to be seized. Based upon the information provided, the commissioner or his designee shall determine whether probable cause exists that the property identified by the law enforcement officer was used or was intended to be used in a violation of this act;

(B) If the commissioner or the commissioner's designee determines there is probable cause to seize the property, he shall direct the officer to seize the property. At the time of the seizure, the person or persons from whom the property was seized shall be given written notice that the seized property is subject to forfeiture. The notice shall include an advisement that:
(I) The person has the right to attend the hearing required by subsection (c) of this section, but shall not have the right to present evidence or cross examine any witness;

(II) The person will be given at least fifteen (15) days' notice of the time, date and location of the hearing; and

(III) The purpose of the hearing is for a court to determine whether there was probable cause to believe that the property was used or was intended to be used in violation of this act.

(C) If the commissioner or his designee determines there is no probable cause to seize the identified property, he shall not authorize the seizure of any property based upon that event or occurrence and the officer shall not seize any property.

(c) Within thirty (30) days of the seizure, a probable cause hearing shall be held in circuit court, in
the county where the property was seized to determine whether probable cause existed to seize the property pursuant to paragraph (b)(iii) of this section. The court may extend the time for the hearing by an additional thirty (30) days. One or more of the law enforcement officers who made the seizure shall testify under oath regarding the facts and circumstances which established probable cause to seize the property. The hearing shall be recorded by sound, sound-and-visual, or stenographic means. If the court determines, based upon the evidence presented, that at the time of the seizure:

(i) Probable cause did not exist to seize the property, the court shall order the property to be immediately returned to its lawful owner or one of the persons from whom it was seized; or

(ii) Probable cause existed to seize the property, the court shall order that the commissioner may file an action for the forfeiture of the property.

(e)(d) Prompt institution of proceedings. In the event of seizure pursuant to subsection (b) of this
section, no proceedings under subsection (d) action for the
forfeiture of property pursuant to this section of this
section shall be instituted promptly instituted unless it
is brought within one (1) year from the date of seizure.
All state forfeiture proceedings or actions shall be
brought by the commissioner or the commissioner's designee.

(d) (e) Seized property not repleviable; sealing or
removal of seized property. — Property taken or detained
under this section shall not be subject to replevin, but is
deemed to be in the custody of the commissioner subject
only to the orders and decrees of the court having
jurisdiction over the forfeiture proceedings. When property
is seized under this act, the commissioner may; shall place
the property under seal or otherwise assure the property is
maintained under conditions reasonably necessary to
preserve the property's value or may sell the property for
value and hold the proceeds thereof until the forfeiture
proceedings have become final as to all parties and all
rights of appeal have been exhausted. In order to preserve
the property, the commissioner may deposit funds into a
demand deposit account at an institution located within the
state of Wyoming.
(i) Place the property under seal;

(ii) Remove the property to a place designated by him; or

(iii) Require the board to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(f) Before a forfeiture action may be filed and no later than sixty (60) days from the date that property is seized pursuant to subsection (b) of this section or the date of entry of an order finding probable cause pursuant to subsection (c) of this section, whichever is later, the commissioner shall serve a notice of seizure and intended forfeiture upon any third party, ascertained after reasonably diligent inquiry, known to have an interest in the property. The notice shall describe the date and location of the seizure, the property seized and the statutory basis for the forfeiture. The notice shall be served in accordance with the Wyoming Rules of Civil Procedure except that service by publication shall not be
required. The notice requirements of this subsection shall not apply to the party or parties from whom the property was directly seized.

(g) A court shall not issue any forfeiture order unless the notice under paragraph (f) of this section has been accomplished to the satisfaction of the court.

(h) After the commissioner is authorized by the court or by this section to file a forfeiture action, the Wyoming Rules of Civil Procedure shall govern the forfeiture action unless in conflict with subsections (j) through (n) of this section.

(j) The complaint to seek forfeiture of property under this section shall describe with reasonable particularity:

(i) The approximate value of the property;

(ii) The facts giving rise to the seizure or custody;
(iii) The name and position of the person making the seizure or taking the property into custody;

(iv) The name and address of the owners of the property or those persons who were in possession of the property at the time of the seizure; and

(v) The manner in which all parties reasonably known to have an interest in the property seized were served in accordance with subsection (f) of this section.

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STAFF COMMENT

The requirements of paragraphs (j)(i) through (j)(v) were taken from W.S. 7-2-105(a)(i) through (a)(v) in an effort to have uniform provisions in the two statutes, where appropriate Subsection (j)(v) was amended to comply with the new requirements of subsection (f).

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(k) In the action for the forfeiture of property, the burden of proof shall be on the commissioner to establish by clear and convincing evidence the extent to which, if any, the property is subject to forfeiture.
(m) Subsequent to the commissioner carrying his burden of proof pursuant to subsection (k) of this section, an interest in property belonging to a third party shall not be forfeited to the extent the third party establishes he has a perfected lien in the property, proves by a preponderance of evidence that he has a perfected priority interest in the property or that he is an innocent owner.

For purposes of this subsection:

(i) With respect to a property interest in existence at the time the violation of this act took place, "innocent owner" means a person who held an interest in the property and neither had knowledge of nor consented to the violation;
(ii) With respect to a property interest acquired after the violation of this act has taken place, "innocent owner" means a person who, at the time that person acquired the interest in the property:

(A) Was a bona fide purchaser or seller for value of goods or services or a holder of a bona fide security interest; and

(B) Did not know and was reasonably without cause to believe the property was subject to forfeiture.

(n) The right to trial by jury applies to forfeiture proceedings under this section.

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STAFF COMMENT

Compare W.S. 7-2-105(d), which provides all issues are decided by the judge rather than a jury.

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(о) A person's interest in property is not subject to forfeiture to the extent that the forfeiture is grossly
disproportionate to the gravity of the offense giving rise to the forfeiture. The commissioner shall have the burden of demonstrating by a preponderance of the evidence that a forfeiture is not grossly disproportionate. Proportionality shall be decided by the court as follows:

(i) In determining whether a forfeiture is grossly disproportionate, the court shall consider:

(A) The extent to which the property was used or intended to be used in executing the underlying offense;

(B) The value of the property, including both its fair market and subjective value;

(C) The actions of the person involved in the activity giving rise to the forfeiture proceedings;

(D) The severity of the criminal sanctions associated with the actions of the person;
(E) Whether the property constitutes the person's lawful livelihood or means of earning a living;

(F) Whether the offense or attempted offense has severe collateral consequences; and

(G) Any other factors the court deems necessary and relevant.

(ii) If the court finds the forfeiture is grossly disproportionate to the offense, it shall reduce or eliminate the forfeiture as it finds appropriate.

The proportionality standard provided in subsection (o) is from the United States Supreme Court case of U.S. v. Bajakajian, 524 U.S. 321 (1998). The Attorney General provided factors to guide the courts determination of proportionality. The committee may wish to compare subsection (o) with W.S. 7-2-105(m) in considering the proportionality issue. W.S. 7-2-105(m) provides: "Upon the application of any claimant, the court may fix the value of a forfeitable interest in the seized property and permit the claimant to redeem the property upon the payment of a sum equal to the value, which sum shall be disposed of as would the proceeds of the sale of the property under a judgment of forfeiture."
(p) The proceedings and judgment of forfeiture shall be in rem and shall be against the property itself.

(e)-(g) When property is forfeited under this act, the commissioner may:

(i) Retain it for official use; in which case it shall become the property of the state of Wyoming;

(ii) Sell any such property which is not required to be destroyed by law and which is not harmful to the public. The proceeds shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs;

(iii) Require the board to take custody of the property and remove it for disposition in accordance with law;

(v) Transfer ownership and control of the property to any municipality or political subdivision of the state for its official use; or

(vi) Authorize any law enforcement officer to apply to the district court with jurisdiction for an order providing for destruction of the contraband controlled substances or paraphernalia if no longer necessary for evidentiary purposes, provided, however, that a district court order shall not be necessary for the division of criminal investigation to destroy quantities of contraband controlled substances after the division has tested random samples. The division of criminal investigation shall adopt rules necessary to operate a program to destroy bulk quantities of contraband controlled substances, which shall include:

(A) The photographing and videotaping of the entire bulk amount of seized contraband controlled substances to maintain its evidentiary value and to create exhibits for use in legal proceedings;
(B) The extraction of ten (10) random samples from the entire bulk amount of seized contraband controlled substances for laboratory analysis;

(C) A weighing on properly calibrated scales of both the bulk amount of seized contraband controlled substances and the representative samples;

(D) The additional retention of:

(I) Five (5) ounces of organic material if the controlled substance is marihuana or a substance of similar organic composition;

(II) Five (5) grams of a controlled substance in powdered or crystalline form;

(III) Five-tenths (0.5) of a gram of a controlled substance in liquid form;

(IV) An amount sufficient for testing by experts shall be made available from the additionally
retained sample for the purpose of defending criminal
charges arising from the possession, use or sale of the
controlled substance.

(E) After the testing and retention of samples specified in this paragraph, the commissioner or
his designee may order the destruction of the bulk amount
of the seized contraband controlled substance in excess of the representative sample and the additional retained samples of the seized contraband controlled substance;

(F) Once the representative samples and the additional retained samples of the contraband controlled substance are no longer necessary for evidentiary purposes, any law enforcement officer, upon authorization from the commissioner, may apply to the district court with jurisdiction for an order providing for the destruction of the remaining contraband controlled substance.

(f)(r) Any controlled substance listed in Schedules I through V that is possessed, transferred, sold or offered for sale in violation of this act is contraband and shall be seized and summarily forfeited to the state. Any
controlled substance listed in Schedules I through V which is seized or comes into possession of the state and the owner is unknown, is contraband and shall be summarily forfeited to the state.

(g) Seizures and summary forfeiture of certain species of plants generally.—Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this act, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the state.

(h) Authority for seizure and forfeiture of plants.—The failure, upon demand by the commissioner, or his authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.
Any law enforcement agency of this state may accept, receive, dispose of and expend the property or proceeds from any property forfeited to the federal government or any state and allocated to the agency by the United States attorney general pursuant to 21 U.S.C. 881(e) or any law of another state. The property or proceeds shall be in addition to funds appropriated to the law enforcement agency by the state legislature or any unit of local government. The property or proceeds may be credited to any lawfully created fund or account designated to receive proceeds of forfeitures.

Any law enforcement agency of this state which receives property or proceeds pursuant to subsection (j) of this section shall report to the attorney general on forms to be prescribed by the attorney general:

(i) The receipt of property or proceeds within thirty (30) days from the receipt; and

(ii) The disposition or expenditure of any property or proceeds within ninety (90) days from the disposition or expenditure.
(m)(y) The attorney general shall submit a biennial and annual report to the joint appropriations interim committee and the joint judiciary interim committee not later than August 1 concerning recipients and the amount of property and proceeds accepted, received, disposed of or expended during the prior calendar year under subsection (j) of this section by law enforcement agencies, other than property subject to summary forfeiture.

(n)(z) No law enforcement agency of this state shall accept property or proceeds pursuant to subsection (j)(u) of this section if the tender of the property or proceeds is conditioned upon the state law enforcement agency's adoption of federal law enforcement practices and procedure.

Section 2. This act shall apply to seizures of property which occur after June 30, 2016 and to any forfeitures proceedings related to property seized after June 30, 2016.

Section 3. This act is effective July 1, 2016.
(END)