

SESSION OF 2018

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2459**

As Amended by House Committee on Judiciary

**Brief\***

HB 2459, as amended, would create and amend law related to civil asset forfeiture, as follows.

**Creation of Kansas Asset Seizure and Forfeiture Repository and Related Reporting Requirements**

The bill would create a new section within the Kansas Standard Asset Seizure and Forfeiture Act (SASFA) requiring the Kansas Bureau of Investigation (KBI) to establish, on or before July 1, 2019, the Kansas Asset Seizure and Forfeiture Repository (Repository), which would gather information concerning each seizure for forfeiture made by a seizing agency pursuant to SASFA. The information gathered would include, but not be limited to:

- The name of the seizing agency or name of the lead agency if part of a multi-jurisdictional task force and any applicable agency or district court case numbers for the seizure;
- The county where and date and time the seizure occurred, a description of the initiating law enforcement activity leading to the seizure, and the specific location where the seizure occurred;
- Descriptions of the type of property and contraband seized and the estimated values of the property and contraband;

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Whether criminal charges were filed for an offense related to the forfeiture and court and case number information of such charges;
- A description of the final disposition of the forfeiture action, including any claim or exemption asserted under SASFA;
- Whether the forfeiture was transferred to the federal government for disposition;
- Total cost of the forfeiture action, including attorney fees; and
- Total amount of proceeds from the forfeiture action, specifying the amount received by the seizing agency and the amount received by any other agency or person.

The bill would require the KBI to maintain the Repository and an associated public website and would require the KBI to promulgate rules and regulations before July 1, 2019, to implement the new section.

On and after July 1, 2019, each seizing agency would be required to report the specified information concerning each seizure for forfeiture to the Repository, with the prosecuting attorney submitting information to the seizing agency within 30 days after the final disposition of the forfeiture, and the seizing agency submitting the required information to the Repository within 60 days after the final disposition of the forfeiture.

On or before February 1, beginning in 2020, each law enforcement agency (agency) would be required to annually compile and submit a forfeiture fund report to the Repository. If the agency is a state agency, the report would be required to include the agency's state forfeiture fund balance on January 1 and December 31 of the preceding calendar year and the total amount of the deposits and a listing, by

category, of expenditures during the preceding calendar year. If the agency is a city or county agency, the report would be required to include the agency's special law enforcement trust fund balance on January 1 and December 31 of the preceding calendar year and the total amount of deposits and a listing, by category, of expenditures during the preceding calendar year.

The reports for each agency would be required to separate and account for deposits and expenditures from proceeds from forfeiture credited to the agency's fund pursuant to the SASFA section governing disposition of forfeited property, deposits and expenditures from proceeds from forfeiture actions under federal law, and amounts held by the agency related to pending forfeiture actions under SASFA.

On March 1 of each year, beginning in 2020, the KBI would be required to determine if each agency's financial report matches the agency's seizing report. If the agency has not submitted the required financial report, or if the agency's financial report does not substantially match the agency's seizing report, the KBI would be required to notify the agency of the difference in reports. If the agency does not correct the reporting error within 30 days, the KBI would be required to send the agency and the county or district attorney for the county where the agency is located a certified letter notifying the agency it is out of compliance. Upon receipt of the letter, no forfeiture proceedings could be filed on property seized by the agency. Once the agency has achieved compliance with the reporting requirements, the KBI would be required to send the agency and the county or district attorney a certified letter notifying the agency it is in compliance and forfeiture proceeding filings may continue under SASFA. Each year, on or before April 15, the KBI would be required to report to the Legislature any agencies in the state that have failed to come into compliance with the reporting requirements for the agencies' funds.

The bill would amend the Kansas Open Records Act to provide that, except for requests of summary data compiled from information submitted by multiple agencies or as otherwise provided by law, requests for records submitted to the Repository shall be directed to the agency from which the records originated.

### **Amendments to Existing SASFA Sections**

The bill would amend multiple sections of SASFA, as follows.

#### ***Exemptions***

The statute governing exemptions would be amended to require a common carrier be an actual consenting party or privy to a violation of SASFA before the carrier's conveyance could be subject to forfeiture, rather than allowing forfeiture upon the appearance of consent or being privy to a violation. This statute also would be amended to clarify a reference to owners or interest holders who acquire the property after the conduct giving rise to forfeiture.

#### ***Seizure of Property: County or District Attorney and Attorney General Requirements***

The bill would amend the statute governing the seizure of property to clarify that the county or district attorney has 14 days to accept or decline a written request for forfeiture from a local or state agency. For those cases where the county or district attorney approves another attorney to represent a local agency in the forfeiture proceeding, the bill would prohibit the county or district attorney from approving an attorney with whom the county or district attorney has a direct or indirect financial interest. Similarly, for state agencies, the attorney general would be prohibited from approving an attorney with whom the attorney general has a direct or indirect financial interest. A county or district attorney and the

attorney general would be prohibited from requesting or receiving any referral fee or personal financial benefit from any proceeding under the SASFA.

### ***Commencement of Forfeiture Proceedings: Service of Notice***

The statute governing commencement of forfeiture proceedings would be amended by specifying that the various types of service of the required notice are to be accomplished and are effective pursuant to the Code of Civil Procedure. The bill would extend the circumstances under which service by publication is allowed to include where service by certified mail was attempted but was not effective.

The bill would require an affidavit describing the essential facts supporting forfeiture and copies of Judicial Council forms for petitioning for recognition of an exemption and for making a claim be included with the notice.

### ***Recognition of Exemption***

The statute governing recognition of exemption would be amended to require, rather than allow, the plaintiff's attorney to make an opportunity to file a petition for recognition of exemption available, and to require the plaintiff's attorney to acknowledge this opportunity in the notice of pending forfeiture.

The time provided for an owner of or interested holder in the property to file a claim or a petition for recognition of exemption would be extended from 30 days to 60 days, and the bill would state that such claims or petitions must "substantially comply" with the requirements for claims. The time for the plaintiff's attorney to provide the seizing agency and the petitioning party with a written recognition of exemption and statement of nonexempt interests in response to each petitioning party would be reduced from 120 days to

90 days after the effective date of the notice of pending forfeiture.

The time provided for an owner of or interest holder in any property declared nonexempt to file a claim would be extended from 30 days to 60 days after the effective date of the notice of the recognition of exemptions and statement of nonexempt interests.

The time before the recognition of exemption and statement of nonexempt interests becomes final if no claims are filed would be extended from 30 days to 60 days, in keeping with the time extensions described above.

### ***Claims; In Rem Proceedings***

The sections governing claims and *in rem* proceedings would be amended to extend the time provided for an owner or interest holder in property to file a claim or answer from 30 days to 60 days. Attestation requirements that the claim or answer and all supporting documents be in affidavit form, signed under oath, and sworn to by the affiant would be removed, leaving only the requirement that the claim or answer be signed by the claimant under penalty of perjury. A possible penalty of making a false writing would be removed.

The bill would remove requirements that the claim or answer set forth the date, identity of the transferor, and a detailed description of the circumstances of the claimant's acquisition of an interest in the property; the specific provision of SASFA relied on in asserting the property is not subject to forfeiture; all essential facts supporting each assertion; and the specific relief sought. It would add a requirement that the claim or answer include a detailed description of when and how the claimant obtained an interest in the property.

The bill would specify that substantial compliance with the claim or answer requirements shall be deemed sufficient and add a provision allowing the right against self-

incrimination to be asserted in a claim or answer. If the right is asserted, the court may, at its discretion, draw an adverse inference from the assertion against the claimant, but the adverse inference could not, by itself, be the basis of a judgment against the claimant.

The bill would further amend the section governing claims by removing a prohibition against granting an extension of time to file a claim except for good cause.

The bill would further amend the section governing *in rem* proceedings to remove provisions governing discovery and a requirement the court hold a hearing on the claim within 60 days after service of the petition.

#### ***Time to File a Claim in In Personam Proceedings***

The statute governing *in personam* proceedings would be amended to extend the time in which an owner of or interest holder in property that has been forfeited and whose claim is not precluded may file a claim from 30 days to 60 days after initial notice of pending forfeiture or after notice following the entry of an order of forfeiture, whichever is earlier.

#### ***Rebuttable Presumptions and Elements***

The bill would amend the section governing judicial proceedings to remove a rebuttable presumption that certain items found in close proximity to contraband or an instrumentality of conduct giving rise to forfeiture are the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct.

A rebuttable presumption that property is subject to forfeiture if the seizing agency establishes three elements would be amended to remove the presumption and instead state that the totality of the circumstances shall determine if

the property of a person is subject to seizure, while the existing elements would be changed to non-exclusive factors to be considered and a fourth factor (proximity to contraband or an instrumentality giving rise to forfeiture) would be added.

The bill would remove a rebuttable presumption that property in or upon which controlled substances are located at the time of seizure was being used or intended for use to facilitate an act giving rise to forfeiture.

A provision preventing a defendant convicted in a criminal proceeding from denying the essential allegations of the criminal offense in a later forfeiture proceeding would be changed to prevent the defendant from denying the elements of the criminal offense.

A provision allowing only the plaintiff's attorney to file a motion to stay discovery against the criminal defendant and seizing agency in civil proceedings during a related criminal proceeding would be amended to remove the language limiting filing to the plaintiff's attorney.

### ***Disposition of Forfeited Property***

The statute governing disposition of forfeited property would be amended to specify an exclusive list of 12 special, additional law enforcement purposes for which proceeds from forfeiture may be used. The bill would require moneys in the funds containing forfeiture proceeds to be separated and accounted for in a manner that allows accurate tracking and reporting of deposits and expenditures of: proceeds from forfeiture credited to the fund; proceeds from pending forfeiture actions under SASFA; and proceeds from forfeiture actions under federal law.

Existing reporting requirements would be moved within this section and a sunset date for these requirements of July 1, 2019, would be added in light of the bill's new reporting requirements.

### ***Technical Amendments***

The bill would make various technical changes to update or correct statutory references and ensure consistent wording throughout statutes.

### **Background**

Following a 2016 Legislative Division of Post Audit report and the introduction of five House bills and three Senate bills in 2017 on the topic of civil asset forfeiture, Representative Finch and Senator Wilborn requested the Kansas Judicial Council study the topic. Following its study, the Judicial Council issued its report, including a draft of recommended legislation, in December 2017. The report and recommended legislation is available on the Judicial Council website.

The bill, based on the Judicial Council's recommended legislation, was introduced by the House Committee on Judiciary at the request of the Judicial Council.

In the House Committee hearing, a representative of the Judicial Council, the director of the KBI, and representatives of the American Civil Liberties Union of Kansas, Kansas Association of Chiefs of Police, Kansas County and District Attorneys Association, Kansas Peace Officers' Association, Kansas Sheriffs' Association, and the League of Kansas Municipalities testified in support of the bill. An attorney and representatives of the Kansas Appleseed Center for Law and Justice, Kansas Association of Counties, Kansas Association of Criminal Defense Lawyers, Kansas Highway Patrol, and National Federation of Independent Business submitted written-only testimony supporting the bill.

Representative Finney and a representative of the Johnson County Sheriff's Office testified as neutral conferees. Representative Alcalá, the Attorney General, a Sedgwick

County Commissioner, and a representative of the Kansas Policy Institute submitted written-only neutral testimony.

A private citizen submitted written-only opponent testimony.

The House Committee amended the bill to add provisions requiring the KBI to determine whether agencies have submitted the required financial reports and whether each agency's financial report matches its seizing report, and prohibiting further forfeiture proceedings by an agency that is out of compliance until the agency has achieved compliance.

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the KBI estimates the bill would increase FY 2019 expenditures by \$345,188 from the State General Fund, including \$280,500 in one-time costs to outsource the creation of the Repository, reporting mechanisms, and public website; \$10,200 in one-time costs for information technology and furniture; and \$54,488 in ongoing costs for 1.0 FTE position to enter data, train stakeholders, act as a subject matter expert, and respond to information requests. The KBI indicates its information technology staff's current workload prohibits establishing these functions in-house before July 1, 2019. The KBI states the bill would increase costs for local governments to gather and report the required information, but the fiscal effect cannot be estimated.

The Office of the Attorney General indicates the bill would have no discernible fiscal effect, but a prohibition on collecting a fee for cases referred to the Office of the Attorney General could reduce the number of referrals it accepts. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2019 Governor's Budget Report*.