**Section by Section – The DUE PROCESS Act
Civil Asset Forfeiture Reform**

The DUE PROCESS Act implements procedural reforms to ensure fairness and continued effectiveness of federal forfeiture and adoptions. The bill seeks to build on changes and incorporate lessons learned from the Civil Action Forfeiture Reform Act (CAFRA) in 2000.

**Section 1. Short Title**

The act can be cited as the DUE PROCESS Act (DPA) of 2016.

**Section 2. General Rules for Civil Forfeiture Proceedings**

One of the most important changes in CAFRA was the creation of a timeline governing the process from seizure to forfeiture. The ability to force timely adjudication mitigates the hardship to innocent owners and expedites title transfer to the government in the event of a valid forfeiture.

To that end, the DPA broadens the applicability of the CAFRA timelines, adjusts the timeframes in light of the past sixteen years of real world experience, and implements new protections to ensure property owners have the opportunity to contest seizures.

**Expanding the CAFRA Timelines.** The CAFRA timelines currently apply only in nonjudicial (administrative) forfeitures. This was likely a typographical error, but the result is that property owners lose the benefits of CAFRA in some of the highest value forfeiture proceedings. The DPA ensures that the statutory timelines apply equally in all types of forfeiture proceedings.

**Deadline for Notice from the Government.** Under current law, the government has 60 days to provide notice of a seizure to a property owner. The DPA reduces this to 30 days. When the federal government adopts a state seizure, the notice period is 60 days. The Department of Justice (DOJ) can extend this period for an additional 30 days for good cause. A court can extend the period for an additional 30 days based on specified factors.

**Required Notice.** DPA creates new notice requirements, which include an address where a property owner can contest a seizure and a duty to inform property owners of their right—created in the DPA—to request an initial hearing, to be represented by counsel at that hearing, and to have counsel provided if the property owner is indigent.

For purposes of deadlines, a property owner’s claim is considered received when it is mailed and the law expressly allows for equitable tolling of deadlines when appropriate.

**Property Owner’s Response.** The DPA extends the period that property owners have to respond to a seizure. In the case of personal notice, the property owner has 65 days (increased from 35 days), and in the case of publicized notice, 60 days (increased from 30).

**Filing of a Claim.** The government has 90 days after an objection is filed to commence forfeiture proceedings. Under current law, a court can extend this time period upon motion of the government. Under the DPA, the period can be extended only upon agreement of both parties.

**Initial Hearing.** Upon request, a property owner is entitled to an initial hearing. At the hearing, a magistrate judge shall inform the party of his right to be represented by counsel and the right to be provided counsel under specified circumstances for indigent property owners. The judge shall order the immediate release of property if the seizure was not made according to law or if the property owner meets the requirements of 983(f)(1).

**Transparency on Administrative Forfeitures.** A seizing agency must publicize its disposition of remission and mitigation requests.

**Section 3. Representation**.

The right of an indigent property owner to have counsel provided to them is extended to all civil forfeiture proceedings. Under current law, indigent property owners are only entitled to counsel at judicial proceedings despite the fact that a majority of forfeitures are resolved administratively.

**Section 4. Burden of Proof**

Recognizing the punitive nature of civil forfeiture proceedings, the DPA raises the government’s burden of proof from a preponderance of the evidence to clear and convincing evidence. This is still lower than the criminal standard of beyond a reasonable doubt.

**Section 5. The Right to Retain Counsel of Choice**

Section 5 is the bill’s only reform of criminal forfeiture. In *Kaley v. United States*, the Supreme Court ruled that a criminal defendant is not constitutionally entitled to an evidentiary hearing to contest the factual predicate of a pretrial restraint on assets even when that money is necessary to pay for his defense.

The DPA reverses the *Kaley* decision and bolsters the Sixth Amendment right to counsel. If the government restrains assets pretrial, a defendant can move for a hearing to determine whether the seizure should be modified or rescinded to preserve the defendant’s right to counsel. At the hearing, the court must consider (1) the weight of the evidence against the defendant, (2) the weight of the evidence with respect to the forfeiture, (3) the history and characteristics of the defendant, and (4) the nature and circumstances of the case.

**Section 6. Recovery of Attorney’s Fees**

Allows for recovery of attorney’s fees when civil forfeiture cases are resolved through settlement assuming the settlement amount is greater than 50% of the seized property’s value.

**Section 7. Annual Audit of Civil Forfeitures**

The DPA requires the DOJ Inspector General to conduct an annual audit of a sample of federal civil forfeitures to ensure that they are consistent with the Constitution and the law. The IG’s report shall also include an assessment of the fiscal health of the Asset Forfeiture Fund, as well as a projection on any expected growth or reduction.

**Section 8. Publicly Available Databases**

The DPA requires the Attorney General to establish and maintain two forfeiture-related databases. One database is a real-time catalogue of federal forfeitures to assist persons whose property has been seized.

The second database provides broad details on forfeiture to inform Congress and the public of the types of forfeiture, the agencies involved, and the conduct that leads to forfeited property.

**Section 9. Monetary Instruments and Structuring**

This section codifies already implemented DOJ/IRS policy related to structuring and forfeiture. Structuring is a crime only if cash deposits or withdrawals are done with the intent of avoiding government reporting requirements.

The IRS, however, had frequently used civil forfeiture to seize property when it identified patterns of deposits or withdrawals that were consistent with forfeiture even when it lacked sufficient evidence to file criminal charges or identify other criminal activity.

Last year DOJ and IRS announced that they would only charge people with structuring if the funds that were being structured were from illegal sources (*e.g.*, drug trafficking) or the structuring was done to further or hide criminal activity (*e.g.*, tax evasion).

This section codifies that policy and only allows civil forfeiture in structuring cases when the property to be seized is derived from an illegal source or otherwise used to conceal illegal activity.

**Section 10. Standard of Proof Relating to Innocent Owners**

The DPA provides additional protection to innocent owners. If the government is attempting to forfeit property under a civil forfeiture statute because the property was used in the commission of a crime, the government must prove that (1) there was a substantial connection between the property and the offense; and (2) the owner of the seized property intentionally used the property in the offense, knowingly consented to its criminal use, or reasonably should have known that the property might be used in connection with the offense.

**Section 11. Proportionality.**

Under current law, a judge may reduce the value of a forfeiture only when the forfeiture is so grossly disproportionate to the underlying wrongdoing that it rises to the level of a Constitutional violation under the Eighth Amendment. The DPA gives judges greater latitude to reduce the size of a forfeiture penalty based on the following factors: the value of the property, the seriousness of the offense, the culpability of the claimant, the claimant’s prior record, the claimant’s financial condition and need to support a family, and the intent of forfeiture statute in question.

**Section 12. Effective Date.**

The DPA will be effective when adopted. Seizures made prior to enactment will be forfeited under current law.