Asset Forfeiture (SB 684/HB 1287)

October 27, 2015

Overview

- Study Authorization
- Methodology
- Background
- Virginia Law
- Virginia Data
- Other States
- Recommendations and Items for Consideration

Study Authorization

- Senate Bill 684 (SB 684), patroned by Senator Carrico, and House Bill 1287 (HB 1287), patroned by Delegate Cole, were introduced during the Regular Session of the 2015 General Assembly.
- As introduced, the two bills were identical.
- House Bill 1287 was slightly amended in the House Courts of Justice Committee.

Study Authorization

- Both bills were passed by in the Senate Finance Committee, and a letter was sent to the Crime Commission, requesting that the subject matter of the bills be reviewed.
- The Executive Committee of the Crime Commission authorized a broad review of asset forfeiture in Virginia.

Study Authorization

- Both SB 684 and HB 1287 would require that any forfeiture actions related to criminal activity (pursuant to Va. Code § 19.2-386.1) would be stayed until a criminal conviction, and the property would not be forfeited until completion of all appeals.
  - If no judgment of conviction for a qualifying offense is entered, the seized property would then be released.

Study Authorization

- The amended version of HB 1287 provided two exceptions to the requirement that seized property could not be forfeited unless there was a conviction for a qualifying offense, and all appeals were completed:
  - (1) The forfeiture was ordered by a court pursuant to a lawful plea agreement; or,
  - (2) The owner of the property did not submit a written demand for return of the property within 1 year from the date of seizure, in which case the forfeiture case could proceed.

Methodology

- Study activities:
  - Collected available literature and data;
  - Met with key stakeholders;
  - Completed a statutory review of Virginia and other states;
  - Surveyed all law enforcement agencies and Commonwealth's Attorneys' Offices;
  - Reviewed over 80 law enforcement agencies' general orders/policies pertaining to asset forfeiture.

Background

- Asset forfeiture, in this context, can be defined as a civil lawsuit, initiated by the government, to seize the instrumentalities and profits of criminal activity.

- There are early legal precedents for this type of action; in Colonial times, smuggled goods could be seized and sold to ensure applicable customs duties were received by the government.
  - This was separate from any criminal action taken against individuals who were involved in smuggling.

Background

- At an early date, forfeiture also became a tool used to combat and deter criminal activity.
  - *"All monies actually staked or betted whatsoever, shall be liable to seizure…under a warrant from a magistrate…and be paid into the treasury of the Commonwealth, for the use and benefit of the literary fund, deducting thereout fifty percent upon all monies seized, to be paid to the person or persons making the said seizure*."
    - Revised Code of 1819, Chapter 147, section 11.

Background

- Forfeiture started to become more prominent as governments across the country sought ways to combat the enormous profits generated by the sales of drugs.
- Until 1991, the Virginia Constitution required that all forfeited property accrued by the Commonwealth, as well as fines for offenses committed against the Commonwealth, be paid into the Literary Fund, which is used to fund Virginia schools. (Va. Constitution, Article VIII, § 8).

Background

- In 1991, the Constitution of Virginia was amended, to permit the General Assembly to allow for "the proceeds from the sale of all property seized and forfeited to the Commonwealth for a violation of the criminal laws…proscribing the manufacture, sale or distribution of a controlled substance or marijuana" to "be distributed by law for the purpose of promoting law enforcement."
  - Proceeds from the forfeiture of items connected to non-drug criminal offenses still go to the Literary Fund.

Background: Literary Fund Data

- The total net revenue from all Literary Fund sources has remained stable over the past 5 years.

FY	Total Literary Fund Revenue
2011	$ 89,465,124
2012	$ 89,668,006
2013	$ 91,973,522
2014	$ 86,144,047
2015	$ 89,108,012

Source: Virginia Dep't of Accounts, Literary Fund Data, CARS System.

Background: Literary Fund Data

Net Revenue from Individual Literary Fund Sources, FY15

Source	FY15 Net Revenue
Fines, Penalties & Forfeited Recognizances	$60,598,703
Proceeds from Unclaimed Lottery Prizes	$12,421,426
Interest on Fines and Forfeitures	$6,633,262
Interest on Literary Loans	$4,275,160
Fines Imposed by the State Corporation Commission	$2,912,604
Interest from Other Sources	$1,657,132
Regulatory Board Monetary Penalty & Late Fees	$525,818
Forfeited/Confiscated Property and Funds	**$339,964**
Fines, Fort, Court Fees, Costs, Penalties & Escheat	$2,000
Criminal History Fee	$32
Private Donations, Gifts & Grants	$10
Pay to Circuit Court for Commissions	-$212,113
Refund- Misc. Disbursements Made Prior Years	-$45,586
Property Escheated by Appointed Escheater	-$400
TOTAL	**$89,108,012**

Source: Virginia Dep't of Accounts, Literary Fund Data, CARS System.

Background

Broadly speaking, forfeiture of assets related to criminal activity serves a number of public policy goals:

- Removes contraband and dangerous items from the public;
- Recompenses the government for lost income;
- Recompenses the government for the expenses of a criminal prosecution and investigation;
- Prevents unjust enrichment by criminals;
- Helps directly fund law enforcement efforts to keep society safe; and,
- Thwarts and deters criminal activity.

Background

- Deterring and combatting ongoing criminal activity is especially relevant when dealing with an organized criminal enterprise, such as the distribution of drugs.
- Directly funding law enforcement efforts is especially important when it comes to combatting organized criminal enterprises.
- Law enforcement must handle the logistics of lengthy investigations and criminals who can have enormous resources at their disposal. For instance:
  - Need to pay confidential informants;
  - Set up controlled buys;
  - Create fictitious businesses and transaction sites;
  - Surveillance equipment.

Background: “Drug/Money Cycle”

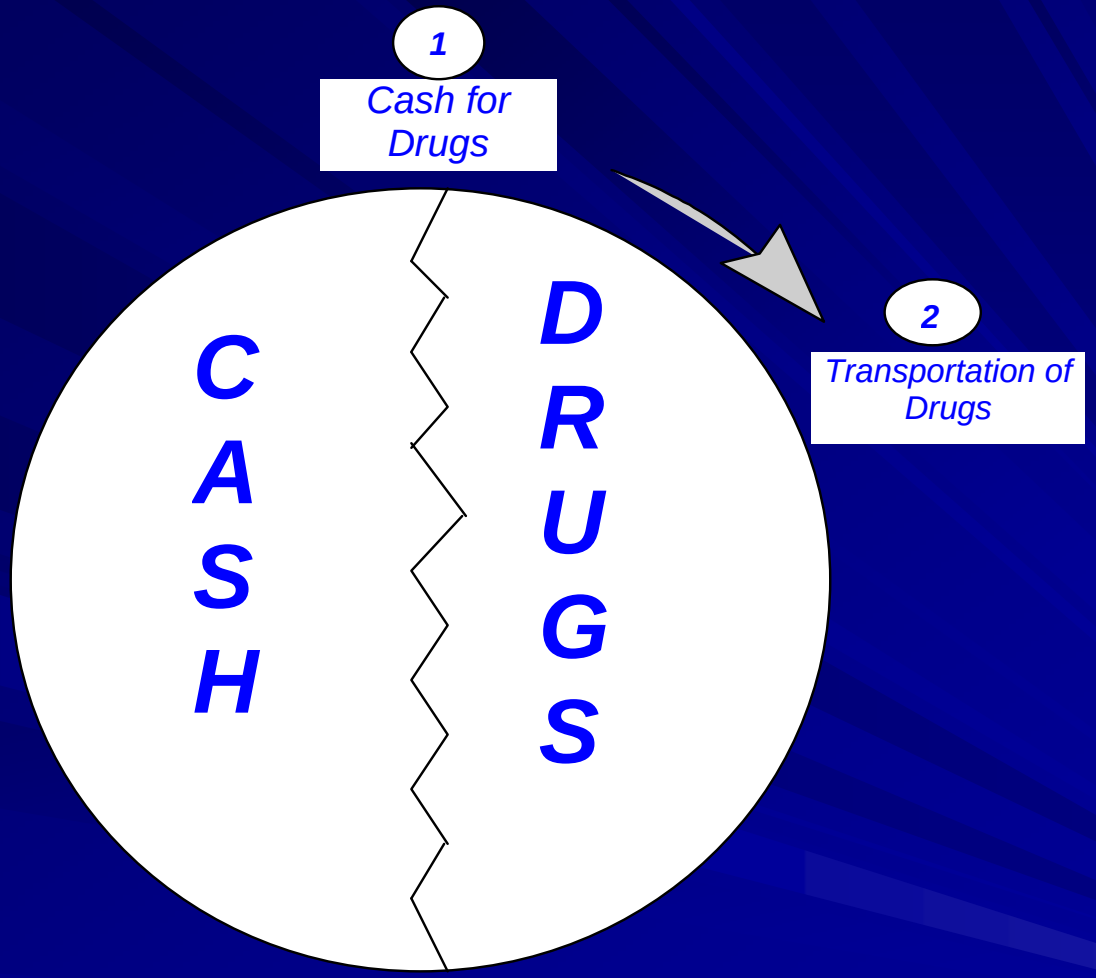
Source: U.S. Dep’t of the Treasury, Financial Crimes Enforcement Network (FinCEN).

Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).

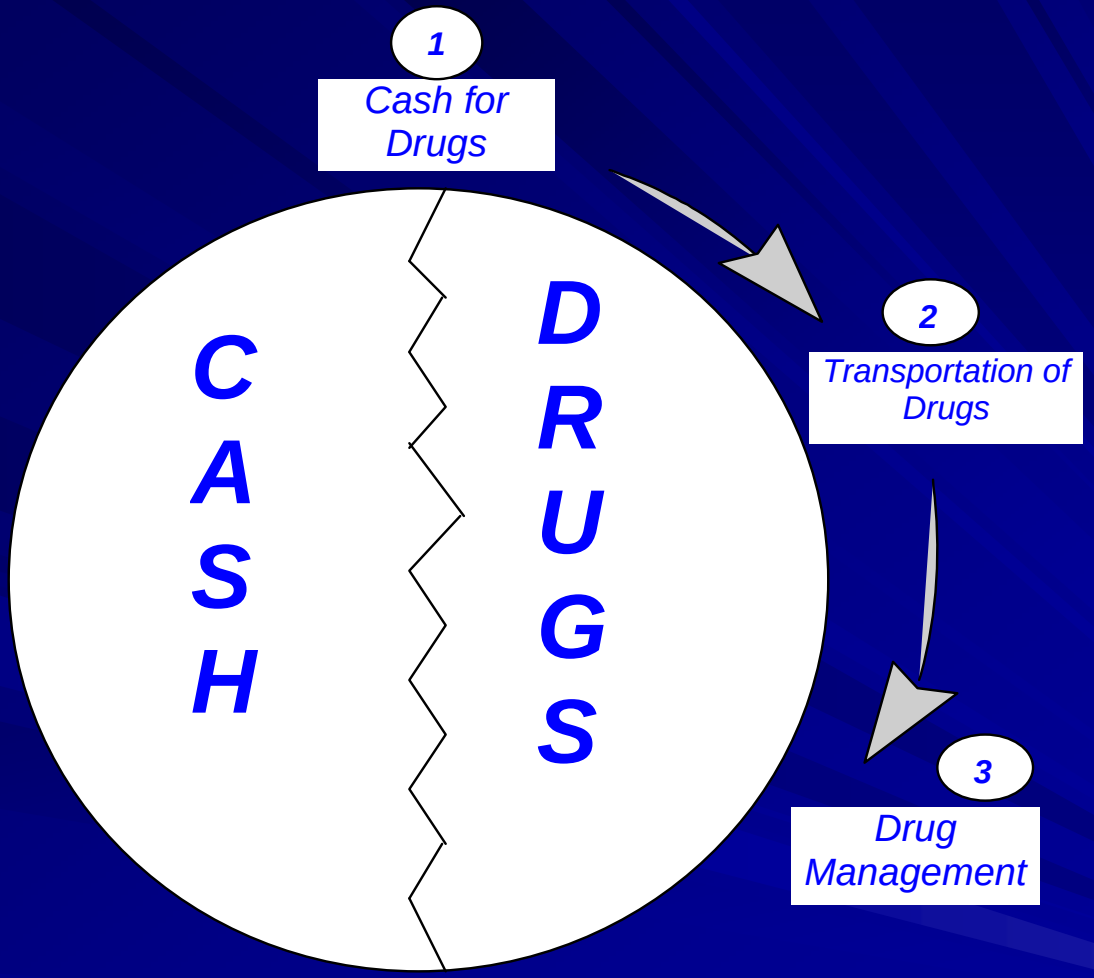
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).

Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).

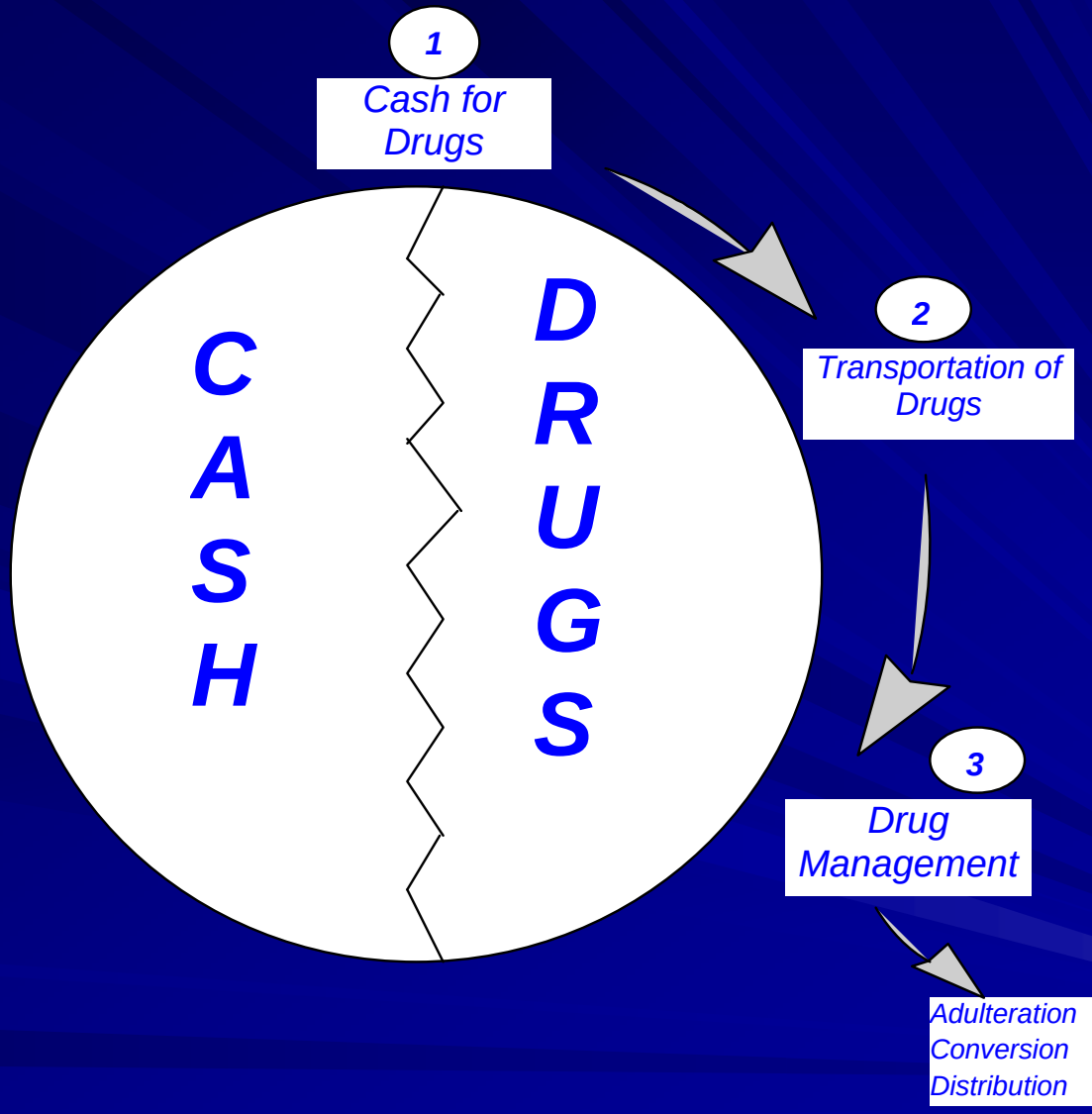
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



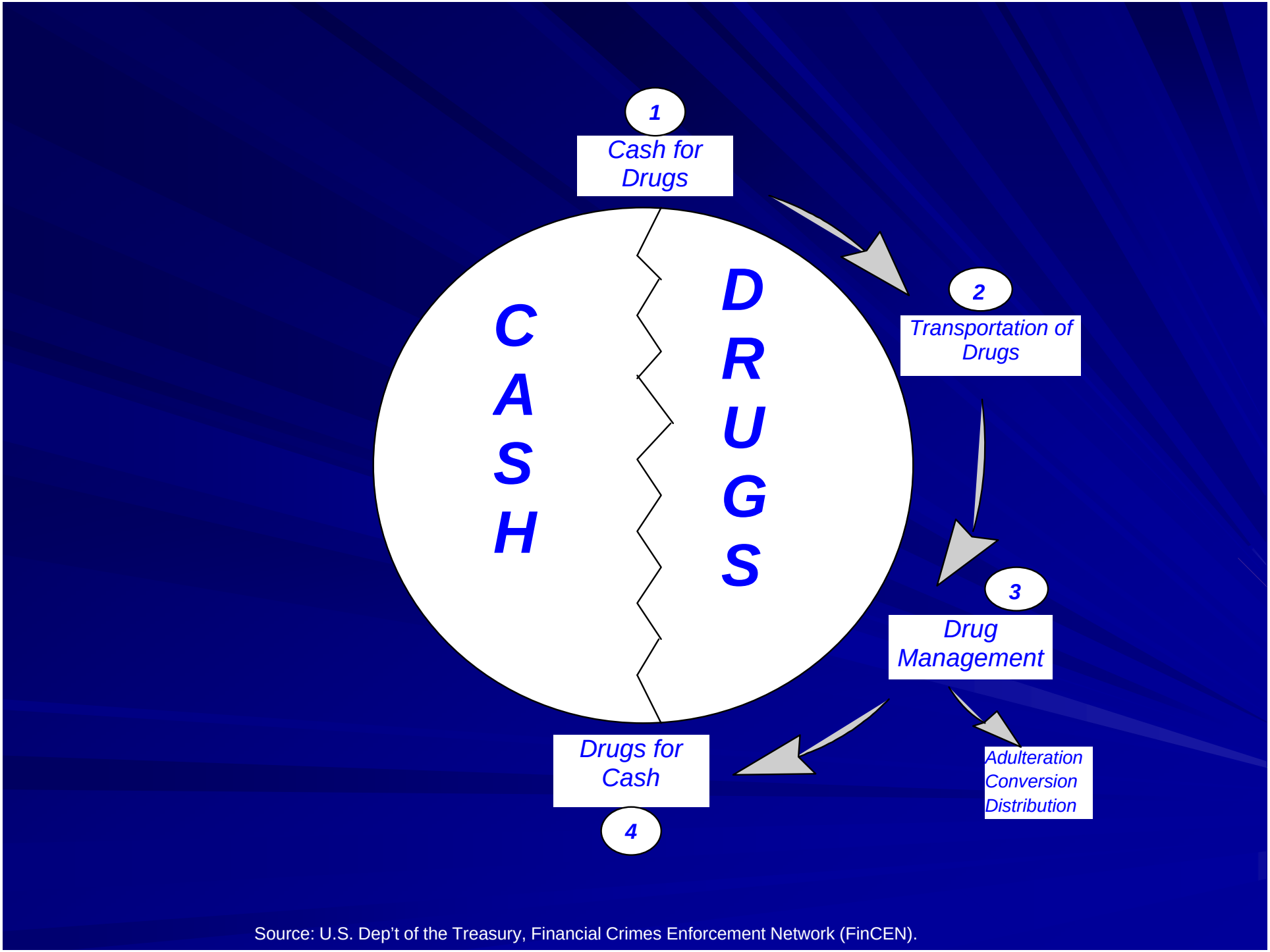
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



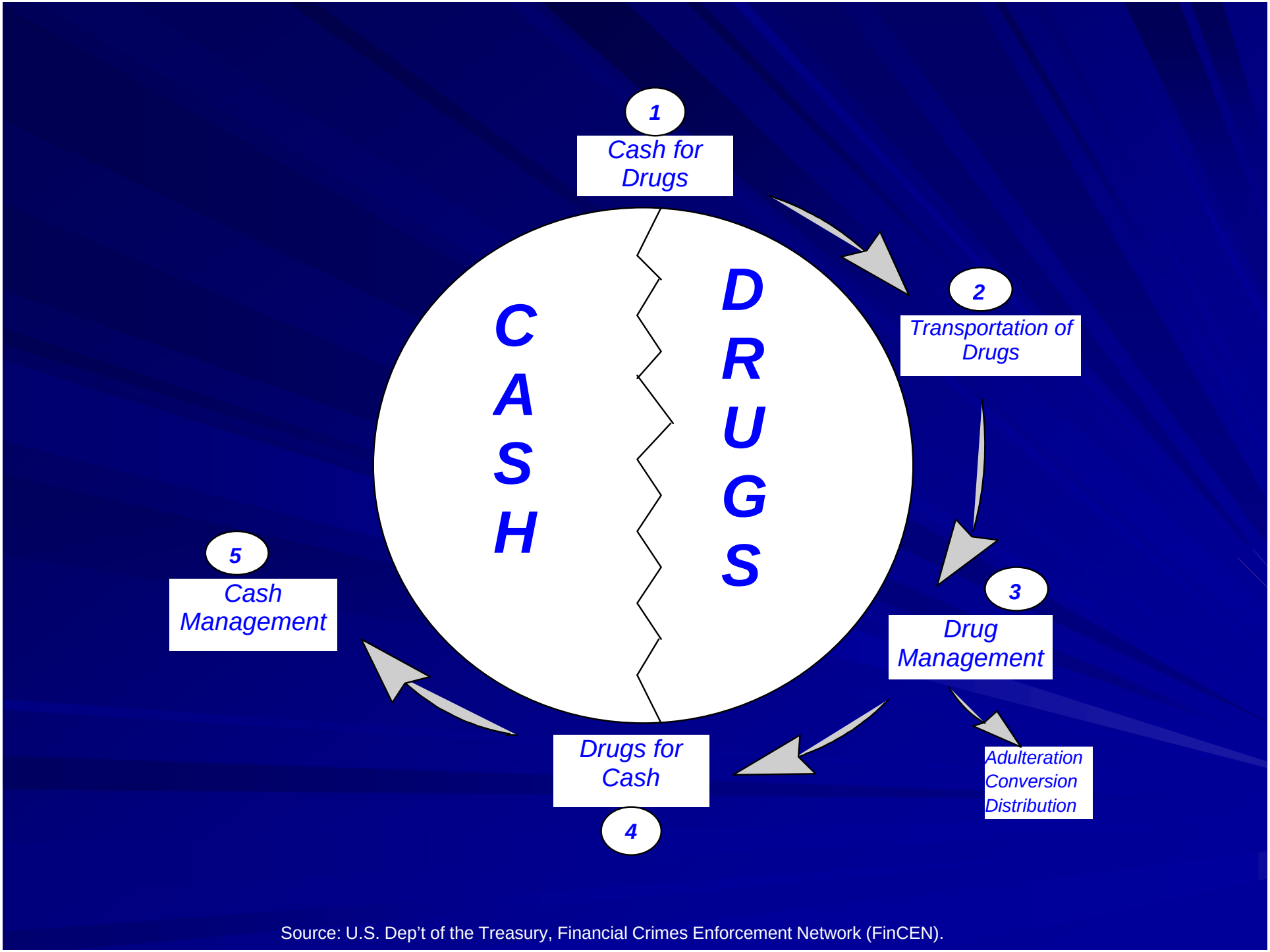
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



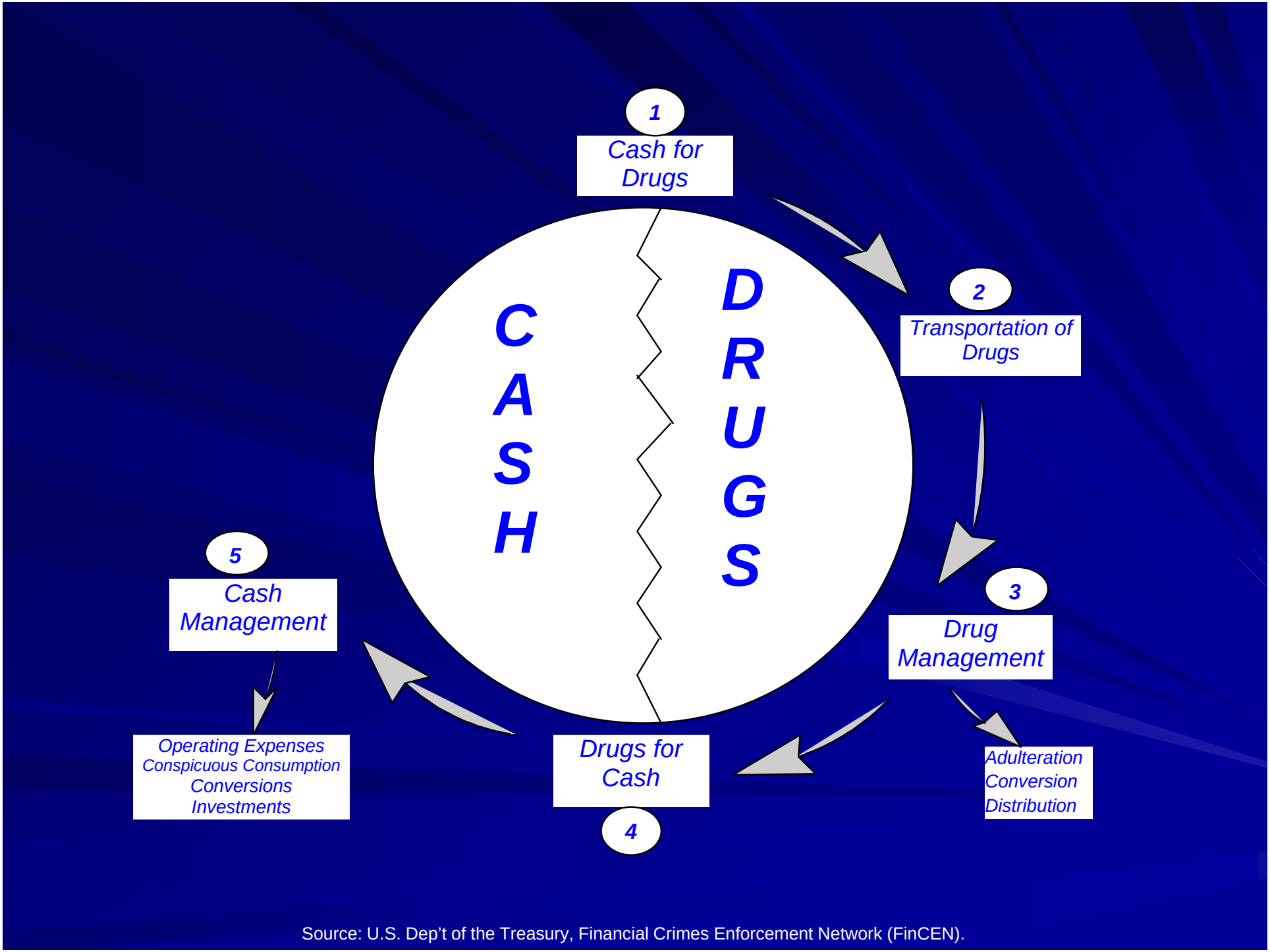
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



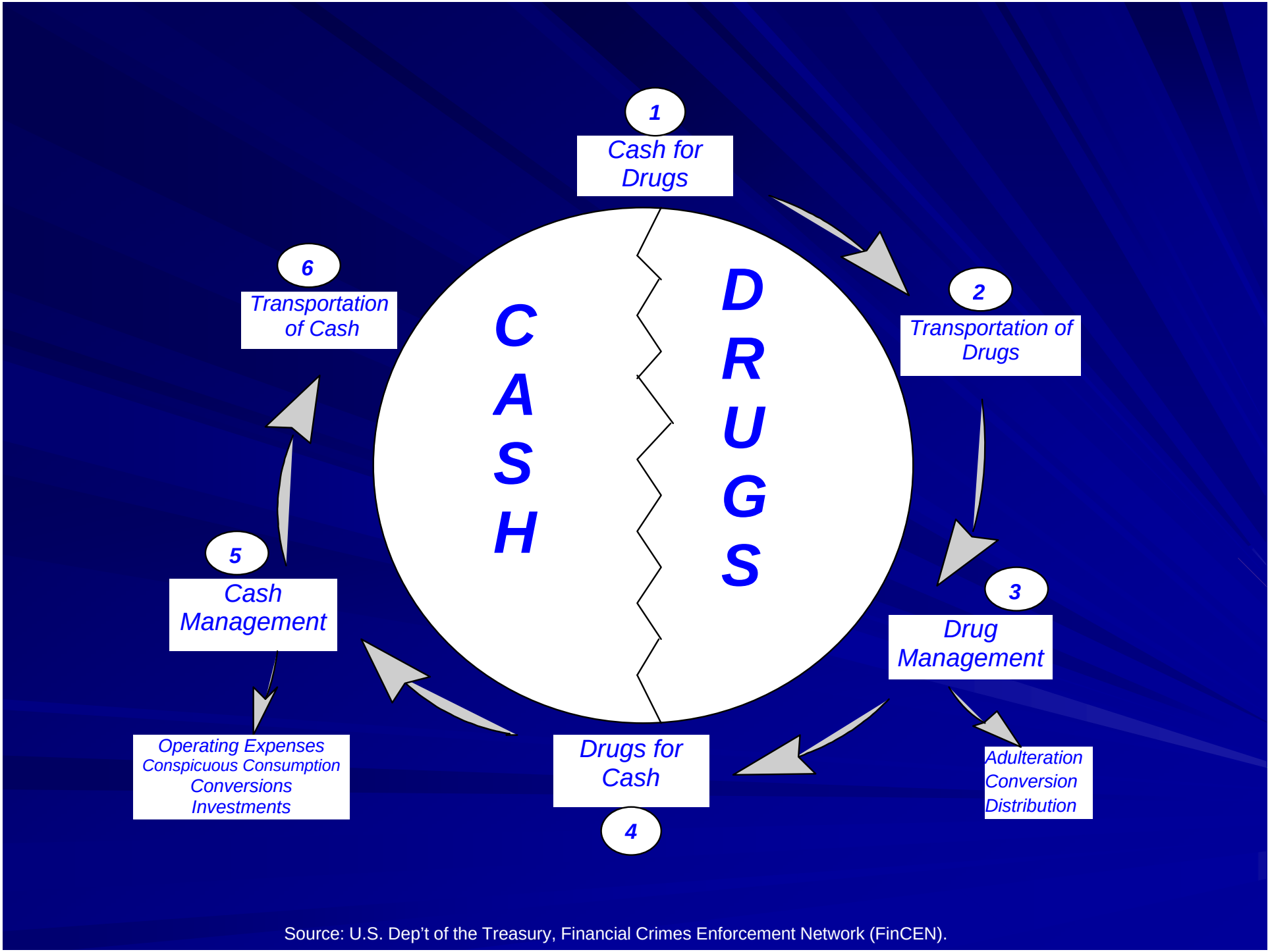
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



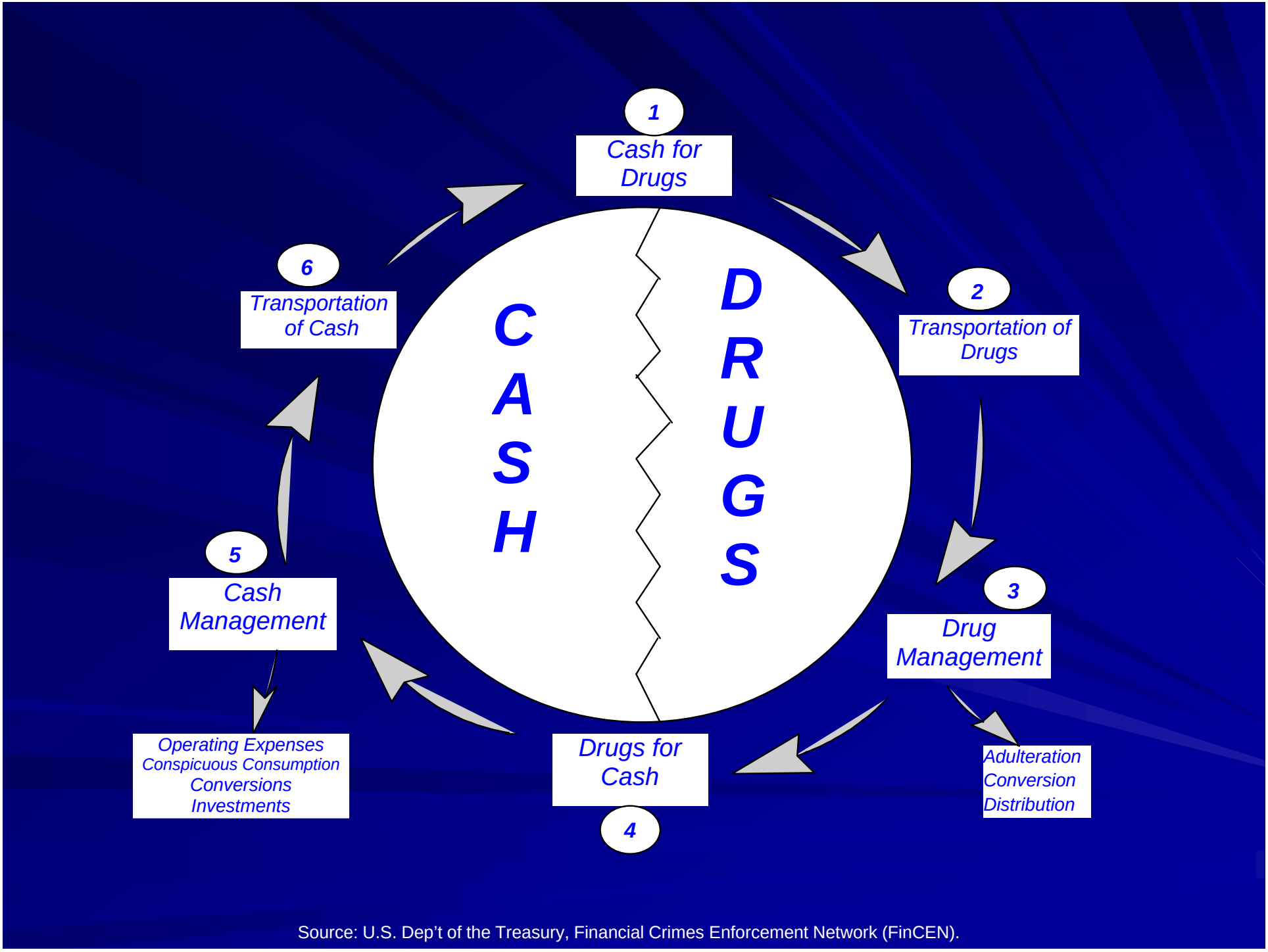
Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).



Source: U.S. Dep't of the Treasury, Financial Crimes Enforcement Network (FinCEN).

Background

- However, if not properly overseen or monitored, direct funding of law enforcement through asset forfeiture can lead to inappropriate purchases.

- There have been numerous stories in the press highlighting instances where cash was seized by law enforcement, in a manner that indicates abuse of the system.

Background

- Example: Matt Lee, a 31 year old college graduate, with no criminal record, had received a $2,500 loan from his father to help him get started with a new job in California.
- Driving from Michigan to California, he was stopped in Humboldt County, Nevada, and his $2,500 was confiscated on suspicion that it was drug money.
- Mr. Lee had to hire an attorney to have his money returned to him; attorney fees ended up costing him $1,269, nearly half the amount his father had loaned him.

  – Source: Washington Post, Sept. 8, 2014.

Background

- The Washington Post recently ran a series of articles on the subject of asset forfeiture.
- Of the 17 or so specific cases given as examples, only 4 involved forfeitures that took place in Virginia.
- Of those 4 cases, three involved forfeiture under the federal system, not Virginia's state asset forfeiture laws.
  - It was not clear if the remaining case was state or federal, but it seems to have also involved a federal forfeiture proceeding.

Background

- By contrast, a Virginia prosecutor revealed a case where a woman, unemployed and with no visible means of income, purchased multiple vehicles in a short period of time.
- She repeatedly lent her cars to boyfriends and ex-boyfriends, who used the cars in drug transactions.
- The woman claimed, in all instances, that she did not know her vehicles were being used for criminal activity.
  - She also could not account for how she was able to purchase multiple vehicles.

Background- Constitutional Law

- Although the due process requirements for asset forfeitures are less than what exist for criminal trials, certain constitutional safeguards must still be observed.
- The Eighth Amendment does apply, and in theory would prohibit an excessive forfeiture for minor wrongdoing. Austin v. United States, 509 U.S. 602 (1993).
  - In practice, forfeitures are almost never found to have violated the Eighth Amendment.

Background-Constitutional Law

- Because asset forfeiture involves the seizure of an individual's property, there are additional limitations placed on the government's actions.
- The Fourth Amendment does apply to forfeiture proceedings, so no seizures can be made that are unreasonable. U.S. v. James Daniel Good Real Property et al, 510 U.S. 43 (1993).
  - In general, a probable cause standard, or something beyond mere suspicion, must be used.

Background-Constitutional Law

- The Fifth Amendment's due process requirements also apply to forfeitures. U.S. v. James Daniel Good Real Property et al, 510 U.S. 43 (1993).
  - In general, there must be prior notice and the opportunity for a hearing prior to the order of forfeiture being entered by a court.
- This is similar to the Virginia Supreme Court's holding that the statutory requirements of Va. Code § 19.2-386.3 are mandatory and jurisdictional, such that failure to file an information within 90 days of seizure must result in the release of the property. Commonwealth v. Brunson, 248 Va. 347 (1994).

Background-Constitutional Law

- However, as noted, due process requirements are less stringent than in a criminal case.
- For example, there is no requirement that an "innocent owner" defense be granted to the co-owner of an automobile that is forfeited, and no requirement that the innocent owner be granted compensation from the state. Bennis v. Michigan, 516 U.S. 442 (1996).

Background-Constitutional Law

- Similarly, failure to file a notice of seizure within 21 days, as required by Va. Code § 19.2-386.3, is not jurisdictional, and will not prevent the forfeiture. Commonwealth v. Wilks, 260 Va. 194 (2000).
  - Unlike the filing of the information, the filing of the notice is "directory and not mandatory," and does not define any basic rights.

Virginia Law- Criminal Related AF

- The General Assembly has specified which criminal offenses can lead to civil forfeiture actions:
  - Illegal manufacture of alcoholic beverages;
  - Acts of terrorism;
  - The transportation of stolen property;
  - Abductions (including misdemeanor parental abduction);
  - Prostitution;
  - Child pornography;

Virginia Law- Criminal Related AF

- Criminal offenses that can lead to civil forfeiture actions (continued):
  - Computer crimes;
  - Manufacture, possession or sale of illegal electronic communication devices;
  - Money laundering;
  - Cigarette trafficking and counterfeit cigarettes;
  - Drug manufacture and distribution;
  - Gambling;

Virginia Law- Criminal Related AF

- Criminal offenses that can lead to civil forfeiture actions (continued):
  - Any weapon unlawfully possessed or used in a felony;
  - Soliciting a child for sexual activity using a communications system;
  - Extortion; and,
  - Illegal wage withholding.

Virginia Law- Criminal Related AF

- The authorizing statutes for forfeiture have been developed piecemeal. Different crimes allow for different types of property to be forfeited.
- For example: Real property can be forfeited if connected with terrorism, drug distribution, money laundering, prostitution or illegal wage withholding.
  - It cannot be forfeited if connected with gambling, the manufacture of child pornography, or cigarette trafficking.
- Slightly different procedures and limitations can be involved, depending upon the statute, even for the same type of property.

Virginia Law- Criminal Related AF

- Vehicle Example: Under Va. Code § 19.2-386.16(A), a vehicle can be forfeited, without a conviction, if:
  - It is used to transport stolen property worth more than $200;
  - It is used to transport property obtained in a robbery, regardless of value; or,
  - It is used for a second offense involving prostitution (including misdemeanor solicitation).
- Under Va. Code § 19.2-386.16(B), a vehicle can be forfeited, without a conviction, for a first offense of pimping, but only if the victim is a juvenile.

Virginia Law- Criminal Related AF

- Vehicle Example (continued):
  - Under Va. Code § 19.2-386.35, a vehicle (or other property) can be forfeited for a first violation of various prostitution offenses, including misdemeanor solicitation. (But not misdemeanor prostitution).
    - However, there must be a conviction and the civil forfeiture action "shall be stayed until conviction."

Virginia Law- Criminal Related AF

- Vehicle Example (continued):
  - Under Va. Code § 19.2-386.16(B), a vehicle can be forfeited for abduction in violation of Va. Code § 18.2-48.
    - No conviction is required.
  - Under Va. Code § 19.2-386.35, a vehicle (or other property) can be forfeited for abduction in violation of Va. Code § 18.2-48.
    - However, a conviction is required and the civil forfeiture action "shall be stayed until conviction."

Virginia Law- Criminal Related AF

- Vehicle Example (continued):
  - Under Va. Code § 19.2-386.34, a vehicle can be forfeited for a felony DUI in violation of Va. Code § 18.2-266.
    - However, a conviction is required, and the forfeiture action is stayed "**until the exhaustion of all appeals**."
  - Va. Code § 19.2-386.34 also uniquely provides for a family hardship exception to the forfeiture of the vehicle, which does not exist for any other forfeiture statute.

Virginia Law- Criminal Related AF

- It should be noted that the following statutes require a conviction for the forfeiture to proceed:
  - Va. Code § 19.2-386.29 (weapons unlawfully carried or used in the commission of a felony);
  - Va. Code § 19.2-386.31 (forfeiture of property used in connection with child pornography);
  - Va. Code § 19.2-386.32 (forfeiture of property used in connection with child abduction);
  - Va. Code § 19.2-386.34 (felony DUI, appeals also must be finished); and,
  - Va. Code § 19.2-386.35 (prostitution, abduction, extortion).

Virginia Law- Process

- The process for most civil forfeiture actions in Virginia is governed by Chapter 22.1 of Title 19.2 of the Code of Virginia.
- Per Va. Code § 19.2-386.1, the forfeiture action is commenced when the Commonwealth's Attorney files an information with the circuit court clerk.
- There is a strict requirement that the information be filed "within three years of the date of actual discovery by the Commonwealth of the last act giving rise to the forfeiture."

Virginia Law- Process

- However, most items are seized by law enforcement in the course of investigations or arrests.
- In that instance, law enforcement notifies the Commonwealth's Attorney "forthwith" in writing of the seizure, per Va. Code § 19.2-386.3(A).
- Law enforcement must also conduct an inventory of the seized property and "as soon as practicable," provide a copy to the owner.
  - "Failure to provide a copy of the inventory shall not invalidate any forfeiture." Va. Code § 19.2-386.2(C).

Virginia Law- Process

- The Commonwealth's Attorney shall, within 21 days of receiving notice of the seizure from law enforcement, file a "notice of seizure for forfeiture" with the circuit court, stating the property seized, the grounds for and date of the seizure, and all owners and lien holders then known. Va. Code § 19.2-386.3(A).
  - Failure to file does not invalidate the forfeiture, per Wilks.
- The clerk of court then mails "forthwith" by first-class mail notice of seizure for forfeiture to the last known address of all identified owners and lien holders. Va. Code § 19.2-386.3(A).

Virginia Law- Process

- If the property seized is a motor vehicle, a special procedure is required pursuant to Va. Code § 19.2-386.2:1:
  - The attorney for the Commonwealth "shall forthwith notify the Commissioner of the Department of Motor Vehicles, by certified mail."
  - The Commissioner then "promptly certifies" to the Commonwealth's Attorney the name and address of the person to whom the vehicle is registered, together with the name and address of any lien holders.
  - The Commissioner also notifies the owners and lien holders in writing of the seizure and where it occurred.

Virginia Law- Process

- The Commonwealth's Attorney MUST file an information in the circuit court within 90 days of the seizure, or the property shall be released to the owner or lien holder. Va. Code § 19.2-386.3(A).
- All parties defendant must then be served a copy of the information and a notice to appear.
- "The notice shall contain a statement warning the party defendant that his interest in the property shall be subject to forfeiture…unless within 30 days after service, an answer under oath is filed." Va. Code § 19.2-386.3(B).

Virginia Law- Process

- If the information is filed before the property is seized, either the clerk of the court or a judge of the court, upon a motion by the Commonwealth's Attorney, shall issue a warrant to law enforcement authorized to serve criminal process in the jurisdiction where the property is located, to seize the property. Va. Code § 19.2-386.2(A).
- If the property is real property, a notice of lis pendens shall be filed with the clerk of the circuit court where the property is located. Va. Code § 19.2-386.2(B).

Virginia Law- Process

- At any time prior to the filing of an information, the Commonwealth's Attorney may, "upon payment of costs incident to the custody of the seized property, return the seized property to an owner or lien holder." Va. Code § 19.2-386.5.
- The owner or lien holder of seized property also has the right to request the clerk of court appraise the value of the property. He can then post a bond for its fair cash value, plus court costs and the costs of the appraisal, and have the property returned. Va. Code § 19.2-386.6.

Virginia Law- Process

- If the property seized "is perishable or liable to deterioration, decay, or injury by being detained in custody pending the proceedings," the circuit court may order the property sold, and hold the proceeds of the sale pending final disposition of the case. Va. Code § 19.2-386.7.

Virginia Law- Process

- A party defendant "may appear at any time within thirty days after service on him," and answer under oath "the nature of the defendant's claim," the title or interest in the property, and "the reason, cause, exemption or defense he may have against the forfeiture of the property." Va. Code § 19.2-386.9.
- If an owner or lien holder has not received actual or constructive notice of the action, he may appear at any time prior to final judgment and may be made a party. Va. Code § 19.2-386.9.

Virginia Law- Process

- If a party defendant fails to appear, he shall be in default. However, within 21 days after the entry of judgment, a party defendant may petition DCJS "for remission of his interest in the forfeited property."
  - Only one such petition was filed in FY14.
- For good cause shown and upon proof of the defendant's valid exemption, DCJS shall grant the petition and direct the state treasury to either remit to the defendant an amount not exceeding his interest in the property, or convey clear and absolute title to the forfeited property. Va. Code § 19.2-386.10.

Virginia Law- Process

- If a party defendant appears, the case proceeds to trial. Trial by jury can be demanded by either the Commonwealth or the party defendant.
- The Commonwealth has the burden of proving the property is subject to forfeiture. Upon such a showing, the "claimant" has the burden of proving his interest in the property is "exempt" under subdivision 2, 3, or 4 of § 19.2-386.8.
- The proof of all issues shall be by a preponderance of the evidence." Va. Code § 19.2-386.10(A).

Virginia Law- Process

- Note: The forfeiture action "shall be independent of any criminal proceeding against any party or other person for violation of law. However, upon motion and for good cause shown, the court may stay a forfeiture proceeding that is related to any indictment or information." Va. Code § 19.2-386.10(B).

Virginia Law- Process

- The exemptions a defendant can assert for seized property are listed in Va. Code § 19.2-386.8:
  - A conveyance used by a common carrier, unless the owner was a consenting party or knew of the illegal conduct;
  - A conveyance used by a criminal, not the owner, who was in unlawful possession of the conveyance;
  - Any property if the owner did not know and had no reason to know of the illegal conduct;
  - A bona fide purchaser for value without notice;
  - The illegal conduct occurred without the owner's "connivance or consent, express or implied;" and,
  - The illegal conduct was committed by a tenant, and the landlord did not know or have reason to know of the tenant's conduct.

Virginia Law- Process

- The exemptions of a defendant who is a lien holder are similar:
  - The lien holder did not know of the illegal conduct at the time the lien was granted;
  - The lien holder held a bona fide lien that was perfected prior to the seizure of the property; and,
  - The illegal conduct occurred without his "connivance or consent, express or implied."

Virginia Law- Process

- In the event there is a sale of the property to a bona fide purchaser for value in order to avoid the consequences of a forfeiture, "the Commonwealth shall have a right of action against the seller of the property for the proceeds of the sale." Va. Code § 19.2-386.9.

Virginia Law- Process

- Once the property has been forfeited, it is either sold, returned to a law enforcement agency, or destroyed if the value of the property "is of such minimal value that the sale would not be in the best interest of the Commonwealth." Va. Code § 19.2-386.11(A).
- Contraband and weapons may be ordered destroyed by the court. Va. Code § 19.2-386.11(C).
- Any sale of forfeited property "shall be made for cash, after due advertisement….by public sale or other commercially feasible means." Va. Code § 19.2-386.12(A).

Virginia Law- Process

- Any costs, including sales commissions and costs for the storage and maintenance of the property, shall be paid out of the net proceeds from the sale of the property. If there are no net proceeds, the costs and expenses shall be paid by the Commonwealth from the Criminal Fund. Va. Code § 19.2-386.12(B).
- NOTE: Parties in interest to any forfeiture "shall be entitled to reasonable attorneys' fees and costs if the forfeiture proceeding is terminated in [their] favor." Va. Code § 19.2-386.12(B).

Virginia Law- Process

Expenses Paid by Criminal Fund Pursuant to § 19.2-386.12, FY12-FY15

FY	Individuals Receiving Vouchers	Total Amount Disbursed
2012	5	$ 3,537
2013	6	$ 11,120
2014	4	$ 2,005
2015	7	$ 5,816
TOTAL	**22**	**$ 22,478**

Source: Office of the Executive Secretary, Supreme Court of Virginia.

Virginia Law- Process

- DCJS retains 10% of proceeds "in a non-reverting fund, known as the Asset Sharing Administrative Fund." Va. Code § 19.2-386.14(A1).
- DCJS then distributes the remaining proceeds to any "federal, state or local agency or office that directly participated in the investigation or other law-enforcement activity which led…to the seizure and forfeiture." Va. Code § 19.2-386.14(B).
- Forfeited property and proceeds may not supplant existing programs or funds, per Va. Code § 19.2-386.12(D).

Data

- Staff requested data from a number of sources, including:
  - U.S. Department of Justice;
  - Va. Department of Criminal Justice Services;
  - Va. Supreme Court;
  - Va. Department of Accounts (Literary Fund data);
  - Va. Criminal Injuries Compensation's Criminal Fund; and,
  - Va. Deptartment of Motor Vehicles.

Data

- Staff also surveyed all Virginia law enforcement agencies and Commonwealth's Attorneys' Offices.
  - 87% (118 of 135) of primary law enforcement agencies responded;
    - An additional 56 responses were received from town, campus and other state agencies.
  - 83% (99 of 120) of Commonwealth's Attorneys responded.

Data

- In FY14, Virginia received a combined total of approximately $10.8 million in disbursals from the federal and state asset forfeiture (AF) programs.
  - Federal AF Program Disbursals, FY14: $6,641,267
  - DCJS' State AF Program Disbursals, FY14: $4,185,594.
- Virginia law enforcement and Commonwealth's Attorneys' Offices can participate in the federal asset forfeiture program, the state asset forfeiture program, or both.

Federal AF Program Data

- All 50 states and territories participate in the Federal Equitable Sharing Program.
  - Encompasses the seizure and forfeiture of assets that represent the proceeds of, or were used to facilitate federal crimes.

- In FY14, states received a total of $425,052, 377.
  - Virginia received $6,641,267 (1.5% of this total amount.)
    - Recipients included 75 Law Enforcement Agencies, Drug Task Forces and Commonwealth's Attorneys' Offices.

Federal AF Program Data

Top 15 States Receiving Disbursals from the Federal AF Program, FY14

Rank	State	Total
1	California	$77,400,978
2	New York	$76,140,067
3	Texas	$26,594,306
4	Georgia	$22,736,427
5	Florida	$17,045,912
6	Rhode Island	$17,026,355
7	Illinois	$16,143,203
8	New Jersey	$12,258,703
9	North Carolina	$10,805,901
10	Pennsylvania	$10,079,052
11	Connecticut	$8,823,913
12	Ohio	$8,402,535
13	Michigan	$8,101,026
14	Massachusetts	$7,719,173
15	**Virginia**	**$6,641,267**

Source: U.S. Dep't of Justice, Asset Forfeiture Fund Reports to Congress, Equitable Sharing Payments.

Federal AF Program Data

Total Disbursed from Federal AF Program to Virginia, FY04-FY14

FY	# Agencies	Total Disbursed
2004	77	$ 4,268,111
2005	84	$ 4,069,042
2006	66	$ 4,948,114
2007	82	$ 29,647,752*
2008	75	$ 26,673,908*
2009	84	$ 7,067,360
2010	75	$ 5,701,332
2011	84	$ 6,331,350
2012	75	$ 7,326,146
2013	66	$ 4,382,422
2014	75	$ 6,641,267
TOTAL		**$ 107,056,804**

Source: U.S. Dep't of Justice, Asset Forfeiture Fund Reports to Congress, Equitable Sharing Payments. * Anomaly due to one large case settlement disbursed over a 2-year time period to one agency.

State Drug-Related Data (DCJS)

- DCJS manages the tracking and reimbursement of state drug-related asset forfeitures in Virginia.
  - Since 1991, DCJS has disbursed $102,991,395 to Virginia's law enforcement and Commonwealth's Attorneys' Offices.
- Data collected by DCJS is fairly comprehensive for:
  - Items seized pursuant to drug-related crimes.
    - Does not account for items seized pursuant to NON-drug related crimes whose subsequent forfeiture funds are sent to the Literary Fund.
  - Items seized that are valued at $500 or more.
    - Less detailed information is collected for forfeitures less than $500.

State Drug-Related Data (DCJS)

- Staff requested the following data from DCJS:
  - 10 Year Overview of Assets Seized by Agency, FY06-FY15
    - All participating agencies must submit forms for each and every drug-related item seized and must update DCJS on the outcome of each case for each item.
  - Sample of Court Orders Resulting in Forfeiture
    - DCJS requires that copies of court orders be submitted in all cases resulting in a forfeiture.
  - Annual Certification Reports
    - Participating agencies must also submit an annual certification report that outlines their beginning AF balance, AF funds received, and an itemized list of how AF funds were spent.

State Drug-Related Data (DCJS)

- Staff requested the following data (cont.):
  - Sharing Agreements
    - Outline how proceeds from a disbursal are to be distributed.
    - DCJS keeps 10% of the proceeds from each forfeited item.
    - The remaining proceeds are divided according to each agency's or Task Force's sharing agreement between law enforcement and Commonwealth's Attorneys' Offices.
    - Many of the sharing agreements provide that 80% of the share goes to the law enforcement agency and 20% goes to the Commonwealth's Attorney's Office.
      - However, some prosecutors will receive shares as low as 10% to as high as 45%.
      - Some prosecutors will retain more of a share (50/50) if the case results in a trial or involves real estate.
      - Task Force sharing agreements are far more complex as they involve multiple agencies.

State Drug-Related Data (DCJS)

10 Year Overview of State Drug-Related Forfeitures, FY06-FY15*

FY	# Agencies	Total Cases	Total Items Seized	Value of Items Seized	Total Disbursed to Agencies
2006	42	143	189	$639,152	$110,899
2007	46	180	219	$991,263	$235,460
2008	68	265	365	$2,020,786	$266,128
2009	96	432	582	$2,639,639	$780,855
2010	158	2,006	2,464	$10,134,559	$4,957,627
2011	150	2,002	2,346	$10,258,608	$5,350,350
2012	143	2,003	2,457	$11,576,315	$5,820,171
2013	161	2,000	2,369	$11,546,672	$5,253,183
2014	149	1,994	2,412	$10,624,949	$4,185,594
2015	154	1,775	2,123	$10,250,119	$5,600,969**
TOTAL		**12,800**	**15,526**	**$70,682,062**	**$32,561,236**

Source: VA Department of Criminal Justice Services. * Data as of September 8, 2015. ** Most recent figure provided on DCJS website.

State Drug-Related Data (DCJS)

- From FY10-FY15:
  - Currency is the most frequently seized item
    - 64% (9,034 of 14,171)
  - Vehicles were the 2nd most frequently seized item
    - 25% (3,479 of 14,171)
  - Range of values of items seized by law enforcement:
    - $71 to $1,115,004
  - Range of disbursals received by participants:
    - $0 to $510,790

State Drug-Related Data (DCJS)

Types of Items Seized in State Drug-Related Forfeitures, FY10-FY15

FY	Total Items Seized	Currency	Vehicles	Electronics	Jewelry	Firearms	Property	Boats	Other
2010	**2,464**	*1,511*	*627*	152	64	26	8	4	72
2011	**2,346**	*1,426*	*604*	117	83	39	7	4	66
2012	**2,457**	*1,438*	*630*	139	33	59	7	3	148
2013	**2,369**	*1,541*	*571*	73	75	42	4	1	62
2014	**2,412**	*1,613*	*585*	76	21	46	4	4	63
2015*	**2,123**	*1,505*	*462*	53	15	39	6	0	43
TOTAL	**14,171**	***9,034***	***3,479***	**610**	**291**	**251**	**36**	**16**	**454**

Source: VA Department of Criminal Justice Services. * Data as of September 8, 2015.

State Drug-Related Data (DCJS)

- In FY14, there were 2,412 items seized with 936 still having a pending status.
  - When removing pending cases, there were 1,476 items with a finalized status.
- Overall case outcome for the remaining 1,476 items was:
  - 75% (1,107 of 1,476) were forfeited;
  - 17% (245 of 1,476) were returned to owner;
  - 6% (85 of 1,476) were dismissed in court;
  - 2% (34 of 1,476) were released to a lienholder; and,
  - <1% (5 of 1,476) were administrative/other.

State Drug-Related Data (DCJS)

- However, there are variations in outcomes depending on the type of items seized. For example, 86% (959 of 1,115) of currency was forfeited; whereas, only 41% (116 of 282) of vehicles were forfeited in FY14.

Types of Items Seized by Case Outcome, FY14

Type of Item Seized	Total Items	Forfeited	Return to Owner	Dismissal	Release to Lienholder	Other
Currency	**1,115**	***959***	101	53	0	2
Vehicle	**282**	***116***	110	29	26	1
Electronics	**23**	***8***	12	1	2	0
Firearms	**2**	***1***	1	0	0	0
Jewelry	**13**	***11***	1	1	0	0
Real Estate	**2**	***0***	2	0	0	0
Boat	**3**	***2***	1	0	0	0
Other	**36**	***10***	17	1	6	2
TOTAL	**1,476**	***1,107***	**245**	**85**	**34**	**5**

Source: VA Department of Criminal Justice Services. Cases with pending status not included in these figures.

State Drug-Related Data (DCJS)

- Court Order Analysis:
  - Staff requested and analyzed a sample of 388 court orders from FY14 state drug-related cases.
  - Staff wanted to determine how many forfeitures were a result of default *versus* other means.
- Of the 388 forfeiture court orders:
  - 95% (368 of 388) involved currency;
  - 14% (56 of 388) involved vehicles;
  - 3% (12 of 388) involved electronics;
  - 2% (7 of 388) involved firearms; and,
  - <1% (3 of 388) involved jewelry.

State Drug-Related Data (DCJS)

- Of the 388 forfeiture court orders:
  - 61% (237 of 388) were a result of **default;**
    - Defendant did not answer information or did not appear.
  - 28% (108 of 388) involved a defendant signing a plea agreement, waiver, consent to forfeiture or other type of settlement prior to the hearing;
  - 11% (41 of 388) involved a defendant, owner or GAL appearing but case resulted in forfeiture; and,
  - <1% (2 of 388) resulted in trial.

State Drug-Related Data (DCJS)

- Annual Certification Reports, FY14:
  - Staff entered and analyzed 352 annual certification reports submitted by participating agencies for FY14.
    - 224 law enforcement agencies, 109 Commonwealth's Attorneys' Offices, and 19 Drug Task Forces.
  - Range of Beginning AF Fund Balances: $0 to $1,044,793.
  - Range of Additional AF Proceeds: $0 to $95,271.
    - Under $500 forfeitures, auction proceeds, transfers from other agencies.
  - Range of AF Funds Spent: $0 to $361,641.
  - Participants must then itemize funds spent into several specific categories.

State Drug-Related Data (DCJS)

Total Forfeiture Funds Spent by Itemized Category, FY14

Category	Number of Agencies	Total Funds Spent	% of Total
Informants/Buys	24	$44,783	0.9%
Body Armor/Protective Gear	23	$87,398	1.8%
Firearms/Weapons	30	$150,942	3.2%
Electronics/Surveillance Equipment	34	$176,844	3.7%
Building/ Improvements	28	$340,356	7.2%
Salaries	13	$366,563	7.7%
Travel/Training	86	$571,458	12.1%
Communications/Computers	88	$881,588	18.6%
Other*	137	$2,120,675	44.7%
TOTAL SPENT		**$4,740,607**	

Source: VA Department of Criminal Justice Services, FY14 Annual Certification Reports. * Other category includes a wide array of approved expenditures for items such as uniforms, K9 officers, drug test kits, task force/professional dues and expert witnesses.

State Non-Drug Related Data

- Staff attempted to determine the amount of funds sent by law enforcement to the Literary Fund from non-drug related asset forfeitures.
- Most reported that $0 was sent from their agency in FY14.
  - Several agencies reported that they did not track this information.
- 15 law enforcement agencies provided FY14 amounts totaling $159,972.
  - Range= $125 to $62,314.
- Unable to break down by *type* of non-drug related crimes.

State Asset Forfeiture Data

- Data Summary:
  - Excellent data is maintained for state drug-related AF.
  - The volume of cases, items seized and disbursals received have remained consistent over the past 5 years.
  - Most seizures involve currency and vehicles.
    - However, DMV does not readily keep track of all vehicle forfeitures/hold letters.
  - In general, 75% of cases result in forfeiture and 25% of cases result in the item being returned to the owner or a lienholder.
  - Most forfeitures are a result of default or some type of plea agreement/settlement.
  - Very few cases appear to go to trial.

State Asset Forfeiture Data

- Data Summary:
  - Agencies are held accountable to the state program through detailed annual certification reports to DCJS.
  - Nearly all agencies also reported having annual audits by DCJS and/or other entities.
  - Most agencies reported having a designated person(s) to handle AF cases.
  - Data for non-drug related AF is not captured in a reliable, transparent manner like drug-related AF data.
  - Data not readily captured to connect the related criminal charges and convictions.
  - Data not readily available to ascertain how many civil AF trials involve a verdict in favor of the complainant.

Other States

- Forfeiture statutes of other states were reviewed, with a focus on:
  - Is a conviction required for a forfeiture to proceed?
  - What is the burden of proof?
  - Is the burden of proof different for an "innocent owner?"
  - Is the defendant entitled to a stay in proceedings?
  - Is a prevailing defendant entitled to costs or attorney fees?

Other States

- Is a conviction required for a forfeiture to proceed?
  - 33 states (and the federal government) are like Virginia and do not require a criminal conviction prior to forfeiture.
  - 7 states have blended or mixed requirements where a conviction is necessary in some circumstances but not others.
  - 9 states essentially require a conviction. Exceptions are made if the claimant agrees to the forfeiture.

Other States

- Is a conviction required for forfeiture to proceed?
  - Examples of states that have mixed requirements:
    - Colorado is a blended jurisdiction; no forfeiture may be entered until an owner of the property is convicted of a qualifying offense; however, for most of those offenses, if the state can prove by clear and convincing evidence that the property was instrumental to the crime, or its proceeds related to the criminal activity of a non-owner and the owner is not an "innocent owner," then the property may be forfeited without a conviction. C.R.S. 16-13-307(1.5), (1.7).

Other States

- Examples of states that have mixed requirements (cont.):
  - New York does not require a conviction for forfeitures related to certain drug related felonies; however, forfeitures related to other felonies do require a conviction. NY CLS CPLR § § 1310, 1311.
  - North Carolina requires a conviction for forfeitures, except for RICO forfeitures. N.C. Gen. Stat. § 90-112; § 75D-5.

Other States

- What is the burden of proof?
  - 23 states (and the federal government) are like Virginia and use a preponderance of the evidence standard.
  - 8 states use a probable cause standard.
  - 1 state uses a prima facie standard.
  - 1 state uses a reasonable certainty standard.
  - 8 states use a clear and convincing standard.
  - 2 states use a beyond reasonable doubt standard.
  - 6 states use blended or multiple standards.
    - CA, KY, NY, OR, TN, VT all have a higher standard of proof if real property is being forfeited.

Other States

- The burden of proof for an innocent owner exception:
  - 24 states (and the federal government) are like Virginia and use a preponderance of the evidence standard;
  - 4 states use a clear and convincing standard;
  - 15 states do not specifically note a standard in their statutes;
  - 6 states use blended or multiple standards.
    - CA, KY, NY, and OR use a higher standard of proof depending upon the type of property being forfeited;
    - UT and VT use a higher standard of proof based on whether the claimant is a criminal defendant.

Other States

- Who bears the burden of proof if an innocent owner exception is claimed?
  - 32 states (and the federal government) are like Virginia and place the burden of proof on the claimant.
  - 11 states place the burden of proof on the state.
  - 6 states use blended or multiple standards.
    - AL, KY, ME place the burden on the state for forfeitures of real property.
    - OR places the burden on the state, except if the property is cash, weapons, or negotiable instruments.
    - UT and VT place the burden on the state only if the claimant is a criminal defendant.

Other States

- Is the defendant entitled to request a stay or continuance in the proceedings?
  - 8 states (and the federal government) are like Virginia and statutorily specify that the proceedings may be stayed on the motion of either party.
  - 3 states statutorily specify that the proceedings may be stayed on the motion of the claimant.
  - 7 states statutorily specify that the proceedings shall be stayed on the motion of either party.
  - MD requires the proceedings to be stayed if a family residence is the subject of the forfeiture and the claimant is appealing the criminal conviction.

Other States

- Other states, usually those requiring a conviction, mandate forfeiture proceedings be stayed until after the criminal trial:
  - MO mandates that forfeiture proceedings be stayed until the disposition of criminal charges; no property can be forfeited unless the person is found guilty.
  - NY mandates that forfeiture proceedings be stayed during the pendency of a related criminal action, but with the consent of all parties, the forfeiture may proceed.
  - MT requires a conviction for forfeiture; unless the defendant requests separate proceedings, the forfeiture proceedings are held directly after the conviction.

Other States

- Is the defendant entitled to costs or fees?
  - 5 states are like Virginia and award the claimant costs and/or fees as a matter of right if he prevails.
  - 2 states exempt a prevailing claimant from costs and/or fees as a matter of right if he prevails.
  - 4 states will award a prevailing claimant for costs and/or fees upon a discretionary finding of the court.
  - 4 states have mixed requirements; some costs and/or fees are awarded as a matter of right, while others require a discretionary finding by the court.

Other States

- Is the defendant specifically entitled to attorney fees?
  - 3 states are like Virginia and require that the prevailing claimant shall be awarded attorney fees.
  - 3 states specify in statute that attorney fees may be awarded to the prevailing claimant upon a finding by the court.

Other States

- Examples of other statutory provisions:
  - 7 states prohibit a forfeiture that would be excessive or disproportionate to the severity of the offense.
  - Vermont specifically allows the claimant and the prosecutor to enter into a forfeiture agreement under which the claimant will not be charged with a crime.
  - Missouri specifically prohibits forfeiture to be used in bargaining to defer prosecution, obtain a guilty plea, or affect a sentencing recommendation.
    - While criminal and forfeiture proceedings can be resolved at the same time, the court shall not approve any forfeiture settlement without first finding that no improper bargaining has occurred.

Other States

- Examples of other statutory provisions:
  - Texas specifically prohibits law enforcement from requesting, requiring, or inducing a person to execute a document purporting to waive that person's interest in or rights to seized property.
    - Texas also prohibits prosecutors from doing this before a court proceeding has been initiated.

Summary

- Summary of other state statutes:
  - Virginia's statutory scheme is very similar to most other states.
  - More than 30 states and the federal government are like Virginia: a preponderance of the evidence standard is used; no requirement for a criminal conviction; the burden is on the claimant, after the state proves the property is subject to forfeiture, to establish that he is an "innocent owner."
  - Virginia is in the minority of states in requiring reimbursement of attorney fees to the claimant if he prevails.

Recommendations

- Staff recommendations, which are based upon the key findings of the study, focus on:
  - Transparency of the Forfeiture Process in Virginia
  - Preventing the Potential for Abuses
  - Automation and Efficiencies
- The first 3 recommendations would require legislation. The other 4 could be handled administratively.
- Several other items for consideration are also included.

Recommendations

- Recommendation 1: The use of "waivers" by law enforcement, whereby the declared owners or lawful possessors of property "waive" their rights to contest forfeiture, should be prohibited.
  - This would not apply to cases where someone denies he is the owner or lawful possessor of property.
  - Having law enforcement directly "negotiate" with a property owner, without the direct involvement of a prosecutor and/or an attorney for the owner, can raise the appearance of unfair dealing or coercion.
  - In other states where this practice became widespread, there have been reports that the process was abused.

Recommendations

- Recommendation 2: DCJS should prepare an annual report to the Governor and General Assembly regarding information on all drug and non-drug asset seizures and forfeitures.
  - The report shall be made available to the public.
  - Public confidence in civil forfeiture in Virginia may be improved if information is readily available.
  - The report should also include disbursals received by Virginia agencies from the Federal Asset Forfeiture Sharing Program.

Recommendations

- Recommendation 3: The word "warrant" should be added to Va. Code § 19.2-386.10(B), so that a forfeiture proceeding may be stayed if it is also related to a warrant.
  - Current law only specifies forfeiture proceedings be stayed when related to an indictment or information.
  - There are instances where the forfeiture is related to a case that is pending for a preliminary hearing, and no indictment has yet been prepared.

Recommendations

- Recommendation 4: DCJS should require participating agencies to submit information on all state law enforcement seizures and state forfeiture actions *stemming from criminal activity*, not just those related to drug offenses.
  - Currently, Virginia does not have detailed data readily available on non-drug asset forfeitures.
  - This would capture information related to *about* 20 other crimes where forfeitures are permitted.

Recommendations

- Recommendation 5: DCJS should collect additional data related to asset forfeitures for criminal charges and convictions that may accompany drug and non-drug related civil asset forfeitures.
  - Currently, the ability to match criminal charges and convictions with civil forfeiture proceedings is not readily available.

Recommendations

- Recommendation 6: DCJS should consider automating their state AF program to afford LE and CA's the ability to upload all forms, annual certification reports and supporting documentation.
  - Survey results indicated that participating agencies desired a more automated process.
  - Participating agencies submit thousands of forms and supporting documentation each year to DCJS.
  - DCJS receives10% of drug-related forfeitures to administer the State Forfeited Asset Sharing Program.
  - DCJS already has an online grant management system for quarterly reporting.

Recommendations

- Recommendation 7: Crime Commission staff should work with law enforcement and prosecutors to help implement training that can be readily accessible online to new asset forfeiture coordinators.
  - There is a high turnover rate for asset forfeiture coordinators.
  - When a new individual is designated as an asset forfeiture coordinator, he should be able to receive training and education quickly, rather than waiting for the next available course.
  - Training has already been developed but is not typically offered online or regularly scheduled.

Items for Consideration

- Virginia's current statutes and practices balance the interests of property owners and the Commonwealth.
- Additional protections for citizens could be implemented in Virginia.
- However, no direct evidence was found of systemic abuse of the asset forfeiture process in Virginia by law enforcement or prosecutors.
- A small minority of states have statutorily enacted provisions that raise the burden of proof or require a conviction for forfeitures to proceed.

Items for Consideration

A. Mandate that the defendant would be entitled to a stay until the resolution of any pending criminal case.
   - Current law says the defendant "may" be granted a stay.
   - 40% (38 of 94) of Commonwealth's Attorneys' Offices reported that they had a policy to stay civil AF cases until the related criminal case is completely resolved (i.e., all appeals finalized).

Items for Consideration

- Both law enforcement and prosecutors have very similar mixed opinions regarding a requirement to stay a civil AF case until any related criminal charges are resolved:

Support of Requirement to Stay a Civil AF Case

Opinion	Law Enforcement	Commonwealth's Attorneys
Strongly Favor	19% (21)	19% (18)
Somewhat Favor	25% (27)	19% (18)
Somewhat Oppose	12% (14)	15% (16)
Strongly Oppose	33% (39)	34% (32)
Undecided	12% (14)	12% (11)
# Respondents	115	95

Source: Virginia State Crime Commission, Law Enforcement and Commonwealth's Attorneys' Asset Forfeiture Survey, 2015.
Note: Percentages may not total 100% due to rounding.

Items for Consideration

B. Mandate that if the defendant wanted the forfeiture proceeding to be heard prior to the resolution of a pending criminal case, the Commonwealth could not stay the case over the defendant's objection.

Items for Consideration

C. Increase the burden of proof on the Commonwealth from "preponderance of the evidence" to "clear and convincing evidence."

Items for Consideration

D. Require a criminal conviction before any forfeiture could be ordered.

- 93% (104 of 112) of law enforcement agencies do not require a criminal conviction against someone before referring a related civil AF case to the CA.
- 18% (17 of 95) of Commonwealth's Attorneys' Offices reported that they had a policy requiring a criminal conviction against someone, before proceeding with a related AF case (understanding that they may have already filed information before the defendant's conviction).

Items for Consideration

- The majority of responding law enforcement and prosecutors *at least* "somewhat oppose" a requirement for an criminal conviction before a related civil AF case can proceed.

Support of Requirement for a Criminal Conviction Before Related Civil AF Case

Opinion	Law Enforcement	Commonwealth's Attorneys
Strongly Favor	9% (11)	5% (5)
Somewhat Favor	16% (18)	15% (14)
Somewhat Oppose	11% (13)	16% (15)
Strongly Oppose	51% (59)	62% (59)
Undecided	13% (15)	2% (2)
# Respondents	116	95

Source: Virginia State Crime Commission, Law Enforcement and Commonwealth's Attorneys' Asset Forfeiture Survey, 2015.

Items for Consideration

E. Require a criminal conviction, and the conclusion of all appeals, before any forfeiture could be ordered.
   - This was the proposal of SB 684 and HB 1287.
   - Exemptions could be provided, such as defaults within a certain timeframe or plea agreements.

Discussion