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**COMMONWEALTH
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**Model Provisions on Money
Laundering, Terrorist Financing,
Preventive Measures and Proceeds of
Crime
(for common law legal systems)**

April, 2009

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Introduction to the Model Provisions

These model provisions on money laundering, financing of terrorism, proceeds of crime and civil forfeiture are the outcome of a collaboration between the Commonwealth Secretariat, the International Monetary Fund (IMF) and the United Nations Office on Drugs and Crime (UNODC). They form a starting point for State authorities as they evaluate the measures that should be incorporated into domestic law in order to prevent, detect, and effectively sanction money laundering, the financing of terrorism and the proceeds of crime.

Using the Model Provisions

As part of an effort to assist jurisdictions prepare or upgrade their legislative framework to conform with international standards and best practices to implement anti-money laundering and combating the financing of terrorism (AML/CFT) measures, the UNODC in 2003 issued the [*Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill*](#).

These 2009 updated model provisions, which are based upon the relevant international instruments concerning money laundering and the financing of terrorism, the FATF 40+9 Recommendations and best practices, replace the 2003 UNODC Model.

The model provisions are intended to be a resource in drafting legislation to address money laundering and the financing of terrorism. Taken together, the provisions incorporate a legislative base for many of the requirements of the relevant international instruments and the FATF 40+9 Recommendations. The provisions also strengthen or supplement these standards in some respects. They suggest an approach both to criminally confiscate and civilly forfeit proceeds, instrumentalities and terrorist property.

State authorities considering the provisions should take care to adapt the underlying concepts and specific language to accord with constitutional and fundamental legal principles in their systems. As well, the provisions may be supplemented with additional measures a State considers suited to effectively combat money laundering and the financing of terrorism in the national context.

The eight Parts of these model provisions are set forth as separate units. Taken together they present a unified whole. Relevant definitions appear at the beginning of each Part. If all or selected Parts are used, adjustments to definitions will be necessary.

The document also includes several features to assist drafting authorities to understand the various provisions and to facilitate their consideration of choices relating to provisions:

- “Notes for Drafting Authorities” provide explanations of selected provisions and suggest various considerations for drafting authorities as they decide how best to proceed.
- Some provisions present “variants” and “optional language.” A “variant” provides two approaches for authorities to consider. Authorities should adopt one or the other, or their own separate approach. “Optional language” is italicized and sets forth an addition that may be included or not.
- Time periods for orders and other matters, whether days, months or years, appear in brackets. The bracketed number is a suggestion.

The eight Parts are as follows:

| | |
|-----------|--|
| Part I: | Preliminary |
| Part II: | Money Laundering and Terrorist Financing Offences |
| Part III: | Cross Border Transportation of Currency and Bearer Negotiable Instruments |
| Part IV: | Preventive Measures |
| Part V: | Financial Intelligence Unit |
| Part VI: | Conviction-Based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders |
| Part VII | Civil Forfeiture |
| Part VIII | Recovered Assets Fund |
| Annex I | Model Decree on the Financial Intelligence Unit |

The provisions were drafted by a group of experts, including participants from the Commonwealth Secretariat, the International Monetary Fund and the United Nations Office on Drugs and Crime, that met in London in March 2008, and in Washington D.C. in October 2008, and that finalised the provisions in April, 2009.

The document as a whole is a complex instrument with provisions that interconnect in various ways. The model provisions also cover a wide range of subject matter areas. While there was considerable effort to avoid inconsistencies and drafting errors, a review of model provisions by drafting authorities, the comparisons that are likely to take place with existing legislation, and experience that is gained through actual use of these or similar provisions are all likely lead to suggestions for adjustments and change.

The organisations hope to revisit the document within a reasonable period to incorporate new developments and standards, to alter the text to improve the provisions and to address any issues of inconsistency. We invite your comments and suggestions and your active participation in this endeavour. Comments should be directed to:

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**An Act to provide for criminal offences of money laundering
and terrorist financing,
to establish preventive measures to combat
money laundering and the financing of terrorism,
and to recover the proceeds of crime,
instrumentalities and terrorist property**

ENACTED by the [insert method/name] of [insert name of State]

Part I: Preliminary

Section 1. Extent, Commencement and Application

- (1) This Act shall extend throughout [insert name of State].
- (2) It shall come into force *Variant 1*: [on (insert date)] *Variant 2*: [at once].
- (3) It shall apply notwithstanding any other Act to the contrary.
- (4) In this Act the word “includes” is a term of specification but not limitation, any reference to the singular includes the plural and any reference to the plural includes the singular, and any reference to either gender includes a reference to the other.

Drafting Note: Drafting authorities should consider the effect new provisions that are being prepared for adoption will have on laws that are in effect, and the need for transitional provisions to enable ongoing investigations, prosecutions and confiscation proceedings to continue. They should also consider consequential amendments needed for any provisions currently in effect.

Section 2. Definitions

In this Act, unless the contrary intention appears: [applicable definitions should be set forth here in summary form or alternatively at the beginning of each Part].

Drafting Note: In the model provisions, the applicable definitions are set forth or referenced in some manner at the beginning of each Part. Definitions may also appear in the provisions to which they are specific if the term is unique to that provision, or in the case of a criminal offence if it is important that definitions be set forth as part of the offence provision.

If a comprehensive Act is formulated using these model provisions, applicable definitions can be placed here.

Part II: Money Laundering and Terrorist Financing Offences

Section 3. Money Laundering Offences

Drafting Note: The relevant FATF Recommendation is [Recommendation 1](#) which provides for criminalization consistent with the [1988 Vienna Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances \(“Vienna”\)](#) and the [2000 Transnational Organized Crime Convention \(“Palermo” Convention\)](#).

Proceeds of Crime. Proceeds of crime is a defined term. That definition includes a reference to “criminal offence.” Drafting authorities should choose an approach to “criminal offence” among the alternatives provided under [FATF Recommendation 1](#). The scope of the money laundering offence, that is the criminal offences to which it extends, should be clear. One way to accomplish this is by including a definition of “criminal offence” in the provision that makes money laundering a criminal offence. This approach is taken in the model provisions.

Types of Property and Coverage of Foreign Offences. The money laundering offence should extend to any type of property regardless of value that directly or indirectly represents proceeds. The definitions section applicable to the money laundering offence sets forth a broad definition of property which covers any kind of assets, and a definition of proceeds that covers property or economic advantage obtained directly or indirectly through the commission of an offence. The definition of offence in turn, in addition to domestic offences, covers foreign offences subject to dual criminality principles.

Self-laundering: As the section refers to “any person,” this includes both the person who committed the predicate offence and third party launderers. Although generally not an issue in States in the common law tradition, there can be a question whether the offence should be extended to the person who also committed the predicate offence.

The [Vienna](#) and [Palermo Conventions](#) provide an exception to the general principle that both the predicate offender and third parties should be liable for money laundering where fundamental principles of domestic law require that it not apply to the person who committed the predicate offence. In some countries, constitutional principles prohibit prosecuting a person both for money laundering and a predicate offence. In the case of most common law countries, there do not appear to be fundamental principles that prohibit the application of the money laundering offence to self-launderers. However, if an exception is necessary, an additional provision, as “[t]he offence of money laundering shall not apply to persons who have committed the predicate offence” should be incorporated.

If drafters believe that there is a need for additional clarity beyond the reference to “any person” to ensure that those who launder their own proceeds are covered, a provision can be added as “[t]he offences set forth in Section 3(2) - (5) shall also apply to the person who has committed the offence(s), other than money laundering, that generated the proceeds of crime.”

Drafting Note continued:

Kinds of Offences: As the UN's [Legislative Guide to the Palermo Convention](#) and [Legislative Guide for the Implementation of the United Nations Convention Against Corruption](#) make clear, there are four general kinds of conduct that should be criminalized. The minimum requirements for each are:

1. **Conversion or transfer of proceeds of crime.** This includes “instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.” (See, e.g., paragraph 231, in [Legislative Guide](#) for the implementation of the UN Corruption Convention). Regarding mental elements, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds, and the act must be done for either one of the two purposes stated – concealing or disguising criminal origin or helping any person (whether one’s self or another) to evade criminal liability for the crime that generated the proceeds.

2. **Concealment or disguise of proceeds of crime.** There are many aspects noted in the provision as to which there can be concealment or disguise – almost any aspect of, or information about, the property, so this section is broad. The concealment or disguise must be intentional and the accused must have knowledge that the property constitutes proceeds of crime at the time of the act. This provision deals with the intentional deception of others. This will include the intentional deception of law enforcement authorities. True nature may be the essential quality of it having been derived from criminal activity. Origin may be the physical origin, or its origin in criminality. For this second offence, there should not be a requirement of proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin. Although as a general matter this will be the purpose of the concealing or disguising, the applicable UN Conventions require that there be criminalization that is not dependant upon a showing of such purpose.

3. **Acquisition, possession or use of proceeds.** This section imposes liability on recipients who acquire, possess or use property, and contrasts with the two provisions above that deal with liability for those who provide illicit proceeds. There must be intent to acquire, possess or use, and the accused must have knowledge at the time of acquisition or receipt that the property was proceeds.

4. **Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling.** There are varying degrees of complicity or participation other than physical commission of the offence: assistance (aiding and abetting, facilitating) and encouragement (counselling). In addition, attempts are to be criminalized. Finally, this section includes conspiracy, a common law concept, or as an alternative, an association of persons working together to commit an offence.

Knowledge: The variants suggested are first, the basic one of knowledge that the property is proceeds of crime (which knowledge may be inferred from objective factual circumstances); and secondly a more flexible standard of knowledge or suspicion that the property is proceeds of crime.

Drafting Note continued: An even less demanding negligence standard may also be added. It is set forth in a separate subsection, here Section 3(5), as States adopting this standard often choose to provide lesser penalties for negligent money laundering. The second variant which includes “suspecting” eases the proof by covering situations where evidence suggests that the person had a suspicion that the property might well be proceeds. Some States also use, as the alternative standard in their criminal money laundering provision, that the person had reasonable grounds to believe the property constituted proceeds.

Drafters may also wish to consider adding to “knowing” in each of the subsections, the term “believing.” This would provide for liability where persons believe what they have taken or converted is proceeds, even though it is not. It would apply, for instance, where monies or goods were provided by a law enforcement officer. This is set forth as an option in the model provision.

In choosing a standard, drafters should review the domestic standards within the jurisdiction relating to the concept of criminal knowledge. In some States, for instance, the concept might include situations of wilful blindness or recklessness.

Stating Elements and Penalties for Offences. It will be observed that different methods are used for stating the elements of an offence in the model provisions. The prohibited conduct may be stated first, or it may follow the mental state that must be proved to make that conduct criminal. That stylistic difference may be dictated by the need to explain or offer variants of either the conduct or the intent definition. Similarly, the penalty for prohibited conduct may be included in each subsection establishing the elements of an offence, or set forth in a separate subsection, or it could even be grouped with other offences and penalties in a separate Part for prominence and ease of reference. This variety of approaches reflects the variety of drafting styles found in national legislation, and drafters should choose the style that is most consistent with their needs and local practice.

(1) The following definitions apply in this section:

“**offence**” except when the reference is to the specific offence established by subsection (2), (3), (4), (5) or (6), means:

Variant 1: (a) any offence under the law of [insert name of State]; and

(b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 2: (a) any offence against a provision of any law in [insert name of State] for which the maximum penalty is death or life imprisonment or other deprivation of liberty of more than one year; and

(b) any offence under a law of a foreign State, in relation to acts or omissions, which had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 3: (a) offences defined in Schedule 1 to this Act; and

(b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Drafting Note: The definition of “offence” should reflect one of the three approaches set forth in [FATF 40 Recommendation 1](#). Drafting authorities should consider which approach to adopt: all offences, all serious offences, a comprehensive list that reflects all serious offences, or some combination of these. Variant two as drafted, the serious offence approach, should be altered in those instances where a country has minimum thresholds in their legal system. See [FATF Recommendation 1](#) below. It is essential, whichever approach is chosen, that similar offences under the laws of another State also be covered. Use of the list approach has the disadvantage of requiring frequent changes in legislation as new offences are enacted.

[FATF Recommendation 1](#) provides that predicate offences to money laundering:

“may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year’s imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment.

Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences.”

The designated categories appear in the [Glossary to the FATF 40](#). They are:

- participation in an organised criminal group and racketeering;
- terrorism, including terrorist financing;
- trafficking in human beings and migrant smuggling;
- sexual exploitation, including sexual exploitation of children;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit arms trafficking;
- illicit trafficking in stolen and other goods;
- corruption and bribery;
- fraud;
- counterfeiting currency;
- counterfeiting and piracy of products;
- environmental crime;
- murder, grievous bodily injury;
- kidnapping, illegal restraint and hostage-taking;
- robbery or theft;
- smuggling;
- extortion;

Drafting Note continued:

- forgery;
- piracy; and
- insider trading and market manipulation.

The [Glossary](#) also notes that “[w]hen deciding on the range of offences to be covered as predicate offences under each of the categories listed above, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences.”

“**proceeds**” and “**proceeds of crime**” means any property or economic advantage derived from or obtained directly or indirectly through the commission of a criminal offence [*Option: or in connection therewith*]. It shall include economic gains from the property and property converted or transformed, in full or in part, into other property.

Drafting Note: A number of common law countries, for instance the United Kingdom and South Africa, make it clear in their legislation that benefits of criminal conduct include property obtained “in connection with” the offense. Adding this phrase expands the concept of proceeds somewhat. It should, for instance, make it clear in the case of a stand-alone money laundering prosecution where there is no prosecution for the predicate offence that the funds being laundered which may be viewed primarily as proceeds of the predicate activity are also considered proceeds of the money laundering offence.

“**property**” means asset of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [insert name of State] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.

Drafting Note: Property. The [Vienna](#) and [Palermo Conventions](#) and the [UN Convention Against Corruption](#) use the term “property” to refer to assets that may be subject to those instruments. The [International Convention for the Suppression of the Financing of Terrorism](#) uses “funds” to express the same concept, but adds an illustrative list beginning with “including but not limited to” that sets forth various examples of covered assets. The model provisions’ definition of “property” includes the [Vienna](#) and [Palermo Conventions](#) and [UN Convention Against Corruption](#) terminology, supplemented by the illustrative examples from the [Terrorism Financing Convention](#).

It also adds the terms “currency” and “deposits and other financial resources” to remove any doubt that those items are included, and language providing that the definition applies wherever the property is located. See also definitions in the [Glossary to the FATF Methodology](#).

(2) Any person who converts or transfers property

Variant 1: knowing [*or believing*] that it is the proceeds of crime

Variant 2: knowing [, *believing*] or suspecting that it is the proceeds of crime

for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of an offence to evade the legal consequences of his action, commits an offence.

(3) Any person who conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to property

Variant 1: knowing that such property is the proceeds of crime

Variant 2: knowing or suspecting that such property is the proceeds of crime

commits an offence.

(4) Any person who acquires, uses or possesses property

Variant 1: knowing at the time of receipt that such property is the proceeds of crime

Variant 2: knowing or suspecting at the time of receipt that such property is the proceeds of crime

commits an offence.

(5) [**Option:** Any person who performs any of the acts described in subsections (2), (3) or (4) having reasonable grounds to know or suspect that the property is proceeds of crime commits an offence].

Drafting Note: Section 3(5) provides for liability under a negligence standard for the three kinds of money laundering offences. A person is liable when he ought reasonably to have known or suspected that property constituted proceeds.

(6) Participation in, association with or conspiracy to commit, an attempt to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences set forth in subsections (2) through (5) is also an offence.

(7) Knowledge, suspicion, intent or purpose required as elements of an offence set forth in (2) through (6) above may be inferred from objective factual circumstances.

Drafting Note: Knowledge, intent and purpose as states of mind cannot generally be proven directly as a fact, only inferred from proven facts.

Drafting Note continued: Barring a person having stated to another person that they knew or that they had a specific purpose, direct proof would not appear possible.

Section 3(7) sets forth a rule of evidence that shall apply. The inference is specifically provided for in Article 3.3 of the [Vienna Convention](#) and Article 5.3 of the [Palermo Convention](#); and Article 28 of the 2003 [UN Convention against Corruption](#). It does not alter the intent standard, and objective factual circumstances referenced can be used, for instance, to establish that a person suspected, or knew, that property was the proceeds of crime under Section 3(4). It may also be used to prove a person should have known that property was the proceeds of crime under Section 3(5). Even if objective factual circumstances establish that a reasonable person would have reason to know that property was proceeds, if the fact finder is convinced that the accused was only negligent and did not subjectively realise the illegality, the liability would be under the negligent money laundering offence set forth in Section 3(5).

The general principles of criminal law in many States recognize the intentional element of any criminal offence as something that may be inferred from objective factual circumstances. However, even in such situations, there may be varying levels of acceptance and willingness by the courts regarding the drawing of inferences from objective factual circumstances. Section 3(7) makes it explicit that, for the money laundering offence, these states of mind may be inferred from objective factual circumstances.

(8) In order to prove the property is the proceeds of crime, it shall not be necessary that there be a conviction for the offence that has generated the proceeds [**Option:** *or that there be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence*].

Drafting Note: One of the most difficult issues that a prosecutor may face in securing a money laundering conviction is establishing that the property involved is proceeds. If the standard in the jurisdiction is set too high, a money laundering offence could be prosecuted successfully only if the predicate activity was prosecuted and a conviction obtained. As is recognized in connection with [FATF Recommendation 1](#), this would defeat the purpose of the criminal provision. See Methodology, Essential criterion 1.2.1 to [Recommendation 1](#). In addition, drafters should consider whether to include the language set forth as an option. This will depend upon the kind of proof a court is likely to require, and the State’s general approach regarding acceptable levels of proof. It provides specifically that to show property is proceeds, the prosecutor need not provide evidence of the specific offence or the specific perpetrator. Rather the prosecutor need only establish that some kind of criminal activity occurred which resulted in proceeds.

Drafting authorities may also consider adding language to Section 3(8) that proof that property is proceeds of crime can be inferred from the factual objective circumstances surrounding the way in which property was handled. With this, it would be clear that evidence regarding the circumstances in which the property is handled may give rise to a strong inference that such property could only have been derived from crime (See, *R v Anwoir & others* (Court of Appeal for England & Wales) at paragraph. 21.

(9) For the purposes of this section, “proceeds of crime” includes proceeds of an offence committed outside the national territory if the conduct constitutes an offence in the State or territory where the conduct occurred and would have constituted an offence if committed within the national territory of [insert name of State adopting the law].

Drafting Note: It is essential that it be very clear that the money laundering offence applies to proceeds generated by foreign offences.

(10) The offences set forth in Sections 3(2), 3(3) and 3(4) shall be punishable, in the case of natural persons, by imprisonment of [insert number] to [insert number] years and a fine of [insert amount] to [insert amount], or either of these penalties, and in the case of legal persons by a fine of [insert amount] to [insert amount].

[Option: and a fine of up to _____ times the amount of the laundered sums.]

Drafting Note: Persons, both natural and legal, should be subject to effective, proportionate and dissuasive sanctions for money laundering. In assessing whether the sanctions meet this test, the level of penalties for both imprisonment and fines are considered relative to the penalties for other serious offences in the State and for similar offences in other States. See [FATF Recommendation 2](#), [FATF Methodology](#) Criterion 2.5 and footnote 5.

A separate clause for the fine for legal persons permits the State to choose a larger minimum and maximum fine for legal entities, which is generally viewed as a significant factor in ensuring the penalty is dissuasive.

Adding the optional language provides the sentencing judge greater flexibility. In particular, it offers the judge a wider range of authority to impose a significant (and proportionate) penalty in the case of a conviction of persons who oversee large criminal organizations.

Drafting authorities may also want to provide for the dissolution of a legal entity as a possible penalty for aggravated situations. This could also be considered for other penalty provisions, for instance, Section 4(4) relating to terrorist financing.

(11) The offences set forth in Section 3(5) shall be punishable, in the case of natural persons, by imprisonment of [insert number] to [insert number] years and a fine of [insert amount] to [insert amount], or either of these penalties, and in the case of legal persons by a fine of [insert amount] to [insert amount].

Drafting Note: States may want to set a lesser penalty for an offence under a negligence standard, where the offender is not shown to have known based upon objective factual circumstances, but only that he should have known.

(12) An attempt to commit any offence set forth in Sections 3(2) - (5), aiding, abetting, facilitating or counselling the commission of any such offence, and participation, association with or conspiracy to commit such offence shall be punished, in the case of natural persons, by imprisonment of [insert number] to [insert number] years and a fine of [insert amount] to [insert amount], or either of these penalties, and in the case of legal persons by a fine of [insert amount] to [insert amount].

Section 4. Terrorist Financing Offences

Drafting Note: The criminal offence defined in Section 4 is based upon the requirements of the [International Convention for the Suppression of the Financing of Terrorism](#) (“[Terrorism Financing Convention](#)”) and many aspects of [FATF Special Recommendation II \(SR II\)](#) and its [Interpretative Note](#).

Terrorist Financing Convention. The [Convention](#) requires the criminalization of the provision and collection of “funds” for the purpose of committing terrorist acts, with “funds” having the same meaning as “property” used in Section 3 in connection with the money laundering offences. The [Convention](#) also requires State parties to provide for the freezing/seizing and confiscation of the instruments and proceeds of that financing offence. This latter requirement is accomplished by the inclusion of the financing offence as a kind of offence to which Part VI applies (confiscation orders and preventive measures). The [Convention](#) does not extend the criminalization requirement to funds provided to or collected for general support, and is limited to use or intended use for terrorist acts.

FATF SR II and Interpretative Note. The [Interpretative Note to Special Recommendation II](#) goes further and suggests criminalization of provision to and collection for a terrorist organisation and for an individual terrorist regardless of intended use. Section 4 is drafted to implement not only the [Convention](#) criminalization obligation but to cover much but not all of the additional criminalization scope of [SR II](#). It covers the provision to and collection for terrorist organisations, but is more limited in scope than [SR II](#) with respect to individual terrorists.

The breadth of coverage regarding funds for an individual terrorist when they are in no way linked to a terrorist act is a subject for discussion and consideration as this provision is drafted. There are human rights considerations as some resources are obviously necessary to sustain life and health. The model provision at Section 4(1)(b) takes a middle ground by limiting criminalization in the case of individual terrorists to situations where the funds are to facilitate the person’s terrorist-related activities. As drafted, it is not a provision that meets fully [SR II](#) as its meaning is reflected in the [Interpretative Note](#). However, in the case of a terrorist group, Section 4(1) fully conforms to the [Interpretative Note](#) by criminalizing any provision or collection of funds with the intention or in the knowledge that they are to be used in full or in part by a terrorist organization.

Section 4, by criminalizing the financing of a terrorist organisation as well as of terrorist acts, makes the property of terrorist organizations subject to freezing/seizure and confiscation both as an instrument and as the proceeds of such financing offence, unless the property was provided or collected prior to the effective date of the law. The confiscation and preventive measures provisions found in Part IV of the model provisions will apply in the case of these assets since the provisions apply to all offences (as defined).

If both Parts II and VI are adopted, this will assist States in meeting the second part of [FATF SR III](#) which provides that countries should have measures to permit them to seize and confiscate proceeds, instrumentalities and intended instrumentalities for financing terrorism, terrorist acts or terrorist organizations.

Drafting Note continued: Definition of Funds. The definition of funds is found in Section 4(1). This definition contains all the elements of the definition of funds found in the [Terrorism Financing Convention](#).

The definition of funds found in Subjection 4(1) corresponds to the definition of funds used in the [Terrorism Financing Convention](#), with the addition of the examples ‘currency’ and ‘deposits and other financial resources’ so as to remove any doubt that those items are included, and of language providing that the definition applies wherever the property is located. This definition of funds differs from the definition of “funds or other assets” found in Section 7, Part IV on Preventive Measures, and in the [SR III Interpretative Note](#) at para. 7(d). “Funds or other assets” includes income or value derived from assets but does not have language providing that the definition applies wherever the property is located. See also definitions in the [Glossary to the FATF Methodology](#).

“**Wilfully**” Article 2-1 of the [Terrorism Financing Convention](#) in defining the minimum elements for an offence that States should adopt includes the terms “unlawfully and wilfully” before “provides or collects funds.” The language suggested here for a domestic criminal provision does not include “unlawfully” as it appears superfluous. The purpose of defining elements of conduct that constitute a criminal offence is to make that conduct unlawful.

The term “wilfully” may also be unnecessary if, as used in a State’s legal system, it means “intentional and knowing” provision or collection of funds. In such circumstances, the addition of “wilfully” would not appear to add anything to the mental state required for the commission of an offence.

If under the general criminal law principles within a particular jurisdiction, the addition of “wilfully” adds the mental element of knowledge that the conduct is forbidden by law—that is there is a purpose to disobey or disregard the law—it would have a more restrictive effect. It would limit liability to circumstances where the provider or collector knew or should suspect that the conduct is forbidden by law and intentionally or recklessly acts in disregard of such law. In any event, the *Convention* provides only a minimum standard, and there is no requirement that this limitation be adopted.

(1) In this section, the following definitions apply:

“**funds**” means assets of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [insert name of State] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.

“**terrorist act**” means:

(a) **Variant 1:** an act, which constitutes an offence within the scope of, and as defined in one of the treaties listed in the annex to the 1999 International Convention for the Suppression of the Financing of Terrorism; and

Variant 2: an act which constitutes an offence within the scope of, and as defined in one of the following treaties: Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), International Convention against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1980), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988), and the International Convention for the Suppression of Terrorist Bombings (1997); and

(b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Drafting Note: Variants 1 and 2 of paragraph (a) are different ways of stating the offences required to be criminalized by Article 2.1(a) of the [Terrorism Financing Convention](#). Whichever variant is used for subsection (a), it is essential that it be followed by paragraph (b) which implements Article 2.1 (b) of the [Convention](#).

“**terrorist organisation**” means any group of terrorists that:

- (a) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;
- (b) participates as an accomplice in terrorist acts;
- (c) organises or directs others to commit terrorist acts; or
- (d) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

Drafting Note: The definition of terrorist organisation is the same as appears in the [Interpretative Note to FATF Special Recommendation II](#).

“**terrorist**” means any natural person who:

- (a) commits or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;

- (b) participates as an accomplice in terrorist acts;
- (c) organizes or directs others to commit terrorist acts; or
- (d) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

Drafting Note: The definition of “terrorist” is the same as that reflected in [Interpretative Note to FATF Special Recommendation II](#).

(2) Any person who by any means, directly or indirectly, [*wilfully*] provides or collects funds, or attempts to do so, with the intention that they should be used or in the knowledge that they are to be used in whole or in part:

- (a) in order to carry out a terrorist act; or
- (b) by a terrorist to facilitate that person’s activities related to terrorist acts or membership in a terrorist organization; or
- (c) by a terrorist organisation

commits an offence.

(3) An offence under subsection (2) of this section is committed:

- (a) even if the terrorist act referred to in subsection (2) of this section does not occur or is not attempted;
- (b) even if the funds were not actually used to commit or attempt the terrorist act referred to in subsection (2) of this section; and
- (c) regardless of the State or territory in which the terrorist act is intended to or does occur.

(4) It shall also be an offence to:

- (a) participate as an accomplice in an offence within the meaning of subsection (2) of this section;
- (b) organise or direct others to commit an offence within the meaning of subsection (2) of this section;
- (c) intentionally contribute to the commission of an offence under subsection (2) by a group of persons acting with a common purpose,

where the contribution is to further the criminal activity or purpose of the group that includes commission of an offence under subsection (2) or where the contribution is made knowing the intention of the group is to commit an offence under subsection (2).

(5) The offences set forth in subsections (2) and (4) of this section shall be punishable in the case of a natural person by imprisonment of [insert number] to [insert number] years and a fine of [insert amount] to [insert amount] or either of these penalties, and in the case of a legal person by a fine not exceeding [ten] times that amount.

Drafting Note: Drafting authorities may also want to provide for the dissolution of a legal entity as a possible penalty in the case of a legal entity.

Part III: Cross Border Transportation of Currency and Bearer Negotiable Instruments

Section 5. Obligation to *[Declare/Disclose]* Physical Cross-border Transportation of Currency and Bearer Negotiable Instruments

Drafting Note: Definitions. It is envisioned that this Part, which consists of Sections 5 and 6, would be adopted in conjunction with Part IV on Preventive Measures to combat money laundering and the financing of terrorism. Definitions of “currency”, “bearer negotiable instrument” and “proceeds” are set forth in Part IV. Definitions of “offence,” “terrorist act,” “terrorist organization” and “terrorist” are set forth in Part II, Money Laundering and Terrorist Financing Offences. “Instrumentality” and “terrorist property” are defined in Part VII, Civil Forfeiture. Those definitions will have to be incorporated in Part III if it is adopted separately from the other Parts.

FATF Special Recommendation IX. Part III sets forth provisions to assist with the implementation of FATF [Special Recommendation IX](#). SR IX can be implemented either through a declaration system that requires all persons to make a declaration when moving the specified assets, or a disclosure system that requires those moving the specified assets in excess of a defined amount to make a disclosure upon request by competent authorities.

Additional Items to Cover. SR IX does not require cross-border declarations regarding gold, other precious metals, or e-money but authorities may consider including such items. If a decision is made to extend the requirements to e-money, authorities should include a definition of “e-money” along the following lines: a stored value or prepaid product in which a record of the funds or value is stored on a device in a person’s possession, including both prepaid cards (also known as electronic purses) and prepaid software products that use computer networks such as the internet (also known as digital cash).

In considering whether to cover items of value in addition to currency and bearer negotiable instruments and the kinds of property to cover, drafters should be aware that the cross-border obligation should aim primarily to cover property for which there is no audit trail, and property that may be used in connection with terrorist activities.

(1) Any person who enters or leaves the territory of [insert name of State] in possession of currency or bearer negotiable instruments [**Option:** *or e-money, precious metals or precious stones*] or arranges for the transportation of such items into or out of the territory by cargo, courier, postal service or any other means, shall:

Variant 1: declare currency or bearer negotiable instruments in an amount equal to or above [15,000 EUR/USD].

Variant 2: disclose currency or bearer negotiable instruments upon request to [customs authorities, competent authority].

Such [**Variant 1:** declaration **Variant 2:** disclosure] shall be recorded by the relevant [insert name of customs or other competent authority] which shall provide access to this information to [insert name of FIU].

(2) Any person who intentionally or by gross negligence fails to:

Variant 1: declare currency or bearer negotiable instruments in an amount equal to or above [15,000 EUR/USD]

Variant 2: disclose currency or bearer negotiable instruments upon request by [insert name of customs or other competent authority]

when entering or leaving [insert name of State] as required pursuant to Section 5(1) commits an offence and shall be punishable by imprisonment of [insert number] to [insert number] years and a fine of [insert amount] to [insert amount], or either of these penalties.

Section 6. Detention and Forfeiture of Currency and Other Bearer Negotiable Instruments

(1) The [insert name of customs or other competent authority] may seize or restrain part of or the whole amount of the [**Variant 1:** non-disclosed] [**Variant 2:** non-declared] currency or bearer negotiable instruments [**Option:** *or e-money, precious metals or precious stones*]

- (a) if there are reasonable grounds for suspecting that it is proceeds of an offence or an instrumentality used or intended for use in the commission of an offence, or terrorist property; or
- (b) if there is a false [**Variant 1:** declaration] [**Variant 2:** disclosure].

(2) Property detained under subsection (1) shall not be detained for more than [72] hours after seizure, unless a [insert deciding authority] orders its continued detention for a period not exceeding [3] months from the date of the initial seizure. The [insert deciding authority] may order such detention upon being satisfied that:

- (a) there was a false declaration or disclosure or there are reasonable grounds for the suspicion referred to in subsection (1); and
- (b) the continued detention of the property is justified while:
 - (i) its origin or derivation is further investigated; or
 - (ii) consideration is given to the institution in [insert name of State] or elsewhere of criminal proceedings against any person for an offence with which the seized item(s) is connected.

Drafting Note: It will be necessary to choose which authority will make the order under Section 6(2) and subsequent subsections, typically either a magistrate or specified court.

(3) A [insert deciding authority] may subsequently order continued detention of the property if satisfied of the matters set forth in subsection (2), but the total period of detention shall not exceed [2] years from the date of the order made under that subsection.

(4) Subject to subsection (5), property detained under this section may be released in whole or in part to the person on whose behalf it was transported:

- (a) by order of a [insert deciding authority] that its continued detention is no longer justified, upon application by or on behalf of that person and after considering any views of the [public prosecutor's office]; or
- (b) by [insert name of customs or other competent authority], if satisfied that the continued detention of the seized property is no longer justified.

(5) Property detained under this section shall not be released if an application for restraint, confiscation or forfeiture of the property is pending under [insert reference to applicable provisions of domestic law (comparable to Part VI of the model provisions)], or if proceedings have been instituted in [insert name of State] or elsewhere against any person for an offence with which the property is connected, unless and until the proceedings on the application or the proceedings related to an offence have been concluded. If the application relates to property that is commingled with other property, the commingled property is subject to continued detention under this subsection.

(6) If requested by the prosecutor, a [insert deciding authority] shall order forfeiture of any property which has been seized and detained under this section if satisfied on the balance of probabilities that the property directly or indirectly represents:

- (a) terrorist property; or
- (b) proceeds of an offence or an instrumentality used or intended for use in the commission of an offence.

(7) Before making an order of forfeiture under subsection (6), the court shall order that notice be provided to any person who has asserted an interest in the property and provide an opportunity for that person to be heard.

Part IV: Preventive Measures

Drafting Note: Part IV, which consists of Sections 7-37, addresses preventive measures to combat money laundering and the financing of terrorism. The Part makes reference in the text to “this Act” as it is envisioned that the Part would be adopted alone or with other Parts of these provisions as a separate Act. Authorities should review the use of the term in drafting provisions.

The model provisions for preventive measures reflect many of the FATF 40 + 9 standards by suggesting model text to be incorporated in the legal provisions of a jurisdiction. In some instances, the nature of the subject matter is such that usually the provisions would necessarily be in primary legislation (for instance provisions on criminal liability or the lifting of financial secrecy) or are basic obligations that States would generally set forth in a primary law (an obligation to conduct customer due diligence or to report suspicions).

The structure of these preventive measures model provisions is that they were drafted as a part of comprehensive primary legislation that covers many aspects of a State’s AML/CFT obligations. They thus appear here as part of that overall primary legislation.

Placement of some of these provisions in secondary legislation, regulation or some other kind of instrument is a choice for drafting authorities with the caveat that authorities should pay attention to the General Information Interpretative Note to the FATF 40 + 9 which deals with matters to be set out in law and regulation and those that alternatively may be set forth by law, regulation or other enforceable means.

Section 7. Definitions; Authority to make Regulations

(1) The following definitions shall apply in this Part:

“**account**” means any facility or arrangement by which a financial institution or a designated non-financial business and profession does any of the following:

- (a) accepts deposits of funds or other assets;
- (b) allows withdrawals or transfers of funds or other assets; or
- (c) pays negotiable or transferable instruments or orders drawn on, or collects negotiable or transferable instruments or payment orders on behalf of, any other person;

and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit.

“**bearer negotiable instrument**” includes monetary instruments in bearer form such as travellers cheques; negotiable instruments, including cheques, promissory notes and money orders, that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery; and

incomplete instruments including cheques, promissory notes and money orders, signed but with the payee's name omitted.

“beneficial owner” means:

- (a) a natural person who ultimately owns or controls the rights to and/or benefits from property, including the person on whose behalf a transaction is conducted; or
- (b) a person who exercises ultimate effective control over a legal person or legal arrangement.

A natural person is deemed to ultimately own or control rights to or benefit from property within the meaning of subsection (a) above when that person: (1) owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal entity [25] percent or more of the shares or voting rights of the entity, or (2) otherwise exercises control over the management of the entity.

Drafting Note: The percentage used to determine whether a person is a beneficial owner is a matter of choice for the jurisdiction. [*EU Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*](#) at Art. 3(6) provides a standard of 25% or lower that applies for EU member States.

“correspondent banking” means the provision of banking, payment and other services by one bank (the “correspondent bank”) to another bank (the “respondent bank”) to enable the latter to provide services and products to its own customers.

“currency” means the coin and paper money of [insert name of State], or of a foreign country, that is designated as legal tender or is customarily used and accepted as a medium of exchange.

Drafting Note: The definition of currency is drafted to cover the situation where a currency is customarily used in a country other than the country where it was issued, for instance, where the Euro is customarily used in a non Euro-based State.

“customer” means any of the following:

- (a) the person for whom a transaction or account is arranged, opened or undertaken;
- (b) a signatory to a transaction or account;
- (c) any person to whom an account or rights or obligations under a transaction have been assigned or transferred;

- (d) any person who is authorised to conduct a transaction or control an account;
- (e) any person who attempts to take any of the actions referred to above;
- (f) such other person as may be prescribed by regulation by the [minister/competent authority].

“designated non-financial businesses and professions” means any of the following:

- (a) casinos, including internet casinos;
- (b) real estate agents;
- (c) dealers in precious metals and dealers in precious stones;
- (d) lawyers, notaries, other independent legal professionals and accountants when they prepare for, engage in, or carry out transactions for a client concerning any of the following activities:
 - (i) buying and selling of real estate;
 - (ii) managing of client money, securities or other assets;
 - (iii) management of bank, savings or securities accounts;
 - (iv) organisation of contributions for the creation, operation or management of legal persons;
 - (v) creation, operation or management of legal persons or arrangements, and buying and selling of business entities;
- (e) trust and company service providers not otherwise covered by this law which, as a business, prepare for or carry out transactions on behalf of customers in relation to any of the following services to third parties:
 - (i) acting as a formation, registration or management agent of legal persons;
 - (ii) acting as, or arranging for another person to act as, a director or secretary of a company or a partner of a partnership, or to hold a similar position in relation to other legal persons;
 - (iii) providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
 - (iv) acting as, or arranging for another person to act as, a trustee of an express trust or other similar arrangement;
 - (v) acting as, or arranging for another person to act as, a nominee shareholder for another person; and
- (f) such other businesses and professions as may be prescribed by regulation by the [insert name of minister/competent authority].

Drafting Note: The selection of additional “designated non-financial businesses and professions” in a particular jurisdiction involves important policy and operational choices. The category was drafted to include both “gatekeepers” whose collaboration or negligence makes money laundering possible, and businesses other than financial institutions through which money may be laundered. Thus States may opt to include gaming and gambling houses, auction houses, lotteries as well as businesses that sell high value goods (such as car dealerships or high value electronic dealers) or goods that can be used to move criminal proceeds out of and back into cash. See [FATF Recommendation 20](#).

For lawyers, notaries and other independent legal professionals and for trust and company service providers (TCSPs), under the definition section of the model provisions, they are a designated non-financial business and profession only when they engage in an activity that makes such a person subject to the preventive measures obligations set forth in this Part.

For instance, under [FATF Recommendations 12 and 16](#), as a minimum standard, customer due diligence, record keeping, suspicious transaction reporting and internal control obligations apply to lawyers, notaries and other independent legal professionals only when they engage in the activities noted in subsection (d) of the model provision. [FATF Recommendation 12\(e\)](#) makes TCSPs subject to customer due diligence and record-keeping obligations when they prepare for or carry out specified transactions, and under [FATF Recommendation 15](#) subject to suspicious transaction reporting and internal control obligations when they engage in a specified transaction. The definition of TCSP in subsection (e) brings together the concepts reflected in the definition section of the FATF Recommendations together with the limitations in [FATF Recommendations 12 and 16](#).

For subsection (d)(iv), “management of legal persons” is suggested here rather than “management of companies” as is found in [FATF Recommendations 12 and 16](#), as legal persons is a defined term under this model provisions.

For subsection (e)(4) relating to TCSPs, “or other similar arrangement” is included although not specifically set forth in the related FATF 40 definition. This is to make clear that similar arrangements are also covered, for instance the administration of an anstalt formed under Austrian, German, Liechtenstein and Swiss laws. Although such structures are not usual in common law jurisdictions, TCSPs located in common law jurisdictions may be involved in forming or otherwise advising regarding such arrangements.

“**document**” means a record of information kept in any form.

“**financial institution**” means any person or entity that conducts as a business one or more of the activities listed below for or on behalf of a customer:

- (a) acceptance of deposits and other repayable funds from the public, including private banking;
- (b) lending, including, but not limited to, consumer credit, mortgage credit, factoring (with or without recourse), and financing of commercial transactions, including forfeiting;
- (c) financial leasing other than with respect to arrangements relating to consumer products;

- (d) the transfer of money or value;
- (e) issuing and managing means of payment, including, but not limited to, credit and debit cards, travellers' cheques, money orders and bankers' drafts, and electronic money;
- (f) issuing financial guarantees and commitments;
- (g) trading in (i) money market instruments, including, but not limited to, cheques, bills, certificates of deposit and derivatives; (ii) foreign exchange; (iii) exchange, interest rate and index instruments; (iv) transferable securities; and (v) commodity futures trading;
- (h) participation in securities issues and the provision of financial services related to such issues;
- (i) individual and collective portfolio management;
- (j) safekeeping and administration of cash or liquid securities on behalf of other persons;
- (k) investing, administering or managing funds or money on behalf of other persons;
- (l) underwriting and placement of life insurance and other investment-related insurance, including insurance intermediation by agents and brokers; and
- (m) money and currency changing.

Drafting Note: "Financial institutions" can be defined either by describing types of financial activities or types of businesses. The model provision above adopts the former approach.

One important advantage to using the types of financial activities, as the recommended language suggests, is that there is a greater degree of clarity that there is coverage in those instances where a person or firm is engaging in the activity but is not registered or otherwise formally recognized (for instance, an unregistered bank). Whichever approach is chosen, it is important that all businesses that perform any activities described above be covered by the statutory definition of financial institution. If authorities decide to list types of businesses, the list should contain a catch-all to capture any other entities that carry out the functions noted in the list above.

Drafting Note continued: A list might provide:

- (a) banks and other credit institutions;
- (b) life insurance and investment-related insurance companies, insurance underwriters, and insurance agents and brokers;
- (c) investment banks and firms;
- (d) brokerage firms;
- (e) mutual funds and collective investment schemes;
- (f) mortgage companies;
- (g) commercial and consumer credit companies;
- (h) persons that issue, manage or operate credit and/or debit card facilities;
- (i) leasing and/or finance companies other than companies that engage solely in financial leasing for consumer products;
- (j) funds management companies;
- (k) check cashers and sellers or redeemers of travellers' cheques, money orders, or other monetary instruments;
- (l) any person that engages in the purchase, sale or conversion of currency as a business;
- (m) any person that engages in funds transfers as a business;
- (n) any person providing facilities for the safekeeping of cash or liquid securities on behalf of other persons;
- (o) any other entity carrying out any of the following functions: (drafting authorities should insert a list compatible with the FATF 40 list of functions); and
- (p) such other activity, business or operation as prescribed by regulation by the minister/competent authority.

“funds or other assets” means financial assets, property of every kind, whether tangible or intangible, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such funds or other assets, including but not limited to bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts or letters of credit, and any interest, dividends or other income on or value accruing from or generated by such funds or other assets.

Drafting Note: The definition of “funds or other assets”—a term used in this Part in several places—is the same as is in the [Glossary to the FATF 40 Methodology](#) and is the definition used in the [Interpretative Note to SR III](#) (Freezing and Confiscating Terrorist Assets). If drafting authorities also want to include a separate definition of “funds,” they should review the definition of “funds” in Part II in connection with the financing of terrorism offence.

“**funds transfer**” means any transaction carried out on behalf of an originator person through a financial institution by electronic means with a view to making an amount of money available to a beneficiary person at another financial institution. The originator and beneficiary may be the same person.

Drafting Note: The definition of “funds transfer” is the same as is in the [Glossary to the FATF 40 Methodology](#).

“**financing of terrorism**” means any offence referred to in Part II, Section 4.

“**legal arrangement**” refers to express trusts or other similar legal arrangements.

“**Minister**” means the [the minister of (name Department or Ministry) or minister responsible for (specify)].

“**money laundering**” means any offence referred to in Part II, Section 3.

“**originator**” means the account holder, or where there is no account, the person that places the order with a financial institution to perform a wire transfer.

“**payable through account**” means a correspondent account used directly by a third party customer of the respondent financial institution to transact business on such party’s own behalf or on behalf of another person.

“**person**” means any natural or legal person.

“**politically-exposed person**” means (i) any person who is or has been entrusted with a prominent public function in a foreign country, including, but not limited to a Head of State or of government, a senior politician, a senior government, judicial or military official, (ii) any person who is or has been an executive in a foreign country of a state-owned company, and (iii) any person who is or has been a senior political party official in a foreign country, and shall include any immediate family member or close associate of such persons.

Drafting Note: [FATF Recommendation 6](#) applies only in the case of foreign politically-exposed persons (PEPs) and the definition set forth above limits a PEP to foreign persons.

However, the [Interpretative Note to Recommendation 6](#) notes that States are encouraged to extend the requirements to individuals who hold prominent public functions in their own country. It is noteworthy that the risks associated with PEPs are similar whether they are domestic or foreign-based.

Drafting authorities should decide whether to extend the application of the act to domestic PEPs, and if so, reformulate this definition so it is applicable to domestic as well as foreign PEPs.

“proceeds” and **“proceeds of crime”** means any property or economic advantage derived from or obtained directly or indirectly through the commission of a criminal offence [*Option: or in connection therewith*]. It shall include economic gains from the property and property converted or transformed, in full or in part, into other property.

Drafting Note: Regarding the optional language, it should be noted that a number of common law countries, for instance the United Kingdom and South Africa, make it clear in their legislation that benefits of criminal conduct include property obtained “in connection with” the offense. Adding this phrase expands the concept of proceeds somewhat. It should, for instance, make it clear in the case of a stand-alone money laundering prosecution where there is no prosecution for the predicate offence that the funds being laundered which are viewed primarily as proceeds of the predicate activity are also considered proceeds of the money laundering offence.

Drafting authorities should be aware of proportionality issues where legitimately-acquired property is commingled with proceeds and ensure in some manner that courts need not consider legitimately-acquired partial interests in property as proceeds.

“property” means assets of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [insert name of State] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.

Drafting Note: “Property” is the term used in this Part rather than “funds.” The [Vienna](#) and [Palermo Conventions](#) and the [UN Convention Against Corruption](#) use the term “property” to refer to assets that may be subject to those instruments. “Property” is the term used in Part IV (Preventive Measures), Part VI (Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders), and Part VII (Civil Forfeiture) rather than “funds” a term used in the [International Convention for the Suppression of the Financing of Terrorism](#) to express the same concept.

Drafting Note continued: “Funds” as defined by the [Terrorism Financing Convention](#) adds an illustrative list “including but not limited to” that sets forth various examples of covered assets.

The model provisions’ definition of “property” includes the [Vienna](#) and [Palermo Conventions](#) and [UN Convention Against Corruption](#) terminology, supplemented by the illustrative examples from the [Financing of Terrorism Convention](#). It adds the examples of “currency” and “deposits and other financial resources” to remove any doubt that those items are included, and language providing that the definition applies wherever the property is located. See also definitions in the [Glossary to the FATF Methodology](#).

Both “property” and “funds” differ from “funds or other assets.” “Funds and other assets” does not include the language providing that the definition applies wherever the property is located, and does not include the illustrative examples “currency” and “deposits and other financial resources.” It expressly includes income or other value accruing from or generated by assets, whereas such income or value is not mentioned in the definitions of “property” or of “funds”.

“record” means any material on which information is recorded or marked and which is capable of being read or understood by a person, or by an electronic system or other device.

“shell bank” means a bank that has no physical presence in the country in which it is incorporated and licensed, unless such bank is wholly owned by one or more financial institutions forming part of a regulated financial services group that is subject to effective consolidated supervision.

Drafting Note: This definition of a shell bank reflects [FATF Recommendation 18](#) which permits a shell bank that is “affiliated” with a regulated financial group, i.e., that operates under internationally recognized supervisory standards. The exception was designed to permit joint ventures as well as majority ownership of such banks.

The definition above permits the possibility of a joint venture of more than two banks assuming each is subject to necessary supervision.

“suspicious transaction report” means a report required to be made under Section 21 of this Act.

“transaction” means a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition, or the arrangement thereof, and includes but is not limited to:

- (a) opening of an account;
- (b) any deposit, withdrawal, exchange or transfer of funds in any currency whether in cash or by cheque, payment order or other instrument or by electronic or other non-physical means;
- (c) the use of a safety deposit box or any other form of safe deposit;

- (d) entering into any fiduciary relationship;
- (e) any payment made or received in satisfaction, in whole or in part, of any contractual or other legal obligation;
- (f) any payment made in respect of a lottery, bet or other game of chance;
- (g) establishing or creating a legal person or legal arrangement; and
- (h) such other transaction as may be prescribed by the [minister/competent authority] by regulation.

Drafting Note: Subsection (g) should ensure that the concept of transaction includes a lawyer's actions in establishing a legal person.

“**wire transfer**” means any transaction carried out on behalf of an originator through a financial institution (including an institution that originates the wire transfer and an intermediary institution that participates in completion of the transfer) by electronic means with a view to making an amount of money available to a beneficiary person at another financial institution.

(2) The [insert name of minister/competent authority] may make regulations for the implementation of the provisions of this Act.

Customer Identification Provisions

Section 8. Customer Identification and Account Opening Procedures

(1) **Ban on Anonymous Accounts.** Financial institutions and designated non-financial business and professions shall not establish or maintain anonymous accounts, or accounts in fictitious names.

(2) **Identification Requirements.** Subject to the special identification requirements of subsection (3), financial institutions and designated non-financial business and professions shall identify their customers and verify their customers' identities by means of reliable and independent source documents or information, such as a passport, a driver's license, a national identification document or a certified certificate of incorporation, when:

- (a) opening an account for or otherwise establishing a business relationship with a customer;
- (b) the customer, who is neither an account holder nor in an established business relationship with the financial institution, wishes to carry out a transaction in an amount equal to or above [15,000 EUR/USD] whether conducted as a single transaction or several transactions that appear to be linked, provided that if the amount of the transaction is unknown, the customer's identification shall be

verified as soon as the amount of the transaction has reached [15,000 EUR/USD];

- (c) notwithstanding subsection (b), the customer wishes to carry out a domestic or international wire transfer of monetary amounts in the amount equal to or above [1,000 EUR/USD];
- (d) doubts exist about the veracity or adequacy of previously obtained customer identification information; or
- (e) there is a suspicion of money laundering or financing of terrorism involving the customer or the customer's account.

Drafting Note: Drafters should consider the specific kinds of documents or information that, in the specific setting within the jurisdiction, would constitute “reliable and independent source documents and information,” and add to or delete from the list in the chapeau.

Drafters may also want to include a provision stating that the minister may prescribe by regulation the documents or information that constitute reliable and independent documents or information.

The monetary amounts in italics are a minimum requirement under the FATF 40. In choosing how to proceed, a smaller amount may be inserted.

(3) **Special Identification Requirements.** Unless there is a suspicion of money laundering or financing of terrorism, in which case identification and verification must take place without regard to any monetary threshold,

- (a) casinos shall become subject to the obligations of Section 8(2) to identify and verify the identity of their customers when customers open an account or engage in financial transactions equal to or above [3,000 EURO/USD];

Drafting Note: As the [Methodology](#) to the [FATF 40 Recommendations](#) at Criterion 12.1(a) (footnote 21) notes, conducting customer identification at the entry to a casino could be, but is not necessarily, sufficient. For the standard to be met, a casino must be able to link customer due diligence information for a particular customer to the transactions the customer conducts in the casino.

- (b) dealers in precious metals and dealers in precious stones [*Option: and other dealers in high value goods*] shall become subject to the obligations of Section 8(2) to identify and verify the identity of their customers whenever receiving payment in currency in an amount of [15,000 EURO/USD] or more; and
- (c) real estate agents shall identify and verify the identity of the vendor and purchaser in accordance with Section 8(2) when involved in transactions concerning the buying or selling of real estate.

Drafting Note: The monetary thresholds set forth in Sections 3(a) and (b) reflect the minimum set forth in the [Interpretative Note to Recommendations 5, 12 and 16](#). There are no thresholds or limitations in Section 8(3) with respect to lawyers, other legal professionals or trust and service company providers. Such professionals must always identify and verify regardless of threshold when, because of the activity they are engaging in, they come within the definition of a designated non-financial business or entity. When they are not engaged in such activities, they are not covered by the provisions of the model provisions.

(4) **Timing of customer identification.** The identification and verification of the identity of each customer, and obtaining of other information required by this section, shall take place before the establishment an account, or of a business relationship (or before the carrying on of further business, if money laundering or financing of terrorism is suspected or if doubts exist about the veracity or adequacy of previously-obtained customer identification information), provided that the [insert name of minister or competent authority] may prescribe the circumstances in which the verification of identity may be completed as soon as reasonably practicable after the commencement of the business if (i) the risk of money laundering or financing of terrorism is effectively managed, and (ii) a delay in verification is essential not to interrupt the normal conduct of business.

(5) **Information to be obtained on customers.** Financial institutions and designated non-financial business and professions shall, with respect to each customer, obtain and verify, as part of their obligation under subsections (2) and (3):

- (a) for a natural person, the full name and address, date and place of birth;
- (b) for a legal person the corporate name, head office address, identities of directors, proof of incorporation or similar evidence of legal status and legal form, provisions governing the authority to bind the legal person, and such information as is necessary to understand the ownership and control of the legal person;
- (c) for legal arrangements, the name of trustees, the settlor, and the beneficiary of express trusts, and any other parties with authority to manage, vary or otherwise control the arrangement;
- (d) in addition to the identity of the customer, the identity of any person acting on behalf of a customer, including evidence that such person is properly authorised to act in that capacity;
- (e) information on the intended purpose and nature of each business relationship;
- (f) sufficient information about the nature and business of the customer to permit

the financial institution or designated business or profession to fulfil its obligations under this Act.

(6) **Information to be obtained on beneficial owners.** Financial institutions and designated non-financial business and professions shall, as part of their obligation under subsections (2) and (3), identify the beneficial owner and shall take such reasonable measures as are necessary to verify the identity of the beneficial owner, provided that the [insert name of minister or competent authority] may prescribe circumstances, such as the ownership of publicly-held corporations, in which such identification and verification is not necessary.

Drafting Note: Identifying the beneficial owner means both: (1) where the customer is a legal person, identifying who owns the legal person, and (2) identifying the actual owner of the funds that the customer is depositing or otherwise dealing with.

(7) **Existing customers.** A financial institution or designated non-financial business and profession shall apply the identification and verification requirements of subsections (2) and (3) to customers and beneficial owners with which it had a business relationship at the time of the coming into force of this Act on a risk-sensitive basis depending on the type and nature of the customer, business relationship, product or transactions, or as may otherwise be prescribed by the [insert name of minister or competent authority] by regulation.

Drafting Note: A framework can provide for a financial institution to apply reduced or simplified measures in a few settings because the risks are low.

As the Methodology to the [FATF 40 Recommendations](#) at Criteria 5.9 -5.12 makes clear, although the general rule is that customers must be subject to the full range of customer due diligence (CDD) measures, including the requirement to identify the beneficial owner, there are circumstances where the risk of money laundering or terrorist financing is lower, where information on the identity of the customer and the beneficial owner of a customer is publicly available, or where adequate checks and controls exist elsewhere in a national system.

In such circumstances, it could be reasonable for a country to allow its financial institutions to apply simplified or reduced CDD measures when identifying and verifying the identity of the customer and the beneficial owner.

Examples (as set forth following Criterion 5.9 in the [FATF 40 Methodology](#)) are:

- (a) financial institutions – provided that they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are supervised for compliance with those requirements.

Drafting Note continued:

- (b) public companies that are subject to regulatory disclosure requirements. This refers to companies that are listed on a stock exchange or similar situations.
- (c) government administrations or enterprises.
- (d) life insurance policies where the annual premium is no more than USD/€1,000 or a single premium of no more than USD/€2,500.
- (e) insurance policies for pension schemes if there is no surrender clause and the policy cannot be used as collateral.
- (f) a pension, superannuation or similar scheme that provides retirement benefit to employees, where contributions are made by way of deduction from wages and the scheme rules do not permit the assignment of a member's interest under the scheme.
- (g) beneficial owners of pooled accounts held by DNFBP provided that they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are subject to effective systems for monitoring and ensuring compliance with those requirements.

In addition, as Criteria 5.10-5.12 to the [FATF 40 Methodology](#) note, if a financial institution is permitted to apply simplified or reduced CDD measures to customers residing in another country, this should be limited to countries that the original country is satisfied are in compliance with and have effectively implemented the [FATF Recommendations](#). Simplified CDD measures are not acceptable whenever there is suspicion of money laundering or terrorist financing or specific higher risk scenarios apply. Where financial institutions are permitted to determine the extent of the CDD measures on a risk sensitive basis, this should be consistent with guidelines issued by the competent authorities.

Section 9. Option: Reliance on Identification by Third Parties

[Financial institutions] [designated non-financial business and professions] [both] may rely on intermediaries or other third-parties to perform customer identifications as required by Section 8, if:

- (a) *there is no suspicion of money laundering or the financing of terrorism;*
- (b) *information on the identity of each customer and beneficial owner is provided immediately on opening of the account or commencement of the business relationship; and*
- (c) *the financial institution or designated non-financial business and profession are satisfied that the third party:*
 - (i) *is able to provide without delay copies of identification information and other documents relating to the obligation of due diligence upon request, and*
 - (ii) *is established in or is subject to the jurisdiction of a State where such person is subject to requirements equivalent to those specified in this Act, and is supervised for compliance with those requirements in a manner equivalent to those applicable in [insert name of State].*

A third party referenced in (c) may not claim professional privilege or a similar principle or rule with respect to the customer identification and beneficial ownership information and documentation involved.

The [insert name of minister/competent authority] may prescribe those jurisdictions that he considers fulfil the terms of subsection 9(c)(ii).

Notwithstanding any other provision in this subsection, the [financial institution] [designated non-financial business and profession] [both] relying on the third party has the ultimate responsibility for compliance with this Act, including all of the due diligence and reporting requirements thereof.

Drafting Note: Under [FATF Recommendation 9](#), States may opt to permit financial institutions to rely on third parties to conduct customer identification subject to specific qualifications. This optional subsection would provide a legislative base for such a practice.

Section 10. Customers not Physically Present

Financial institutions and designated non-financial business and professions shall take adequate measures to address the specific risk of money laundering and financing of terrorism in the event they conduct business relationships or execute transactions with a customer that is not physically present for purposes of identification. Such measures shall ensure that the due diligence is no less effective than where the customer appears in person, and may require additional documentary evidence, or supplementary measures to verify or certify the documents supplied, or confirmatory certification from financial institutions or other documentary evidence or measures, as may be prescribed by regulation by the [insert name of minister/competent authority].

Section 11. High Risk Customers and Politically-exposed Persons

Financial institutions and designated non-financial business and professions shall have appropriate risk management systems:

- (1) to identify customers whose activities may pose a high risk of money laundering and financing of terrorism and shall exercise enhanced identification, verification and ongoing due diligence procedures with respect to such customers; and
- (2) to determine if a customer or a beneficial owner is a politically-exposed person and if so shall:
 - (a) obtain approval from senior management before establishing a business relationship with a customer, or later, as soon as an existing customer is identified as a politically-exposed person;
 - (b) take all reasonable measures to identify the source of wealth and funds and other assets of the customer; and

(c) provide increased and ongoing monitoring of the customer and the business relationship to prevent money laundering or the commission of other offences and to permit the financial institution, designated businesses and professions to fulfil their obligations under this Act, including all of the due diligence and reporting requirements thereof.

Section 12. Identification and Account-opening for Cross-border Correspondent Banking Relationships

When entering into cross-border correspondent banking relationships, financial institutions shall:

- (1) identify and verify the identification of respondent institutions with which they conduct correspondent banking relationships;
- (2) collect information on the nature of the respondent institution's activities;
- (3) based on publicly-available information, evaluate the respondent institution's reputation and the nature of supervision to which it is subject;
- (4) obtain approval from senior management before establishing a correspondent banking relationship;
- (5) evaluate the controls implemented by the respondent institution with respect to anti-money laundering and combating the financing of terrorism;
- (6) establish an agreement on the respective responsibilities of each party under the relationship;
- (7) in the case of a payable-through account, ensure that the respondent institution has verified its customer's identity, has implemented mechanisms for ongoing monitoring with respect to its clients, and is capable of providing relevant identifying information on request;
- (8) not enter into or continue business relations with a shell bank; and
- (9) not enter into or continue business relations with a respondent financial institution in a foreign country if the respondent institution permits its accounts to be used by a shell bank.

Section 13. Inability to Fulfil Customer Identification Obligations

A financial institution or designated non-financial business and profession that cannot fulfil the requirements of Sections 8 through 12 with respect to any customer shall not establish an account for or maintain the business relationship with that customer. Where appropriate, it shall make a report to [insert name of FIU] in accordance with this law.

Provisions on Ongoing Obligations of Financial Institutions and Designated Non-financial Businesses and Professions

Section 14. Record-keeping

(1) Financial institutions and designated non-financial business and professions shall maintain all books and records with respect to their customers and transactions as set forth in subsection (2), and shall ensure that such records and the underlying information are available on a timely basis to [insert name of FIU] [*Variant: and insert name of other competent authorities*].

(2) Such books and records referenced in subsection (1) shall include, as a minimum:

- (a) account files, business correspondence, and copies of documents evidencing the identities of customers and beneficial owners obtained in accordance with the provisions in this law, all of which shall be maintained for not less than five years after the business relationship has ended;
- (b) records on transactions sufficient to reconstruct each individual transaction for both account holders and non-account holders which shall be maintained for not less than five years from the date of the transaction;
- (c) the findings set forth in writing pursuant to Section 17(3) and related transaction information which shall be maintained for at least five years from the date of the transaction; and
- (d) copies of all suspicious transaction reports made pursuant to Section 21, including any accompanying documentation, which shall be maintained for at least five years from the date the report was made.

Section 15. Internal Programs to Combat Money Laundering and Financing of Terrorism

(1) Financial institutions and designated non-financial business and professions shall develop and implement programs for the prevention of money laundering and financing of terrorism. Such programs shall include the following:

- (a) internal policies, procedures and controls to fulfil obligations pursuant to this Act;
- (b) adequate screening procedures to ensure high standards when hiring employees;
- (c) ongoing training for officers and employees to make them aware of the laws and regulations relating to money laundering and the financing of terrorism, to assist them in recognising transactions and actions that may be linked to money laundering or financing of terrorism and instruct them in the procedures to be followed in such cases;
- (d) policies and procedures to prevent the misuse of technological developments including those related to electronic means of storing and transferring funds or value; and
- (e) independent audit arrangements to review and verify compliance with and effectiveness of the measures taken in accordance with this law.

(2) Financial institutions and designated non-financial business and professions shall designate a compliance officer at management level to be responsible for the implementation of, and ongoing compliance with, this law by the institution. Such compliance officer shall have ready access to all books, records and employees of the institution or designated non-financial business and profession necessary to fulfil his responsibilities.

(3) The [insert name of minister/competent authority] may prescribe the type and extent of measures financial institutions and designated non-financial businesses and professions shall undertake with respect to each of the requirements in this section having regard to the risk of money laundering and financing of terrorism and the size of the business or profession.

Section 16. Ongoing Due Diligence

Financial institutions and designated non-financial business and professions shall exercise ongoing due diligence with respect to the business relationship which shall include:

- (1) maintaining current information and records relating to the customer and beneficial owner;
- (2) closely examining the transactions carried out in order to ensure that such transactions are consistent with their knowledge of their customer, the customer's commercial or personal activities and risk profile; and
- (3) ensuring the obligations pursuant to Sections 11 and 12 relating to high risk

customers, politically-exposed persons, and correspondent banking relationships are fulfilled.

Drafting Note: This section should be drafted in conjunction with Sections 11 and 12. Under [FATF Recommendations 5 and 6](#), the ongoing due diligence responsibility with respect to politically-exposed persons includes taking reasonable measures to determine the source of funds. For other high risk categories of customers, there is a responsibility to conduct enhanced due diligence. One type of such due diligence it may be reasonable to conduct is establishing wealth and source of funds. See [Methodology to FATF 40 Recommendations](#), Criteria 5.8 and 6.3.

Section 17. Special Monitoring of Certain Transactions

Financial institutions and designated non-financial business and professions shall:

- (1) pay special attention to all complex, unusual large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose;
- (2) pay special attention to business relations and transactions with persons, including legal persons and arrangements, from or in countries that do not or insufficiently apply the relevant international standards to combat money laundering and the financing of terrorism;
- (3) examine as far as possible the background and purpose of transactions under subsections (1) and (2) and set forth in writing their findings. The findings shall be maintained as specified in Section 14 and shall be made available promptly if requested by [insert name of FIU], a supervisory authority or [name any other competent authority that should have access];
- (4) take such specific measures as may be prescribed from time to time by [insert name of minister/competent authority] by regulation to counter the risks with respect to business relations and transactions specified under subsection (2).

Drafting Note: Section 17 is to assist with implementation of [FATF Recommendations 11 and 21](#). Section 17(4) sets forth an obligation to abide by regulations that a State authority issues to deal with the risks that are associated with relationships institutions within the State might have with institutions in other States where the other State is not adequately implementing the [FATF 40 Recommendations](#). See Recommendations and in particular Methodology Criterion 21.3.

Section 18. Obligations regarding Wire Transfers

(1) Financial institutions when undertaking wire transfers equal to or above [1,000 EUR/USD] shall:

- (a) identify and verify the identity of the originator;
- (b) obtain and maintain the account number of the originator or in the absence of an account number a unique reference number;
- (c) obtain and maintain the originator's address or, in the absence of address, the national identity number or date and place of birth; and
- (d) include information from (a) through (c) above in the message or payment form accompanying the transfer.

(2) Notwithstanding the requirements of subsection (1), a financial institution is not required to verify the identity of a customer with which it has an existing business relationship, provided that it is satisfied that it already knows and has verified the true identity of the customer.

(3) When a financial institution acts as an intermediary in a chain of payments, it shall retransmit all of the information it received with the wire transfer.

(4) The [insert name of minister/competent authority] may by regulation modify the requirements set forth in subsection (1):

- (a) with respect to domestic wire transfers, as long as the regulations provide for full originator information to be made available to the beneficiary financial institution and appropriate authorities by other means; and
- (b) with respect to cross-border transfers where individual transfers from a single originator are bundled in a batch file, as long as the regulations provide for the originator's account number or unique reference number to be included, and that the batch file contains full originator information that is fully traceable in the recipient country.

(5) Subsections (1) and (2) shall not apply to transfers executed as a result of credit card or debit card transactions, provided that the credit card or debit card number accompanies the transfer resulting from the transaction, nor shall they apply to transfers between financial institutions acting for their own account.

(6) If the institutions referred to in subsection (1) receive wire transfers that do not contain the complete originator information required under that paragraph, they shall take measures to

obtain and verify the missing information from the ordering institution or the beneficiary. Should they not obtain the missing information they shall:

Variant 1: refuse acceptance of the transfer.

Variant 2: refuse acceptance of the transfer and report it to [insert name of FIU].

Section 19. Compliance with Obligations by Foreign Subsidiaries and Branches

Financial institutions shall require their foreign branches and majority-owned subsidiaries to implement the requirements of Sections 8 through 18 to the extent that domestic applicable laws and regulations of the host country so permit. If the laws of the country where the branch or majority-owned subsidiary is situated prevent compliance with these obligations, for any reason, the financial institution shall so advise its competent supervisory authority, which may take such steps as it believes to be appropriate to accomplish the purposes of this Act.

Section 20. Prohibition against Shell Banks

No shell bank may be established or permitted to operate in or through the territory of [insert name of State].

Drafting Note: In many jurisdictions, a specific provision of this kind will not be necessary. The prohibition will be accomplished through other legislation or administrative requirements that apply regarding the operation of banks which preclude the possibility of a shell bank being established or operating within a State.

Reporting Obligation Provisions

Section 21. Obligation to Report Suspicious Transactions

(1) Subject to the provisions of subsections (2) and (3), financial institutions, designated non-financial businesses and professions, and their respective directors, principals, officers, partners, professionals and employees, that suspect or have reasonable grounds to suspect that any property:

- (a) is the proceeds of crime, or
- (b) is related or linked to, or is to be used for, terrorism, terrorist acts or by terrorist organisations or those who finance terrorism

shall submit promptly [**Option:** *but not later than [three] working days after forming a*

suspicion] a report setting forth the suspicions to [insert name of FIU]. This obligation also shall apply to attempted transactions.

Drafting Note: In the case of lawyers, notaries and other independent legal professionals, a State may wish to designate an appropriate professional self-regulatory body (SRO) as the authority to be informed in the first instance of the suspicion. Under [FATF Recommendation 16](#) and the [Interpretative Note to FATF Recommendation 16](#), a country may permit the initial reporting to the SRO in such instances. The SRO has the obligation to forward the report of the suspicion to financial intelligence unit (FIU) unless it falls within the category of information as to which there is not an obligation to report because of legal privilege. See also, [EU Directive 2005/60 of 26 October 2005](#) at Section 23 which notes the information must be forwarded to the FIU promptly and unfiltered unless it falls within legal privilege.

(2) Notwithstanding subsection (1), lawyers, notaries, other independent legal professionals and accountants are required to submit reports only when:

(a) they engage, on behalf of or for a client, in a financial transaction associated with an activity specified in relation to such professionals under Section 7 [Definitions] of this Act; and

(b) the relevant information upon which the suspicion is based was not received from or obtained on a client:

- (i) in the course of ascertaining the legal position of their client; or
- (ii) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

Drafting Note: The FATF standard that requires reporting by lawyers, notaries and other independent legal professionals, as reflected in Section 21(2), is limited to reporting when, on behalf of or for a client, such persons engage in a financial transaction. This is a narrower formulation than the general reporting obligations set forth in Section 21(1) and narrower than the obligation to conduct customer due diligence which extends, additionally, to situations when the lawyer and client are making preparations for such a transaction.

Drafting Note continued: It distinguishes between situations in which legal professionals and accountants become aware of a potentially suspicious transaction in the course of being asked to give professional legal or accounting advice, and situations, in which reporting is required, in which professionals actually engage in a transaction for their client.

Under [FATF Recommendation 12](#), and the definition of “designated non-financial businesses and professions” in these model provisions, the minimum requirement is that lawyers, notaries, other independent legal professionals and accountants report suspicious activity when they prepare for or carry out transactions for their client in any of five categories of activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

If accountants within the State are subject to the same obligation of secrecy or privilege as lawyers, they are also not required to report a suspicious transaction in the circumstances identified in Section 21(2), and the drafting should reflect local practice.

The above reflects minimum requirements. States are free to expand the definition of designated non-financial business and profession to cover lawyers, notaries, etc. and accountants in more instances than is set forth under the five categories above. Any provision adopted, however, should respect the professional secrecy obligations as defined by the State’s laws.

(3) Dealers in precious metals and dealers in precious stones [*Option: and other dealers in high value goods*] are required to submit a report of a suspicious transaction in accordance with paragraph (1) only when they engage in any currency transaction equal to or above [15,000 EUR/USD].

[Option: add subsection] Financial institutions and designated non-financial businesses and professions shall refrain from carrying out a transaction which they suspect to be related to money laundering or financing of terrorism until [insert time period, for instance one business day] after they have reported their suspicion to the [insert name of FIU], except that, where refraining from the carrying out of a transaction is impossible or is likely to frustrate the efforts to investigate a suspected transaction, financial institutions and designated non-financial businesses and professions may execute the transaction and shall report their suspicion to [insert name of the financial intelligence unit] immediately afterwards. [Variant: If [insert name of FIU] considers it necessary by reason of the seriousness or urgency of the case, it may order the suspension of a transaction for a period not to exceed [insert time period as 3 business days]].

Drafting Note: The optional subsection above provides for the postponing of a transaction that is suspected to involve money laundering or the financing of terrorism. It provides the FIU with an opportunity to order the suspension of the transaction for a short period providing time for an investigation and steps to seek a freezing order from judicial authorities.

[Option: add subsection] Supervisory authorities shall inform [insert name of FIU] if, in the course of their responsibilities, they discover facts that could be related to money laundering or terrorist financing.

Drafting Note: The optional subsection above requires any authority that is supervising a financial institution or designated non-financial business or entity to advise the FIU of facts that suggest money laundering or terrorist financing. The provision of information by supervisors is not required by the FATF standards, but is a best practice that may be adopted.

Often the provision for this kind of cooperation between agencies within a State is part of internal regulations rather a provision in preventive measures legislation. A regulation may provide that the financial or other supervisor disclose information coming to its attention that indicates a person has been or may be involved in money laundering or terrorist financing.

(4) [Insert name of FIU] shall issue regulations on the procedures for and form in which the reports shall be submitted and shall publish guidance from time to time in order to assist financial institutions and designated non-financial businesses and professions to fulfil their obligations under this section.

Section 22. Option: Obligation to Report Currency Transactions

Financial institutions and designated non-financial business and professions are required to submit promptly [Option: but not later than [three] working days] a report to [insert name of the financial intelligence unit] any currency transaction in an amount equal to or above [15,000 EUR/USD], whether conducted as a single transaction or several transactions that appear to be linked.

Drafting Note: Some countries, in addition to requiring the reporting of cross-border transportation of currency and bearer negotiable instruments, require financial institutions to report currency transactions above a certain level.

Drafting Note continued: The decision whether to adopt such a provision, and the appropriate reporting threshold, depends on the framework a State adopts to screen for suspicious activity which in turn depends upon circumstances specific to each State regarding the nature and size of money flows, and on a policy choice on the best method to ensure the highest level of AML/CFT compliance.

Section 23. Disclosing Information regarding Compliance

Whenever it appears to [insert name of FIU] or to a competent supervisory authority that a financial institution or designated non-financial business and profession, or any of their respective directors, officers or employees, is not complying or has not complied with the obligations set out in this law, it may apprise the [insert name of FIU] or the competent supervisory authority, as the case may be, accordingly.

Section 24. Option: Inapplicability of Confidentiality Provisions

No secrecy or confidentiality provision in any other law shall prevent a financial institution or designated non-financial business and profession from fulfilling its obligations under this Act.

Drafting Note: Depending upon how bank secrecy laws and regulations operate within a jurisdiction, there may be a need for a provision that makes clear that bank secrecy is lifted for purposes of a financial institution complying with AML/CFT obligations provided for by this legislation.

Section 25. Prohibition against Tipping-off

(1) No financial institution or designated non-financial business and profession, nor any director, partner, officer, principal or employee thereof shall disclose to their customer or a third party that a report or any other information concerning suspected money laundering or financing of terrorism will be, is being or has been submitted to [insert name of FIU], or that a money laundering or financing of terrorism investigation is being or has been carried out except in the circumstances set forth in subsection (2) or when otherwise required by law to do so.

(2) A disclosure may be made to carry out a function that a person has relating to the enforcement of any provision of this Act or of any other enactment, or, in the case of a lawyer, notary, other independent legal professional or accountant [*Option: acting as an independent legal professional*] when seeking to dissuade a client from engaging in illegal activity.

Drafting Note: As the [Interpretative Note to FATF Recommendation 14](#) makes clear, if an accountant acting as an independent legal professional seeks to dissuade a client from engaging in illegal activity, this should not be viewed as tipping off. The language is set forth as optional as drafters must determine whether this would apply within the State for which the provisions are being drafted.

Section 26. Protection of Identity of Persons and Information relating to Suspicious Transaction Reports

(1) Except for the purposes of the due administration of this law, no person shall disclose any information that will identify or is likely to identify the person who prepared or made a suspicious transaction report, or handled the underlying transaction.

(2) No person shall be required to disclose a suspicious transaction report or any information contained in the report or provided in connection with it, or the identity of the person preparing or making such report or handling the underlying transaction in any judicial proceeding unless the judge or other presiding officer is satisfied that the disclosure of the information is necessary in the interests of justice.

Drafting Note: Protecting the identity of the person who makes a report and the information in the report facilitates reporting by persons and entities.

The provisions that appear in Section 26(a) and 26(b) are not required by the *FATF 40* standards, but they are a common part of preventive measure legislation adopted by States. Under the Methodology for assessing compliance with [FATF Recommendation 14](#) on protection for those who report in good faith, there is a review under non-essential criterion 14.3 of whether the States' laws or regulations protect the names of those who report to the FIU.

Section 27. Exemption from Liability for Good Faith Reporting of Suspicious Transactions

No criminal, civil, disciplinary or administrative proceedings for breach of banking or professional secrecy or contract shall lie against financial institutions and designated non-financial businesses and professions or their respective directors, principals, officers, partners, professionals or employees who in good faith submit reports or provide information in accordance with the provisions of this law.

Drafting Note: Under [FATF Recommendation 14](#), there should be legal provisions that protect financial institutions when they report in good faith from liability for a breach of restrictions on disclosure of information.

As there must be a finding that the submission was in good faith and the provision of the information was in accordance with the law, the model provision indicates that such a proceeding may not “lie” against such person, rather than that a proceeding may not be instituted.

Provisions on Supervision for Compliance and Maintenance of Beneficial Ownership Information

Section 28. Option: Authorities Responsible for Supervision

Responsibility for supervision of compliance with the requirements set forth in Sections 8 through 26 of this law is as follows:

[List authority that will supervise for each kind of financial institution and designated non-financial business and profession, e.g., supervisory or regulatory authority or the competent disciplinary authority, Central Bank, Minister of Justice, Ministry of Finance, Ministry of Commerce, casino supervisory authority, self-regulatory organization for a profession, etc.]

Drafting Note: A preventive regime must also include provisions that, through one mechanism or another, designate the authorities that are responsible for overseeing compliance with anti-money laundering and counter-terrorist financing (AML/CFT) mandates. In most States, in the case of financial institutions, this is the responsibility of the financial supervisory authorities for each kind of institution.

The delineation of the responsibility to oversee for AML/CFT purposes for each specific substantive area may be found in a State’s AML law or regulations. This optional provision would set forth such responsibility. The procedures, manner, authority, etc. for oversight will typically be set forth in the State’s banking, securities or insurance and other supervision laws. There it is part of the larger responsibility of oversight for such institutions. Similarly, States must have provisions for oversight of each designated non-financial business and profession’s compliance with AML/CFT obligations.

The *FATF 40 + 9 Recommendations* also require that States consider the adequacy of oversight and regulation within their State of entities that can be abused for the financing of terrorism with particular attention to non-profits.

The provision is set forth as optional as it is needed only if it is determined that, in the context of the particular State, the designation of the supervisory authorities that will have the AML/CFT oversight responsibility should be reflected in law and not regulation or administrative directive. In addition, sector-specific and other legal provisions within the State should be reviewed to ensure that they provide for the following that are relevant to the AML/CFT obligations:

Drafting Note continued:

- the regulation and supervision of financial institutions and designated non-financial businesses and professions for compliance with AML/CFT obligations including as appropriate through on-site examinations;
- authority to issue instructions, guidelines or recommendations to assist financial institutions and designated non-financial businesses and professions to comply with their obligations;
- measures to establish and apply fit and proper criteria for owning, controlling, or participating, directly or indirectly, in the directorship, management or operation of a financial institution or other relevant institutions as a casino;
- the provision of assistance in investigations, prosecutions or proceedings relating to money laundering, predicate offences and financing of terrorism;
- cooperation and sharing arrangements regarding relevant information with other competent authorities;
- measures to ensure the foreign branches and majority-owned subsidiaries of the State's financial institutions adopt and enforce measures consistent with this law to the extent permitted by local laws and regulations; and
- measures to ensure the supervisory authorities: (1) report promptly to the financial intelligence unit any information concerning suspicious transactions or facts that could be related to money laundering or the financing of terrorism; (2) provide prompt and effective cooperation to agencies that perform similar functions in other States; and (3) maintain statistics concerning measures adopted and sanctions imposed in enforcing AML/CFT requirements.

Section 29. Option: Mechanism to Maintain Beneficial Ownership Information

The [insert name of minister/competent authority] shall prescribe a mechanism by which adequate, accurate and current information on the beneficial ownership and control structure of legal persons and arrangements is maintained in [insert name of State]. The mechanism shall provide for access to the information on a timely basis by [name competent authorities including law enforcement, FIU, supervisory and judicial authorities].

Drafting Note: Under [FATF Recommendations 33 and 34](#), measures should be in place that ensure transparency regarding legal persons and legal arrangements, in particular on beneficial ownership. If legal persons are permitted to issue bearer shares, this should include measures that ensure that bearer shares are not misused for purposes of money laundering. The model provision may facilitate compliance with [FATF Recommendation 33](#) by providing the authority for a minister to set up a register or other mechanism within the State.

Drafting Note continued: As such, it may form a first step towards compliance with the recommendation, and must be followed up with regulatory action that establishes and maintains an effective mechanism within the jurisdiction.

Examples of mechanisms that States could use to improve transparency include the following which appear in the Organisation for Economic Cooperation and Development Report [*Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes \(2001\)*](#):

- (1) A system of central registration (or up front disclosure system) where a national registry records the required ownership and control details for all companies and other legal persons registered in that country. The relevant information could be either publicly available or only available to competent authorities. Changes in ownership and control information would need to be kept up to date.
- (2) Requiring company service providers to obtain, verify and retain records of the beneficial ownership and control of legal persons.
- (3) Relying on the investigative and other powers of law enforcement, regulatory, supervisory, or other competent authorities in a jurisdiction to obtain or have access to the information.

These mechanisms are, to a large degree, complementary, and countries may find it desirable and beneficial to use a combination of them. To the extent that countries rely on the investigative powers of their competent authorities, the authorities should have sufficiently strong compulsory powers to obtain the relevant information.

Whatever the mechanism, it is essential that competent authorities are able to obtain, or have access in a timely fashion to, the beneficial ownership and control information that is adequate, accurate and timely; and to share such information with other competent authorities domestically and internationally.

Provisions on Offences relating to Preventive Measures

Drafting Note: [*FATF Recommendation 17*](#) provides that there should be “effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative” in the case of a failure to comply with AML/CFT requirements.

Individuals as well as institutions may engage in conduct violative of the preventive measures mandates in various ways with differing degrees of seriousness. States should carefully evaluate the range and kinds of sanctions for each failure to comply. Criminal sanctions are often considered appropriate where an individual or institution has engaged in an intentional violation or gross negligence. A dissuasive and effective regime should include a range of administrative sanctions to deal with non-compliance.

Drafting Note continued: These could include a written warning, an order to comply with specific instructions (possibly accompanied with a daily fine for non-compliance), a requirement for regular reports on measures undertaken, an administrative fine in an amount sufficient to be effective and dissuasive, an order barring an individual from employment within a sector, a restriction on certain powers of a manager, director, or controlling owner, or a requirement for the replacement of such person, the imposition of a conservatorship, or the suspension or withdrawal of a license. In common law jurisdictions, administrative sanctions are typically found in sector-specific laws or regulations.

Sections 30-36 below establish criminal liability for certain actions. A series of separate sections facilitates setting different penalties. The provisions can be placed together, as here, or at the end of each substantive section.

Section 30. Failure to Comply with Identification Requirements

Any person who intentionally or by gross negligence:

- (1) fails to undertake the identification of customers or otherwise to fulfil the customer identification and risk management requirements in accordance with Sections 8(2) - (6);
- (2) opens an anonymous account or an account in a fictitious name for a customer in violation of Section 8(1); or
- (3) fails to fulfil the obligations relating to the obtaining of information for and processing of a wire transfer as required by Section 18

commits an offence under this Act and shall be punishable by imprisonment of [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Section 31. Failure to Maintain or Provide Access to Records

Any person who intentionally or by gross negligence:

- (1) fails to maintain books and records as required by Section 14;
- (2) destroys or removes such records; or
- (3) fails to make such information available in a timely manner in response to a lawful request for such books or records

commits an offence under this Act and shall be punishable by imprisonment of [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Section 32. Failure to Fulfil Due Diligence Obligations or Maintain Internal Controls

Any person who intentionally or by gross negligence:

- (1) fails to conduct due diligence with respect to customers, accounts, and transactions in compliance with Section 16;
- (2) fails to comply with the obligations for special monitoring set forth in Sections 17(1)-(4); or
- (3) fails to maintain internal control programs in compliance with Sections 15(1)-(2)

commits an offence under this Act and shall be punishable by imprisonment of [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Section 33. Failure in regard to Suspicious Transaction or Other Reporting

Any person who intentionally or by gross negligence fails to submit a report to [insert name of FIU] as required by Section 21 [*add, if appropriate, optional currency transaction reporting section*] commits an offence under this Act and shall be punishable by [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Section 34. False or Misleading Statement

Any person who intentionally makes a false or misleading statement, provides false or misleading information, or otherwise fails to state a material fact in connection with such person's obligations under this Part, including the obligation to make a suspicious transaction [*Option: or currency transaction*] report, commits an offence and shall be punishable by [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Section 35. Confidentiality Violation

Any person who intentionally or by gross negligence discloses to a customer or a third party information in violation of [insert appropriate reference (similar to Section 25(1))] commits an offence under this Act and shall be punishable by [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Drafting Note: Section 35 provides a “tipping off” offence. Tipping off is a disclosure by an institution or designated non-financial business or profession or any person associated with these businesses that a report is being or has been made, or an investigation begun.

Section 36. Shell Bank Offence

Any person who intentionally or by gross negligence:

- (a) sets up a shell bank in [insert name of State] or
- (b) enters into or continues business relations with a shell bank or a respondent financial institution in a foreign country that permits its account(s) to be used by a shell bank

commits an offence under this Act and shall be punishable [insert imprisonment range] and a fine [insert monetary range], or either of these penalties.

Section 37. Other Sanctions

A person found guilty of any offence set forth in Sections 30 to 36:

- (a) is subject, in addition, to the sanctions and measures available to the competent supervisory, regulatory or disciplinary authority for administrative violations; and
- (b) may also be banned [*permanently/for a maximum period of [indicate period]*] from pursuing the business or profession which provided the opportunity for the offence to be committed.

Part V: Financial Intelligence Unit

Drafting Note: Sections 38-42, which together form Part V, are basic provisions to establish a financial intelligence unit that will serve to deal effectively with suspicious transaction reports that are generated as a result of the preventive measures obligations that Part IV sets forth for financial and designated non-financial businesses and professions.

Definitions. It will be necessary to include definitions of “terrorist property” (and thus also “terrorist act” and “terrorist organisation”) as well as definitions for “proceeds of crime,” “offence,” “financial institutions” and “designated non-financial businesses and professions” in this Part if it is used separately, and the terms are not incorporated by reference to other provisions within domestic law. Typically, this Part will be integrated in some way with a State’s preventive measures provisions since, as noted, it establishes the unit that will receive suspicious transaction reports that are required by those provisions. Definitions for the terms appear in Parts II, IV and VI.

Section 38. Establishment and Structure

(1) There is hereby established the [insert name of FIU]. [Insert name of FIU] shall serve as the central, national agency of [insert name of State] responsible for receiving, requesting, analyzing and disseminating information concerning suspected proceeds of crime and terrorist property, as provided for by this law.

Drafting Note: The phrase “terrorist property” should be used in Section 38 rather than, for instance, “potential financing of terrorism” as terrorist property has greater breadth. It will include property already owned or possessed by a terrorist group or individual, and proceeds of a terrorist act as well as property involved in financing activities.

(2) The composition, organization, operation and resources of [insert name of FIU] shall be established by [*Variants:* decree, regulation, other relevant legal instrument].

Drafting Note: A legal framework for a financial intelligence unit (FIU) can be established through statutory provisions, regulations, or, in some States, through administrative provisions or a combination of these. Whatever form is used to establish the FIU, the provisions should:

- formally establish the FIU within the State;
- define the FIU’s responsibilities with precision;
- set forth a structure for the organization and its leadership; and

Drafting Note continued:

- provide for decision-making processes and operations that protect against undue influence or interference.

Other than the core responsibility of receiving, analyzing and disseminating information on suspected money laundering and terrorist financing, the FIU's responsibilities may vary significantly from State to State as will the powers conferred on the FIU and its organizational structure. An FIU may be located within a police service, the prosecutor's office, the Central Bank or a ministry of finance or justice and benefit from the infrastructure and resources of these services, or it may be established as an independent office.

The model provisions in this Part cover only basic, core elements. These provisions should be supplemented. For instance, a State may also decide that its FIU should have responsibility to supervise the compliance of some designated non-financial businesses and professions, or to provide specific guidance on typologies that are relevant within the jurisdiction. In order to provide additional details on the procedural aspects of the FIU, a model decree is attached to the model provisions.

States should also consider provisions in law or regulation that support operational independence and autonomy for the FIU to ensure it is free, within the State's system, from undue influence or interference. For instance, there could be a provision that limits the review of decisions by the director of the FIU, or that the director's decision to analyse a matter or disseminate a suspicious transaction report is not subject to review. There might be a provision that sets a fixed term for the director with dismissal permissible only in the case of verifiable misconduct.

Drafters should review provisions in other jurisdictions, and may consult with authorities in various States on their experiences regarding the wide range of duties and responsibilities some FIUs have been assigned.

Section 39. Obligation regarding Confidentiality and Use of Information

(1) Every person who has duties for or within [insert name of FIU] is required to keep confidential any information obtained within the scope of his duties, even after the cessation of those duties, except as otherwise provided in this Act and [insert reference to State's preventive measures provisions] or as ordered by a court. Such persons may only use such information for the purposes provided for and in accordance with this Part and [insert reference to State's preventive measures provisions].

(2) Any current or past employee of [insert name of the FIU] or other person who has duties for or within [insert name of the FIU] who intentionally reveals information the confidentiality of which is required to be protected by subsection (1) commits an offence under this Act and shall be punishable by [insert imprisonment range] and a fine [insert monetary penalty range] or either of these penalties.

Section 40. Action regarding Reports and Other Information Received

Whenever [insert name of FIU] has:

Variant 1: reasonable grounds to suspect

Variant 2: serious indications

that property is proceeds of crime, is related to or intended for the financing of terrorism, or is terrorist property, it shall forward the relevant information to [the prosecutor, investigative authority, judicial authority, etc.] [**Option (add):** *who shall decide upon further action.*]

Drafting note: Section 40, which specifies the actions of the FIU with respect to information it receives, should not be limited to suspicious transaction reports but should extend to any other information the FIU receives, for instance, if relevant in the jurisdiction, currency transaction reports.

The Egmont Group's [Interpretative Note Concerning the Egmont Definition of a Financial Intelligence Unit](#) provides that a FIU is "[a] central, national agency responsible for receiving, (and as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information:

- (i) concerning suspected proceeds of crime and potential financing of terrorism, or
- (ii) required by national legislation or regulation,

in order to combat money laundering and terrorism financing.”

According to the explanatory materials, subsection (i) concerns the reporting of “suspicious or unusual transaction or activities regarding funds that are suspected of having originated from criminal activity or of being intended to support terrorist activity. Subsection (ii) relates to disclosures otherwise required by national legislation or regulation and “encompasses all other mandated types of reporting requirements required by law, whether involving currency, cheques, wires or other transactions.”

The Egmont Group materials further explain “disseminating”: “FIUs at a minimum must be able to share information from financial disclosures and the results of their analysis regarding money laundering and related crimes, as determined by domestic legislation, and terrorism financing, firstly with domestic competent authorities, and secondly, with other FIUs. ...”

[FATF Recommendation 26](#) addresses establishing a FIU that would disseminate “STR and other information regarding potential money laundering or terrorist financing.” The Methodology at 26.5 provides that “[t]he FIU should be authorised to disseminate financial information to domestic authorities for investigation or action when there are grounds to suspect ML or FT.”

Drafting Note continued: Taken together, it is clear that the FIU must be authorised to forward information to the competent authority once it concludes a likelihood, using either a reasonable grounds to suspect or serious indications standard, that there is property (funds and property having the same definition) that is proceeds of crime, related to the financing of terrorism, or is terrorist property. The definition of proceeds of crime includes both direct and indirect proceeds.

Section 41. Access to Information

(1) In relation to any information it has received in accordance with its functions, [insert name of FIU] is authorised to obtain from any entity or person subject to the reporting obligation set forth [insert reference to State’s suspicious transaction reporting requirement (as Section 21 in the model provisions)] any additional information that [insert name of FIU] deems necessary to carry out its functions. The information requested shall be provided within the time limits set and the form specified by [insert name of FIU].

Drafting note: The FIU or some other authority must be able to secure this information. Section 41 provides for direct access by the FIU. If authorities decide not to permit the FIU with direct access, then the authority that obtains the information must be able to provide it to the FIU and do so in a timely manner. See, Methodology Criterion 26.3 and 26.4. Section 22 of [EU Directive 2005/60/EC of 26 October 2005](#) also deals with this issue.

[Option: add subsection: ()] *The [insert name of FIU] is authorised to access and review information on-site that belongs to or is in the custody of financial institutions and designated non-financial businesses and professions which is necessary to the fulfilment of the functions of the [insert name of FIU].*

(2) Paragraph (1) **[Option: and ()]** *[if optional subsection is used add such reference]* of this section shall be applied subject to the restrictions **[Variant: limitations]** in the definition of “designated non-financial businesses and professions” in [reference where definition is found] and subject to [insert any limitation enacted in the State regarding reporting obligation for lawyers, notaries, other independent legal professionals and accountants (as Section 21(2) in the model provisions)].

(3) The [insert name of FIU] may, in relation to any report or information it has received, obtain, where not otherwise prohibited by law, any information it deems necessary to carry out its functions from:

- (a) a law enforcement authority;
- (b) any authority responsible for the supervision of the entities and persons subject to this law; and
- (c) any other public agency within the State.

Drafting Note: [FATF Recommendation 26](#) provides in part that: “[t]he FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.”

Section 41(3) provides for direct access by the FIU to any information held by various State authorities where access to that information is not otherwise prohibited by law.

Section 42. Sharing Information with Foreign Counterpart Agencies

(1) [Insert name of FIU] may, spontaneously or upon request, share information with any foreign counterpart agency that performs similar functions and is subject to similar secrecy obligations with respect to the information it receives based upon reciprocity or mutual agreement [*Option: add: on the basis of cooperation arrangements entered into between [name of FIU] and such foreign counterpart agency*].

Drafting Note: Cooperation Agreements. Many States require a formal cooperation arrangement in order to provide a FIU in another State with information that its FIU has gathered. If specific arrangements are necessary, the optional language in Section 42 should be considered, as well as the inclusion of the optional subsection, an enabling provision which provides the FIU with the necessary authority to enter into such agreements. Such cooperation arrangements also would generally specify the use to which the other State may put the information, and the use a State may make of information it receives from a foreign counterpart agency.

A memorandum of understanding or other arrangement, even if not required, is often the best vehicle to articulate the obligations of the receiving FIU with respect to the information. The most restrictive approach is to limit use by the receiving FIU only for the specific matter for which it was requested with no further disclosure or dissemination of the information to other authorities in the receiving State or elsewhere without the consent of the sending FIU.

Alternatively there might be general agreement to such dissemination with the receiving FIU able to use and process the information just as it would use and process domestic information it receives, with a restriction on the use of the report itself (or alternatively the information in the report) in the course of judicial proceedings unless the providing authority consents. Requiring such consent would protect against any use in a proceeding that involved criminal activity that might not be covered by the providing State’s statute. There are innumerable variations on dissemination and use. These are most appropriately addressed by specific arrangements between the two cooperating FIUs considering the specifics of their domestic frameworks.

Drafting Note continued: Information Exchange. The Egmont Group has adopted [Principles for Information Exchange](#) (June 2001) and [Best Practices for the Exchange of Information](#). Under the [Principles](#) at D11 and 12, FIUs may use information exchanged “only for the specific purpose for which the information was sought or exchanged,” and “the requesting FIU may not transfer information shared by a disclosing FIU to a third party, nor make use of the information in an administrative, investigative, prosecutorial, or judicial purpose without the prior consent of the FIU that disclosed the information.” The specific arrangements in a memorandum of understanding can address these issues in the context of the specific States exchanging information.

[Option: add subsection (): The [insert name of FIU] may enter into an agreement or arrangement to facilitate the exchange of information with a foreign counterpart agency that performs similar functions and is subject to similar secrecy obligations.]

(2) The [insert name of FIU] may make inquiries on behalf of a foreign counterpart agency where the inquiry may be relevant to the foreign counterpart agency’s analysis of a matter involving suspected proceeds of crime or terrorist property, or potential financing of terrorism. The [insert name of FIU] may:

- (a) search its own databases, including information related to reports of suspicious transactions, and other databases to which [insert name of FIU] has direct or indirect access, including law enforcement databases, public databases, administrative databases and commercially available databases;
- (b) obtain from financial institutions and designated non-financial businesses and professions information that is relevant in connection with such request;
- (c) obtain from competent authorities information that is relevant in connection with such request to the extent [insert name of FIU] could obtain such information in a domestic matter; and
- (d) take any other action in support of the request of the foreign counterpart that is consistent with the authority of [insert name of FIU] in a domestic matter.

Drafting Note: Under [FATF Recommendation 40](#), and the [Interpretative Note](#) (IN) to Recommendation 40 at paragraph 4, the minimum requirement is that of searching databases as set forth in Section 42(2)(a) above.

The additional items are discretionary but encouraged. As the IN sets forth, if a FIU is permitted to do so, it should contact other competent authorities and financial institutions on behalf of the inquiring FIU. Section 42(2)(b) - (d) provide the FIU with authority to take such actions on behalf of the inquiring FIU as it could on its own behalf, including requiring additional information from institutions that have a duty to report suspicions.

Part VI: Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders

Drafting Note: Part VI deals with conviction-based confiscation. It addresses both the final orders to confiscate property and the preliminary orders to secure property for eventual confiscation. All such orders are premised upon the existence of a criminal case. For an order to confiscate property, there must be a criminal conviction. To restrain or seize property, there must be a criminal investigation in which an order to confiscate or recover benefits is anticipated. Part VI also addresses investigative orders to assist in proceeds investigations.

Drafting authorities should review use of the terms “part” and “act” for appropriate usage as versions of these model provisions are adopted either alone or in conjunction with other segments of the model provisions.

Application to Terrorism and Terrorism Financing. The provisions in this Part do not provide separately for the criminal confiscation of property relating to terrorism or the financing of terrorism. This is because these conviction-based confiscation provisions are meant to apply where there is a conviction for any serious offence under national law. Accordingly, they will apply to the proceeds and instrumentalities of terrorism financing offences and any other terrorism-related offence under domestic law. The scope of these provisions should be broad enough to capture funds raised or provided in a terrorism financing setting, either as proceeds or instrumentalities of a terrorism financing offence. Likewise, if membership in a terrorist organization is a criminal offence, it should cover the assets of such organization.

Definitions. Definitions applicable in this Part appear in Section 43(5).

Terms: Part VI provides for orders to “confiscate” proceeds and instrumentalities and to recover benefits. The terms “confiscate” and “forfeit” can be confusing as the way in which they are used varies from State to State. In some jurisdictions, confiscation refers to a value order while forfeiture refers to recovering the actual proceeds and/or instrumentalities.

In these model provisions the references are the opposite. A “confiscation order” applies where the enforcement authority is recovering actual proceeds and instrumentalities. “Benefit orders” are used to recover the value or benefit received. The terms that the drafting authorities use will be a matter of local practice. The important point is that the concepts of criminal confiscation and criminal forfeiture are co-extensive in that they each refer to the recovery of property in connection with a criminal offence whether that is proceeds, instrumentalities or benefits from the offence.

Modes of confiscation: Part VI provides for two kinds of orders after a criminal conviction: first, *in rem* forfeiture orders directed against the proceeds or instruments of crime (described as “confiscation orders”) (Sections 59-62) and secondly, *in personam*, value orders designed to neutralise the benefit from the crime and directed against persons who have benefited from crime (described as “benefit recovery orders” and “extended benefit recovery orders”) (Sections 63-65).

Drafting Note continued: Kinds of Criminal Offences. The kinds of criminal offences for which such orders are available depends upon the definition drafting authorities choose for “offence” for purposes of this Part. The widest application occurs if “offence” is defined as “any offence against the laws of [State].” This may provide for an application that is broader than is necessary, for instance, in the case of petty shoplifting, etc.

Application can be narrowed by using the “threshold approach” which might define an offence as “any offence against the laws of [State] carrying a penalty of 12 months imprisonment or more.” The most restrictive way is to define offence by reference to a scheduled list of the offences a conviction for which will trigger the operation of the provisions.

Restraint and Seizure Orders. For property to be available for confiscation, it is essential that it be immobilized at an early point. Sections 44-52 address the restraint and seizure of property as provisional measures to preserve property in support of eventual confiscation.

Confiscation and Benefit Recovery Order. There are two features of criminal confiscation provisions that many States use to address the significant challenges that States face in recovering criminal proceeds and benefits in connection with a criminal conviction.

First, there are provisions that permit recovery for additional kinds of conduct. Secondly, there are provisions that ease the proof burden with respect to what constitutes proceeds or benefit by use of inferences and presumptions.

These features have been found important for without them recovery of the real world benefits of crime often will not be possible. The evidentiary burden regarding fast-moving and often hidden proceeds constitutes a high and often impossible barrier for the prosecution. The two approaches above are reflected in provisions adopted by many common law jurisdictions. Care must be taken in drafting and applying such provisions in order to ensure consistency with a State’s fundamental principles, and procedural fairness for defendants and third parties whose property rights will be affected.

In this model, provisions or options incorporate each of these features. Section 63 provides an option to extend the conduct for which recovery may occur to criminal activity beyond the offence of conviction, that is, to “related activity.” Section 59(6) - (7) sets forth inferences the court may use in the case of a confiscation order. In addition, Section 64(1)(d) provides an inference for use with a benefit recovery order. Optional subsections 65(7) and (8) relate to presumptions in an extended benefit recovery setting.

Section 43. Application of Part and Definitions

(1) This Part shall apply:

(a) in respect to any offence as defined in paragraph (a) of the definition of “offence”; and

(b) in respect of an offence under the law of a foreign State in relation to acts and omissions which, had they occurred in [insert name of State], would have constituted an offence in [insert name of State] provided that:

- (i) in the case of a request relating to a restraint or to the recovery proceeds, instrumentalities or benefits, there is property located in [insert name of State] that can be restrained or recovered for the purpose of a confiscation order or benefit [*Option: or extended benefit*] recovery order; or
- (ii) in the case of a request relating to tracing, identifying, locating or quantifying proceeds, benefits or instrumentalities, there is or may be relevant information or evidence within [insert name of State]; and
- (ii) a request for assistance has been made by the foreign state for the restraint or confiscation of property in relation to the offence, or for information or evidence that may be relevant to the proceeds, benefits or instrumentalities of the offence.

(2) With respect to the application of this Part to the offences set forth in subsection (1)(b), the authorities within [insert name of State] shall have discretion whether or not to seek orders and to otherwise apply the provisions of this Part.

Drafting note: Section 43(1) makes clear that this Part applies to “offences” both domestic and foreign. Subsection (5), the definitions subsection, contains a definition of “offence.” Subsection (1)(b) makes it clear that this Part may be used in support of a foreign request for assistance. The section enables the conviction-based confiscation proceeding to occur based upon the foreign prosecution. Under international standards, it is essential that the State be able to provide such assistance, whether through this kind of provision or some other method. See [FATF Recommendation 38](#).

The effect of having the restraint and confiscation provisions available for domestic authorities to use in the case of a foreign conduct is that another State can make a request based upon an investigation or conviction in their State. Even in the absence of a restraint or confiscation order in the foreign state, such a State could ask the authorities in the requested State to seek a restraining or confiscation order. All of this presupposes that there is relevant property located in the requested State.

Section 43(1) limits the operation of conviction-based confiscation and benefit recovery orders, when triggered by a foreign offence, to the circumstances set out in the subsection. These are that there must be property subject to restraint or confiscation within the jurisdiction or may be relevant information in the jurisdiction, and there is a request from the State in which the foreign offence was committed for investigative assistance or assistance in relation to the freezing or confiscation of the assets.

Section 43(2) makes clear that the State that receives the request retains discretion regarding use of these provisions. This discretion provides a safeguard in the case of requests which may appear to be based upon irregular, unfair or discriminatory proceedings in the requesting State.

(3) This Part shall apply even if the conduct which forms the basis for the offence occurred before the Part came into effect, and shall apply to any benefit whether it was obtained before or after this Part came into force.

Drafting Note: Retrospective Application. Section 43(3) makes clear that the remedies provided in this Part—restraint, confiscation and benefit recovery orders—are available even though the conduct that is the basis for the restraint or confiscation pre-dates the adoption of the Act. It will be important to make clear that the new provisions will apply even if the offence concerned, or the benefit obtained, took place before the Act came into force. This Act will not apply however if the conviction for the offence took place before the Act came into force.

If domestic law and jurisprudence treats confiscation as a penalty, rather than a consequence of conviction, this provision on retroactivity is not appropriate. As the [*International Covenant on Civil and Political Rights*](#) notes at Article 15: “Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed.”

(4) Any question of fact to be decided by a court on an application under this Part is to be decided on a balance of probabilities.

(5) In this Part, the following definitions shall apply:

“**benefit**” means an advantage, gain, profit, or payment of any kind, and the benefits that a person derives or obtains or that accrue to him include those that another person derives, obtains or that otherwise accrue to such other person, if the other person is under the control of, or is directed or requested by, the first person.

“**court**” means [insert reference to judicial authority that will be given authority to act with respect to the applications set forth in the Part].

Drafting Note: Court: The definition permits individual countries to determine which courts should be given jurisdiction to deal with applications relating to conviction-based confiscation. In countries where asset confiscation legislation is new, it is not uncommon for jurisdiction to be restricted to senior or mid-level courts for the first few years of operation. Once issues generated by the legislation have been resolved by the higher courts, a decision might be made to expand jurisdiction to include all courts, including magistrates’ courts.

If in some situations, the deciding authority for a particular application may be different than the “court” as defined generally, drafting authorities should not use the generic term “court” but include a specific reference to the deciding authority in the section, noting, for instance, that a magistrate or judge shall decide. This is of particular importance in some common law jurisdictions where certain orders, as a search warrant or production order, might be issued by a judge as a *persona designata*, where the power being exercised is executive rather than judicial. In order for there to be judicial supervision of the decision, the order might have to be issued in this manner.

Drafting Note continued: A section on jurisdiction could also be added if needed. One approach is to match the jurisdiction of courts under these provisions to their jurisdiction in civil matters. For example, if a magistrates' court may not make orders in relation to land or other property over a certain value, the same approach would apply.

“dealing with property” means any of the following:

- (a) a transfer or disposition of property;
- (b) making or receiving a gift of the property;
- (c) removing the property from [insert name of State];
- (d) where the property is a debt owed to that person, making a payment to any person in reduction or full settlement of the amount of the debt;
- (e) using the property to obtain or extend credit, or using credit that is secured by the property; or
- (f) where the property is an interest in a partnership, doing anything to diminish the value of the partnership.

“effective control” in relation to property means the exercise of practical control over the property whether or not that control is supported by any property interest or other legally enforceable power. In determining whether property is subject to the effective control of a person:

- (a) it is not necessary to be satisfied that the person has an interest in the property;
- (b) regard may be had to—
 - (i) shareholdings in, debentures over, or directorships of a company that has an interest (whether direct or indirect) in the property;
 - (ii) a trust that has a relationship to the property; and
 - (iii) family, domestic, business or other relationships between persons having an interest in the property, or in companies referred to in paragraph (a), or trusts referred to in paragraph (b), and other persons.
- (c) A court may refuse to treat property as being subject to the effective control of a person if it is satisfied that a person's ownership or control of the property is subject to a lawful, bona fide trust held for the benefit of a third party.

Drafting Note: Section 43(5) in its definition of effective control at subsection (c) ensures the court can protect third-party property that has been placed under the control of the defendant for a lawful purpose. For instance, it might arise in relation to property held by a relevant person (whose property interests might otherwise be subject to restraint) to carry out a lawful obligation imposed by a trust, for instance where the relevant person has been appointed the executor of an estate and carry out the terms of a bequest in a will. Another example might be the case of an attorney who is the subject of an investigation who has an account that holds client funds in trust.

“**enforcement authority**” means [insert name of authority State shall use for this Part on criminal confiscation and related orders].

Drafting Note: Enforcement Authority. The term “enforcement authority” is used as multiple prosecuting units may be involved. If this flexibility is not required “the Director of Public Prosecutions” or some other appropriate term can be substituted. The enforcement authority should be a legal office. Since the authority will be seeking orders in connection with a criminal case and presenting evidence to the court, it would not be appropriate in most cases for this to be a police agency.

The term is also used in Part VIII on Civil Forfeiture. If another authority is responsible for the civil cases, enforcement authority may be defined in different ways in the two Parts.

“**gift**” means property given by one person to another person, and includes any transfer of property directly or indirectly:

- (a) after the commission of an offence by the first person;
- (b) to the extent of the difference between the market value of the property at the time of its transfer and
 - (i) the consideration provided by the transferee, or
 - (ii) the consideration paid by the transferor

whichever is greater .

“**gift caught by the Act**” is a gift made by the subject of an investigation or defendant at any time after the commission of the offence, or, if more than one, the earliest of the offences to which the proceedings relate; and the court considers it appropriate in all the circumstances to take the gift into consideration.

“**instrumentality**” and “**instrumentalities**” means any property used or intended to be used, in any manner, wholly or in part [*Variant 1:* to commit] [*Variant 2:* in or in connection with the commission of] a criminal offence or criminal offences and is deemed to include property of or available for use by a terrorist organization.

Drafting Note: The definition of instrumentality reflected in *Variant 1* is the same as it appears in the 1990 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (CETS 141), commonly known as the Strasbourg Convention, and the 2005 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (CETS 198) and in the civil law model law.

Variant 2 reflects language used in provisions in some common law countries. This variant broadens the property that might be considered an instrumentality. Case law that may be helpful in deciding on an approach and that discusses the concepts underlying “instrumentalities” include (from Australia): *DPP (NSW) v. King* [2000], NSWSC 394 (New South Wales Supreme Court) per O’Keefe (Available on AustLII); *Taylor v A-G (SA)* (1991), 55 SASR 462 [53 A Crim R 166] (Court of Criminal Appeal South Australia); (from South Africa): *NDPP v. RO Cook Properties* (Cases 260/03, 666/02 and 111/03) (Supreme Court of Appeal of South Africa) (13 May 2004); *Mohunram and Anor v. NDPP* [2007] ZACC 4; *NDPP v. Geysler* [2008] ZASCA 15 (RSA) (available on SafLII).

“**interest**” in relation to property, means:

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power or privilege in connection with the property.

“**offence**” and “**criminal offence**” except when the term refers to a specific offence means:

Variant 1: (a) any offence under the law of [insert name of State]; and

(b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 2: (a) any offence against a provision of any law in [insert name of State] for which the maximum penalty is death or life imprisonment or other deprivation of liberty of more than one year; and

(b) any offence under a law of a foreign State, in relation to acts or omissions, which had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 3: (a) offences defined in Schedule 1 to this Act; and

(b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Drafting Note: As noted in the introduction to Part VI, the kinds of criminal offences for which confiscation and benefit recovery orders are available depends upon the definition drafting authorities choose for “offence” for purposes of this Part.

The definition of “offence” should reflect one of the three approaches in [FATF 40 Recommendation 1](#). See note on R. 1 in Part II, Section 3. Drafting authorities should consider which approach to adopt: all offences, all serious offences, a comprehensive list that reflects all serious offences, or some combination of these. The use of Variant 1 will permit confiscation and restraint provisions to be used for all offences including minor offences, and drafting authorities should consider whether they want to make all such offences potential triggering activity. If Variant 2 is chosen, the provisions on restraint and confiscation will be available in the case of all serious offences, that is those that have a penalty, as a maximum, of more than a year. In those instances where a country has minimum rather than maximum threshold in its legal system, Variant 2 will need to be altered. Use of Variant 3 alone, the list approach, has the disadvantage of requiring frequent changes in legislation as new offences are enacted.

It is essential, whichever approach is chosen, that similar offences under the laws of other States are also covered. This is addressed through including subsection (b) in each Variant.

“**person**” means any natural or legal person.

“**proceeds**” and “**proceeds of crime**” means any property or economic advantage derived from or obtained directly or indirectly through the commission of a criminal offence [*Option: or in connection therewith*]. It shall include, economic gains from the property and property converted or transformed, in full or in part, into other property.

Drafting Note: Regarding the optional language, it should be noted that a number of common law countries, for instance the United Kingdom and South Africa, make it clear in their legislation that benefits of criminal conduct include property obtained “in connection with” the offense. Adding this phrase expands the concept of proceeds somewhat. It should, for instance, make it clear in the case of a stand-alone money laundering prosecution where there is no prosecution for the predicate offence that the funds being laundered which are viewed primarily as proceeds of the predicate activity are also considered proceeds of the money laundering offence.

Drafting authorities should be aware of proportionality issues where legitimately-acquired property is commingled with proceeds and ensure in some manner that courts need not consider legitimately-acquired partial interests in property as proceeds.

“**property**” means asset of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [insert name of State] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.

Drafting Note: “Property” is the term used in this Part rather than “funds.” The [Vienna](#) and [Palermo Conventions](#) and the [UN Convention Against Corruption](#) use the term “property” to refer to assets that may be subject to those instruments. “Property” is the term used in Part IV (Preventive Measures), Part VI (Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders), and Part VII (Civil Forfeiture) rather than the “funds” a term used in the [International Convention for the Suppression of the Financing of Terrorism](#) to express the same concept. “Funds” as defined by the [Terrorism Financing Convention](#) adds an illustrative list “including but not limited to” with various examples of covered assets.

The model provisions’ definition of “property” includes the [Vienna](#) and [Palermo Conventions](#) and [UN Convention Against Corruption](#) terminology, supplemented by the illustrative examples from the [Financing of Terrorism Convention](#). It adds the examples of “currency” and “deposits and other financial resources” to remove any doubt that those items are included, and language providing that the definition applies wherever the property is located. See also definitions in the [Glossary to the FATF Methodology](#).

Both “property” and “funds” differ from “funds or other assets.” “Funds and other assets” does not include the language providing that the definition applies wherever the property is located and does not include the illustrative examples “currency” and “deposits and other financial resources.” It expressly includes income or other value accruing from or generated by assets, whereas such income or value is not mentioned in the definitions of “property” or of “funds”.

“property in which the defendant has an interest” includes:

- (a) any property that is, on the day when the first application is made under this Part in respect of that offence, subject to the effective control of the defendant; and
- (b) any property that was the subject of a gift from the defendant to another person within the period of [6] years before the first application made under this Part in respect of that offence.

“property in which the relevant person has an interest” includes:

- (a) any property that is, on the day when the first application is made under this Part in respect of that offence, subject to the effective control of the relevant person; and
- (b) any property that was the subject of a gift from the relevant person to another person within the period of [6] years before the first application made under this Part in respect of that offence.

Drafting Note: The definitions of “property in which the defendant has an interest” and “property in which the relevant person has an interest” are critical to the effective operation of benefit recovery orders as these extend the classes of property over which a restraining order and final orders can be obtained to property held by third parties in certain cases. It is important that this power be built into Part VI. Without it, persons who commit crime will be able easily to evade application of this Part by distancing themselves from their property using family members or associates as nominal “front” owners of property.

In the case of a relevant person, the definition applies with respect to applications for and the granting of restraining orders under Sections 44, 45 and 48. In the case of the defendant (a person who is also included in the concept of “relevant person”), the definition becomes important for instance in Sections 64(1)(d) and 70 which relate to valuing the defendant’s benefit and realization of defendant’s property to satisfy an order.

Absent these definitions, a person would be taken to have an interest only in property that he legally owns. In common law jurisdictions, a person might also be taken to have an interest or beneficial interest in property that is owned by a third party, but that is held on their behalf pursuant to a trust. However, trusts can often be structured in ways that make the ultimate beneficial ownership of the trust property very difficult or impossible to determine.

This definition extends the classes of property over which a person will be considered to hold an interest, to property that the person has gifted in certain circumstances (see definition) and property that the person “effectively controls” (also defined).

These powers enable a court to look behind legal structures, such as trusts, that may be used to obscure true ownership. They also permit the court to unravel transactions that have the effect of conferring legal ownership of property upon a third party by means of gift or other transaction, while the person making the gift or engaged in the transaction retains covert control of the asset in question.

“**relevant person**” is a person who has been convicted of an offence, has been charged with an offence, or is the subject of an investigation for an offence.

Restraining Orders

Drafting Note: Restraining Orders. Sections 44-54 deal with restraining orders. The period between the time that a person first comes to the attention of law enforcement authorities and the making of a confiscation or benefit recovery order may be lengthy. It is therefore essential to have a mechanism to preserve property that might ultimately be subject to confiscation. This is usually achieved by means of a restraining order. Such orders can be imposed against all types of property – both tangible (cars, boats, jewellery) and intangible (bank accounts, a debt obligation).

Drafting Note continued: The restraining order provisions are used for two purposes: they are available to restrain property for a confiscation order (proceeds and instruments of crime), see Section 59, as well as property that might be used to satisfy a benefit recovery order (and extended benefit recovery order if that option is chosen) (Sections 63 and 65). The restraining order provisions therefore run in two parallel streams depending upon the purpose for which the order is required. Section 44(1) requires that there be an indication whether the restraining order is sought because it is proceeds or an instrumentality, or because a relevant person has an interest in the property. This will avoid confusion.

Restraining Orders when Property is Outside the Jurisdiction. While a court might be able to issue an order for the restraint of property that is outside its territory, such order will have effect only if the State where the property is located is willing to recognize the order. In legal assistance settings, the foreign State where property is located typically asks the requesting State either to provide information and evidence so the foreign State can seek its own order (the more usual approach), or will ask that the requesting State to forward a restraint order issued by its courts which it will then recognize and register.

Section 44. Application for Restraining Order

Drafting Note: Application for Restraining Order

Timing of Application. It is important to be able to apply for a restraining order before a person has been charged with an offence. Otherwise, the person under investigation or defendant will have an opportunity to conceal or dissipate the property.

Some existing approaches permit restraint when a target is charged, or is about to be charged, with an offence. Others go further and permit restraint of property in the court's discretion as long as a criminal investigation has commenced. The latter approach is taken in this provision. Experience has shown that assets are dissipated long before charging, and, absent the possibility of a restraint early on, it will be unlikely assets will be left to confiscate.

Subject of Investigation. A person is a subject of an investigation for an offence when his conduct is being investigated by a law enforcement officer, acting in accordance with his duty, with a view to ascertaining whether the person should be charged with an offence.

Charging. The State may have particular procedures associated with charging which drafting authorities may need to reference or explain in order to avoid doubt as to when this stage in a proceeding has commenced.

Court. Drafting authorities may want to consider which court will receive applications for restraining orders and make sure this is aligned with the definition of a court in Section 43(5). It need not necessarily be the court that will determine an application for a confiscation, benefit recovery or extended benefit recovery order. The court that deals with a criminal prosecution, however, is generally best suited to handle these latter orders.

(1) Where a person has been convicted of an offence, has been charged with an offence, or is the subject of an investigation for an offence, (referred to hereafter in this Part as “the relevant

person”), the enforcement authority may make application to the court for an order under subsection 2 against any one or more of the following:

- (a) specified property that is reasonably believed to be proceeds or instrumentalities of such offence;
- (b) specified property in which the relevant person has an interest.

Drafting Note: Specified property: Under Section 44(1), an application to restrain property for the purpose of a confiscation order should apply to specified property. This is because only property with a demonstrated link or nexus to the offence can ultimately be confiscated.

Section 44 (1)(b) applies the concept of specified property to orders to restrain assets in anticipation of a benefit recovery order. In some States, there may be a possibility that global orders can be sought, and drafting authorities can alter the language of Section 44(1)(b) if a decision is made to permit such applications. Such an order would apply to all assets of the defendant, even if not specified. Global orders, if adopted, could lead to court challenges on proportionality and overbreadth given their propensity to unintentionally affect innocent third party interests. Specific orders, by contrast, are tailored to specific pieces of property and thus do not raise issues of excessive breadth.

Although Section 44 is meant to restrain the specific person’s interest in property for the purpose of securing a benefit recovery order, it may indirectly affect another person’s interest and the court will need to consider how best to protect that other person’s rights.

- (2) An application for an order to restrain property reasonably believed to be proceeds or instrumentalities of an offence under subsection (1)(a) may be made to secure property for the purposes of an application for a confiscation order pursuant to Section 59.
- (3) An application for an order to restrain specified property in which the relevant person has an interest under subsection (1)(b) may be made to secure property for the purposes of a benefit recovery order [**Option:** or an extended benefit recovery order] pursuant to Section 63 [**Option:** and 65].
- (4) If so requested by the enforcement authority, an application for an order pursuant to subsection (1) shall be heard *ex parte* and *in camera* unless to do so would clearly not be in the interest of justice.

Drafting Note: Most restraining orders will need to be obtained urgently and in a way that does not alert the relevant person that their property is about to be restrained. Thus it should be made clear that, when the enforcement authority considers that secrecy is required, the court shall deal with these applications without giving notice to, and in the absence of, the defendant or others with an interest in property the subject of the application (*ex parte*) and in a non-public proceeding (*in camera*) to avoid any tipping off of a defendant. This is accomplished by Section 44(4).

Drafting Note continued: This does not prevent the enforcement authority from having an application heard *inter partes* that is, on notice to the defendant and other interested third parties. This would be appropriate where there is no risk of concealment or dissipation, for instance when the property involved has already been secured by a bona fide third party.

Section 44(4) is meant to govern the court's exercise of its inherent discretion.

- (5) An application made to secure property for the purposes of a confiscation order under subsection (1)(a) shall be in writing and shall be supported by an [**Variants:** affidavit; evidence; verified statement] of [specify officials to be authorised] indicating that the officer believes, and the grounds for his belief, that the property which is the subject of the application is proceeds of crime or an instrumentality.

Drafting Note: Section 44(5) provides for use of either an affidavit, verified statement, or other form of evidence. The form of the material that the court will consider will depend upon local procedure. However, it is important that there be legal responsibility for, and a written record of, the representations made.

Officers making application. Drafting authorities will need to decide which officials of the enforcement authority or other law enforcement officers will be entitled to substantiate applications under this section. It is best that the court hear directly from the persons who are intimately involved in the investigation. Drafting authorities should identify the officers that will be involved (from what agency) either here or in the definitions section, and recognize that several other sections in this Part also call for action by officers who may be the same or different than those mentioned here. Use of officers of sufficiently senior rank will guard against misuse of the provisions.

- (6) Where an application under subsection (1)(a) is made prior to the charging of a person for an offence, the [**Variants:** affidavit; evidence; verified statement] shall also set forth the officer's belief, and the grounds for his belief, that the relevant person committed the offence, is the subject of an investigation for the offence and is likely to be charged with the offence or an offence arising from the same conduct.
- (7) An application to secure property for the purposes of a benefit recovery order [**Option:** or extended benefit recovery order] under subsection (1)(b) shall be in writing and shall be supported by an [**Variants:** affidavit; evidence; verified statement] of [specify officials to be authorised] indicating that the officer believes, and the grounds for his belief, that the relevant person derived a benefit directly or indirectly from the commission of the offence.
- (8) Where an application under subsection (1)(b) is made prior to the charging of the person with an offence, the [**Variants:** affidavit; evidence; verified statement] shall also set forth the officer's belief, and the grounds for his belief, that the relevant person committed the offence and is likely to be charged with the offence or a related offence.
- (9) If property which is the subject of an application under subsection (1)(b) is the property of a third party, the affidavit or statement shall indicate that the officer believes, and the

grounds for his belief, that the property the subject of the application is property in which the relevant person has an interest.

Drafting Note: Third-Party Interests. Section 44(9) sets out the evidentiary requirements that should be addressed in order to obtain a restraining order over property for the purpose of a benefit recovery order that, on the face of it, is owned by a third party. In essence, in order to restrain such property, it is necessary to show that the defendant has an “interest” in it. “Interest” is a defined term and includes, in addition to the ordinary meaning of “interest in property,” property over which a person under investigation (or charged) has effective control or property which he has gifted.

The evidence in support of an application for the restraint of third-party property should indicate the basis upon which it is alleged that the property is property in which the relevant person has an “interest,” and the extent of that interest. This will enable the court to determine whether an order over the third party property should be made, and if so, whether the order should be made over the whole property or over some lesser interest in the property.

For example, if the property is wholly owned by a third party but the evidence is that the property is effectively controlled by the relevant person, it would be appropriate to restrain the whole property.

However, it may be that the property is wholly owned by the third party, subject to a trust in relation to a share of the property. This would be the case, for instance, where the relevant person contributed 25% of the purchase price of a house that the third party then purchased in his name. The third party supplied the remaining 75% of the purchase price from his own funds.

Here the third party is the legal owner of the whole property, subject to a trust in favour of the relevant person in respect of his 25% share. In such a case it would not be appropriate to restrain the whole property as this would inappropriately capture the interest legitimately owned by the third party. An order in this case should be over the “relevant person’s 25% interest in property.” The practical effect of such an order will probably be to prevent dealings in the entire property until the matter is finally resolved, or the relevant person’s 25% share is paid out.

It will, however, be clear that whatever happens, the third-party interest in the property can never be applied to the payment of a benefit recovery order made against the relevant person.

Section 45. Restraining Order

Drafting Note: Grant of Restraining Order. Section 45 provides the court with discretion to issue a restraining order where it concludes there are reasonable grounds to believe first, that a person committed the offence and there is an investigation or charge relating to that conduct, and secondly, that the property to be restrained is proceeds or an instrumentality (if a confiscation order is contemplated) or that the person derived a benefit (if a benefit recovery or extended benefit recovery order is contemplated).

Drafting Note continued: Standard for Granting. Standards that States use to grant restraints vary. Among them would be that a confiscation or benefit recovery order is likely to be granted or that there are reasonable grounds to believe that such an order may be made. The provision suggested here, Section 45(1), does not rely on the likelihood that an order will be granted, as such a standard may be difficult to apply. Rather it looks to the reasons underlying whether an order will ultimately be made.

Some States have required, in addition, a showing of risk of dissipation or concealment. These can be very difficult to establish particularly at an early stage of an investigation. Using this standard may mean that there will be no assets to secure an eventual order.

Drafting authorities ultimately must evaluate the balance that is appropriate in their domestic context for a restraint with the understanding that if the evidentiary threshold is too high, State authorities may only rarely be able to restrain fast-moving criminal proceeds and assets may never be reachable, but if too low, it could amount to an unfair interference with a person's right to peaceful enjoyment of possessions.

(1) Where the enforcement authority applies to the court for a restraining order in accordance with Section 44, and the court is satisfied having regard to the facts and beliefs set out in the [*Variants: affidavit; evidence; verified statement*] in support of the application and any other relevant matter, that there are reasonable grounds to believe that subsection (1)(a) below, and any one of subsections (1)(b), (1)(c) [*Option: and 1(d)*] below are satisfied, it may order any of the matters set out in subsection (2) below:

- (a) where the relevant person has not been convicted of the offence, that he committed the offence and that the person is either the subject of a criminal investigation or has been charged with the offence; and
 - (b) where the application for a restraining order is made for the purpose of securing property for the purpose of a confiscation order, that the property the subject of the application is proceeds of crime or an instrumentality; or
 - (c) where the application for a restraining order is made for the purpose of securing property for the purpose of a benefit recovery order, that the relevant person derived a benefit from the commission of the offence, and has an interest in that property.
- [(d) *Option: or where the application for a restraining order is made for the purpose of securing property for the purpose of an extended benefit recovery order, that offence is a serious offence for the purposes of Section 65 and that the relevant person has an interest in that property.*]

(2) The court may order any one or more of the following:

- (a) that the property, or such part of the property as specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order;
- (b) that the property, or such part of the property as is specified in the order, shall be seized, taken into possession, delivered up for safekeeping or otherwise

secured by a named authorised officer, the enforcement authority or such other person appointed for this purpose by the court; or

- (c) if the court is satisfied that the circumstances so require, direct a named receiver or trustee to take custody and control of the property, or such part of the property as is specified in the order and to manage or otherwise deal with the whole or any part of the property in accordance with any direction from the court.

Drafting Note: Section 45(2) deals with the nature of the order that will be effective to restrain the property. A simple order as provided in subsection 2(a) will suffice for many types of property, for instance a bank account. Other kinds of property may need to be taken into possession or held by an authorised officer under subsection 2(b). Other property may require ongoing management, for instance farms, businesses or share portfolios, and certain kinds of real estate. Subsection 2(c) thus provides for the appointment of a named receiver or trustee to deal with such matters.

In some jurisdictions existing government agencies may have appropriately qualified persons who can serve as receivers/trustees. Thus, allowance should be made for States to appoint appropriate persons who may not be formal trustees. In others, the court will need to turn to appropriately-qualified private persons such as members of accounting firms. This will have significant cost implications, and considerable care must be taken in remuneration arrangements. Preferably this should not be left to the court, but be set out in regulations.

Authorities should determine the nature of the entities or persons within the jurisdiction that have the necessary experience to manage or preserve property and take steps to realize it that might be designated in this and other sections that provide for duties of a “receiver or trustee”. It will be best to draft the provision in a way that leaves the court discretion to choose the kind of person or entity to designate (named trustee, receiver, etc.) in a specific instance.

(3) Where a receiver or trustee has been appointed under subsection (2)(c) in relation to property, he may do anything that is reasonably necessary to preserve the property and its value including, without limiting the generality of this:

- (a) becoming a party to any civil proceedings that affect the property;
- (b) ensuring that the property is insured;
- (c) realising or otherwise dealing with the property if it is perishable, subject to wasting or other forms of loss, its value volatile or the cost of its storage or maintenance is likely to exceed its value, subject to the proviso that this power may only be exercised without the prior approval of the court in circumstances where:
 - (i) all persons known by the trustee to have an interest in the property consent to the realisation or other dealing with the property; or
 - (ii) the delay involved in obtaining such approval is likely to result in a

- significant diminution in the value of the property; or
- (iii) the cost of obtaining such approval would, in the opinion of the trustee, be disproportionate to the value of the property concerned;
- (d) if the property consists, wholly or partly, of a business:
- (i) employing, or terminating the employment of, persons in the business;
 - (ii) doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis; and
 - (iii) selling, liquidating or winding up the business if it is not a viable, going concern, subject to obtaining the prior approval of the court; and
- (e) if the property includes shares in a company, exercising rights attaching to the shares as if the trustee were the registered holder of the shares.

Drafting Note: Section 45(3) sets forth the particulars for an order that specifies the actions the receiver or trustee can take with respect to the property. It provides in Section 45(3)(c) for such person to realise or deal with the property, for instance, to sell it in some circumstances.

- (4) An order made under subsection 2(c) terminates:
- (a) when ordered by the court; or
 - (b) when an order is made pursuant to Section 70; or
 - (c) [30] days after the making of a confiscation order or a benefit recovery order.

Drafting Note: Under the model provisions, a receiver or a trustee appointed by the court can have two roles in relation to restrained property: preserving/managing pending confiscation and realising the property post-confiscation. A court order must be made to authorise a receiver or a trustee to discharge these functions.

A preservation/management order may be made pursuant to Section 45 at an early stage in the proceedings, either when a restraining order is made or at some subsequent time if it becomes apparent that restrained property needs to be managed or maintained in order to preserve its value. After a confiscation or benefit recovery order is made, the role of the receiver/trustee should change from preservation/management of restrained property to realising the property and discharging the confiscation or benefit recovery order.

Drafting Note continued: Subsections (4)(a) and (b) make it clear that a new order pursuant to Section 70 will be required to empower the receiver or trustee to undertake this new role. The subsections provide that a preservation/management order under Section 45 will terminate either upon being revoked by the court, or when an order to realise confiscated property is made pursuant to Section 70.

Paragraph 45(4)(c) is included to preserve a Section 45 preservation/management order for a 30 day grace period after the making of a confiscation or benefit recovery order. It will address those situations in which an order under Section 70, has not, for whatever reason, issued at the same time as the confiscation or benefit recovery order. In this circumstance, the receiver or trustee can continue to manage property under the Section 45 order thereby preventing serious problems that might be caused if the receiver trustee's powers were suddenly terminated upon confiscation.

(5) A restraining order in respect of property may be made whether or not there is any evidence of risk of the property being disposed of, or otherwise dealt with, in such manner as would defeat the operation of this Act.

Drafting Note: Section 45(5) makes clear that risk of dissipation is not a pre-requisite to the making of an order. It is important to clarify this point, as a restraining order in connection with a criminal case should be viewed as conceptually different than the common law remedy of *Mareva* injunctions which apply to private civil litigation and are limited by the requirement to demonstrate risk of dissipation and balance of convenience. (See, e.g., *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.) Restraining orders in criminal cases should be easier to obtain since the person affected has been charged, or is subject to being charged, with an offence that he is reasonably believed to have committed, or he has been convicted of the offence.

Section 46. Enforcement of Restraining Orders Abroad

(1) This section applies if a restraining order under Section 45 has been made.

(2) Where the enforcement authority believes that specified property in which the relevant person has an interest is situated in a State or territory outside [insert name of the State], it may request assistance from the government of such State or territory to enforce the restraining order in such State or territory.

Drafting Note: Property Abroad. Section 46 may be used in cases where there is property in a foreign state that has been identified as property in which the relevant person has an interest. Without such a provision, it is easy for a person under investigation or who has been charged to remove property beyond the reach of investigators in the State conducting the investigation with authorities having limited access to it for purposes of restraint.

Drafting Note continued: It will be important to ensure that this provision be considered in relation to provisions of domestic law permitting mutual legal assistance so that requests can be made in an effective manner.

In some States, mutual legal assistance provisions may be comprehensive enough to permit outgoing requests of this kind, and this provision would not be necessary. It is important, however, that it be quite clear that such provisions do apply.

Section 43(1)(b) enables the provisions of this Act to be used in support of foreign applications for assistance. This provision will enable the authorities within the State in similar circumstances to seek assistance from other States.

Section 47. Notice of Restraining Order

Where a restraining order is made the enforcement authority shall, within [21] days of the making of the order, or such other period as the court may direct, give notice of the order to persons affected by the order.

Drafting Note: Notice. It will be important to ensure that notice of the order is given to the person whose conduct has given rise to the investigation, prosecution or conviction even if he is no longer the holder of property to be restrained. Section 47 provides for this.

The person should be served with sufficient information to enable him to understand the basis of the restraining order, or alternatively, there should be a procedure in place to afford him access to appropriate information. Where third parties hold the property, the court should determine the extent to which such background information should be provided. The number of days is a matter of choice for the State.

Section 48. Further Orders

(1) Where a court makes a restraining order, the court may, at the time when it makes the order or at any later time, make any further orders that the court considers appropriate. Without limiting the generality of this, the court may make any one or more of the following orders:

- (a) an order revoking the restraining order or varying the property to which it relates;
- (b) an order varying any condition to which the restraining order is subject;
- (c) an order directing the owner or the relevant person or a director or officer specified by the court of a body corporate that is an owner or the relevant person to give to the enforcement authority and to any receiver or trustee appointed pursuant to Section 45(2)(c) a sworn statement setting out such particulars of the property or dealings with the property, of the owner or the relevant person, as the case may be, as the court thinks proper;

- (d) where the restraining order directed a receiver or trustee to take custody and control of property pursuant to Section 45(2)(c):
 - (i) an order regulating the manner in which the receiver or trustee may exercise his powers or perform his duties under the restraining order;
 - (ii) an order determining any question relating to the property to which the restraining order relates, including any question with respect to the property to which the restraining order relates relating to the liabilities of the owner or the exercise of the powers, or performance of the duties, of the receiver or trustee;
 - (iii) an order directing the owner or another person to do any act or thing necessary or convenient to be done to enable the receiver or trustee to take custody and control of the property in accordance with the restraining order;
- (e) an order to provide for meeting, out of the property or a specified part of the property, all or any of the following:
 - (i) the relevant person's reasonable living expenses (including the reasonable living expenses of his dependants (if any)) and reasonable business expenses;
 - (ii) the relevant person's reasonable expenses in defending a criminal charge or any proceeding under this Act.

(2) A court may make provision under subsection (1)(e) for reasonable legal or living and business expenses only if the relevant person satisfies the court that he cannot meet such expenses out of property that is not subject to a restraining order, and the court determines it is in the interest of justice to make such a provision.

Drafting Note: Section 48 makes clear that the court can make any further orders in relation to the restraining order it deems appropriate. Thus it may revoke or vary the order, Section 48(a), and may provide for legal and living expenses out of the restrained property, Section 48(1)(e), among other orders.

Legal and Living Expenses. The issue of making restrained assets available for legal and living expenses is a difficult one, and one which is approached by jurisdictions in a number of ways. If there is unlimited access, restrained assets can be completely consumed by such expenses within a short time. The model provision at Section 48(2) permits access if the court determines it to be in the interest of justice, and that there is no other source for payment.

Drafting Note continued: Regarding legal expenses, some jurisdictions prohibit the use of restrained assets for legal expenses and require a defendant who is unable to pay for representation because there are no non-restrained assets available, to turn to legal aid services at legal aid rates. This solution presupposes that a legal aid service is available to be used in this way. Some jurisdictions cap the rate, or require the court to have regard to the legal aid rates in making such an order.

Section 48(1)(e), while it does not prohibit access to restrained assets to pay for legal or living expenses, requires that such expenses be “reasonable.” This may require a level of supervision from the court. Also, as noted, the request must meet the twofold test: (1) there must not be unrestrained assets that could be used to pay such expenses, and (2) the court must decide it is in the interest of justice to provide access to the assets.

Drafting authorities should consider how reasonableness would be determined in the domestic context, for instance with reference to existing or specially-created fee schedules or ‘capped’ fees for specified tasks, or by review or supervision of the fees by a trustee or receiver.

To establish that unrestrained assets are not available, the court will need to look at evidence of the totality of the person’s financial resources and presumably have a sworn statement that no other assets exist.

The nature of the restrained property is also a factor that the court could consider or could be included by drafting authorities in a provision. If the property is restrained because it is shown on a reasonable basis to be proceeds of crime, there is a good argument that a defendant should never be permitted access to such property to pay for expenses. Whatever course is chosen, drafting authorities must ensure there is some kind of access to legal representation so that fundamental rights in a criminal proceeding are not denied.

(3) An order under subsection (1)(a),(b) or (e) may be made on application by an owner, the relevant person or, subject to obtaining the leave of the court, any other person.

(4) An order under subsection (1)(a) – (e) may be made on application by the enforcement authority or a receiver or trustee appointed to take control of property pursuant to Section 45(2)(c).

(5) Where a person is required to give a statement pursuant to subsection (1)(c), the person is not excused from making the statement on the ground that the statement might tend to incriminate the person, or make the person liable to a confiscation order, benefit recovery order, [*Option: extended benefit recovery order*] or a penalty.

(6) Where a person makes a statement pursuant to an order under subsection (1)(c), anything disclosed in any statement and any information, document or thing obtained as a direct or indirect consequence of the statement is not admissible against the person in any criminal proceeding except a proceeding in respect of the falsity of the statement.

(7) For the purposes of subsection (6), applications for a restraining order, a confiscation order or a benefit recovery order [*Option: or an extended benefit recovery order*] are not criminal proceedings.

Drafting Note: Section 48(7) makes clear that the use immunity conferred by Section 48(6) does not apply to proceedings for orders under this Act.

Section 49. Exclusion of Property from Restraint

Drafting Note: Exclusion of Property. Section 49 provides for the exclusion of property from a restraint order. Sections 49(1) and 49(2) deal with requests from third parties, and subsection (3) addresses requests by the subject of an investigation or a defendant who has been charged (“the relevant person”).

Sections 49(1) and 49(2) are provisions designed to protect the interests of *bona fide* purchasers. They should ensure that the amount of the consideration paid by a *bona fide* purchaser may be excluded from the operation of the restraint order. Section 49(1)(a)(iv) is aimed at ensuring that wilfully-blind third parties are not in a position to recover instrumentalities.

Subsection 49(1)(b) provides that, in the case of a benefit recovery order, the property should not be excluded if it is property in which the relevant person has an interest. Property in which such a person has an interest includes property that he owns or effectively controls as well as property which he has gifted. Thus, for property to be excluded, it is not enough for third parties to show that the property is legally theirs. They also must demonstrate that it is not subject to the effective control of the defendant.

If a relevant person has only a partial interest in property, the restraining order should reflect this by only restraining that interest (leaving other interests held by third parties and that are not subject to the effective control of the relevant person unrestrained).

In the event that, for whatever reason, a restraining order does ‘capture’ property or an interest in property in which a defendant has no interest (as that term is defined), the exclusion order procedure provides the owner of such property with a mechanism to exclude the property from restraint.

(1) Where a person who is not the relevant person having an interest in property that is subject to a restraining order applies to the court to exclude his interest from the order, the court shall grant the application if satisfied:

- (a) in the case of a restraining order to secure property for a confiscation order either:
 - (i) that the property is not proceeds or an instrumentality; or
 - (ii) that the applicant was not, in any way, involved in the commission of the offence in relation to which the restraining order was made;
- and
- (iii) where the applicant acquired the interest before the commission of the offence, the applicant did not know that the relevant person would use,

or intended to use, the property in or in connection with the commission of the offence; or

- (iv) where the applicant acquired the interest at the time of or after the commission or alleged commission of the offence, the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of crime.
- (b) in the case of a restraining order to secure property for a benefit recovery order, [*Option: or extended benefit recovery order*] that the property interest which is the subject of the application is not property in which the relevant person has an interest.

(2) For purposes of subsection (1)(a)(iii) and (iv), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the relevant person.

(3) Where a person having an interest in property that is subject to a restraining order who is a defendant applies to the court to exclude his interest from the order, the court shall grant the application if satisfied:

- (a) in the case of an order that secures property for a confiscation order, that the property is not proceeds or an instrumentality of crime; and
- (b) in the case of an order that secures property for a benefit recovery order, [*Option: or extended benefit recovery order,*] that a benefit recovery order [*Option: or extended benefit recovery order*] cannot be made against the defendant.

(4) Where property is restrained to secure it for the purposes of both confiscation and benefit recovery [*Option: or extended benefit recovery*] orders, a court may decline to make an order excluding property from restraint if the criteria for exclusion from only one kind of restraining order are satisfied upon the ground that the other purpose for which the property is restrained still applies.

Section 50. Registration of Restraining Orders

Where a restraining order applies to property of a particular kind, and the provisions of any law provide for the registration of title to, or charges over, property of that kind, the authority responsible for administering those provisions shall, on application by the enforcement authority, record on the register kept pursuant to those provisions the particulars of the restraining order. If those particulars are so recorded, a person who subsequently deals with the property shall, for the purposes of Section 50, be deemed to have notice of the restraining order at the time of the dealing.

Section 51. Contravention of Restraining Order

(1) A person who knowingly contravenes a restraining order by disposing of or otherwise dealing with property that is subject to the restraining order is guilty of an offence punishable

upon conviction by a fine of [insert amount] or imprisonment for a period not exceeding [insert number] years or both if the person is a natural person, or by a fine of [insert amount] if the person is a corporation.

(2) Where:

- (a) a restraining order is made against property;
- (b) the property is disposed of or otherwise dealt with in contravention of the restraining order; and
- (c) the disposition was either not for sufficient consideration or not in favour of a person who acted in good faith;

the enforcement authority may apply to the court that made the restraining order for an order that the disposition or dealing be set aside.

(3) Where the enforcement authority makes an application under subsection (2) in relation to a disposition or dealing, the court may make an order:

- (a) setting the disposition or dealing aside from the day on which it took place; or
- (b) setting the disposition or dealing aside from the day of the order under this subsection, and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the order is made under this subsection.

Section 52. Seizure Order

(1) The court may make an order on application by the enforcement authority to search for and seize specified property that is the subject of a restraining order, or property which the court reasonably believes is proceeds or instrumentalities of crime, provided the court is satisfied that:

- (a) in the case of specified property that is the subject of a restraining order, a restraining order has not been effective to preserve the property; or
- (b) in the case of property that the court reasonably believes is proceeds or instrumentalities of crime, there is a reasonable likelihood of dissipation or alienation of the property if the order is not granted; and
- (c) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the property identified in (1) above and note they must be satisfied].

(2) A property seizure order under this section shall also grant power to a person named in the order to enter any premises in [insert name of the State] to which the order applies, and to use all necessary force to effect such entry.

(3) If during the course of searching under an order granted under this section, an authorised officer finds any thing that he believes on reasonable grounds:

- (a) will afford evidence as to the commission of an offence; or
- (b) is of a kind which could have been included in the order had its existence been known of at the time of application for the order;

he may seize that property or thing and the seizure order shall be deemed to authorise such seizure.

(4) Property, other than evidence of other crimes, seized under an order granted under this section, may only be retained by or on behalf of the enforcement authority for [30] days.

(5) The enforcement authority may subsequently make application for a restraining order in respect of such property.

Drafting Note: Seizure Order. A restraint order is the usual means of securing property for eventual post-conviction recovery. However there are circumstances where a restraint order would be ineffective because the property the prosecutor seeks to immobilize is in the hands of the defendant or some other person who will not voluntarily produce or preserve it. In these circumstances, the seizure order provided for by Section 52 provides a compulsory mechanism to secure property for eventual recovery post-conviction.

Provision should also be made either in this law or the State's general criminal procedure code for situations where evidence of other criminal offences is discovered in the course of execution of a Section 52 search warrant. For instance, the executing authority might discover prohibited drugs while searching for a specified article of jewellery that is covered by the Section 52 warrant.

The seizure order provided for by Section 52 contains only the essential components of the power necessary for its operation. Section 52(1)(c) is an essential requirement and drafting authorities will need to look closely at standards and procedures within the State and include them in some way. States should ensure the usual warrant standards in the jurisdiction (for instance, in some jurisdictions probable cause to believe that an offence was committed and that the specified property is at the place to be searched) as well as the powers, procedures and controls are inserted to facilitate the proper operation of the order.

Section 53. Protection of the Trustee

Where a court has appointed a receiver or trustee in relation to property pursuant to Sections 45(2)(c) or 70, the receiver or trustee shall not be personally liable for any loss or claim arising out of the exercise of powers conferred upon him by the order or this Part unless the court in which the claim is made is satisfied that:

- (a) the applicant has an interest in the property in respect of which the loss or claim is made; and
- (b) the loss or claim arose by reason of the negligence or reckless or intentional

misconduct of the receiver or trustee.

Section 54. Duration of Restraining Order

(1) Subject to subsection (3), a court which makes a restraining order pursuant to this Part upon the basis that a person is the subject of an investigation of an offence shall discharge the order if the person is not charged with that offence, or an offence arising from the same conduct or course of conduct, within [12] months of the date upon which the restraining order was made.

(2) Where subsection (1) applies, the enforcement authority shall bring the matter before the court. Where no application pursuant to this subsection is made by the enforcement authority within 14 days of the expiration of the period referred to in the subsection (1), any person affected by the restraining order may apply under this subsection.

(3) Where a restraining order is likely to be discharged by reason of the operation of subsection (1), or an order made under this subsection is about to expire, a court may, upon the application of the enforcement authority, extend the operation of the order for a specified period if it is satisfied that it is in the interest of justice to do so.

Drafting Note: Section 54 addresses restraint orders that are issued at the investigative stage and seeks to ensure that they are proportionate. Such orders are proportionate only if the prosecutor acts within a reasonable time to bring the case.

The enforcement authority is obliged under this section to seek a discharge of the order if charges are not instituted within a specific time. Once charges are returned, a restraint will usually be in force until further order of the court. Applications to discharge would then be made under Section 48(1).

Application for Confiscation or Benefit Recovery Order

Section 55. Application for Confiscation Order or Benefit Recovery [*Option: or Extended Benefit Recovery*] Order

Drafting Note: Section 55 addresses applications for final orders once a conviction has occurred.

Kinds of Orders. The enforcement authority may apply for several kinds of orders. A benefit recovery order must be used when it is not possible to identify a specific asset as the proceeds (including converted/substituted assets) of an offence. Either a confiscation order or a benefit recovery order may be used when proceeds (including converted/substituted assets) can be identified.

Drafting Note continued: General Provisions. Section 55(1) addresses the kinds of orders that may be sought. Section 55(2)-(4) sets forth when the orders may be sought. Section 55(5)-(6) deals with finality issues.

(1) Where a person is convicted of an offence, the enforcement authority may apply to the court for one or both of the following orders in respect of one or more such offences:

- (a) a confiscation order against property that is proceeds or an instrumentality of that offence;
- (b) a benefit recovery [*Option: or extended benefit recovery*] order against the person.

(2) Except with the leave of the court, the enforcement authority must make an application under subsection (1) within [6] months of the date upon which a person was convicted of the offence.

(3) A court shall grant leave under subsection (2) only if it is satisfied that:

- (a) the property or benefit to which the application relates was derived, realised or identified after the period referred to in subsection (1); or
- (b) the application is based upon evidence that could not reasonably have been obtained by the enforcement authority before the period referred to in subsection (1); and
- (c) it is [*Option: otherwise*] in the interest of justice to do so.

(4) The enforcement authority may amend an application for a confiscation order or benefit recovery order [*Option: or extended benefit recovery order*] at any time prior to the final determination of the application by the court, providing that reasonable notice of the amendment is given to affected persons.

(5) Where an application under this section has been finally determined, the enforcement authority may not make a further application for a confiscation order or a benefit recovery order [*Option: or extended benefit recovery order*] in respect of the same offence without the leave of the court. The court must not give such leave unless it is satisfied that:

- (a) the property or benefit to which the new application relates was identified after determination of the previous application;
- (b) necessary evidence became available after the previous application was determined; or
- (c) it is otherwise in the interests of justice to do so.

(6) A further application under Section 55 may not be made later than [6] years after the date of the final determination of the application under this section.

(7) For the purposes of this section, a person shall be taken to be convicted of an offence if:

- (a) the person is convicted, whether summarily or on indictment, of the offence;
- (b) the person is charged with, and found guilty of, the offence but is discharged without any conviction being recorded, or is found to be not criminally responsible; or
- (c) the court, with the consent of the convicted person, considers the offence in passing sentence on the person for another offence.

Section 56. Application for Confiscation Order or Benefit Recovery Order in the case of Absconding and Death

Drafting Note: Absconding and Death. Section 56 addresses applications for confiscation and benefit recovery orders in the case of persons who abscond or die after charging but before a conviction. Sections 56(1) and 56(2) provide a procedure for the enforcement authority to secure a determination by the court that a specific person will be taken to be convicted, and thus that the provisions of the Part regarding confiscation and benefit recovery orders will apply. Under Section 56(3), for a person to be taken to be convicted, the court, in addition to concluding that the person was charged and either absconded or died, must also be satisfied that there is evidence of sufficient weight to support a conviction.

In cases where a restraining order was issued at the investigative stage, authorities should rely on civil forfeiture provisions to seek to forfeit restrained property. In addition, in the case of a person who has absconded after learning of an investigation but before charging, authorities may also seek to proceed with a trial *in absentia* and upon conviction confiscate the property in accordance with the provisions of this Part.

For jurisdictions that do not have civil forfeiture provisions if a person who is under investigation with property restrained dies, it will be difficult to deal in any easy manner with the restrained property. Authorities could consider including a special provision that would provide in essence, for a criminal trial against the restrained assets. In this, a court would have to be satisfied that the evidence against the person is of sufficient weight to support a conviction beyond a reasonable doubt for a specific offence, that the offence generated proceeds (or instrumentalities used to commit the offence) and that the property restrained was such proceeds/instrumentalities.

(1) A person will also be taken to have been convicted of an offence for purposes of Section 55 when the court, on application by the enforcement authority, is satisfied under subsection (3) that the person should be taken to have been convicted and that this Part should apply to him.

(2) The enforcement authority may make an application to the court for the determination under subsection (1) that a specified person shall be taken to be convicted.

(3) The court may grant an application under subsection (2) where it is satisfied that:

- (a) a person was charged with an offence, a warrant for his arrest was issued in relation to the charge and reasonable attempts to arrest the person pursuant to a warrant have been unsuccessful during the period of [6] months commencing on the day the warrant was issued; or
 - (b) a person was charged with the offence but died without the charge having been determined; and
 - (c) having regard to all the evidence before the court that such evidence is of sufficient weight to support a conviction for the offence.
- (4) For the purposes of subsection (3)(a), a person shall be taken to have been convicted on the last day of the period referred to in that subsection.
- (5) The enforcement authority may not make application under Section 65 for an extended benefit order in the case of a person taken to be convicted under this section.
- (6) Where a person has died, any notice authorised or required to be given to a person under this Part may be given to the person's legal personal representative.
- (7) A reference in this Part to a person's interest in property is, if the person has died, a reference to an interest in the property that the person had immediately before his death.

Section 57. Service of Application and Appearances

- (1) Where the enforcement authority makes an application for a confiscation order against property under Section 55:
- (a) it shall serve a copy of the application on the person convicted and on any other person whom the enforcement authority has reason to believe may have an interest in the property;
 - (b) the person convicted and any other person claiming an interest in the property may appear and adduce evidence at the hearing of the application; and
 - (c) at any time before its final determination of the application, the court may direct the enforcement authority to provide such notice as the court deems appropriate to any person who, in the court's opinion, appears to have an interest in the property.
- (2) Where the enforcement authority makes an application for a benefit recovery [*Option: or extended benefit recovery*] order under Section 55:
- (a) it shall serve a copy of the application on the person convicted; and
 - (b) the person convicted and, subject to obtaining the leave of the court, any other person claiming an interest in the property may appear and adduce evidence at the hearing of the application.

(3) The absence of the person convicted, or of any person to whom notice has been given, does not prevent the court from making a confiscation order or benefit recovery order in their absence.

(4) The court may waive the requirements under subsections (1) and (2) to give notice if:

- (a) the person convicted is before the court; and
- (b) the court is satisfied either that any other person who has an interest in the property is present before the court or that it is fair to waive the requirement despite any such person not being present.

Section 58. Procedure on Application

(1) Where an application is made for a confiscation order or a benefit recovery order [*Option: or extended benefit recovery order*] in respect of a person's conviction of a offence, the court may, in determining the application, have regard to any evidence received in the course of the proceedings against the person convicted.

(2) Where an application for a confiscation order or a benefit recovery order [*Option: or extended benefit recovery order*] is before the court before which the defendant was convicted, the court, if satisfied it is reasonable to do so, may defer imposing sentence until it has determined the application.

Drafting Note: Deferral of Sentencing. Section 58(2) permits a sentencing court to defer imposing sentence until any pending application for a benefit recovery, extended benefit recovery or confiscation order is dealt with. The sentencing court is thus able to consider, if it deems it appropriate, the effect of the confiscation order/benefit recovery order in determining the sentence. In some States, these orders will be considered part of the sentence and penal in effect. In others, they will be viewed only as a consequence of the criminal conviction and not formally part of the sentence.

With the relationship between confiscation and sentence varying from State to State, there is likely a range of practice. In some States, the orders might not be appropriate to consider at all at sentencing. Where consideration is permitted, there will be situations where it should likely affect the sentence. For instance, several defendants could have been involved in a criminal venture with some dissipating all assets and others having assets available for recovery. Valuable lawfully-acquired property, in excess of the benefit from the conduct, may have been used as an instrument.

There is no requirement that the court defer sentencing. Public policy may require that a convicted person be sentenced as soon as possible after conviction. In other situations, the section will not apply because the application for the order will be made after sentencing.

(3) Any court with jurisdiction to hear an application for a confiscation order or a benefit recovery order [*Option: or extended benefit recovery order*] under this Part may make such an order by the consent of the relevant parties or persons.

(4) No applicant for a confiscation order or benefit recovery order [*Option: or extended benefit*

recovery order], prosecutor or member of a law enforcement agency should enter into an agreement to settle any matter in respect of which a confiscation order or benefit recovery order [*Option: or extended benefit recovery order*] could be made under this Part which involves the payment of money or the transfer of property to the State except:

- (a) by way of a consent order under subsection (3); or
- (b) as restitution for stolen property; or
- (c) as compensation for loss or destruction of or damage to property; or
- (d) with the approval of the court before which the person was convicted and before which an application for a confiscation order or benefit recovery order might be made.

Section 59. Confiscation Order on Conviction

Drafting Note: Confiscation of Proceeds and Instrumentalities. Section 59 provides for the court to order confiscation of both proceeds and instrumentalities. In most situations, it is expected that there will be an application by the prosecutor for this order under Section 55, but the provision also permits the court to act on its own whenever it believes such an order is appropriate. Thus the court and prosecutor will serve as counter-balances to each other in ensuring confiscation is addressed. Proceeds as defined includes property into which proceeds were later converted or transformed. Under Section 59(3), if property is determined to be proceeds, the court is to order its confiscation.

Under Section 59(4), in the case of instrumentalities, the court may make such an order. This difference in treatment stems from the nature of proceeds (which should always be taken) and instrumentalities. Confiscating instrumentalities is an important part of a State's system against acquisitive crime. However, proportionality issues may arise, for instance, where an expensive vehicle is involved in connection with a minor fraud. In addition, in the case of instrumentalities, there may be other provisions of law in the general criminal code or criminal procedure code that apply. In formulating Section 59(4), drafting authorities should consider how the power relates to any other power to confiscate instrumentalities of crime, and issues of proportionality and consistency. Drafting authorities should consider whether to provide for the confiscation of the equivalent value of instrumentalities if instrumentalities have been removed, transferred or disposed of. Although the freezing and seizing of property of corresponding value to instrumentalities appears to be contemplated by Methodology Criterion 3.1 (which relates to FATF Recommendation 3), this is not a requirement under the *Vienna* or *Palermo Conventions*. State practice on this issue varies. The model provisions do not address this issue.

Inferences. Section 59(6) and 59(7) set forth inferences that the court may apply in the determining whether property was an instrumentality or proceeds. They apply to property the defendant possessed at the time of the offence (Section 59(6)), and to property acquired at the time of or shortly after the offence (Section 59(7)).

Drafting Note continued: The subsections announce a rule of evidence that a court may draw certain inference in the absence of evidence to the contrary. The court's ability to draw such inferences is wholly discretionary. It would be based upon its evaluation of all the evidence. Even if no evidence to the contrary is provided, the court is free to accept or reject the inference that the property was an instrumentality because it was possessed by the defendant at the time of the offence, or that it was proceeds because acquired by him at the time of or shortly after the event.

- (1) A confiscation order is an order *in rem*, following conviction for an offence, to forfeit to the State property that is the proceeds or instrumentalities of such offence.
- (2) The court may make an order under this Section if the enforcement authority has applied to the court for an order under Section 55 or, in the absence of an application, if the court believes it is appropriate to make an order.
- (3) Where the court is satisfied, on a balance of probabilities, that property is proceeds of crime in respect of an offence for which the defendant has been convicted, the court shall order that it be confiscated.
- (4) Where the court is satisfied, on a balance of probabilities, that property is an instrumentality of crime in respect of an offence for which the defendant has been convicted, the court may order that it be confiscated.
- (5) In considering whether to issue a confiscation order, the court may have regard to:
 - (a) the rights and interests of third parties in the property;
 - (b) the gravity of the offence concerned;
 - (c) any extraordinary hardship, beyond that which might ordinarily be expected to flow from the operation of this section, that may reasonably be expected to be caused to any person by the operation of the order; and
 - (d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.
- (6) In determining whether property is an instrumentality of such an offence, unless satisfied to the contrary, the court may infer that the property is an instrumentality of crime if it was in the defendant's possession at the time of or immediately after the commission of the offence for which the defendant was convicted.
- (7) In determining whether property is proceeds of such an offence, unless satisfied to the contrary, the court may infer that the property was derived, obtained or realised as a result of or in connection with the commission of the offence, if it was acquired or possessed by the defendant, during or within a reasonable time after the period of the commission of the offence.
- (8) Where the court orders the confiscation of property other than money, the court shall specify in the order the amount that it considers to be the value of the property at the time of its order.

(9) Where the court makes a confiscation order, the court may give such directions as are necessary or convenient for giving effect to the order.

Section 60. Enforcement of Confiscation Order Abroad

(1) This section applies if a confiscation order under Section 59 has been made.

(2) Where, after conviction for an offence, a confiscation order has been made in [insert name of the State] in respect of property that is proceeds or an instrumentality, and such property is situated in a State or territory outside [insert name of the State], the enforcement authority may request assistance from the government of the other State or territory to ensure that the property specified in the order is realised.

(3) If a request under subsection (2) has resulted in the realisation of property in the foreign State or territory, the property realised shall be applied in accordance with the terms of any agreement between the States.

Drafting Note: This section will apply where there has already been a restraining order in place in the foreign country, but that is not a prerequisite. Where the final confiscation order has been obtained, this provision may be used to seek enforcement of that order abroad. As with restraining orders, this provision will need to be linked to the mutual assistance provisions in the State adopting the provision so that the request for foreign enforcement can be made in an effective manner.

A State may be a party to a multilateral or bilateral agreement about the sharing of assets that are recovered through the enforcement of a confiscation order in a foreign State. Most commonly, equal shares are used.

Section 61. Effect of Confiscation Order

(1) Subject to subsection (2), where a court makes a confiscation order against any property, the property vests absolutely in [insert name of State] by virtue of the order.

(2) Where the property is property the title to which is passed by registration in accordance with the provisions of [insert name of State's land registration act], the property vests in [insert name of State] in equity by virtue of the order and vests at law when the applicable registration requirements have been met.

(3) For property of the kind set forth in subsection (2), [insert name of authority within State that should hold title] is entitled to be registered as owner of the property, and the enforcement authority is authorised to do anything necessary or convenient to secure such registration including executing instruments for transferring an interest in the property.

(4) Where the court makes a confiscation order against property, the property shall not, except with the leave of the court and in accordance with any directions of the court, be disposed of, or

otherwise dealt with before the expiration of the appeal period applicable to the confiscation order, or, if an appeal is made, before the appeal is finally determined.

Section 62. Exclusion of Property from a Confiscation Order

(1) A person who is not the defendant and who has an interest in property that is subject to a confiscation order may apply to the court to exclude his interest from the order. The court shall grant the application if satisfied:

- (a) that the property is not proceeds or an instrumentality; or
 - (b) that the applicant was not in any way involved in the commission of the offence in relation to which the confiscation order was made;
- and
- (c) where the applicant acquired the interest before the commission of the offence, the applicant did not know that the defendant would use, or intended to use, the property in or in connection with the commission of the offence; or
 - (d) where the applicant acquired the interest at the time of or after the commission or alleged commission of the offence, the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of crime.

(2) For purposes of subsections (1)(c) and (1)(d), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the defendant.

Drafting Note: Section 62 protects owners. It also protects the interests of *bona fide* purchasers and ensures that the amount of the consideration paid by a purchaser may be excluded from the operation of the confiscation order. Section 62(1)(d) is a provision to ensure that 'wilfully blind' third parties are not able to recover proceeds or instruments of crime.

(3) An application under this section may be made whether or not the interest in property the subject of the application is or was the subject of a restraining order.

(4) An application under this section shall be made with [6] months of the day on which the confiscation order is made, except that a person who was served with the application for a confiscation order under Section 57 or made an appearance at the hearing on the application for a confiscation order may not, without leave of court, make an application under this section after the confiscation order or whose application to exclude the property from restraint under Section 49 was considered and dismissed.

Section 63. Benefit Recovery Order on Conviction

(1) A benefit recovery order is an order *in personam* requiring the defendant to pay an amount equal to the benefit he derived from an offence or offences of which he was convicted [*Option: and related criminal activities*].

(2) The court may make an order under this section if the enforcement authority has applied to the court for an order under Section 63 or, in the absence of an application, if the court believes it is appropriate to make an order.

(3) Where the court is satisfied on a balance of probabilities that the defendant has benefited from an offence or offences [*Option: or has benefited from any criminal activity which the court finds to be related to such offence*], it shall order him to pay to [insert name of State] an amount equal to the value of his benefit from that offence or those offences [*Option: and such related criminal activities*].

Drafting Note: Benefit Recovery Orders. Section 63 provides for the court to order the recovery of benefits. The enforcement authority will in the usual case have made an application for the order under Section 55, but the court may also issue such an order upon its own initiative.

The model provisions provide several options regarding the benefits recoverable:

First, recovery only of the benefits from the offence of conviction;

Second, in addition to the benefits from the offence of conviction, recovery of benefits from related criminal activity through one or both of two methods:

- use of the optional language set forth in Section 63; and
- use of optional provision Section 65 on extended benefit recovery orders.

Recovery of Extended Benefits. Section 63(3) contains optional language that if used permits the court to order a recovery of benefit beyond that attributable to the offence of conviction. As noted in the introductory drafting note to this Part, this is one method common law States use to deal with the challenges posed in recovering the real-world benefits a criminal may have gained.

It addresses the problem that the benefit calculation based upon offences for which a defendant has actually been convicted will often be quite small as prosecutors are often able to take action only with respect to a representative sample of a person's criminal activity. Thus, the benefits from the conduct shown beyond a reasonable doubt might only be a small indication, rather than the overall proceeds from a criminal course of conduct.

Drafting authorities will need to consider whether using this extension is acceptable under the principles of the State's legal system or whether constitutional or other issues are raised by its use. In some jurisdictions, it would be unacceptable to take this straightforward approach and relate a benefit recovery order to criminal conduct for which there has been no conviction. In these jurisdictions, other approaches may be acceptable such as applying a more significant consequence to certain defined offences (as in Section 65).

Drafting Note continued: The consequence is that with such a conviction the defendant must justify the existence of assets disproportionate to his legitimate income. Special care must be taken in deciding the approach to take.

If the optional language set forth in Section 63 is used, authorities will also need to consider whether criminal activity “related to such offence” should be defined or left to the court to decide in the context of each case. If optional language is adopted, corresponding changes must be also be made in Section 64.

(4) The court shall assess the value of the benefit a person has derived from the commission of an offence or offences [*Option: and related criminal activities*] in accordance with Sections 64 through 67.

(5) Where the court makes a benefit recovery order against a person:

- (a) the order shall not, except with the leave of the court and in accordance with any directions of the court, be enforced before the relevant appeal date; and
- (b) if, after the relevant appeal date, the order has not been vacated or discharged, the order may be enforced and any proceeds applied in accordance with this Part and any directions given by the court.

(6) In this section "relevant appeal date" used in relation to a benefit recovery order made in consequence of a person's conviction of an offence means:

- (a) the date on which the period allowed by rules of court for the lodging of an appeal against a person's conviction, or for the lodging of an appeal against the making of a benefit recovery order, expires without an appeal having been lodged, whichever is the later; or
- (b) where an appeal against a person's conviction or against the making of a benefit recovery order is lodged, the date on which the appeal lapses in accordance with the rules of court or is finally determined, whichever is the later.

Section 64. Rules for Determining the Value of Benefit

(1) For the purposes of this Part, the value of the benefit derived by a defendant from an offence [*Option: and related criminal activities*] may include:

- (a) any money received by the defendant, or by another person at the request or by the direction of the defendant, as a result of the commission of the offence; and
- (b) the value of any property that was derived or realised, directly or indirectly, by the defendant or by another person at the request or by the direction of the defendant, as a result of the commission of the offence; and
- (c) the value of any service or financial advantage provided for the defendant or

another person, at the request or by the direction of the defendant, as a result of the commission of the offence; or

- (d) unless the court is satisfied that the increase was due to causes unrelated to the commission of the offence, any increase in the total value of property in which the defendant has an interest in the period beginning immediately before the commission of the offence and ending at some time after the commission of the offence;

but does not include any property confiscated under this Part.

Drafting Note: Section 64 sets forth the rules for calculating the defendant's benefit. It shall be either Section 64(1)(a)-(b) and 64(1)(c) or alternatively Section 64(1)(d). Section 64(1)(d) provides that benefit can be established by a net worth analysis. This at its core includes an inference that any increase in net worth in an appropriate period surrounding the offence is a benefit. For a discussion of inferences, see the note on use of inferences at Section 58. There may be evidence that suggests an inference that the increase in net worth emanated from the commission of the offence should not be made.

The exclusion of property confiscated under the Part ensures that double recovery of both the property and the value of the property does not result if both a confiscation and a benefit recovery order are used.

(2) In calculating, for the purposes of a benefit recovery order, the value of benefit derived by the defendant from the commission of an offence:

- (a) any expenditure of the defendant in connection with the commission of the offence shall be disregarded; and
- (b) the court shall make any adjustment necessary to prevent a benefit from being counted more than once.

Drafting Note: The effect of Section 64(2)(a) is that the defendant's expenses in committing the crime are not deducted. Thus if illegal substances are purchased and then sold at a profit, the purchase price paid by the defendant even if from legal sources is considered part of the benefit. Section 64(2)(b) ensures that where more than one method is used to determine benefits, there is no double counting of benefits.

(3) For the purposes of subsection (1)(d), if an offence is committed between two dates, the period begins immediately before the earlier of the two dates and ends at some time after the later of the two dates.

(4) Where the benefit derived by a defendant was in the form of property, including narcotic drugs or some other form of illegal property, the court may, in determining the value of that property, have regard to evidence given by a law enforcement officer or other person whom the court considers has expert knowledge of the value of that kind of property.

Section 65. Option: Extended Benefit Recovery Orders

Drafting Note:

Overview. Section 65 provides for another kind of benefit recovery order that drafting authorities may want to use to deal with serious crime. It will be particularly helpful for those States that are not able to adopt the optional extended benefit language in Section 63.

Section 65 provides, in essence, that one consequence of a certain kind of criminal conviction may be an order requiring the payment of an amount that appears to represent the general benefits the convicted person has reaped from his life of crime rather than the benefit merely from the specific crime of conviction. This is an approach that the United Kingdom has taken with its [*Proceeds of Crime Act 2002*](#).

Section 65 operates by applying certain presumptions which the defendant is free to rebut. The court is statutorily directed to find that all of a defendant's interests and gifts were criminal benefits once all the conditions of Section 65 are satisfied. The government is thereby relieved of the burden of going forward with evidence on those facts. The defendant under Section 65(8) may make a showing which the court accepts, or there may be other evidence that would convince the court of the matters set forth in Section 65(8). Thus, the defendant has the opportunity to rebut the presumed criminal nature of the benefits either by providing evidence or relying upon evidence in the government's case that may support an innocent origin.

Depending upon the evidentiary and ethical rules of the legal system, the government may have to disclose to the defendant evidence known to it that arguably tends to rebut the unlawful nature of his assets, or even to demonstrate in its case that it has made good faith efforts to identify and give the defendant credit for all lawful sources of income. Absent rebuttal evidence, the government will prevail with respect to the presumption.

When to Use. An extended benefit recovery order should be available only in clearly defined circumstances that present indicia of serious, ongoing, or organized criminal activity. Thus, Sections 65(4) and 65(5) make it clear that this section is only to be used by the court to assess benefit in those cases where the defendant has engaged in a kind of criminal activity that suggests he is a 'career criminal' and engaged in a continuing series of criminal activities.

The specific determination of what those trigger points should be—whether in amounts or numbers of convictions—may be altered by drafting authorities. Through triggering activity, it might be limited to situations where the conviction follows at least two other convictions, or is a conviction for a kind of serious offence (for instance drug trafficking, trafficking in humans, or corruption) that suggests the individual has engaged in ongoing criminal conduct beyond the course of conduct that resulted in the conviction.

A monetary trigger is also included to ensure that persons convicted of, for instance, three minor drug trafficking offences, would not be captured. In any event, this kind of provision should not be available against defendants who have engaged in minor or single conduct offences.

Drafting Note continued: It should be noted that, in an extended benefit recovery setting, the benefit assessment is not concerned with what the defendant made from the offence of conviction. The defendant need not even necessarily have been successful in acquiring a benefit from the offence of conviction. As noted in Section 65(1), the court is not looking at the specific benefit from the offence.

Consequence of Presumption. The use of a presumption is a common technique to alleviate the burden of proof. It is premised on common experience of a connection between a known fact and the one to be inferred, particularly when one party has superior access to knowledge. Once a presumption is in place, based upon an initial evidentiary showing, the defendant runs the risk of non-persuasion if there is no evidence in the record to rebut the presumption.

Provisions that permit courts to use presumptions concerning property or benefits derived from criminal activity are widespread in common law jurisdictions. The FATF noted in a 2001 review, [Anti-Money Laundering Systems 1992-99](#), that most members with legal systems based on common law permit or require the court to make assumptions about the illicit origin of property.

Evidence in the record coming either from the government or the defendant may satisfy the court that a presumption has been rebutted. These presumptions are useful to prosecutors as, if they apply, they excuse the prosecution from proving actual use or derivation of the property, which might be difficult in many cases. These presumptions can be removed if it is not considered appropriate to extend the operation of the Act in this way or if there are constitutional problems associated with the use of such provisions.

Because this structure looks at general benefit to a defendant from his criminal lifestyle, and not at the specific benefit that the defendant reaped from the offence of conviction, it must be carefully structured so as not to be viewed as general confiscation. It is essential that the defendant have a full opportunity to present evidence to substantiate the legitimacy of his wealth. In addition, the enforcement authority must apply for an extended benefit recovery order, and the court has discretion whether to apply the presumption.

As noted above, drafting authorities must decide what the triggering mechanisms will be, in essence in what circumstances it is appropriate and proportional for a convicted defendant to be subject to an assumption that all of his wealth is unlawfully acquired, and to permit in connection with a conviction on one offence a recovery of benefits in excess of the actual benefits that emanate from that offence.

- (1) An extended benefit recovery order is an order in personam for the defendant to pay an amount not restricted to the benefit obtained from the offence for which he has been convicted.*
- (2) Where the defendant has been convicted of a serious offence, the enforcement authority may apply to the court for an extended benefit recovery order under this section.*
- (3) Where an application is made under subsection (2), any order made must take into account any amount realised by virtue of any order made against the defendant under Section 63 or any previous order made under this section.*
- (4) Where an application under subsection (2) is made, the court may assess the benefit derived by the defendant in accordance with subsection (7) if it is satisfied that:*

- (a) *the defendant has been convicted of a serious offence; and*
- (b) *the serious offence upon which the application is based is the third serious offence of which the defendant has been convicted (either in relation to the current proceeding or any other time within 10 years preceding the defendant's conviction for the serious offence that is the subject of the application before the court).*

(5) *For the purpose of this section, a serious offence is an offence from which a benefit of at least [insert monetary amount] has been derived.*

Drafting Note: The definition of a serious offence for purposes of Section 65 is a matter that requires careful consideration. It is likely to vary from jurisdiction to jurisdiction. As noted in the introduction, the idea is to capture those criminal activities that tend to attract “career criminals.” The definition should not extend to low-level offences. Not only would this be unfair to the offenders, it would also waste resources necessary to make these provisions work. The definition here is a simple one based upon a threshold benefit.

It is also possible to add other offences that will trigger such orders, for instance drug-related offences involving a trafficable quantity (however defined), and other offences that, for whatever reason, would not be caught by the benefit threshold.

(6) *For the purpose of making an extended benefit recovery order under this section, the court may have regard to evidence received in the course of the proceedings against the defendant.*

(7) *In assessing the value of the benefit derived by a defendant for the purposes of an extended benefit recovery order, the court shall, subject to subsection (8), include—*

- (a) *all property in which the defendant had an interest at the date the application for an extended benefit recovery order is finally determined; and*
- (b) *all expenditure and gifts of the defendant within the period of [6] years immediately before the date in (a) above to the extent not included in (a).*

(8) *The court shall not treat as benefit specified property or expenditure if it is satisfied that:*

- (a) *in the case of property, the property was not used in, or in connection with, any criminal conduct and was not derived or realised, directly or indirectly, by the defendant from any criminal conduct; or*
- (b) *in the case of an expenditure or gift, the property expended or gifted was lawfully acquired and was not derived or realised, directly or indirectly, by any person from any criminal conduct; or*
- (c) *to include any item of property, expenditure or gift would pose a serious risk of injustice.*

Drafting Note: Calculating the Extended Benefit. The drafting note at the beginning of this section makes clear the philosophy behind the extended benefit recovery order. The scheme is based on the principle that an offender who gives reasonable grounds to believe that he is living from crime should be required to account for his assets, and should have them confiscated to the extent that he is unable to account for their lawful origin. In a case where the court has decided to impose such an order, Sections 65(7) and 65(8) provide guidance to the court as to how to calculate the extended benefits in a particular case.

Rather than look at particular benefit from the conviction crime to assess the extended benefit, the court must look at the whole financial circumstances of the defendant, and do this in two particular ways.

The first assessment will be a total of all the property of the defendant at the date when the application for the extended benefit recovery order is finally determined by the court. The second aspect of the assessment will be a calculation of everything that the defendant has spent, or has gifted, in the specified period before the date of the court's determination. This period could reasonably be set at 6 years, but periods between 4 and 10 years would also be reasonable here.

The result of this calculation is that where a defendant is found to be liable to an extended benefit recovery order, effectively the court is saying that everything that he has owned over the specified period is potentially subject to the order (unless a Section 65(8) exclusion applies).

So where a repeat criminal has acquired wealth over the years, and, in anticipation of a court order, gifts away significant assets, or gambles it away, the court can take such gifts or expenditure into its assessment, and make an extended benefit recovery order of an appropriate amount. Since the order is an order *in personam*, the defendant has to pay this amount, or face the consequences as defined in Section 67, which might well result in substantial additional periods of imprisonment.

Section 67(8) gives a mechanism for the defendant to seek the exclusion from assessment of particular property. The first case where this will be possible is where he can demonstrate both that the property was legitimately acquired, and was not an instrumentality. Secondly, expenditures or gifts will be excluded where they too can be shown to be legitimate. The third category for exclusion will be if inclusion would cause a serious risk of injustice. Such circumstances should be rare and will be for the court to determine, but it is important to retain this safeguard.

Section 66. Statements Relating to Benefit

(1) Where the enforcement authority has applied to the court for a benefit recovery order [*Option: or extended benefit recovery order*], it may provide to the court, and if so shall serve upon the defendant, a statement setting out:

- (a) an assessment of the value of the benefit obtained by the defendant; and
- (b) [*Add if Optional Section 65 is used*] material relevant to an assessment of benefit pursuant to Section 65.

The court may, for the purposes of determining whether there was a benefit and the value of the benefit, treat any acceptance by the defendant of the allegations set forth in the statement as conclusive of the matters to which it relates.

(2) The court may require any defendant served with a copy of a statement under subsection (1) to respond to each allegation in it and, in so far as he does not accept any allegation, to indicate on oath any facts upon which he proposes to rely. The court may treat a defendant's failure to respond or to indicate the facts upon which he will rely as his acceptance of every allegation in the statement other than:

- (a) an allegation regarding whether he complied with the requirement; and
- (b) an allegation that he has benefited from the offence or that he obtained any property or advantage as a result of or in connection with the commission of the offence.

Drafting Note: Section 66 provides a mechanism for the enforcement authority to validate its information on benefit so that the court can make an appropriate determination of benefit.

Section 67. Amount Recovered Under Benefit Recovery [*Option: and Extended Benefit Recovery*] Orders

Drafting Note: Recoveries under Benefit Recovery Orders. Section 67 addresses the amount that the defendant must pay. This will be either the benefit amount as determined by the court, or a lesser amount if, through a certificate process set forth in Section 67(4)-(7), the defendant has demonstrated that he is able to pay only a lesser amount. This may be because, for instance, he has spent the benefits received.

Section 67 also addresses the consequences of non-payment. If payment is not made within a reasonable period (4 months suggested in this Section), the prosecutor can apply for the imposition of imprisonment in addition to any term by reason of the underlying offence. If the defendant cannot pay, it is up to him to activate the certificate procedure and to satisfy the court that he is unable to pay.

It is one thing for a court to make a benefit recovery order, and another thing for it to be paid. The restraining order provisions, by permitting property of a defendant to be restrained, may effectively secure sufficient assets which, when realised, enable the order to be paid in full. However, the value of restrained assets may be insufficient, or they may have been reduced by court-ordered payments for living or legal expenses. Thus, the operation of Sections 63-65 may well result in a court determining there is a benefit the value of which greatly exceeds restrained assets.

Drafting Note continued: Courts in both criminal and civil matters impose judgments that reflect benefits to a person or an assessment of actual damage and are in excess of a defendant's assets which may not be known to the court. A benefit recovery order falling into this category (as to which a defendant has not used the certificate process to limit the amount) would simply remain on the record of the court, and would be capable of enforcement at a later time in the event that the financial situation of the defendant improves.

The certificate process is aimed at ensuring that the court is advised of defendant's actual financial situation, and that the defendant is not able to engage in fraud in this regard. In addition Section 67(8) provides an avenue for the authorities to reach any assets which may have been hidden by a defendant as well as later-acquired assets where there is a later ability to pay the actual full amount of the benefit.

Section 67 provides a powerful mechanism designed to ensure a defendant, against whom a benefit recovery order has been made, complies with the order to the greatest extent possible. This is done by creating a procedure for a term of imprisonment in the case of non-payment. This would operate harshly if applied against a defendant who could not pay, but the procedures here assure that any non-payment is not due to a lack of available assets. If a defendant is able to satisfy the court that his available assets are less than the amount of the benefit recovery order, his obligation to pay will be reduced to the value of his available assets.

This type of provision has been used successfully in the United Kingdom. There may be constitutional or policy reasons why it is not appropriate in some States in which case it should not be used.

(1) The amount to be recovered under a benefit recovery [*Option: or extended benefit recovery*] order shall be the amount specified in the order under Sections 63 [*and 65*] or, if a certificate is issued pursuant to subsection (6), for a lesser amount, the amount specified in the certificate.

(2) No earlier than [4] months after the later of –

- (a) the date upon which a benefit recovery [*Option: or extended benefit recovery order*] is made; or
- (b) the date upon which a certificate is issued pursuant to this section; or
- (c) the date upon which any appeal lodged against a benefit recovery [*Option: or extended benefit recovery*] order or a certificate issued pursuant to this section is finally determined, dismissed or withdrawn

the court shall, upon the application of the enforcement authority, where the defendant has failed to pay all or part of the amount to be recovered under the benefit recovery [*Option: or extended benefit recovery*] order, impose a term of imprisonment of up to [insert number of years] where the unpaid amount exceeds [insert first amount] but does not exceed [insert second amount].

Drafting Note: Prison Term for Non-Payment. Section 67(2) provides for the imposition of a term of imprisonment. Drafting authorities may wish to include a scale of imprisonment periods to reflect varying sums of unpaid amounts. Under Section 67(2), imposition of the imprisonment term is mandatory. This is because the certificate procedure results in the imposition of a final amount that does not exceed the ability of the defendant to pay. States may wish to consider the imposition of lighter sentences in exceptional circumstances. In some States, it may not be possible to use a mandatory sentence, and the provision should reflect that the court may impose the term.

- (3) Where a court imposes a term of imprisonment under subsection (2), it shall direct that:
- (a) the term be served consecutively upon any other form of imprisonment imposed on that person, or that the person is then serving; and
 - (b) that any law regarding the remission of sentences of prisoners serving a term of imprisonment shall not apply to the term of imprisonment imposed under subsection (2); and
 - (c) notwithstanding any term of imprisonment imposed, the unpaid amount will remain due and owing.
- (4) An application for the certificate set forth in subsection (6) may be made by the defendant to the court in which an application for a benefit recovery [*Option: or extended benefit recovery*] order has been made against him pursuant to Section 55.
- (5) An application pursuant to subsection (4):
- (a) may not be made more than [30] days after the date upon which a benefit recovery or extended benefit recovery order was made;
 - (b) must be supported by a sworn [*Variants: affidavit; evidence; verified statement*] of the defendant and of any other person upon whom the defendant proposes to rely;
 - (c) must be served upon the enforcement authority together with any supporting [*Variants: affidavits; evidence; verified statements*]; and
 - (d) has the effect of suspending the running of time under subsection (2)(b) until the application is finally determined, is dismissed or is withdrawn.
- (6) The court shall grant a certificate pursuant to this section if, having regard to any [*Variants: affidavit; evidence; verified statement*] filed pursuant to subsection (5), any [*Variants: affidavit; evidence; verified statement*] filed in response by the enforcement authority and any oral testimony, it is satisfied that:
- (a) it has been provided with an accurate assessment of the total value of the financial resources held by the defendant, or subject to his effective control (irrespective of whether they are subject to a restraining order under this Act); and

- (b) the total value of the financial resources held by the defendant, or subject to his effective control is less than the amount ordered to be paid under the benefit recovery order.

(7) Where a certificate is granted pursuant to subsection (6), it must specify a monetary amount equal to the total value of the financial resources held by the defendant or subject to his effective control.

(8) The court may, on the application of the enforcement authority within [insert number] years after the grant of the certificate, vary or revoke it or issue a benefit recovery [*Option: or extended benefit recovery*] order in a new amount, when:

- (a) it is made aware of facts that would have led it to a different conclusion regarding the granting of a certificate or the amount of a certificate; or
- (b) the defendant acquires possession or control of additional assets which, had they been available at the date of the certificate, would have resulted in the certificate not being granted or granted for a higher amount.

Drafting Note: The certificate process has the effect of reducing the amount the defendant is obligated to pay based upon actual ability to pay at a point in time. Absent Section 67(8), the effect of this would be to place such a defendant in a better position than civil litigants as to whom judgments they cannot conceivably pay at the time of issuance are made.

There is a question whether it is equitable to permit a defendant to be relieved of an ongoing obligation to pay the full amount of his benefit. When at a later point, he has assets available to return his benefit, the issue is whether he should, just as the civil litigant, have an obligation to make payment. Drafting authorities will need to consider this issue weighing the State's policy regarding finality of judgments, the need to ensure that crime does not pay and the need to provide a practical opportunity for offenders to commence a new life. It would be appropriate to compare the situation of the civil litigant against whom a large judgment has been made bearing in mind such litigant's bankruptcy options.

By providing the enforcement authority with a lengthy period under Section 67(8) for it to go after later-acquired assets when it deems it appropriate, drafters could provide an avenue for the State to recover the full benefit for the same time period provided under the State's rules for recovery of civil judgment amounts.

Section 68. Discharge of Benefit Recovery [*Option: and Extended Benefit Recovery*] Order

- (1) A benefit recovery order [*Option: or an extended benefit recovery order*] is discharged:
- (a) on the satisfaction of the order by payment of the amount due under the order;
 - (b) if the conviction of the offence or offences in reliance on which the order was

made is or is taken to be quashed and no conviction for the offence or offences is substituted; or

- (c) if the order is quashed.
- (2) A person's conviction for an offence shall be taken to be quashed in any case:
- (a) where a person is convicted of the offence, if the conviction is quashed or set aside;
 - (b) where a person is charged with and found guilty of the offence but is discharged without any conviction being recorded, if the finding of guilt is quashed or set aside; or
 - (c) where the person is granted a pardon in respect of the person's conviction for the offence.

Section 69. Appeals

An application to appeal against the grant, or the refusal to grant, a confiscation order or a benefit recovery order [*Option: or extended benefit recovery order*] may be made in accordance with the applicable procedural rules of [insert name of State].

Section 70. Realisation of Property

(1) Where a confiscation order or benefit recovery order [*Option: or extended benefit recovery order*] is made, the order is not subject to appeal, and the order is not discharged, the court may, on an application by the enforcement authority, exercise the powers conferred upon the court by this section.

(2) The court may appoint a receiver or trustee to take possession and control of, and then to realise:

- (i) where a confiscation order has been made, the property subject to confiscation pursuant to that order; and
- (ii) where a benefit recovery order [*Option: or extended benefit recovery order*] has been made:
 - (a) property in which the defendant has an interest; or
 - (b) restrained property, or
 - (c) specified items of property in which the defendant has an interest.

(3) Where a receiver or trustee has already been appointed pursuant to Section 45(2)(c) to take possession or control of property in which the defendant has an interest, any order made pursuant to subsection (2) should be made in respect of that receiver or trustee.

(4) The court may make any further orders to assist the receiver or trustee in the discharge of his duties that the court considers are reasonably necessary.

(5) The court shall, in respect of any property, exercise the powers conferred by this section only after it affords persons asserting any interest in the property a reasonable opportunity to make representations to the court.

Section 71. Application of Monetary Sums

(1) Monetary sums in the hands of the receiver or trustee from his receipt of the property of the defendant and from the realisation of any property under Section 70 shall, after any such payments as the court may direct are made out of those sums, be paid to the [insert payment authority, e.g. Registrar of the court] and applied on the defendant's behalf towards the satisfaction of the benefit recovery order [*Option: or extended benefit recovery order*] in the manner provided by subsection (3).

(2) If, after full payment of the amount payable under the confiscation order or benefit recovery order [*Option: or extended benefit recovery order*], any sums under subsection (1) remain in the hands of such a receiver or trustee, the receiver or trustee shall distribute those sums among such of those persons who held property which has been realised under this Part and in such proportions, as the court directs, after giving a reasonable opportunity for those persons to make representations to the court.

(3) Property received by the [e.g., Registrar of the court] in payment of amounts due under a benefit recovery order [*Option: or extended benefit recovery order*] or to satisfy a confiscation order shall be applied as follows:

- (a) if received from a receiver under subsection (1), it shall first be applied in payment of the receiver or trustee's remuneration and expenses; and
- (b) the balance shall be paid or transferred to [a Recovered Assets Fund] [the Treasury].

Section 72. Compensation Order

(1) The court may make a compensation order on application to it by a person if:

- (a) a restraining order was made under this Act;
- (b) an application for a confiscation or benefit recovery [*Option: or extended benefit recovery*] order under this Act was not granted or was withdrawn and the restraining order was revoked; or an application for such an order was never made because the defendant was acquitted;
- (c) the person suffered a loss as a result of the operation of the restraining order; and

- (d) there was a serious default consisting of gross negligence or intentional misconduct on the part of a person involved in the investigation or prosecution and the investigation would not have continued or the proceedings would not have started or continued had the default not occurred.

(2) The amount of compensation to be paid under this section is the amount the court thinks reasonable having regard to the loss suffered and any other relevant circumstances.

(3) An application under subsection (1) must be made no later than [3] months after the date a restraining order was revoked on the basis of the withdrawal or denial of the application referenced in subsection (1)(b). The person making an application must provide notice of the application to the [insert name of enforcement authority].

Drafting Note: Compensation. Section 72 addresses the situations in which compensation or damages should be provided if no final order issues and a restraining order is revoked. Such compensation would be in favour of persons whose property had been restrained and suffered a consequential loss. Many States (for instance the United Kingdom, Singapore and Canada) limit this to situations where there was a serious default on the part of a person involved in the investigation or prosecution. The theory is that such restraints are a usual part of a criminal investigation or proceeding, and in the normal case there is no obligation on the part of the authorities to provide compensation for losses except in case of bad faith, intentional misconduct, etc.

Section 72(1)(d) sets forth the serious default standard that is reflected in United Kingdom's legislation (Section 72, *Proceeds of Crime Act*), with the explanation that such default must consist of gross negligence or intentional misconduct. An alternative would be to provide some other standard or to leave this matter in the hands of the court to determine on a "clearly in the interest of justice" standard. This may, however, have a chilling effect on law enforcement/prosecutors and result in significant challenges and litigation for those involved.

Section 72(3) provides a time limit for any application for compensation. Three months is suggested as appropriate time limit but drafting authorities may wish to use a longer or shorter time.

Costs. No provision is made here regarding costs. Drafters should review the State's provisions regarding the awarding of costs in connection with criminal proceedings to determine if any provision is necessary. Normally a court would not award costs in a criminal matter unless there were extraordinary circumstances such as a showing of serious misconduct by the prosecutor or law enforcement officials.

Investigative Orders for Criminal Confiscation

Drafting Note: Investigative Measures Provisions. Sections 73-78 provide four special investigative measures for use in criminal confiscation investigations: a production order for property tracking documents (Section 73), a search warrant power for such documents when they are not obtainable through a production order (Section 76), a provision for a customer information order to secure information on the existence of financial accounts (Section 77), and a provision for a monitoring order to monitor a financial account (Section 78).

Many States will already have existing provisions in their criminal procedure codes that enable the investigator and prosecutor in a criminal matter to require the production of (or, as necessary, search for) documents, and to secure information from financial institutions about accounts. The question for drafting authorities will be whether existing provisions are of sufficient scope and availability to identify and trace property early in an investigation and otherwise meet the particularized needs of a proceeds investigation.

In some States, for instance, in the United States and Canada, authorities rely almost exclusively on existing statutorily-based methods to secure information for the proceeds aspects of a criminal case. However, in other States, special provisions have been enacted in proceeds-of-crime legislation to support investigations and supplement general criminal code provisions. This is because of a concern that the scope afforded by existing provisions would not be sufficient for a full investigation, or actual experience that pre-existing provisions were inadequate for a proceeds investigation. In some States, the pre-existing provisions might be viewed as applying only to a narrow range of evidence that supports the existence of criminal activity, and not extend to identifying proceeds and assets to which a benefit recovery order would apply.

The essential point is that drafting authorities need to ensure that there is a full capacity to trace proceeds and ascertain the amount of the benefit at very early stages of an investigation as well as after a conviction has been secured. They should ensure a foreign State will be able to ask whether an account exists, or a deposit was made and secure a quick response. This can be through provisions as those suggested in this part, though other provisions of law, or through amendments to existing provisions to apply pre-existing production and search tools to proceeds matters.

Section 73. Production Order for Property Tracking Documents

- (1) A production order under this section will require the production of a document relevant in identifying, locating or quantifying property or necessary for its transfer, hereinafter referred to as a "property tracking document."
- (2) An authorised officer may apply *ex parte* and in writing to court for an order to require the person believed to have possession or control of a property tracking document to produce such document.
- (3) An application under this section shall be supported by [*Variants*: an affidavit; evidence; verified statement] setting out the grounds for the application.

(4) Where the court finds there are reasonable grounds to believe that a person has been, is or will be involved in the commission of an offence, and that any specified person has possession or control of a property tracking document relating to:

- (a) the property of a person involved in the commission of such an offence; or
- (b) the proceeds or instrumentalities of such an offence

it may make an order that the person produce the document to an authorised officer at a time and place specified in the order.

(5) If any of the material specified in an application for a production order for property tracking documents consists of information contained in a computer, the production order has effect as an order to produce the material in a form in which it can be taken away, and in which it is visible and legible.

(6) An authorised officer to whom documents are produced under this section may:

- (a) inspect the documents; and
- (b) make copies of the documents; or
- (c) retain the documents for as long as is reasonably necessary for the purposes of this Part, provided that copies of the documents are made available to the person producing them if requested, or reasonable access is provided to the documents.

Drafting Note: Section 73(6)(c) provides for the enforcement authority's retention of documents if copies are available to the producing party upon that party's request. Since there may be situations where documents may be costly to copy and the person producing them can demonstrate little current need for copies, perhaps because they are historical in nature, the enforcement authority can opt to provide reasonable access to the documents.

Drafting authorities should ensure the issue of cost is dealt with in a practical and fair manner under local practice. The framework should be such that prohibitive costs cannot easily be used as a means to frustrate an investigation.

(7) A person may not refuse to produce a document ordered to be produced under this section on the ground that:

- (a) the document might tend to incriminate the person or make the person liable to a penalty; or
- (b) the production of the document would be in breach of an obligation (whether imposed by a law of [insert name of State] or otherwise) of the person not to disclose either the existence or contents, or both, of the document.

(8) An authorised officer for purposes of Sections 73, 75 and 76 shall be [name authorities that shall apply for/execute productions orders].

Section 74. Evidential Value of Information

(1) Where a person produces a document pursuant to an order under this Part, the production of the document, and any information, document or thing obtained as a direct or indirect consequence of the production of the document, is not admissible against the person in any criminal proceedings except proceedings under Section 75.

(2) For the purposes of subsection (1), proceedings on an application for a restraining order, a confiscation order or a benefit recovery order [*Option: or extended benefit recovery order*] are not criminal proceedings.

Section 75. Failure to Comply with a Production Order

Where a production order requires a person to produce a document to an authorised officer, the person is guilty of an offence against this section if he:

- (a) contravenes the order without reasonable cause; or
- (b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular and does not so indicate to the authorised officer and provide to the authorised officer any correct information of which the person is in possession or control.

Penalty: in the case of a natural person, imprisonment for a maximum of [insert number] years or a maximum fine of [insert amount], or both, and in the case of a corporation [e.g., five times] such fine.

Drafting Note: Drafters should also review analogous provisions of Section 48 providing for compulsory orders, use immunity and limits to that immunity in connection with restraint orders. Whatever language is used, a decision should be made as to whether contravention of a court order will be made a separate statutory offence, as it is in Sections 51, 75 and 77, or be dealt with under general provisions punishing non-compliance with a court order, as is the case with respect to orders in Part VII in connection with civil forfeiture.

Section 76. Power to Search for and Seize Documents relevant to Locating Property

(1) The court may make an order on application by [insert name of the enforcement authority] to search for and seize documents relevant in identifying, locating or quantifying property or necessary for its transfer, hereinafter referred to as “property tracking documents,” provided that the following circumstances are satisfied:

- (a) a production order has been given in respect of the document and has not been complied with; or

- (b) a production order in respect of the document would be unlikely to be effective; or
- (c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the document without any notice to any person; or
- (d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained; and
- (e) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the documents identified in (1) above and note they must be satisfied.]

Drafting Note: Subsections (a)-(d) of Section 76(1) set forth four alternative circumstances when a search and seizure rather than production order is called for. Whichever instance is applicable, in addition, subsection (e) must be met. Section 76(1)(e) requires that the usual grounds and rules for granting a search warrant apply.

Typically this will mean that the authorities will have to show reasonable grounds to believe that a person has been, is, or will be, involved in the commission of an offence; and that the place or person to whom the warrant applies has or will have possession or control of a property tracking document in relation to that offence. It will also require that the usual rules will apply with respect to time of entry, return to the court, etc.

(2) If during the course of searching under an order granted under this section, an authorised officer finds any thing that he believes on reasonable grounds:

- (a) will afford evidence as to the commission of an offence; or
- (b) is of a kind which could have been included in the order had its existence been known of at the time of application for the order ,

he may seize that property or thing and the seizure order shall be deemed to authorise such seizure.

(3) An authorised officer who has seized property tracking documents pursuant to this section may retain the documents for as long as is reasonably necessary for the purposes of this Part provided that copies of the documents are made available to the person producing them if requested, or reasonable access is provided to the documents.

Section 77. Customer Information Orders

Drafting Note: Customer Information Order. A customer information order is an order requiring a financial institution to produce to an authorised officer of the enforcement authority specified information about its customer(s). It will most typically be used to discover whether a named person has an account at a financial institution.

In some jurisdictions, there are centralised banking registers that make it possible for investigators to establish whether particular persons have accounts with financial institutions in that jurisdiction. However, many other jurisdictions do not have such centralised systems. The procedure provided for in Section 77 will enable a similar effect to be achieved.

The procedure cannot be used speculatively. The provisions of the section make that clear (especially subsection (3)). The information can be extremely useful. If for example, during the course of an investigation, a letter addressed to the defendant from a particular bank is discovered, but there is no knowledge of any account in that bank, then the customer information order could be used to obtain from that bank confirmation as to whether the defendant has an account there. If he does have such an account, then a production order can be sought in the usual way for the relevant documents relating to that account.

(1) A court may, on an application made by [insert name of enforcement authority/authorised officer] and if the conditions set forth in subsections (2) and (3) are met, make an order that a financial institution provide to an authorised officer any such customer information as it has relating to the person or account specified in the application.

(2) The application states that there is an investigation of a specified offence and the order is sought for purposes of a criminal investigation of such offence.

(3) The court is satisfied that there are reasonable grounds for believing that the financial institution may have information that is relevant in the investigation.

(4) Customer information is information whether a person holds, or has held, an account or accounts at the financial institution (whether solely or jointly), and information identifying a person who holds an account, and includes all information as to—

- (a) the account number or numbers;
- (b) the person's full name;
- (c) his date of birth;
- (d) his most recent address and any previous addresses;
- (e) the date or dates on which he began to hold the account or accounts and, if he has ceased to hold the account or any of the accounts, the date or dates on which he did so;

- (f) such evidence of his identity as was obtained by the financial institution;
- (g) the full name, date of birth and most recent address, and any previous addresses, of any person who holds, or has held, an account at the financial institution jointly with him;
- (h) the account number or numbers of any other account or accounts held at the financial institution to which he is a signatory and details of the person holding the other account or accounts;
- (i) if a legal entity:
 - (i) a description of any business which it carries on;
 - (ii) the country or territory in which it is incorporated or otherwise established and any number allocated to it;
 - (iii) its registered office, and any previous registered offices;
 - (iv) the full name, date of birth and most recent address and any previous addresses of any person who is a signatory to the account or any of the accounts; and
- (j) any other information which the court specifies in the customer information order.

(5) A financial institution shall provide the information to the authorised officer in such manner, and at or by such time, as is specified in the order.

(6) An authorised officer for purposes of Section 77 shall be [name authority that shall apply for and execute customer information orders].

(7) No obligation to maintain the confidentiality of information held by a financial institution, whether imposed by a law or contract, can excuse compliance with an order made under this section.

(8) A financial institution, for purposes of this section, means a bank or other credit institution, a life insurance and investment-related insurance company, insurance underwriters, and insurance agents and brokers; an investment bank or firm; a brokerage firm; a mortgage company; check cashers and sellers or redeemers of travellers' cheques, money orders, or other monetary instruments; and any person that engages as a business in funds transfer, check cashing or the purchase, sale or conversion of currency.

(9) Where a financial institution subject to an order under Section 77 knowingly:

- (a) fails to comply with the order; or
- (b) provides false or misleading information in purported compliance with the order,

the financial institution commits an offence under this subsection.

Penalty: in the case of a natural person who is a director, employee or agent of a financial institution, a maximum fine of [insert amount], and in the case of a body corporate [e.g. five times] the fine.

(10) A financial institution that has been served with an order under Section 77 shall not disclose the existence or operation of the notice to any person except:

- (a) an officer or agent of the institution for the purpose of complying with the order;
- (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
- (c) an authorised officer referred to in the order.

Penalty: in the case of a natural person who is a director, employee or agent of a financial institution, a maximum fine of [insert amount], and in the case of a body corporate [e.g. five times] the fine.

Drafting Note: Section 77(10) contains a “tipping off” provision, and Section 77(9) has a general offence provision. These are useful additions to protect the confidentiality of an ongoing criminal investigation.

Section 78. Monitoring Orders

Drafting Note: Monitoring Order. Where an account in a financial institution has been discovered, either because of a customer information order or otherwise, the monitoring order will allow the account to be monitored in real time, so that any transactions can be identified quickly. If, for example, the account holder asks for the transfer of a significant sum out of his account, a monitoring order will enable the investigators to be aware of this intention, and to take appropriate steps to deal with dissipation of assets.

The section provides details as to how the order should be applied for and enforced. The monitoring order applies for a relatively short, fixed time period. As with customer information orders, there is a penalty provision for non-compliance, and a tipping off provision.

(1) The [insert name of enforcement authority/an authorised officer] may apply, *ex parte* and in writing to a court for an order (in this section called a "monitoring order") directing a financial institution to give information to an authorised officer. An application under this subsection shall be supported by [**Variants:** an affidavit; evidence; verified statement].

(2) A monitoring order shall:

- (a) direct a financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person

with the financial institution;

- (b) not have retrospective effect; and
- (c) only apply for a period of a maximum of [3] months from the date it is made.

(3) A court shall issue a monitoring order only if it is satisfied that there are reasonable grounds for believing that:

- (a) the person in respect of whose account the order is sought:
 - (i) has committed or was involved in the commission, or is about to commit or be involved in the commission of, an offence; and
 - (ii) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a offence; or
- (b) the account is relevant to identifying, locating or quantifying terrorist property.

(4) A monitoring order shall specify:

- (a) the name or names in which the account is believed to be held; and
- (b) the class of information that the financial institution is required to give.

(5) An authorised officer for purposes of Section 78 shall be [name authority that shall apply for/execute monitoring orders].

(6) A financial institution, for purposes of this section, means a bank or other credit institution, a life insurance and investment-related insurance company, insurance underwriters, and insurance agents and brokers; an investment bank or firm; a brokerage firm; a mortgage company; check cashers and sellers or redeemers of travellers' cheques, money orders, or other monetary instruments; and any person that engages as a business in funds transfer, check cashing or the purchase, sale or conversion of currency.

(7) Where a financial institution subject to an order under Section 78, knowingly:

- (a) fails to comply with the order; or
- (b) provides false or misleading information in purported compliance with the order,

the financial institution commits an offence under this subsection.

Penalty: in the case of a natural person who is a director, employee or agent of a financial institution, a maximum fine of [insert amount], and in the case of a body corporate [e.g. five times] the fine.

(8) A financial institution that is or has been subject to a monitoring order shall not knowingly disclose the existence or operation of the order to any person except:

- (a) an officer or agent of the institution for the purpose of ensuring compliance with the order;
- (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
- (c) the authorised officer referred to in the order.

Penalty: in the case of a natural person who is a director, employee or agent of a financial institution, a maximum fine of [insert amount], and in the case of a body corporate [e.g. five times] the fine.

(9) Nothing in this section prevents the disclosure of information concerning a monitoring order for the purposes of or in connection with legal proceedings or in the course of proceedings before a court, provided that nothing in this section shall be construed as requiring a legal adviser to disclose to any court the existence or operation of a monitoring order.

Part VII: Civil Forfeiture

Section 79. Definitions

In this Part, the following definitions shall apply:

“**court**” means [insert reference to judicial authority that will be given authority to act with respect to the applications set forth in the Part].

“**enforcement authority**” means [fill in name of authority the State decides to designate to institute civil forfeiture matters under Part VII].

Drafting Note: Enforcement Authority. The enforcement authority should be a legal office since the authority will be pursuing civil cases before the court. Thus, it would not be appropriate in most cases for this to be a police agency.

The term is also used in Part VI on Criminal Confiscation. It may be defined separately for the two Parts as needed.

“**instrumentality**” and “**instrumentalities**” means any property used or intended to be used, in any manner, wholly or in part [**Variant 1:** to commit] [**Variant 2:** in or in connection with the commission of] a criminal offence or criminal offences and is deemed to include property of or available for use by a terrorist organization.

Drafting Note: The definition of instrumentality reflected in **Variant 1** is the same as it appears in the 1990 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (CETS 141), commonly known as the Strasbourg Convention, and the 2005 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (CETS 198) and in the civil law model law.

Variant 2 reflects language used in provisions in some common law countries. This variant broadens the property that might be considered an instrumentality. Case law that may be helpful in deciding on an approach and that discusses the concepts underlying “instrumentalities” include (from Australia): *DPP (NSW) v. King* [2000], NSWSC 394 (New South Wales Supreme Court) per O’Keefe (Available on AustLII); *Taylor v A-G (SA)* (1991), 55 SASR 462 [53 A Crim R 166] (Court of Criminal Appeal South Australia); (from South Africa): *NDPP v. RO Cook Properties* (Cases 260/03, 666/02 and 111/03) (Supreme Court of Appeal of South Africa) (13 May 2004); *Mohunram and Anor v. NDPP* [2007] ZACC 4; *NDPP v. Geysers* [2008] ZASCA 15 (RSA) (available on SafLII).

“**interest**” in relation to property, means:

- (a) a legal or equitable estate or interest in the property; and
- (b) a right, power or privilege in connection with the property.

“**offence**” and “**criminal offence**” except when the term refers to a specific offence means:

Variant 1: (a) any offence under the law of [insert name of State]; and

(b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 2: (a) any offence against a provision of any law in [insert name of State] for which the maximum penalty is death or life imprisonment or other deprivation of liberty of more than one year; and

(b) any offence under a law of a foreign State, in relation to acts or omissions, which had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 3: (a) offences defined in Schedule 1 to this Act; and

(b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Drafting Note: The civil forfeiture provisions apply in the case of proceeds. The definition of proceeds relates to property received “through the commission of a criminal offence.” Thus the scope drafting authorities decide upon for “offence” in this definitional provision will impact the availability of civil forfeiture within the jurisdiction.

The definition of “offence” should reflect one of the three approaches in [FATF 40 Recommendation 1](#). See note on R. 1 in Part II, Section 3. Drafting authorities should consider which approach to adopt: all offences, all serious offences, a comprehensive list that reflects all serious offences, or some combination of these. The use of Variant 1 will permit the civil forfeiture provisions to be used for all offences including minor offences, and drafting authorities should consider whether they want to make all such offences potential triggering activity. If Variant 2 is chosen, the civil forfeiture provisions will be available in the case of all serious offences, that is those that have a penalty, as a maximum of more than a year. In those instances where a country has minimum rather than maximum threshold in its legal system, Variant 2 will need to be altered. Use of Variant 3 alone, the list approach, has the disadvantage of requiring frequent changes in legislation as new offences are enacted.

Drafting Note: It is essential to effective international cooperation that similar offences under the laws of other States also be covered. This is taken addressed through including subsection (b) in each Variant.

“**person**” means any natural or legal person.

“**property**” means assets of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [insert name of State] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.

Drafting Note: Property. The [Vienna](#) and [Palermo Conventions](#) and the [UN Convention Against Corruption](#) use the term “property” to refer to assets that may be subject to those instruments. The [International Convention for the Suppression of the Financing of Terrorism](#) uses “funds” to express the same concept, but adds an illustrative list “including but not limited to” various examples of covered assets. The model provisions’ definition of “property” includes the [Vienna](#) and [Palermo Conventions](#) and [UN Convention Against Corruption](#) terminology, supplemented by the illustrative examples from the [Financing of Terrorism Convention](#). It also adds the examples of “currency” and “deposits and other financial resources” to remove any doubt that those items are included, and language providing that the definition applies wherever the property is located. See also definitions in the [Glossary to the FATF Methodology](#).

“**proceeds**” and “**proceeds of crime**” means any property or economic advantage derived from or obtained directly or indirectly through the commission of a criminal offence [*Option: or in connection therewith*]. It shall include, economic gains from the property and property converted or transformed, in full or in part, into other property.

Drafting Note: Regarding the optional language, it should be noted that a number of common law countries, for instance the United Kingdom and South Africa, make it clear in their legislation that benefits of criminal conduct include property obtained “in connection with” the offense. Adding this phrase expands the concept of proceeds somewhat. It should, for instance, make it clear in the case of a stand-alone money laundering prosecution where there is no prosecution for the predicate offence that the funds being laundered which are viewed primarily as proceeds of the predicate activity are also considered proceeds of the money laundering offence.

Drafting Note continued: Drafting authorities should be aware of proportionality issues where legitimately-acquired property is commingled with proceeds and ensure in some manner that courts need not consider legitimately-acquired partial interests in property as proceeds.

“terrorist” means any natural person who:

- (a) commits or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;
- (b) participates as an accomplice in terrorist acts;
- (c) organizes or directs others to commit terrorist acts; or
- (d) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

Drafting Note: The definition of “terrorist” is the same as that reflected in [Interpretative Note](#) to [FATF Special Recommendation II](#).

“terrorist act” means

- (a) **Variant 1:**
an act, which constitutes an offence within the scope of, and as defined in one of the treaties listed in the annex to the 1999 International Convention for the Suppression of the Financing of Terrorism; and

Variant 2:

an act which constitutes an offence within the scope of, and as defined in one of the following treaties: Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), International Convention against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1980), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988), and the International Convention for the Suppression of Terrorist Bombings (1997); and

- (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Drafting Note: Variants 1 and 2 of paragraph (a) are different ways of stating the offences required to be criminalized by Article 2.1(a) of the [Terrorism Financing Convention](#). Whichever variant is used for subsection (a), it is essential that it be followed by paragraph (b) which implements Article 2.1 (b) of the [Convention](#).

“**terrorist organisation**” means any group of terrorists that:

- (a) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully;
- (b) participates as an accomplice in terrorist acts;
- (c) organises or directs others to commit terrorist acts; or
- (d) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

Drafting Note: The definition of terrorist organisation is the same as appears in the [Interpretative Note](#) to [FATF Special Recommendation II](#).

“**terrorist property**” means:

- (a) proceeds from the commission of a terrorist act;
- (b) property which has been, is being, or is intended to be used to commit a terrorist act;
- (c) property which has been, is being, or is intended to be used by a terrorist organisation;
- (d) property owned or controlled by, or on behalf of, a terrorist organisation; or
- (e) property which has been collected for the purpose of providing support to a terrorist organisation or funding a terrorist act.

Drafting Note: A definition of terrorist property (and the related definitions of terrorist, terrorist act and terrorist organisation) will not be necessary if drafters choose the option of providing for the civil forfeiture of instrumentalities. Instrumentalities by definition already include property provided or collected for terrorist acts or terrorist organizations.

Section 80. Civil Forfeiture Order

Drafting Note: Civil Forfeiture Orders. The scheme for civil forfeiture is set out in Part VII of the Act. Section 80 introduces the concept of civil forfeiture. Civil forfeiture enables the enforcement authority (as defined in Section 80(3)) to bring civil proceedings in an appropriate civil court in the State to recover property that is or represents property obtained through criminal conduct, is terrorist property, or, if the Part is drafted to cover instrumentalities, is an instrumentality.

This is likely to be an entirely new statutory right of action in the State, and is reserved to the enforcement authority. The procedure for civil forfeiture actions will likely be governed by the usual rules of civil procedure in the State's courts. In some instances, jurisdictions will need to work with the judiciary on necessary amendments to the rules of civil procedure.

As noted above, if instrumentalities are included, it will not be necessary to include terrorist property since instrumentalities by definition covers terrorist property.

Drafting authorities should review how the terms "part" and "act" are used when model provisions form a basis for new provisions in a State's framework.

(1) An order for civil forfeiture is an order *in rem*, granted by a court with civil jurisdiction to forfeit to the State property that is proceeds [*or instrumentalities*] or terrorist property.

Drafting Note: Section 80(1) defines a civil forfeiture order. The order can be distinguished from the definition of a confiscation order in two ways. First, it does not follow a conviction, and secondly, it is granted by a civil court. The subsection also makes clear that a civil forfeiture proceeding is a proceeding *in rem*.

Since not all rules of civil procedure are designed to accommodate *in rem* forfeiture proceedings, some procedural rule changes may be required. This may involve consultation with the judiciary. For example, a jurisdiction that currently does not have "*in rem*" proceedings may need to adopt rules regarding such matters as notice to affected persons and intervention rights.

(2) The court, on an application by the enforcement authority, shall grant a civil forfeiture order in respect of property within the jurisdiction of [insert name of the State], where the court finds, on a balance of probabilities, that such property is proceeds [**Option:** *instrumentalities*] and/or terrorist property.

Drafting Note: Section 80(2) sets out the initial position that the court with civil jurisdiction shall grant a civil forfeiture order where it is satisfied that property is proceeds, instrumentalities or terrorist property. Drafters should decide on coverage for each of these three categories of property based upon the needs within the jurisdiction and in light of the comments below.

Once the decision has been reached that property does fall into one of the categories set forth in a provision, the court should grant the forfeiture order. Section 80(2) also makes it clear that the standard of proof for such a decision is a balance of probabilities, and that the power applies only to property subject to the jurisdiction of the courts of the State. This latter limitation means that only property within the State will be affected.

Proceeds. Coverage of proceeds means that property derived from the commission of an offence will be subject to civil forfeiture. Civil forfeiture provisions traditionally have been directed at the recovery of proceeds. The definition of proceeds, which includes the notion of property converted or transformed into other property, makes it clear that it will not be sufficient to defeat a claim for civil forfeiture to demonstrate that the property in question has been sold or otherwise disposed of. If it has been sold etc., for value, then the property liable to forfeiture is the consideration received for the original proceeds. This ensures that criminals cannot defeat these provisions by alienating property. There is a further provision to this effect at Section 80(5) below.

Terrorist Property. Section 80(2) makes it clear that the provisions apply to terrorist property as well as to proceeds. A provision that provides for the forfeiture of proceeds alone is not adequate to capture most kinds of terrorist property. If a jurisdiction lacks existing separate legislation that provides for the forfeiture on a balance of probabilities or similar civil standard of property owned or controlled by or on behalf of a terrorist group and property that has been or will be used to carry out or facilitate a terrorist act, the general civil forfeiture provisions set forth in this Part can provide for the civil forfeiture of such property.

It is important that there be provisions for the civil forfeiture of such property for any number of reasons including the fact that it may not always be possible to commence criminal proceedings against a specific person when such property is located.

Terrorist property is a term defined under Section 79 and covers both instrumentalities – property used or intended for use in the commission of a terrorist act – and the property of a terrorist organization.

Instrumentalities. Careful consideration should be given to inclusion of instrumentalities which some, but not all, States with civil forfeiture provisions include in an unrestricted fashion. In Section 80(2), it is presented as an option. Instrumentalities by definition include terrorist property.

Covering instrumentalities will mean that property obtained with legitimate funds, but used in committing an offence, can be forfeited civilly. Questions of proportionality may arise regarding the civil forfeiture of an instrumentality of significant value where the gravity or monetary value of the offence is relatively small.

States with civil forfeiture provisions have adopted different approaches to covering instrumentalities. In some States, civil forfeiture of an instrumentality is broadly available and there is reliance on the discretion of enforcement authorities to pursue appropriate cases.

Drafting Note continued: Alternatively, the State may have to show a substantial nexus between the use of the property and the conduct. Property that has a mere incidental connection to the conduct will not be liable to forfeiture as an instrument.

Other States limit civil forfeiture of an instrumentality to cash as an instrumentality, or, in another instance, a limitation to property likely to be used in unlawful activities that may result in serious bodily harm, or in the acquisition of other property. In some instances, property can be both an instrument and a proceed. For instance, drug profits (a proceed) may also be an instrument when used to purchase additional illegal drugs. Funds collected or provided for a terrorist activity are both the proceeds of a financing offence and an intended or actual instrumentality of the terrorist activity.

(3) For the purposes of proceedings for civil forfeiture, the enforcement authority is defined as [insert name of authority that the State has decided to use to institute for civil forfeiture actions].

Drafting Note: Section 80(3) provides the opportunity to define the authority that will have the responsibility for undertaking civil forfeiture actions. In most countries it will not be necessary to establish a separate body. However, care should be taken to ensure an appropriate separation between the enforcement authority and prosecution authority to preserve the civil nature of the procedure.

States have adopted a number of different approaches. These include using civil lawyers already employed by the government, establishing separate agencies, or identifying a discrete section of a prosecution agency. It will be more difficult to resist challenges to the procedure made on the basis of double jeopardy if there is no clear demarcation between the agency with responsibility for prosecution, and the agency, or part of an agency, with responsibility for civil forfeiture.

(4) In order to satisfy the court under subsection (2) above:

(a) that property is proceeds, it is not necessary to show that the property was derived directly or indirectly, in whole or in part, from a particular criminal offence, or that any person has been charged in relation to such an offence; only that it is proceeds from some criminal offence or offences;

[Option: (b) that property is an instrumentality, it is not necessary to show that the property was used or intended to be used to commit a specific criminal offence, or that any person has been charged in relation to such an offence; only that it was used or intended to be used to commit some criminal offence or offences;]

(c) that property is terrorist property, it is not necessary to show that the property:

(i) was derived from a specific terrorist act as long as it is shown it was derived from some terrorist act; or

(ii) has been or is being or is intended to be used by a terrorist organisation, or to commit a specific terrorist act, as long as it is shown that it has been,

is being or is intended to be used by some terrorist organization or to commit some terrorist act; or

- (iii) is owned or controlled by or on behalf of a specific terrorist organisation, as long as it is shown to be owned or controlled by or on behalf of some terrorist organization; or
- (iv) has been provided or collected for the purpose of supporting a specific terrorist organisation or funding a specific terrorist act, as long as it is shown to have been provided or collected for the purpose of providing support to some terrorist organisation or funding some terrorist act

or that any person has been charged in relation to such conduct.

Drafting Note: Section 80(4) addresses how the court should arrive at the decision that property is proceeds etc. It sets forth the link between the conduct and the property. It provides that it is not necessary to show that property was obtained through a particular kind of criminal offence, as long as it can be shown to have been obtained through an offence of one kind or another. So it will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, or money laundering, or fraud or some other criminal activity, provided it can be shown that they are attributable to one or other of these in the alternative, or perhaps some combination. It will also not be necessary to show that any person has been charged with any offence in connection with the conduct described.

(5) An application for civil forfeiture may be made in respect of property into which original proceeds have been converted either by sale or otherwise.

Drafting Note: Although the definition of proceeds makes it clear that tracing of proceeds is possible, Section 80(5) puts it beyond doubt that where the original criminal proceeds have been disposed of, an application for forfeiture will be competent in respect of the “replacement” property. This will be particularly important where the original proceeds have been acquired by an innocent third party, and will enable for example the court to order the forfeiture of the sale price rather than the original asset, which cannot be followed into the hands of the innocent third party.

(6) For the purposes of civil forfeiture, an offence shall also include conduct that has occurred in a country outside [insert name of the State] and is unlawful under the law of that country as long as had it occurred in [insert name of the State], it would have constituted an offence under the law of [insert name of the State] and under Section 79 of this Part. The court shall determine on a balance of probabilities whether such conduct has occurred.

Drafting Note: Section 80(6) deals with the underlying conduct that can give rise to proceedings for civil forfeiture. A civil forfeiture action may be undertaken with respect to several classes of property including proceeds. The definition of proceeds in Section 79 brings in the concept of property that is from a criminal offence. The definition of “offence/criminal offence” in Section 79 in turn includes foreign offences on a dual criminality basis. Subsection (6) makes clear that an offence that can give rise to civil forfeiture proceedings will include conduct which occurs in a country outside the State and is criminal conduct under the criminal law of that country, and would be unlawful if it occurred in the State undertaking the civil forfeiture proceeding.

This provision may not be necessary if a definition in Section 79 covers the matter, but it may be helpful for this to be made explicit in the civil forfeiture provisions, and to note the civil standard of proof that applies.

The effect of this provision is to enable property which has been obtained through conduct abroad to be recovered if the conduct was unlawful where it took place and is also criminal conduct to which the Act applies in the State. The test the court must use in determining whether the conduct occurred and was unlawful conduct is the balance of probabilities. This is the normal standard of proof that applies in civil proceedings. The criminal standard of proof, under which matters must be proved beyond reasonable doubt, does not apply in a civil recovery proceeding.

(7) For the purposes of making a determination under subsection (2) above, proof that a person was convicted, found guilty or found not criminally responsible is proof that the person committed the conduct.

Drafting Note: If a person has been convicted, found guilty, or found not criminally responsible for an offence, proof of such a court determination shall, as a result of Section 80(7), enable the court to conclude that the specified person committed the conduct that resulted in proceeds, etc.

(8) Property may be found to be proceeds under subsection (2) even if a person was acquitted of the offence, or if the charge was withdrawn before a verdict was returned, or if the proceedings were stayed.

Drafting Note: Section 80(8), which further develops the civil nature of the remedy of civil forfeiture, makes it clear that the remedy of civil forfeiture may still be appropriate even where a person has been acquitted in a criminal process associated with the criminal conduct, or the proceedings have otherwise terminated without a conviction. The remedy may remain appropriate because the question is not whether the court is satisfied beyond reasonable doubt that a named person committed a specific criminal offence, but whether on a balance of probabilities the property was derived from criminal conduct.

Drafting Note continued: The principle behind civil forfeiture is that proceeds from criminal conduct should not be held by those whose conduct has led to their acquisition: no one should be able to profit from criminal conduct. Civil forfeiture is not a penalty. It is directed at an asset not at a person. It is not related therefore to the concept of conviction of an individual.

(9) **Variant 1:** Orders for civil forfeiture can be sought in respect of property whenever obtained.

Variant 2: A civil forfeiture proceeding shall not be commenced after the [insert number of years] anniversary of the date that the property became a proceed, [**Option:** *instrumentality*] and/or terrorist property.

Drafting Note: Civil forfeiture is based on the theory that property that is acquired as a result of criminal conduct can never be held lawfully. It does not matter, for civil forfeiture, when the property was acquired, since the ownership can never be made legal. This is the basis for permitting retrospectivity as is contained in this Section 80(9).

The first variant provides for actions regardless of when property was obtained. Under the second variant, there would be a limitation, for instance 12-15 years after the date the property became a proceed, etc. and the date of the commencement of the civil proceeding. Drafting authorities will need to determine what period it considers appropriate between these two dates before actions of civil forfeiture should not be entertained by the courts.

(10) Orders for civil forfeiture may be granted with respect to property acquired or used before the Act came into force.

Drafting Note: In addition to Section 80(9) which addresses only whether there is a statutory prescription period for the initiation of a civil forfeiture action, it is necessary to make clear separately and regardless of any prescription period that the Act has retrospective applicability, that is that it may be applied to property acquired or used before the Act came into force. This is accomplished through Section 80(10).

(11) An order for civil forfeiture may be sought where the conduct on which the application for forfeiture is based was committed by a person now deceased.

Drafting Note: Section 80(11) emphasises the *in rem* nature of the proceedings by making it clear that proceedings may be brought in respect of property even though the person upon whose criminal conduct the action is founded is deceased.

(12) **Option:** [A civil forfeiture action [**Option (add also):** *to recover proceeds*] shall not be brought where the value or aggregate value of the property concerned is less than [insert amount]].

Drafting Note: Section 80(12), an optional section, would set a monetary threshold before a civil forfeiture action is undertaken.

Because the procedure before the courts is likely to be complex and time consuming, States may not wish to embark on this type of procedure where the value or total value of the property concerned is less than a particular amount. However, in considering whether to use a threshold, States should also be cognizant of the effect the retention of even less significant levels of criminal benefit may have on communities who see criminals maintaining property or lifestyles beyond their legitimate means.

In addition, drafting authorities may want to limit this section to proceeds, as different considerations are involved in the case of terrorist property and instrumentalities. In such cases the use of the property and the threat to public safety are paramount rather than underlying value.

Section 81. Property Freezing Order

(1) Where specified property that is reasonably believed by the enforcement authority to be proceeds [*Option: or instrumentalities*] or terrorist property, the enforcement authority may apply to the court for a property freezing order in respect of such property.

Drafting Note: To civilly forfeit property, there must be a mechanism to freeze property which is, or will become, the subject of proceedings. This is to ensure that the property is not dissipated pending the outcome of the proceedings.

Section 81(1) provides for the making of an application for a property freezing order which will freeze the property in anticipation of an application for civil forfeiture. A property freezing order will relate only to specified and identified property. It will not relate to a generic description of everything that a person owns. This emphasises the *in rem* nature of the proceedings.

(2) An application for a property freezing order made under Section 81(1) shall be in writing and shall be supported by an [*Variants: affidavit; evidence; verified statement*] of an [insert reference to officers who will make application] indicating that the officer believes, and the grounds for his belief, that the property the subject of the application is proceeds of crime [*Option: or an instrumentality*] or terrorist property. An application for a property freezing order may be made *ex parte* and without notice.

Drafting Note: The property freezing order, in distinction to the actual application for civil forfeiture, will most often be made *ex parte* (that is with only the applicant appearing), and without notice to those who may be affected in accordance with Section 81(2). This again will be to ensure that property is preserved.

Drafting Note continued: There may be circumstances in which providing notice would not jeopardize a successful freezing, but they are likely to be rare. Supporting evidence/documents for a property freezing order application will be similar to those required for a restraining order in criminal procedure. In individual States, the requirements may differ, but the normal procedural rules should apply.

(3) The hearing of an application for a property freezing order may be heard *in camera*.

Drafting Note: Section 81(3) provides that the hearing for the property freezing order may be held *in camera*. This is to ensure that the property is not hidden or dissipated before a freezing order is in place. The State may already have provisions under its own rules as to whether a hearing on a restraint application may be heard *in camera*.

(4) The court may make a property freezing order to preserve the specified property where it is satisfied that there are reasonable grounds to believe that the property, or part of it, is proceeds, [*Option: or instrumentalities*] or terrorist property.

Drafting Note: It is important to set the test for the granting of an order to freeze at the appropriate level. If the standard for granting it is too high, the enforcement authority will rarely be able to satisfy the test, and there is serious risk that assets which should be forfeited will be lost. On the other hand, too easy a standard will result in unwarranted interference in the enjoyment of property.

Section 81(4) sets the test at “reasonable grounds to believe” that the property constitutes proceeds, instrumentalities or terrorist property. This standard is one that has been used in a number of systems and strikes a reasonable balance between the two arguments above. An alternative, used in some jurisdictions, is “where there is a serious question to be tried.”

The language also makes clear that it is also possible to apply for a property freezing order for property where it is suspected that only part of the property is proceeds, instrumentalities or terrorist property, where for example a property is jointly owned, and only one share is thought to be proceeds etc. A freezing order should apply to the extent possible only to the interest that represents the proceed, instrumentality or terrorist property, but there may be situations where parts are indivisible and the order must apply to the whole. This provision makes clear that the court may issue its order with respect to the whole.

(5) Within [21] days of the granting of a property freezing order or such other period as the court may direct, notice of the order shall be served on all persons known to the enforcement authority to have an interest in the property affected by the order, and such other persons as the court may direct.

Drafting Note: The range is generally somewhere between 15 to 45 days, with a 21-day period often chosen.

Section 82. Further Provisions in relation to Property Freezing Orders

Drafting Note: Section 82 deals with the effect of property freezing orders. Authorities should consider, when drafting provisions, the powers set forth in Section 82(1)(a) to (e). Depending upon how the provisions are drafted, they will have consequences for the enforcement authority and for choices on use of trustees and receivers, both private and public.

In any particular case, it will not normally be necessary for a property freezing order to contain all of these provisions. Section 82, however, will provide the court with the power to formulate an appropriate order in each instance.

The enforcement authority will decide depending on the nature of the property in a particular case the orders it would like to seek and for which assets. A variety of different orders may be needed in a single case depending upon the kinds and status of the property involved.

(1) Where a court makes a property freezing order, the court may, at the time when it makes the order, or at any later time, make any further orders that it considers appropriate. Without limiting the generality of the above, the court may make any one or more of the following orders:

- (a) an order that the property or part of the property specified in the property freezing order shall be seized, taken into possession, delivered up for safekeeping or otherwise secured by the enforcement authority;

Drafting Note: Section 82(1)(a) contains a provision that would allow the court to include in the property freezing order a power for the enforcement authority to seize or otherwise take into its possession specified property. This type of power will most commonly be used when the property is valuable moveable property, such as performance motor vehicles or jewellery that could without such a power easily be disposed of to frustrate any potential final order. The enforcement authority will have to ensure the safekeeping of such items as are delivered up to it. For that purpose it may have to consider such matters as storage and insurance.

- (b) an order that the property or part of the property specified in the freezing order shall be dealt with in a particular manner including by an encumbrance which is ordered by the court on such property in favour of the enforcement authority together with an order that prohibits any other encumbrance, and/or by a prohibition regarding dealing in or with such property;

Drafting Note: In Section 82(1)(b), it is within the court's power to order that specified property be dealt with in a particular manner (for instance not sold, transferred, mortgaged etc.), or to order an encumbrance in favour of the enforcement authority. This provision will enable a court to effectuate its freezing order by dealing with immovable property in an effective way. There may be a need for procedural rules to ensure that the orders interface appropriately with land titles as well as with personal property security systems.

Drafting Note continued: An orders to place an encumbrance may be needed for immoveable property. Service of notice will be particularly important.

- (c) an order to appoint a (Option: add: *named*) receiver or trustee to take custody and/or control of the property or a part of the property that is specified in the property freezing order, and to manage or otherwise deal with the whole or any part of the property in accordance with any directions of the court;

Drafting Note: Section 82(1)(c) contains a provision allowing for the appointment of a receiver or trustee. Such an appointment would normally only be contemplated where there is a management aspect for certain assets, for example in running a business.

In connection with the powers of the trustee, an order under Section 82(1)(c) should specify which actions a trustee can take without further reference to the court. For example, where a house is the subject of the order, can the trustee arrange a tenancy, or sell it as a result of his own decision, or must he go back to the court for authority? Since applications to the court will be costly, it will be advisable to give the trustee broad general powers, with reference to the court only in exceptional circumstances.

- (d) such other order for the preservation, management or disposition of the property or part of the property specified in the property freezing order as the court considers appropriate.

Drafting Note: Section 82(1)(d) is a general provision that will enable the court to make such order as it thinks appropriate depending on the nature of the assets in the property freezing order.

- (e) For purposes of this section:

“**dealing with property**” means any of the following:

- (a) a transfer or disposition of property;
- (b) making or receiving a gift of the property;
- (c) removing the property from [insert name of State];
- (d) where the property is a debt owed to that person, making a payment to any person in reduction or full settlement of the amount of the debt;
- (e) using the property to obtain or extend credit, or using credit that is secured by the property; or

- (f) where the property is an interest in a partnership, doing anything to diminish the value of the partnership.

“**gift**” means property given by one person to another person, and includes any transfer of property directly or indirectly:

- (a) after the commission of an offence by the first person;
- (b) to the extent of the difference between the market value of the property at the time of its transfer and
 - (i) the consideration provided by the transferee; or
 - (ii) the consideration paid by the transferor

whichever is greater.

(2) Any costs associated with the appointment of a receiver or trustee and the work subsequently undertaken by him pursuant to the appointment shall be paid from [*Variants*: recovered assets fund; special purpose account].

Drafting Note: Section 82(2) contains provisions which follow from those contained in Section 82(1)(c) above, in relation to the appointment of a trustee or receiver. As noted above, there are usually costs associated with such an appointment.

This provision indicates how the costs might be met. It is suggested that these could be paid for, retrospectively, out of recovered assets, but it may also be desirable to identify a particular fund for the payment of such costs. Model provisions in Part VIII provide for the establishment of a recovered assets fund, and if adopted, a link to such a fund would be appropriate.

The costs may be considerable. A trustee or receiver may become involved in litigation as a result of the appointment, and his legal costs will have to be met. He may need to consult independent professionals—for example for advice on running a specialist concern—and these too may submit fees. All of these considerations will make enforcement authorities cautious before embarking on an appointment which may ultimately have cost implications that cannot initially be quantified or estimated.

Particular care should be taken with these provisions to ensure that the payments may be made, especially initially, when there may be no recovered assets to fund such payments.

(3) Where a receiver or trustee has been appointed under subsection (1)(c) in relation to property, he may do anything that is reasonably necessary to preserve the property and its value including, without limiting the generality of this:

- (a) becoming a party to any civil proceedings that affect the property;
- (b) ensuring that the property is insured;
- (c) realising or otherwise dealing with the property if it is perishable, subject to

wasting or other forms of loss, its value volatile or the cost of its storage or maintenance likely to exceed its value, subject to the proviso that this power may only be exercised without the prior approval of the court in circumstances where:

- (i) all persons known by the trustee to have an interest in the property consent to the realisation or other dealing with the property;
 - (ii) the delay involved in obtaining such approval is likely to result in a significant diminution in the value of the property; or
 - (iii) the cost of obtaining such approval would, in the opinion of the trustee, be disproportionate to the value of the property concerned;
- (d) if the property consists, wholly or partly, of a business:
- (i) employing, or terminating the employment of persons in the business;
 - (ii) doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis; or
 - (iii) selling, liquidating or winding up the business if it is not a viable concern, subject to obtaining the prior approval of the court;
- (e) if the property includes shares in a company, exercising rights attaching to the shares as if the trustee were the registered holder of the shares.

Drafting Note: Section 82(3) contains important provisions related to the management and sale of property in particular circumstances. There may be occasions where the assets are by nature perishable. In such circumstances it would be pointless to freeze them to await the outcome of prolonged litigation, since by then the assets would have no value. It would be better to enable the enforcement authority, or a trustee or receiver, to step in and sell the assets while they still have a value.

There is also a balancing decision when assets are particularly expensive to maintain compared with their actual value. In those circumstances too it may be appropriate to permit the enforcement authority or trustee or receiver to sell such assets since the cost of their continued maintenance would outweigh any ultimate value recovered. It will be important in such cases for there to be a court order that authorizes the enforcement authority or trustee or receiver to dispose of assets in order to avoid later claims for compensation by a person who might claim the assets were irreplaceable.

(4) The court may exclude from the property freezing order such amount as it considers appropriate for the payment of reasonable living expenses to any person whose property is the subject of a property freezing order. The court shall not exercise its discretion to exclude an amount unless it is satisfied that the person cannot meet such expenses out of property that is not subject to a property freezing order and the court determines that it is in the interests of justice to make such an exclusion.

(5) The court may exclude from the property freezing order such amount as it considers appropriate for the payment of reasonable legal expenses incurred by any person whose property is the subject of a property freezing order. The court shall not exercise its discretion to exclude an amount unless it is satisfied that the person cannot meet such expenses out of property that is not subject to a property freezing order and the court determines that it in the interests of justice to make such an exclusion.

Drafting Note: Legal and Living Expenses. Drafting authorities should consider whether to include provisions for the payment of expenses out of frozen assets and what the limits should be for such payments. Payments under both Section 82(4) and 82(5) will diminish the potential for forfeiture. Accordingly, mechanisms should be introduced to ensure that the provisions are not abused, for example, by frivolous legal challenges. Jurisdictions should make choices from a policy and constitutional perspective bearing in mind issues such as fairness, equality of arms, etc.

The first provision relates to the payment of living expenses out of the property subject to the property freezing order. The second relates to the payment of legal expenses. In neither case may the court exercise its discretion to provide for such expenses where there are other assets to meet the expenses. Some jurisdictions have chosen to introduce only a provision in relation to access to legal expenses. Others have no such provisions at all.

If a provision on legal expense payments is adopted, it may be appropriate to link payments to legal aid rules and rates.

The provisions set forth in subsections 82(4) and (5) should be compared with those for payment of living and legal expenses found in Section 48 dealing with restrained property. The details of those Part VI provisions are different in some details from the Section 82 provisions. For example, Section 48(1)(e) specifies that an order may permit payment of living expenses for dependents and business expense, whereas Section 82(4) does not refer to dependents or business expenses. Corresponding provisions under Parts VI and VII should be compared to find the most desirable approach.

(6) Where a court makes a property freezing order, it may upon application by anyone with an interest in the property or by the enforcement authority and at any time make any further order in respect of the property including an order to revoke the freezing order or to vary the order.

Drafting Note: Orders to Revoke or Vary a Property Freezing Order. Section 82(6) makes provision for an application to the court to revoke or vary the original freezing order after the original property freezing order is granted.

It should be clear that property freezing orders are always subject to revocation by the court. Those that issue at the investigative stage before the initiation of the civil proceeding are of particular concern. This provision leaves the time period open-ended with the order continuing until an affected party applies to the court for revocation at which point the court must make a discretionary determination whether it is just to continue the order. This provides wide flexibility to enforcement authorities.

Drafting Note continued: There may be circumstances where no party seeks the lifting of the restraint, and the enforcement authority then would have as much time as it needs to prepare its full case for filing without the necessity of making a showing to the court.

Alternatively, drafting authorities may wish to make orders issued at the investigative stage valid for a specific period of time, and if no application for civil forfeiture is filed within that time, the freezing order is lifted unless the enforcement authority establishes to the satisfaction of the court the reasons it should continue.

The application can be made by anyone with an interest in the property, which would include the person in whose possession the property was immediately before the order was made. It would also include, for example, a third party with an interest in the property such as a mortgage lender who had granted a loan over the property, as well as the enforcement authority itself. There could be a variety of reasons for such an application.

There might be a need for the person whose property is subject to the order to have access to it, or the enforcement authority might wish to sell the property if its value suddenly appears to be about to decrease. With property freezing orders often in force for substantial periods of time, applications to vary may well be necessary.

At the conclusion of the forfeiture proceedings, whether by way of an order for forfeiture or otherwise, it will be necessary to seek the revocation of the property freezing order so that the property can once again be freely dealt with. This will be essential even where there has been a civil forfeiture order: even the enforcement authority will be unable to realise the property until the freezing order has been revoked.

Section 83. Property Seizure Order

Drafting Note: Seizure Orders. A property freezing order is the usual means of securing property for eventual recovery under civil forfeiture. However there are circumstances where a property freezing order would be ineffective because the property is in the hands of a person who will not voluntarily produce or preserve it. In these circumstances, the property seizure order provided for by Section 83 provides a compulsory mechanism to secure property for eventual civil forfeiture. Once it has been seized, the enforcement authority may then seek a property freezing order for the property and the property will be held in anticipation of forfeiture. Sections 83(3)-(4).

The seizure order provided for by Section 83 contains only the essential components of the power necessary for its operation. Subsection (1)(c) is an essential requirement, and drafting authorities will need to look closely at standards and procedures within the State and include them in some way. States should ensure the usual warrant standards in the jurisdiction (for instance, in some jurisdictions, probable cause to believe that an offence was committed and that the specified property is at the place to be searched) as well as the powers, procedures and controls are inserted to facilitate the proper operation of the order.

Drafting Note continued: Provision should also be made either in this law or through the general criminal procedure code of the State for situations where evidence of other criminal offences is discovered in the course of execution of a warrant under this section. For instance, the executing authority might discover prohibited drugs while searching for a specified article of jewellery that is covered by the warrant.

Section 83(5) will enable the enforcement authority to be accompanied by police officers in order to execute more effectively an order under this section. This will apply only if the enforcement authority is not staffed by police officers. Where it is so staffed, these provisions will not be necessary.

(1) The court may make an order on application by the enforcement authority permitting an authorised officer to search for and seize specified property that is, or that the court finds could be, the subject of a property freezing order under Section 81 above in the following circumstances:

- (a) a property freezing order would not be effective to preserve the property; or
- (b) there is a reasonable suspicion of risk of dissipation or alienation of the property if the order is not granted; and
- (c) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the specified property identified in subsection (1) above and note they must be satisfied].

(2) If during the course of a search under an order granted under this section, an authorised officer finds any property that he believes on reasonable grounds is of a kind which could have been included in the order had its existence, or its existence in that place, been known of at the time of application for the order, he may seize that property and the seizure order shall be deemed to authorise such seizure.

(3) Property seized under an order granted under this section, may only be retained by or on behalf of the enforcement authority for [30] days.

(4) The enforcement authority may subsequently make application for a property freezing order in respect of such property.

(5) If the enforcement authority believes that the execution of an order under this section may give rise to a breach of the peace or other criminal conduct, it may request that the authorised officer be accompanied by appropriate law enforcement officers who will assist in execution of the order.

(6) An authorised officer for purposes of Section 83 shall be [insert name of authorities that shall apply for and execute seizure orders].

Section 84. Applications for and Granting of a Civil Forfeiture Order

(1) Where the enforcement authority believes that any property is proceeds [*Option: or instrumentalities*] or terrorist property, it may apply to the court for an order of civil forfeiture in respect of that property. An application under this section shall be in accordance with the State's rules of civil procedure, and shall be in writing.

Drafting Note: Section 84 contains the requirements for the making of the actual application for and the granting of the forfeiture order and the consequences of such an order.

Section 84(1) provides that the application should be in accordance with normal rules of civil procedure, and must be in writing. Rules of procedure will vary widely, but these proceedings should be treated as a normal civil claim.

(2) Where the enforcement authority makes an application for a civil forfeiture order against property under this section:

- (a) it shall serve a copy of the application on the any person whom the enforcement authority has reason to believe has an interest in the property;
- (b) any person claiming an interest in the property may appear and adduce evidence at the hearing of the application; and
- (c) at any time before the final determination of the application, the court may direct the enforcement authority to provide such notice as the court deems appropriate to any person who, in the court's opinion, appears to have an interest in the property.

Drafting Note: Section 84(2) is drafted in similar terms to Section 55 in relation to applications for confiscation orders. It clarifies those upon whom notice of the application for civil forfeiture should be served, but makes clear that ultimately the court itself will be the arbiter of who should be served with notice. Timing of the notice of the application will have to be determined. In some countries notice will be given by the enforcement authority before the application is lodged, while in others, the court will order service. Again, in some countries adjustment to the normal rules of civil procedure may be required.

(3) Service of notice under subsection (2) above shall be effected in accordance with rules applicable in civil court proceedings.

Drafting Note: There may be challenges or difficulties in effecting service in a civil forfeiture matter. Persons may seek to evade service, and there may be an issue regarding service of persons living in other jurisdictions. Drafting authorities could consider supplementing this provision if the usual rules regarding service are not adequate to deal with such issues.

(4) Any person who asserts an interest in the property and who seeks to oppose the making of a civil forfeiture order, or who wishes to exclude his interest from a civil forfeiture order shall file an appearance in accordance with the [insert name of State]'s civil procedure rules.

Drafting Note: Section 84(4) deals with the interests of persons who may have an interest in the property in respect of which the civil forfeiture order is sought. It is for this reason that service of notice is so important. The civil rules should establish the time period for claims, etc. As with any civil action, there is a need for time frames and certainty. Parties with claims should have opportunities for notice and objection and an opportunity to have their claim considered by the court. The system should also permit finality once a final order has issued and the time period for appeals has expired.

There will be cases where there are complex interests in property apart from the interest of the person upon whose criminal conduct the action is founded. For example, there may be a mortgage in respect of the property, and the grantor of the mortgage will be able to assert his claim under this provision. The mere holding of an interest in the property however should not of itself be enough to justify the refusal of a civil forfeiture order.

The court should deal with the interests of such persons in a way that is compatible with the granting of the order, for example by granting a civil forfeiture of a property and at the same time making an order to repay outstanding mortgage indebtedness. The interest of the legitimate owner is protected by Section 85

(5) Where an application for a civil forfeiture order is before the court, the court may determine by its own procedures the evidence that may be adduced before it. It shall in particular ensure that any person with an interest of any nature in the property the subject of the application has an opportunity to make representations to the court as to whether an order for civil forfeiture should be granted.

(6) Where the court is satisfied on a balance of probabilities that property specified in the application is proceeds [*Option: or instrumentalities*] or terrorist property, it shall grant a civil forfeiture order in respect of such property.

Drafting Note: Section 84(6) makes it clear the test the court will use in granting an order. Once the court is satisfied on a balance of probabilities, the court must issue the order for forfeiture.

(7) A civil forfeiture order shall have the effect of vesting the forfeited property in a named representative of the enforcement authority or specified receiver or trustee who shall be responsible for realizing the property in accordance with Section 89.

Drafting Note: Section 84(7) makes clear that the effect of a civil forfeiture order is a transfer of ownership of the property, or a specified part of the property. The model provision provides that the property vests with a named person in the enforcement agency, or if necessary an outside receiver or trustee with specialised skills. See Section 89 on Realisation of Property.

Section 85. Orders Regarding Legitimate Owners

Drafting Note: Section 85 protects third parties who may have an interest in property which is the subject of an application for a civil forfeiture order. Section 85(1) provides that the court can protect legitimate owners, and subsection (2) provides a definition of legitimate owner in respect of the three types of property. This section should be read in conjunction with Section 80(5), which also makes it clear that applications for civil forfeiture should be made against “replacement” assets where proceeds have been sold for value.

(1) If, in the course of a hearing of an application for a civil forfeiture order, the court is satisfied on a balance of probabilities that any property which is the subject of the application is proceeds [*Option: instrumentalities*] or terrorist property and that a person is a legitimate owner, the court shall make any order it considers necessary to protect that person’s interest in the property.

(2) A legitimate owner means:

- (a) in the case of proceeds, a person who:
 - (i) was the rightful owner of the property before the criminal conduct occurred and was deprived of the property by the criminal conduct; or
 - (ii) acquired the property in good faith and for fair value after the criminal conduct and did not and could not reasonably have known the property was proceeds;

[Option (to use if instrumentalities are included) (b) in the case of instrumentalities, a person who has done all that can reasonably be done to prevent the property being used as an instrumentality; and]

- (c) in the case of terrorist property, a person who can satisfy the court that he would be a legitimate owner if the property were proceeds or instrumentalities.

(3) No order may be made under subsection (1) if the property is property that is unlawful for the person to possess in [insert name of State].

Drafting Note: Section 85(3) addresses property that it is unlawful to possess. For instance, if the property were a valuable firearm, a legitimate owner would not be able to claim it if he did not have a valid firearms certificate for the weapon.

Section 86. Fugitive Claims

A person who is a fugitive from justice in [insert name of State] may not appear, either personally or through a representative, in a proceeding for civil forfeiture in [insert name of State] or contest the granting of a civil forfeiture order.

Drafting Note: Section 86 provides that a person who might otherwise claim as a legitimate owner is not protected if the person is a fugitive from justice in the State where the forfeiture case is being heard. Such a person does not have standing to contest the civil forfeiture or appear in the proceeding either personally or through a representative.

Section 87. Appeals

- (1) An application to appeal against the grant, or the refusal to grant, a civil forfeiture order may be made in accordance with [insert name of State]'s rules of civil procedure.
- (2) An application to appeal against the grant or the refusal to grant, a recall, revocation or variance of a property freezing order may be made at any time while it is in force in accordance with [insert name of State]'s rules of civil procedure.

Drafting Note: Section 87 provides a simple framework for appeals against both property freezing orders and final determinations of civil forfeiture orders. Both should be determined in accordance with the State's normal rules of civil procedure. National time scales and procedural rules applying to civil appeals generally should be followed.

Section 88. Option: Limit on Purchase of Forfeited Property

No person who had possession of property or was entitled to possession of property affected by a civil forfeiture order under Section 80 immediately prior to the making of the order, nor any person acting on behalf of such a person, other than a legitimate owner, shall be entitled to purchase the property from the enforcement authority.

Drafting Note: Section 88 precludes the person who owned the property immediately before the civil forfeiture order was made from purchasing the property from the enforcement authority when the property is sold.

The provision is not an essential part of the structure of a civil forfeiture regime, but may help. The purpose of civil forfeiture is to deprive criminals of their assets, and to remove from them the trappings of their criminal activity. It thus acts as a demonstrable deterrent to others. If however, persons engaged in criminal activity are allowed to buy back their own assets at the conclusion of the proceedings, then the deterrent value is diminished, as, to the outside world, such persons remain the owner of property which might include a valuable house or car.

Authorities could also make practical arrangements, even absent such a provision, to ensure that any funding an owner provides to purchase the property is adequately demonstrated to be of lawful origin. If this is not done, the enforcement authority may be condoning further criminal conduct by accepting proceeds from other criminal conduct.

Section 89. Realisation of Forfeited Property

(1) Subject to any limits in the order for civil forfeiture granted by the court, the enforcement authority, its named representative or specified receiver or trustee under Section 84(7) may take such steps to sell, destroy or otherwise deal with property as it or he sees fit.

Drafting Note: Section 89(1) permits actions with respect to property that is the subject of a civil forfeiture order. In addition to selling the property, the enforcement agency or appropriate person may otherwise deal with it including as necessary preserve or manage it for a period, and also destroy the property. Destroying property is appropriate in a limited range of settings for instance where the property is an emblem or paraphernalia of organised crime organisation, or the property if sold could be used for further criminal conduct.

Section 89(1) describes realisation of civilly-forfeited assets from the perspective of the powers of the enforcement authority or trustee. Section 70 in Part IV describes the realisation of assets under a criminal confiscation/benefit recovery/extended benefit recovery order from the perspective of the court's actions. The two approaches should be compared and adapted to find the approach most compatible with domestic law.

(2) Subject to subsection (1) above, the enforcement authority or named representative or specified receiver or trustee must realise the value of the property vested in it by the forfeiture order, so far as practicable, in the manner best calculated to maximise the realised amount.

Drafting Note: Section 89(2) makes clear that the enforcement authority or others in whose name the property has vested must realise the forfeited property for as much as possible. The State may wish to make provision of a specific fund, as provided for in Section 97, into which the realised sums would be paid.

Drafting Note continued: There may be a few situations where the enforcement authority, representative or receiver may not want to maximize the value, for instance if property has a dual use (property that could be used for a drug lab but also for a legitimate purpose) but in such instance, an appropriate order under subsection (1) could be sought

(3) The enforcement authority or person named under Section 84(7) may incur reasonable expenditure for the purpose of realising its value.

Drafting Note: Section 89(3) grants a power to incur reasonable expenditure in delegating the sale of the property to others. While, in the case of a single house or bank account, realisation may be a simple task, where there are numerous, complex or specialised assets to sell, it may be appropriate for the enforcement authority or receiver to employ experts in the field. In such case, this provision will ensure there is authority to pay for such professional assistance.

(4) Any expenditure incurred by the enforcement authority under subsection (3) above shall be recovered from [insert name of State's designated fund].

Drafting Note: The State will have to consider the designation of a special fund to ensure that the property manager of the enforcement authority can meet such expenditures as are incurred.

(5) The proceeds of the realisation of any property forfeited as a result of a civil forfeiture order shall be paid into [insert where funds should go, for instance fund created under Section 97].

Drafting Note: Drafting authorities should make clear through Section 89(5) what the State will do with the realised funds. The State might establish a separate fund as is provided for in Section 97.

Section 90. Compensation and Protection of the Trustee

(1) If, in the case of any property in respect of which an application for a civil forfeiture order has been made, or in respect of which a property freezing order has been made at any time, the court does not in the course of the proceedings make a civil forfeiture order, the person whose property it is may make an application to the court for compensation. The person making an application must provide notice of the application to the [insert name of enforcement authority].

(2) If the court has made a decision by reason of which no forfeiture order could be made in respect of the property, the application for compensation must be made within the period of [3] months from the date of the decision, or if there is an appeal against the decision, from the date on which any proceedings on appeal are finally concluded.

(3) The court may grant an application made under this section in such amount as the court thinks reasonable having regard to the loss suffered and any other relevant circumstances.

(4) Where the court has appointed a receiver or trustee in relation to property pursuant to Sections 82(1)(c), 84(7) or 89, the receiver or trustee shall not be personally liable for any loss or claim arising out of the exercise of powers conferred upon him by the order or this Part unless the court in which the claim is made is satisfied that:

- (a) the applicant has an interest in the property in respect of which the loss or claim is made; and
- (b) the loss or claim arose by reason of the negligence or reckless or intentional misconduct of the receiver or trustee.

Drafting Note: Section 90 provides for compensation claims to be made where an action for civil forfeiture has not been successful, and for the protection of the receiver or trustee from liability.

Section 90(1) sets out the broad provision which will enable such claims to be made. It is important to remember that such claims will be possible even if there has been no substantive claim for forfeiture, but the enforcement authority has secured a property freezing order. Any interference with the property owner's rights of ownership, if not followed by an order for forfeiture, could give rise to a claim for compensation. Action by the enforcement authority should not therefore be taken lightly.

In many circumstances, even if the court does not ultimately grant an order of forfeiture, no compensation will be appropriate, because the enforcement authority will have looked after the property well and secured it in such a way that its value is retained. However, there will be circumstances where compensation may be appropriate.

Section 90(2) provides a time limit for any application for compensation. Three months is suggested as appropriate time limit but drafting authorities may wish to use a longer or shorter time.

Section 90(3) provides that it is a matter for the court to determine the level of compensation to be awarded in an appropriate case. Compensation should be just that – compensation for loss. Assuming that the enforcement authority has acted in good faith in bringing the action, there is no scope here for damages for non-monetary injury, or punitive awards.

Section 90(4) protects the receiver or trustee from liability from claims from the exercise of his powers except where he is shown to have been negligent or engaged in reckless or intentional misconduct.

Section 91. Obtaining Information from Foreign Authorities

The enforcement authority may make a request to a foreign authority for information or evidence relevant to a civil forfeiture investigation or proceeding, or the administration of a victim claim, and may enter into an agreement with such authority relating to such request(s) and the use and disclosure of any information or evidence received.

Drafting Note: Section 91 permits the enforcement authority to seek information and evidence from a foreign authority for a civil forfeiture investigation or proceeding. It is up to the foreign authority to determine whether such information or evidence can be provided and under what conditions.

Drafting authorities should consider the options available under existing laws and procedures for gathering foreign information and evidence for a civil forfeiture proceeding and decide whether this provision would be useful. If used, authorities should consider whether any coordination is necessary on a domestic basis with other parts of government for the enforcement authority to enter into agreement with or seek information from foreign authorities. Sometimes a mutual legal assistance treaty may be used; more often the civil nature of the proceeding precludes the use of such treaties.

The opposite position, that is where the State is asked to provide information to a foreign authority in connection with a civil forfeiture investigation, is addressed in Section 92 which addresses disclosure of information generally.

Section 92. Option: Disclosure of Information

Drafting Note: Section 92 is set forth as an option. This is because it may be unnecessary if there is already a basis for sharing with other government agencies, and because a provision of this kind raises critical issues that drafters must resolve regarding when data that has been gathered by various agencies and departments should be shared with other agencies and departments of government. The sample provision provides a very wide gateway for sharing. It should be considered carefully by States in connection with their domestic data sharing principles and with a recognition that such a provision would support broader effectiveness for a domestic civil forfeiture program.

Drafters should consider whether various key public authorities, as prosecutorial authorities, police, customs, human services, tax authorities etc. are able to engage in information-sharing with the enforcement authority and any limitations on this power. They should consider data protection and right of privacy principles within the jurisdiction which typically permit interference with privacy and provide for data sharing for legitimate aims subject to various protections. Since civil forfeiture is often needed and used to deal with property which criminal processes have uncovered, there should be every effort to ensure that information gathered by prosecutors may be used as a basis for civil forfeiture as long as there is no misuse of the criminal mechanisms solely to assist civil forfeiture.

Section 92(1) provides for the Director of Public Prosecutions (or the State's prosecuting authority) to provide information to the enforcement authority. Since often civil forfeiture is contemplated when a prosecution is not possible, this provision will facilitate civil investigations since the prosecuting authority is likely often to hold information that is relevant to potential actions by the enforcement authority.

(1) Information the [insert name of prosecutorial authorities, for instance, Director of Public Prosecutions] has obtained or that was obtained on its behalf in connection with the exercise of any of its functions may be disclosed to [the enforcement authority] in connection with the

exercise of any of its functions under this Part.

(2) Information [the enforcement authority] has obtained in connection with the exercise of any of its functions under this Part may be disclosed by it [notwithstanding any rules of confidentiality to the contrary] if the disclosure is for the purposes of any of the following:

- (a) consideration of and bringing of proceedings for civil forfeiture under this Part or the enforcement of any court order;*
- (b) a criminal investigation whether in [insert name of the State] or elsewhere;*
- (c) a criminal proceeding whether in [insert name of the State] or elsewhere;*
- (d) **Option:** a civil forfeiture investigation or proceeding in another jurisdiction.*

Drafting Note: Section 92(2) would permit the enforcement authority to pass information back to State prosecutorial authorities if it uncovers information relating to criminal conduct. This would apply not just within the State but elsewhere if it is for a criminal matter.

Drafting authorities may also want make such information available for purposes of a foreign civil forfeiture investigation or proceeding as set forth in Section 92(2)(d). The starting point for such outward sharing should be the principles of domestic law or practice that apply to the provision of such information or evidence in civil cases generally. The treatment of outward sharing involves consideration of a series of complex issues, including the nature of the agency that serves as the enforcement authority, an analysis of domestic data sharing and privacy protection issues, the appropriate treatment of information and evidence gathered by the enforcement authority from other domestic agencies, and foreign policy issues regarding the State's relationships with various foreign jurisdictions.

(3) Information which is held by any of the following persons may be disclosed to the enforcement authority in connection with the exercise of any of its functions under this Part: [tailor to suit the needs of the State, incorporating a list of officials determined to be appropriate, for instance police, customs, social security, tax, etc.].

Investigative Orders for Civil Forfeiture

Drafting Note: Civil Investigative Measures. Civil forfeiture cases are governed by the general civil rules within a State.

Drafting Note continued: The usual civil discovery mechanisms under State practice should be available to the enforcement authority as they pursue such cases. Some States with civil forfeiture provisions rely exclusively on such mechanisms. Other States have special provisions available to the civil enforcement authority.

If, as is typically the case, the pre-filing investigative tools available to the enforcement authority or its general access to information are limited, there will be a need for provisions as those in this Part.

For States introducing a new civil forfeiture regime, it is generally essential for some investigative measures to be introduced as part of the regime. This is because a civil litigant's ability to require that a person produce documents or provide testimony in support of the civil action is limited in time to the period after the filing of the case and is likely restricted in other ways. For instance, typically in a civil setting there is no power to search for documents or things.

Civil forfeiture actions support important public policy goals within a State. They supplement criminal confiscation in seeking to ensure that proceeds do not remain with wrong-doers. As such, they should not be equated with typical civil cases between private litigants where pre-filing investigative tools may be limited.

Sections 93-96 provide two special investigative measures for use in civil forfeiture investigations: a production order for property tracking documents (Sections 93 and 94), and a search warrant power for such documents when they are not obtainable through a production order (Sections 95 and 96). Search warrants in support of a civil case, (see both Section 95 below and Section 83, *supra*), although extraordinary tools in a civil setting, are also very important measures to ensure the effectiveness of a civil forfeiture program. Drafting authorities should consider the adoption of such provisions in the context of domestic law and practice.

Section 93. Production Order for Property Tracking Documents

Drafting Note: Section 93 is restricted to the obtaining of documents relevant to the property. Where property that is, or potentially may be, subject to an application for civil forfeiture is sought, and likely to be available only through a search followed by seizure, then the appropriate way of proceeding will be by way of a property seizure order under Section 83.

Authorities may also wish to prepare a code of practice to govern the use of these investigative powers, since the use of civil forfeiture will in most cases be a new and far-reaching remedy. Such a code could cover things such as how investigative orders are to be implemented, who should be involved, and what information is provided to the person on whom the order is served. This will of course often not be the person whose criminal conduct has led to the investigation. Allied with this might be the obligation to report periodically on the use of such powers to an appropriate authority, at least for an initial period, to ensure that the powers are being used appropriately.

(1) A production order under this section in relation to a civil forfeiture investigation is an order requiring a person to produce a document relevant in identifying, locating or quantifying

property or necessary for its transfer, hereinafter referred to as a "property tracking document," or requiring that person to give a specified person access to the material.

Drafting Note: Section 93(1) makes clear the effect of a production order. It will order a specified person either to produce specified material or to allow access to it.

(2) Where [insert name of the enforcement authority] has reasonable grounds to believe that property as specified in subsection (5) below is or may be subject to an application for a civil forfeiture order, it may apply *ex parte* and in writing to a court for an order requiring the person believed to have possession or control of a property tracking document to produce such document.

Drafting Note: Section 93(2) provides for the enforcement authority to apply writing to the court for a production order in the course of a civil forfeiture investigation. Such an investigation will have to have identified particular property as potential proceeds, terrorist property (or instrumentalities) before such an application can be made. The application will have to specify the property that is the object of the investigation (subsection (4)). Because the property has to be identified, the application for documents relating to it may not be made speculatively. However, the enforcement authority will be able to add other property to the specified property in the course of its investigation. It is not a limited list of property.

An application may be granted by the court if it is satisfied that the requirements in the remainder of the section have been met. It will be of importance to ensure that the enforcement authority can make applications for production orders *ex parte*, and that the hearings for such applications be held in private.

(3) An application under this section shall be supported by [**Variants:** an affidavit; evidence; verified statement] setting out the grounds for the application.

(4) The application must:

- (a) specify the property that is subject to the civil forfeiture application;
- (b) state that the production order is sought for the purposes of the investigation;
- (c) state that the production order relates to a specified property tracking document, or to a property tracking document of a description specified in the application; and
- (d) state that a person specified in the application appears to be in possession or control of the property tracking document.

Drafting Note: The provisions of Section 93(4) contain details about what must be included in the application. All of these elements must be included to satisfy the court that the enforcement authority has a real need for the material specified. Before a civil forfeiture investigation can begin, the enforcement authority will have to have identified particular property as potential proceeds, terrorist property (or instrumentalities). Only then can these investigative orders be sought from the court. The application will have to specify the property that is the object of the investigation.

(5) Where an application is made to the court according to this section and the court finds there are reasonable grounds to believe that specified property is or may be the subject of an application for civil forfeiture, and that a specified person has possession or control of a property tracking document relating to the specified property, it may make an order that the person produce the document to a named representative of the enforcement authority at a time and place specified in the order.

(6) Before granting an application for a production order under this section, the court must be satisfied that there are reasonable grounds for believing that:

- (a) the property said to be the subject of the civil forfeiture investigation is proceeds, [*Option: instrumentalities*] and/or terrorist property; and
- (b) the person specified in the application has control of the property tracking document specified in the application.

Drafting Note: Section 93(6)(a) creates the further precondition that the enforcement authority has to satisfy the court as to why it thinks the property which is the subject of the civil forfeiture application is indeed proceeds. This will require a narration of the investigation, and a history of the criminal conduct. Often, a civil forfeiture investigation will follow on from a criminal investigation that did not result in charges. It may be the case that the evidence that is narrated at this stage in the application will derive from that closed criminal investigation.

Section 93(6)(b) is self explanatory. It is however an important safeguard in the structure of these provisions. Its inclusion will help to prevent speculative and unnecessarily intrusive applications. Some statutory frameworks, for instance the United Kingdom's [Proceeds of Crime Act 2002](#), go further and require a showing that a property tracking document will likely be of substantial value to the investigation.

(7) A production order granted under this section does not grant right of entry to premises.

Drafting Note: Section 93(7) makes it clear that the production order does not mean there is a right of entry to premises. If it is thought that the person holding the material will not produce or grant access to the material, then a production order should not be sought, but a search warrant under Section 95 below should be obtained.

(8) A production order may be made subject to such other conditions as the court may impose.

Drafting Note: Section 93(8) deals with how the order should be executed. The State may well have its own pre-existing rules about such matters. Safeguards can be included, for instance, a time limit on the operation of the order.

Section 94. Further Provisions Relating to Production Orders for Property Tracking Documents

Drafting Note: Section 94 sets forth additional provisions relating to production orders. Many of these will be self explanatory. Equally, the State may have in its own code of procedure or particular conditions which it wishes to impose in such cases. The provisions in Section 94 are likely to be thought to be the minimum necessary in all cases, but it will be a matter for discussion in each State.

(1) A person may not refuse to produce documents ordered to be produced under this section on the ground that:

- (a) the document might tend to incriminate the person or make the person liable to a penalty; or
- (b) the production of the document would be in breach of an obligation (whether imposed by a law of [insert name of State] or otherwise) of the person not to disclose either the existence or contents, or both, of the document.

but a production order granted under this Part does not require a person to produce or give access to any items subject to legal privilege.

Drafting Note: Section 94(1) makes it clear that the grounds for refusal to produce documents in response to a production order will be very limited. There will, however, never be an obligation to produce material subject to legal privilege. The concept is fairly widely recognised, but it may be thought helpful to add further provisions here if necessary to define the particular circumstances in which documents may or may not be considered to be covered by the definition of privilege. For example, merely because documents have been drawn up by a lawyer will not mean that they are subject to an exemption.

(2) A production order granted under this Part has effect in spite of any restriction on the disclosure of information however imposed.

Drafting Note: Section 94(2) addresses data protection or other confidentiality restrictions that might be viewed as applying to the material sought. Drafting authorities should consider whether there are particular circumstances within a State that should be addressed specifically in this subsection.

(3) The person to whom documents are produced under this section may:

- (a) inspect the documents; and
- (b) make copies of the documents; or
- (c) retain the documents for as long as is reasonably necessary for the purposes of this Part provided that a copy of the document is made available to the person producing it if requested, and that the document is eventually returned to the person producing it, or reasonable access is provided to the records.

Drafting Note: Section 94(3) deals with practical issues. It suggests ways in which the production order can be executed, and how the officer of the enforcement authority may deal with documents. Instead of actually handing over the material sought, an officer may, if he prefers, either examine them *in situ*, or seek copies of the originals, or actually seize them.

Bank documents are a good example of a case where copies typically will be sufficient. There may be a need to have an additional provision about the cost of such copying. If there are many pages, as might well be the case with bank documentation, cost could be a material factor. Responsibility for costs should be clearly established either through additional language in this section or elsewhere in State regulation.

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Section 94(3) will also allow the enforcement authority to retain material until the purpose for which it was produced is served. It also makes clear that the material should eventually be handed back to its owner. Enforcement authorities should therefore have clear procedures in place to enable them to deal appropriately at the conclusion of an investigation with all the material gathered in an investigation.

(4) If any of the material specified in an application for a production order consists of information contained in a computer, the production order has effect as an order to produce the material in a form in which it can be taken away, and in which it is visible and legible.

Drafting Note: Many documents today are held in computerised form. Section 94(4) is a simple provision making it clear that where a production order is served on a person who has retained documents in computer format, the enforcement authority can require that the documents be produced in hard copy.

Drafting Note continued: There may be other provisions necessary here dealing with computerised records, for example, the admissibility of computerised material and the issue of copies as opposed to originals. Drafting authorities will have to consider what additional aspects should also be included.

(5) A production order may be made in relation to material in the possession or control of [*Variant 1:* a government department; *Variant 2:* [insert names of selected government departments]], and may include material which would otherwise be regarded as confidential.

Drafting Note: Section 94(5) makes it clear that production orders can be sought where the holder of the material is a government department or alternatively such government departments as the drafters include. In a civil forfeiture investigation, government records often form an essential part of the investigation, particularly to check the validity of assertions made about income.

States should consider this power in the context of their national laws that limit the disclosure of information, in particular those that protect tax information and other information subject to official secrets, those that address privilege, and in the context of public policy considerations regarding reasonable access to government records. It is best that a provision be adopted that is geared towards permitting the free flow of information in support of civil forfeiture actions.

In some States, it may not be appropriate to have production orders made against government departments. In such cases, drafters should then ensure there is access, to the full extent public policy decisions support access, through some other means.

(6) The court may discharge or vary the order in accordance with applicable procedural rules.

Drafting Note: Despite the best endeavours of all parties, there will be occasions when a production order has to be varied or discharged. Section 94(6) makes it clear that the court may use its usual domestic rules in dealing with this. There will probably be an existing code with procedural provisions that may be used. Alternatively, simple domestic rules could be articulated here about how such variation and discharge applications should be dealt with.

Section 95. Search Warrants for Property Tracking Documents

Drafting Note: Apart from production orders, the other main investigative measure that will be important in conducting civil forfeiture investigations will be the search warrant. This provision deals with search warrants seeking property tracking documents. Section 83 is the provision that governs a search for, and seizure of, specified property that constitutes proceeds, terrorist property or, if the option is chosen, instrumentalities.

Drafting Note continued: A search warrant as envisioned in this section is a much more invasive measure than a production order. There will be a need for strict controls surrounding its use. But the search warrant will probably be well known in the State as an existing investigative measure for other investigations. It may be helpful here if the State has in mind the conditions that govern the operation of the search warrant in these other cases, and ensure that this provision is consistent with those measures.

(1) Where [insert name of the enforcement authority] has reasonable grounds to believe that specified property is or may be subject to an application for a civil forfeiture order, it may apply *ex parte* to the court for a search warrant for property tracking documents. The court may grant such a warrant if it is satisfied that each of the requirements for the making of the warrant as specified in this section is fulfilled.

Drafting Note: Section 95(1) provides that the enforcement authority may apply for a search warrant for property tracking documents where it is engaged in a civil forfeiture investigation and has identified particular property that may be subject to forfeiture. The court then has to be satisfied of the matters set out later in the section before exercising its discretion as to whether it should grant a warrant.

(2) An application under this section shall be in writing and shall be supported by [*Variants:* an affidavit; evidence; verified statement] setting out the grounds for the application.

Drafting Note: As with a production order application, the application for the search warrant should be in prescribed form. This is set out in Section 95(2) but will vary according to the normal rules of procedure for such matters in the State.

(3) A search warrant in relation to a civil forfeiture investigation is an order authorising a person named in the warrant to enter (using such force as is necessary) and search premises specified in the application, and further authorising that person to seize and retain any property tracking document specified in the warrant which is found there and which is likely to be of substantial value to the investigation.

Drafting Note: Section 95(3) sets out what can be searched for. This will be a property tracking document that is likely to assist in the investigation, for example, a document relating to the acquisition of a specific piece of property. Where it is suspected that there will be material on the premises that actually could itself be subject to an application for forfeiture, that is, proceeds, instrumentalities or terrorist property, then, as noted above, an application under Section 83 will be the appropriate way to proceed.

(4) Before granting an application for a search warrant under this section, the court must be satisfied that there are reasonable grounds for believing that the property said to be the subject of the civil forfeiture investigation is proceeds or terrorist property [*Option:* *and/or instrumentalities*]. The court must also be satisfied that there are reasonable grounds for believing that the document specified in the warrant is within the premises.

Drafting Note: Section 95(4) again makes it clear that the fundamental prerequisite for this investigative order, as with the production order, is that specified property is proceeds or terrorist property [or instrumentalities]. The court will also have to be satisfied by the enforcement authority through its application that its belief that the specified property tracking documents are on the premises is well founded. This will all have to be narrated in the application in the form acceptable within the State.

(5) Before granting an application for a search warrant under this section, the court must be satisfied that:

- (a) a production order has been given in respect of the document and has not been complied with; or
- (b) a production order in respect of the document would be unlikely to be effective or;
- (c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the person authorised does not gain immediate access to the document without any notice to any person; or
- (d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained; and
- (e) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the documents identified in (1) above, and note they must be met].

Drafting Note: In order to ensure that a search warrant is only used exceptionally, and not as a routine procedure, Section 95(5) makes it clear that it should only be available where the use of a production order is not possible for whatever reason. It may be that a production order has already been tried, and has not been complied with, or it may be that the enforcement authority has a well-founded belief that the use of a production order would not produce a successful result. In such a case, the court might be satisfied that a search warrant would be appropriate. It will be helpful to include in the application the specific reasons why it is thought that a production order would not be appropriate.

Section 96. Further Provisions Relating to Search Warrants

Drafting Note: Drafting authorities will have the opportunity in this section to introduce the rules it considers necessary to govern the application for, and execution of, search warrants sought under Section 95.

Drafting Note continued: Section 96 replicates to a large extent the provisions in the section containing further provisions about production orders, and the same considerations will apply here. In particular it should be noted drafting authorities should consider closely which provisions they deem essential. There may be other safeguards considered necessary. These should either be included here, or may be incorporated in the rules of procedure of the court. Also in this section are some fundamental ideas, such as the prohibition from seizing items subject to legal privilege (subsection (2)) and a provision about computerised material (subsection (4)).

(1) A search warrant under Section 95 may only be granted to officers authorised by [insert name of the enforcement authority] to carry out searches. If the enforcement authority believes that the execution of an order may give rise to a breach of the peace, it may request that the officer named in the warrant be accompanied by a police officer who will assist in execution of the order.

Drafting Note: Section 96(1) makes it clear that the search power should only be available to properly-authorized members of the enforcement authority. In some States, the enforcement authority will be able to use the resources of police forces, while in others there will be civilian investigators. Whichever course is adopted, it is essential, to safeguard the propriety of this invasive measure, that the officers carrying out the search are properly trained. The term “authorised” implies that such authorisation will only be given where adequate training has been undertaken and completed.

(2) A search warrant granted under Section 95 does not confer the right to seize any items subject to legal privilege.

(3) Property tracking documents seized under Section 95 may be retained for as long as is reasonably necessary for the purposes of this Act provided that a copies of the documents are made available to the person from whom they were seized within (insert number of days) of the seizure if requested.

(4) A search warrant authorises the person executing it to require any information which is held in a computer to be produced in a form in which it can be taken away, and in which it is visible and legible.

(5) If during the course of searching under an order granted under Section 95, the officer named in the warrant finds a property tracking document [**Option:** *or any thing*] that he believes on reasonable grounds:

(a) is of a kind which could have been included in the order had its existence, or its existence in that place, been known of at the time of application for the order; or

[**Option:** *(b) is of a kind which could have been included in an order under Section 83 had its existence or its existence in that place, been known at the time of the application for the order; or*]

[**Option:** *(c) will afford evidence as to the commission of an offence;*]

he may seize that property tracking document [*Option: or thing*] and the seizure order shall be deemed to authorise such seizure.

Drafting Note: Section 96(5) deals with the situation where the officer, when searching under the authority of a warrant granted under Section 95, unexpectedly discovers additional property tracking documents, other proceeds or terrorist property relevant in the proceeding, or evidence of the commission of any (other) offence at the premises.

Under Section 96(5), the officer may seize the additional property tracking document (subsection (a)).

Section 96(5) (b) and (c) extend the incidental seizure power further. They are set forth as options. Drafting authorities will have to decide whether, having regard to the legal framework within the State, they should be adopted and how they should be structured.

Factors to be considered include the impact of any use of civil enforcement authority personnel that lack police powers to execute the search and whether the approach is consistent with State's general approach to extensions of seizure authority.

Section 96(5)(b) covers the situation where the officer is searching for specified documents, and finds, for example, a valuable piece of jewellery which, had he known of before, he would have included in a separate application for seizure under Section 83. Rather than leave the item *in situ*, and risk its subsequent loss, he is authorised under this provision to seize it as if it had been included in the warrant.

Section 96(5)(c) covers the more complex situation where what is discovered unexpectedly is not an item which may itself be liable to civil forfeiture, but evidence of a completely separate offence. This is especially sensitive if the officer executing the civil search is not a police officer, since there will not be police powers of seizure to fall back on. Drafting authorities should consider how to deal with such a discovery by a non-police enforcement authority of evidence of the commission of another offence, for instance illegal substances.

Provisions on disclosure of information under Section 92 could usefully be used here to enable the enforcement authority to give evidence of the discovery to the police. The problem should not arise if the enforcement authority is staffed by police officers.

(6) Rules of court may be made to govern the issuing and execution of search warrants.

Part VIII: Recovered Assets Fund

Section 97. Establishment of Fund

(1) There is hereby established in the accounts of [name of State] an account to be known as [insert name of fund, for instance, the (name State)'s Recovered Assets Fund].

(2) The [insert name of authority, for instance, Minister of Justice] shall issue regulations for implementation of the provisions of this Part.

Section 98. Receipts and Disbursements

(1) There shall be credited to the [insert name of Fund]:

- (a) all moneys derived from the fulfilment of confiscation, benefit recovery, [*Option: extended benefit recovery*] and civil forfeiture orders and from settlements of confiscation, recovery and forfeiture claims;
- (b) any sums of money allocated to the [insert name of Fund] from time to time by [*Variants: legislative or parliamentary*] appropriation;
- (c) any voluntary payment, grant or gift made by any person for the purposes of the [insert name of Fund];
- (d) any income derived from the investment of any amounts that are credited to the [insert name of Fund]; and
- (e) any sharing of confiscated or forfeited property and funds received from other States.

(2) [Insert authority, for instance, the Minister of Justice] may authorise payments out of the [insert name of Fund] to:

- (a) compensate victims who suffer losses as a result of offences, criminal conduct or terrorism;
- (b) pay expenses relating to the recovery, management and disposition of property under the provisions of this Act, including mortgages and liens against relevant property, and the fees of receivers, trustees, managers or other professionals providing assistance;
- (c) share recovered property with foreign States;
- (d) pay third parties for interests in property as appropriate;
- (e) pay compensation ordered by a court pursuant to [insert reference to provisions, here Sections 72 and 90];

- (f) enable the appropriate law enforcement agencies to continue to address [serious offences or specified offences] and terrorism;
- (g) assist in [insert societal goals, e.g. the rehabilitation of drug users; public education regarding the dangers of drug abuse]; and
- (h) pay the costs associated with the administration of the [insert name of Fund], including the costs of external audits.

Drafting Note: A State may conclude that one use for forfeited assets is distribution to domestic law enforcement agencies. If so, care should be taken to ensure that the program is carefully thought through and monitored. Otherwise, issues could arise in individual cases regarding whether the prospect of receiving a share of recovered assets has in some way compromised the broader criminal justice considerations that underlie law enforcement activities.

Section 99. Annual Report and Audit

(1) The [Minister of Justice] shall send a report that shall be made publicly available to [legislative body; parliament] not later than [insert time period] from the [end of the fiscal year] detailing:

- (a) the amounts credited to the [insert name of Fund];
- (b) the investments made with the amounts credited to the [insert name of Fund];
and
- (c) the payments made from the [insert name of Fund] including the specific purpose for which payments were made and to whom.

(2) The [Minister of Justice] shall have an annual audit conducted [by external auditors] of disbursements into and out of [insert name of Fund].

Annex I

MODEL [*DECREE, REGULATION*] ON THE FINANCIAL INTELLIGENCE UNIT ISSUED FOR PURPOSES OF APPLICATION OF SECTION OF [*Insert Name of Law*]

Organization

Section 1

The financial intelligence unit established under Section of the [*insert name of law*] shall have [*Option: autonomy over the use of its budget and*] independent decision-making authority over matters within its responsibility.

Section 2

The financial intelligence unit shall be composed of suitably qualified staff [*Option: with expertise particularly in the fields of finance, banking, law, information processing, customs or police investigations*] and may be made available by Government agencies. It may also comprise liaison officers responsible for cooperation with the other administrations.

Section 3

The head, experts, liaison officers and other staff of the financial intelligence unit may not concurrently hold a position in any of the financial institutions or designated non-financial businesses and professions referred to [*insert name of law*]. They shall not hold any kind of office, or undertake an assignment or perform an activity that might affect the independence of their position. [*Option: Law enforcement officers appointed to posts in the financial intelligence unit shall cease to exercise any investigatory powers held by them in their former employment.*]

Operation

Section 4

The reports required of the financial institutions and designated non-financial businesses and professions shall be sent to the financial intelligence unit by any rapid means of communication. They shall, where applicable, be confirmed in writing and contain the identity and address of the reporting party, the customer or the beneficial owner and, where applicable, the beneficiary of the transaction and other persons involved in the transaction or events, and shall indicate the nature and description of the transaction or events/activity and, in the case of a transaction, the amount, transaction date and time, the account numbers and any other financial institutions and designated non-financial businesses and professions involved, [*Option: if applicable add: the time within which the operation is to be carried out or the reason why its execution cannot be deferred.*]

Section 5

The financial intelligence unit shall, in conformity with the laws and regulations on the protection of privacy and on computerized databases, operate a database containing all relevant

information concerning suspicious transaction reports and other information as provided for under the aforementioned law and by this [*decree, regulation*], the transactions carried out and the persons undertaking the operations, whether directly or through intermediaries.

Section 6

An annual report shall be drawn up by the financial intelligence unit and submitted to:

Variant 1: the Government

Variant 2: the Parliament

Variant 3: the Minister of Justice, the Minister of Finance and other competent authorities.

The report shall provide an overall analysis and evaluation of the reports received and of money laundering and financing of terrorism trends.

[Option: Operating budget

Section 7

Each year, the financial intelligence unit shall establish its budget for the following year, subject to the limits fixed by [name of competent minister]