

Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime

Commonwealth Secretariat



The Commonwealth



UNODC

United Nations Office on Drugs and Crime



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Preface

These model legislative provisions relating to money laundering, terrorism financing, proceeds of crime, civil forfeiture and sanctions 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).

The model provisions form a starting point for states to evaluate the measures that should be incorporated into their domestic law to prevent, detect and effectively sanction money laundering and terrorism financing and to recover the proceeds of crime, with the overall objective of maintaining compliance with the revised Financial Action Task Force (FATF) Recommendations.

Using the model legislative provisions

The model legislative provisions aim to assist states in reviewing or updating their legislative framework so that it conforms with international standards. The model provisions revise and update the Common Law Model Provisions Joint Project of the IMF, UNODC and the Commonwealth Secretariat of April 2009 and are based upon the relevant international instruments concerning money laundering and terrorism financing, including confiscation and forfeiture, as set out in the FATF 40 Recommendations of 2012 and FATF Best Practices.

The model legislative provisions now include at Part XI legislative provisions for implementing United Nations (UN) financial sanctions under the Al-Qaida and 1988 sanctions regimes. It should be borne in mind that there are also United Nations Security Council Resolutions (UNSCRs) related to the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing which, under FATF Recommendation 7, require implementation in the same manner.

Jurisdictions considering these legislative provisions should take care to adapt the underlying concepts and specific language to accord with constitutional and fundamental legal principles in their systems and to ensure that the provisions are compatible with other legal concepts and existing legislation. These provisions can be supplemented with additional measures that jurisdictions consider are suited to recovering the proceeds of crime, money laundering and terrorism financing in the national context.

The various parts of the model legislative provisions are intended to be free-standing modular units, although there is a degree of interdependence. Taken together they present a comprehensive legal framework. Definitions appear at the beginning of each part. If only selected parts are used, adjustments to definitions may be necessary.

The model legislative provisions provide for the criminalisation of money laundering and terrorism financing and related offences, for the recovery of proceeds and instrumentalities of crime, for preventive and investigative measures, for the establishment of a financial intelligence unit (FIU), for the detection of cross-border transportation of cash and bearer negotiable instruments, for the implementation of international obligations in relation to financial sanctions, and for ancillary purposes. The model legislative provisions also set out two separate mechanisms for depriving criminals of the proceeds and instrumentalities of crime: first, through confiscation following a criminal conviction; and, second, through non-conviction-based measures pursuant to civil process, also referred to as civil forfeiture.

However, the scope of these model legislative provisions does not extend to the following FATF 40 Recommendations:

- (i) FATF Recommendation 6 pertaining to the requirements under UNSCR 1373 and successor resolutions to apply targeted financial sanctions related to terrorism and terrorism financing;
- (ii) FATF Recommendation 7 pertaining to targeted financial sanctions related to proliferation of weapons of mass destruction;
- (iii) FATF Recommendations 24 and 25 on transparency of legal persons and legal arrangements;
- (iv) FATF Recommendation 8 relating to non-profit organisations;
- (v) FATF Recommendation 14 pertaining to money and value transfer services; and
- (vi) a comprehensive framework for mutual legal assistance and extradition as required under FATF Recommendations 36–40.

Included, as an annex, is a suggested constitution for an FIU.

These model legislative provisions also include several features to assist drafters to understand the concepts and to assist in their consideration of the various alternatives:

- ‘Drafting notes’ provide explanations of selected provisions and suggest background, context, good practice and variations.
- 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 italicised 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. Each jurisdiction will have its own time period norms, which should be incorporated into these model provisions.
- A number of measures require the setting of thresholds above which supervisory and enforcement measures preventing currency and/or cash misuse ought to apply. These are referred to in the provisions as ‘the designated amount’. Setting the

correct threshold level is critical and individual to each jurisdiction; it necessarily depends on cultural behaviour, commercial practices and an assessment of risk. Where values are given, they are for the purposes of practical example only, leaving a margin of discretion for the drafter. It is strongly recommended that states take note of the current relevant FATF Recommendation when setting the right threshold.

Experts, including participants from the Commonwealth Secretariat, the IMF and the UNODC, met in London between 2013 and 2015 and updated the model legislative provisions. While considerable effort was made to avoid inconsistencies and drafting errors, a review of the model legislative provisions by drafting authorities as well as the comparisons that are likely to take place with existing legislation and experience gained through actual use of these or similar provisions are all likely to lead to suggestions for further adjustments and change. Comments and suggestions and an active participation by users of the model legislative provisions are welcome in this endeavour, and should be directed to:

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International Monetary Fund	amlcft@imf.org
United Nations Office on Drugs and Crime	gpml@unodc.org

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The *Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime* is a product of a collaboration between the Commonwealth Secretariat, the United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF). These model provisions were first developed by a group of experts drawn from these organisations in April 2009. Since that time, the Financial Action Task Force's (FATF) 40 Recommendations have been revised, guidance notes for a risk-based approach to virtual currencies have been published by FATF, and jurisprudence on money laundering, terrorism financing, proceeds of crime and civil forfeiture has evolved. These developments necessitated the establishment of a Commonwealth Revision Working Group of the partners, who, in 2012 with the assistance of some individual and government experts and under the Chairmanship of Andrew Mitchell QC, undertook a comprehensive review of the model provisions.

This publication is the revised and updated version of the 2009 edition.

The Secretariat wishes to acknowledge with profound gratitude the efforts of all those who have contributed to the development and the subsequent revision of the model provisions, with particular reference to UNODC, whose unflinching supports and guidance led to the 2009 publication and this revised edition; the IMF, whose invaluable and painstaking scrutiny helped to develop both the original and revised versions; and the staff of the Secretariat's Rule of Law Division (formerly the Legal and Constitutional Affairs Division), for their technical expertise and organisational ability in superintending and directing the affairs of the working groups that saw to the development of the original and revised versions.

This acknowledgement would be incomplete without the specific mention of Andrew Mitchell QC, who chaired the working group that revised the model provisions; Jeff Simser, Legal Director at the Ministry of the Attorney General, Canada, who was a member of the original team that drafted the 2009 version and also of the Revision Working Group; Lorna Harris, who, as a representative of the United Kingdom Home Office, participated as an expert in the first edition, and, as a consultant to the IMF, in the Revision Working Group; Michiel van Dyk, Anti-Money Laundering Advisor, the Global Programme against Money Laundering, Proceeds of Crime and the Financing of Terrorism (GPML), UNODC, who participated as an expert and as the representative of the UNODC for both the first edition and the Revision Working Group; Richard Chinner, Legal Advisor in the Assets Forfeiture Unit of the National Prosecuting Authority of South Africa; and the following individual experts: Mr Faisal Osman, Barrister and counsel in the Chambers of Andrew Mitchell QC;

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List of abbreviations

AML/CFT	anti-money laundering and countering financing of terrorism
CDD	customer due diligence
DNFBP	designated non-financial business or profession
EOT	Assets Freeze Explanation of Terms Paper
FATF	Financial Action Task Force
FIU	financial intelligence unit
IMF	International Monetary Fund
PEP	politically exposed person
SRB	self-regulated body
TCSP	trust and company service provider
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution

Part I

Preliminary

An Act to Criminalise Money Laundering and Terrorism Financing, to Establish Preventive Measures to Combat Money Laundering and Terrorism Financing, and to Recover the Proceeds of Crime, Instrumentalities and Terrorist Property

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

Drafting note: This title will have to be amended if only selected parts of these model legislative provisions are used, so that the title reflects the actual content.

Section 1 Extent, Commencement, Application and Interpretation

This Act makes provision for the criminalisation of money laundering and terrorism financing and related offences, for the recovery of proceeds and instrumentalities of crime, for preventive and investigative measures, for the establishment of the Financial Intelligence Unit (FIU), for the detection of cross-border transportation of cash and bearer negotiable instruments, for the implementation of international obligations in relation to financial sanctions, and for ancillary purposes. This Act shall extend throughout [insert name of jurisdiction].

This Act shall come into force on [insert date of enforcement].

- (1) This Act applies notwithstanding any other law.
- (2) In this Act, definitions provided for in any Part shall apply to the whole Act notwithstanding that the definition is within a particular Part.
- (3) In this Act the word ‘includes’ is a term of specification and not of 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: This provision eliminates the need to set out certain definitions multiple times. Should drafters opt to leave out one or more parts of the model legislative provisions, they must ensure that any definitions within those parts are brought forward into Section 1 unless such definitions are relevant only to the deleted part.

Section 2 National Cooperative Body

- (1) A National Cooperative Body for Combating Money Laundering and Terrorism Financing shall be established, and shall comprise the following members:
 - (a) a representative of the [insert relevant authority]
 - (b) a representative of the [insert relevant authority]
 - (c) ...
 - (d) ...
- (2) The National Cooperative Body established under this Section shall have the following functions:
 - (a) to coordinate measures to identify, assess and understand the national money laundering and terrorism financing risks;
 - (b) to coordinate the development, regular review and implementation of national policies and activities to combat money laundering, terrorism financing and the financing of proliferation of weapons of mass destruction;
 - (c) to collect and analyse statistics and other information from competent authorities to assess the effectiveness of the national anti-money laundering and countering financing of terrorism (AML/CFT) system;
 - (d) ...
- (3) The National Cooperative Body shall issue regulations to set up its internal structure and work procedures.

Drafting note: Under the revised FATF standard, jurisdictions are required to have a designated authority or other coordination mechanism responsible for coordinating the development and implementation of national policies and activities on AML/CFT and for combating the financing of proliferation of weapons of mass destruction (FATF Recommendation 2); and to designate an authority or mechanisms to coordinate the national money laundering and terrorism financing risk assessment (FATF Recommendation 1). Both recommendations suggest that the designation of a competent authority as reflected in this section is one possible avenue for jurisdictions to comply with the relevant requirements.

The language under Section 2 may be set out in primary law, as suggested in this model legislative provision, or in a regulation or administrative decision. In any case, the cooperative body should comprise representatives of all relevant authorities, including prosecution, law enforcement, all supervisory authorities, customs, judiciary and, where useful, other authorities such as the Ministry of Finance, the Ministry of Justice, etc. The powers given to the cooperative body in Section 2(2) could be expanded to include tasks such as coordination of the country's mutual evaluation or other tasks. Operational and procedural aspects of the cooperative body's work may be addressed through regulation issued under Section 2(3).

Part II

Preventive Measures

Drafting note: Part II sets out preventive measures to be applied by financial institutions and designated non-financial businesses and professions (DNFBPs) to combat money laundering and terrorism financing. There is reference in the text to ‘this Act’ as it is envisaged that Part II could be adopted as a separate act or together with other parts of the model legislative provisions. Drafting authorities should review the use of the term in the provisions.

The FATF standard generally grants jurisdictions discretion in choosing the legal tool for introducing preventive measures – whether through primary or secondary legislation, or other enforceable means. Certain aspects of the FATF standards, however, must be set out in primary legislation, namely:

- (1) the principle of undertaking customer due diligence (CDD);
- (2) record-keeping requirements for transactions and CDD information; and
- (3) the obligation to promptly report suspicious transactions to the FIU.

It is important to note that the provisions in this model legislation not only introduce the general obligations for financial institution/DNFBPs to apply due diligence, keep records and file suspicious transaction reports (STRs), but prescribe these obligations in great detail. Drafting authorities may thus choose to include some of these detailed provisions in secondary legislation, regulations or other enforceable instruments rather than to address them through primary legislation. This approach would provide for a greater level of flexibility should an amendment to the relevant requirements become necessary.

Section 3 Definitions

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

Account means any facility or arrangement by which a financial institution or a DNFBP does any of the following:

- (a) accepts deposits of funds;
- (b) allows withdrawals or transfers of funds;
- (c) pays negotiable or transferable instruments or other orders, or collects negotiable or transferable instruments or payment orders on behalf of any other person; or
- (d) makes any facility or arrangement for a safety deposit box or for any other form of safe deposit.

Accountable person means a financial institution or a DNFBP.

Bearer negotiable instrument means any monetary instrument in bearer form, such as travellers' cheques; negotiable instruments, including cheques, promissory notes and money orders, that are in bearer form, endorsed without restriction, made out to a fictitious payee or otherwise in such form that title thereto passes upon delivery; or incomplete instruments such as cheques, promissory notes and money orders, signed but with the payee's name omitted.

Beneficial owner means a natural person who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted, or any person who exercises effective control over a legal person or legal arrangement.

Business relationship means an association between individuals and/or companies entered into for any commercial purpose.

Correspondent relationship means the provision of banking, payment, cash management, international wire transfers, cheque clearing, payable through accounts, foreign exchange, securities transactions, funds transfer or similar services by one financial institution (the correspondent institution) to another financial institution (the respondent institution).

Drafting note: Under the revised FATF standard the requirements for correspondent banking relationships were expanded to cover also 'other, similar relationships', for example those established for securities transactions or funds transfers. The definition should reflect this change.

For further information on correspondent banking see *The Wolfsberg Group – Wolfsberg Anti-Money Laundering Principles for Correspondent Banking 2014*.

Currency or money means coin and paper money of any jurisdiction that is designated as legal tender or is customarily used and accepted as a medium of exchange, including virtual currency as a means of payment.

Drafting note: The definition of currency should be drafted to cover both domestic and foreign currency and should include a reference to virtual currencies. During the process of updating the model legislative provisions, the FATF Guidance on Virtual Currencies was published. In brief, the FATF guidance adopts the approach that AML/CFT frameworks may indirectly apply to persons using virtual currencies for commercial purposes when they interact with the established finance system. The FATF guidance makes clear that persons and institutions that facilitate interaction or exchange between virtual currency and the established finance system should be subject to existing AML/CFT regimes.

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 in (a) to (d) above; or
- (f) such other person as may be prescribed by regulation by the [minister/competent authority].

DNFBPs means any of the following:

- (a) casinos, including internet casinos and ship-based casinos;
- (b) real estate agents;
- (c) dealers in precious metals and dealers in precious stones when they engage in any currency transaction equal to or above [designated amount];

Drafting note: The FATF-designated threshold for dealers in precious metals and dealers in precious stones is EUR/US\$5,000. Jurisdictions may, however, set a lower threshold if this is deemed necessary in the specific jurisdictional context to properly mitigate the risks of money laundering or terrorism financing through these sectors.

- (d) lawyers, notaries, other 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 funds or securities;
 - (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 legal arrangements, and buying and selling of business entities;

Drafting note: Drafting authorities shall ensure that the definition under (d) is sufficiently comprehensive to include any regulated professionally-qualified individual undertaking transactional work.

- (e) trust and company service providers (TCSPs) not otherwise covered by this Act which, as a business, prepare for or carry out or otherwise provide the following services or transactions 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 legal arrangement;
 - (iv) acting as, or arranging for another person to act as, a trustee of an express trust or performing the equivalent function for another, similar form of legal arrangement;
 - (v) acting as, or arranging for another person to act as, a nominee shareholder for another person;
- (f) such other businesses and professions as may be prescribed by regulation by the [insert name of minister/competent authority].

Drafting note: Businesses and professions listed under items (a) to (e) are covered by the FATF definition DNFBPs and thus must be covered by jurisdictions' AML/CFT requirements.

Item (f) of the definition includes the possibility of designating additional categories of DNFBPs if a particular jurisdiction identifies other service providers that either act as gatekeepers to the financial sector or may be used for money laundering or terrorism financing purposes. Examples of such additional categories are gaming and gambling houses, auction houses and lotteries, as well as businesses that sell high-value goods such as car dealerships. Although the FATF standard does not mandate the expansion of AML/CFT frameworks beyond those categories specifically covered under items (a) to (e) above, jurisdictions may nevertheless find it necessary or useful to do so. In making this policy choice, however, the need to mitigate existing risks needs to be carefully balanced against the oftentimes limited resources available to governments and individual authorities to ensure effective implementation of the law.

For subsection (e) relating to TCSPs, the phrase 'another, similar form of legal arrangement' is included to cover legal arrangements such as the administration of a Stiftung under German, Austrian, Swiss or Liechtenstein law. Although such structures are not used in common law jurisdictions, TCSPs in common law jurisdictions may be involved in forming or advising on or administering such arrangements.

Document means a record of information kept in any form, including in electronic format.

Financial institution means any person that conducts as a business one or more of the following activities or operations 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) money or value transfer services;
- (e) issuing and managing means of payment, including, but not limited to, credit and debit cards, cheques, 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) otherwise 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;
- (m) money changing; and
- (n) carrying on such other activity, business or operation as prescribed by regulation by the minister/competent authority.

Drafting note: The term 'financial institution' can be defined by describing either the types of financial activities or the types of businesses. The model provision above adopts the former approach. One important advantage to defining the term through reference to the types of financial activities, as the recommended language suggests, is that the definition also covers persons engaged

(continued)

(continued)

in the relevant activity but not registered or otherwise formally recognised (for instance, an unregistered bank).

Whichever approach is chosen, it is important that all persons or businesses that perform any of the activities described above be covered by the statutory definition of 'financial institution'. If authorities decide to define the term through reference to the types of businesses, the list should contain a catch-all provision to capture any other entities that carry out the functions noted in the list above. The relevant definition may read along the following lines:

- (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) cheque 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 person that conducts as a business one or more of the following activities for or on behalf of a customer: (authorities should insert a list compatible with the FATF 40 list of functions); or
- (p) any such other activity, business or operation as prescribed by regulation by the minister/competent authority.

Funds or property means assets, economic resources, property of every kind, whether corporeal or incorporeal, tangible or intangible, movable or immovable, however acquired, wherever located, legal documents or instruments in any form, electronic or digital, evidencing title to, or interest in, such assets, economic resources or property, including but not limited to currency, bank credits, deposits and other financial

resources, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit, and any interest in, dividends or other income on or value accruing from or generated by, in full or in part, any such assets, economic resources or property.

Drafting note: The definition of 'property' or 'funds' combines all elements of the definitions of 'property' and 'funds or other assets' from the glossary to the FATF 40 Recommendations; of 'property' as set out in the Vienna, Palermo and Merida Conventions; and of 'funds' as set out in the Terrorism Financing Convention. Thus, the definition comprehensively covers the requirements under all these instruments.

Funds transfer: see **Wire transfer**.

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 IV, Section 36.

Originator means the person who allows a wire or funds transfer from his/her account, or, where there is no account, the person that places the order with a financial institution to perform a wire or funds transfer.

Payable through account means a correspondent account used directly by a third-party customer of the respondent 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 (PEP) means a domestic PEP, a foreign PEP or a person who has been entrusted with a prominent function by an international organisation, and includes family members and close associates of any of PEP.

A **domestic PEP** is an individual who is or has been entrusted domestically with a prominent public function, for example head of state or of government, senior politician, senior government, judicial or military official, senior executive of a state-owned corporation or important political party official.

A **foreign PEP** is an individual who is or has been entrusted with a prominent public function by a foreign jurisdiction, for example head of state or of government, senior politician, senior government, judicial or military official, senior executive of a state-owned corporation, or important political party official.

Persons who have been entrusted with a prominent function by an international organisation are members of senior management of such an organisation, including directors, deputy directors and members of the board or equivalent functions.

Drafting note: The examples of who qualifies as a PEP are likely to be subject to particular local variations, depending on the political and social structures of a jurisdiction, but must always include any person who has been elected or otherwise appointed to a position that allows him or her to influence or direct how a state contracts or invests, or how a state's resources are applied. The term is not intended to cover middle-ranking or more junior individuals in the categories mentioned in the definitions.

The FATF standard requires that the definition of PEPs shall also apply to family members and close associates but does not define the terms 'family members' or 'close associates.' It is thus up to each jurisdiction to define these terms based on local customs and social structures. Typically jurisdictions would cover within the definition of 'family member' any of the following: the spouse or any person considered equivalent to the spouse; children and their spouses or persons considered equivalent to their spouse; parents; siblings; and cousins. The term 'close associate' would usually cover any natural person who is known to have joint beneficial ownership of legal entities or legal arrangements or who is in a close business relations with a PEP, or who has sole beneficial ownership of a legal entity or legal arrangement that is known to have been set up for the benefit *de facto* of a PEP.

Proceeds and **Proceeds of crime** mean any funds or property derived from or obtained, directly or indirectly, as a result of [*Option: or in connection with*] the commission of a criminal offence, including economic gains and funds or property converted or transformed, in whole or in part, into other funds or property.

Drafting note: The optional language ('in connection with') is designed to capture those instances in which the conduct is partially responsible for the proceeds and not solely responsible for the proceeds. Adding this phrase expands the concept of 'proceeds', and makes it clear, for example, in the case of a stand-alone money laundering prosecution, where there is no prosecution for the predicate offence, that the funds being laundered and which are viewed as proceeds of the predicate offence can also be viewed as proceeds obtained 'in connection with' the money laundering offence.

Property: see **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.

Senior management means an officer or employee with sufficient knowledge of the institution's money laundering and terrorism financing risk exposure and sufficient seniority to make decisions affecting its risk exposure. It need not, in all cases, involve

a member of the board of directors and includes a person responsible for compliance or duly authorised to bind the accountable person.

Shell bank means a bank that has no physical presence in the jurisdiction in which it is incorporated and licensed, and which is unaffiliated with a regulated financial group that is subject to effective consolidated supervision. 'Physical presence' means meaningful mind and management located within a jurisdiction. The existence of a local agent or low-level staff does not constitute physical presence.

Suspicious transaction report means a report required to be made under Section 17(1) of this Act.

Terrorism financing means any offence referred to in Part IV, Section 37.

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

- (i) opening of an account;
- (ii) any deposit, withdrawal, exchange or transfer of funds, whether in currency or by cheque, payment order or other instrument or by electronic or other non-physical means;
- (iii) the use of a safety deposit box or any other form of safe deposit;
- (iv) entering into any fiduciary relationship;
- (v) any payment made or received in satisfaction, in whole or in part, of any contractual or other legal obligation;
- (vi) any payment made in respect of a lottery, bet or other game of chance;
- (vii) establishing or creating a legal person or legal arrangement; and
- (viii) such other transaction as may be prescribed by the [minister/competent authority] by regulation.

Virtual currency is a digital representation of value that can be digitally traded and functions as:

- (i) a medium of exchange; and/or
- (ii) a unit of account; and/or
- (iii) a store of value that does not have legal tender status or carry any security or guarantee in any jurisdiction.

Wire transfer or funds 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 funds available to any person at another financial institution.

Unless there is a suspicion of money laundering or terrorism financing, in which case the full range CDD measures must be applied without regard to any

monetary threshold, Sections 4(3), 5, 6, 7, 9, 10, 12 and 13(1) of this Act shall apply to:

- (a) casinos only when a customer opens an account or engages in a financial transaction equal to or above [the designated amount], whether conducted as a single transaction or as several transactions that appear to be linked; and
- (b) real estate agents when they are involved in financial transactions for their client concerning the buying or selling of real estate, and with respect to both the vendors and purchasers.

Drafting note: The FATF-designated threshold for casinos is EUR/US\$3,000. Below this amount jurisdictions may but are not required to oblige casinos to apply the full range of CDD measures. As the methodology to the FATF 40 Recommendations at Criterion 22.1(a) (footnote 44) notes, the practice of customer identification at entry to a casino could but is not necessarily sufficient. Jurisdictions must require casinos to ensure that they are able to link CDD information for a particular customer to the transactions made by that customer in the casino.

There are no thresholds or limitations with respect to lawyers, other legal professionals or TCSPs. Such professionals must always identify and verify, regardless of threshold, whenever the activity they are engaging in comes within the definition of a DNFBP. When they are not engaged in such activities, they are not covered by the model provisions.

For dealers in precious metals and dealers in precious stones, the FATF provides a threshold of EUR/US\$15,000 and dealers are subject to the AML/CFT obligations only with regard to cash transactions exceeding this amount. Since the designated threshold is the same under Recommendations 22 and 23, it is more practical to incorporate it as part of the definitions in Section 3(1).

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

Section 4 Risk Assessment

- (1) An accountable person shall identify, assess and monitor its money laundering and terrorism financing risks.
- (2) Such measures shall take into account customer, geographic area, product, service, transaction and means of delivery risk factors and shall be proportionate to the nature and size of the accountable person's business and take into account the outcome of any risk assessment carried out at a national level, and any regulatory guidance issued.
- (3) An accountable person shall document the risk assessment in writing, keep it up to date and make it available to relevant competent authorities [*option: and SRBs*] upon appropriate request.

- (4) Prior to the launch of a new product or business practice or the use of a new or developing technology, an accountable person shall identify and assess the money laundering or terrorism financing risks that may arise in relation to such new products or business practices, or new or developing technologies for both new and pre-existing products, and take appropriate measures to manage and mitigate these risks.

Drafting note: The revised FATF standard reflects a risk-based approach to preventive measures, on an ongoing basis. Accountable persons are expected to identify, assess and understand the money laundering/financing terrorism risks to which they are exposed and to take measures commensurate to those risks in order to mitigate them effectively.

The risk assessment that accountable persons are required to conduct under FATF Recommendation 1 forms the basis of the risk-based approach. Further risk elements are enshrined throughout the FATF Recommendations, for example in Recommendations 10 (CDD measures), 11 (PEPs), 18 (internal controls and foreign branches and subsidiaries) and 19 (high risk countries).

Accountable persons are likely to require further guidance on the methodology to be applied for carrying out the risk assessment; the types of customer, jurisdiction or geographic area and product, service, transaction or delivery channel risk factors that need to be taken into consideration; and the intervals at which the assessment should be updated, etc. Jurisdictions may opt to provide such guidance through secondary legislation, or sector-specific guidance or recommendations. The examples indicated in the interpretative note to Recommendation 10, paragraphs 15 (for higher risk factors) and 17 (for lower risk factors), should be integrated in this guidance.

Recommendation 15 specifically requires that accountable persons carry out a risk assessment in relation to and prior to launching a new product or business practice, or before using new or developing technologies, and to take appropriate measures to manage any identified risks.

Section 5 Customer Due Diligence Requirements

- (1) An accountable person shall not establish or maintain an anonymous account or an account in a fictitious name.
- (2) An accountable person shall undertake CDD measures by means of reliable and independent source documents or information, such as a passport, a driver's licence, a national identification document, or in the case of legal persons or legal arrangements, a certificate of incorporation, a certificate of good standing, a partnership agreement or a deed of trust, and in the following circumstances:

Drafting note: Drafters should consider the specific kinds of documents or information that would constitute ‘reliable and independent source documents and information’ in their country-specific context and add to or delete from the list above. Some jurisdictions have chosen to differentiate between documents to be provided by their nationals and documents to be provided by foreign natural or legal persons. It is also important to specifically state the types of documents that may be considered reliable for purposes of identifying and verifying information pertaining to legal persons and legal arrangements.

Drafters may also opt to set out such level of detail through regulation rather than in primary legislation.

- (a) when opening an account for or otherwise establishing a business relationship with a customer;
- (b) where a customer who is neither an account holder nor in an established business relationship with the accountable person wishes to carry out:
 - (i) a transaction in an amount equal to or above [the designated amount], whether conducted as a single transaction or several transactions that appear to be linked or

Drafting note: The FATF-designated threshold for CDD for occasional customers is EUR/US\$15,000. Jurisdictions may, however, opt to set a lower threshold if this is considered necessary to properly mitigate national money laundering or terrorism financing risks.

Drafting note: The FATF-designated threshold for CDD on wire transfers is EUR/US\$1,000. Owing to the potential terrorism financing threat posed by small wire transfers, however, jurisdictions are encouraged to minimise or even eliminate threshold requirements for wire transfers, taking into account the risks of driving transactions underground and the importance of financial inclusion.

- (ii) a wire transfer [in the amount equal to or above the designated amount];
 - (c) whenever doubts exist about the veracity or adequacy of previously obtained customer identification information;
 - (d) whenever there is a suspicion of money laundering or terrorism financing involving the customer or the customer’s account.
- (3) With respect to each customer and business relationship, when applying CDD measures an accountable person shall take into account the outcome of the risk

assessment required to be carried out under Section 4. Where the risks are higher, an accountable person shall conduct enhanced due diligence measures consistent with the risks identified. Where the risks are lower, an accountable person may conduct simplified due diligence measures, unless there is a suspicion of money laundering or terrorism financing or a higher risk may be apparent, in which case enhanced CDD measures shall be undertaken. In all cases, an accountable person shall apply the following CDD measures:

Drafting note: As the methodology to the FATF 40 Recommendations at Criteria 10.17–18 makes clear, although the general rule is that all customers must be subject to the full range of CDD measures, including the requirement to identify the beneficial owner, there are circumstances where the risk of money laundering or terrorism financing is either higher or lower, and where enhanced CDD may thus be called for or simplified CDD may be reasonable.

Jurisdictions will need to make sure that accountable persons fully understand and correctly apply the risk-based approach to preventive measures. It will be necessary for competent authorities to issue guidance to accountable persons to clarify what enhanced and simplified CDD measures may entail and when they are permissible. To the extent possible, the examples of enhanced and simplified CDD measures as set out in paragraphs 20 and 21 of the interpretative note to FATF Recommendation 10 should be integrated in such guidance.

It should be made clear to accountable persons that, even if the risks identified are lower, CDD measures still have to be applied in all cases. It is only the extent of those measures that may be adjusted in line with the lower risk associated with an individual business relationship or transaction. In addition, it should be emphasised that a lower money laundering or financing terrorism risk for one CDD measure, for example for identification and verification purposes because information on the identity of the customer and the beneficial owner is publicly available, does not necessarily mean that the same customer may automatically be treated as low risk also for all other types of CDD measures, for example for transaction monitoring. Simplified measures are never permissible in case of suspicion of lower money laundering or financing terrorism.

Risk variables such as the purpose of an account or relationship, the level of assets to be deposited by a customer or the size of transactions undertaken, and the regularity or duration of the business relationships also may, either by themselves or in combination, increase or decrease the potential money laundering risks associated with certain business relationships, customers, jurisdictions or geographic areas, products, services, transactions or delivery channels. For example, if business relationships with country A are generally considered low risk, the significant amount of deposits by a national of country A in a specific case may still make this one business relationship high risk and require enhanced CDD measures.

- (a) Identify the customer and verify the customer's identity as follows, using reliable, independent source documents, data or information:

Drafting note: FATF Recommendation 10 does not prescribe the types of information that accountable persons must obtain for natural person customers, nor does it prescribe what verification measures must be applied with regards to the various types of customers. Jurisdictions thus have the discretion to develop the relevant requirements on this point and to add or remove from the list suggested under subsections (i) and (ii) below.

- (i) for a customer that is a natural person, obtain and verify the full legal and any other names, telephone number and email address, permanent address, date and place of birth, nationality, occupation, public position held and/or name of the employer, official personal identification number or other unique identifier contained in an unexpired official document that bears a photograph of the customer, and signature;
- (ii) for a legal arrangement or customer that is a legal person, obtain and verify the name, legal form, status and proof of existence, provisions governing the authority to regulate and bind the legal person or legal arrangement; the names of any director, trustee or other person holding a senior management position in the legal entity or legal arrangement; and the address of the registered office or principal place of business.
- (b) Identify and verify the identity of any person purporting to act on behalf of the customer, and verify that such person is properly authorised to act in that capacity.
- (c) Understand and, as appropriate, obtain information on the purpose and intended nature of the business relationship.
- (d) Identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner so that the accountable person is satisfied it knows who the beneficial owner is. As part of this obligation, an accountable person shall:
- (i) For customers that are legal persons, obtain and take reasonable measures to verify:
- (a) the identity of any natural person(s) who ultimately owns or controls a legal entity by directly or indirectly owning more than *[applicable percentage threshold]* of the shares or voting rights or ownership interests in the legal person, including through bearer shareholdings, trust arrangements or other means; or
- (b) if there is doubt under (a) as to whether the person(s) with controlling ownership interests is(are) the beneficial owner(s), or where no natural person under (a) is identified, the identity of the natural person(s) exercising ultimate effective control over the legal person through other means; or

- (c) where no natural persons are identified under (a) or (b), the identity of the natural person(s) who hold(s) the position of senior managing official.
- (ii) For legal arrangements, obtain and take reasonable measures to verify:
 - (a) for trusts, the identity of the settlor, the trustee(s), the protector if any, the beneficiaries or, where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates, and any other natural person directly or indirectly exercising ultimate effective control over the trust, including through a chain of control or ownership;
 - (b) for other types of legal arrangements similar to trusts, the identity of the natural persons holding equivalent or similar positions as those indicated in (a).

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. Measures set out under Section 5(3)(d)(i) are to be understood as cascading measures. Each measure shall be used only if the previous one has been applied and did not result in the identification of the beneficial owner.

The FATF Recommendations do not prescribe that a controlling ownership interest in a legal entity must be determined based on a shareholding percentage, nor do they stipulate a specific threshold. They merely note that a beneficial owner is 'any natural person having a controlling ownership interest in a legal person' and footnote 30 under Recommendation 10 states that 'a controlling ownership interest depends on the ownership structure of the specific company but may be based on a percentage threshold.' It is thus within jurisdiction's discretion to decide how 'controlling ownership' shall be defined. However, many jurisdictions have adopted a threshold for determining a controlling ownership interest and, therefore, the model legislative provision also adopts this approach.

It is also for each country to determine what it considers as 'direct' or 'indirect' controlling ownership. Directive 2015/840 of the European Parliament and of the Council on the Prevention of the Use of the Financial Systems for the Purpose of Money Laundering and Terrorism Financing (the fourth EU Directive) defines the concepts of 'direct' and 'indirect' ownership as follows: 'A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership; a shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of one or more natural person(s) or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership.'

- (c) for life and other investment-related insurance business, in addition to applying regular identification and verification measures to customers and beneficial owners, take the following measures as soon as beneficiaries of life or investment related insurance policies are identified or designated:
- (i) for beneficiaries that are identified as specifically named natural or legal persons or legal arrangements, take the name of that person;
 - (ii) for beneficiaries that are designated by characteristics or class, or by other means, obtain sufficient information concerning the beneficiaries to satisfy the life or investment-related insurance business that it will be able to establish the identity of the beneficiary at the time of the pay-out;
 - (iii) in all cases, verify the identity of the beneficiaries at the time of the pay-out.

Drafting note: Under the revised FATF standard, there is a specific requirement for accountable persons to apply additional CDD measures in relation to beneficiaries of life and other investment-related insurance business. These requirements can be set out in either primary or secondary legislation or through other enforceable means. The information collected shall be recorded and maintained in accordance with the obligations under Section 10 of the model legislative provisions and, where an accountable person is not able to comply with these additional requirements, it shall consider filing a suspicious transaction report with the FIU.

- (4) An accountable person shall apply identification and verification measures under this Section before the opening of an account or establishing of a business relationship, or before carrying out a transaction or wire transfer for a customer. If money laundering or terrorism financing is suspected, or if doubts exist about the veracity or adequacy of previously obtained customer identification information, identification and verification measures shall be completed before the customer may conduct any further business.
- (5) The [insert name of minister or competent authority] may prescribe the circumstances in which verification of the customer and beneficial owner identity may be completed as soon as reasonably practicable after the establishment of the business relationship, provided that the accountable person (i) effectively manages the risks of money laundering or terrorism financing and (ii) a delay in verification is essential not to interrupt the normal conduct of the business.
- (6) An accountable person shall apply the CDD requirements of this Section to customers and beneficial owners with which it had a business relationship at

the time of the coming into force of this Act. Such measures shall be applied at appropriate times and on the basis of materiality and risk, depending on the type and nature of the customer, the business relationship, products or transactions and taking into account whether and when CDD measures have previously been applied and the adequacy of the data obtained, or as may be prescribed by the [insert name of minister or competent authority] by regulation.

Section 6 Reliance on Identification by Third Parties

(1) *[A financial institution] [A DNFBP] [An accountable person] may rely on third parties to perform CDD measures as required by Section 5(3), subject to the following:*

- (a) *there is no suspicion of money laundering or terrorism financing;*
- (b) *the [financial institution] [DNFBP] [accountable person] relying on the third party shall immediately obtain the necessary information as required under Section 5(3) from the third party, including on the identity of each customer and beneficial owner; and*
- (c) *the [financial institution] [DNFBP] [accountable person] shall take adequate steps to satisfy itself that the third party:*
 - (i) *will provide without delay copies of identification information and other relevant documents relating to CDD requirements upon request, and*
 - (ii) *is established in or is subject to the jurisdiction of a State where it is subject to requirements equivalent to those specified in this Act, and*
 - (iii) *is regulated, supervised or monitored as to compliance with and has measures in place for compliance with these requirements; and the [insert name of minister/competent authority] may prescribe any jurisdiction that he/she considers fulfils the terms of section 6, subsection (1)(c)(ii).*

(2) *Notwithstanding any other provision in this subsection, the [financial institution] [DNFBP] [accountable person] relying on the third party shall always remain responsible for compliance with this Act, including CDD and reporting requirements.*

A [financial institution] [DNFBP] [accountable person] relying on a third party that is part of the same financial group as the [financial institution] [DNFBP] [accountable person] may consider that the requirements under subsections (1) and (2) are met if:

- (a) *the financial group applies CDD and record-keeping requirements and internal controls and measures in accordance with the requirements under this Act;*
- (b) *the implementation of the CDD and record-keeping requirements and internal controls and measures is supervised at the financial group level by a competent authority; and*
- (c) *any higher jurisdiction risk is adequately mitigated by the group's AML/CFT policies.*

Drafting note: Section 6 is not mandatory but may be adopted by jurisdictions. Under FATF Recommendation 17 jurisdictions may opt to permit an accountable person to rely on third parties to conduct customer identification subject to specific qualifications. This Section would provide a legislative base for such a practice. States may choose to grant this option only to financial institutions, only to DNFBPs or to all types of accountable persons.

It is important for states to clarify, through either secondary legislation or guidance, that Section 6 does not apply to outsourcing or agency relationships. In a typical third-party reliance scenario, the third party is a regulated, supervised or monitored financial institution or DNFBP subject to the full range of CDD and record-keeping requirements. The third party will typically have an existing relationship with the customer and applies its own procedures to perform the CDD measures. In comparison, in an outsourcing/agency relationship, the outsourced entity applies CDD measures on behalf of the delegating financial institution or DNFBP and, in the course of doing so, is subject to that financial institution or DNFBP's controls.

Section 7 Politically Exposed Persons

- (1) An accountable person shall have in place appropriate risk management systems to determine whether a customer or beneficial owner is a PEP and:
 - (a) For a foreign PEP shall:
 - (i) obtain approval from a designated senior manager before establishing or continuing a business relationship with such customer or beneficial owner;
 - (ii) take reasonable measures to identify the source of wealth and source of funds; and
 - (iii) conduct enhanced on-going monitoring of the business relationship to permit the accountable person to fulfil his or her obligations under this Act, including all of the CDD and reporting requirements thereof.
 - (b) For a domestic PEP or person who has been entrusted with a prominent function by an international organisation, apply the measures under subsection (1)(a) in the case of a higher risk.

Drafting note: The international standard does not require the same high level of diligence to be applied to domestic PEPs as to foreign PEPs unless there is a higher risk. Jurisdictions may, however, opt to go beyond this minimum standard and apply all measures under Section 7(1)(a) to all types of PEPs, whether foreign, domestic or international.

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(continued)

The definitions of domestic, foreign and international PEPs also encompass those persons who no longer hold the position that resulted in their initial qualification as a PEP. While the FATF standard does not prescribe an end to the status of a PEP and thus requires indefinite application of enhanced CDD measures to such persons and business relationships, many EU countries have taken a different approach and apply enhanced CDD measures to 'former' PEPs for a duration of 12 months from the time when the person stopped being entrusted with a prominent public function. After that time, the application of enhanced CDD is required only for those former PEPs that continue to pose a risk and until such time as the person is deemed to pose no further risk. The fourth EU Directive prescribes enhanced CDD measures for former PEPs that should last for a period of at least 12 months and a risk-based approach thereafter.

- (2) An accountable person shall take reasonable measures to determine, prior to the time of pay-out, whether the beneficiary of a life or other investment-related insurance policy or the beneficial owner of the beneficiary of such a policy is a PEP and, in case of a higher risk, shall:
 - (a) inform senior management before the pay-out of the policy proceeds; and
 - (b) conduct enhanced scrutiny on the whole business relationship with the policyholder and consider filing a report to [insert name of FIU] in accordance with this law.

Section 8 Identification and Account Opening for Cross-border Correspondent Relationships

- (1) When entering into a cross-border correspondent relationship, a financial institution shall, in addition to applying the measures under Sections 5 and 7 above:
 - (a) identify and verify the identity of the respondent institution with which they enter into a correspondent relationship;
 - (b) collect sufficient information on the respondent institution to fully understand the nature of its business and activities;
 - (c) based on publicly available information, evaluate the respondent institution's reputation and the nature of supervision to which it is subject, including whether it has been subject to any money laundering or terrorism financing investigation or regulatory action;
 - (d) obtain approval from a designated senior manager before establishing a new correspondent relationship;

- (e) evaluate the controls implemented by the respondent institution with respect to AML/CFT;
 - (f) establish an agreement on the responsibilities of each party under the relationship with particular regard to (e) above;
 - (g) in the case of a payable-through account, ensure that the respondent institution has conducted CDD on its customers that have access to the account, has implemented mechanisms for on-going monitoring with respect to its customers, and is able to provide relevant CDD information to the financial institution upon request; and
 - (h) in the case of trusts or other legal arrangements that sever legal ownership from beneficial interest, ensure that the beneficial owner has been appropriately identified.
- (2) A financial institution shall not enter into or continue a correspondent relationship with a shell bank.
- (3) A financial institution shall not enter into or continue a correspondent relationship with a respondent institution that permits its accounts to be used by a shell bank.

Drafting note: The obligations under FATF Recommendation 13 regarding correspondent banking apply only to financial institutions, and not to DNFBPs. The reference here should thus be not to ‘accountable persons’ but to ‘financial institutions’.

Section 9 Inability to Fulfil Customer Identification Obligations

An accountable person that cannot fulfil the requirements of Sections 5–8 of this Act shall not open the account or establish the business relationship, or carry out the transaction, or shall terminate the business relationship. The accountable person shall also consider filing a report to [insert name of FIU] in accordance with this Act.

Provisions on On-going Obligations of an Accountable Person

Section 10 Record-keeping

- (1) An accountable person shall maintain all books and records with respect to their customers and transactions in accordance with 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*] or as and when required to be disclosed.

- (2) Such books and records shall include, as a minimum:
- (a) all records obtained through CDD measures, including account files, business correspondence and copies of all documents evidencing the identities of customers and beneficial owners, and records and the results of any analysis undertaken in accordance with the provisions of this Act, all of which shall be maintained for not less than five years after the business relationship has ended;
 - (b) records on transactions, both domestic and international, that are sufficient to permit reconstruction of 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 record of any findings pursuant to Section 12(1)(a) 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 17 or other reports made to the FIU in accordance with this Act, including any accompanying documentation, which shall be maintained for at least five years from the date the report was made.

Section 11 Internal Controls to Combat Money Laundering and Terrorism Financing

- (1) An accountable person shall develop and implement programmes for the prevention of money laundering and terrorism financing. Such programmes shall be approved by senior management and be monitored and enhanced, if and as necessary. The programmes shall be appropriate to the risks identified under Section 4 or [insert name of national authority competent to carry out national risk assessments on AML/CFT] and be proportionate to the nature and size of the accountable person's business, but should at a minimum include the following:

Drafting note: FATF Recommendation 1 requires countries to carry out a national risk assessment for AML/CFT. It may be that one or more authorities are coordinating such a risk assessment at the national level. Reference to any such authority and the risks identified at the national level should be included here to ensure that internal controls take into account not only institutional but also national risks. If jurisdictions adopt the draft provisions under Section 2 of the model legislative provisions, which set up the National Committee and give it the mandate to coordinate the national risk assessment, the reference here should be to 'the National Committee'.

- (a) internal policies, procedures and controls to fulfil the obligations pursuant to this Act;
 - (b) adequate screening procedures to ensure appropriate and high standards when hiring employees;
 - (c) on-going training for all statutory directors, officers and employees to maintain awareness of the laws and regulations relating to money laundering and the terrorism financing, to assist them in recognising transactions and actions that may be linked to money laundering or terrorism financing and to instruct them in the procedures to be followed in such cases; and
 - (d) independent audit arrangements to review and verify compliance with and effectiveness of the measures taken in accordance with this Act.
- (2) An accountable person shall designate a compliance officer at senior management level to be responsible for the implementation and on-going compliance of the accountable person's internal programmes, controls and procedures with the requirements of this Act. The compliance officer shall have unrestricted access on demand to all books, records and employees of the accountable person as necessary to fulfil his or her responsibilities.
- (3) Financial groups shall implement group-wide programmes against money laundering and terrorism financing, addressing all aspects under subsections (1) and (2) and including policies and procedures for sharing of information within the group for AML/CFT purposes and for safeguarding the confidentiality and use of the shared information. Such policies and procedures shall be applied to all branches and majority-owned subsidiaries of the financial group. Group-level compliance, audit and AML/CFT functions shall have the power to request customer, account and transaction information from branches and subsidiaries as necessary to fulfil their functions.
- (4) The [insert name of minister/competent authority] may prescribe the type and extent of measures an accountable person shall undertake with respect to each of the requirements in this Section, having regard to the risks of money laundering and terrorism financing, the size of the business or profession, and the standards set by relevant professional bodies.

Section 12 On-going Due Diligence

- (1) An accountable person shall exercise risk-based on-going due diligence throughout the course of each business relationship, which shall include:
- (a) ensuring that documents, data, information and records collected under the CDD process are kept updated and relevant, and undertaking regular reviews of existing records, particularly for higher risk customers;

- (b) examining transactions carried out to ensure that they are consistent with the accountable person's knowledge of the customer, the customer's commercial or personal activities and risk profile, and, where necessary, the source of funds; and
- (c) ensuring that the obligations pursuant to Act, including for high-risk customers, PEPs and correspondent relationships, are fulfilled at all times.

Section 13 Enhanced Customer Due Diligence

- (1) An accountable person shall examine as far as possible the background and purpose of all complex, unusually large transactions and all unusual patterns of transactions that have no apparent economic or visible lawful purpose. Where the risks identified are higher, the accountable person shall apply enhanced CDD measures consistent with the risks identified and increase the degree and nature of monitoring of the business relationship to determine whether those transactions or activities appear unusual or suspicious.
- (2) An accountable person shall apply enhanced CDD to business relationships and transactions with customers, beneficial owners or accountable persons from higher-risk jurisdictions identified by the [insert name of competent authority] or the accountable person. Such enhanced measures shall be effective and proportionate to the risks identified.
- (3) An accountable person shall take such measures as may be prescribed from time to time by [insert name of minister/competent authority] to counter the risks identified with respect to customers, beneficial owners or accountable persons from high-risk jurisdictions.

Drafting note: FATF Recommendation 19 deals with high-risk countries and sets out two distinct obligations, which are (1) that accountable persons apply enhanced CDD to higher-risk countries; and (2) that countries apply specific countermeasures to high-risk countries that were prescribed by a relevant competent authority. The requirements are addressed in subsections (2) (for enhanced CDD) and (3) (for countermeasures), respectively.

Section 14 Obligations Regarding Wire Transfers

- (1) A financial institution, when undertaking wire transfers [*option: equal to or above the designated amount*], shall include accurate originator and beneficiary information as follows, and ensure that such information remains with the wire transfer or related message throughout the payment chain:

Drafting note: FATF Recommendation 16 applies to cross-border wire transfers as well as domestic transfers, including serial and cover payments. However, countries may choose to adopt a *de minimis* threshold for cross-border wire transfers of US\$/EUR1,000 or less. Below this threshold, countries may opt to apply slightly less stringent requirements. Instead of including full originator and beneficiary information as outlined in subsection (1), fiscal institutions may be permitted to include only the name of the originator and beneficiary, and an account number for each, or a unique transaction reference number. Such information need not be verified for accuracy, unless there is a suspicion of money laundering or terrorism financing.

- (a) the full name of the originator;
 - (b) the account number of the originator or, in the absence of an account number, a unique reference number;
 - (c) the originator's address or national identity number or customer identification number or date and place of birth;
 - (d) the name of the beneficiary; and
 - (e) the beneficiary account number where such an account is used to process the transaction.
- (2) The [insert name of minister/competent authority] may by regulation modify the requirements in subsection (1) with respect to:
- (a) 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) 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 provided the batch file contains full originator information that is fully traceable in the recipient jurisdiction.
- (3) 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 on their own account.
- (4) A financial institution generating a wire transfer shall ensure that:
- (a) the transfer contains required and accurate originator and beneficiary information as set out under subsection (1) or (2);
 - (b) all originator and beneficiary information is kept in accordance with Section 10; and
 - (c) no wire transfer is executed that does not comply with the requirements under this Section.

- (5) A financial institution processing an intermediary element of a wire transfer shall:
- (a) ensure that all originator and beneficiary information that accompanies a wire transfer is retained with it;
 - (b) where technical limitations prevent the required originator or beneficiary information accompanying a cross-border wire transfer from remaining with it a related domestic wire transfer, keep a record for at least five years from the day of the transaction of all the information received from the ordering or other intermediary financial institution;
 - (c) take reasonable measures to identify cross-border wire transfers that lack full and accurate originator and beneficiary information as required under subsection (1) or (2)(b); and apply risk-based policies and procedures to determine whether to execute, reject or suspend such a cross-border wire transfer and appropriate follow-up action.
- (6) A financial institution receiving a wire transfers shall:
- (a) verify the identity of the beneficiary of a wire transfer and keep this information in line with the requirements under Section 10; and
 - (b) take reasonable measures to identify cross-border wire transfers that lack originator and beneficiary information as required under subsection (1) or (2)(b); and apply risk-based policies and procedures to determine whether to execute, reject or suspend such a cross-border wire transfer and appropriate follow-up action.

Section 15 Compliance with Obligations by Foreign Subsidiaries and Branches

An accountable person shall require foreign branches and any subsidiaries over which it has control to implement the requirements of Sections 4–14 of this Act to the extent that the applicable laws and regulations in the jurisdiction where the foreign branch or subsidiary is domiciled so permit. If such laws prevent compliance with these obligations for any reason, the accountable person shall advise its competent supervisory authority.

Section 16 Prohibition against Shell Banks

- (1) It shall not be lawful to establish, operate or deal with a shell bank, and any person who establishes, operates or intentionally deals with a shell bank shall be guilty of an offence.
- (2) It shall not be lawful for an accountable person to deal with a shell bank in another jurisdiction and any accountable person who intentionally deals with such a shell bank shall be guilty of an offence.

Drafting note: In many jurisdictions a specific provision of this kind will not be necessary as market entry requirements or other administrative or legal requirements are such that a shell bank would not be able to obtain a banking licence and thus be established or operate in that jurisdiction. Compliance with FATF Recommendations 13 and 26 on the issue of shell banks can thus be accomplished through other legislation or administrative requirements and in the absence of a specific prohibition to this effect.

Reporting Obligation Provisions

Section 17 Obligation to Report Suspicious Transactions

- (1) Subject to the provisions of subsection (3), an accountable person that suspects or has reasonable grounds to suspect that any funds or property are:
 - (a) the proceeds of crime; or
 - (b) related or linked to, or are to be used for, financing terrorism or terrorist acts, or by a terrorist or a terrorist organisation or those who finance terrorism shall promptly submit [*option: but not later than [three] working days after forming a suspicion*] a report setting forth the suspicions to [insert name of FIU] and in such cases shall promptly respond to requests from [insert name of FIU] for additional information. This obligation shall apply to both completed and attempted transactions, and regardless of the amounts involved.

Drafting note: States have the option of allowing members of the legal profession to file STR reports through an appropriate professional SRB if concerns over legal privilege obligations would make it difficult to ensure effective reporting by lawyers directly to the FIU. Under FATF Recommendation 23 and its interpretive note, states may permit the initial reporting to the SRB in such instances. The SRB has the obligation to forward, promptly and unedited, the report of the suspicion to the FIU. See also Article 34 of the fourth EU Directive, which, in the case of auditors, external accountants, tax advisors, notaries and other legal professionals, permits reporting to the FIU through a competent SRB, provided the SRB is obliged to promptly forward the information to the FIU in an unedited manner.

- (2) An accountable person shall provide [insert name of FIU] with all necessary information upon request, and in accordance with the procedures established by [insert name of FIU].
- (3) Notwithstanding subsection (1), lawyers, notaries, other independent legal professionals and accountants are required to submit reports under subsection (1) or provide information under subsection (2) 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 3 of this Act; and
- (b) the relevant information upon which the suspicion is based or that is requested by [insert name of FIU] was not received from or obtained on a client:
 - (i) in the course of ascertaining the legal rights or obligations 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 limits the requirements for reporting by lawyers, notaries, other independent legal professionals and accountants to instances where the lawyer, notary, professional or accountant is engaging in a financial transaction on behalf of or for a client. Section 17(3) is thus formulated in a narrower fashion than the general reporting obligations set forth in Section 17(1) and also narrower than the obligation to conduct CDD, which extends, additionally, to situations in which the lawyer and client are making preparations for such a transaction. 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 professionals actually engage in a transaction for their client and are subject to the reporting obligation.

Under FATF Recommendation 23, and the definition of DNFBPs in these model provisions, the minimum requirement is that lawyers, notaries, other independent legal professionals and accountants report suspicious activity when they engage in 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

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in the circumstances identified in Section 17(3), and the drafting should reflect local practice.

The above reflects minimum requirements. States are free to expand the definition of a DNFBP to cover lawyers, notaries, accountants, etc. in more instances than are set forth under the five categories above. Any provision adopted, however, should respect the professional secrecy obligations as defined by the state's laws.

- (4) *An accountable person shall refrain from carrying out a transaction that it suspects to be related to money laundering or terrorism financing until [insert time period, for instance one business day] after it has reported its 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, an accountable person may execute the transaction and shall report its suspicion to [insert name of the FIU] immediately thereupon.*

[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 three business days].

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

- (5) *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 terrorism financing.*

Drafting note: This subsection requires supervisory authorities to advise the FIU of facts that suggest money laundering or terrorism financing. The provision of information by supervisors is not required by the FATF standards but is a best practice that jurisdictions may choose to adopt.

In some jurisdictions the provision for this kind of cooperation between agencies within a state is part of internal regulations rather than a measure set out in primary legislation. A regulation may provide that supervisory authorities shall disclose information that comes to their attention and indicates that a person has been or may be involved in money laundering or terrorism financing.

- (6) *[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 accountable persons to fulfil their obligations under this Section.*

Section 18 Obligation to Report Currency Transactions

An accountable person shall submit promptly [option: and not later than after [three] working days] a report to [insert name of the FIU] of any currency transaction in an amount equal to or above [the designated amount], whether conducted as a single transaction or several transactions that appear to be linked.

Drafting note: Some jurisdictions require financial institutions and DNFBPs to report cash transactions above a certain threshold, and regardless of the existence of any criminal suspicion.

The decision whether or not to adopt such a provision and the appropriate reporting threshold depend on the framework a state adopts to screen for suspicious activity and should take into account the nature and size of the jurisdiction's currency flows. States should take care to ensure that the threshold for the currency reporting requirement is not so low that the FIU is overwhelmed with routine reports and that accountable persons do not use this provision as a justification to avoid checks for suspicious transactions, regardless of the amounts involved.

Section 19 Inapplicability of Confidentiality Provisions

There shall be no liability for any breach of any secrecy or confidentiality provisions in any other law if an accountable person is fulfilling their obligations under this Act.

Drafting note: Depending on how bank secrecy laws and regulations operate within a jurisdiction, there may be a need for a provision that makes clear that bank or professional secrecy is lifted for purpose of an accountable person complying with AML/CFT obligations provided for by this law.

Section 20 Prohibition against Tipping-off

Any accountable person, or any director, partner, officer, principal or employee thereof, who discloses to a customer or a third party that a report under Section 17(1), or other information, is being or has been submitted to [insert name of FIU], or that a money laundering or terrorism financing investigation has begun, is being or has been carried out, except in the circumstances provided for in subsection (2) or when otherwise required by law to do so, commits an offence that shall be punishable by imprisonment of up to [insert imprisonment range] and a fine of up to [insert monetary range], or both.

Subsection (1) does not apply where a disclosure was made in order to carry out any function that a person has relating to the enforcement of any provision of this Act or of any other enactment.

Section 21 Protection of Identity of Persons and Information Relating to Suspicious Transaction Reports

- (1) *Except for the purposes of the administration of this Act, 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, in any judicial proceeding unless the court 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 above are not required by the FATF 40 Recommendations, but they are nevertheless advisable to preserve the anonymity and confidentiality of persons making or connected with reports and unless the interests of justice otherwise dictate any information arising from such a report.

Section 22 Exemption from Liability for Good Faith Reporting of Suspicious Transactions

No criminal, civil, disciplinary, administrative or any other related proceedings for breach of banking secrecy, professional secrecy or contract shall lie against an accountable person or his or her directors, principals, officers, partners, professionals or employees who, in good faith, submit reports or provide information in accordance with the provisions of this Part of the Act.

Section 23 Authorities Responsible for Supervision

- (1) *Responsibility for supervision of compliance by accountable persons with the requirements of this Part of this Act is as follows: [list authority that will supervise for each kind of financial institution and DNFBP, for example: The Central Bank for xxx, The Ministry for Justice for xxx, The Ministry of Finance for xxx, Ministry of Commerce for xxx, casino supervisory authority for xxx, self-regulated organisations for xxx, 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 by accountable persons with their AML/CFT obligations. 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 often be found in a state's AML law. This

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optional provision would set forth such responsibility. The detailed procedures, manner, authority, etc. for oversight will then 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 financial institutions. Similarly, states must have provisions for oversight of each type of DNFBP to ensure compliance with AML/CFT obligations. 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 supervisory authorities with the following powers relevant to the AML/CFT obligations:

- the regulation and supervision of all types of financial institutions and DNFBPs for compliance with AML/CFT obligations, including as appropriate through on-site examinations;
- the authority to compel accountable persons to produce any documents and information, including on the specific domestic and international risks associated with customers, products and services of the accountable person;
- the authority to issue instructions, guidelines or recommendations to assist financial institutions and DNFBPs to comply with their obligations;
- the authority to provide assistance in investigations, prosecutions or proceedings relating to money laundering, predicate offences and terrorism financing;
- the authority to cooperate and enter into sharing arrangements regarding relevant information with other domestic and foreign competent authorities;
- the authority to apply appropriate regulatory or supervisory measures to prevent criminals or their associates from holding, or being the beneficial owner of, a significant or controlling interest, or holding a, or participating directly or indirectly in the, directorship, management or operation of a financial institution or other relevant institutions such as a casino;
- the authority to take all necessary measures to prevent criminals or their associates from being professionally accredited, or holding or being the beneficial owner of a significant or controlling interest or holding a management function in a DNFBP, for example through evaluating a person on the basis of a 'fit and proper' test;
- the authority to verify that financial institutions and DNFBPs apply and enforce measures consistent with this law also to their foreign branches and majority-owned subsidiaries, to the extent permitted by local laws and regulations;

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- the authority to provide prompt and effective cooperation to agencies that perform similar functions in other States;
- the obligation to maintain statistics concerning measures adopted and sanctions imposed in enforcing AML/CFT requirements; and
- the authority to apply effective, proportionate and dissuasive regulatory or supervisory sanctions for failure by accountable persons to comply with their AML/CFT obligations.

(2) *The supervisory authority shall issue [insert directions/regulations/guidelines] to assist accountable persons to implement their AML/CFT obligations under this Act. An accountable person failing to comply with any direction or regulation issued by a relevant supervisory authority shall be liable to an administrative sanction as may be prescribed in the relevant directive or regulation.*

Section 24 Administrative Sanctions

A supervisory authority under Section 23 that discovers a failure by an accountable person it supervises to comply with the provisions of this Part may impose one or more of the measures available to it for administrative violations; and may ban the accountable person [*permanently/for a maximum period of [indicate period]*] from pursuing the business or profession that provided the opportunity for the violation to occur.

Drafting note: Supervisory sanctions form the heart of any comprehensive, dissuasive and effective sanctions regime to deal with non-compliance by accountable persons with their AML/CFT obligations.

The measures available 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 licence. Such administrative sanctions are typically found in sector-specific laws or regulations and applied by supervisory authorities.

Section 24 of the model legislative provisions makes such sanctions and measures available to competent supervisory authorities also for violations of or a failure by an accountable person to comply with its AML/CFT obligations, and regardless of whether or not the accountable person acted intentional, recklessly or simply based on a mistake. Jurisdictions should review the administrative

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sanctions available to their supervisory authorities to ensure that these sanctions include all the measures cited above.

If the measures currently available are not sufficient, Section 24 could be redrafted to list the specific supervisory measures, rather than to refer to existing administrative sanctions.

Section 25 Failure to Comply with Identification Requirements

Any accountable person, including any director, partner, officer, principal or employee thereof, who intentionally:

- (1) fails to carry out the a risk assessment pursuant to Section 4; or
- (2) fails to undertake the identification of customers or otherwise to fulfil the customer identification or other requirements in accordance with section 5 (2)–(5); or
- (3) opens an anonymous account or an account in a fictitious name for a customer in violation of Section 5(1); or
- (4) fails to fulfil the obligations relating to the obtaining of information for and processing of a wire transfer as required by Section 14;
- (5) establishes a shell bank or enters into a correspondent relationship with a shell bank or a financial institution that allows its accounts to be used by a shell bank;
- (6) fails to maintain books and records as required by Section 10; destroys or removes such records; or fails to make such information available in a timely manner in response to a lawful request for such books or records; commits an offence that shall be punishable by imprisonment for up to [insert imprisonment range] or a fine [insert monetary range] or both.

Drafting note: FATF Recommendation 35 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 that violates 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. As indicated above, administrative sanctions by supervisory authorities are at the heart of any comprehensive sanctions regime for violation of preventive measures by an accountable person. In cases where an accountable person has violated the provisions of the law either intentionally or in a serious, repetitive and/or systematic manner, additional criminal sanctions may be appropriate and useful. Sections 25–30 provide draft language for establishing

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criminal liability for accountable persons for certain intentional violations of preventive measure provisions.

Drafting authorities should carefully consider the extent to which criminal liability for violation of preventive measures is admissible and desirable in the national context, and remove or amend the language in Sections 25–30 accordingly. Statutory sanctions for criminal offences shall be proportionate to the violation and be neither too harsh nor too lenient. Drafting authorities should note that the sanction provided for within the European regulatory model is for no more than two years' imprisonment for breach of these types of preventive measures.

Section 26 Failure to Fulfil Due Diligence Obligations or Maintain Internal Controls

Any accountable person, including any director, partner, officer, principal or employee thereof, who intentionally:

- (1) fails to conduct ongoing due diligence with respect to customers, accounts and transactions in compliance with Section 12;
- (2) fails to comply with the obligations for enhanced due diligence in Section 13; or
- (3) fails to maintain internal control programmes in compliance with Section 11 or commits an offence that shall be punishable by imprisonment of [insert imprisonment range] or a fine [insert monetary range], or both.

Section 27 Failure in Regard to Suspicious Transaction or Other Reporting

Any accountable person, including any director, partner, officer, principal or employee thereof, who intentionally fails to submit a report to [insert name of FIU] as required by Section 17(1) or provide information as required under Section 17(2) [*add, if appropriate, optional currency transaction reporting section*] commits an offence that shall be punishable by imprisonment of up to [insert imprisonment range] or a fine of up to [insert monetary range], or both.

Section 28 False or Misleading Statements

Any accountable person, including any director, partner, officer, principal or employee thereof, who intentionally makes a false or misleading statement, provides false or misleading information or otherwise fails to state a material fact in connection with his or her obligations under this Part, including the obligation to make a suspicious transaction [*option: or currency transaction*] report, commits an offence that shall be

punishable by imprisonment up to [insert imprisonment range] or a fine up to [insert monetary range], or both.

Section 29 Confidentiality Violation

Any accountable person, including any director, partner, officer, principal or employee thereof, who intentionally discloses to a customer or a third party information in violation of Section 20(1) commits an offence under this Part that shall be punishable by imprisonment up to [insert imprisonment range] or a fine up to [insert monetary range], or both.

Section 30 Other Sanctions

An accountable person, including any director, partner, officer, principal or employee thereof, found guilty of any offence in Sections 25–29:

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

Part III

Financial Intelligence Unit

Drafting note: Sections 31–35 are basic provisions to establish an FIU that will serve as a national centre for the receipt and analysis of suspicious transaction reports and other information relevant to money laundering, associated predicate offences and terrorism financing and generated as a result of the preventive measures obligations that Part II provides for financial businesses and DNFBPs, and for disseminating the results of that analysis.

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,’ ‘DNFBPs’ and ‘accountable person’ 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 preventive measures provisions since, as noted, it establishes the unit that will receive suspicious transaction reports that are required by those provisions. Definitions of the terms appear in Part II.

Section 31 Establishment and Structure

- (1) There is to be established [insert name of FIU]. [Insert name of FIU] shall be the national agency responsible for receiving, requesting and analysing reports under Section 17 and any other reports or information relating to money laundering, proceeds of crime, terrorism financing or terrorist property, as provided for by this Act, and for disseminating the results of that analysis to competent authorities either spontaneously or upon request.
- (2) The composition, organisation, operation and resources of [insert name of FIU] shall be established by [*variants: decree, regulation, other relevant legal instrument*].

Drafting note: The phrase ‘terrorist property’ should be used in this section rather than, for instance, ‘potential terrorism financing’ 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.

A legal framework for an FIU can be established through statutory provisions, regulations, or, in some states, administrative provisions or a combination of these. Whatever form is used to establish the FIU, the provisions should:

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- formally establish the FIU within the state;
- define the FIU's responsibilities with precision;
- set out a structure for the organisation and its leadership; and
- provide for decision-making processes and operations that protect against undue influence or interference.

Other than the core responsibility of receiving, analysing and disseminating information on suspected money laundering, associated predicate offences and terrorism financing, the FIU's responsibilities may vary significantly from state to state, as will the powers conferred on the FIU and its organisational 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 DNFBPs 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 regulations that support operational independence and autonomy for the FIU to ensure that 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 that have been assigned to some FIUs.

Section 32 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 or her 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 use such information only 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 FIU] or other person who has duties for or within [insert name of FIU] who intentionally reveals information the confidentiality of which is required to be protected by subsection (1) commits an offence that shall be punishable by imprisonment of up to [insert imprisonment range] and a fine of up to [insert monetary penalty range], or both.

Section 33 Action Regarding Reports and Other Information Received

- (1) [Insert name of FIU] may disseminate information and the results of its analysis to relevant competent authorities when there are grounds to suspect that a transaction is related to money laundering, a predicate offence or terrorism financing.
- (2) [Insert name of FIU] may respond to requests from competent authorities for relevant information in money laundering, predicate offences or terrorism financing investigations. The decision on conducting any analysis and/or dissemination of information to the requesting authority shall remain with [insert name of FIU].
- (3) [Insert name of FIU] may withhold consent to a transaction [*Variant: depending on the option chosen under Section 17(4): order continued suspension of a transaction*] under Section 17(4) in order to analyse the transaction, confirm the suspicion and disseminate the results of the analysis to the competent authorities. [Insert name of FIU] may take such action also at the request of an FIU from another jurisdiction.

Section 34 Access to Information and Analysis Function

- (1) In relation to any information it has received in accordance with its functions, [insert name of FIU] is authorised to obtain from any accountable person any additional information that it deems necessary to properly carry out its analysis. The information requested shall be provided within the time limits and in the form specified by [insert name of FIU].
- (2) [Insert name of FIU] is authorised to access and review information that belongs to or is in the custody of an accountable person wherever [insert name of FIU] deems it appropriate to access and review such material for the fulfilment of its functions, provided that, if the premises are not the premises of [insert name of FIU], an order to access such information provided for by this Section is obtained from a [insert name of person with suitable authority to grant access].
- (3) 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 'DNFBPs' in [Section 3(1)] and subject to [insert any limitation enacted in the State regarding reporting obligation for lawyers, notaries, other independent legal professionals and accountants (as Section 17(2) in the model provisions)].

- (4) [Insert name of FIU] may, in order to conduct proper analysis, obtain, where not otherwise prohibited by law, any financial, administrative or law enforcement information and any relevant information collected and/or maintained by or on behalf of other authorities and, where appropriate, commercially held data, including from:
- (a) a law enforcement authority;
 - (b) any authority responsible for the supervision of the entities and persons subject to this law;
 - (c) tax authorities;
 - (d) customs; and
 - (e) any other public agency.
- (5) [Insert name of FIU]'s analysis function shall consist of:
- (a) the operational analysis, which focuses on individual cases and specific targets, activities or transactions or on appropriate selected information, depending on the type and volume of the disclosures received and the expected use after dissemination; and
 - (b) the strategic analysis addressing money laundering and terrorism financing trends and patterns.

Section 35 Cooperation with Foreign Counterpart Agencies

- (1) The [insert name of FIU] may, acting on its own initiative or upon request, seek from or share any information relevant to its functions with a foreign counterpart agency that performs similar functions and is subject to similar obligations of confidentiality, secrecy and disclosure with respect to the performance of its functions.
- (2) Whenever [insert name of FIU] provides information pursuant to subsection (1) to a foreign counterpart agency, it shall obtain from that agency a suitable declaration or undertaking that the information will be used only for the purpose for which it was sought, unless the foreign counterpart agency seeks and obtains the agreement of [insert name of FIU] for the information to be used for another purpose.
- (3) [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.
- (4) [Insert name of FIU] may make enquiries on behalf of a foreign counterpart agency where the enquiry may be relevant to the foreign counterpart agency's functions.
- (5) [Insert name of FIU] may:
- (a) utilise its own databases, including information related to reports of suspicious and/or cash 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 an accountable person 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.

Part IV

Money Laundering and Terrorism Financing Offences

Section 36 Money Laundering Offences

(1) The following definitions apply in this Part:

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

Drafting note: FATF Recommendation 3 provides for the criminalisation of money laundering, consistent with the Vienna and Palermo Conventions. In essence, money laundering is defined as the conversion, transfer, concealment, disguising, acquisition, possession or use of proceeds of crime. The term ‘proceeds of crime’ as set out under Section 3 covers any property or funds derived from or obtained as a result of or in connection with an ‘offence’. Funds or assets are ‘proceeds of crime’ and thus fall under the scope of the money laundering provision only if they are proceeds of an ‘offence’. To define the scope of the money laundering offence, drafting authorities must thus choose an approach to defining the term ‘offence’. Variants 1 (a), 2 (a) and 3 (a) below provide a number of alternatives for drafting authorities to consider. Variant 1 covers all offences under domestic law, variant 2 covers only those offence with a particular serious sanction and variant 3 covers only offences specifically listed in a schedule.

Whichever approach is adopted, each country should specify a minimum range of offences within each of the designated categories of offences that appear in the glossary to the FATF 40 Recommendations, namely participation in an organised criminal group and racketeering; terrorism, including terrorism 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 or grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling (including in relation to customs and excise duties and taxes); tax crimes (related to direct taxes and indirect taxes); extortion; forgery; piracy; and insider trading and market manipulation.

The interpretive note to Recommendation 3 provides that ‘countries should apply the crime of money laundering to all serious offences, with a view to

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including the widest range of predicate offences. Predicate offences 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 that are punishable by a maximum penalty of more than one year's imprisonment or, in the case of those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months' imprisonment.'

Under the FATF standard, it is also required that the money laundering offence can be applied not only to proceeds generated domestically but also to proceeds that were generated abroad but are laundered in domestically. It is thus important the term 'offence' is defined to cover *both* items (a) and (b).

Countries have two options for expanding the money laundering offence to include all foreign-generated proceeds as reflected under items 1(b), 2(b) and 3(b): They can either draft the offence so that it applies to 'any act committed abroad that constitutes an offence under the laws of the foreign state and would have constituted an offence under domestic law, had the act occurred here' (see item (b) option in brackets), or they can adopt a slightly wider approach and apply the money laundering offence to 'any act that occurred abroad but that would have constituted an offence domestically, had the act occurred here' (see item (b) option without the language in brackets). The second approach is broader as it is not relevant whether the foreign act is criminalised abroad, as long as it would have been a criminal offence under domestic law. From a practical perspective the latter approach makes the application of the money laundering offence to foreign conduct easier, as it is no longer required to analyse foreign legal systems to determine whether or not a specific act is criminalised abroad.

Variant 1

- (a) any offence under the laws of [insert name of State]; and
- (b) [*option: 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, life imprisonment or other deprivation of liberty of more than one year and;

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

Variant 3

Drafting note: If this variant is adopted, a schedule of offences will need to be included. As a minimum, the offences listed in the glossary to the FATF Recommendations should be included in any such schedule.

- (a) offences defined in Schedule [1] to this Act; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Drafting note: Types of property and coverage of foreign offences. Money laundering offences should extend to any type of property regardless of value that directly or indirectly represents criminal proceeds. The definitions section applicable to the money laundering offence sets out 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.

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 with a 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 contain language providing for 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 so require. In practice, however, evaluators in numerous assessment reports have successfully argued that the elements of the money laundering offence go beyond those of the predicate offence and that in the case of self-laundering the principle of double jeopardy would not apply and would thus not preclude the criminalisation of self-laundering. Jurisdictions should thus be very careful in considering whether it is indeed the case that constitutional principles prohibit a statutory provision that would allow for the prosecution of the same person for both money laundering and a predicate offence.

In the case of any doubts on this point, and to ensure that those who launder their own proceeds are covered by the scope of the offence, a more explicit provision may be added along the lines of ‘[t]he offences set forth in Sections

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3(2)–(5) shall also apply to the person who has committed the offence(s) that generated the proceeds of crime.’

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 kinds of conduct that should be criminalised as money laundering:

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 by 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, for example, paragraph 231 in the *Legislative Guide for the Implementation of the Merida Convention*).

Regarding the mental element, the conversion or transfer must be intentional, that is the accused should have knowledge or suspicion at the time of conversion or transfer that the assets are criminal proceeds. Consideration might be given to including a provision that the money laundering act must be committed for one of two stated purposes – 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. The provision allows for concealment or disguise in respect of almost any activity or property, or information about the same, so this section is broad. The concealment or disguise must be intentional and the accused must have knowledge or suspicion that the property constitutes proceeds of crime at the time of the act. This provision deals with the deception of others. This will include the intentional deception of law enforcement authorities as to the true nature of the property, having been derived from criminal activity. Origin may be the physical origin, or its origin in criminality. For this second offence, it is important to note that, in contrast to the ‘transfer or concealment’ offence, there should be no requirement of proof for the ‘concealment or disguise’ offence 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 this criminalisation is not dependent on proving such purpose.

3. Acquisition, possession or use of proceeds. This section imposes liability on recipients who acquire, possess or use property knowing or suspecting that the property has an illicit origin. It contrasts with the earlier provisions that deal with liability for those who make illicit proceeds available as the accused must have knowledge or suspicion at the time of acquisition or receipt that the property was criminal proceeds.

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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 should be criminalised. This section includes conspiracy, a common law concept, or, as an alternative, an association of persons working together to commit an offence.

5. Knowledge [*mens rea*]. The variants suggested are, first, the basic one of 'knowing' that the property is the proceeds of crime (which knowledge may be inferred from objective factual circumstances); and, secondly a more flexible standard of 'knowing or suspecting' that property is proceeds of crime.

The second variant, which includes 'suspecting', relaxes the required proof by allowing for the situation that the evidence suggests that the person suspected that the property was proceeds. Some states also use, as an alternative standard in criminal money laundering provision, a further variant that the person had 'reasonable grounds to believe' that the property constituted proceeds.

Drafters could consider adding to 'knowing', in each of the subsections, the term 'or believing.' This would provide for liability where persons believe that what they have taken or converted is proceeds even though it is not. It would apply, for instance, where property was provided by a law enforcement officer as part of an undercover operation or controlled delivery.

A less demanding 'negligence' standard may also be considered. It is also an option in these provisions (Section 36(5)). States adopting this standard may choose to provide for lesser penalties for negligent money laundering.

In choosing a standard, drafters will wish to consider the relevant domestic standards relating to the concept of criminal 'knowledge'. In some states, for instance, the concept might include wilful blindness or recklessness.

6. 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 provided for 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. These variations in approach reflect the variety of drafting styles found in different national legislation.

(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 [*or believing*] that such property is the proceeds of crime commits an offence.

Variant 2: knowing [*or believing*] 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 commits an offence.

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: Subsection 36(5) provides for liability under a negligence standard for the three kinds of money laundering offences as a result of which a person is liable when he or she ought reasonably to have known or suspected that property constituted proceeds of crime.

(6) An attempt to commit any offence pursuant to Section 36(2)–(5), aiding, abetting, facilitating or counselling the commission of any such offence, or participation, association with or conspiracy to commit such offence shall be punishable in accordance with subsection (12).

(7) Knowledge, suspicion, intent or purpose required as elements of an offence in subsections (2), (3), (4), (5) and (6) may be inferred from objective factual circumstances.

(8) No conviction for the offence that has generated the proceeds shall be necessary to prove that property is directly or indirectly the proceeds of crime. [*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: Knowledge, intent and purpose as states of mind cannot generally be proven directly as a fact and are usually only to be inferred from proven facts. Direct proof is difficult. People engaged in such criminal conduct will necessarily carry out this conduct carefully and secretly, and inferences from primary facts are necessarily an important element of proof.

Inferences are specifically provided for in Article 3.3 of the Vienna Convention, Article 6.2.f of the Palermo Convention; and Article 28 of the United Nations 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 36(4). It may also be used to prove a person *should* have known that property was the proceeds of crime under Section 36(5).

Even if objective factual circumstances establish that a reasonable person should have known that property was proceeds, if the fact finder is convinced that the accused was only *negligent* and did not subjectively realise the illegality of the property, the liability then could be grounded only under the *negligent* money laundering offence set forth in Section 36(5).

The general principles of criminal law in many states recognise 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 36(7) makes it explicit that, for the money laundering offence, these states of mind may be inferred from objective factual circumstances.

Prosecutors have to establish that the property involved in the allegation of money laundering is the proceeds of a criminal offence. If the required proof is set too high, a money laundering offence will be successfully prosecuted only if the predicate activity was prosecuted and a conviction obtained. As is recognised (see FATF Recommendation 3), this would defeat the purpose of the provision.

In addition, drafters are advised to include the language provided under subsection (8) above. In many jurisdictions, law enforcement authorities, prosecutors and judges still struggle with the notion that money laundering is an autonomous offence that can be investigated and adjudicated independently from and in the absence of an investigation of an associated predicate offence. The suggested language provides specifically that to establish that property is proceeds of crime, the prosecutor does not need to provide evidence of the specific offence that generated the proceeds, or the specific perpetrator of the predicate offence. Rather the prosecutor need only establish that property is the result of some kind of criminal activity. It confirms that a conviction for money

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laundering may be achieved even in cases where no case has been investigated or adjudicated for the predicate offence.

Drafting authorities may also consider adding language to Section 36(8) that proof that the proceeds of crime can be inferred from the 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.

- (9) *For the purposes of this Section, ‘proceeds of crime’ includes proceeds of an offence committed outside [State] provided that the conduct constitutes an offence in the State or territory where the conduct occurred and would have constituted an offence if committed within [insert name of State adopting the law], or if the conduct was not an offence in the other state, whilst contravening the law of [State].*

Drafting note: See drafting note on the definition of ‘offence’ above. It is essential that it be very clear that the money laundering offence applies also to proceeds generated abroad (paragraph 5 of the interpretive note to FATF Recommendation 3). This can be done either by adopting item (b) under the definition of the term ‘offence’, as explained below, or by including the language suggested under subsection (9).

- (10) The offences in Sections 36(2), 36(3) and 36(4) shall be punishable, in the case of natural persons, by imprisonment of up to [insert number] years and a fine of no more than [insert amount], or both, and in the case of legal persons by a fine of no more than [insert amount].
- (11) [*option: and a fine of up to _ times the amount of the laundered sum.*]
- (12) The offences in Sections 36(5) and 36(6) shall be punishable, in the case of natural persons, by imprisonment of up to [insert number] of years and a fine of up to [insert amount] or both, and in the case of legal persons by a fine of up to [insert amount].

Drafting note: States may want to set a lesser penalty for an offence under a negligence standard.

Section 37 Terrorism Financing Offences

- (1) In this Section, the following definitions apply:

Funds means assets of every kind as defined in Section 3.

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) 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’ is the same as that in the glossary to the FATF 40 Recommendations (page 121).

Terrorist act means:

- (a) *variant 1*: an act that constitutes an offence within the scope of, and as defined in, any 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 that constitutes an offence within the scope of, and as defined in, any 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), the International Convention for the Suppression of Terrorist Bombings (1997), the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the 2010 Protocol Supplementary to the Convention for the Suppression of the Unlawful Seizure of Aircraft; and

- (b) any other act that is intended to cause death or serious bodily injury to a civilian, or to any other person not taking any active part in 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 organisation 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 criminalised 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), thereby implementing Article 2.1(b) of the Convention. It is also important to note that the intent element under subsection (b) may not apply to the offences under subsection (a), as the latter constitute very specific and serious types of conducts that may but do not in all circumstances require a specific intent.

Terrorist organisation means any group 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 glossary to the FATF 40 Recommendations (page 121).

‘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.’ This draft 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 ‘intentionally and knowingly’ providing or collecting the funds. In such circumstances, the inclusion of ‘wilfully’ does not add anything to the *mental element* required for the commission of this offence.

If under the general criminal law principles, the addition of ‘wilfully’ adds to the *mental element* that the conduct is forbidden by law because there is a purpose to disobey or disregard the law, then it would have a more restrictive effect. It would limit liability to circumstances in which the provider or collector of the funds 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.

- (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; or
 - (c) by a terrorist organisation
- commits an offence.
- (3) An offence under subsection (2) is committed:
- (a) even if a terrorist act referred to in subsection (2) does not occur or is not attempted;
 - (b) even if the funds were not actually used to commit or attempt a terrorist act referred to in subsection (2); 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);
 - (b) organise or direct others to commit an offence within the meaning of subsection (2) or;
 - (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 the commission of an offence under subsection (2) or where the contribution is made knowing that the intention of the group is to commit an offence under subsection (2).
- (5) The offences in subsections (2) and (4) shall be punishable in the case of a natural person by imprisonment of up to [insert number] years and a fine of up to [insert amount], or both, and in the case of a legal person by a fine of up [insert amount].

Drafting note: The criminal offences defined in Section 37 are based on the requirements of the Terrorism Financing Convention and FATF Recommendation 5 and its interpretive note.

The Terrorism Financing Convention requires the criminalisation 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 money laundering offences. FATF Recommendation 5 goes further and requires the criminalisation of the same conduct for the purpose of generally

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collecting or providing funds for the purpose of supporting an individual terrorist or a terrorist organisation. This section is drafted not only to implement the Terrorism Financing Convention criminalisation obligation but also to cover the additional criminalisation scope of Recommendation 5 (ante).

Both the FATF standard and the Terrorism Financing Convention also require jurisdictions to provide for the freezing/seizing and confiscation of the instrumentalities and proceeds of such financing offence. This requirement is accomplished by the coverage of the terrorism financing offence under Part V (confiscation orders and preventive measures).

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

In the case of a terrorist group, Section 37(1) fully conforms to the interpretive notes by criminalising 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 organisation.

Section 37, by criminalising the financing of a terrorist organisation as well as of terrorist acts, makes the property of terrorist organisations 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 Parts II and V 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 V are adopted, this will assist states in meeting the second part of FATF Recommendation 4, 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 organisations.

Definition of funds. The definition of funds is found in Section 37(1). This definition contains all the elements of the definition of funds found 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 3, Part II on Preventive Measures, 'Funds or other assets' in Section 3 includes income or value derived from assets but does not provide that the definition applies wherever the property is located. See also definitions in the glossary to the FATF Recommendations.

Part V

Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders

Drafting note: This part implements FATF Recommendation 4 and the associated interpretive notes. The model comprises three sets of provisions on this issue: (1) provisions that are mandatory to comply with basic international standards (reference will be made to the relevant FATF standard in the drafting notes), which will be noted below; (2) additional provisions that are recommended for an effective and comprehensive asset recovery regime but that are not required under the FATF standard; and (3) provisions that are optional and reflect best practice.

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.

Part V deals with conviction-based confiscation. It addresses both the preliminary orders to secure property for eventual confiscation and final orders to confiscate property. To obtain a confiscation order, there must be a criminal conviction of a natural or legal person. To restrain or seize property, there must at least be a criminal investigation in which an order to confiscate or recover benefits is anticipated. Part V also addresses investigative orders to assist in confiscation proceedings.

Application to terrorist acts and terrorism financing. Conviction-based confiscation provisions apply where there is a conviction for any criminal offence. The scope of these provisions should be broad enough to capture funds raised or provided in a terrorism financing setting, as objects, proceeds or instrumentalities of a terrorism financing offence. Likewise, if membership in a terrorist organisation is a criminal offence, it should cover the assets of such an organisation.

Definitions. Definitions applicable in this part appear in Section 38(4).

Terms: Part V provides for orders to ‘confiscate’ proceeds, objects 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. Care will have to be taken in individual jurisdictions to ensure that the correct terminology is used. In particular, there is often

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confusion between the terms ‘freeze’, ‘restrain’ and ‘seize’. Their use is defined in these model provisions but definitions may differ from state to state.

Modes of confiscation: Part V 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 53-56) 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 57–60).

Section 38 Application of Part and Definitions

Drafting note: Kinds of criminal offences

The kinds of criminal offences for which confiscation orders under this part are available depend upon the definition drafting authorities choose for ‘offence’ for the purposes of this part. The widest application occurs if ‘offence’ is defined as ‘any offence against the laws of [State]’ (all-crimes approach).

Applications can be defined by using the ‘threshold approach’, which might specify an offence as ‘any offence against the laws of [State] carrying a maximum penalty of more than [12] months’ imprisonment’ or a minimum threshold approach such as ‘all offences that are punished by a minimum penalty of more than [six] months’ imprisonment.’

A third way is to define the offences by reference to a scheduled list of the offences a conviction for which will trigger the operation of the provisions (list approach). Adoption of any of those approaches or a combination thereof would comply with FATF Recommendation 3. Best practice might suggest adoption of an all-crimes approach. Please also see the drafting note under Part IV, Section 36, on this issue.

Restraint and seizure orders. For property to be available for confiscation, it is essential that it be secured as early as possible. Sections 39-48 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 states may use to address the significant challenges in recovering criminal proceeds. First, there are provisions that provide for recovery in respect of general criminal activity. Secondly, there are provisions

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that reduce the standard of proof with respect to what constitutes proceeds or benefit. Both of these features have been found important, for without them recovery of the proceeds of crime will often not be possible.

The evidentiary burden regarding fast-moving and often hidden proceeds constitutes a high and often impossible barrier for prosecutors. 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 these model legislative provisions, provisions or options incorporate each of these features. Section 58 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.' Sections 53(6) and (7) provide for inferences that the court may use in the case of a confiscation order. In addition, Section 58(1)(d) provides an inference for use with a benefit recovery order. Optional Sections 59(7) and (8) relate to assumptions in an extended benefit recovery setting.

Section 38(1), in combination with the definition of offence below, makes clear that this part applies to both domestic and foreign offences. Subsection 38(4), the definitions subsection, contains a definition of 'offence.'

Under international standards, it is essential that the state be able to provide mutual legal assistance, whether through this kind of provision or some other method. See, for example, FATF Recommendation 38.

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

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

Drafting note: Retrospective application. Section 38(2) makes clear that the remedies provided in this part – restraint, confiscation and benefit recovery orders – should be available even though the conduct that is the basis for the restraint or confiscation predates 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 if the conviction for the offence took place before it came into force.

If domestic law and jurisprudence treats confiscation as a penalty, rather than as restorative or reparative, this provision on retroactivity is not appropriate. As the UN *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 offence was committed.’

In this Part, the following definitions shall apply:

Benefit means any advantage, gain, profit or payment of any kind, and the benefit that a person derives or obtains or that accrue to him or her includes any advantage that another person derives or obtains, or that otherwise accrues 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 states to determine which courts should be given jurisdiction to deal with applications relating to conviction-based confiscation. In states 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.

A section on the limits of jurisdiction could 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 might be thought sensible to apply in confiscation cases.

Dealing with property includes 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;
 - (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 and;
 - (iv) the ability of the person to decide whether and to what extent the property may be dealt with.
- (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 38 in its definition of effective control at paragraph (c) above ensures that 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 to 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 and who has an account that holds client funds in trust.

Enforcement authority means [insert name of authority the 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

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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 VI on Civil Forfeiture. If another authority is responsible for civil cases, it may be helpful for 'enforcement authority' to 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 made after the commission of an offence by the first person, 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.

Instrumentality and **instrumentalities** includes 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 shall include property that is used in or intended or allocated for use in the financing of terrorism or terrorist acts or by terrorist organisations.

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 jurisdictions. This variant broadens the property that might be considered an instrumentality to include objects of crime. Case law that may be helpful in deciding on an approach and that discusses the concepts underlying 'instrumentalities' includes (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* (2004(2)) SACR 208 (Supreme Court of Appeal of South Africa); *Mohunram and Anor v. NDPP* [2007] ZACC 4; *NDPP v. Geysler* [2008] ZASCA 15 (RSA) (available on SafLII), *NDPP v. Mohamed No* [2003] ZACC4.

Interest in relation to property includes:

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

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) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, 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 more than 12 months' imprisonment; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, 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) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, 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 V, the kinds of criminal offences for which confiscation and benefit recovery orders are available depend upon the definition drafting authorities choose for 'offence' for purposes of this part.

The definition of 'offence' should reflect one of the approaches in the interpretive note to FATF Recommendation 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 this is a manageable and proportionate aim. If variant 2 is chosen, the provisions on restraint and confiscation will be available in the case of all serious offences, namely those that carry a maximum penalty of more than one year. In the case of a country that has a minimum rather than maximum threshold in its legal system, variant 4 will be appropriate. Use of variant 3 alone, the list approach, has the disadvantage of requiring frequent changes in legislation as new offences are enacted.

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

Person means any natural or legal person.

Proceeds and ‘**proceeds of crime**’ carry the meanings as defined in Part II, Section 3.

Property carries the meaning as defined in Part II, Section 3.

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, subject to the effective control of the defendant; and
- (b) any property or its value gifted by the defendant to another person within the period of [six] years ending at the date of the first application made under this Part.

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, subject to the effective control of the relevant person; and
- (b) any property or its value that was gifted by the relevant person to another person within the period of [six] years ending at the date of the first application made under this Part.

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 restraint 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 V. Without it, persons who commit a crime will be easily able to evade an application of this part by distancing themselves from their property using others as nominees.

The definition of ‘relevant person’ applies with respect to applications for and the granting of restraint orders under Sections 39, 40 and 43. 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 58(1)(d) and 63 which relate to valuing the defendant’s benefit and realisation 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 or she 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 which 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.

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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 arrangements 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 is the subject of an investigation for an offence, has been charged with an offence or has been convicted of an offence.

Serious crime shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

Terrorist property has the same meaning as the definition of terrorist property in Part VI, Section 66.

Restraint Orders

Drafting note: Restraint orders. Sections 39–48 deal with restraint 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 restraint order. Such orders can be imposed against all types of property – both tangible (cars, boats, jewellery) and intangible (bank accounts, a debt obligation).

The restraint order provisions may be used either to restrain property for a confiscation order (proceeds and instruments of crime; see Section 53) or to restrain property that might be used to satisfy a benefit recovery order (and extended benefit recovery order if that option is chosen) (Sections 57 and 59). The restraint order provisions therefore run in two parallel streams depending upon the purpose for which the order is required. Section 39(1) requires that there be an indication whether the restraint 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.

Restraint 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 an order is made *in personam*. Typically the foreign state where property is located either will ask the requesting state to provide information and evidence so that the foreign state can seek its own order (the more usual

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approach) or will ask that the requesting state forward an appropriate order issued by its courts, which it will then recognise and register.

The term ‘restraint order’ has been used in this draft law, but individual states may use alternative terminology that is more appropriate to their system.

Although Section 39 is meant to restrain a specific person’s interest in property for the purpose of securing a confiscation order or a benefit recovery order, it may indirectly affect another person’s interest. The court will need to consider how best to protect third-party rights.

Section 39 Application for Restraint Order

- (1) Where a person is the subject of an investigation for an offence, or has been charged with an offence or has been convicted of an offence (referred to hereafter in this Part as ‘the relevant person’) and there are reasonable grounds to believe that he or she has benefited from an offence or is in possession of property that is an instrumentality of an offence, or terrorist property, the enforcement authority may apply for an order under subsection 2 in respect of any of the following:
 - (a) property that is the proceeds of such offence;
 - (b) instrumentalities of such offence;
 - (c) any property in which the relevant person has an interest;
 - (d) terrorist property.

Drafting note: Application for restraint order

Timing of application: It is important to be able to apply for a restraint order before a person has been charged with an offence otherwise the person under investigation will have an opportunity to conceal or dissipate property. Some existing approaches permit restraint only at the time charges are or are about to be laid. Best practice suggests that restraint orders be obtained as early as possible following the commencement of a criminal investigation.

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 or not the person should be charged with an offence.

Charging: The state may have particular procedures associated with charging which drafting authorities will consider if there is doubt as to when this stage in proceedings has commenced.

Court: Drafting authorities may wish to consider which court will hear applications for restraint orders and make sure this is aligned with the definition of a court in Section 38(4). It need not necessarily be the court that will determine an application for a confiscation, benefit recovery or extended benefit recovery order.

- (2) An application for an order under this Section to restrain property, 'a restraint order', may be made to secure the property for the purposes of an application for an order under Section 49, or for an application for a benefit recovery order [*option: or an extended benefit recovery order*] pursuant to Section 57 [*option: Sections 57 and 59*].
- (3) Upon application by the enforcement authority, an application for an order under this Section shall be heard *ex parte* and *in camera*, unless to do so would clearly not be in the interests of justice.

Drafting note: Most restraint 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 may deal with these applications without giving notice to, and in the absence of, the defendant or others with an interest in property that is 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 39(3).

This does not prevent an application from being 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 39(3) is meant to govern the court's exercise of its inherent discretion. See discussion on this issue in *Chatterjee v. Ontario* 2009 [SCC] 19.

- (4) An application for a restraint order under subsection (2) shall be in writing and shall be supported by [*variants: an affidavit; evidence; a verified statement*] of [specify the person to be authorised] indicating that the authorised person believes, and the grounds for his belief, that:
 - (a) the person has benefited from an offence and that the property that is the subject of the application is proceeds of crime; or
 - (b) the property is an instrumentality or derived or intended for use in an act of terrorism; or
 - (c) that the property is terrorist property.

Drafting note: Section 39(4) requires the use of an affidavit, verified statement or other form of supporting 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.

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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. Use of officers of sufficiently senior rank will guard against the misuse of these provisions. It is best that the court hear directly from the persons who are intimately involved in the investigation. Drafting authorities should identify the officers who will be involved (from what agency) either here or in the definitions section.

- (5) Where an application under subsection (1)(a) is made prior to the conviction of a person for an offence, the [*variants: affidavit; evidence; verified statement*] shall state the officer's grounds for belief, and the grounds for believing that the relevant person committed the offence(s), and is the subject of an investigation for the offence(s).
- (6) An application for a restraint order in respect of 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 [*variants: an affidavit; evidence; a verified statement*] of [specify officials to be authorised] indicating the grounds upon which the officer reasonably believes that the relevant person derived a benefit directly or indirectly from the commission of the offence(s).
- (7) Where an application under subsection (1)(b) is made prior to the conviction of the person with an offence, the [*variants: affidavit; evidence; verified statement*] shall state the officer's grounds for believing that the relevant person committed the offence(s) and is the subject of an investigation for the offence(s).
- (8) If property that is the subject of an application for an order under this Section is the property of a third party, the [*variants: affidavit; evidence; verified statement*] shall indicate that the officer believes, and the grounds for his or her belief, that the property that is the subject of the application is property in which the relevant person has an interest.

Drafting note: Third-party interests. Section 39(8) sets out the evidentiary requirements that should be addressed in order to obtain a restraint order for the purpose of a benefit recovery order over property 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 its ordinary meaning, property over which a person under investigation (or charged) has effective control or property which he or she 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. The court could be provided with real and personal property search results.

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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 per cent of the purchase price of a house that the third party then purchased in his or her name, the third party supplying the remaining 75 per cent of the purchase price from his or her 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 or her 25 per cent 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 per cent interest in the 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 until the relevant person's 25 per cent share is paid out.

It will be clear, however, 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 40 The Restraint Order

Drafting note: Grant of restraint order. Section 40 provides the court with discretion to grant a restraint order where it considers there are reasonable grounds to believe:

- that a person committed the offence and there is an investigation or charge relating to that conduct; and
- that the property to be restrained is proceeds or an instrumentality or terrorist property (if a confiscation order is contemplated) or that the person derived a benefit (if a benefit recovery or extended benefit recovery order is contemplated).

Standard for granting a restraint order. Standards that states use to grant restraint orders vary. Among them would be that a confiscation or benefit recovery order is likely to be made or that there are reasonable grounds to believe that such an order may be made. Section 39(1) does not rely on the likelihood

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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 require, in addition, evidence of a risk of dissipation or concealment. This can be very difficult to obtain, particularly at an early stage of an investigation. Using this requirement may mean that there will be no assets to satisfy an eventual order.

Drafting authorities must evaluate the appropriate balance to be struck for 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, this could amount to unfair interference with a person's right to peaceful enjoyment of possessions.

- (1) Where the enforcement authority applies to the court for a restraint order in accordance with this Section, 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) and any one of subsections (1)(b), (1)(c) [*option*: and 1(d)] are satisfied, it may order any of the matters set out in subsection (2):
 - (a) where the relevant person has not been convicted of an offence, that he or she committed an offence and that the person is either the subject of a criminal investigation or has been charged with an offence; and
 - (b) where the application for a restraint order is made for the purpose of securing property for a confiscation order, that the property could properly be the subject of an application for a confiscation order; or
 - (c) where the application for a restraint order is made for the purpose of securing property for a benefit recovery order, that the relevant person derived a benefit from the commission of the offence, and has an interest in that property; [or]
 - (d) where the application for a restraint order relates to terrorist property, that the property so relates.
 - (e) [*option*: where the application for a restraint order is made for the purpose of securing property for an extended benefit recovery order, that offence is a serious offence for the purposes of Section 59 and that the relevant person has an interest in that property.]

Drafting note: Throughout these model legislative provisions, when referring to the level of evidence required for an order, the standard of 'belief' has been adopted. However, when orders are being sought at the early stage of an investigation, drafters may consider that the appropriate evidential standard is

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‘suspect’. In determining which standard to apply, consideration will need to be given both to other provisions in domestic law and to the impact that ‘suspicion’ as a standard may have on applications for mutual legal assistance.

- (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 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.
- (3) Where a person has been appointed under subsection (2)(c) in relation to property, he or she 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 and that all obligations in respect of the property are satisfied;
 - (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, provided this power may be exercised without the prior approval of the court only where:
 - (i) all persons known by the appointed person 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 person appointed, be disproportionate to the value of the property concerned;

Drafting note: The importance of managing seized assets cannot be overstated. Asset management is a developed skill, and states will have to establish and maintain mechanisms dedicated to ensuring the maintenance of the value of seized assets. Part XI of this draft contains sample asset management provisions

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that drafters can employ. FATF Recommendation 4 includes a requirement to identify, trace and evaluate property, and those responsible for asset management will have to be able to undertake these functions as well.

Section 40(2) deals with the nature of the order required to restrain property. A simple order, as provided for 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 on-going management, for instance on-going concerns, businesses or share portfolios and certain kinds of real estate. Subsection 2(c) thus provides for the appointment of a named receiver (or trustee as local law requires) to deal with such matters. The term used for the person appointed by the court under Section 40(2)(c) will be a matter for the state concerned. It may be that terms other than those suggested may be used, for example 'asset manager'.

To avoid confusion with a person appointed to a similar role under the civil forfeiture part of these laws, it may be that a different term should be used for each part. Clarification of the terms used, perhaps by a definition, will be essential to avoid confusion with other use of the same terms. In some jurisdictions, existing government agencies may have appropriately qualified persons who can undertake this role. 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 set out in regulations and in any order made. It is a prerequisite of the appointment of a property 'manager' that there is property that requires management to guard against its value being diminished, thereby ensuring that in the event of conviction the proper value of the property will be available to the state and, in the event of an acquittal, the original asset will be available for return to its owner with its value maintained.

Under the model provisions, a person appointed by the court can have two roles in relation to restrained property: preserving/managing the property pending confiscation and realising the property post confiscation.

A preservation/management order may be made pursuant to Section 40 at an early stage in the proceedings, either when a restraint 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.

- (d) if the property consists, wholly or partly, of a business:
 - (i) employing, or terminating the employment of, persons in the business;
 - (ii) doing anything that is necessary or convenient for carrying on the business on a sound and lawful 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 he or she were the registered holder of the shares.

Drafting note: Section 40(3) provides for an order that regulates the actions of the appointed person with respect to the property. It provides in Section 40(3)(c) for such person to realise or deal with the property, for instance to sell it in some circumstances.

Under the model provisions, a person appointed by the court can have two roles in relation to restrained property: preserving/managing the property pending confiscation and realising the property post confiscation.

A preservation/management order may be made pursuant to Section 40 at an early stage in the proceedings, either when a restraint 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.

- (4) A restraint 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 a manner as would defeat the operation of this Act.

Drafting note: Section 40(4) makes clear that risk of dissipation is not a prerequisite for the making of an order. It is important to clarify this point, as a restraint order in connection with a criminal case should be viewed as conceptually different from 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, for example, *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.) Restraint orders in criminal cases should be easier to obtain since the person affected has been charged, or is likely to be charged, with an offence that he or she is reasonably believed to have committed, or he or she has been convicted of the offence.

Section 41 Restraint Orders and International Requests

- (1) This Section applies:
 - (a) if a restraint order under Section 40 has been made; or
 - (b) in respect of an offence under the law of a foreign State in relation to acts and or omissions that, had they occurred in [insert name of State], would have constituted an offence in [insert name of State] and a request for assistance has been made by the foreign State for the restraint or confiscation of property

relating to such acts and or omissions, or for information or evidence that may be relevant to the proceeds, benefits or instrumentalities of the offence.

- (2) Where the enforcement authority believes that 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 such State or territory to enforce the restraint order in that State or territory.

Drafting note: Property abroad. Section 41 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.

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 41(3) enables the provisions of this act to be used in support of foreign applications for assistance.

- (3) Where the enforcement authority is asked to assist a foreign State pursuant to subsection (2) above, it may make an application to the relevant court for such orders as are appropriate having regard to all the circumstances of the request for assistance.

Section 42 Notice of Restraint Order

Where a restraint 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 or she is no longer the holder of property to be restrained. Section 42 provides for this.

The person should be served with sufficient information to enable him or her to understand the basis of the restraint order or, alternatively, there should be

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a procedure in place to afford him or her 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. It should be noted that the service of these orders as soon as is reasonably practicable is best practice. States are encouraged to consider reducing the statutory number of days to the barest minimum consistent with the practicalities of service within the jurisdiction.

Section 43 Further Orders

- (1) Where a court makes a restraint order, it 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 this, the court may on the application of any person affected make:
 - (a) an order revoking the restraint order or varying the property to which it relates;
 - (b) an order varying any condition to which the restraint 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 person appointed pursuant to Section 40(2)(c) a sworn statement setting out particulars of all property wherever situated or dealings with such property, of the owner or the relevant person, as the court thinks proper;
- (2) Where the restraint order appoints a person to take custody and control of property pursuant to Section 40(2)(c) the court may make:
 - (a) an order regulating the manner in which the person may exercise his or her powers or perform his or her duties under the restraint order;
 - (b) an order determining any question relating to the property to which the restraint order relates, including any question with respect to the property to which the restraint order relates, relating to the liabilities of the owner or to the exercise of the powers, or performance of the duties, of the person appointed and/or;
 - (c) an order directing the owner or another person to do any act or thing necessary or convenient to be done to enable the person appointed to take custody and control of the property in accordance with the restraint order;
 - (d) 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 or her dependants (if any)) and reasonable business expenses; and/or

- (ii) the relevant person's reasonable expenses in defending a criminal charge or any proceeding under this Act.
- (3) A court may make provision under subsection (1)(e) for reasonable legal, living and business expenses only if the relevant person satisfies the court that he or she cannot meet such expenses out of assets that are not subject to a restraint order, that he or she has disclosed the extent of all his or her interests in all assets in which he or she has any interest and the court determines it is in the interest of justice to make such a provision.

Drafting note: Section 43 makes it clear that the court can make any further orders in relation to the restraint order that it deems appropriate. Thus, it may revoke or vary the order (Section 43(1)(a)) and may provide for legal and living expenses out of the restrained property (Section 43(2)(d)), 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 that is approached by different 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 43(3) permits access if the court determines it to be in the interest of justice to do so, and in the absence of any other funding. 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. The UK Proceeds of Crime Act 2002 specifically prohibits the use of restrained funds to pay for private legal fees unless it is to make refunds to the legal aid fund administered by the state. This approach leads to a much more proportionate use of restrained funds in relation to legal fees.

Section 43(2)(d), 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 person appointed by the court.

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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 should require 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 property is restrained because it is shown on a reasonable basis to be the proceeds of crime, there is a good argument that a defendant should never be permitted access to such property to pay for expenses. Drafting authorities must ensure there is some kind of access to legal representation, so that fundamental rights in a criminal proceeding are not denied.

- (4) 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 penalty.
- (5) 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.
- (6) For the purposes of subsection (5), applications for a restraint order, a confiscation order or a benefit recovery order [*option: or an extended benefit recovery order*] are not criminal proceedings.

Drafting note: Section 43(6) makes clear that the use immunity conferred by Section 43(5) does not apply to proceedings for orders under this act.

Section 44 Exclusion of Property from Restraint

- (1) Where a person who is not the relevant person has an interest in property that is subject to a restraint order applies to the court to exclude his or her interest from the order, the court shall grant the application if it is satisfied:
 - (a) in the case of a restraint order to secure property for a confiscation order:
 - (i) that the property is not or does not represent proceeds or an instrumentality and
 - (ii) that the applicant was not, in any way, involved in the commission of the offence in relation to which the restraint order was made;
- or:
- (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 that would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of crime.
 - (b) in the case of a restraint order to secure property for a benefit recovery order, [*option: or extended benefit recovery order*] that the property interest that is the subject of the application is not property in which the relevant person has an interest.
- (2) For the purposes of subsection (1)(a)(iii) and (iv), the value of the applicant's interest shall be in proportion to the proper consideration the applicant provided to the relevant person.
- (3) Where a person having an interest in property that is subject to a restraint order and who is a defendant applies to the court to exclude his or her 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 the proceeds or an instrumentality of crime or terrorist property; 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 exclude property from restraint under this Section unless satisfied that each of the relevant provisions for exclusion apply.

Drafting note: Exclusion of property. Section 44 provides for the exclusion of property from a restraint order. Sections 44(1) and 44(2) deal with requests from third parties, and subsection (3) deals with requests by the subject of an investigation or a defendant who has been charged ('the relevant person').

Sections 44(1) and 44(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 44(1)(a)(iv) is aimed at ensuring that wilfully blind third parties are not in a position to recover instrumentalities.

Section 44(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

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an interest. Property in which such a person has an interest includes property that he or she owns or effectively controls as well as property that he or she 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 restraint order should reflect this by restraining only 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 restraint 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.

Section 45 Contravention of Restraint Order

- (1) A person who knowingly contravenes a restraint order by disposing of or otherwise dealing with property that is subject to the restraint order is guilty of an offence punishable upon conviction by imprisonment for a period not exceeding [insert number] years or a fine of up to [insert amount], or both, if the person is a natural person, or by a fine of [insert amount] if the person is a corporation.

Drafting note: Contravention of restraint order. Section 45 prescribes criminal consequences for a breach of a restraint order. This approach emphasises the serious nature of such breaches and provides for appropriate criminal consequences. An alternative approach would be to treat such breaches as a contempt of court. The state's domestic court procedure will provide appropriate remedies.

- (2) Where a restraint order is made against a property and the property is disposed of or otherwise dealt with in contravention of the restraint order, and the disposition was for insufficient consideration or the purchaser did not act in good faith, the enforcement authority may apply to the court for an order that the disposition or dealing be set aside.

Section 46 Seizure Order

- (1) On application by the enforcement authority, the court may make an order for the enforcement authority to search for and seize property that is the subject of a restraint order, or property that the court reasonably believes is an instrumentality of crime, or terrorist property, provided it is satisfied that the restraint order may not be effective to preserve the subject of the restraint order or:

- (a) [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) An order under this Section may also grant power to a person named in the order to enter any premises 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, the person named in the order finds any thing that he or she believes on reasonable grounds:
 - (a) will afford evidence as to the commission of an offence; or
 - (b) is of a kind that could have been included in the order had its existence been known of at the time of application for the order; he or she may seize that property or thing and the seizure order shall be deemed to authorise such seizure.
- (4) Unless the court orders otherwise, property seized under this Section shall be retained by the enforcement authority until further order of the court unless required as evidence in any criminal proceedings.

Drafting note: Seizure order. A restraint order is the usual means of securing property for eventual post-conviction recovery. However, in some circumstances a restraint order will be ineffective because the property the prosecutor seeks to immobilise 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 46 provides a compulsory mechanism to secure property for eventual recovery post conviction.

Provision should also be made either in this law or in the state's general criminal procedure code for situations in which evidence of other criminal offences is discovered in the course of execution of a Section 46(1) search warrant. For instance, the executing authority might discover prohibited drugs while searching for a specified article of jewellery.

The seizure order provided for by Section 46 contains only the essential components of the power necessary for its operation. Section 46(3) 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 that 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 47 Protection of the Appointed Person

- (1) Where a court has appointed a person in relation to property pursuant to Section 40(2)(c) or 63, he or she shall not be liable for any loss or claim arising out of the

exercise of powers conferred upon him or her by the order or this Part unless the court 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 person appointed.

Drafting note: Any person appointed under this act should be subject to the same requirements as to integrity, competence and insurance as any other person appointed with the responsibility to have control and/or management of the assets of a third party under any other legislation. Examples might include a public trustee, a litigation guardian, a court-appointed receiver or a bankruptcy trustee.

Section 48 Duration of Restraint Order

Unless the court otherwise orders in the interest of justice, a court that makes a restraint order pursuant to this Part upon the basis that a person is the subject of an investigation shall discharge the order upon application if the person is not charged within a reasonable time of the date of the original order.

Drafting note: Section 40 provides for 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.

Once charges are laid, a restraint order will usually be in force until further order of the court. Applications to discharge would then be made under Section 48.

Section 49 Application for Confiscation Order or Benefit Recovery [*option: or Extended Benefit Recovery*] Order

- (1) Where a person is convicted, the enforcement authority may apply to the court for one or both of the following orders:
 - (a) a confiscation order against property that is proceeds or an instrumentality of that offence or terrorist property;
 - (b) a benefit recovery [*option: or extended benefit recovery*] order against the person.

Drafting note: Section 49 addresses applications for orders post conviction.

Kinds of orders. The enforcement authority may apply for several kinds of orders.

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A confiscation order or a benefit recovery order should be used when the proceeds of the offending (including converted/substituted assets) can be identified. Similarly, a confiscation order should be used when the property is identified as an instrumentality or terrorist property. A benefit recovery order will be appropriate when it is not possible to identify a specific asset as the proceeds (including converted/substituted assets) or instrumentality of an offence.

An optional addition is an extended benefit recovery order in circumstances in which states decide to adopt assumptions as to the extent of the criminal conduct of the defendant following conviction.

Section 49(1) addresses the kinds of orders that may be sought. Section 49(2)–(4) sets forth when the orders may be sought. Section 49(5) and (6) deals with finality issues.

Normally, the application for a confiscation order will be made at the time the conviction is obtained. Section 49(2) provides that the application should be made within a prescribed time limit of the conviction. Section 49(3) provides for the situation in which property that could have been subject to an application for confiscation is identified, or evidence to identify property is only obtained, only some time after the conviction.

- (2) Except with the leave of the court, the enforcement authority must make an application under subsection (1) within [six] 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 it is in the interests 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 in the interests of justice to do so.

- (6) A further application under Section 49 may not be made later than [six] years after the date of the final determination of the application under this Section.
- (7) For the purposes of this Section, a person shall also be treated as convicted of an offence if:
 - (a) found not guilty by reason of insanity following a determination that the criminal acts were committed; or
 - (b) the court takes the offence into consideration with the consent of the convicted person when passing sentence.

Section 50 Application for Confiscation Order or Benefit Recovery Order in the Case of Absconding or Death

- (1) On application by the enforcement authority the court may treat a person as convicted for the purposes of Section 49(1) where:
 - (a) he or she was charged with an offence, a warrant for his or her arrest was issued in relation to the charge and reasonable attempts to arrest him or her pursuant to a warrant have been unsuccessful during the period of [six] months commencing on the day the warrant was issued; or
 - (b) he or she 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.
- (2) For the purposes of subsection (1)(a), a person shall be deemed to have been convicted on the last day of the period referred to in that subsection.
- (3) The enforcement authority may not make application under Section 59 for an extended benefit order in the case of a person deemed to be convicted under this Section.
- (4) 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.
- (5) 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.

Drafting note: Absconding and death. Section 50 addresses applications for confiscation and benefit recovery orders in the case of persons who abscond or die after being charged but before a conviction. Jurisdictions may decide that such provisions are not appropriate, especially if they have provisions for civil forfeiture. The existence of civil forfeiture provisions to cover such cases

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is a very strong argument in favour of their inclusion in a comprehensive asset recovery regime.

Sections 50(1) and (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 50(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 restraint order was made 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 might seek to proceed with a trial *in absentia* (depending on the provisions of local law) and upon conviction to 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 not be easy to deal 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. Such difficulties, however, constitute a strong argument in favour of the introduction of civil forfeiture provisions.

Section 51 Service of Application and Appearances

- (1) Where the enforcement authority makes an application for an order under Section 49(1):
 - (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) The absence by absconding or death of the person, or of any person to whom notice has been given, does not prevent the court from making an order in their absence.
- (3) The court may waive the requirements under subsection (1) 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 52 Procedure on Application

- (1) Where an application is made for an order under Section 49, 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 an order under Section 49 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.
- (3) Where the court determines not to defer imposing sentence, it shall leave out of account in deciding the appropriate sentence any financial orders that it may otherwise consider appropriate. Where the court does defer imposing sentence, it shall determine the extent of any order under Section 49 before considering any other financial order.

Drafting note: Deferral of sentencing. Section 52(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/(extended) 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 to be a range of practice. In some states, it might not be appropriate to consider the orders at all at sentencing. Consideration, if permitted, in some situations may 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 instrumentality.

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, this section will not apply because the application for the order will be made after sentencing.

Section 53 Confiscation Order on Conviction

- (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 that offence or terrorist property.
- (2) The court may make an order under this Section if the enforcement authority has applied to the court for an order under Section 49, or if the court believes that it is appropriate to make such an order.
- (3) Where the court is satisfied that property is the proceeds of crime or terrorist property, the court shall order that it be confiscated.
- (4) Where the court is satisfied that property is an instrumentality of crime, the court shall order that it be confiscated.
- (5) In considering whether to make a confiscation order relating to an instrumentality, the court may have regard to the rights and interests of third parties taking into account the interests of justice [and in particular having regard to the public interest in the confiscation of the instrumentalities of crime].
- (6) In determining whether property is an instrumentality, the court may infer that the property is an instrumentality if it was in the defendant's possession at the time of or immediately after the commission of the offence unless the defendant satisfies the court that such inference is inappropriate.
- (7) In determining whether property is proceeds, 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 after the commission of the offence, unless the defendant satisfies the court that such inference is inappropriate.
- (8) In determining whether property is terrorist property, the court may infer that the property was derived, obtained or realised as a result of or in connection with terrorist acts if it was acquired or possessed by the defendant, unless the defendant satisfies the court that such inference is inappropriate.
- (9) Where the court makes an order under this Section in respect of property other than money, the court shall specify the monetary amount that it considers to be the value of the property at the time of its order.
- (10) Where a court is minded to make a confiscation order under this Section but the property is no longer available, the court may make an order in a monetary value equivalent to the original property.
- (11) Where the court makes an order under this Section, it may give such directions as are necessary or convenient for giving effect to the order.

Section 54 Enforcement of Confiscation Order Abroad

- (1) This Section applies if a confiscation order under Section 53 has been made.

- (2) Where a confiscation order has been made in respect of property that is situated in a State or territory outside [insert name of the State], the enforcement authority may request assistance from the appropriate authorities in the other State or territory to enforce the said order.
- (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 and any such realisation shall be treated as compliance by the defendant with the terms of the order.

Drafting note: This section will apply where a restraint order is already in place in the foreign jurisdiction, but this is not a prerequisite. Where the final forfeiture or confiscation order has been obtained, this provision may be used to seek enforcement of that order abroad. As with restraint 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.

FATF Recommendation 38 requires states to be able to take expeditious action in response to foreign requests for, *inter alia*, confiscation. It also requires that states should have effective arrangements for ‘... the sharing of confiscated assets’.

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. The interpretative note to FATF Recommendation 38 also requires that countries should take such measures as may be necessary to enable them to share among or between other countries confiscated property.

Section 55 Effect of Confiscation Order

- (1) Subject to subsection (2), where a court makes a confiscation order, the property shall vest in [insert name of State] upon the making of the order.
- (2) Where title to property is conveyed or transferred by registration, the property shall vest in [insert name of State] by virtue of the order.

Drafting note: In any particular state, the authority in whose name confiscated property vests will depend on domestic arrangements. Consideration will have to be given to consequential amendments to land registration and similar systems. See the sample provisions for a recovered assets fund in Part XI below.

- (3) Upon vesting, the enforcement authority is authorised to do anything necessary or convenient to secure registration, including executing instruments for transferring an interest in the property.

- (4) Where the court makes a confiscation order, 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 56 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 or her 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(s) in relation to which the order was made; and
 - (c) where the applicant acquired the interest before the commission of the offence, he or she 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 of the offence, the interest was acquired in circumstances that did not arouse a reasonable suspicion that the property was proceeds or an instrumentality.
- (2) For purposes of subsections (1)(c) and (d), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the defendant.

Drafting note: Section 56 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 56(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 that is the subject of the application is or was the subject of a restraint order.
- (4) An application under this Section shall not be made more than [six] months after the day on which the confiscation order is made.
- (5) A person who was served with the application for a confiscation order under Section 51 or made an appearance at the hearing on the application for a confiscation order may not, without leave of the court, make an application under this Section after either the confiscation order was made or an application to exclude the property from restraint under Section 44 was considered and dismissed.

Section 57 Benefit Recovery Order on Conviction

Drafting note: Benefit recovery orders. Section 57 provides for the court to order the recovery of benefit. The enforcement authority will, in the usual case, have made an application for the order under Section 49, but the court may also issue such an order upon its own initiative.

The model provisions provide several options:

- (1) recovery only of the benefit from the conduct resulting in conviction;
- (2) in addition to the benefit from the offence, recovery of the benefit arising out of criminal activity through one or both of two methods:
 - (a) use of the optional language set out in Section 57; or
 - (b) use of optional provision in Section 59 on extended benefit recovery orders.

- (1) A benefit recovery order is an order *in personam* requiring the defendant to pay an amount equal to the benefit that he or she derived as a result of or in connection with his or her conviction [*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 a benefit recovery order or if the court considers it appropriate to do so.
- (3) Where the court is satisfied that the defendant has benefited from his or her conduct [*option: or has benefited from any criminal activity*], it shall order him or her to pay an amount equal to the value of his or her benefit.

Drafting note: Recovery of extended benefit. Section 57(3) contains optional language that permits the court to order recovery of benefit beyond the specific conduct resulting in a conviction. As already noted, this is one method common law states use to deal with the challenges they face in attempting to recover the actual benefits a criminal may have gained from his or her general unlawful conduct. Given the prevalence of tax evasion, this type of provision might be considered a useful tool when recovering the proceeds of such evasion.

It also addresses the problem that the benefit calculation based upon offences for which a defendant was convicted will often not reflect the total benefit of his conduct, as prosecutors are unable to take action with respect to all of a person's criminal activity. Thus, the benefits of the conduct that are proven beyond a reasonable doubt might only be a small proportion of the proceeds accruing from a criminal course of conduct, rather than the total amount.

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One consequence of the use of the extended benefit provisions is that the defendant will have to justify the existence of assets disproportionate to his or her legitimate income. This may place a burden of proof on the defendant or, alternatively, may be used by the defence to counter the prosecution's assertions of benefit gained. States will need to consider carefully how they want to approach this

Use of the extended benefit provisions will need to be considered in the context of the state's legal system and constitutional or other arrangements.

If the optional language set forth in Section 57 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 58.

- (4) The court shall assess the value of the benefit that a person has derived from an offence [*option: and other criminal activity*] in accordance with Sections 58–60.
- (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 varied or quashed, the order may be enforced and any proceeds applied in accordance with this Part and any directions given by the court.
- (6) Where the enforcement authority has applied to the court for a benefit recovery order, it may provide to the court, and if so shall serve upon the defendant, a statement setting out an assessment of the value of the benefit obtained by the defendant.
- (7) The court may, for the purposes of determining whether benefit is established and the value of the benefit, treat any acceptance by the defendant of the allegations set out in the statement as conclusive of the matters to which it relates.
- (8) The court may require any defendant served with a copy of a statement under subsection (6) to respond to each allegation in it and, in so far as he or she does not accept any allegation, to indicate on oath any facts upon which he or she proposes to rely. The court may treat a defendant's failure to respond or to indicate the facts upon which he or she will rely as his or her acceptance of every allegation in the statement other than:
 - (a) an allegation regarding whether he or she complied with the requirement; and
 - (b) an allegation that he or she has benefited from the offence or that he or she obtained any property or advantage as a result of or in connection with the commission of the offence.

- (9) In this Section ‘relevant appeal date’ used in relation to a benefit recovery order made in consequence of a person’s conviction 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 58 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 other criminal activities*] may include:
- (a) any money or other property received by the defendant, or by another person at the request or by the direction of the defendant, as a result of or in connection with 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 or in connection with 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 or in connection with the commission of the offence; or
 - (d) unless the court is satisfied that the increase was unrelated to the commission of the offence, any increase in the value of property in which the defendant has an interest in the period beginning immediately before the commission of the offence and ending at the date the court makes its order;

but does not include any property confiscated under this Part.

Drafting note: Section 58 provides the rules for calculating the defendant’s benefit. It shall be either Section 58(1)(a)–(c) or Section 58(1)(d). Section 58(1)(d) provides that benefit can be established by a net worth analysis. At its core this includes an inference that any increase in net worth in an appropriate period relating to the offence is a benefit. There may be evidence that suggests that 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 there is no double recovery, i.e. recovery of both the property and the value of the property, 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 in connection with the commission of the offence shall not be excluded; and
 - (b) the court shall make such adjustment as is necessary to prevent a benefit from being counted more than once.

Drafting note: The effect of Section 58(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 58(2)(b) ensures that, where more than one method is used to determine benefits, there is no double counting of benefits.

- (3) Where the benefit derived by a defendant was in the 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 type of property.

Section 59 Option: Extended Benefit Recovery Orders

Drafting note: Overview. Section 59 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 58. Section 59 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 benefit the convicted person has reaped from his or her life of crime rather than the benefit merely from the specific crime of conviction. This is an approach that the United Kingdom took in the Proceeds of Crime Act 2002.

Section 59 operates by applying certain assumptions, which the defendant is free to rebut pursuant to Section 59(8). The court must find that all of a defendant's interests, including any gifts, are criminal benefit if all the conditions set out in Section 59 are satisfied. In cases where an extended benefit order applies, the state has the benefit of an assumption that such assets are the product of criminal activity; the task of rebutting that assumption becomes a matter for the defendant. In doing so, he or she may adduce evidence or rely on material disclosed in the state's case.

Depending on the particular rules applicable in the state, the prosecution will have to disclose to the defendant evidence known to it that arguably tends to

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rebut the assumption that his or her assets are of unlawful origin, 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 or an overriding consideration of the interests of justice, the state will prevail with respect to the assumptions.

When to use. An extended benefit recovery order should be made available in clearly defined circumstances, in order to undermine serious, on-going, or organised criminal activity. Thus, according to Section 59(4) and (5), the section is to be used by the only court to assess benefit in cases where the defendant has engaged in criminal activity that suggests that he or she is a 'career criminal' and/or is engaged in a continuing series of criminal activities.

The specific determination of when the extended benefit order provisions should be engaged, and whether they should refer to monetary amounts or numbers of convictions, can be a matter for local drafting. Their use may be limited to situations in which the conviction follows at least two other convictions, or is a conviction for a certain kind of serious crime (for instance drug trafficking, trafficking in human or corruption) that suggests that the individual has engaged in continuing criminal conduct beyond the course of conduct that resulted in the conviction. There might also be a value threshold if the trigger is the number of convictions, to avoid a petty criminal being caught by the provisions.

It should be noted that an extended benefit recovery assessment is not concerned with what the defendant made from the offence for which he or she was convicted. The defendant need not even necessarily have been successful in acquiring a benefit from that offence. As noted in Section 59(1), the court is not looking at the specific benefit from the offence.

Consequence of assumptions. The use of an assumption is a common technique that may mitigate the burden of proof. It is premised on common experience of a connection between a known fact and the one to be assumed, particularly when one party has superior access to knowledge. Once an assumption is in place, based upon evidence, the defendant runs the risk of the assumption being accepted as fact if he or she adduces no evidence to rebut it.

The term 'assumption' has been used in these model provisions, although it is acknowledged that in many jurisdictions the appropriate word will be 'presumption'. States will have to use appropriate terminology for their jurisdiction.

Provisions that permit courts to use assumptions concerning property or benefits derived from criminal activity are widespread in common law jurisdictions.

These assumptions are useful to prosecutors as, if they apply, they relieve the prosecution from proving actual use or derivation of the property, which might be difficult in many cases. A defendant is in a better position to explain the

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source of his or her wealth than an external investigator. Evidence from the state or the defendant may satisfy the court that an assumption has been rebutted.

Assumptions can be left out of the scheme if it is not appropriate to extend the operation of the act in this way in a state, or if there are legal or constitutional problems associated with the use of such provisions. However, obtaining extended benefit orders without the use of assumptions would be challenging.

Because this structure looks at general benefit to a defendant from his or her criminal lifestyle, and not at the specific benefit that the defendant obtained from the unlawful conduct that resulted in the conviction, it must be carefully structured so as not to be viewed as general confiscation. It is essential that the defendant has a full opportunity to present evidence and substantiate the legitimacy of his or her wealth.

A decision will have to be made as to 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 or her wealth has been unlawfully acquired, and to permit in connection with a conviction a recovery of benefits in excess of the benefits that are derived directly from the offence that resulted in that conviction.

- (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 or she has been convicted.*
- (2) *Where the defendant has been convicted of a serious crime, 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 57 (in a case arising out of the same criminal conduct) or any previous order made under this Part.*
- (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 crime; and*
 - (b) *the serious crime upon which the application is based is the third serious crime of which the defendant has been convicted (either in relation to the current proceeding or at any other time within [ten] years preceding the defendant's conviction for the serious crime that is the subject of the application before the court).*
- (5) *For the purpose of this Section, a serious crime is not an offence in respect of which an extended benefit recovery order can be made if the value of the benefit is less than [insert monetary amount].*

Drafting note: The definition of a serious crime for purposes of Section 59 is a matter that requires careful consideration and appears in Section 38. 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 of serious crime is a reference back to the definition in Section 38, which is in turn taken from Article 2 of the Palermo Convention.

Subsection (5) is based upon a threshold benefit test and therefore would not trigger the powers of court without proof of a set threshold being reached.

It would then be 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 made by the defendant within the period of [six] 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, if there are reasonable grounds to believe that an offender is living on the proceeds of crime, then he or she should be required to account for his or her assets, and should have them confiscated to the extent that he or she is unable to account for their lawful origin. In a case where the court has decided to impose such an order, Sections 59(7) and (8) provide the court with powers that allow it to calculate the extended benefits in a particular case.

Rather than look at particular benefit from the offence to assess the extended benefit, the court must look at the whole financial circumstances using two methods.

The first will be a calculation of the value of all property received or transferred by the defendant. 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 six years, but periods between four and ten years would also be reasonable here. It is to be noted in this context that six years is the usual period during which people are required to keep books and records of their business, and so it is suggested that this period or such other period as is applied in that context is the right limit.

The result of this calculation is that, if 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 59(8) exclusion applies).

So, if a repeat criminal has acquired wealth over a period of years, and, in anticipation of a court order, gifts significant assets, or gambles them away, the court can take such gifts or gambling losses into its assessment, and can 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 60, which might well result in substantial additional periods of imprisonment.

Section 59(8) gives a mechanism for the defendant to seek the exclusion from assessment of particular property. This will be possible, first, if the defendant can demonstrate that the property both was legitimately acquired and was not an instrumentality and second, in the case of expenditures or gifts that can be shown to be legitimate. A third justification for exclusion is that 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.

- (9) *Where the enforcement authority has applied to the court for an extended benefit recovery order, it may provide to the court, and if so shall serve upon the defendant, a statement setting out an assessment of the value of the extended benefit obtained by the defendant.*
- (10) *The court may, for the purposes of determining whether extended benefit is established and its value, treat any acceptance by the defendant of the allegations set out in the statement under subsection (9) as conclusive of the matters to which it relates.*
- (11) *The court may require any defendant served with a copy of a statement under subsection (9) to respond to each allegation in it and, in so far as he or she does not accept any allegation, to indicate on oath any facts upon which he or she proposes to rely.*
- (12) *The court may treat a defendant's failure to respond or to indicate the facts upon which he or she will rely as his acceptance of every allegation in the statement other than an allegation regarding whether he complied with the requirement.*

Drafting note: Section 59(9)–(12) provides a mechanism for the enforcement authority to validate its information on benefit so that the court can make an appropriate determination in the absence of any cooperation from the defendant.

Section 60 Amount Recovered under Benefit Recovery [option: and Extended Benefit Recovery] Orders

- (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 Section[s] 57 [and 59] or, if a certificate is issued pursuant to subsection (6), for the lesser amount specified in the certificate.
- (2) The order shall be paid by no later than [four] months following the date of the recovery order.
- (3) In the event that the order is not paid by the date identified in subsection (2) above, the defendant shall serve a sentence of imprisonment in default of payment consecutive to any sentence imposed for the criminal conduct, if any. Such sentence will be determined by reference to [such term as is considered appropriate by local practice].
- (4) Where a court imposes a term of imprisonment under subsection (3), it shall direct that:
 - (a) notwithstanding any term of imprisonment imposed, the unpaid amount will remain due and owing; [optional], and
 - (b) [optional] 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 (3).

Drafting note: It is advisable that the legislation provide for the imposition of a sentence in default of payment to be imposed at the time of the making of the order, thereby saving court time and expense on a further hearing, and also putting the defendant on notice at a very early stage as to the consequences of non-payment. The length of such default sentence will be a matter for the drafting authorities to determine, it being plainly a matter of national preference.

Prison term for non-payment. Section 60(3) 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 60(3), 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. Some states calibrate the sentence in default to the default terms imposed for non-payment of fines.

- (5) The court shall grant a certificate on the application by the defendant pursuant to this Section if, 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, there are reasonable grounds to believe that:
 - (a) the value of the financial resources held by the defendant has declined to the extent that it is less than the benefit recovery order [*option: or extended benefit recovery order*]; and
 - (b) it is considered by the court appropriate in the interests of justice to reduce the order.
- (6) An application pursuant to subsection (5):
 - (a) may not be made more than [30] days after the date upon which a benefit recovery [*option: 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 whose evidence the defendant proposes to rely;
 - (c) must be served upon the enforcement authority together with any supporting [*variants: affidavits; evidence; verified statements*]; and
- (7) The court may suspend the running of time under subsection 2(b) until the application is finally determined, dismissed or withdrawn if it appears to the court to be in the interests of justice to do so.
- (8) Where a certificate is granted pursuant to subsection (5), it must specify a monetary amount equal to the total value of the financial resources held by the defendant or subject to his or her effective control.

- (9) 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 value of the assets held by the defendant not yet realised increase in value or the defendant acquires possession or control of new and additional assets that, 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 that the defendant is obligated to pay based upon his or her ability to pay at a point in time, namely the time of the granting of the certificate. If a certificate has been granted reducing the original amounts the defendant had to pay, absent Section 60(9) he or she would benefit from later acquired wealth.

It is debatable if it is equitable to permit a defendant to be relieved of an ongoing obligation to pay the full amount of his or her benefit. When, at a later point, the defendant has assets available to repay his or her benefit, the issue is whether he or she should, just like 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. By providing the enforcement authority with a lengthy period under Section 60(9) during which it can go after later-acquired assets if it deems it appropriate to do so, 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.

It is one thing for a court to make a benefit recovery order and another for it to be paid. The restraint order provisions, by permitting property of a defendant to be restrained, may effectively secure assets that, when realised, enable the order to be paid in full. However, the value of restrained assets may be insufficient, or their value may have been reduced by court-ordered payments for living or legal expenses. Thus, the operation of Sections 57–60 may well result in a court determining that there is a benefit the value of which greatly exceeds restrained assets.

Courts in both criminal and civil matters issue orders that reflect benefits to a person or an assessment of actual damage and are in excess of a defendant's assets, all of 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,

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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 a defendant's actual financial situation, and that the defendant is not able to engage in fraud in this regard. In addition, Section 60(9) provides an avenue for the authorities to reach any assets that 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 60 provides a powerful mechanism designed to ensure that 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 did not have the means to 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 or her available assets are less than the amount of the benefit recovery order, then his or her obligation to pay will be reduced to the value of the available assets.

This type of provision has been used successfully in the United Kingdom, although it is clear that there may be constitutional or policy reasons why it is not appropriate in some states. Obviously, great care should be used in policy decisions relating to this.

Section 61 Satisfaction and Discharge of Orders

- (1) An order made under this Part is satisfied by payment of the amount due or transfer of the property due under the order.
- (2) An order made under this Part is discharged if the conviction on the basis of which the order was made is quashed and no conviction for the offence or offences is substituted, or if the order itself is quashed.
- (3) 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 the person is granted a pardon in respect of the person's conviction for the offence.

Section 62 Appeals

Any application to appeal against the granting of, or the refusal to grant, an order under this Part shall be made in accordance with the rules applicable to appeals against sentence.

Section 63 Realisation of Property

- (1) Where an order is made under this Part, and the order is neither subject to appeal nor discharged, the court may, on application by the enforcement authority, exercise the powers conferred upon the court by this Section.
- (2) The court may appoint a receiver to take possession and control of, and then to realise:
 - (a) where a confiscation order has been made, the property subject to confiscation pursuant to that order; and
 - (b) where a benefit recovery order [*option: or extended benefit recovery order*] has been made, any property in which the defendant has an interest.
- (3) Where a receiver has already been appointed pursuant to Section 40(2)(c), any order made pursuant to subsection (2) may be made in respect of that receiver.
- (4) The court may make any further orders to assist the receiver in the discharge of his or her duties that the court considers are reasonably necessary.

Drafting Note: The term ‘receiver’ has been used in the context of an appointment under this section. In some jurisdictions alternative terminology may be more appropriate.

In addition, drafters should be aware that there are asset management provisions in Part X that might be applied.

Reference is made in subsection (3) to the appointment of a person under Section 40(2)(c), but the appointment under this section need not necessarily relate to the same person. Further, the appointment can be made under this section in the absence of an earlier appointment under Section 40(2)(c).

- (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 64 Application of Monetary Sums

- (1) Monetary sums in the hands of the receiver 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 order made under this Part in the manner provided by subsection (3).
- (2) If, after payment of the amount payable under the order made under this Part, any sums under subsection (1) remain in the hands of the receiver, such sums shall be distributed amongst persons who held property that 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 an order made under this Part shall be applied as follows:
 - (a) if received from a receiver under subsection (1), it shall first be applied in payment of the remuneration of the receiver and expenses of the management of the property; and
 - (b) the balance shall be paid or transferred to [a Recovered Assets Fund] [the Treasury].

Section 65 Compensation Order

- (1) The court may make a compensation order on application to it by a person if:
 - (a) a restraint order was made under this Act;
 - (b) an application for a confiscation order or a benefit recovery order [*optional: or extended benefit recovery order*] under this Part was not granted or was withdrawn and the restraint order was discharged; or an application for a confiscation order or a benefit recovery order [*optional: or extended benefit recovery order*] was never made because the defendant was acquitted;
 - (c) the person suffered a loss as a result of the operation of the restraint order; and
 - (d) there was serious default consisting of gross negligence or intentional misconduct on the part of a person or persons 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 that 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 [six] months after the date on which the event relied on in subsection(1)(b) occurred. The person making an application must provide notice of the application to the enforcement authority.

Drafting note: Compensation. Section 65 addresses the situations in which compensation or damages should be provided if no final order issues and a restraint order is revoked. Such compensation would be in favour of persons whose property had been restrained and who suffered a consequential loss. Many states (for instance the United Kingdom, Singapore and Canada) limit this to situations in which there was a serious default on the part of a person involved in the investigation or prosecution. The theory is that such restraints

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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 65(1)(d) sets out a serious default standard that is reflected in the United Kingdom's legislation (Section 72, *Proceeds of Crime Act*), with the explanation that such default must consist of gross negligence or intentional misconduct.

Section 65(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 demonstration of serious misconduct by the prosecutor or law enforcement officials.

Part VI

Civil Forfeiture

Section 66 Definitions

(1) 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 [insert name of authority the State decides to designate to institute civil forfeiture matters under this Part].

Drafting note: This part relates to the making and enforcement of orders with respect to property that is proved to be property arising out of unlawful conduct. These forfeiture orders are civil in nature; therefore, they are applied for in the civil courts, and they are available even if there is no prosecution or conviction or, indeed, if, following a criminal trial, the defendant is acquitted.

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. In some states, it is a completely separate office from the general prosecution office; in others, it is a branch of the prosecution.

The term is also used in Part V on criminal confiscation. It may be, and indeed often is, defined differently in the two parts, if necessary.

Instrumentality and **instrumentalities** carry the same meaning as in Part V, Section 38.

Interest, in relation to property, carries the same meaning as in Part V, Section 38.

Offence or **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 that, 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 that, 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 that, 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 is property received ‘through the commission of a criminal offence’. Thus, the scope that drafting authorities decide upon for ‘offence’ in this definition will influence the availability of civil forfeiture within the jurisdiction.

The definition of ‘offence’ should reflect one of the three approaches in the interpretative note to FATF 40 Recommendation 3. See also the drafting note on Recommendation 3 in Part II, Section 3, above. 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 a 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 for effective international cooperation that similar offences under the laws of other jurisdictions are also covered. This is dealt with in subsection (b) of each variant.

Person carries the same meaning as defined in Part V, Section 38.

Proceeds and **proceeds of crime** carry the same meanings as in Part II, Section 3.

Property carries the same meaning as in Part II, Section 3.

Terrorist carries the same meaning as in Part IV, Section 37.

Terrorist act carries the same meaning as in Part IV, Section 37.

Terrorist organisation carries the same meaning as in Part IV, Section 37.

Drafting note: The definitions of ‘terrorist’ and ‘terrorist organisation’ are the same as appear in the glossary to the FATF Recommendations.

Terrorist property means:

- (a) proceeds from the commission of a terrorist act;
- (b) property that has been, is being, or is intended to be, used to commit a terrorist act;
- (c) property that 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 that 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 organisations.

Section 67 Civil Forfeiture Order

Drafting note: Overview: Civil forfeiture orders. Civil forfeiture enables the enforcement authority (as defined in Section 66(1)) 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.

FATF Recommendation 4 (2012) specifically requires countries to consider adopting such measures, to the extent consistent with the principles of their domestic law. It is therefore very important that all countries should give this matter consideration, at least.

This is likely to be an entirely new statutory right of action in the state, and is reserved for the enforcement authority. The procedure for civil forfeiture actions is likely to 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 civil procedure rules.

As noted above, if instrumentalities are included, it will not be necessary to include terrorist property since instrumentalities by definition cover terrorist property.

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Drafting authorities should review how the terms ‘part’ and ‘act’ are used within 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 or represents proceeds [*or instrumentalities*] or terrorist property.

Drafting note: Section 67(1) defines a civil forfeiture order. The order can be distinguished from the definition of a confiscation order: it does not follow a conviction, and it is granted by a civil court.

The subsection also makes clear that a civil forfeiture proceeding is a proceeding *in rem*. This means that the property itself is the defendant, not the owner or a person who has an interest in the property. In Canada, for example, a typical style of cause might be Attorney General v. \$100,000 in cash. Since not all civil procedure rules 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 it finds, on a balance of probabilities, that such property is proceeds [*option: instrumentalities*] and/or terrorist property.

Drafting note: Section 67(2) empowers a court with civil jurisdiction to 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 court has determined that property falls into one of the categories set out in the provision, it should grant the forfeiture order. Section 67(2) also makes it clear that the standard of proof is upon the 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. Using the definition of ‘proceeds’, it follows that property derived from the commission of an offence, including property converted or transformed into other property, will be subject to civil forfeiture. 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

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value, then the property liable to forfeiture is the consideration received for the original proceeds. This ensures that criminals cannot defeat these provisions by converting property into another asset.

Terrorist property. Section 67(1) 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 types of terrorist property. If a jurisdiction has existing legislation providing for the forfeiture of property owned or controlled by or on behalf of a terrorist group, then adding terrorist property may not be necessary.

It is important that there be provisions for the civil forfeiture of such property for many reasons, not least 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 66 and covers both instrumentalities – property used or intended for use in the commission of a terrorist act – and the property of a terrorist organisation.

Instrumentalities. Careful consideration should be given to inclusion of instrumentalities that some, but not all, states with civil forfeiture provisions include in an unrestricted fashion. In Section 67(2) it is suggested as an option. Instrumentalities will necessarily, by definition, include terrorist property, so care will have to be taken when including both.

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 if 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.

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, 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 proceeds. For instance, drug profits (proceeds) 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) 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 a criminal offence or offences;
 - (b) [*option: 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:
 - (i) the property was derived from a specific terrorist act; or
 - (ii) the property has been, is being, or is intended to be, used by a terrorist organisation, or to commit a specific terrorist act, as long it is shown that it has been, is being, or is intended to be, used by some terrorist organisation or to commit some terrorist act;
 - (iii) the property 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 organisation; or
 - (iv) the property 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
 - (v) that any person has been charged in relation to such conduct, provided always that the evidence reveals that the property is connected to terrorism however evidenced.

Drafting note: Section 67(3) addresses how the court should arrive at the decision that property is proceeds etc. It sets out 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 conduct, as long as it can be shown to have been obtained through an offence of one kind or another.

It will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, money laundering, fraud or some other criminal activity, provided it can be shown that the proceeds 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.

- (4) 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 67(4) 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.

- (5) 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: Section 67(5) deals with the underlying conduct that can give rise to civil forfeiture. A civil forfeiture action may be obtained over several classes of property, including proceeds. (See Section 3 for the definition of ‘proceeds.’) The definition of offence/criminal offence includes foreign offences upon a dual criminality basis. The effect of this provision is to enable property that has been obtained through criminal 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. This provision may not be necessary if a definition in Section 66 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 standard of proof that the court must apply in determining whether the conduct was unlawful conduct is the balance of probabilities. The criminal standard of proof does not apply in civil recovery proceedings.

- (6) Property may be found to be proceeds under subsection (2) even if a person was acquitted of any offence(s), charges were withdrawn before a verdict was returned, or if the proceedings were stayed.

Drafting note: Section 67(6) further develops the civil nature of the remedy of civil forfeiture, and 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.

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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 therefore not related to the concept of an individual's conviction.

(7) *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 proceeds [*option: instrumentality*] and/or terrorist property.

Drafting note: Civil forfeiture is based on the theory that property that is acquired as a result of unlawful 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 a claim to be made whenever the property was acquired as is contained in this Section 67(7).

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 on which the property was acquired from unlawful conduct and the commencement of the civil recovery proceedings. Issues to consider include the balance between the right of the state to seek civil recovery and the point at which the state should lose that right by passage of time. It will normally be appropriate to introduce some period here, to allow enforcement authorities time to collect the relevant information.

- (8) 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 67(7), 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 67(8).

Some states may not use such retrospective application, but the consequence of the omission of Section 67(8) will be that the enforcement authority will be ineffective for a considerable period after the commencement of the act.

- (9) An order for civil forfeiture may be sought where a person now deceased committed the conduct on which the application for forfeiture is based.

Drafting note: Section 67(9) 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.

- (10) [*option: Civil forfeiture proceedings shall not be brought where the value or aggregate value of the property concerned is less than [insert amount].*]

Drafting note: Section 67(10), an optional section, would set a monetary threshold before a civil forfeiture action can be brought.

Because the procedure before the courts can 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 cognisant of the effect the retention of even less significant levels of criminal benefit may have on communities that 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 68 Property Freezing Order

- (1) Where the enforcement authority reasonably believes that property is 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: For civil forfeiture, there must be a mechanism to freeze property that is, or will become, the subject of proceedings. This is to ensure that the property is not dissipated pending the outcome of the proceedings. What the order is called is a matter for the state. It should normally be called something different from the order obtained in criminal proceedings, called in these laws a restraint order, to avoid confusion. But there is no requirement for it to be called a property freezing order. For example, in some states it is called a property restriction order.

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Section 68(1) provides for the making of an application for a property freezing order that 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) Where the enforcement authority applies to the court for an order in accordance with this Section, 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 the property the subject of the application is proceeds of crime [*option: or an instrumentality*] or terrorist property, it may make the order. 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 68(2). This again will be to ensure that property is preserved. There may be circumstances in which providing notice would not jeopardise 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 restraint order in a 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: 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 property that is the subject of the application 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

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that assets that should be forfeited will be lost. On the other hand, too lenient a standard will result in unwarranted interference in the enjoyment of property. Section 68(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 makes clear that it is also possible to apply for a property freezing order for property that may only be partly the proceeds of crime. However, in some situations the parts are indivisible and the order must apply to the whole asset. This provision allows for that eventuality.

- (5) Within [21] days of a property freezing order being granted 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 and 45 days, with a 21-day period often chosen.

Section 69 Further Provisions in Relation to Property Freezing Orders

Drafting note: Section 69 deals with the effect of property freezing orders. Authorities should consider, when drafting provisions, the powers set out in Section 69(1)(a)–(e). There will be consequences for the enforcement authority and for choices on the use of trustees and receivers, both private and public, depending on how the provisions are drafted.

It will not normally be necessary for a property freezing order to contain all of these provisions. Section 69(1) provides the court with the power to formulate an appropriate order depending on the factual background.

A variety of different orders may be needed in a single case depending upon the location 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;
- (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 that 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;
- (c) an order to appoint a [*option: add 'named'*] receiver 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;
- (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: There are provisions on asset management in Part XI that, if adopted, will need to be considered in the drafting of this section.

Section 69(1)(a) contains a provision that would allow the court to include in a 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 movable 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.

In Section 69(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 give effect to 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. An order to place an encumbrance may be needed for immovable property. Service of notice will be particularly important. Section 69(1)(c) contains a provision allowing for the appointment of a receiver. Such an appointment would normally be contemplated only for certain assets for which there is a management aspect, for example running a business.

An order under Section 69(1)(c) should specify which actions the receiver can take without further reference to the court. For example, where a house is the subject of the order, can the receiver arrange a tenancy or sell it as a result of his or her own

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decision is it necessary to go back to the court for authority? Since applications to the court will be costly, it will be advisable to give the receiver broad general powers, with reference to the court required only in exceptional circumstances.

Section 69(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.

(2) For the purposes of this Section:

Dealing with property carries the same meaning as in Part V, Section 38.

Gift carries the same meaning as in Part V, Section 38.

(3) Any costs associated with the appointment of a receiver and the work subsequently undertaken by him or her pursuant to the appointment shall be paid from [*variants: recovered assets fund; special purpose account*].

Drafting note: Section 69(3) contains important provisions that follow from those contained in Section 69(1)(c) above, in relation to the appointment of a 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. The model provisions in Part XII 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 receiver may become involved in litigation as a result of the appointment, and his or her legal costs will have to be met. In addition, the receiver 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 that 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 can be made, especially initially, when there may be no recovered assets to fund such payments. The costs associated with such appointments are another reason why states may wish to consider imposing a minimum threshold value of property before embarking on civil forfeiture proceedings.

(4) Where a receiver has been appointed under subsection (1)(c) in relation to property, he or she may do anything that is reasonably necessary to preserve the property and its value including, without limiting the generality of this Section:

- (a) by becoming a party to any civil proceedings that affect the property;
- (b) by ensuring that the property is insured;

- (c) by 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 be exercised without the prior approval of the court only in circumstances where:
 - (i) all persons known by the receiver 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 receiver, 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;
 - (iii) selling, liquidating or winding up the business if it is not a viable concern, subject to obtaining the prior approval of the court; or
 - (iv) 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 69(4) contains important provisions related to the management and sale of property in particular circumstances. There may be occasions when 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 relative to 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 authorises 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.

- (5) 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.

- (6) 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 legal and/or living expenses out of frozen assets and what the limits should be for such payments. Payments under both Section 69(5) and (6) 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 (Section 69(5)) relates to the payment of living expenses out of the property subject to the property freezing order. The second (Section 69(6)) 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, taking the position that in most civil cases costs follow the event – if the defendant prevails he or she will be entitled to costs under the rules of civil procedure. If a provision on legal expense payment is adopted, it may be appropriate to link payments to legal aid rules and rates.

The provisions set forth in Sections 69(5) and (6) should be compared with those for payment of living and legal expenses dealing with restrained property under the criminal part of these laws. The details of those provisions are different in some details from the Section 69 provisions. For example, Section 43(1) (e) specifies that an order may permit payment of living expenses for dependants and business expenses, whereas Section 69(5) does not refer to dependants or business expenses. Corresponding provisions under these parts should be compared to find the most desirable approach.

- (7) Where a court has made 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 or orders in respect of the property including an order to revoke the freezing order or to vary the order, where it appears to the court to be in the interests of justice to do so.

Drafting note: Orders to revoke or vary a property freezing order. Section 69(7) 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 are issued 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.

There may be circumstances in which no party seeks to vary or discharge the property freezing order. The enforcement authority would then have as much time as it needs to prepare its full case without the need to return to court until the substantive proceedings begin. 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 reasons as to why it should continue.

An application under Section 69(7) can be made by anyone with an interest in the property, which would include the person who had possession of the property 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. As property freezing orders are often in place for a substantial period 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 70 Property Seizure Order

- (1) The court may make a seizure order under this Section on application by the enforcement authority, permitting an authorised officer to search for and seize property that the court finds could be the subject of a property freezing order under Section 68 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 this subsection 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 or she believes, on reasonable grounds, is of a kind that 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 or she may seize that property and the seizure order shall be deemed to authorise such seizure provided notice of the seizure of the property is reported within [] hours to the court and a record of the seizure of such property is left at the premises from which the property is seized and is given to the occupier of the premises.
- (3) Property seized under an order granted under this Section may be retained by or on behalf of the enforcement authority for only [28] days. The enforcement authority may subsequently make application for a property freezing order in respect of such property.

Drafting note: It will be important for the enforcement authority to apply to the court for a property freezing order in respect of any property recovered as a result of the use of orders granted under this section, since any seizure is time limited under this subsection.

- (4) 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 appropriate law enforcement officers accompany the authorised officer.
- (5) An authorised officer for purposes of this Section shall be [insert name of authorities that shall apply for and execute seizure orders].

Section 71 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 a civil forfeiture order in respect of that property, and such application shall be made in accordance with [the State's] rules of civil procedure.

Drafting note: Section 71 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 71(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 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 71(2) 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 jurisdictions notice will be given by the enforcement authority before the application is lodged, while, in others, the court will order service. Again, in some jurisdictions adjustment to the normal rules of civil procedure may be required.

- (3) Service of notice under subsection (2) shall be made 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 [insert name of State]'s civil procedure rules.

Drafting note: Section 71(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 timeframes and certainty. Parties with claims should have opportunities for notice and objection and an opportunity to have their claim considered by the

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court. The system should also permit finality once a final order has issued and the time period for appeals has expired.

In some cases 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 or her 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.

Section 72 protects the interest of the legitimate owner.

- (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 that is 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 any 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 71(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 who shall be responsible for realising the property in accordance with Section 75.

Drafting note: Section 71(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 with specialised skills. See Section 75 for provisions on realisation of property.

Section 72 Orders Regarding Legitimate Owners

- (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 that is the subject of the application is proceeds [*option: instrumentalities*] or terrorist property but 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.

Drafting note: Section 72 protects third parties who may have an interest in property that is the subject of an application for a civil forfeiture order. Section 72(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 67(4), which also makes it clear that applications for civil forfeiture should be made against 'replacement' assets where proceeds have been sold for value.

- (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;
 - (b) [*option (to use if instrumentalities are included): 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 or she 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 it is unlawful for the person to possess in [insert name of State].

Drafting note: Section 72(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 73 Fugitive Claims

A person who has absconded from any process of the court and is still an absconder in [insert name of State] may not appear, either personally or through a representative, in a proceeding for civil forfeiture or contest the granting of a civil forfeiture order.

Drafting note: Section 73 provides that a person who might otherwise claim as a legitimate owner is not protected if the person has absconded 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 74 Appeals

- (1) An appeal will lie to the court of appeal [or relevant appellate tribunal] by any interested party affected by a decision of [a high court] in relation to a property freezing order.
- (2) An appeal will lie to the court of appeal [or relevant appellate tribunal] against the grant, or the refusal to grant, a civil forfeiture order.

Drafting note: This section 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 75 Realisation of Forfeited Property

- (1) Subject to any limits in the civil forfeiture order, the enforcement authority [Insert: its named representative or property manager] may take such steps to sell, destroy or otherwise deal with property as it sees fit.
- (2) Subject to subsection (1) above, the enforcement authority or property manager must realise the value of the property vested in it by the civil forfeiture order, so far as practicable, in the manner best calculated to maximise the realised amount. The enforcement authority or property manager should dispose of the forfeited property as soon as practicable.
- (3) The enforcement authority or property manager may incur reasonable expenditure for the purpose of realising its value.

Drafting note: This subsection 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. It may not be necessary, however, as the enforcement authority will always have discretion as to how it disposes of property. The purpose of civil forfeiture is to deprive criminals of their assets, and to remove from them the

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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 may also want to make practical arrangements, even without 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.

Subsection (3) may be redundant if Part XI (Asset Management) is applied.

This section permits actions with respect to property that is the subject of a civil forfeiture order. In addition to selling the property, the enforcement authority or property manager may otherwise deal with it, including, if necessary, preserve or manage it for a period, or may destroy the property. Destroying property is appropriate in a limited range of settings, for instance where the property is the paraphernalia of an organised criminal organisation or the property, if sold, could be used for further criminal conduct.

A comparison should be made with the regime in Part V, which includes similar powers under the criminal confiscation provisions. Consideration should be given to the property management provisions in Part XI and the recovered assets fund in Part XII.

Section 75(3) grants a power to incur reasonable expenditure in the sale of the property. In the case of even a simple house sale there will typically have to be a series of adjustments for taxes paid, water bills, electricity, and so on. For a bank account, realisation may be a simple task. However, where there are numerous, complex or specialised assets to sell, it may be appropriate for the enforcement authority or property manager to employ experts in the particular field. In such a case, this provision will ensure that there is authority to pay for such professional assistance. Even if it is hoped that the enforcement authority will be self-financing in due course, it will be necessary to ensure that it is adequately funded from the outset to enable it to pay for such necessary functions.

- (4) Any expenditure incurred by the enforcement authority under subsection (3) above shall be recovered from the amount of money realised by the property forfeited. In the event that the sum realised is not sufficient to cover such expenditure, the enforcement authority should recover the balance from [insert name of State's designated fund].

Drafting note: Whilst administration expenditure will ordinarily be repaid from assets realised in the course of the enforcement authority's appointment,

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the state will have to consider the designation of a special fund to ensure that the property manager of the enforcement authority can meet the expenditure incurred at the time that it arises [see Part XII].

- (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 the Recovered Assets Fund created under Section 117, Part XII].

Section 76 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, the court does not make a civil forfeiture order or following any appeal the civil forfeiture order is set aside, 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, any application for compensation must be made within the period of [three] 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.*

Drafting note: This section may be unnecessary if the property management provisions are applied

Section 76 provides for compensation claims to be made where an action for civil forfeiture has not been successful, and for the protection of the receiver from liability.

Section 76(1) sets out the broad provision that 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 provided 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 in which compensation may be appropriate.

Section 76(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.

- (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 in relation to property pursuant to Section 40(2)(c), Section 69(1)(c) or Section 112, the receiver shall not be personally liable for any loss or claim arising out of the exercise of powers conferred upon him or her 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.

Drafting note: Section 76(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 for punitive awards.

Section 76(4) protects the receiver from liability from claims from the exercise of his powers except where he or she is shown to have been negligent or engaged in reckless or intentional misconduct.

Section 77 Obtaining Information from Foreign Authorities

- (1) The enforcement authority may make a request to an appropriate foreign authority for information or evidence relevant to a civil forfeiture investigation or proceedings, and may enter into an agreement with such authority relating to such request(s) and the disclosure and/or use of any information or evidence received.

Drafting note: This section permits the enforcement authority to seek information and evidence from a relevant foreign authority for a civil forfeiture investigation or proceedings. 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 civil forfeiture 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 civil 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 proceedings precludes the use of such treaties. In such cases a bilateral treaty may be considered.

Section 78 Disclosure of Information

- (1) Information the [insert name of prosecutorial authorities] 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 any of the functions of the enforcement authority under this Part.
- (2) Information that 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.].
- (3) 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 a civil forfeiture investigation or proceeding in another jurisdiction, where the perpetrator of the unlawful conduct that has given rise to the civil forfeiture proceedings is dead or has absconded or if his or her whereabouts are unknown or his or her identity is unknown.
- (4) *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 any one 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 wherever that investigation may be undertaken;*
 - (c) *criminal proceedings wherever they may have been commenced.*

Drafting note: This section deals with four situations. The first two are mandatory and the last two are optional.

The first two subsections allow the state prosecuting authority to provide information to the enforcement authority. Since civil forfeiture is often contemplated when a prosecution is not possible, this provision will facilitate civil forfeiture investigations. The prosecuting authority is often likely to hold information that is relevant to potential actions by the enforcement authority.

The provisions of these two subsections may already exist in state legislation, but as a minimum there should be a basis for sharing information with other government agencies. A provision of this kind raises critical issues that drafters must resolve, for example whether or not data that have been gathered by various agencies and departments should be shared with other agencies and

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departments of government. The sample provisions provide a very wide gateway for sharing and should be considered carefully in connection with domestic data-sharing principles and with the recognition that such provisions would support broader effectiveness for a domestic civil forfeiture programme.

Drafters should consider whether various key public authorities, such as prosecutorial authorities, police, customs, 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 that criminal processes have uncovered, every effort should be made 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.

Part VII

Investigative Orders

Drafting note: Investigative orders. This part contains provisions relating to ancillary orders, which will assist in the investigation of asset recovery cases, whether in the criminal or civil context. Chronologically, the first in many investigations will be the customer information order, followed by the monitoring order, the production order and, finally, the search and seizure order. Not all orders may be necessary, or indeed appropriate, in every case.

The production order and the search and seizure order will be familiar to most jurisdictions. The customer information order and the monitoring order are relatively recent developments in investigative techniques and have considerable potential added value to financial investigations. Disclosure orders are also relatively new, and are included for civil recovery investigations. The provisions in Section 88 could be applied in criminal investigations. Jurisdictions should consider carefully which measures they wish to include.

Sections 79–83 provide four special investigative measures for use in criminal asset recovery investigations: a provision for a customer information order to secure information on the existence of financial accounts (Section 79), a production order for property tracking documents (Section 80), a search warrant power for such documents when they are not obtainable through a production order (Section 82) and a provision for a monitoring order to monitor a financial account (Section 83).

Sections 84–88 contain provisions for investigative measures to be used in civil forfeiture investigations. These measures are the customer information order (Section 84), the production order (Section 85), the search warrant power (Section 87) and the disclosure order (Section 88).

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 particularised needs of a proceeds investigation.

In some states, for instance in the USA and Canada, authorities rely almost exclusively on existing statutory powers to secure information in proceeds cases. However, in other states, special provisions have been enacted in proceeds of

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crime legislation to support investigations and supplement general criminal investigative provisions.

This is because of a concern that the existing provisions might be inadequate for a proceeds investigation. In some states, the existing provisions might be viewed as applying to only a narrow range of evidence that supports the existence of criminal activity, and not as extending 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 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 is able to ask whether an account exists, or a deposit was made, and secure a quick response. This can be through provisions such as those suggested in this part, through other provisions of law or through amendments to existing provisions to apply pre-existing production and search tools to proceeds matters.

Section 79 Customer Information Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, 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 subsections (2) and (3) are satisfied, it may make an order that a financial institution provide to an authorised officer any customer information, as defined in subsection (4) below, that it holds relating to the person or account specified in the application. An application pursuant to this Section may be made *ex parte*.
- (2) The first condition is that the application must state that there is an investigation into a specified offence and that the order is sought for the purposes of a criminal investigation into that offence.
- (3) The second condition is that the court is satisfied that there are reasonable grounds for believing that the financial institution may have information that is relevant to the investigation.
- (4) Customer information is information as to whether a person holds, or has held, an account or accounts at a 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 or her date of birth;
 - (d) his or her most recent address and any previous addresses;

- (e) the date or dates on which he or she began to hold the account or accounts and, if he or she has ceased to hold the account or any of the accounts, the date or dates on which he or she did so;
 - (f) such evidence of his or her 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 or her;
 - (h) the account number or numbers of any other account or accounts held at the financial institution to which he or she 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 that it carries on;
 - (ii) the jurisdiction 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;
 - (v) the beneficial owner(s); and
 - (vi) any other information that 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 the purposes of this Section 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 or investment-related insurance company, insurance underwriters or insurance agents or brokers; an investment bank or firm; a brokerage firm; a mortgage company; cheque 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, cheque cashing or the purchase, sale or conversion of currency.
- (9) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it knowingly:

- (a) fails to comply with the order; or
 - (b) provides false or misleading information in purported compliance with the order;
- (10) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it discloses 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.
- (11) In the event of a conviction for an offence under either subsection (9) or (10) in the case of a natural person who is a director, employee or agent of a financial institution, the penalty shall be imprisonment for a term not exceeding [insert period] or a fine of up to [insert amount], or both, and in the case of a legal entity a fine of up to [the designated amount].

Drafting note: Section 79(10) contains a ‘tipping off’ provision. This is a useful addition to protect the confidentiality of an on-going criminal investigation.

Section 80 Production Order

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that the conditions set out in subsection (2) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may make the order requiring a person believed to have possession or control of any document relevant in identifying, locating or quantifying property or necessary for its transfer to produce such document. An application may be made *ex parte*.
- (2) There must be 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 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.
- (3) 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.

- (4) A 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 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 80(4)(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 in which documents may be costly to copy and the person producing them cannot demonstrate significant 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 that 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.

- (5) 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) on the person not to disclose either the existence or contents, or both, of the document;
 - (c) But a production order granted under this Section does not require a person to produce or give access to any items subject to legal privilege.
 - (d) A production order granted under this Section has effect notwithstanding any restriction on the disclosure of information, however imposed.
 - (e) A production order may be made in relation to material in the possession or control of a government department and may include material which would otherwise be regarded as confidential.
 - (f) A production order granted under this Section does not grant right of entry to premises other than for the purpose of serving notice of an order made under this Section.
- (6) A production order may be made subject to such other conditions as the court may impose.

- (7) The court may vary or discharge an order under this Section in accordance with applicable procedural rules.

Section 81 Failure to Comply with a Production Order

- (1) Where a production order requires a person to produce a document to the enforcement authority, the person is guilty of an offence against this Section if he or she:
 - (a) fails to comply with the order without reasonable excuse; 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 enforcement authority and provide to it any correct information of which the person is in possession or control.
- (2) Where a person is convicted of an offence against this Section, he or she will be liable, in the case of a natural person, to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both, and in the case of a legal entity, to a fine of up to [the designated amount].

Drafting note: Drafters should also review the analogous provisions of Section 43 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 Section 45, or be dealt with under general provisions punishing non-compliance with a court order, as is the case with respect to orders in Part VI in connection with civil forfeiture.

Section 82 Power to Search for and Seize Property

- (1) Where the enforcement authority applies to the court for a search warrant in accordance with this Section, and the court is satisfied that there are reasonable grounds to believe, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, that the requirements in this Section have been met, the court may grant a search warrant for such property. An application may be made *ex parte*.
- (2) The requirements of which the court must be satisfied before granting an order under this Section are:
 - (a) a production order has been served and has not been complied with or a production order would be unlikely to be effective; or
 - (b) 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 premises where the material is held without any notice to any person; or

- (c) the material involved cannot be identified or described with sufficient particularity to enable a production order to be obtained;
- (d) the material in respect of which the search warrant is sought is likely to be of substantial value to the investigation; and
- (e) [insert such conditions and grounds from domestic law considered necessary to safeguard issuance of a coercive warrant identified in (1) above.]

Drafting note: Subsections (a)–(d) of Section 82(2) set out four alternative circumstances when a search and seizure rather than production order is appropriate. Whichever instance is applicable, in addition, subsection (e) must be met. Section 82(2)(e) requires that the usual grounds and rules for granting a search warrant apply.

Typically this will mean that the enforcement authority 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 contains or has or will have possession or control of a 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.

- (3) If during the course of searching under an order granted under this Section, an authorised officer finds anything that he or she believes on reasonable grounds:
 - (a) will afford evidence as to the commission of an offence; or
 - (b) is of a kind that could have been included in the order had its existence been known of at the time of application for the order, he or she may seize that property or thing and the seizure order shall be deemed to authorise such seizure.
- (4) An authorised officer who has seized property and/or other things pursuant to this Section may retain it for as long as is reasonably necessary for the purposes of this Part provided that copies of any documents seized are made available to the person producing them if requested, or reasonable access is provided to them.

Section 83 Monitoring Orders

Drafting note: Monitoring order. Where an account in a financial institution has been discovered, through a customer information order or otherwise, a monitoring order will allow the account to be monitored in real time. Any transactions should be identified quickly. If, for example, the account holder asks for the transfer of a significant sum out of his or her account, a monitoring order

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will enable the investigators to be aware of this intention, and to take appropriate steps to deal with the proposed dissipation of the account holder's 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) Where the enforcement authority applies to the court for an order in accordance with this Section, 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 the conditions in subsection (3) are met, it may direct a financial institution to give information to an authorised officer. An application under this subsection may be made *ex parte*.
- (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) apply for a period of a maximum of [three] months from the date it is made, unless renewed by the court following a further application and then for no more than [] months. A monitoring order shall in any event not be in place for more than [six] months in total.
- (3) A court shall issue a monitoring order only if it is satisfied that there are reasonable grounds to believe that:
 - (a) the person in respect of whose account the order is sought:
 - (i) has committed, 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 an 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 the purposes of subsection (1) shall be [name of authority that shall apply for/execute monitoring orders].

- (6) A financial institution, for the purposes of this Section, means a bank or other credit institution, a life insurance or investment-related insurance company, insurance underwriters or insurance agents or brokers; an investment bank or firm; a brokerage firm; a mortgage company; cheque 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, cheque cashing or the purchase, sale or conversion of currency.
- (7) Any person who is employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it knowingly:
- (a) fails to comply with the order; or
 - (b) provides false or misleading information in purported compliance with the order.
- (8) Any person who is employed by a financial institution that is or has been subject to an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it discloses the existence or operation of the order to any person except where the disclosure is made to:
- (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.
- (9) In the event of a conviction for an offence under either subsection (7) or (8), in the case of a natural person who is a director, employee or agent of a financial institution, the penalty shall be imprisonment for a term not exceeding [insert number] years or a fine of up to [insert amount], or both, and in the case of a body corporate a fine of up to [the designated amount].
- (10) Nothing in this Section prevents the disclosure of information relating to a monitoring order for the purposes of or in connection with legal proceedings provided that nothing in this subsection shall be construed as requiring disclosure to any court the existence or operation of a monitoring order.

Drafting note: Civil investigative orders. Civil forfeiture cases should be governed by the civil procedure rules within a state.

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 enforcement authority. If, as is typically the case, the

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pre-filing investigative tools available to the enforcement authority or its general access to information are limited, there will be a need for provisions such as 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 to be restricted in other ways. For instance, in civil proceedings, typically there is no power to search for documents or things although some jurisdictions have developed such a procedure.

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.

Four special investigative measures are proposed in the sections that follow:

- Customer information orders
- Production orders
- Search warrants
- Disclosure orders

Drafters should consider the adoption of such provisions in the context of domestic law and practice.

The enforcement 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 unlawful conduct has led to the investigation.

Section 84 Customer Information Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that the conditions set out in subsections (2) and (3) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may make an order that a financial institution provide to the enforcement authority any customer information as defined in subsection (4) below that it holds relating to the person or account specified in the application. An application may be made *ex parte*.
- (2) The first condition is that the application must state that the order is sought for the purposes of a civil forfeiture investigation.

- (3) The second condition is that the court is satisfied that there are reasonable grounds for believing that the financial institution may have information that is relevant to a civil forfeiture investigation.
- (4) Customer information is information as to whether a person holds, or has held, an account or accounts at a 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 account holder's full name;
 - (c) the account holder's date of birth;
 - (d) the account holder's most recent address and any previous addresses;
 - (e) the date or dates on which the account holder's began to hold the account or accounts and, if he or she has ceased to hold the account or any of the accounts, the date or dates on which he or she did so;
 - (f) such evidence of the account holder's 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 or her;
 - (h) the account number or numbers of any other account or accounts held at the financial institution to which he or she 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 that it carries on;
 - (ii) the jurisdiction 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;
 - (v) the beneficial owner(s); and
 - (vi) any other information that the court specifies in the customer information order.
- (5) A financial institution shall provide the information to the enforcement authority in such manner, and at or by such time, as is specified in the order.
- (6) 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.

- (7) A financial institution, for purposes of this Section, means a bank or other credit institution, a life insurance or investment-related insurance company, insurance underwriters or insurance agents or brokers; an investment bank or firm; a brokerage firm; a mortgage company; cheque 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, cheque cashing or the purchase, sale or conversion of currency.
- (8) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it knowingly:
 - (a) fails to comply with the order; or
 - (b) provides false or misleading information in purported compliance with the order.
- (9) Any person employed by a financial institution that has been served with an order under this Section, or the financial institution itself, commits an offence under this Section if he, she or it discloses 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) a representative of the civil enforcement authority referred to in the order.
- (10) In the event of a conviction for an offence under either subsection (8) or (9) in the case of a natural person who is a director, employee or agent of a financial institution the penalty shall be imprisonment for a term not exceeding [insert period] or a fine of up to [insert amount], or both in the case of a legal entity.

Drafting note: Customer information order. A customer information order is an order requiring a financial institution to produce to 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 84 will enable a similar effect to be achieved.

The provisions of the section make it clear (especially subsection (3)) that the procedure cannot be used speculatively.

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The information sought 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.

Section 85 Production Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that the conditions set out in subsection (2) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may make the order requiring a person believed to have possession or control of any document relevant in identifying, locating or quantifying property or necessary for its transfer to produce such document. An application may be made *ex parte*.
- (2) There must be reasonable grounds to believe that:
 - (a) specified property is said to be the subject of a civil forfeiture investigation;
 - (b) specified property is proceeds and/or instrumentalities; and
 - (c) the person specified in the application has control of the document or documents.
- (3) 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.
- (4) A 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 copies of the documents are made available to the person producing them if requested, or reasonable access is provided to the documents.

Drafting note: This subsection 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 in which documents may be costly to copy and the person producing them cannot demonstrate significant current

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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 in accordance with local practice. The framework should be such that prohibitive costs cannot easily be used as a means to frustrate an investigation.

- (5) 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) on the person not to disclose either the existence or contents, or both, of the document.
 - (c) A production order granted under this Section does not require a person to produce or give access to any items subject to legal privilege.

Drafting note: This subsection makes it clear that the grounds for refusal to produce documents will be very limited. There will, however, be no obligation to produce material subject to legal privilege.

- (d) A production order granted under this Section has effect notwithstanding any restriction on the disclosure of information, however imposed

Drafting note: This subsection addresses data protection or other confidentiality restrictions that might be thought to apply to the material sought.

- (e) A production order may be made in relation to material in the possession or control of a government department and may include material that would otherwise be regarded as confidential.
 - (f) A production order granted under this Section does not grant right of entry to premises other than for the purpose of serving notice of an order made under this Section.
- (6) A production order may be made subject to such other conditions as the court may impose.
- (7) The court may vary or discharge an order under this Section in accordance with applicable procedural rules.

Section 86 Failure to Comply with a Production Order

- (1) Where a production order requires a person to produce a document or documents to the enforcement authority, the person is guilty of an offence against this Section if he or she:
 - (a) fails to comply with the order without reasonable excuse; 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.
- (2) Where a person is convicted of an offence against this Section, he or she will be liable, in the case of a natural person, to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both, and in the case of a legal entity, to a fine of up to [insert amount].

Drafting note: In relation to offences committed in respect of investigative orders under this part, it is necessary to decide whether contraventions of a court order should be categorised as separate statutory offences, as has been drafted here, or are dealt with in some other way under general civil contempt provisions punishing non-compliance with a court order.

Section 87 Power to Search for and Seize Property

- (1) Where the enforcement authority applies to the court for an search warrant in accordance with this Section, and the court is satisfied that there are reasonable grounds to believe, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, that the requirements in this Section have been met, the court may grant a search warrant for such property. An application may be made *ex parte*.
- (2) 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 or document or documents specified in the warrant that is or are found there and which is or are likely to be of substantial value to a civil forfeiture investigation.

Drafting note: This section sets out what can be searched for. This will assist in the investigation. 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 or instrumentalities, then an application under Section 70 will be the appropriate way to proceed.

- (3) 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 a civil forfeiture investigation is proceeds or instrumentalities. The court must also be satisfied that there are reasonable grounds for believing that the property or document or documents specified in the warrant is or are on the premises.
- (4) The court may grant the application for a search warrant under this Section if it is satisfied that the requirements of this Section are met and:
 - (a) a production order has been made 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 enforcement authority does not gain immediate access to the property or document or documents without any notice to any person; or
 - (d) the property or document or documents involved cannot be identified or described with sufficient particularity to enable a production order to be obtained; and
 - (e) the property or document or documents in respect of which the search warrant is sought is or are likely to be of substantial value to the civil forfeiture investigation; and
 - (f) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the property or documents or document identified in (1) above, and note they must be met].

Drafting note: This section sets out four circumstances in which a search and seizure order, rather than a production order, is appropriate. Whichever instance is applicable, in addition, subsections (e) and (f) must be met. The section requires that the usual grounds and rules for granting a search warrant apply.

Typically this will mean that the authorities will have to show that they have 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, contains, or has or will have possession or control of a 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.

- (5) If during the course of executing an order granted under this Section, the enforcement authority finds any thing that it believes on reasonable grounds:

- (a) will afford evidence relevant to the civil forfeiture investigation; and
 - (b) is of a kind that could have been included in the order had its existence been known of at the time of application for the order, he, she or it may seize that property or thing and the seizure order shall be deemed to authorise such seizure.
- (6) A search warrant granted under this Section does not confer the right to seize any items subject to legal privilege.
 - (7) If any of the material specified in an application for a search warrant consists of information contained in a computer, the search warrant 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.
 - (8) Any person who intentionally obstructs a person authorised by the court under this Section to carry out a search of premises commits an offence and shall be liable to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both.
 - (9) Documents seized as a result of a search warrant under this Part may be retained for as long as is reasonably necessary for the purposes of this Part provided that copies of them are made available to the person from whom they were seized within [insert number of days] of the seizure if requested. Where property other than documents is seized, a list of such property shall be provided to the person from whom it was so seized.

Section 88 Disclosure Orders

- (1) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied that there are reasonable grounds to believe the conditions set out in subsection (2) have been met, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application, the court may grant the order. An application may be made *ex parte*.
- (2) A Court may make a disclosure order where it is satisfied on reasonable grounds that—
 - (a) any property specified in the application for the order is proceeds and/or instrumentalities;
 - (b) a person specified in the application for the order has derived a benefit from his or her unlawful conduct;
 - (c) information that may be provided in compliance with a requirement imposed under the order is likely to be of substantial value to a civil forfeiture investigation; and
 - (d) it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to a civil forfeiture investigation if the information is obtained.

- (3) A disclosure order shall authorise the enforcement authority to give to any person it considers has relevant information notice in writing requiring him or her, with respect to any matter relevant to an investigation for the purposes of which the order is sought, to—
 - (a) answer questions, either at a time specified in the notice or at once, at a place so specified;
 - (b) provide information specified in the notice, by a time and in a manner so specified; or
 - (c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.
- (4) A person shall not be bound to comply with a requirement imposed by a notice given under a disclosure order unless evidence of authority to give the notice is produced to him or her.
- (5) Any information obtained from a person in compliance with the disclosure order shall not be used in evidence in any proceedings other than the civil forfeiture proceeding to which the order granted under this Section relates, unless—
 - (a) he or she subsequently denies having made the disclosure; or
 - (b) he or she is charged with an offence relating to the provision of false or misleading information.
- (6) A disclosure Order may not compel any person to disclose material subject to legal privilege.
- (7) Where a person who has been served with a disclosure order under this Section fails to comply with the order without reasonable excuse; or in purported compliance with the order, makes a statement, or produces or makes available a document, known to the person to be false or misleading in a material particular, he commits an offence under this Section.
- (8) Where a person is convicted of an offence against this Section, he or she will be liable, in the case of a natural person, to imprisonment for up to [insert number] years or a fine of up to [insert amount], or both, and in the case of a legal entity, to a fine of up to [insert amount].

Part VIII

Cross-border Transportation of Currency and Bearer Negotiable Instruments

Section 89 Obligation to [Declare/Disclose] Cross-border Transportation of Currency and Bearer Negotiable Instruments

- (1) Any person who enters or leaves [insert name of State] in possession of currency or bearer negotiable instruments [*option: or precious metals or precious stones*] or arranges for the transportation thereof into or out of [insert name of State] by any means shall:
 - (1) *Variant 1:* declare currency and/or bearer negotiable instruments [*option: and/or precious metals or precious stones*] in a total amount equal to or above [the designated amount] in value.
 - (2) *Variant 2:* disclose currency and/or bearer negotiable instruments [*option: and/or precious metals or precious stones*] upon request to [customs authorities, competent authority].
 - (3) Such [*variant 1: declaration; variant 2: disclosure*] shall be recorded by the relevant [insert name of customs or other competent authority], which shall provide this information to [insert name of FIU].

Any person who fails to or falsely:

- (1) *Variant 1:* declares currency and/or any other bearer negotiable instrument [*option: and/or precious metals or precious stones*] in an amount equal to or above [the designated amount]
- (2) *Variant 2:* discloses currency and/or any other bearer negotiable instrument [*option: and/or precious metals or precious stones*] upon request by [insert name of customs or other competent authority]

when entering or leaving or transporting currency and/or bearer negotiable instruments into or out of [*option: and/or precious metals or precious stones*] [insert name of State] as required pursuant to subsection (1) commits an offence punishable by imprisonment of up to [insert number] years and a fine of up to [insert amount], or both.

Drafting note: Definitions. This part should be adopted in conjunction with Part II on preventive measures to combat money laundering and the terrorism financing.

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Definitions of 'currency', 'bearer negotiable instrument' and 'proceeds' are set out in Part II.

Definitions of 'offence', 'terrorist act', 'terrorist organisation' and 'terrorist' are set out in Part IV, Money Laundering and Terrorism Financing Offences.

'Instrumentality' is defined in Part V, Section 38.

'Terrorist property' is defined in Part VI, Section 66.

Those definitions will have to be incorporated in this part if it is adopted separately from the other parts.

FATF Recommendation 32. Part VII(A) sets out provisions to assist with the implementation of FATF Recommendation 32. This can be implemented either through a declaration system that requires all persons to make a declaration when moving specified assets or through a disclosure system that requires those moving specified assets in excess of a defined amount to make a disclosure upon request by competent authorities. The obligation to declare or disclose should apply both to travellers carrying cash or bearer negotiable instruments and to the cross-border transportation of such cash or bearer negotiable instruments by way of cargo, mail or any other means.

Additional items. Recommendation 32 does not require cross-border declarations regarding gold, other precious metals or precious stones. The interpretive note to Recommendation 32 makes it clear that such items may be covered under customs laws and regulations.

In considering whether to cover items of value in addition to currency and bearer negotiable instruments, 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.

Section 90 Detention and Forfeiture of Currency and Other Bearer Negotiable Instruments

- (1) The [insert name of customs or other competent authority] may seize and detain in whole or in part the amount of the [*variant 1: non-disclosed or falsely disclosed; variant 2: non-declared or falsely declared*] currency and/or bearer negotiable instruments [*option: and/or precious metals or precious stones*]
 - (a) if there are reasonable grounds for suspecting that it or they is or are proceeds of an offence or are or represent an instrumentality used or intended for use in the commission of such an offence, or is or are terrorist property; or
 - (b) if there is a false [*variant 1: declaration; variant 2: disclosure*] or a failure to [*variant 1: declare; variant 2: disclose*].

- (2) Property detained under subsection (1) shall not be detained for more than [72] hours after seizure, unless a [insert name of deciding authority] orders its continued detention for a period not exceeding [three] months from the date of the original detention or seizure. The [insert deciding authority] may order such further detention upon being satisfied that:
- (a) there was a false declaration or disclosure or a failure to declare or disclose, 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(are) connected.

Drafting note: It will be necessary to choose which authority will make the order under Section 90 and subsequent subsections, typically either a magistrate or specified court.

- (3) A [insert deciding authority] may subsequently order the continued detention of the seized property if satisfied of the matters in subsection (2) for further periods of three months but the total period of all detentions shall not exceed [two] years from the date of the first 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 representations of the [the department responsible for the detention application]; 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 V and 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) Provided that notice is given to any person who has asserted an interest in the property and that person has been provided an opportunity to be heard, if application by the prosecutor has been made, the [insert name of deciding authority] shall order forfeiture of property which has been seized and detained under this Section if satisfied on the balance of probabilities that the property directly or indirectly represents the proceeds of an offence or an instrumentality used or intended for use in the commission of an offence, or is terrorist property.

Part IX

Cash Forfeiture

Drafting note: This part is optional, represents good practice in the United Kingdom and can be a very valuable tool in the arsenal of authorised officers. These provisions introduce a new power for authorised officers to seize cash discovered during investigations or at the point of import or export, provided the cash is reasonably suspected of being derived from or intended to be used in criminal activity, or the instrumentalities of such activity.

In the event that cash (as defined) is found above the minimum amount, an application may be made to the appropriate court for the forfeiture of the cash, if the evidence supports to the civil standard of proof that it is derived from, an instrumentality of, or intended to be used in, criminal conduct. No conviction of anyone is required for the forfeiture of the cash to be ordered; cash forfeiture proceedings are civil proceedings and the civil standard of proof applies.

In order to guard against excessive and disproportionate use of the power, there should be a threshold below which the powers will not be available; this is specified in an order under Section 105. States will need to consider (on a 'risk-based analysis') where to set the minimum threshold. Many jurisdictions are heavily cash dependent. Possession of large sums may not be an unusual occurrence and could be a result of local custom, lack of access to banking facilities, the habit of keeping records or simply an extended 'black market economy'. The mere possession of large sums of cash will not of itself lead to applications for forfeiture, however. There has to be, in addition, evidence to show either the illicit source or purpose of the cash. In jurisdictions where the powers have been introduced, they have proved a powerful weapon in the fight against illicit funds flow; they are designed to remove unlawful capital from the economy and disrupt day-to-day criminal operations.

Whilst adopting non-conviction-based civil recovery proceedings, it shall remain the burden of the state to prove the underlying criminal purpose, but the possession of unusual sums of cash will be evidence from which the state will be able to seek inferences to be drawn. A legitimate possessor of cash will be able to establish both the origin of the cash and the reason for the holding. His or her proprietary rights are protected by the provisions contained within this part relating to release, continued detention and review. Third-party rights are also protected.

States will also have to consider the creation of a fund for the payment in of forfeited cash. There should be a publicly available policy for the uses of such forfeited sums, perhaps for crime prevention initiatives.

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The provisions use the term ‘authorised officer’ as an agent of the state empowered to search, seize, detain and apply to forfeit. States will have to consider whether these powers should be available to all police, customs and border officers who may come across cash in their day-to-day duties as ‘front-line officers.’ This would remove the need for a specially authorised investigator to be present whenever cash is found, often unexpectedly. Section 95 is an option that serves to maintain accountability and prevent the arbitrary use of these powers.

Furthermore, states will have to consider the appropriate forum for these claims. The recovery of cash is intended to be an uncomplicated, rapid and cost-efficient process that ought to be determined by a competent judicial authority without the need to encumber the higher courts. Reference in this part to judicial authority and court may be drafted to allow continued detention and forfeiture to be determined by a court of summary jurisdiction. An appeal must be available to a court of immediate superiority.

These provisions are taken from the UK Proceeds of Crime Act 2002. UK cash seizure has proved to be an effective and robust method of combating criminal funding and laundering and reflects the reality that criminal profits often circulate outside the legitimate banking system.

Section 91 General Purpose of Cash Forfeiture under this Part

- (1) This Part has effect for the purposes of enabling cash that is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before the court.
- (2) The powers conferred by this Part are exercisable whether or not any proceedings have been brought for an offence in connection with the cash.

Section 92 ‘Unlawful Conduct’

- (1) Conduct occurring in any part of [enter name of State] is unlawful conduct if it is unlawful under the criminal law of that Part.
- (2) Conduct that—
 - (a) occurs in a jurisdiction outside the [enter name of State] and is unlawful under the criminal law of that jurisdiction, and
 - (b) if it occurred in a part of the [enter name of State], would be unlawful under the criminal law of that part is also unlawful conduct.
- (3) The court must decide on a balance of probabilities whether it is proved that any matters alleged to constitute unlawful conduct have occurred, or that any person intended to use any cash in unlawful conduct.

Section 93 'Property Obtained through Unlawful Conduct'

- (1) A person obtains property through unlawful conduct (whether his or her own conduct or another's) if he or she obtains property by or in return for the conduct.
- (2) In deciding whether any property was obtained through unlawful conduct—
 - (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct;
 - (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

Section 94 Searches

- (1) If an authorised officer of the enforcement authority who is lawfully on any premises has reasonable grounds for suspecting that there is on the premises cash—
 - (a) that is the proceeds or instrumentalities of crime, or
 - (b) that is intended to be used in the course of unlawful conduct, or
 - (c) is terrorist propertyand
 - (d) the amount of which, not being terrorist property, is not less than the minimum amount, he or she may search for the cash there.

Drafting note: Drafters will need to consider what the minimum amount should be with reference to local cash practices and customs. This is dealt with in Section 105 below and is discussed in the drafting note at the beginning of this section, as well as in the introductory remarks to these model provisions ['the Threshold Amount']. These model provisions are intended to apply a zero tolerance approach to terrorist property, which is why there is no suggestion of 'minimum amount' in respect of that property.

- (2) If an authorised officer has reasonable grounds for suspecting that a person (the suspect) is carrying cash—
 - (a) that is proceeds or instrumentalities of crime, or
 - (b) that is intended to be used in the course of unlawful conduct, and
 - (c) the amount of which is not less than the minimum amount, he or she may exercise the powers described in subsections (4) and (5) below.

- (3) The authorised officer may, so far as he or she thinks it necessary or expedient, require the suspect—
 - (a) to permit a search of any article he or she has with him or her, and
 - (b) to permit a search of his or her person.
- (4) An authorised officer exercising powers by virtue of subsection (3) may detain the suspect for so long as is necessary to exercise those powers.
- (5) The powers conferred by this Section are exercisable only so far as reasonably required for the purpose of finding cash.
- (6) Cash means
 - (a) notes and coins in any currency;
 - (b) postal orders;
 - (c) cheques of any kind, including travellers' cheques;
 - (d) bankers' drafts;
 - (e) bearer bonds and bearer shares.
- (7) Cash also includes any kind of monetary instrument that is found at any place in the [insert name of State], if the instrument is specified by the [relevant minister].
- (8) This Section does not require a person to submit to an intimate search or strip search.

Drafting note: Section 94 is necessary in order to support the powers to seize cash that is the proceeds of crime or which is intended to be used in the course of criminal conduct. These new search powers will not be exercisable unless the suspect cash is thought to exceed the threshold set under Section 105. The search powers will be exercisable on private premises only if an authorised officer has lawful authority to be present.

Section 95 Prior Approval

- (1) The powers conferred by this Section may be exercised only with appropriate approval unless, in the circumstances, it is not practicable to obtain that approval before exercising the power.
- (2) Appropriate approval means the approval of a judicial officer or (if that is not practicable in any case) the approval of a senior authorised officer.
- (3) If the powers are exercised without the approval of a judicial officer in a case where—
 - (a) no cash is seized by virtue of Section 97, or

- (b) any cash seized is not detained for more than 48 hours, the authorised officer who exercised the powers must give a written report to the appointed person.
- (4) In this Section, the appointed person means a person appointed by [insert name of the relevant ministry].

Drafting note: This optional section provides the safeguard that the search powers in Section 95 may be exercised only if prior judicial authority has been obtained or, if that is not practicable, with the approval of a senior investigating officer. This section also recognises that there may be circumstances in which it may not be possible for an officer to obtain the approval of a senior officer. As a matter of good practice and accountability, states may wish to consider whether or not, if judicial approval is not obtained prior to a search, and cash is either not seized or is released before the matter comes before a court, the officer concerned ought to prepare a written report and submit it to an independent person appointed by the relevant minister detailing why the officer considered that he or she had the power to carry out the search and why it was not practicable to obtain judicial approval of the search.

Section 96 Seizure of Cash

- (1) An authorised officer may seize any cash that he or she finds pursuant to searches lawfully carried out if he or she has reasonable grounds for suspecting that the cash is:
 - (a) the proceeds or instrumentalities of unlawful conduct;
 - (b) intended to be used in the course of unlawful conduct;
 - (c) terrorist property.
- (2) An authorised officer may also seize cash if he or she has reasonable grounds for suspecting only part of it to be—
 - (a) the proceeds or instrumentalities of unlawful conduct or terrorist property, or
 - (b) intended to be used in the course of unlawful conduct, if it is not reasonably practicable to seize only that part.
- (3) This Section does not authorise the seizure of an amount of cash if it or, as the case may be, the part to which the authorised officer's suspicion relates is less than the minimum amount.

Drafting note: Section 96 enables an authorised officer to seize cash if he or she has reasonable grounds for suspecting that the cash is derived from unlawful conduct or intended for use in unlawful conduct. Subsection (2) allows for the seizure of indivisible cash only part of which is under suspicion. An example

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of this is a single cheque for US\$50,000 where the suspicion relates to only US\$25,000.

States may wish to consider whether there ought to be a 'minimum amount' when it comes to terrorist property.

Section 97 Detention of Seized Cash

- (1) While the authorised officer continues to have reasonable grounds for his or her suspicion, cash seized under Section 96 may be detained initially for a period of 72 hours.

Drafting note: Care will have to be taken over the initial detention period. A period of 72 hours may not be sufficient if courts do not sit regularly enough. Bank holidays pose a particular problem.

- (2) The period for which the cash or any part of it may be detained may be extended by an order made by a judicial authority, but the order may not authorise the detention of any of the cash:
 - (a) beyond the end of the period of [three] months beginning with the date of the order;
 - (b) in the case of any further order under this Section, beyond the end of the period of two years beginning with the date of the first order.
- (3) An application for an order under subsection (2) may be made by an authorised officer and the court may make the order if satisfied, in relation to any cash to be further detained, that one the following conditions is met.
- (4) The first condition is that there are reasonable grounds for suspecting that the cash is the proceeds of unlawful conduct or terrorist property and:
 - (a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in [insert name of State] or elsewhere) proceedings against any person for an offence with which the cash is connected; or
 - (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
- (5) The second condition is that there are reasonable grounds for suspecting that the cash is the proceeds or instrumentalities of unlawful conduct or terrorist property and:
 - (a) its continued detention is justified while its use is further investigated or consideration is given to bringing (in [insert name of state] or elsewhere)

- proceedings against any person for an offence with which the cash is connected; or
- (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
- (6) The third condition is that there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and:
- (a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in [insert name of state] or elsewhere) proceedings against any person for an offence with which the cash is connected; or
- (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
- (7) An application for an order under subsection (2) may also be made in respect of any cash seized under Section 96(2), and the court may make the order if satisfied that:
- (a) the condition in subsections (4), (5) or (6) is met in respect of part of the cash; and
- (b) it is not reasonably practicable to detain only that part.
- (8) An order under subsection (2) must provide for notice to be given to persons affected.

Section 98 Interest

- (1) If cash is detained under Section 97 for more than 72 hours, it must at the first opportunity thereafter be paid into an interest-bearing account and held there; and the interest accruing on it is to be added to it on its forfeiture or release.
- (2) In the case of cash detained under Section 97 that was seized under Section 96(2), the authorised officer after paying it into the account may release the part of the cash to which the suspicion does not relate.
- (3) Subsection (1) does not apply if the cash or, as the case may be, the part to which the suspicion relates is required as evidence of an offence or evidence in proceedings under this Part.

Drafting note: The effect of Section 98 is that cash may not be detained for more than [72] hours except by order of court. The court may make such an order if satisfied that there are reasonable grounds for the applicant's suspicion and that the continued detention is justified for the purposes of investigating its origin or intended use. The court may also make an order for continued detention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded.

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Monies detained would in most cases be paid into an interest-bearing account as provided in Section 98(1) pending the outcome of proceedings. (Refer to Part XII for the creation of a recovered asset fund by the relevant authority.)

Section 99 Release of Detained Cash

- (1) This Section applies while any cash is detained under Section 98.
- (2) A court may direct the release of the whole or any part of the cash if the following condition is met.
- (3) The condition is that the court, on an application by the person from whom the cash was seized, that the conditions in Section 98 for the detention of the cash are no longer met, in relation to the cash to be released.
- (4) An authorised officer may, after notifying the court under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified.

Drafting note: Section 99 envisages two situations in which cash or any part of the cash may be released to the person from whom it was seized. Firstly, the court may do so in response to an application by the person from whom the cash was seized on the grounds that it was not proceeds or intended to be used in unlawful conduct, and was not terrorist property. The fact that only the person from whom the money is seized may apply to the court is intended to prevent the court from becoming embroiled in a dispute between the person from whom the cash was seized and the rightful owner of the cash.

Secondly, the authorised officer may release cash or any part of it after notifying the court if satisfied that the detention can no longer be justified.

Section 100 Forfeiture

- (1) While cash is detained under Section 99, an application for the forfeiture of the whole or any part of it may be made to a court by the authorised officer.
- (2) The court may order the forfeiture of the cash or any part of it if it is satisfied on a balance of probabilities that the cash or any part thereof:
 - (a) is the proceeds of unlawful conduct;
 - (b) is the instrumentalities of unlawful conduct;
 - (c) is terrorist property;
 - (d) is intended to be used for the purposes of unlawful conduct.

- (3) But in the case of property that belongs to joint owners, the order may not apply to so much of it as the court thinks is attributable to the joint owner's share.
- (4) Where an application for the forfeiture of any cash is made under this Section, the cash is to be detained (and may not be released under any power conferred by this Part) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.

Drafting note: Section 100 enables the court to order the forfeiture of cash or any part of it if satisfied that it is proceeds or intended to be used in unlawful conduct. The balance of probabilities is the evidential standard that applies to the proceedings, this being the normal civil standard of proof. Where the cash is property belonging to joint owners the court must not forfeit the cash that it thinks attributable to the 'innocent' partner's share. An example of this might be a joint bank account into which drug trafficking proceeds (dirty money) has been paid by one signatory and clean money by the other. If the former withdraws all the cash and it is subsequently seized, the court must then distinguish between the clean and dirty money. The court may then return to the 'innocent' partner his share of the money. Subsection (4) provides that cash cannot be released under any circumstance once an application for the forfeiture of that cash is made, until such time as forfeiture proceedings have concluded.

Section 101 Appeal against Forfeiture

- (1) Any party to proceedings in which a forfeiture order is made under Section 100 in respect of detained cash who is aggrieved by the order may appeal to [insert name of superior court with appellant jurisdiction].
- (2) An appeal under subsection (1) must be made within the period of [28] days beginning on the date on which the order is made.
- (3) The appeal is to be by way of a rehearing.
- (4) The court hearing the appeal may make any order it thinks appropriate.
- (5) If the court upholds the appeal, it may order the release of the cash.

Section 102 Application of Forfeited Cash

- (1) Cash forfeited and any accrued interest on it is to be paid into the [insert name of appropriate fund].
- (2) But it is not to be paid in:
 - (a) before the end of the period within which an appeal under Section 101 may be made; or
 - (b) if a person appeals under that Section before the appeal is determined or otherwise disposed of.

Section 103 Victims and Other Owners

- (1) A person who claims that any cash detained under this Part, or any part of it, belongs to him or her may apply to the court for the cash or part to be released to him or her.
- (2) The application may be made in the course of proceedings under Section 97 or Section 100 or at any other time.
- (3) If it appears to the court concerned that—
 - (a) the applicant was deprived of the cash to which the application relates, or of property which it represents, by unlawful conduct,
 - (b) the property of which the applicant was deprived was not, immediately before he or she was deprived of it, the proceeds of unlawful conduct, or represented or was an instrumentality of unlawful conduct, or was intended to be used in unlawful conduct, and
 - (c) that cash belongs to him or her, the court may order the cash to which the application relates to be released to the applicant.
- (4) If—
 - (a) the applicant is not the person from whom the cash to which the application relates was seized,
 - (b) it appears to the court that that cash belongs to the applicant,
 - (c) the court is satisfied that the conditions in Section 97 for the detention of that cash are no longer met or, if an application has been made under Section 100, the court decides not to make an order under that Section in relation to that cash, and

Drafting note: Section 103 allows the true owner of detained cash to apply for its release. Two cases are provided for. Subsection (3) relates to a person who claims that some or all of the cash rightfully belongs to him or her, and that he or she was deprived of it through unlawful conduct. An example of this would be a person who claims that the cash was stolen from him or her. If the court is satisfied, it may order the applicant's cash to be released to him or her. Subsection (4) relates to the case of any other true owner who is not the person from whom the cash was seized. Here, if the court is satisfied, the cash may be released – but only if the person from whom it was seized does not object. That proviso is intended to prevent the court from becoming involved in a complicated ownership dispute between the person from whom the cash was seized and the rightful owner of the cash. The court will have to be satisfied that the cash is not proceeds or intended to be used in unlawful conduct before it can release to a claimed owner.

- (d) no objection to the making of an order under this subsection has been made by the person from whom that cash was seized, the court may order the cash to which the application relates to be released to the applicant or to the person from whom it was seized.

Section 104 Compensation

- (1) If no forfeiture order is made in respect of any cash detained under this Part, the person to whom the cash belongs or from whom it was seized may make an application to the court for compensation.
- (2) If, for any period beginning with the first opportunity to place the cash in an interest-bearing account after the initial detention of the cash for 72 hours, the cash was not held in an interest-bearing account while detained, the court may order an amount of compensation to be paid to the applicant.
- (3) The amount of compensation to be paid under subsection (2) is the amount the court thinks would have been earned in interest during the period in question if the cash had been held in an interest-bearing account.
- (4) If the court is satisfied that, taking account of any interest to be paid under Section 98 or any amount to be paid under subsection (2), the applicant has suffered loss as a result of the detention of the cash and that the circumstances are exceptional, the court may order compensation (or additional compensation) to be paid to him or her.
- (5) The amount of compensation to be paid under subsection (4) is the amount the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
- (6) If a forfeiture order is made in respect only of a part of any cash detained under this Part, this Section has effect in relation to the other part.

Drafting note: Section 104 provides that, where no forfeiture is made following the detention of cash, the person from whom the case was seized, or the person to whom the cash belongs, may apply to the court for compensation. In most cases, the interest that will have accrued from the deposit of the cash into an interest-bearing account as provided in Section 98 will suffice. If, after 72 hours, the cash has not been paid into such an account, then by virtue of subsections (2) and (3) the court may order the payment of compensation to the value of the lost interest. Subsections (4) and (5) also give the court further discretion to order the payment of reasonable compensation where loss has occurred as a result of the detention of the cash (even taking into account interest and compensation otherwise payable) and where the circumstances are exceptional. This section applies to compensation for loss incurred only as a result of the detention of the cash; if an individual has suffered loss for any other reason, this must be pursued elsewhere.

Section 105 'The Minimum Amount'

- (1) In this Part, the minimum amount is the amount in [name the currency] specified in an order made by [insert name of the relevant minister].
- (2) For that purpose the amount of any cash held in a currency other than [insert currency of State here] must be taken to be its [insert currency here] equivalent, calculated in accordance with the prevailing rate of exchange.

Drafting note: See the introductory drafting note to this part in relation to setting the appropriate threshold. Any variation to the threshold amount ought to be implemented by secondary legislation. Over time, citizens of the state will become aware of the need to account for and reduce the amount of cash carried at any one time to avoid engagement with these provisions. States ought to periodically review such social behaviour and adjust the amount accordingly.

- (3) There is no minimum amount if the cash seized relates to or is connected with terrorism.

Part X

Unexplained Wealth Orders

Drafting note: These provisions are based upon the unexplained wealth provisions enacted by the Australian Commonwealth (Proceeds of Crime Act 2002), Western Australia (Criminal Property Confiscation Act 2000), Northern Territory (Criminal Property Forfeiture Act 2002), New South Wales (Criminal Assets Recovery Act 1990) and South Australia (Serious and Organised Crime (Unexplained Wealth) Act 2009). They are included here for completeness, and some states may find them useful. However, they are not an essential part of the asset recovery arsenal and are optional.

The relevant authority may seek an unexplained wealth declaration against a person upon application.

The court must declare that the person has unexplained wealth if, on the balance of probabilities, the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. This part will be of particular importance in the case of individuals whose wealth is unexplained by open source material relating to their income.

The unexplained wealth is assessed as the difference between the total value of the person's wealth and the value of the person's lawfully acquired wealth. If there is in relation to these provisions unexplained wealth, then the burden shifts to the respondent to establish that the wealth was lawfully acquired. The respondent is liable to pay the state an amount equal to the amount specified in the unexplained wealth declaration.

The state will have to determine which is the appropriate enforcement authority for such cases. It is likely to be an authority closely connected to the prosecution department; if there is civil forfeiture in the state, it could be the same authority that has responsibility for civil forfeiture.

Section 106 Making an Order Requiring a Person to Appear

- (1) The enforcement authority may apply to a court in writing for an order requiring a specified person [the respondent] to file declarations and answer questions as required in relation to his or her assets.
- (2) An application for an order under subsection (1) must be supported by [*variants: affidavit: evidence: verified statement*] of [a person authorised] stating:
 - (a) the identity of the respondent;

- (b) that the [person authorised] reasonably suspects that the respondent's total wealth exceeds the value of his or her lawfully obtained wealth;
 - (c) that any property the [person authorised] believes is held by the respondent was lawfully obtained;
 - (d) the property the [person authorised] reasonably suspects is owned by the respondent or is under his or her effective control.
- (3) A court may make an order, a preliminary unexplained wealth order, requiring the respondent to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order if:
- (a) the court is satisfied that the [person authorised] [enforcement authority] has reasonable grounds to suspect that the respondent's total wealth exceeds the value of his or her wealth that was lawfully obtained; and
 - (b) The evidential requirements in subsection (2) for the application have been met.

Drafting note: Unexplained wealth orders laws differ from traditional forfeiture laws in another important respect: they shift the burden of proof to the property owner, who must prove a legitimate source for his or her wealth and the forfeiture proceeding is instituted against a person rather than against the property.

- (4) The court may make an order without notice to the respondent under subsection (1), if the enforcement authority requests the court to do so and it appears necessary in the interests of justice.
- (5) For the purposes of this Part, 'lawfully obtained' means property that has been acquired by the respondent through legitimate activities and includes property acquired by inheritance, or by other legitimate transfer.

Section 107 Application to Revoke a Preliminary Unexplained Wealth Order

- (1) If a court makes a preliminary unexplained wealth order, the respondent may apply to the court to revoke the order within 28 days of notice of the order.
- (2) If such an application is made, the court may order an *inter parties* hearing date within 14 days [variant: at the first available date].
- (3) Where an application is made under this Section, the applicant must give the enforcement authority:
 - (a) written notice of the application; and
 - (b) a copy of any [variants: affidavit: evidence: verified statement] supporting the application.

- (4) Where an application is made under this Section, the applicant may appear and adduce evidence.
- (5) The enforcement authority may appear and adduce evidence at the hearing of any application made under this Section and must give the respondent a copy of any material it proposes to rely on to contest the application.
- (6) The notice and copies of any evidence or pleadings under this Section must be given no later than [seven days] before the hearing of the application.
- (7) The court may revoke the preliminary unexplained wealth order if satisfied that:
 - (a) there are no grounds on which the order could be made; or
 - (b) it is in the interests of justice to do so.

Section 108 Unexplained Wealth Order

- (1) The enforcement authority may apply to the court for an unexplained wealth order.
- (2) A court may make an unexplained wealth order requiring the respondent to pay an amount to [State] if:
 - (a) the court has made a preliminary unexplained wealth order, which has not been revoked, in relation to the respondent; and
 - (b) the court is satisfied on a balance of probabilities that any part of the respondent's wealth was not lawfully obtained or held.
- (3) The court must specify in the order that the respondent is liable to pay to [State] an amount (the respondent's 'unexplained wealth amount') equal to the amount that the court is satisfied does not represent the respondent's lawfully acquired property.
- (4) In proceedings under this Section, the burden of proving that the respondent's wealth is not lawfully acquired lies on the respondent.
- (5) When considering the issues under subsection (1), the court may have regard to information not included in the preliminary unexplained wealth order.
- (6) When considering the amount of an unexplained wealth order, the court must deduct an amount equal to the value, at the time of making the order, of any property of the respondent forfeited under a forfeiture, confiscation order or an extended benefit order, including any foreign forfeiture or confiscation order.

Drafting note: The burden of proving the legitimacy of the respondent's wealth lies with him or her, the rationale being that the task of establishing the lawful source of wealth is less onerous on the person who has acquired it. Drafters may want to consider definitions and techniques for the court to determine how and when property is valued for the purposes of an unexplained wealth order.

Section 109 Property Subject to a Person's Effective Control

- (1) If—
 - (a) the court has made an unexplained wealth order, and
 - (b) the enforcement authority applies to the court for an order under this Section, and
 - (c) the court is satisfied that particular property is subject to the effective control of the respondent, the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the unexplained wealth order.
- (2) An order under subsection (1) may be enforced against the property as if the property were the respondent's property.
- (3) An order that restricts the right of the respondent or any named person to deal with the property identified in this Section may be made, upon application of the enforcement authority, if the court is satisfied that the property would not be available to the enforcement authority without such a restriction.
- (4) If the enforcement authority applies for an order under subsection (1) relating to particular property, the authority must give written notice of the application to:
 - (a) the respondent who is subject to the unexplained wealth order; and
 - (b) any other person whom it has reason to believe may have an interest in the property.
- (5) The respondent, and any person who claims an interest in the property, may appear and adduce evidence at the hearing of the application.

Section 110 Enforcement of an Unexplained Wealth Order

- (1) An amount payable by the respondent to [State] under an unexplained wealth order is a civil debt due by the respondent to [State].
- (2) An unexplained wealth order against the respondent may be enforced as if it were an order made in civil proceedings instituted by [State] against the respondent to recover a debt due by him or her to [State].
- (3) An unexplained wealth order is for all purposes to be treated as a judgment debt.
- (4) If an unexplained wealth order is made after the respondent's death, this Section has effect as if the respondent had died on the day after the order was made.

Unexplained Wealth Order Procedural Requirements

Section 111 Procedure and Appeal

- (1) The procedure under this Part shall comply with the [civil procedure rules].
- (2) An appeal will lie to [insert name of relevant court] in relation to any order made by a court under this Part by any person affected.

- (3) The enforcement authority cannot, unless the court gives leave, apply for an unexplained wealth order against any person if:
 - (a) an application has previously been made for an unexplained wealth order in relation to that person; and
 - (b) the application has been finally determined on the merits.
- (4) The court must not give leave unless:
 - (a) it is satisfied that the wealth to which the new application relates was identified only after the first application was determined; or
 - (b) evidence became available only after the first application was determined; and;
 - (c) it is in the interests of justice to give the leave.

Part XI

Asset Management

Drafting note: Effective proactive asset management is critical to the success of any forfeiture legislation, criminal or civil. If assets are allowed to dissipate or disappear, the forfeiture programme will be undermined. In jurisdictions that have provided for this role to be carried out by traditional court-appointed receivers, it has proven to be very costly in terms of net recoveries and has occasionally led to enforcement authorities having to pay monies to the receiver out of taxpayer funds, because the assets recovered have proven to be insufficient to cover the cost of the receiver. Accordingly, this part seeks to identify a role for an employee within the enforcement authority whose responsibility will be to manage, and if necessary realise, property subject to court orders. Drafters will wish to consider whether they can legislate for property managers in a discrete way as is suggested in these model legislative provisions so that the role of the property manager is not different whether the order appointing him or her is made in criminal, civil or cash forfeiture regimes.

Generally speaking, consideration should be given to assigning someone with overall responsibility for property management (in the draft that follows, a 'property manager' is suggested, but that is purely a suggestion). The property manager can then play a role with the law enforcement agency (assisting on pre-seizure planning for example), the court (as an appointee) and third parties, including the owner.

Four potential stages of asset management need to be taken into account:

- (1) The initial freezing of the property – how can the property be secured pending the final outcome of the forfeiture case? Some types of property, such as cash or a vehicle, may need to be physically removed and detained; other types of property, for example real estate, might be secured by a notice on land title. Pre-seizure planning is a vital part of the asset recovery process.
- (2) The on-going management of property, after restraint, but before the final outcome of the case – how can it be preserved pending the forfeiture hearing? Again, the type of property will define the technique needed. A bank account might be effectively frozen by an order binding on the financial institution; a vehicle may need to be securely stored; complex properties, such as an on-going business, will require complex management (paying employees and suppliers, collecting revenues and so on).
- (3) The final disposition of property – in the event that forfeiture is ordered, how can the property be sold or disposed of? Some types of property,

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contraband or weapons for example, may need to be destroyed; most property will be sold. In the event that the court refuses forfeiture, the property must be returned and questions like the liability of public bodies need to be considered.

- (4) Consideration should be given by drafting authorities to whether the powers of a property manager should apply to cash that has been seized. It may be thought that this is unduly bureaucratic given that cash can be readily accounted for and simply deposited in an escrow account.

Note: jurisdictions often produce detailed guidelines on asset management. There is a diverse array of assets that might be subject to seizure, ranging from vehicles and houses through to cash and precious metals. Long-term planning in this regard can have immense benefits; asset forfeiture cases often occur in compressed timelines.

Section 112 Application for a Property Manager

- (1) The head of the relevant enforcement authority shall appoint a Property Manager to have responsibility for taking possession of, preserving, managing, disposing of or otherwise dealing with any property the subject of any proceedings under this Law.
- (2) Where the enforcement authority applies for a restraint order under Part V, it may also apply for the Property Manager in the enforcement agency to be appointed in the case.
- (3) Where the enforcement authority applies for a property freezing order under Part VI, it may also apply for the Property Manager in the enforcement agency to be appointed in the case.
- (4) A Property Manager appointed under this Section may act notwithstanding the prior appointment of a trustee or receiver in respect of any property.
- (5) The Property Manager may him- or herself appoint officials to assist him or her in the execution of his or her functions under this part of this Act.

Section 113 Powers of a Property Manager

Subject to any limits contained in any order of the court in relation to the property, the Property Manager may preserve, manage, modify, store, sell or otherwise dispose of or deal with any property in any manner that he or she thinks appropriate and proper and his or her powers shall include the powers of a receiver.

Section 114 Property Manager Costs and Expenditure

- (1) In the event that the Property Manager incurs any cost or other expenditure in the execution of his or her powers under this Part, he or she shall be entitled to seek

payment from the assets under his or her control and which become available for realisation following a final order made under this Act, and in respect of which he or she incurred such costs or other expenditure.

Drafting note: Drafters will wish to ensure that under their legislation the property manager will have the widest possible powers. In particular, powers that have in the past been useful in other jurisdictions have included the following.

- The property manager should have the power to:
 - remove, take possession of and preserve, store or manage the property for the length of time and on the terms that he or she considers proper (particularly important for vehicles);
 - comply with the terms of any order to which the property is subject, including an order to comply with environmental, industrial, labour or property standards or to pay taxes, utility charges or other charges;
 - make improvements to the property to maintain its economic value.
- The property manager may need the authority to share information with, and receive information from, law enforcement authorities. Ideally, the property manager will be involved in cases prior to the courts being involved.
- The property manager should be able to make the following provisions:
 - provisions to arrange for the insurance of property;
 - provisions to destroy property that has little value, particularly in relation to the costs of storage;
 - provisions to allow for the destruction of contraband or of property that is inherently dangerous;
 - provisions to donate property for humanitarian purposes if it cannot be sold, despite reasonable efforts, after a year.

Drafters will want to ensure that consequential amendments are made. For example:

- The land registry and personal property security systems may need a clear legislative authority for the property manager to register notice of a potential forfeiture.
- Some jurisdictions have escheats laws (e.g. for those who die intestate or for the assets of corporations that cease to exist), which may need to be excluded.

The word forfeiture can be used in other contexts (e.g. landlord–tenant law).

- (2) In the event that the property under the Property Manager's control does not become available for realisation following the final order made under this Act, or the realisation produces funds insufficient to meet the costs or other expenditure,

the Property Manager may seek to recover such costs or other expenditure or part thereof incurred from the Recovered Assets Fund established under Part XII.

Drafting note: The financial aspects of the forfeiture programme need to be carefully considered. A forfeiture programme can run like any other government programme, with revenues going into a consolidated fund and appropriations supporting the programme. Alternatively, revenues (e.g. money realised from the disposition or income of forfeited property) can be segregated and used to cover expenses, including asset management expenses of the programme. Finally, if other jurisdictions are involved in cases (e.g. through a mutual legal assistance treaty request), consideration might be given to sharing funds realised with those jurisdictions.

Section 115 Duties of a Property Manager

- (1) Where the Property Manager takes control of property pursuant to a court order, he or she shall, as soon as practicable after the order is issued, prepare and file with the court a report in the prescribed form identifying the location of the property.
- (2) The Property Manager will initiate and maintain detailed records of all property restrained, seized and forfeited under any Part of this Act.

Drafting note: It is essential that records are kept detailing the whereabouts and value of assets that are being managed. In particular, the property manager will maintain records detailing the value of any property under his or her management at the time of freezing/seizure, and thereafter as appropriate, keep records of its ultimate disposition, and, in the case of a sale, keep records of the value realised.

Further guidance on the information to be kept should be provided in Regulations and supporting guidance notes.

Section 116 Property Manager Liability

No action or other proceeding may be commenced against any party in respect of the actions of the Property Manager for any act done in good faith in the performance or intended performance of any duty under this part of this Act, or in the exercise or intended exercise of any power under this Act, or for any neglect or default in the performance or exercise in good faith of any such duty or power.

Drafting Note: Drafters should consider what the process will be where the court refuses to grant forfeiture. The statute can leave the matter entirely to the courts or it can circumscribe the types of orders the court can make in respect of compensation for the return of property.

Part XII

Recovered Assets Fund

Section 117 Establishment of Fund

- (1) There is hereby established 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 including the distribution of any funds deposited into the Recovered Assets Fund.

Section 118 Receipts and Disbursements

- (1) There shall be credited to the [insert name of Fund]:
 - (a) all monies derived from the fulfilment of confiscation, benefit recovery [*option: extended benefit recovery*] and civil forfeiture orders [*option: and unexplained wealth orders*] and from settlements of confiscation, recovery and forfeiture [*option: and unexplained wealth*] claims;
 - (b) any cash sums made subject to a forfeiture order pursuant to an application under Part VIII or Part IX of this Act;
 - (c) any sums of money allocated to the [insert name of Fund] from time to time by [*variants: legislative or parliamentary*] appropriation;
 - (d) any voluntary payment, grant or gift made by any person for the purposes of the [insert name of fund];
 - (e) any income derived from the investment of any amounts that are credited to the [insert name of fund]; and
 - (f) 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 Sections 65 and 104;
- (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: There are two ways of dealing with forfeited funds. One is simply to provide that the forfeited funds are credited to the state's general revenue. The other is as provided above.

Section 119 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].

Part XIII

Sanctions

Implementing the United Nations Targeted Financial Sanctions under the Al-Qaida and 1988 Sanctions Regimes

Drafting note: These model provisions do not attempt to provide a single model for the implementation of the UN Al-Qaida and 1988 sanctions regimes. Instead they provide guidance on key requirements that UN Member States may wish to consider when designing their national framework for implementing the two UN sanctions regimes. They do not purport to override national authorities.

Background: These model provisions aim to assist UN Member States in designing their national framework for implementing the financial sanctions pursuant to the UN Al-Qaida sanctions regime under United Nations Security Council Resolutions (UNSCRs) 1267 (1999), 1989 (2011) and 2083 (2012) and the 1988 sanctions regime under UNSCRs 1988 (2011) and 2082 (2012).

The 1267 sanctions regime (as it was previously known) was established on 15 October 1999 by the United Nations Security Council (UNSC) with the adoption of UNSCR 1267 for the purpose of imposing sanctions measures on Taliban-controlled Afghanistan for its support of Usama bin Laden. The sanctions regime has been modified and strengthened by subsequent resolutions, including UNSCRs 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009) and 1989 (2011). The table in Annex 1 sets out the major changes brought to the 1267 sanctions regime by the above-mentioned resolutions.

In June 2011, the Security Council, by way of UNSCRs 1988 (2011) and 1989 (2011), split the previous 1267 sanctions regime, concerning Al Qaida, Usama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them, into two separate sanctions regimes, namely the Al-Qaida sanctions regime and the 1988 sanctions regime. Consequently, the previous Consolidated List was split into two lists, namely, the Al-Qaida Sanctions List and the 1988 Sanctions List.

Under UNSCR 1989 (2011) and its successor, UNSCR 2083 (2012), the Al-Qaida sanctions regime or 1267/1989 sanctions regime continues to monitor the implementation of the three sanctions measures (assets freeze, travel ban and arms embargo) imposed against Al-Qaida and other individuals, groups, undertakings and entities associated with Al-Qaida as part of the Security

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Council's action against terrorism. The list of such individuals, groups, undertakings and entities is now known as the Al-Qaida Sanctions List.

The Al-Qaida sanctions regime is overseen by the Al-Qaida Sanctions Committee, established pursuant to UNSCR 1267 (1999) and UNSCR 1989 (2011). The Al-Qaida Sanctions Committee is made up of the members of the Security Council.

Background: At the same time, UNSCR 1988 (2011) established the new 1988 sanctions regime, which continues to monitor the implementation of the three sanctions measures (assets freeze, travel ban and arms embargo) imposed against the Taliban, that is persons and entities designated as such prior to the adoption of UNSCR 1988 (2011), and those individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan. Accordingly, the names of such individuals, groups, undertakings and entities are now found in a separate list commonly referred to as the 1988 Sanctions List. UNSCR 1988 (2011) and its successor, UNSCR 2082 (2012), reiterate the need to ensure that the sanctions regime contributes effectively to ongoing efforts to combat the insurgency and support the government of Afghanistan's work to advance reconciliation in order to bring about peace, stability and security in Afghanistan.

The 1988 sanctions regime is overseen by the 1988 Sanctions Committee established pursuant to UNSCR 1988 (2011). The 1988 Sanctions Committee is made up of the members of the Security Council.

With respect to measures implementation, paragraphs 43 and 44 of UNSCR 2082 (2012) are worth noting. These paragraphs reiterate the importance of all states (including non-UN Member States) identifying, and where necessary introducing, 'adequate procedures' to fully implement all aspects of the three sanctions measures. The resolution does not specify that these measures should be enshrined in laws, regulations or other enforceable means. However, paragraph 44 of UNSCR 2082 (2012) 'takes note' of the need to have appropriate legal authorities and procedures to apply and enforce targeted financial sanctions that are not conditional upon the existence of criminal proceedings, and to apply an evidentiary standard of proof of 'reasonable grounds' or 'reasonable basis', as well as the ability to collect or solicit as much information as possible from all relevant sources.

The resolution further acknowledges that the FATF standards are useful for implementing the sanctions and as such strongly urges all UN Member States to implement the comprehensive international standards embodied in the FATF's revised 40 Recommendations on Combating Money Laundering and the Terrorism financing and Proliferation, particularly Recommendation 6 on targeted financial sanctions related to terrorism and terrorism financing.

Section 120 Definitions

1988 Sanctions Committee means the committee established pursuant to UNSCR 1988 (2011).

1988 Sanctions List means the UN Sanctions List established and maintained by or under the authority of the UNSC with respect to individuals, groups, undertakings and entities designated as or associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan.

Affected party means any party against whom a freezing order has been executed in [insert name of jurisdiction], claiming not to be the one against whom the sanction has been imposed.

Assets means funds and other financial assets or economic resources.

Al-Qaida Sanctions Committee means the Committee established pursuant to UNSCRs 1267 (1999) and 1989 (2011).

Al-Qaida Sanctions List means the UN Sanctions List established and maintained by or under the authority of the UNSC with respect to Al-Qaida and individuals, groups, undertakings and entities associated with Al-Qaida.

Delisted party means any individual, group, undertaking or entity whose name has been removed from the relevant UN Sanctions List by or under the authority of the UNSC.

Economic resources means assets of every kind, whether movable or immovable, tangible or intangible, actual or potential, that are not funds but potentially may be used to obtain funds, goods or services and includes:

- (a) land, buildings or other real estate;
- (b) equipment, including computers, computer software, tools and machinery;
- (c) office furniture, fittings and fixtures and other items of a fixed nature;
- (d) vessels, aircraft and motor vehicles;
- (e) inventories of goods;
- (f) cultural goods, works of art, precious stones, jewellery or gold;
- (g) commodities, including oil, minerals or timber;
- (h) arms and related material,
- (i) patents, trademarks, copyrights, trade names, franchises, goodwill and other forms of intellectual property; and
- (j) internet hosting or related services.

Drafting note: The above definition is set out in the Assets Freeze Explanation of Terms Paper (EOT) approved by the Al-Qaida Sanctions Committee, which applies equally to the 1988 sanctions regime. With respect to the freezing action, the UNSCRs refer to ‘funds and other financial assets or economic resources’. The interpretive note to FATF Recommendation 6, however, uses the term ‘funds or other assets’, which is defined in the glossary as follows:

Drafting note: ‘The term *funds or other assets* means any assets, including, but not limited to, financial assets, economic resources, assets of every kind, whether tangible or intangible, movable 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.’ While the above FATF definition refers to the term ‘economic resources’, no attempt is made by the FATF to define the term.

With respect to ‘internet hosting or related services’, refer to paragraph 5 of UNSCR 2082 (2012) and paragraph 4 of UNSCR 2083 (2012).

Extraordinary expenses means categories of expenses other than those falling under ordinary expenses.

Focal point means the focal point established under UNSCR 1730 (2006).

Freeze funds and other financial assets or economic resources includes preventing their use, alteration, movement, transfer or access, unless with the specific authorisation of the relevant Sanctions Committee.

Freeze of economic resources means preventing the use of economic resources to obtain funds, goods, or services in any way, including, but not limited to, by selling, hiring or mortgaging them.

Drafting note: The above definitions are set out in the EOT:

The term ‘freeze’ is also defined in the FATF glossary:-

‘For the purposes of Recommendations 6 and 7 on the implementation of targeted financial sanctions, the term freeze means to prohibit the transfer, conversion, disposition or movement of any funds or other assets that are owned or controlled by designated persons or entities on the basis of, and for the duration

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of the validity of, an action initiated by the UNSC or in accordance with applicable Security Council resolutions by a competent authority or a court ...'

'... In all cases the frozen property, equipment, instrumentalities, funds or other assets remain the property of the natural or legal person(s) that held an interest in them at the time of the freezing and may continue to be administered by third parties, or through other arrangements established by such natural or legal person(s) prior to the initiation of an action under a freezing mechanism, or in accordance with other national provisions. As part of the implementation of a freeze, countries may decide to take control of the property, equipment, instrumentalities, or funds or other assets as a means to protect against flight.'

Funds and other financial assets include:

- (a) cash, cheques, claims on money, drafts, money orders, bearer instruments, and other payment instruments;
- (b) deposits with financial institutions or other entities and balances on accounts, including but not limited to (1) fixed or term deposit accounts, (2) balances on share trading accounts with banks, brokerage firms or other investment trading accounts;
- (c) debts and debt obligations, including trade debts, other accounts receivable, notes receivable and other claims of money on others;
- (d) equity and other financial interest in a sole trader or partnership;
- (e) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
- (f) interest, dividends or other income on or value accruing from or generated by assets;
- (g) credit, right of set-off, guarantees, performance bonds or other financial commitments;
- (h) letters of credit, bills of lading, bills of sale; notes receivable and other documents evidencing an interest in funds or financial resources and any other instruments of export financing;
- (i) insurance and reinsurance.

Drafting note: The above definition is set out in the EOT.

Listing criteria means the criteria, as defined in the applicable UNSCR, that indicate that an individual, group, undertaking or entity is eligible for designation on a UN Sanctions List.

Drafting note: The listing criteria are set out in paragraphs 2, 3 and 5 of UNSCR 2083 (2012) and paragraphs 2, 3 and 4 of UNSCR 2082 (2012).

Listed party means any individual, group, undertaking or entity designated on a UN Sanctions List by or under the authority of the UNSC as being subject to UN sanctions.

Office of the Ombudsperson means the office created by UNSCR 1904 (2009) to review requests from listed parties seeking to be removed from the Al-Qaida Sanctions List.

Ordinary expenses includes funds and other financial assets or economic resources that are:

- (a) basic expenses, necessary for payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges;
- (b) intended exclusively for the payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees; or
- (c) intended exclusively for the payment of service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.

Party means any individual, group, undertaking or entity.

Property registries include land and other immoveable property registries, motor vehicle registries, ship and aircraft registries, share registries and company registries.

Public sector agencies include national security agencies, national intelligence services, law enforcement bodies, FIU and regulatory authorities.

Regulatory authorities include the banking and non-banking financial services regulators, non-profit organisations regulator and the regulators or oversight bodies of DNFBPs.

Sanctions Committee means a subsidiary organ established by the UNSC for the performance of its functions and includes the Al-Qaida Sanctions Committee and the 1988 Sanctions Committee.

UN sanctions means enforcement measures, not involving the use of arms force, as may be adopted from time to time by the UNSC under Chapter VII of the UN Charter.

UN Sanctions List or Sanctions List means a list established and maintained by or under the authority of the UNSC comprising individuals, groups, undertakings or entities subject to UN sanctions; and includes the Al-Qaida Sanctions List and the 1988 Sanctions List.

Without delay means, ideally, within a matter of hours of a designation by the UNSC or its relevant Sanctions Committee (e.g. the 1267 Committee, the 1988 Committee, the 1718 Sanctions Committee or the 1737 Sanctions Committee) as defined in the FAFT glossary. The phrase 'without delay' should be interpreted in the context of the need to prevent the flight or dissipation of funds or other assets that are linked to terrorists, terrorist organisations or those who finance terrorism, and to the financing

of proliferation of weapons of mass destruction, and the need for global, concerted action to interdict and disrupt their flow swiftly.

Section 121 Establishment of the Competent Authority

The [insert name of the Competent Authority] shall be the Competent Authority.

The Competent Authority shall be responsible for the effective implementation of the UN designations and sanctions.

Section 122 Powers and Functions of the Competent Authority

The Competent Authority:

- (1) shall be responsible for the overall administration of UN sanctions measures;
- (2) shall, where appropriate and after consultation with relevant public sector agencies, propose names for designation by the relevant Sanctions Committee;
- (3) may in collaboration with public sector agencies develop such rules and guidance and disseminate other relevant information as may be necessary for the purposes of the effective implementation of the UN sanctions;
- (4) may enter into arrangements for proper co-ordination and co-operation with public sector agencies;
- (5) shall have the power to collect or solicit information from public sector agencies, property registries and any other person who is reasonably believed to have in his or her possession, custody or control the assets of any listed party.

Section 123 Dissemination of the United Nations Sanctions List

- (1) The Competent Authority shall by notice in the *Official Gazette* (or other official means of communication) publish, in a timely manner, the UN Sanctions Lists, including changes that may occur from time to time to the Sanctions Lists.
- (2) A notice in the *Official Gazette* (or other official means of communication) under subsection (1) shall contain an order by the Competent Authority for the freezing of the assets of listed parties in accordance with Section 126.

Section 124 Listing Proposals

- (1) The Competent Authority shall be responsible for identifying and proposing (through diplomatic channels) to the relevant Sanctions Committee names of parties that meet the listing criteria for designation on a UN Sanctions List.

Drafting note: The listing criteria are set out in paragraphs 2, 3 and 5 of UNSCR 2083 (2012) and paragraphs 2, 3 and 4 of UNSCR 2082 (2012).

- (2) For the purposes of subsection (1), the Competent Authority shall consult and seek such assistance from relevant public sector agencies as may be necessary to determine whether, on reasonable grounds, there is sufficient evidence to support the listing of a party on a UN Sanctions List.
- (3) Notwithstanding any other enactment, a public sector agency shall furnish to the Competent Authority all such information, including, where relevant, intelligence material, as may be required to assist the Competent Authority in making a determination under subsection (2).
- (4) Notwithstanding any other enactment, where at any time in the course of the exercise of its functions, any public sector agency receives or otherwise becomes aware of, any information relevant to the designation of a party on a UN Sanctions List or a listed party, the public sector agency shall forthwith pass on that information to the Competent Authority.
- (5) When proposing names to the relevant Sanctions Committee, the Competent Authority shall:
 - (a) follow the procedures, including using standard forms for listing, contained in or as may be adopted pursuant to any relevant UNSCR;
 - (b) to the extent possible, provide as much relevant information as possible on the proposed party, including sufficient identifying information and such other relevant information as may be required under any applicable UNSCR;
 - (c) specify if the relevant Sanctions Committee may not make known its status as a designating State.

Drafting note: Paragraphs 10 to 14 of UNSCR 2083 (2012) and paragraphs 12 to 14 of UNSCR 2082 (2012) set out the procedures that a designating State must follow when submitting a proposal for designation. The Committee Guidelines also contain additional procedures that must be followed. It is not intended to cover the procedures in detail in this document.

Paragraph (c) above, relates to paragraph 12 of UNSCR 2083 (2012) which reads as follows:

‘Decides that Member States proposing a new designation, as well as Member States that have proposed names for inclusion on the Al-Qaida Sanctions List before the adoption of this resolution, shall specify if the Committee or the Ombudsperson may not make known the Member State’s status as a designating State.’

- (6) For the purposes of making a determination under this Section, the Competent Authority may consult with such other States or UN entities as may be relevant.

Drafting note: This provision covers the provision of paragraph 18 of UNSCR 2082 (2012):

‘Strongly urges Member States, when considering the proposal of a new designation, to consult with the Government of Afghanistan on the designation prior to submission to the Committee, to ensure coordination with the Government of Afghanistan’s peace and reconciliation efforts, and encourages all Member States considering the proposal of a new designation to seek advice from UNAMA, where appropriate;’

- (7) Any information given under this Section may be given subject to conditions restricting the use and disclosure of the information imparted.

Drafting note: For the Al-Qaida sanctions regime, the provisions of paragraph 18 of UNSCR 2083 (2012), which apply to countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national, provide as follows:

‘Reaffirms further the provisions in Paragraph 17 of UNSCR 1822 (2008) regarding the requirement that Member States take all possible measures, in accordance with their domestic laws and practices, to notify or inform in a timely manner the listed individual or entity of the designation and to include with this notification the narrative summary of reasons for listing, a description of the effects of designation, as provided in the relevant resolutions, the Committee’s procedures for considering delisting requests, including the possibility of submitting such a request to the Ombudsperson in accordance with paragraph 21 of UNSCR 1989 (2011) and Annex II of this resolution, and the provisions of UNSCR 1452 (2002) regarding available exemptions;’

Paragraph 17 of UNSCR 1822 (2008) reads: ‘Demands that Member States receiving notification as in paragraph 15 above take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the listed individual or entity of the designation and to include with this notification a copy of the publicly releasable portion of the statement of case, any information on reasons for listing available on the Committee’s website, a description of the effects of designation, as provided in the relevant resolutions, the Committee’s procedures for considering delisting requests, and the provisions of UNSCR 1452 (2002) regarding available exemptions;’

Paragraph 15 of UNSCR 1822 (2008) reads as follows: ‘Decides that the Secretariat shall, after publication but within one week after a name is added to the Consolidated List, notify the Permanent Mission of the country or countries

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where the individual or entity is believed to be located and, in the case of individuals; the country of which the person is a national (to the extent this information is known) in accordance with paragraph 10 of UNSCR 1735 (2006);'

Paragraph 10 of UNSCR 1735 (2006) reads as follows: 'Decides that the Secretariat shall, after publication but within two weeks after a name is added to the Consolidated List, notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known), and include with this notification a copy of the publicly releasable portion of the statement of case, a description of the effects of designation, as set forth in the relevant resolutions, the Committee's procedures for considering delisting requests, and the provisions of UNSCR 1452 (2002);'

There is no corresponding provision in UNSCR 2082 (2012).

Section 125 Notification of Listing

- (1) Where a listed party is believed to be a national of or located in [insert name of jurisdiction], the Competent Authority shall by notice in the *Official Gazette* (or other means of official communication) notify the listed party of the designation by or under the authority of the UNSC.
- (2) A notice published in the *Official Gazette* (or other means of official communication) under subsection (1) shall include:
 - (a) the narrative summary of reasons for listing;
 - (b) a description of the effects of designation, as provided in the relevant UNSCR;
 - (c) procedures of the relevant Sanctions Committee for considering delisting requests, including, where applicable, the possibility of submitting such a request to the Office of the Ombudsperson; and
 - (d) the provisions regarding available exemptions.

Section 126 Freezing of the Assets of Listed Parties

- (1) Subject to Section 127, any person who has in his or her possession, custody or control the assets of any listed party shall immediately freeze such assets upon the issue of a freezing order by the Competent Authority, which shall remain in place for as long as the listing remains in place.
- (2) For the purposes of subsection (1), assets includes funds derived from assets owned or controlled, directly or indirectly, by a listed party or by persons acting on his or her behalf or at his or her direction.
- (3) Measures taken under subsection (1) shall be immediately reported to the Competent Authority.

- (4) Any person who makes available, directly or indirectly, any assets for the benefit of a listed party shall commit an offence and shall on conviction be punishable by [insert penalty].

Drafting note: See paragraph 1(a) of UNSCR 2082 (2012) and UNSCR 2083 (2012):

Freeze ‘[...] and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons’ benefit, by their nationals or by persons within their territory’.

- (5) The measures under this Section also apply to the payment of ransoms to a listed party.

Drafting note: Paragraphs 6 of UNSCR 2082 (2012) and UNSCR 2083 (2012) confirm ‘that the requirements in paragraph 1(a) above shall also apply to the payment of ransoms’ to listed parties.

- (6) Any person who fails to comply with subsection (1) shall commit an offence and shall on conviction be punishable by [insert penalty].

Section 127 Assets Freeze Exemptions

- (1) A listed party may request the Competent Authority to release part of the frozen assets that are necessary for ordinary or extraordinary expenses.
- (2) Having determined that the assets are to be used for the purposes set out in subsection (1) above, the Competent Authority shall notify the relevant Sanctions Committee of its intention to authorise the relevant exemptions.
- (3) In the absence of a negative decision from the relevant Sanctions Committee within three working days of the notification, the Competent Authority shall issue an exemption order authorising the relevant ordinary expenses subject to such terms and conditions as may be appropriate in the circumstances.
- (4) The Competent Authority shall issue an exemption order authorising the relevant extraordinary expenses as soon as it receives the approval of the relevant Sanctions Committee.
- (5) A request for exemption under this Section shall include the following information:
- (a) recipient’s name and address;
 - (b) recipient’s permanent reference number on the relevant Sanctions List;
 - (c) recipient’s bank information, including name and address of bank and account number;

- (d) purpose of payment the expenses and justification for the determination of the expenses falling under ordinary or extraordinary expenses;
- (e) amount of instalment;
- (f) number of instalments;
- (g) payment starting date;
- (h) bank transfer or direct debit;
- (i) interests;
- (j) specific funds being unfrozen;
- (k) any other relevant information.

Drafting note: See Section 12(d) of the Guidelines of the Committee for the Conduct of its Works (adopted by the 1988 Sanctions Committee on 15 April 2013) and Section 11(d) of the Guidelines of the Committee for the Conduct of its Works (adopted by the Al-Qaida Sanctions Committee on 15 April 2013).

Section 128 Exemptions Request to the Al-Qaida Sanctions Committee

Notwithstanding Section 127, a listed party on the Al-Qaida Sanctions List residing in [insert name of jurisdiction] may request the Al-Qaida Sanctions Committee through the focal point mechanism to exempt such frozen assets as may be necessary for ordinary or extraordinary expenses provided that the request has also been submitted to the Competent Authority.

Drafting note: Paragraph 8 of UNSCR 2083 (2012) ‘Encourages Member States to make use of the provisions regarding available exemptions to the measures in paragraph 1(a) above, set out in paragraphs 1 and 2 of UNSCR 1452 (2002), as amended by UNSCR 1735 (2006), and authorizes the Focal Point mechanism established in UNSCR 1730 (2006) to receive exemption requests submitted by, or on behalf of, an individual, group, undertaking or entity on the Al-Qaida Sanctions List, or by the legal representative or estate of such individual, group, undertaking or entity, for Committee consideration, as described in paragraph 37 below;’

Paragraph 37 (a) of UNSCR 2083 (2012) ‘Decides that the Focal Point mechanism established in UNSCR 1730 (2006) may receive requests from listed individuals, groups, undertakings, and entities for exemptions to the measures outlined in paragraph 1(a) of this resolution, as defined in UNSCR 1452 (2002) provided that the request has first been submitted for the consideration of

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the States of residence, and decides further that the Focal Point shall transmit such requests to the Committee for a decision, directs the Committee to consider such requests, including in consultation with the state of residence and any other relevant states, and further directs the Committee, through the Focal Point, to notify such individuals, groups, undertaking or entities of the Committee's decision;'

Section 129 Additions to Frozen Accounts

The Competent Authority may allow the addition to accounts frozen any payment in favour of a listed party provided that such payments continue to be subject to the freezing order and are frozen.

Drafting note: See paragraphs 7 of UNSCRs 2082 (2012) and 2083 (2012).

Section 130 Mistaken Identity

- (1) An affected party shall apply in writing to the Competent Authority for the unfreezing of his or her assets.
- (2) An application under subsection (1) shall be accompanied by relevant documentation to support the claim of the affected party.
- (3) The Competent Authority shall examine an application received under subsection (1) and may request such additional information as may be necessary from the affected party, any relevant public sector agency or any person who has in his or her possession, custody or control the frozen assets of an affected party to make a determination as to whether the affected party is not the actual listed party.
- (4) Where the Competent Authority establishes that the affected party is not the actual listed party, it shall immediately direct any person who has in his or her possession, custody or control the frozen assets of an affected party to unfreeze the assets of the affected party.
- (5) A direction under subsection (4) shall clearly set out the reasons indicating that the affected party is not the listed party and shall be accompanied by such supporting documentation as may be necessary in the circumstances.
- (6) Any person who has in his or her possession, custody or control the frozen assets of an affected party shall immediately unfreeze such assets, upon the issue of a direction by the Competent Authority.
- (7) Any person who fails to comply with a direction issued under subsection (4) shall commit an offence and shall on conviction be punishable by [insert penalty].

Section 131 Appointment of Administrator

Drafting note: The EOT further clarifies that the term ‘freeze’ does not mean confiscation or transfer of ownership. The person or state body responsible for regulating frozen assets should make reasonable efforts to do so in a manner that does not result in their undue deterioration, provided that this does not conflict with the overall intention behind the freezing action – to deny listed individuals, groups, undertakings and entities the financial means to support terrorism.

In cases where a listed party owns or controls funds or other financial assets or economic resources in which unlisted persons also have a segregable interest, for example as joint owners or employees, the freeze is directed against that share of the asset owned or controlled by the listed party. In such cases, states should ensure that the listed party is not able to exercise his or her interest in the asset directly or indirectly, including by issuing instructions regarding any benefit, financial or otherwise, that may accrue from the asset. In some cases, it might therefore be advisable to appoint an administrator.

- (1) Subject to subsection (2), the Competent Authority may appoint a fit and proper person as an administrator in relation to the whole or part of the assets of a listed party.
- (2) The remuneration payable to an administrator as determined by the Competent Authority shall be reasonable and be recovered from the frozen assets of a listed party as approved by the relevant Sanctions Committee.
- (3) Where the Competent Authority appoints an administrator under subsection (1), it shall, to the extent possible, give notice in writing of the appointment to the listed party.
- (4) The administrator shall manage the whole of the assets entrusted to his or her administration and for the purpose of doing so:
 - (a) shall comply with such directions given to him or her by the Competent Authority under subsection (5); and
 - (b) shall manage the assets honestly and in good faith and shall exercise care, diligence and skill that a reasonable person would exercise in comparable circumstances.
- (5) The Competent Authority may give such directions to the administrator as to his or her powers and duties as it deems desirable in the circumstances of the case.
- (6) The administrator may apply to the Competent Authority for instructions as to the manner in which he or she shall conduct the management of the assets of the listed party under administration or any matter arising in the course of that management.
- (7) The duties of the administrator shall cease upon the delisting of the listed party by the relevant Sanctions Committee and he or she shall use his or her best endeavours to facilitate the return of the management of the assets to the delisted party.

Section 132 State-sponsored Delisting

- (1) Notwithstanding Section 133, a listed party who is a national or resident of or is incorporated or registered in [insert name of jurisdiction] may submit a request to the Competent Authority to take such measures in accordance with the relevant UNSCR for the removal of the name of the listed party from the relevant Sanctions List.
- (2) When submitting a request (through the diplomatic channel) for delisting to the relevant Sanctions Committee, the Competent Authority shall follow such procedures, including using any standard form for delisting, as may be adopted by the Sanctions Committee and the request shall contain the reasons for submitting the delisting request.
- (3) Where relevant, the Competent Authority shall consult with other relevant States or UN entities.

Drafting note: Paragraph 29 of UNSCR 2083 (2012) ‘Directs the Committee to continue to work, in accordance with its guidelines, to consider delisting requests of Member States for the removal from the Al-Qaida Sanctions List of individuals, groups, undertakings and entities that are alleged to no longer meet the criteria established in the relevant resolutions, and set out in paragraph 2 of the present resolution, which shall be placed on the Committee’s agenda upon request of a member of the Committee, and strongly urges Member States to provide reasons for submitting their delisting requests.’

Subsection (3) above provides for the requirement under paragraph 21 of UNSCR 2082 (2012): ‘Strongly urges Member States to consult with the Government of Afghanistan on their delisting requests prior to submission to the Committee, to ensure coordination with the Government of Afghanistan’s peace and reconciliation efforts;’

Section 133 Non-state-sponsored Delisting

Notwithstanding Section 132, a listed party may submit a petition for delisting directly to the Office of the Ombudsperson or the focal point, as the case may be.

Section 134 Delisting Requests for Dead Individuals and Defunct Entities

Drafting note: Paragraph 30 of UNSCR 2083 (2012) ‘Encourages States to submit delisting requests for individuals that are officially confirmed to be dead, particularly where no assets are identified, and for entities reported or confirmed to have ceased to exist, while at the same time taking all reasonable

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measures to ensure that the assets that had belonged to these individuals or entities have not been or will not be transferred or distributed to other individuals, groups, undertakings and entities on the Al-Qaida Sanctions List;

- (1) Where a listed party is a national or resident of or is incorporated or registered in [insert name of jurisdiction] and is officially confirmed to be dead or to have ceased to exist, as the case may be, the Competent Authority shall (through the diplomatic channel) submit a request for the delisting of the dead or defunct party.
- (2) When submitting a request for delisting to the relevant Sanctions Committee under subsection (1), the Competent Authority shall follow such procedures, including using any standard form for delisting, as may be adopted by the relevant Sanctions Committee and the request shall contain the reasons for submitting the delisting request.
- (3) The request for delisting shall be accompanied by such additional information as may be required under the applicable UNSCR.

Section 135 Notice of Delisting

Where a delisted party is a national or resident of or is incorporated in or is believed to be located in [insert name of jurisdiction] the Competent Authority shall, in a timely manner, by notice in the *Official Gazette* (or such other means of official communication) notify the listed party that his name has been removed from the relevant Sanctions List.

Drafting note: See Paragraphs 27 of UNSCR 2082 (2012) and 35 of UNSCR 2083 (2012).

Paragraph 27 of UNSCR 2082 (2012) ‘Confirms that the Secretariat shall, as soon as possible after the Committee has made a decision to remove a name from the List, transmit the decision to the Government of Afghanistan and the Permanent Mission of Afghanistan for notification, and the Secretariat should also, as soon as possible, notify the Permanent Mission of the State(s) in which the individual or entity is believed to be located and, in the case of non-Afghan individuals or entities, the State(s) of nationality, and recalls its decision that States receiving such notification take measures, in accordance with domestic laws and practices, to notify or inform the concerned individual or entity of the delisting in a timely manner;’

Paragraph 35 of UNSCR 2083 (2012) ‘Confirms that the Secretariat shall, within 3 days after a name is removed from the Al-Qaida Sanctions List, notify the Permanent Mission of the State(s) of residence, nationality, location or incorporation (to the extent this information is known), and decides that States receiving such notification shall take measures, in accordance with their domestic laws and practices, to notify or inform the concerned individual or entity of the delisting in a timely manner;’

Section 136 Unfreezing of Frozen Assets

- (1) Where the name of a listed party is removed from the relevant Sanctions List, the Competent Authority shall immediately issue an order to unfreeze the assets of the delisted party.

Drafting note: Paragraph 30 of UNSCR 2083 (2012) ‘Encourages States to submit delisting requests for individuals that are officially confirmed to be dead, particularly where no assets are identified, and for entities reported or confirmed to have ceased to exist, while at the same time taking all reasonable measures to ensure that the assets that had belonged to these individuals or entities have not been or will not be transferred or distributed to other individuals, groups, undertakings and entities on the Al-Qaida Sanctions List;’

- (2) A notice to unfreeze the assets of a delisted party shall be subject to such terms and conditions as the Competent Authority may deem appropriate to ensure that the assets of the delisted party will not be transferred or distributed to another listed party or otherwise be used for terrorist purposes.
- (3) Any person who has in his or her possession, custody or control the frozen assets of any delisted party shall immediately unfreeze such assets upon the issue of an unfreezing order by the Competent Authority.
- (4) Where any assets have been frozen as a result of the listing of Usama bin Laden, the Competent Authority shall:
 - (a) submit a request to the Al-Qaida Sanctions Committee to unfreeze such assets;
 - (b) provide assurances to the Committee that the assets will not be transferred directly or indirectly to a listed party or otherwise used for terrorist purposes; and
 - (c) not issue an unfreezing order without the approval of the Committee.

Drafting note: Paragraph 32 of UNSCR 2083 (2012) ‘Decides that, prior to the unfreezing of any assets that have been frozen as a result of the listing of Usama bin Laden, Member States shall submit to the Committee a request to unfreeze such assets and shall provide assurances to the Committee that the assets will not be transferred, directly or indirectly, to a listed individual, group, undertaking or entity, or otherwise used for terrorist purposes in line with UNSCR 1373 (2001), and decides further that such assets may only be unfrozen in the absence of an objection by a Committee member within thirty days of receiving the request, and stresses the exceptional nature of this provision, which shall not be considered as establishing a precedent.’

- (5) Any person who fails to comply with subsections (2) and (3) shall commit an offence and shall on conviction be punishable by [insert penalty].

Section 137 Exchange of Information

- (1) [Insert name of jurisdiction] may enter into an arrangement or agreement with the Office of the Ombudsperson to facilitate the sharing of information, including confidential information.

Drafting note: Paragraph 23 of UNSCR 2083 (2012) ‘Strongly urges Member States to provide all relevant information to the Ombudsperson, including any relevant confidential information, where appropriate, encourages Member States to provide relevant information in a timely manner, welcomes those national arrangements entered into by Member States with the Office of the Ombudsperson to facilitate the sharing of confidential information, encourages Member States’ further cooperation in this regard, and confirms that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it;’

- (2) Where the Competent Authority receives, or otherwise becomes aware of, any identifying or other information on a listed party, the Competent Authority shall forthwith pass on that information to the relevant Sanctions Committee.

Drafting note: Paragraph 38 of UNSCR 2083 (2012) ‘Encourages all Member States, in particular designating States and States of residence or nationality, to submit to the Committee additional identifying and other information, along with supporting documentation, on listed individuals, groups, undertakings and entities, including updates on the operating status of listed entities, groups and undertakings, the movement, incarceration or death of listed individuals and other significant events, as such information becomes available;’

- (3) Any information given under this Section may be given subject to conditions restricting the use and disclosure of the information imparted.

Section 138 Supervision

- (1) Regulatory authorities may, in collaboration with the Competent Authority, develop such rules and guidance and disseminate other relevant information as may be necessary for the purposes of the effective implementation of the UN sanctions.
- (2) Financial institutions and DNFBPs shall implement internal controls and other procedures to enable them to effectively comply with their obligations under these provisions.
- (3) The regulatory authorities shall supervise and enforce compliance by the persons over whom they exercise regulatory control or oversight with the requirements imposed pursuant to these provisions.

- (4) Where it appears or is represented to any regulatory authority that any person has refrained from complying or negligently failed to comply with the requirements under these provisions, the regulatory authority may take, against the person concerned, any regulatory action that it is empowered to take for failure to have proper systems and controls or not operating in a safe and sound manner, as the case may be.

Section 139 Record-keeping

- (1) The Competent Authority shall keep and maintain a record of:
 - (a) all proposals for designation made;
 - (b) all assets frozen pursuant to these provisions;
 - (c) all exemption orders issued under these provisions; and
 - (d) all delisting petitions received and actions taken.

Section 140 Confidentiality

- (1) Subject to these provisions, the Competent Authority shall not communicate to any unauthorised person any matter relating to this Act.
- (2) For the purposes of this Section an 'unauthorised person' means any person other than:
 - (a) a Sanctions Committee;
 - (b) a public sector agency; and
 - (c) a person with whom the Competent Authority is authorised under these provisions to collaborate, consult, seek advice or request information from or exchange information with.

Section 141 Immunity

- (1) No action shall lie against the Competent Authority for anything done or omitted to be done by the Competent Authority in the performance, in good faith, of its functions or the exercise, in good faith, of its powers under these provisions.
- (2) No action shall lie against any person who has in his or her possession, custody or control the assets of a listed party for anything done by him or her in the performance, in good faith, of its obligations under these provisions.

Annex I

Criminal Assets Recovery Committee

Establishment of Committee

- (1) There is hereby established a Committee to be known as the Criminal Assets Recovery Committee.
- (2) The Committee consists of:
 - (a) the Minister, who is the chairperson of the Committee;
 - (b) the Minister responsible for home affairs;
 - (c) the Minister responsible for finance;
 - (d) the Attorney-General; and
 - (e) if necessary, one other person designated by the Minister.
- (3) The members of the Committee may designate their deputies to attend a meeting of the Committee in their place.
- (4) The Committee must designate one of its members as deputy chairperson of the Committee, and, when the chairperson is not available, the deputy chairperson must act as chairperson.
- (5) The Permanent Secretary of the Ministry responsible for justice must make staff members available to perform the administrative functions of the Committee.

Conditions of Service and Other Benefits of Certain Members of Committee

- (6) A member of the Committee appointed:
 - (a) is entitled, unless that member is a staff member, to receive remuneration, allowances and other benefits;
 - (b) will be designated on terms and conditions and for periods determined by the Committee.

Meetings of Committee

- (7) A meeting of the Committee must be held at a time and place determined by the chairperson.
- (8) The procedure, including the manner in which decisions must be taken, to be followed at meetings of the Committee and the manner in which the Committee must conduct its affairs must be determined by the Committee, if the procedure has not been prescribed.

Objects of Committee

- (9) The objects of the Committee are to:
- (a) advise Cabinet in connection with all aspects of confiscation or forfeiture of property to the State and the transfer of confiscated or forfeited property to the Fund in terms of this Act or any other Act;
 - (b) advise Cabinet in connection with the rendering of financial assistance to law enforcement agencies in order to combat organised crime, money laundering, criminal gang activities and crime in general; and
 - (c) advise Cabinet in connection with the rendering of financial assistance to any other institution, organisation or fund established with the object to render assistance in any manner to witnesses, including protected witnesses and victims of crime.

Functions and Powers of Committee

- (10) The Committee may make:
- (a) recommendations to Cabinet with regard to the policy to be adopted concerning the confiscation, forfeiture and realisation of property and the transfer of that property to the Fund in terms of this Act or any other Act;
 - (b) recommendations to Cabinet with regard to the allocation of property and moneys from the Fund to specific law enforcement agencies;
 - (c) recommendations to Cabinet with regard to the allocation of property and moneys from the Fund to any institution, organisation or fund contemplated; and
 - (d) recommendations to Cabinet regarding the allocation of moneys for the administration of the Fund.
- (11) In order to fulfil the functions referred in subsection (10) the Committee may:
- (a) exercise any powers and perform any functions conferred or imposed on it by this Act, and any powers that are necessary or expedient for or incidental to the achievement of its objects;
 - (b) co-opt any person to advise it on any specific matter.

Annex II

Model Decree on the Financial Intelligence Unit

MODEL [DECREE, REGULATION] ON THE FINANCIAL INTELLIGENCE UNIT ISSUED FOR PURPOSES OF APPLICATION OF SECTION [] OF [Insert Name of Law]

Organisation

Section 1 Establishment

The Financial Intelligence Unit (FIU) 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 Composition

The FIU 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 Conflicts of Interest

The head, experts, liaison officers and other staff of the FIU may not concurrently hold a position in any of the financial institutions or designated non-financial businesses and professions (DNFBPs) 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 FIU shall cease to exercise any investigatory powers held by them in their former employment.*]

Operation

Section 4 Reports

The reports required of the financial institutions and DNFBPs shall be sent to the FIU 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 DNFBPs 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 Database

The FIU shall, in conformity with the laws and regulations on the protection of privacy and on computerised 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 [*regulation*], the transactions carried out and the persons undertaking the operations, whether directly or through intermediaries.

Section 6 Annual Report

An annual report shall be drawn up by the FIU 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 terrorism financing trends.

[*option: Operating budget*]

Section 7 Budget

Each year, the FIU shall establish its budget for the following year, subject to the limits fixed by [insert name of competent minister].

