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Chapter V

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There are a number of steps that each country needs to take to assure that its anti-money laundering (AML) institutional framework meets international standards. International standard setters recognize that countries have diverse legal systems and, therefore, no country is in a position to adopt specific laws that are identical to those of another country. Other specific requirements for combating the financing of terrorism (CFT) are discussed in Chapter IX. Consequently, this chapter discusses five legal system requirements that are principles primarily for AML. These principles permit each country to adopt laws that are consistent with both its own cultural circumstances, legal precepts and constitution, as well as international standards. They are:

- ratification and implementation of the *Vienna Convention*;[1]
- criminalization of money laundering and terrorist financing;

1. *United Nations Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances* (1988) (*Vienna Convention*). See also Chapter III, The United Nations, The *Vienna Convention*, http://www.incb.org/e/conv/1988/.

- laws for seizure, confiscation and forfeiture of illegal proceeds;
- the types of financial institutions to be covered by AML laws; and
- integrity standards for financial institutions.

The legal system requirements for AML, as well as others in this Reference Guide, are based upon *The Forty Recommendations on Money Laundering* (*The Forty Recommendations*) issued by the Financial Action Task Force on Money Laundering (FATF).[2] *The Forty Recommendations* are phrased as recommendations, but are much more than mere suggestions or recommendations. They are mandates for action by every country, not just FATF members, if that country is to be viewed as complying with international standards. Thus, each FATF recommendation should be considered very carefully by a country as it establishes or improves its institutional AML framework.

A. Ratification and Implementation of the Vienna Convention

The starting place for implementing an AML institutional framework is the ratification and implementation of the *Vienna Convention*. This is the first recommendation of FATF.[3] Many countries have ratified this convention; the issue, however, is whether the country has taken sufficient steps to implement fully its requirements. The *Vienna Convention* serves as a basis for a number of other FATF recommendations on preventing, detecting, and prosecuting money laundering, which are discussed in detail in this and other chapters of the Reference Guide.

The United Nations (UN) took the first step toward criminalizing international money laundering in 1988, when it instituted the *Vienna Convention*. The convention created three categories of criminal offenses related to money laundering, although it did not use the term "money laundering" in any of the three categories.

The first type of money-laundering crime identified in the convention involves either (a) the transfer or conversion of property with the knowledge

2. *The Forty Recommendations*, http://www1.oecd.org/fatf/40Recs_en.htm. *The Forty Recommendations* are reprinted in Annex IV of this Reference Guide.
3. *Id.*, Rec. 1.

that such property is derived from a drug-trafficking offense for the purpose of concealing or disguising its illicit origin, or (b) helping another to evade the legal consequences of his or her other actions.[4]

The second type of money laundering offense is defined as an effort to conceal or disguise the true nature, source, location, disposition; movement, rights with respect to, or ownership of property with the knowledge that the property was derived from a drug-trafficking offense.[5] The third type of offense involves acquiring, possessing, or using property with the knowledge that it is derived from a drug-trafficking offense.[6]

Under the *Vienna Convention*, countries are obligated to enact the first two types of offenses into domestic law; the third offense is not mandatory. Rather, the third offense is specifically subject to each country's "constitutional principles and basic concepts of legal principles."[7]

The *Vienna Convention*'s definitions of criminal money laundering are the most widely accepted definitions of the concept and the ones used in all of the current international legal instruments on this topic. The *Vienna Convention*'s definitions are incorporated in *The Forty Recommendations* by FATF, which state, among other things, that "each country should take such measures as may be necessary, including legislative ones, to enable it to criminalize money laundering as set forth in the *Vienna Convention*."[8]

The Council of Europe adopted elements of the *Vienna Convention* in drafting its Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990).[9] Other international organizations followed suit: the Organization of American States, with its Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Crime (1999) (OAS-Model Regulations),[10] the United Nations Model Legislation on Laundering, Confiscation and International

4. The *Vienna Convention*, article 3(1)(b)(i).
5. *Id*., article 3(1)(b)(ii).
6. *Id*., article (3)(c)(i).
7. *Id*.
8. *The Forty Recommendations*, Rec. 4.
9. Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 6(1)., http://www.imolin.org/coeeng.htm.
10. Organization of American States, *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug and other Serious Offenses* (1999), article 2(1), (2) & (3)., http://www.cicad.oas.org/Desarrollo_Juridico/eng/legal-regulations-money.htm.

Cooperation in Relation to the Proceeds of Crime (1999) (UN Model Legislation),[11] and United Nations Model Money Laundering and Proceeds of Crime Bill (2000) (UN Model Crime Bill).[12]

B. Criminalization of Money Laundering and of Terrorist Financing

If the international community is to have any hope of preventing the criminal activities related to the laundering of money and the financing of terrorism, each country must have a legal framework that criminalizes these activities. Criminalization serves three principal objectives. First, it compels compliance with AML preventive measures. Second, it ties acts that may appear innocent to outright criminal activity, i.e., the actions of the party processing illegal proceeds are made a criminal act. Third, criminalization establishes a specific basis for greater international cooperation in this critical law enforcement function. Because of the criminal nature and the international aspects of money laundering offenses, competent authorities within a country have recourse to powerful international tools, especially mutual legal assistance mechanisms and, thereby, can more effectively track, enforce, and prosecute international money-laundering.

1. Predicate Offenses

A predicate offense for money laundering is the underlying criminal activity that generates proceeds, which when laundered, lead to the offense of money laundering.[13] Designating certain criminal activities as predicate offenses for money laundering is necessary to comply with international standards. Because the *Vienna Convention* was drafted as an international drug-control instrument, the predicate offenses for money laundering relate only to drug-trafficking offenses. Subsequent instruments that adopted the *Vienna Convention* language with respect to the definition money laundering have

11. Article 1.1.1, http://www.imolin.org/m199eng.htm.
12. Section 17, http://www.imolin.org/poc2000.htm.
13. See United Nations Convention against Transnational Organized Crime (2000), article 2(h), http://www.undcp.org/adhoc/palermo/convmain.html; Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 1(e).

invariably expanded the scope of the predicate offense to include other substantial profit-generating crimes.

In fact, FATF encourages countries to extend the scope of the predicate offense to include all serious offenses, including those that are not necessarily drug-related.[14] The Council of Europe adopted a very broad definition of predicate offenses in its Anti-Money Laundering Convention, a definition that is not confined to the laundering of drug money.[15] The *United Nations Convention against Transnational Organized Crime* (2000) (*Palermo Convention*) imposes an obligation on all State parties to apply the convention's money-laundering offenses to "the widest range of predicate offenses."[16]

Similarly, the UN adopted a broad definition of the predicate offense in the UN Model Legislation, permitting each country either to define the predicate offense by category, by a sanction-based assessment of seriousness, or by a list of specific offenses.[17] Although the UN Model Legislation is nearly silent on the scope of the predicate offense, it does envision a broad definition of predicate offenses. The UN Model Crime Bill, on the other hand, defines the predicate offense as any "serious offense."[18] The definition of "serious" is determined by a sanction of imprisonment not less than a certain duration; the UN Model Crime Bill proposes a 12-month duration, although alternative durations are permissible.[19] Countries may choose to extend the list of predicate offenses to a pre-set list of crimes. For example, a listing of crimes could include smuggling (arms, people, goods, etc.), fraud, theft, embezzlement, racketeering, prostitution and kidnapping. In short, the profit-generating character of a given criminal activity becomes the criterion in deciding whether that activity is a predicate offense for money laundering.

With regard to the UN Model Legislation, or other model legislation, such instruments should be treated as suggested approaches and language for drafting legislation; they should not be merely copied. In the drafting process, model laws should be adapted to take into account the particular country's circumstances, constitution and legal principles.

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14. *The Forty Recommendations*, Rec. 4.
15. Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 1(e) & article 6(4) and Explanatory Report para. 16.
16. The *Palermo Convention*, article 2(a), http://www.undcp.org/adhoc/palermo/convmain.html.
17. Article 1.1.2 (a).
18. Section 2(n) and (s) and Section 17.
19. *Id*.

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Because criminalization is a matter of domestic jurisdiction, different countries will make different determinations about what constitutes a predicate offense for money laundering. To prevent these inevitable national variations from undermining the effectiveness of mutual legal assistance and extradition matters, each country needs to be constructive in applying its criminality and territoriality principles so as not to thwart the law's overall intent; this applies to all money laundering offenses, regardless of the predicate offense. In order to facilitate international legal assistance and extradition arrangements, it may be necessary to ensure that the predicate offense is a crime in all countries involved: the country where the crime was committed, the country requesting assistance, and the country whose assistance is requested.

The extension of the predicate offense to cover all serious offenses, regardless of jurisdiction, is more conducive to international cooperation and more consistent with the transnational character of money laundering activities. There would be a significant international limitation if a country were to require that, in order for a money-laundering offense to occur, the proceeds should derive only from a predicate offense committed within its jurisdiction. Countries should especially consider exempting from the territoriality principle those predicate offenses that generate large proceeds and which typically result in complex transnational laundering operations, such as drug trafficking and corruption.

2. Terrorist Financing

Those who finance terrorism, like criminals, use the international financial system to hide the funds they need to support their activities, even if these funds have legitimate sources. A practical way to undermine the capacity of these organizations is to help prevent their funds from entering the global financial system, in the first place. Failing that, a country needs legislation to detect when terrorist funds have entered its borders so that the funds can be confiscated and forfeited.

In its eight *Special Recommendations on Terrorist Financing* (*Special Recommendations*), ATF urges countries to criminalize the financing of terrorism, terrorist acts and terrorist organizations and to designate these as predi-

cate offenses of money laundering.[20] This issue is discussed in greater depth in Chapter IX.

3. State of Mind

According to the *Vienna Convention*, the perpetrator's state of mind—his or her intent or purpose in committing the money laundering offense—means "knowing" that the proceeds are the product of the predicate offense.[21] Countries may extend the scope of liability, however, to "negligent money laundering," where the perpetrator *should have* known that the property was, or was obtained with, the proceeds of a criminal act.

Countries have various options in determining the "state of mind" connected with a money-laundering offense.[22] The legislature of a country may decide that actual knowledge about the illicit origin of property, or that mere suspicion about that illicit origin, constitutes the requisite mental element for obtaining convictions for money laundering. The legislature may also accept a "should have known" standard of culpability. This latter definition constitutes a form of negligent money laundering.[23] In addition to this general-intent requirement, the law might provide for a *specific* intent to "conceal or disguise the illicit origin" of the property, or the intent to help another "evade the legal consequences of his or her actions."[24]

According to the UN Model Legislation, actual knowledge, or "having reason to believe," that property is derived from criminal acts, constitutes the so-called mental element of money laundering; this language was adopted by the UN Model Crime Bill.[25] The Model Bill also envisages some money-laundering offenses with specific intent such as concealing or disguising the origin, nature, location, disposition, movement, or ownership of the property. Also, some money-laundering offenses could require proving the specific

20. *Special Recommendations*, Spec. Rec. II. http://www1.oecd.org/fatf/SrecsTF_en.htm. The crime of terrorist financing is defined in article 2(1) of the United Nations International Convention for the Suppression of the Financing of Terrorism (1999).
21. The *Vienna Convention*, article 3(b)(i).
22. UN Model Legislation, http://www.imolin.org/ml99eng.htm.
23. *Id*., Article 1.1.1.
24. *Id*., at subparagraph (a).
25. UN Model Crime Bill, at Section 17(a).

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intent of an individual to assist another in evading the legal consequences of his or her actions.[26]

A broad definition of the "state of mind" was adopted in the OAS-Model Regulations.[27] These model regulations address three different states of mind: that (i) the accused had knowledge that the property constitutes proceeds of a criminal activity as defined in the convention, (ii) the accused should have known that the property was obtained with the proceeds of criminal activity; and (iii) the accused was intentionally ignorant of the nature of the proceeds.[28] Under this third category of state of mind, the accused neither "did not know" nor "should have known" the source of the proceeds, but nevertheless suspected its criminal provenance and chose not to conduct further investigation to verify or dispel this suspicion. In that sense, the accused intended to remain ignorant or was "willfully blind" when he or she "could have known" of the criminal offense by investigation or inquiry. In terms of culpability, this state of mind standard falls between the negligence and specific knowledge standard of intent. The Model Regulations further provide that these three culpable states of mind can be inferred from objective and factual circumstances.[29]

Because of the difficulty inherent in proving the state of mind of a person who is engaging in an activity that is ordinary on its face, the *Vienna Convention*, FATF and many the other legal instruments provide that the law should permit the inference of the required state of mind from objective factual circumstances.[30]

4. Corporate Liability

Money laundering often takes place through corporate entities. The concept of corporate criminal liability, however, varies greatly among different coun-

26. *Id*., at subparagraph (b).
27. OAS-Model Regulations.
28. OAS-Model Regulations, Article 2.
29. *Id*., at subparagraph (5).
30. The *Vienna Convention*, article 3(3); *The Forty Recommendations*, Rec. 5; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 6(2)(c); United Nations Convention against Transnational Organized Crime (2000), article 6(2)(f).

tries. Some countries, mainly those with a common law tradition, subject corporations to criminal liability laws. In countries with a tradition of civil law, corporations may not be covered by criminal laws. Thus, consideration should be given to modifying such a country's laws to provide for corporate criminal liability where permissible.

FATF recommends that corporations, not only their employees, be subject to criminal liability whenever possible under the general principles of a country's legal system.[31] Significant civil or administrative sanctions could be a sufficient substitute in cases where the legal or constitutional framework does not subject corporations to criminal liability.

The UN Model Legislation does not provide criminal liability for corporations. It does provide, however, for applying other sanctions to corporate entities,[32] and for applying them whenever money-laundering offenses are committed on behalf of, or for the benefit of, a corporation by one of the corporation's agents or representatives. The sanctions envisioned by the UN Model Legislation include fines, bans on carrying out certain business activities, closure or winding up, and the publication of rulings.[33] The UN Model Legislation does not categorize these as criminal sanctions and it specifically provides that these should not derogate from the personal liability of the agent or the employee of the corporation for the acts.[34]

Criminal liability is extended to corporate entities on the same basis as natural persons in the OAS-Model Regulations. In fact, one provision specifically defines a "person" for the purposes of the regulation as meaning "any entity, natural or juridical, including among others a corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, capable of acquiring rights or entering into obligations."[35] In the UN Model Crime Bill, the UN defines "person" for the purposes of the Model Bill as including both natural and legal persons.[36] While this language defines "person" more narrowly than that of the OAS, it still acknowledges the principle of criminal liability for corporations.

31. *The Forty Recommendations*, Rec. 6; OAS-Model Regulations, article 15.
32. UN Model Legislation, Article 4.2.3.
33. *Id*.
34. *Id*.
35. OAS-Model Regulations, Article 1(6).
36. Section 2(l).

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5. Perpetrator Liability for Laundering

An important question is whether money laundering liability extends to the person who committed the predicate offense, as well as to the person who has laundered the ill-gotten proceeds. Some countries do not hold the perpetrator of the predicate offense liable for laundering the proceeds of his criminal actions, if he or she is not involved in the laundering activity. The basic rationale for this approach is that punishing the perpetrator for evading the legal consequences of his or her criminal activity could amount to double jeopardy, i.e., multiple punishments for a single criminal offense.

Other countries hold the perpetrator of the predicate offense liable for laundering the ill-gotten proceeds on the basis that the conduct and the harm of evasion are distinct from the predicate offense. There are also practical reasons for this approach. Exempting perpetrators of predicate offenses from money-laundering liability could severely penalize third parties for their conduct in handling criminal proceeds, while perpetrators remain immune from liability. This could occur when the predicate offense has been committed extraterritorially, placing it beyond the jurisdiction of the state prosecuting third parties for their laundering activities.

The general international standard in this area is a broad laundering offense that permits for the perpetrator to be held liable for laundering the proceeds of his or her own criminal activities regardless of active participation in laundering activities.[37] This standard, however, also permits national variations to be employed in this regard.

6. Lawyers' Fees

The offenses of money laundering can be defined in legislation so broadly that, in their totality, they include any transaction involving the use of the proceeds derived from a criminal activity. Given such a broad interpretive construction, these laws could have the effect of criminalizing the mere

37. *United Nations Convention against Transnational Organized Crime* (2000), article 6(2)(f); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 6(2)(b), UN Model Legislation, Article 1.1.1; UN Model Crime Bill, Sec. 17; OAS-Model Regulations, Article 2.

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receipt of a fee by a lawyer for the purpose of providing criminal defense. This poses unique problems of due process.

Considering that the right of the accused to adequate defense in criminal trials is now established as one aspect of the right to a fair trial, countries should be careful in drafting the scope of the money laundering offenses. Countries may also wish to consider an effective provision excluding lawyers from such potential criminal liability for merely rendering their services, provided that the services were limited to, or were rendered only in connection with, defending the accused at trial.[38]

Notwithstanding the right of an accused to a fair trial, lawyers also have a duty regarding the integrity of the financial system and integrity of their profession. If a lawyer has knowledge that his or her fees were derived from a criminal activity, the attorney should observe these integrity standards and not blindly accept laundered money, especially if he or she is also rendering other services to the client besides defending the accused in a trial.

C. Seizure, Confiscation, and Forfeiture

The current approaches to international crime and terrorist financing are designed to make criminal activities unprofitable and keep terrorists from accessing funds. These goals cannot be achieved without effective confiscation laws, whereby authorities may permanently deprive criminals and terrorists of their ill-gotten proceeds.[39]

1. Confiscation of Direct and Indirect Proceeds of Crime

International instruments encourage countries to adopt laws that permit the confiscation of the proceeds of crime. In the past under most legal systems, confiscation has largely been confined to the instruments used in the commis-

38. Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime: Explanatory Report, para. 33. The model laws and regulations in this area are silent on this point. See UN Model Legislation; UN Model Crime Bill; OAS-Model Regulations.

39. The *Vienna Convention*, article 1(f), Council of Europe Convention, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 1(d).

sion of the crime, such as the murder weapon, or the subjects of the crime, such as drugs in drug trafficking, as opposed to the proceeds derived from the crime. The *Vienna Convention* defines the proceeds of crime as "any property derived from or obtained, directly or indirectly, through the commission of an offense."[40] Many countries have now adopted this broader understanding of forfeitable property in response to the profits generated by certain criminal activities, particularly in light of the fungibility of these profits and the ease with which they can be moved into, and out of, the international financial system.

FATF encourages countries to adopt laws that permit the confiscation of the laundered property, the proceeds of laundering, and the instrumentalities used, or intended for use, in laundering.[41] Criminals are likely to convert property to some other form if specifically-named property is subject to confiscation prior to the issuance of the confiscation order or its enforcement. They are also likely to transfer the property beyond the reach of authorities or to commingle it with property legitimately derived. In order to address these various situations, which under a traditional understanding of confiscation could render confiscation orders unexecutable, governments should consider adopting the "value confiscation" approach, which gives the government the power to confiscate any property of the perpetrator of a value equivalent to the value of the ill-gotten proceeds.[42]

2. Enforcement of Confiscated Property

The effective enforcement of confiscation orders requires that the relevant authorities possess the powers necessary to identify, trace and evaluate property that could be subject to confiscation.[43] This in turn requires that such authorities have the power to require disclosure or to seize commercial and financial records.[44] FATF specifically recommends that banking secrecy laws,

40. Article 1(p).
41. *The Forty Recommendations*, Rec. 7.
42. The *Vienna Convention*, article 5; Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 2.
43. *The Forty Recommendations*, Rec. 7.
44. The *Vienna Convention*, article 5(3); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 4(1).

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or other privacy protection statutes, for example, should be designed so that they do not create barriers to such disclosure or seizure for these purposes.[45]

Today, funds can now be transferred out of a national jurisdiction with a keystroke on a computer. Thus, authorities should also be granted the power to take preventive measures. For example, they should be able to freeze and seize assets that might be subject to confiscation. This power is a necessary condition for an effective law enforcement framework for preventing the laundering of money.[46] (See Chapter IX, Freezing and Confiscating Terrorist Assets for a detailed discussion of freezing, seizing and confiscating assets. That discussion is equally applicable to AML-related assets.)

3. Third Party Liability

While international law on confiscation does not preclude the confiscation of assets in the hands of third parties, various international agreements qualify the permissibility of such action by requiring countries to take measures to protect the rights of *bona fide* third parties.[47] Third parties that enter into an agreement, and either know or should know that the contract would prejudice the capacity of the state to enforce its confiscation are not *bona fide*. A country's laws should address specially the issue of validity of such agreements under such circumstances.[48]

According to the OAS-Model Regulations, the relevant authority is required to give notification of the proceedings.[49] The notification must allow potential third parties to make claims to the property subject to confiscation. According to the model regulations, the court or other competent authority should return the property to the claimant, if it is satisfied that the claimant: (1) has proper legal title to the property; (2) did not participate in, collude

45. *The Forty Recommendations*, Rec. 2, The *Vienna Convention*, article 5(3); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 4(1).

46. *The Forty Recommendations*, Rec. 7, The *Vienna Convention*, article 5(2); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 3.

47. *The Forty Recommendations*, Rec. 7; The Vienna Convention, article 5(8); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 5; The *Palermo Convention*, article 12(8).

48. *The Forty Recommendations*, Rec. 7.

49. OAS Model Regulations, Article 6.4.

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with, or was not in any other way involved in the predicate offense; (3) did not have knowledge of the use of property for illegal purposes and did not consent freely to this use; (4) did not acquire rights that were specifically designed to evade the confiscation proceedings; and (5) did whatever could reasonably be expected to prevent the illegal use of the property.

In addressing the question of *bona fide* third parties, the UN Model Crime Bill provides that the court can deny the third-party claim to the property in cases where the court finds that the person (1) was involved in the commission of the predicate offense; (2) acquired the property for insufficient consideration; or (3) acquired the property knowing its illicit origin.[50] By comparison, the UN Model Legislation uses a more strict standard, which does not require involvement in the predicate offense as a basis for denying the claim to the property.[51]

4. International Aspects of Confiscation

Establishing an effective confiscation regime for domestic purposes is only the first step toward eliminating the profitability at the heart of so many international money laundering activities. The second necessary step, and one vital to the overall success of this effort, is creating cooperative mechanisms for enforcing cross-border confiscation orders. Countries may enable the relevant authorities to implement confiscation requests from other countries, employing such measures as tracing, identification, freezing, and seizure.

As an incentive for international cooperation, countries may consider establishing asset-sharing arrangements. The general principle in the disposal of confiscated assets is that such disposal be subject to the domestic laws and regulations of the country that executed the confiscation order.[52] The international legal instruments, however, encourage countries to enter into mutual arrangements that provide for the sharing of the confiscated property among all the countries that cooperated in the investigation and confiscation

50. Section 36. This is a model law designed for common law jurisdictions.

51. See UN Model Legislation , Article 4.2.9 This is a model Law designed for civil law jurisdictions.

52. The *Vienna Convention*, article 5(a); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), article 15; The *Palermo Convention*, article 14(1).

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process.[53] The legal instruments also encourage allocating some of the confiscated funds to the intergovernmental agencies that are dedicated to the fight against crime.[54]

D. Scope of Covered Financial Institutions

An important policy consideration to be made with regard to financial institution requirements is to determine which financial institutions are to be covered by the country's AML framework. The starting point is, of course, commercial banks and similar institutions. International standards, however, include different types of institutions, many of which may not be thought of as financial institutions. FATF recommends that most of *The Forty Recommendations* apply to both banks and non-bank financial institutions (NBFIs).[55]

The following are entities that should be considered by a country, depending upon the unique characteristics of NBFIs in that country.

- commercial bank or institution with similar powers;
- trust company;
- private banker;
- branch of a foreign bank located outside of the country;
- broker or dealer in securities or commodities;
- investment banker;
- investment company;
- insurance company;
- currency exchange;
- issuer, redeemer, or cashier of travelers' checks, checks, money orders or similar instruments;
- dealer in precious metals, stones, or jewels;
- pawnbroker;
- loan or finance company;

53. The *Vienna Convention*, article 5(b); The *Palermo Convention*, article 14(3)(b); OAS-Model Regulations, article 7(d) .
54. The *Vienna Convention*, article 5(b)(i); The *Palermo Convention* (2000), article 14(3)(a); OAS-Model Regulations, article 7(e).
55. *The Forty Recommendations*, Recs. 8 and 9.

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- travel agency;
- licensed sender of money;
- telegraph company;
- merchant, commodity-trading advisor, or commodity pool operator.

FATF also recommends that countries consider applying certain financial institution requirements to businesses or individuals that conduct certain financial activities. These activities are as follows:

- acceptance of deposits and other repayable funds from the public;
- consumer credit;
- mortgage credit;
- factoring, with or without recourse;
- finance of commercial transactions (including forfeiting);
- financial leasing;
- money transmission services;
- issuing and managing means of payment (e.g. credit and debit cards, cheques, traveler's cheques and bankers' drafts…);
- financial guarantees and commitments;
- trading for account of customers (spot, forward, swaps, futures, options…) in:
  - money market instruments (cheques, bills, CDs, etc.);
  - foreign exchange;
  - exchange, interest rate and index instruments;
  - transferable securities;
  - commodity futures trading.
- participation in securities issues and the provision of financial services related to such issues;
- individual and collective portfolio management;
- safekeeping and administration of cash or liquid securities on behalf of clients;
- life insurance and other investment related insurance;
- money changing.

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FATF recommends that, at a minimum, the NBFIs that should be included are: bureaux de change, stock brokers, insurance companies, and money transmitter/transfer services.[56]

Once the scope of financial institutions to be covered has been determined, it is important that competent authorities be designated to ensure effective implementation of the financial institution's requirements.[57] The designation of competent authorities for the implementation purposes also applies to all of *The Forty Recommendations*.[58]

E. Integrity Standards

Money cannot be laundered, nor terrorism financed, without the assistance of financial institutions. When criminals control financial institutions or hold senior management positions, countries find it exceedingly difficult to prevent and detect money laundering. The laws and regulatory measures of a country should be written so that convicted criminals cannot hold or control significant investments in any of a country's covered financial institutions. Similarly, convicted criminals should be prevented from holding any significant management position with such financial institutions, including positions on the boards of directors, executive or supervisory boards, or comparable positions.[59]

In this regard, laws or regulations should be in place requiring the registration, authorization, and/or licensing of financial institutions so that such criminal involvement is precluded. These provisions should also require that directors, senior managers and persons holding similar positions are evaluated with regard to expertise and integrity. Such persons should possess the appropriate qualifications, including the skills and experience relevant to the position held in the financial institution. Such persons should have no criminal record for violations of fiduciary duty or similar crimes, and there should be no record of adverse regulatory judgments ren-

56. FATF, Guidance Notes for the *Special Recommendations*, at paragraph 19. http://www1.oecd.org/fatf/pdf/TF-SAGUIDE20020327_en.pdf.
57. *The Forty Recommendations*, Rec. 27.
58. *Id*.
59. *Id*., Recs. 25 and 29.

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dering that person unfit to hold a position as senior manager, director, or a comparable position.

Country laws or regulations should also provide an effective mechanism to withdraw the license of a financial institution on the basis of substantial irregularities relating to money laundering and the financing of terrorism. The withdrawal of the license should also occur if the financial institution fails to maintain standards of integrity when its large investors or management officials change.[60]

Finally, an effective AML/CFT institutional framework applies certain requirements to financial institutions. These requirements involve customer identification, record keeping, reporting of suspicious transactions and others. Failure to abide by these requirements results in penalties that could include loss of the license to engage in business.[61]

60. *Id.*, Rec. 29

61. See Chapter VI for a detailed discussion of these requirements.