



GUYANA

FORFEITURE OF INSTRUMENTALITIES AND FORFEITURE OF CASH GUIDANCE

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AML/CFT/PF NATIONAL COORDINATION COMMITTEE

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Based on the Guyana Asset Recovery Legislation Desk Review

Caribbean Anti-Crime Program

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1. Introduction

Forfeiture of Instrumentalities

Forfeiture and forfeiture of instrumentalities are available under the forfeiture regime of the AML/CFT Act 2009 (as amended).

However, because of the specific nature of instrumentalities, this type of forfeiture may operate differently from other types of asset forfeiture.

Forfeiture of instrumentalities refers to the recovery of property used in, or in connection with, the commission of the offence.

This guidance will focus upon forfeiture of instrumentalities, not forfeiture of goods.

There are numerous pieces of legislation relating to forfeiture of instrumentalities in Guyana, other than the AML/CFT Act which are referred to in this guidance. These are provided below.

- Narcotic Drugs and Psychotropic Substances (Control) Act, Chapter 10:10
- Customs Act, Chapter 82:01 and
- Cybercrime Act No.16 of 2018

2. Narcotic Drugs and Psychotropic Substances (Control) Act, Chapter 10:10

A. Forfeiture of Land, Machinery, Equipment, and Implements Used for Cultivation of Prohibited Plants

Sections 8(2) – 8(4) of the Narcotic Drugs and Psychotropic Substances (Control) Act provide for forfeiture of land and machinery, equipment, and other implements used for cultivating prohibited plants.

i. What can be Forfeited?

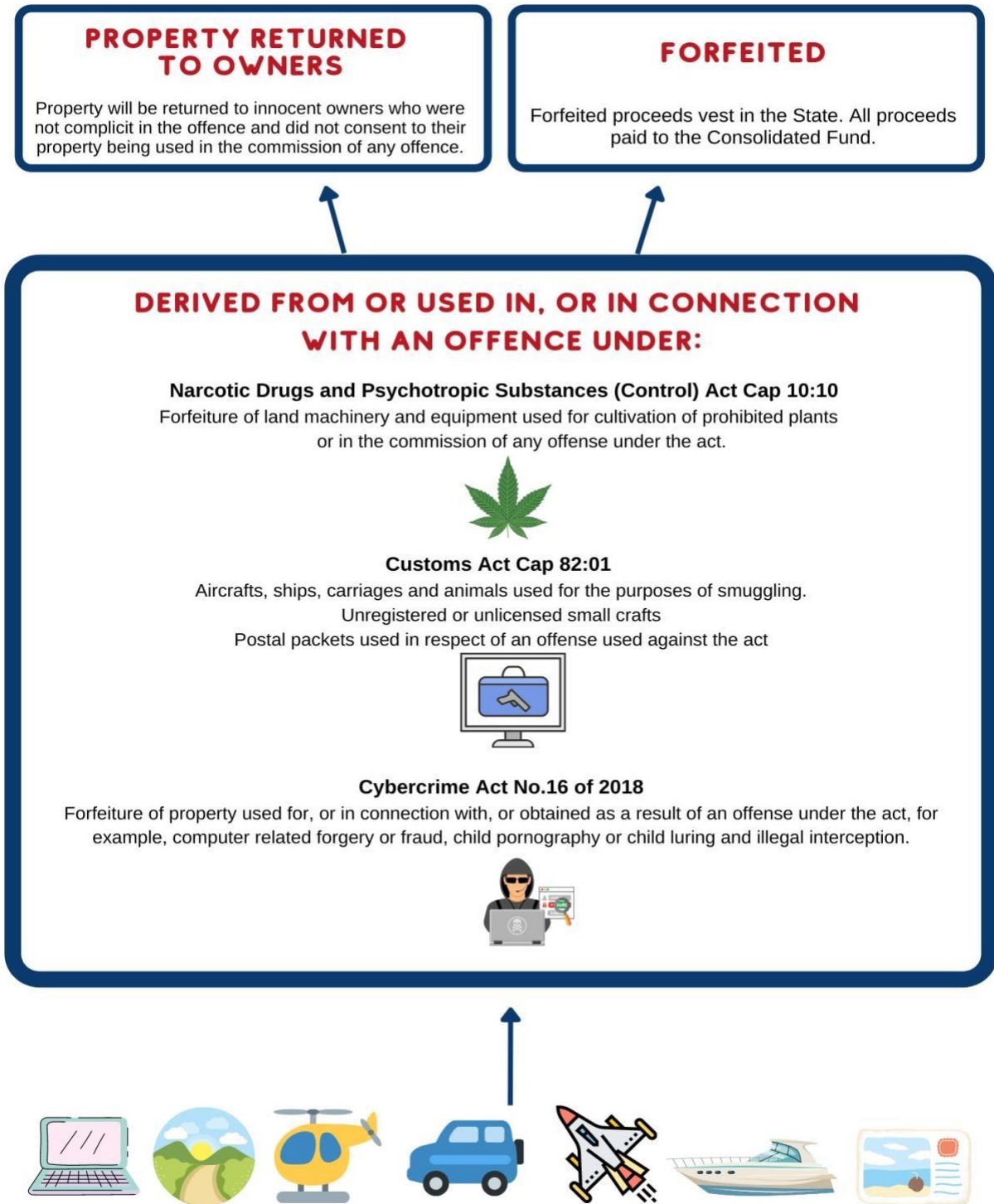
Where the land, machinery, equipment, or implements used in the cultivation of prohibited plants are owned by the person who committed the offence, or leased, licenced, or used subject to any other, similar right, and the cultivation was done with the consent, co-operation, or assistance of the owner, the land, machinery, equipment and implements shall be forfeited to the State (section 8(2)).

If the land is State or Government owned, the lease, licence, grant, permit, or other right in the land shall be forfeited to the State, along with all machinery, equipment, or other implements used for the cultivation (section 8(4)).

Table 1.

FORFEITURE ORDER	FORFEITURE ORDER	PECUNIARY PENALTY ORDER
<p data-bbox="277 531 581 699">Narcotic Drugs and Psychotropic Substances (Control) Act Chap. 10:10 (section 51)</p> <p data-bbox="285 741 573 821">Drugs Offences Only</p> <p data-bbox="297 856 561 930">Application to the High Court</p> <p data-bbox="277 968 581 1041">The applicant is the DPP</p> <p data-bbox="274 1079 584 1560">All assets owned by the defendant at the time the offence is committed, or any time thereafter, will be presumed to be the benefit his or her offending and forfeited to the State, unless the defendant or interested party can prove otherwise.</p>	<p data-bbox="646 531 966 699">Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 (section 46)</p> <p data-bbox="670 741 941 821">Against Tainted Property</p> <p data-bbox="646 856 966 930">Application to the High Court</p> <p data-bbox="670 951 941 1024">The applicant is the DPP</p> <p data-bbox="646 1056 966 1570">The Court may forfeit tainted property. "Tainted property" means property either obtained through or in connection with a serious offence or used in, or in connection with, a serious offence (broad definition of offences). The only exceptions are innocent purchasers or bona fide third parties.</p>	<p data-bbox="1015 531 1334 678">Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 (section 54)</p> <p data-bbox="1044 709 1307 821">Criminal Benefit Attached to the Defendant</p> <p data-bbox="1015 856 1334 930">Application to the High Court.</p> <p data-bbox="1044 951 1307 1024">The applicant is the DPP.</p> <p data-bbox="1015 1056 1334 1644">Operates by calculating the defendant's benefit from crime and requires him or her to pay an amount equal to the value of the benefit. The pecuniary penalty order will be less than the value of the benefit if the defendant can prove that property was not obtained through, or used in, the commission of the serious offence. The other exception is the bona fide third party.</p>

Table 2.



Forfeiture is possible regardless of whether the person is convicted summarily or on indictment. Where land or the licence, grant, permit, or other right, is held by any person jointly or severally with any other person or persons, reference to the owner shall be a reference to each one of those persons.

ii. Protection of Third Parties

If the land is leased, licenced or subject to any other similar right and the owner did not consent, cooperate or assist with the cultivation of prohibited plants, the lease, licence, grant, or permit shall be terminated and all interests in the land shall revert back to the owner (section 8(3)).

Section 8(6) provides some guidance regarding consent and cooperation; it states that if the owner of land (or person who has an interest in land) comes to know that prohibited plants are being cultivated on the land but does not promptly inform the police, the burden of proving a lack of consent, cooperation, or assistance in the cultivation shall rest with them.

iii. Which Court Can Make a Forfeiture Order

The court who convicts the person may forfeit land, machinery, equipment, and implements under section 8.

iv. Mortgages and Charges

Any bona fide holder of any mortgage or charge over forfeited land, machinery, equipment, or implement may enforce the mortgage or charge, despite the forfeiture order.

v. Notice

After the conviction of any person under section 8(1) of the Act, and before the court makes any order under sections 8(2) - 8(4), the court who convicted the person must publish a notice in a newspaper and a Gazette with information about the convicted person, the land, the date of the hearing, and details of the owner, lessee or any other person who has an interest or right in the land.

The notice must also be served on all persons who are known to the court as being the owner, or as having any interest in, or as being in possession of, the land at the time of conviction, every such person shall be given a reasonable opportunity of being heard before any forfeiture order is made.

vi. Vesting of Land

Upon the making of an order under section 8(2) or 8(4), the Commissioner of Lands, or anyone nominated by him or on his behalf, shall take possession of the land described in the order for and on behalf of the State and for that purpose may, if need be, remove any person refusing to vacate such land using reasonable force.

Where an order is made under sections 8(2), (3), or (4), either forfeiting land or reverting land to the owner or an intermediate lessee of the land, the order shall be treated for all purposes as if it were a transport or other document effecting a conveyance of immovable property or any interest therein and the Registrar of Deeds shall, on the production to him of a certified copy thereof, take due notice thereof and shall make such annotations on the records as may be necessary.

B. Forfeiture of Machinery, Equipment, Implement, Pipe, Utensil, or Other Article

i. What can be Forfeited?

Section 35 of the Act also provides for forfeiture of machinery, equipment, implement, pipe, utensil, or other article used for the commission of any offence under the Act.

This includes any conveyance used in any such offence of for carrying such machinery.

ii. Protection for Third Parties

Section 35(2) protects owners of any conveyance who make an application to the court or magistrate, provided that the court or magistrate is satisfied beyond reasonable doubt that the person who was the owner of the conveyance (or in the case of an aircraft or ship, every person who was a responsible officer) when it was made use of for such conveyance, was not concerned in or privy to such use. In such cases, the conveyance shall be restored to the owner by the court or magistrate. iii. Seizure, Detention and Storage

Sections 85 – 89 of the Act set out how conveyances should be seized, detained, stored, and preserved by the Commissioner of Police.

These sections also set out the notice provisions with respect to seized assets.

Customs Act Chapter 82:01

The Customs Act Chapter 82:01 contains provisions related to forfeiture of instrumentalities ranging from aircrafts to animals. Because this process is less complex than other types of conviction and non-convictions-based forfeiture and will not be included in the asset recovery workshops, this assessment will only include a brief analysis of these provisions.

A. Aircraft, Ships, Carriages, and Animals Used for the Purpose of Smuggling

i. Smuggling

Sections 200 and 202 of the Act provide for the forfeiture of ships and aircraft that have been used for the purpose of smuggling prohibited goods. Section 202 of the Act relates specifically to the forfeiture of a ship in circumstances where such ship does not stop when requested to do so and, before being intercepted, throws overboard any part of its contents, or staves or destroys any property to prevent seizure.

ii. Importation

Sections 224 – 228 of the Act also contain provisions related to forfeiture of aircraft, ships and carriages, animals, and things used for the importation, attempted importation, landing, removal, conveyance, exportation or attempted exportation of any un-customed, prohibited or restricted goods, or any goods liable to forfeiture under the customs law. Such items may be seized by any person employed for the prevention of smuggling, or by any person having authority from the Comptroller of Customs. Once seized, the items must be delivered to the Comptroller.

Where any seizure is made and the goods seized are not in the possession of the offender, owner, master, or person in charge of the vessel, aircraft or vehicle, or the seizure has not been made in their presence, the seizing officer shall give notice in writing to the master, owner, or person in charge. The person should be served with the notice in person if possible or by sending such notice by post to his usual place of abode, or his business premises.

Forfeited assets shall be sold or otherwise disposed of in such manner as the Comptroller may direct, unless the person from whom the seizure has been made (or the owner of master) gives notice to the Comptroller within one calendar month from the date of the seizure that he claims the goods. Note that the legislation permits that immediate sale of animals or perishable goods provided that the proceeds are retained pending the outcome of third party proceedings.

iii. Regulation and Licence for Small Craft

Sections 63 – 65 of the Act provide for registration and licencing for small craft.

Sections 64 and 65 detail the mechanisms for forfeiture of such craft in circumstances where such regulation or licence is infringed.

iv. Procedure of Claiming Seized Goods

Section 261 of the Act provides that any claim to seized goods must be made by or in the name of the owner(s).

v. Postal Packets Used in Respect of Customs Offence

Section 192 of the Act permits the seizure and forfeiture of postal packets used in respect of any offence against a customs law.

Cybercrime Act No.16 of 2018

A. Property Used in Connection with Cyber Offences

i. What Can be Forfeited?

Section 40 of the Act deals with forfeiture of property that was used for, or in connection with, or obtained as a result of an offence under the Act.

ii. Applicant and Appropriate Court

The application for forfeiture must be made by the Director of Public Prosecutions.

The court that will hear the application for forfeiture should be the court that heard the criminal case. The offences under the Act are wide-ranging and include the offence of illegal interception, illegal interference, computer-related forgery or fraud, child pornography, and child luring.

iii. Request for Information

If any person can show that electronic data in a computer is useful to them and unrelated to the offence, the court may make an order that the data be copied.

iv. Disposal of Forfeited Property

Once the period for an appeal has expired, or an appeal has been determined, forfeited property vests in the State and will be disposed of in such a manner as the court orders.

v. Search Warrants with Respect to Forfeited Property

Section 41 of the Act provides for the search of any building, place, or vessel to recover any property that has been forfeited under section 40.

3. Forfeiture – Cash Forfeiture

Cash Forfeiture Legislation in Guyana

Cash forfeiture legislation is contained within the Anti-Money Laundering and Countering the Financing of Terrorism Chapter 10:11. The Act provides for seizure of cash in three circumstances:

1. suspicious import or export (section 37);
2. cash derived from or intended for use in unlawful conduct (section 37A); and
3. combating the financing of terrorism (section 67).

A. Suspicious Import or Export

Cash can be seized and detained where it is a suspicious import or export and the amount exceeds ten thousand United States dollars (section 37 of the Act).

i. Who may detain the cash?

A police officer, customs officer, or a person authorised by the Director of the Financial Intelligence Unit.

ii. What is a suspicious import or export?

A suspicious import or export is not defined by the Act. However, the universal CFATF definition may be applied. A suspicious import/export may arise where a police officer, customs officer, or a person authorised by the Director of the Financial Intelligence Unit suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing.

iii. Definition of currency

In addition to the usual definition of cash, “currency” is defined to include jewelry, precious metals, and precious stones and where the context permits, the definition includes currency in electronic form.

iv. The threshold

This provision allows for the seizure of cash exceeding **US \$10,000.00**.

v. Detention period

The initial detention period is 72 hours, excluding weekends and holidays. Any further detention must be obtained from a Judge in Chambers for a period not exceeding three months.

vi. Who may apply

A police officer, customs officer, or a person authorised by the Director of the Financial Intelligence Unit.

vii. Time to apply

Section 37(3) allows for the application for detention of cash to be made “as soon as is reasonably practicable, but not later than seven days”. This section may need revision, because the detention order should be applied for and obtained before the expiration of the 72-hour initial detention period.

viii. Further detention period

Section 37(4) provides that the detention order is valid for a period of 90 days, and may be extended for further 90-day periods until the currency is produced in court. There appears to be no limit on further extension periods.

ix. Depositing detained cash

Cash detained under the section **shall** be deposited into an interest-bearing account **where possible**.

x. Release of detained cash

Section 37(6) provides that the cash, along with any interest accruing, may be released where there are no longer grounds for suspecting that the cash is the proceeds of a crime or no proceedings have been brought in connection with the cash.

B. Cash Derived from or Intended for Use in Unlawful Conduct

Cash may be seized and detained where:

- (a) the amount exceeds **ten million dollars**; and
- (b) a police officer, customs officer or a person authorised by the Director of the Financial Intelligence Unit has reasonable grounds to suspect that:
 - (i) the cash is derived from a **serious offence**;
 - (ii) the cash is intended by any person for use in the commission of a serious offence; (iii) the cash is involved in money laundering or terrorist financing (section 37).

Cash may also be seized under the section providing for seizure where the cash entered or left Guyana after a false declaration was made, or a disclosure was omitted **in the absence of cogent evidence** that the cash was: (i) currency relating to transactions with financial institutions;

- (ii) business transactions;
- (iii) currency in the possession of a person for the purpose of lawful business, trade, industry or commerce; or (iv) currency lawfully imported into or exported out of Guyana.

i. Serious offence defined

“Serious offences” are defined under three distinct groups.

- 1.** Offences in Guyana where the maximum penalty is death or life imprisonment or deprivation of liberty not less than six months. **This provision appears to exclude summary offences.**
- 2.** Offences listed in the Second Schedule of the Act, which contains an exhaustive list of offences.
- 3.** An offence under a foreign law, in relation to an act or omission, which had it occurred in Guyana, would have constituted an offence for which the maximum penalty is death, or imprisonment for life or other deprivation of liberty for a period of not less than six months, and includes money laundering and terrorist financing or an offence listed in the Second Schedule.

ii. Who may seize the cash

A police officer, customs officer, or a person authorised by the Director of the Financial Intelligence Unit. A “customs officer” means a customs officer not below the rank of Supervisor; a "police officer" means a police officer not below the rank of Superintendent of Police

C. Combating the Financing of Terrorism

The third provision under which cash may be seized relates to combating the financing of terrorism (section 67). Under this provision, cash can be seized, detained, or forfeited where the cash:

- (a) is intended to be used for the purposes of terrorism;
- (b) belongs to, or is held in trust for, a terrorist organization; or (c) is or represents property obtained through acts of terrorism.

Terrorist financing is defined by section 68 of the Act to include inchoate offences.

i. Definition of cash

Under this provision, “cash” means—

- (a) coins and notes in any currency;
- (b) postal orders;
- (c) traveler’s cheques;
- (d) banker’s drafts;
- (e) bearer bonds and bearer shares; or
- (f) such other monetary instruments as the Minister may, by notice, publish in the Gazette.

This also includes virtual assets and virtual currencies according to recent amendments to the AML/CFT Act (section 2)

4. Amendments to the AML/CFT Act

A number of consequential amendments were made to the AML/CFT Act with regard to cash seizure –

“37B (1) Subject to sections 37 or 37A, an application for the forfeiture of the whole or any part of it may be made to the Magistrate’s Court by a person authorised by the Director of Public Prosecutions or the relevant Competent Authority.

(2) The Magistrate’s Court may order the forfeiture of the currency, or any part of it, if satisfied that the currency or part—

(a) is obtained or derived from unlawful conduct; or

(b) is intended by any person for use in unlawful conduct.

(3) In the case of recoverable currency which belongs to joint proprietors, one of whom is an excepted joint owner, the order may not apply to so much of it as the Magistrate’s Court thinks is attributable to the excepted joint owner’s share.

(4) Where an application for the forfeiture of any currency is made under this section, the currency is to be detained (and may not be released under any power conferred by this Part) until any proceedings pursuant to the application (including any proceedings on appeal) are concluded.

(5) Where an officer of a relevant Competent Authority seizes unattended currency under section 37 or 37A, that officer may apply for immediate forfeiture of that currency.

1. The Principal Act is amended by inserting immediately after section 37A, the following sections as 37B and 37C-

“Currency forfeiture application and order by the Magistrate’s Court.

“37B (1) Subject to sections 37 or 37A, an application for the forfeiture of the whole or any part of it may be made to the Magistrate’s Court by a person authorised by the Director of Public Prosecutions or the relevant Competent Authority.

(6) The Magistrate’s Court may order the forfeiture of the currency, or any part of it, if satisfied that the currency or part—

(c) is obtained or derived from unlawful conduct; or

(d) is intended by any person for use in unlawful conduct.

(7) In the case of recoverable currency which belongs to joint proprietors, one of whom is an excepted joint owner, the order may not apply to so much of it as the Magistrate’s Court thinks is attributable to the excepted joint owner’s share.

(8) Where an application for the forfeiture of any currency is made under this section, the currency is to be detained (and may not be released under any power conferred by this Part) until any proceedings pursuant to the application (including any proceedings on appeal) are concluded.

(9) Where an officer of a relevant Competent Authority seizes unattended currency under section 37 or 37A, that officer may apply for immediate forfeiture of that currency.

Appeal against forfeiture.

37C (1) Any party to proceedings for an order for the forfeiture of currency under section 37A or section 37B, who is aggrieved by an order under that section or by the decision of the court not to make such an order, may appeal to the Court.

(2) An appeal under subsection (1) shall be made within the period of thirty days commencing on the date on which the order is made.

(3) An appeal under subsection (1) shall be by way of a rehearing by the Court which may make any order that it considers appropriate.

(4) If the Court upholds the appeal, it may order the release of the currency (and any interest accrued in the case of Cash) where the appeal is against an order for forfeiture.”.

An amendment was also made to the Foreign Exchange (Miscellaneous Provisions) Act, Cap. 86:01 as follows –

Second Schedule

(a) Section 6 of the Principal Act is amended as follows-

(i) by substituting for subsections (1) to (4) the following subsection (1)-

“(1) A person who transports or causes the transportation of currency into or out of Guyana, exceeding ten thousand dollars in United States currency or its equivalent in any other currency or such other amount as may be prescribed, shall make a declaration to the Commissioner in the Form in the Second Schedule.”

(ii) in subsection (5)-

(A) by substituting for the words “two hundred and fifty thousand dollars and six months imprisonment” the words “one million dollars and two years imprisonment”;

(B) by substituting for the word “traveller” the word “person”.

END