

EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (REFERENCES TO FINANCIAL INVESTIGATORS) (AMENDMENT) (ENGLAND AND WALES) ORDER 2018

2018 No. 318

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Police officers, immigration officers, officers of HM Revenue and Customs and officers of the Serious Fraud Office (and, in certain circumstances, National Crime Agency officers) have automatic access to powers under the Proceeds of Crime Act 2002 (“POCA”).
- 2.2 Other financial investigators who have been trained and accredited by the National Crime Agency (“the NCA”) (or formerly by the National Policing Improvement Agency or Assets Recovery Agency) can also have access if they fall within a description specified by the Secretary of State by Order. This Order includes a list of bodies whose accredited financial investigators (“AFIs”) can have access to the powers. This Order is made under section 453 of POCA. This Order makes amendments to a previous Order, the Proceeds of Crime Act 2002 (References to Financial Investigators) (England and Wales) Order 2015 (SI 2015/1853) (“the 2015 Order”), which contains the list of AFIs who can access powers in England and Wales.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Under section 3 of POCA (as amended), the NCA has provided a system for the accreditation of financial investigators to allow access to some or all of the powers provided by POCA.
- 4.2 POCA provides a number of powers that can be exercised by an AFI, namely:
- The power to apply to the court for a restraint order to effectively freeze property which may become subject to a confiscation order following a conviction (section 42 of POCA in England and Wales);

- The power to search for, seize and detain property with a view to its future realisation. This will support enforcement of a (future) confiscation order following a conviction (sections 47A to 47R of POCA in England and Wales);
- The powers to search for, seize, detain and seek the forfeiture of cash suspected of being the proceeds of crime or intended for use in unlawful conduct (sections 289 to 303A of POCA);
- The powers to search for, seize, detain and seek the forfeiture of certain personal (or moveable) personal property suspected of being the proceeds of crime or intended for use in unlawful conduct (new sections 303B to 303Z of POCA);
- The powers to freeze and forfeit funds in a bank account that are suspected of being the proceeds of crime or intended for use in unlawful conduct (new sections 303Z1 to 303Z19 of POCA);
- The power for an AFI who is a senior officer to apply for an extension of the moratorium period (new section 336D(7)(h) of POCA);
- The ability to apply to the court for investigation orders and warrants in confiscation investigations, money laundering investigations and detained cash investigations (additions to section 378 of POCA); and
- The power to execute search warrants in financial investigations (sections 352 and 353 of POCA).

4.3 As set out in paragraph 2.2, the Secretary of State can make an order under section 453 of POCA to specify which particular AFIs can access the various powers. This includes a power to specify the definition of a senior officer for the purposes of the various powers where they are to be used by an AFI. This Order amends the 2015 Order to take account of the matters set out in paragraphs 7.1 to 7.14 below.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The overall objective is to ensure that an order is made under section 453 that lists the AFIs working for various public sector bodies who are able to use each of the relevant powers in POCA. By providing the order-making power in section 453, POCA ensures that it is the Secretary of State (and not, for example, the NCA) who decides ultimately which persons and members of staff of agencies, bodies and Government departments should have access to each power in POCA.
- 7.2 Current policy is to limit access to these intrusive powers to appropriate public (rather than private) bodies involved in financial investigation. NCA trains, accredits and monitors individual financial investigators within those bodies.

- 7.3 Organisations whose AFIs are listed in a section 453 order will be able to operate more flexibly and independently of the police in pursuit of the proceeds of crime. This assists with the policy aim of embedding the recovery of the proceeds of crime and financial investigation techniques in the criminal justice system.
- 7.4 The Schedule to this Order amends the 2015 Order to make required amendments, including those which are required as a result of the amendments to POCA made by the Criminal Finances Act 2017 (c.22) (“CFA”).
- 7.5 Officers of the Serious Fraud Office (“SFO”), by virtue of amendments made to POCA by the CFA, now have access to POCA powers directly. This Order therefore removes the references to AFIs who work for the SFO from most of the provisions in the 2015 Order. However, for operational reasons the references to AFIs are preserved in respect of powers relating to restraint orders (sections 42 and 68 of POCA).
- 7.6 The CFA also makes provision for civilian AFIs working in police forces to obtain approval for the use of certain powers from a senior police officer, regardless of whether that officer is an AFI. Previously, a civilian AFI would be required to seek such approval from a police officer qualified as an AFI of a grade specified by the Secretary of State. This was not always practical in an operational context, so this Order removes references to senior police AFIs from the 2015 Order in respect of those powers.
- 7.7 In recognition of the increasing management role played by civilian staff in the police, and the creation of senior grades to enable career development, this Order includes references to AFIs who are senior civilian police staff. The Order defines senior officers as equivalent to a police grade (namely, inspector or superintendent) that is appropriate to the authority being sought. The use of the word ‘equivalent’ recognises the different grading structures across policing as opposed to naming a specific civilian grade. The addition of senior civilian police staff does not extend to all powers as some powers require AFIs to seek authorisation or approval from a senior police officer. Specifically, these are seeking approval for certain functions under section 47 of POCA (see section 47G), approval to search for cash (see section 290(4)) and prior approval to search for listed assets (see section 303E(4)).
- 7.8 This Order provides the Intellectual Property Office (“IPO”) with all powers under POCA with the exception of search and seizure powers under sections 47A to 47R. These powers of search, seizure and detention related to confiscation are currently limited. The IPO, which previously only had confiscation and money laundering investigation powers, has a considerable history of POCA and joint operation work which includes investigations into serious and organised criminality. Full access to POCA powers is therefore appropriate. In addition, this Order changes the IPO’s senior grade for approval and authorisation of certain POCA powers to align it with an equivalent police grade, depending on the approval and authorisation being sought.
- 7.9 POCA already provides for the seizure and forfeiture of cash where there are reasonable grounds to suspect that the cash is derived from, or intended for use in, unlawful conduct. The CFA amends Part 5 of POCA to allow authorised enforcement agencies to seek – where similar grounds exist - the freezing and subsequent forfeiture of monies held in bank and building society accounts. An investigation into funds held in such accounts is known as a “frozen funds investigation” (under Part 8 of POCA). Once investigations have been completed with regard to whether or not the funds are recoverable property or are intended for use in unlawful conduct, forfeiture may be sought, either administratively or via the courts with an Account Forfeiture Order

(under Part 5 of POCA). The investigatory powers associated with a frozen funds investigation are available once an account freezing order is in place. An account freezing order must be in place before account forfeiture can be pursued (either administratively or via the court). An enforcement officer (as defined in section 303Z1(6)) may apply for an account freezing order, which prohibits each person by or for whom the account is operated from making any withdrawals or payments from the accounts, subject to exclusions made by the court. The forfeiture power provided by this new provision is also based on the existing cash forfeiture powers. Accordingly, the list of AFIs and senior AFIs who are able to use this power mirrors the list for the recovery of cash in summary proceedings and supporting detained cash investigations. This Order defines the same list of AFIs for the purposes of the forfeiture of money held in bank and building society accounts and the supporting frozen funds investigation, with the addition of immigration officers who are AFIs (see paragraph 7.13).

- 7.10 Cash forfeiture provisions currently allow for the ‘administrative forfeiture’ of cash. This means that a senior officer who is satisfied that detained cash is derived from, or intended for use in, unlawful conduct may give the person from whom the cash was seized a forfeiture notice which, if no objection is made, results in the forfeiture of the cash (sections 297A – 297G of POCA). In recognition of the significance of forfeiting cash without the involvement of a court, this Order provides that only AFIs of a seniority equivalent to other authorisation and approval functions can issue cash forfeiture notices (previously, this power was more generally available).
- 7.11 In addition, the CFA introduces new powers to seize, detain and forfeit certain listed items of property into POCA. These items include precious metals and stones and artistic works. A new category of investigation (“detained property investigation”) has been created in Part 8 of POCA to support the seizure and forfeiture of relevant property that is reasonably suspected to derive from, or is intended for use in, unlawful conduct. This Order defines the AFIs who are able to access this new forfeiture power. It also defines the level of senior officer, who must provide authorisation where appropriate for the use of searches under section 303C of POCA, where it is not practicable to seek approval from an appropriate judicial officer. The Order makes provision for access to the associated search powers in sections 352 and 353 of POCA and defines which officers are “senior officers” for the purposes of investigation powers in Part 8 of POCA. The new forfeiture powers are based on the existing cash forfeiture powers, and the list of AFIs able to access these powers is substantially the same as those who use cash forfeiture powers. In addition, this Order will allow immigration officers who are AFIs to access the powers in Part 8 of POCA in the context of a detained property investigation (see paragraph 7.13).
- 7.12 The CFA amends the provisions in part 7 of POCA which apply where an entity in the regulated sector has reported a suspicion of money laundering, and has sought consent from a nominated officer, a constable or a customs officer to carry out a particular transaction. Where that consent is refused, the entity is currently prohibited from carrying out the transaction for a period of 31 days (“the moratorium period”). Section 10 of the CFA introduces a new power for a senior officer to apply to the court (the Crown Court in England & Wales and Northern Ireland, and the Sheriff’s Court in Scotland) for an order extending the moratorium period (a “moratorium extension order”). The court can order an extension of up to 31 days where it believes that it is appropriate to allow further time for the law enforcement agency to conduct the investigation. The court may allow up to six extensions, to a maximum of 186

days. An AFI who is a senior officer may apply for a moratorium extension order, and new section 336D(7)(h) of POCA provides that this means an AFI of a description specified in an order made under section 453. This Order inserts provisions into the 2015 Order to define a senior AFI for these purposes. This list of senior officers is the same as the existing list of AFIs who are senior appropriate officers for a money laundering investigation (section 378(6)(c) POCA). This recognises that the listed agencies may – in applying for a moratorium extension - be involved at the pre-investigation (intelligence gathering) stage of a money laundering investigation.

- 7.13 This Order makes additional amendments to the 2015 Order in respect of existing powers in POCA. As the Post Office already has cash seizure/forfeiture powers under Chapter 3 of Part 5 of POCA, it has now been added to the connected power of detained cash investigations in sections 378(3A)(ab) and 378(3AA)(b). These powers will assist the Post Office in building a case for a forfeiture application. This Order also makes a minor correction to the references in the 2015 Order to the “Velindre National Health Trust” so that they now read “Velindre National Health Service Trust”. The definition of senior officer AFIs who are members of the Financial Conduct Authority (“FCA”) is also changed by this Order. A senior officer for the purposes of the powers detailed in this Order is an FCA AFI at or above the grade of Manager. This grade is unchanged, but this Order amends the 2015 Order to enable an FCA Head of Department to authorise an FCA member of staff who is also an AFI – but not necessarily a Manager – to discharge the functions of a senior officer. In relation to immigration officers who are AFIs, this Order defines them as appropriate officers in two circumstances. These are for the purposes of detained property investigations and frozen funds investigations. For the purposes of the same investigations, a senior appropriate officer is defined as a grade at or above Chief Immigration Officer. Immigration officers have direct access to the associated forfeiture and supporting powers under the provisions in POCA (as amended by the CFA). Immigration officers also have direct access to the other powers covered by this Order and do not need to be listed in those related entries.
- 7.14 The Order also makes a further two technical changes. Firstly, it merges the two lists that related to search and seizure warrants - Sections 352 and 353 of POCA both provide access to AFIs to execute search and seizure warrants. Under the 2015 Order these were separate but identical lists. These lists will always be identical as the power to execute a warrant would be the same in the two circumstances. The Order therefore merges the lists and deletes the second list. Secondly, the heading relating to section 378(3AA)(b) is expanded to clarify that this list refers to senior appropriate officers in detained cash investigations.

Consolidation

- 7.15 Paragraph 7.6 of the explanatory memorandum for the Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) Order 2017 (SI 2017/74) reads “the list of public bodies which have (or need) access to the powers afforded to financial investigators is reviewed on an ongoing basis to reflect the changing nature of the threat from serious and organised crime to the United Kingdom. The Criminal Finances Bill laid before Parliament on 13 October 2016, subject to Royal Assent, will extend further powers to accredited financial investigators. It is at this stage that we will embark on a process of consolidation and create a single consolidated Order.”
- 7.16 The Criminal Finances Bill received Royal Assent on 27 April 2017. Provisions in relation to England, Wales and Scotland were fully commenced over a period of time

to 16 April 2018 (see the Criminal Finances Act 2017 (Commencement No. 4) Regulations 2018 (S.I. 2018/78). Consolidation will be completed when legislative consent is obtained from the Northern Ireland Assembly and provisions in the CFA amending POCA are fully commenced across the whole of the UK.

8. Consultation outcome

8.1 The Proceeds of Crime Centre, who are mandated under section 3 of POCA to train and accredit financial investigators, were involved in the development of this Order. They liaised closely with all the agencies who already have a financial investigation capacity and capability. They fully support the amendments and additions made by this Order. Also, as explained elsewhere in this memorandum, many of the amendments made by this Order are consequential on the changes made to POCA by the CFA.

9. Guidance

9.1 Training of financial investigators is provided or approved by the NCA. Once financial investigators are trained and accredited, the continued use of their powers is closely monitored and reviewed by the NCA.

9.2 In addition, codes of practice apply to some of the functions detailed in this Order. These include a code of practice providing guidance on the lawful and proportionate use of search, seizure and detention powers, investigation powers and the new power to recover listed assets.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is neutral. Most of the agencies listed already have accredited financial investigators. The new bodies listed will have previously had upon the police to perform their investigations, so the actual manpower time will not increase. Investigation bodies will also receive a share of money recovered as additional funding to incentivise further work in recovering the proceeds of crime.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 Section 3 of POCA requires the NCA to monitor the performance of AFIs. This monitoring takes the form of continuing professional development (“CPD”) activities, work based CPD submissions via the NCA’s financial investigation professional register and their Regulator’s communication and regular liaison with individual financial investigators and bodies. A sample of all evidence submitted in support of the continued correct use of the powers will mean that the actual casework is examined by NCA Regulators. Any incorrect use of the powers could result in the withdrawal of accredited status.

12.2 The NCA publishes an annual report which details how it has discharged its statutory obligations and objectives set by its annual plan. On a more informal basis, the Secretary of State can also request a report from the NCA on specific matters.

13. Contact

- 13.1 Stephen Goadby at the Home Office can answer any queries regarding the instrument (tel: 020 7035 1559 or email: Stephen.goadby@homeoffice.x.gsi.gov.uk).