

# CRIMINAL FINANCES BILL (HL)

## DELEGATED POWERS

### MEMORANDUM BY THE HOME OFFICE AND HM REVENUE AND CUSTOMS

#### Introduction

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Criminal Finances Bill. The Bill was introduced in the House of Commons on 13<sup>th</sup> October 2016. The memorandum identifies the provisions of the Bill which confer powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected. The memorandum has been prepared by the Home Office and HM Revenue and Customs. There are a number of delegated powers that are not created by this Bill, but will need to be exercised in consequence of amendments made to this Bill. They are listed at Annex A.
2. The Criminal Finances Bill, which was announced in the 2016 Queen's Speech, is a key element in the Government's implementation of the *Action Plan on anti-money laundering and counter-terrorist finance*, published in April 2016. That Action Plan represented one of the most significant changes to the United Kingdom's anti-money laundering and terrorist finance regime in over a decade. The Bill would significantly improve UK law enforcement agencies' ability to recover the proceeds of crime, tackle money laundering and corruption and counter terrorist financing.
3. The Bill is in four Parts:
  - Part 1 strengthens the powers of law enforcement agencies to recover the proceeds of crime, including by: making provision for unexplained wealth orders; extending the use of disclosure orders to money laundering investigations; enabling the sharing of information between bodies in the regulated sector where there is suspicion of money laundering; enhancing the suspicious activity report ("SAR") regime relating to money laundering by providing additional powers to the National Crime Agency ("NCA") to obtain information; and strengthening the civil recovery powers under the Proceeds of Crime Act 2002 ("POCA") to enable the seizure and forfeiture of the proceeds of crime held in bank accounts and specified personal property analogous to the cash provisions.
  - Part 2 makes equivalent provision to Part 1 (on SARs, disclosure orders, information sharing and seizure and forfeiture powers) in relation to terrorism financing and property.

- Part 3 creates two new corporate offences of failure to prevent facilitation of UK tax evasion offences and foreign tax evasion offences.
- Part 4 contains general provisions, including minor and consequential amendments, a power to make consequential provision and standard provisions relating to extent and commencement.

### **Analysis of delegated powers by clause**

#### *Powers to make rules of court*

*The Bill contains a number of powers to make rules of court and these are grouped together below for ease of reference.*

**Clause 1 – new section 362H(2) of POCA: Power to make rules of court in respect of proceedings relating to unexplained wealth orders (NI – High Court).**

**Clause 4 – new section 396H(2) of POCA: Power to make rules of court in respect of the discharge and variation of unexplained wealth orders (S – Court of Session).**

**Clause 9(4) – new section 336B(7) of POCA: Power to make rules of court in connection with proceedings relating to extension of moratorium period (E&W / NI – Crown Court; S – Sheriff Court).**

**Clause 11 – new section 339ZM(5) of POCA: Power to make rules of court in respect of the practice and procedure to be followed in connection with proceedings relating to further information orders (E&W / NI – Magistrates' Court; S – Sheriff Court).**

**Clause 33, Schedule 2, paragraph 3 – paragraphs 14(2) and 24(2) of new Schedule 5A to the Terrorism Act 2000: Power to make rules of court as to the practice and procedure to be followed in connection with proceedings relating to disclosure orders and as to the discharge and variation of such orders (E&W / NI – Crown Court; S – High Court of Justiciary).**

**Clause 35 – new section 22G(5) of the Terrorism Act 2000: Power to make rules of court in respect of the practice and procedure to be followed in connection with proceedings relating to further information orders (E&W / NI – Magistrates' Court; S – Sheriff Court).**

<i>Court:</i>	<i>Crown Court / Magistrates' Court (E&amp;W)</i>
<i>Powered conferred on:</i>	<i>Criminal Procedure Rules Committee</i>
<i>Power exercisable by:</i>	<i>Rules of court made by Statutory Instrument</i>

*Parliamentary procedure:*      *Negative resolution (UK Parliament)*

*Court:*                              *High Court / Crown Court / Magistrates' Court (NI)*

*Powered conferred on:*      *NI Court of Judicature Rules Committee /*

*NI Crown Court Rules Committee /*

*NI Magistrates' Court Rules Committee*

*Power exercisable by:*      *Northern Ireland Statutory Rules*

*Parliamentary Procedure:*   *Negative resolution (NI Assembly)*

*Court:*                              *Court of Session / High Court of Justiciary / Sheriff Court (S)*

*Powered conferred on:*      *Court of Session/ High Court of Justiciary*

*Power exercisable by:*      *Act of Sederunt / Act of Adjournal (Scottish Statutory Instrument)*

*Parliamentary Procedure:*   *No procedure (laid before Scottish Parliament)*

4. The detailed explanation of the clauses follows below:

- a. **Clauses 1 and 4** insert New sections 362H(2) and 396H(2) of POCA to provide that rules of court may be made in respect of proceedings relating to unexplained wealth orders in Northern Ireland and Scotland respectively. It should be noted that rule making powers are not required in relation to the proceedings before the High Court in England and Wales due to the power contained in S. 1 of the Civil Procedure Act 1997.
- b. **Clause 9(4)** inserts new sections 336B(7) of POCA to provide that rules of court may be made in connection with proceedings relating to an application to extend the 31 day 'moratorium period' (triggered by a disclosure under sections 335 and 336).
- c. **Clauses 11 and 35** insert new section 339ZM(5) of POCA and new section 22G(5) of the Terrorism Act 2000 to provide that rules of court may be made in respect of the practice and procedure to be followed in connection with proceedings relating to further information orders.
- d. **Clause 33 (Paragraph 3 of Schedule 2)** inserts paragraphs 14(2) and 24(2) into new Schedule 5A to the Terrorism Act 2000 to provide that rules of court may be made as to the practice and procedure to be followed in connection with proceedings relating to disclosure orders and as to the discharge and variation of such orders respectively.

5. Similar powers already exist in POCA in respect of production orders (section 351(2)) and disclosure orders (section 362(2)), and other provisions. It is appropriate for these procedural provisions to be made by rules of court, given the level of detail involved. In addition, rules of court may be amended more easily and quickly than primary legislation, which will allow any required procedural changes to be made in a timely manner.

6. The powers to make rules of court in sections 91, 351(2), 362(2), 369(2), 375A(10), and 375(1) of POCA are all exercisable using the negative procedure, and the Government considers that this is appropriate for the new provisions (but see below in relation to Scotland). It is to be noted that these existing provisions provide for rules of court to be made in respect of the other investigatory powers in Part 8 of POCA (disclosure orders, customer information orders and account monitoring orders), and also in respect of evidence overseas (section 375A(10)). The Government considers that it is appropriate for the same approach to be taken in respect of unexplained wealth orders, and that the level of parliamentary scrutiny is appropriate.
7. Rules of court in relation to the High Court in Northern Ireland are made by the Northern Ireland Court of Judicature Rules Committee under section 55A of the Judicature (Northern Ireland) Act 1978 (“the 2010 JNIA”). Rules of court so made are Northern Ireland Statutory Rules, and are similarly subject to the negative procedure in the Northern Ireland Assembly pursuant to section 56 of the 2010 JNIA. Equivalent provisions apply to rules made in relation to the Crown Court (S. 53A) and Magistrates’ Court in Northern Ireland (Art. 13 of the Magistrate’s Court Northern Ireland Order 1981). The Government considers that it is appropriate for the same approach to be taken, and that the level of parliamentary scrutiny is appropriate.
8. Acts of Adjournal are made by the High Court of Justiciary in Scotland under section 305 of the Criminal Procedural (Scotland) Act 1995 and are applicable in the High Court of Justiciary and may also be made for the Sheriff’s Court in relation to criminal procedure. Acts of Sederunt are made by the Court of Session in Scotland under sections 103 (civil procedure in the Court of Session) and 104 (civil procedure in the Sheriff’s Court) of the Court (Reform) Scotland Act 2014. Section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 ASP”) provides that Acts of Sederunt and Adjournal are Scottish Statutory Instruments. Acts of Adjournal and Acts of Sederunt that prescribe matters which relate to the practice and procedure of the Scottish Courts are not subject to parliamentary scrutiny. Accordingly, the Government considers that it is not necessary to make the Acts of Adjournal or Acts of Sederunt subject to parliamentary procedure. Section 30 of the 2010 ASP provides that a Scottish Statutory instrument which is not subject to parliamentary procedure must still be laid before the Scottish Parliament as soon as is practicable after it is made.

**Clause 2 – new section 362K(5) of POCA: Power to specify conditions to which exclusions from interim freezing orders for the purpose of legal expenses are to be made subject**

**Clause 15 – new section 303Z5(5) of POCA: Power to specify conditions to which exclusions from account freezing orders for the purpose of legal expenses are to be made subject**

*Power conferred on: Lord Chancellor*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative*

9. New section 362I provides that, in consequence of an unexplained wealth order being made under section 362B, the court can make an interim freezing order (“IFO”) where it considers it necessary in order to avoid the risk of a subsequent recovery order in respect of the property being frustrated. New section 362K(5) of POCA contains provisions relating to the power for the Court to make exclusions from an IFO for the purpose of meeting reasonable legal expenses, in keeping with the equivalent provision at section 245C(5) for freezing orders in the main civil recovery procedures. Section 286A and 286B are existing provisions in POCA, and provide that the Lord Chancellor can, by regulations, make provisions as to the required conditions for a legal expenses exclusion to be made in relation to a freezing order under s245A. New section 362K(5) provides that any legal expenses exclusions made in respect of an IFO are subject to the same conditions as would be the required conditions if the order had been made under section 245A, in addition to any further conditions applied by the court.

10. New section 303Z3 provides that a court can make an account freezing order (“AFO”) if satisfied that there are reasonable grounds for suspecting that money held in the account is property obtained through unlawful conduct, or is intended for use in unlawful conduct. Section 303Z5 provides that the court can make an exclusion from the AFO for the purpose of meeting legal expenses. Section 303Z5(5)(c) applies the required conditions to legal expenses as set out above.

11. It is appropriate for these complex procedures to be set out in regulations, and, given their nature, it is appropriate for the Lord Chancellor to exercise the powers. By extending these existing powers to the new provisions, the Department considers that the approach to this issue will remain consistent.

**Clause 50: Minor and Consequential Amendments, Schedule 5, Para 74 – new Para 412A of POCA. Power to vary monetary amounts (UWOs)**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

12. Clause 1 inserts new sections 362A to 362H into POCA which provide for unexplained wealth orders in England and Wales and Northern Ireland. Clause 4 inserts new sections 396A to 396H which make equivalent provision for unexplained wealth orders in Scotland. These provisions enable certain law enforcement agencies to apply to the High Court (the Court of Session in Scotland) for an order requiring persons suspected of being (or having been) involved in serious crime to explain how they obtained specified property. Where the order is not complied with then a rebuttable presumption arises that the property is derived from unlawful conduct making it easier for law enforcement authorities to recover that property by means of the civil recovery powers in Part 5 of POCA. Clauses 2 and 5 provide for ancillary powers for the Court to make a freezing order on application in order to prevent the dissipation of the property over which an unexplained wealth order is sought. The provisions apply where the value of the property is greater than £100,000 (see new section 362B(2)(b) and 396B(2)(b) of POCA).
13. New Section 412A(1) of POCA provides a power for the Secretary of State by regulations to amend the monetary threshold for the time being specified in new section 362B(2)(b) and 396B(2)(b) to take account of changes in the value of money. In enacting the Bill, Parliament will have agreed that an unexplained wealth order may only be granted by the Courts where the value of property is greater than £100,000. Over time inflation will reduce the relative value of this threshold thereby effectively extending the reach of unexplained wealth orders. The regulation-making power will ensure that the threshold can be adjusted to take account of inflation (or deflation); the effect of any such regulations will be to do no more than restore the monetary threshold to its value at 2016 prices. Primary legislation would be required to make a substantive change to the level of the monetary threshold. Section 67(7) of POCA contains a broadly analogous power to vary the maximum fine that may be imposed by a magistrates' court for failure to comply with an order made under section 67(5). Since the change in the value of money will be uniform across the UK the power is conferred on the Secretary of State even though this a devolved power. There is a duty to consult with Department of Justice (NI) and the Scottish Ministers before making regulations.
14. The regulations are subject to the negative resolution procedure. The Government considers that this is appropriate, even though this is a Henry VIII power because the scope of the power is strictly limited to altering the level of the

monetary threshold to reflect changes in the value of money and therefore to restore the value of the threshold as it was at the time this Bill is enacted. The negative procedure is consistent with that applying to regulations made under section 67(7) of POCA.

Further information notices and orders

**Clause 11 – new section 339ZJ(9) of POCA: Power to vary maximum monetary penalty for failure to comply with a further information order**

**Clause 35 – new section 22D(9) of the Terrorism Act 2000: Power to vary maximum monetary penalty for failure to comply with a further information order**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* Negative

15. Clause 11 makes provision enabling the obtaining of further information in relation to disclosures made under Part 7 of POCA (money laundering). Where a person fails to comply with a further information order, then a magistrates' court (in England and Wales and Northern Ireland) may order the payment of a monetary penalty not exceeding £5000 (see new section 339ZJ(7) of POCA). Clause 35 makes parallel provision for the service of further information notices in connection with disclosures under the terrorist property provisions in Part 3 of the Terrorism Act 2000 and the reasoning below applies to both.
16. New Section 339ZJ(9) of POCA enables the Secretary of State by regulations to amend the monetary threshold for the time being specified in new section 339ZJ(7) to take account of changes in the value. In enacting the Bill, Parliament will have agreed that the courts may impose a monetary penalty not exceeding £5000 for a failure to comply with a further information order. Over time inflation will erode the relative value of this maximum sum thereby effectively reducing the deterrent and punitive value of the penalty. The regulation-making power will ensure that the maximum penalty can be adjusted to take account of inflation (or deflation); the effect of any such regulations will be to do no more than restore the maximum sum to its value at 2016 prices. Primary legislation would be required to make a substantive change to the level of the monetary penalty. Section 67(7) of POCA contains a directly analogous power to vary the maximum fine that may be imposed by a magistrates' court for failure to comply with an order made under section 67(5).
17. By virtue of section 459(4) of POCA, the regulations are subject to the negative resolution procedure. The Government considers that this is appropriate, even

though this is a Henry VIII power because the scope of the power is strictly limited to altering the level of the monetary penalty to reflect changes in the value of money and therefore to restore the value of the penalty as it was at the time this Bill is enacted. The negative procedure is consistent with that applying to regulations made under section 67(7) of POCA.

Civil Recovery (Parts 1 and 2)

**Clause 14 – new section 303B(2) of POCA: Power to amend list of “listed assets” for purposes of civil recovery powers in respect of personal or moveable property**

**Clause 37, Schedule 3, Paragraph 2 – new paragraph 10A(2) of Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001 (“ATCSA”): Power to amend list of “listed assets” for purposes of civil recovery powers in respect of personal or moveable property**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* Draft affirmative

18. Clause 14 inserts new sections 303B to 303Z into POCA which make provision relating to the civil recovery of certain personal or moveable property. The provisions will only be exercisable in relation to specific types of property (referred to as “listed assets”) which are listed at new section 303B(1). The list captures items of property which are being used to store or transfer the proceeds of crime in a manner akin to currency. The Government considers that in order to make the scope of this power certain and reasonably foreseeable to the public, it is necessary to explicitly list the items on the face of the legislation.

19. Under the new civil recovery powers, a relevant officer can search for, and seize, property which he or she perceives to be a listed asset of a value exceeding a minimum threshold of £1,000, in circumstances where there are reasonable grounds to suspect that the property is recoverable property or that it is intended for use in unlawful conduct. The seizure is subject to review by a senior officer within six hours of the seizure taking place.

20. The relevant law enforcement agency can make an application to court for the forfeiture of the listed asset. In recognition that these cases will give rise to a greater complexity than the cash provisions (in Chapter 3 of Part 5 of POCA) on which they are to some extent modelled, there will be no administrative forfeiture process in respect of these listed assets, and the powers can be operated by the High Court in complex cases.

21. New section 303B(2) confers a power on the Secretary of State to amend section 303B(1) so as to add to or remove a description of property from the list of assets to which these powers apply. The Secretary of State is required to consult the Scottish Ministers and the Northern Ireland Department of Justice before making such regulations. The power is necessary to maintain the effectiveness of these provisions, by allowing law enforcement agencies to target the specific types of property which are being used, in effect, in lieu of currency in the criminal economy. Criminals are adept at finding new methods of storing and trading the proceeds of crime and a procedure which can amend the list of assets relatively quickly will in turn allow law enforcement agencies to keep up with the methods deployed by criminals. It is considered that if the list could only be updated by way of primary legislation then there would be a serious risk that criminals would remain one step ahead by exploiting the timeframes generally necessary to make primary legislation. Accordingly, the Government considers that it is appropriate for the Secretary of State to be able to modify the list by way of regulations. The regulation-making power in new paragraph 10A(2) of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001 (inserted by Schedule 3 to the Bill) makes identical provision in respect of the forfeiture of terrorist assets.
22. By virtue of section 459(6ZB) of POCA (as inserted by paragraph 79(6) of Schedule 5), the affirmative procedure applies to such regulations. Given the nature of these powers and the potential ramifications for individuals of adding a description of tangible personal property to the list of assets, the Government considers that they should be subject to debate and prior approval by both Houses. Furthermore, the affirmative procedure is appropriate given that this is a Henry VIII power.
23. Clause 37, Schedule 3, Para 2 inserts new para 10A(2) into Schedule 1 to ATCSA. This is the equivalent provision which allows amendment, by way of regulations made by the Secretary of State, to the list of property over which action may be taken to seize and forfeit terrorist property. The reasons for and justification of this approach are the same as for the Part 1 power described above.

**Clause 14 – new section 303G(5), 303H(4) and 303I(4) of POCA: Power to make regulations bringing into force code of practice in relation to search power conferred by section 303C**

*Power conferred on:* Secretary of State, Scottish Ministers and the Northern Ireland Department of Justice

*Power exercised by:* Regulations made by statutory instrument, Order made by Scottish statutory instrument, Northern Ireland Statutory Rules

*Parliamentary Procedure:* Draft affirmative

24. New section 303C confers a power for law enforcement officers to search a premises where the officer has reasonable grounds for suspecting that a seizable listed asset is on the premises. A “seizable listed asset” means an asset that falls within the scope of the powers (as set out in new section 303B(1)), all or part of which is recoverable property or intended for use in unlawful conduct. New sections 303G(5), 303H(4) and 303I(4) provide that codes of practice can be made in respect of the exercise of these powers (for England and Wales, Scotland and Northern Ireland respectively).

25. The search power is invasive, and raises the need for further detailed guidance to ensure that it is used proportionately and effectively. It is appropriate to set this out in a code of practice due to the level of detail required. A similar search power exists in POCA already in respect of cash at section 289. Codes of Practice are made for the various jurisdictions under sections 292 to 293A in respect of the use of this power.

26. The Government considers that the draft affirmative procedure is appropriate for the use of this power, given the sensitive nature of these powers and that the code will clarify the use of the powers against the public. The draft affirmative procedure allows Parliament, the Scottish Parliament and the Northern Ireland Assembly respectively to give the codes sufficient scrutiny, and the Government notes that section 292 is also to be exercised in this way.

**Clause 14 – new section 303W(9) and (10) of POCA: Power to amend list of persons responsible for payment of compensation**

**Clause 15 – new section 303Z18(9) and (10) of POCA: Power to amend list of persons responsible for payment of compensation**

*Power conferred on:* Secretary of State / Department of Justice for Northern Ireland

*Power exercised by:* Regulations made by statutory instrument / Northern Ireland Statutory Rules

*Parliamentary Procedure:* Affirmative

27. New section 303W of POCA makes provision for the payment of compensation where the powers relating to the civil recovery of listed assets are exercised. New section 303Z18 of POCA makes similar provision for the payment of compensation in respect to the exercise of the bank account forfeiture powers. The provisions are similar to those for the cash process at section 302 of POCA. In respect of the listed assets forfeiture and bank account forfeiture, compensation is payable in exceptional circumstances, and where a listed asset was seized and detained or an account freezing order was made, but none of the assets or money is forfeited. In those circumstances, new sections 303W(5) to (8) and 303Z18(5) to (8) provide which entity shall pay the compensation, depending on which category of officer made the application for the account forfeiture order.

28. New sections 303W(9) and 303Z18(9) deals with the mechanism for paying compensation where the asset was seized or the application was made by an accredited financial investigator. In essence, they provide that the entity for whom the accredited financial investigator was working will pay the compensation, and make certain specific provisions to clarify this. For example, new sections 303W(9)(a) and 303Z18(9)(a) provides that, where the accredited financial investigator was a member of the civilian staff of a police force, the compensation is to be paid out of the police fund from which the expenses of the police force are met.

29. New sections 303W(10) and 303Z18(10) provide a delegated power for the Secretary of State to make regulations to amend new section 303W(9) and 303Z18(9) respectively. New sections 303W(11) and 303Z18(11) provide that the power is exercisable by the Department of Justice for Northern Ireland (and not by the Secretary of State) so far as it may be used to make provision which could be made by an Act of the Northern Ireland Assembly without the consent of the Secretary of State (in accordance with sections 6 to 8 of the Northern Ireland Act 1988). There is an equivalent power in respect of compensation payable by accredited financial investigators under the cash provisions at section 302(7B) of POCA.

30. The Government considers that these powers are necessary, as they correspond to the power the Secretary of State can exercise to make regulations providing which type of accredited financial investigator can access the powers. In addition, the scope of the powers is restricted to amending new sections 303W(9) and 303Z18(9), and as a result permits the Secretary of State to make changes to the administrative basis upon which compensation payments are to be made. This is necessary to ensure that any changes to the funding arrangements for those organisations can be reflected in this provision. In addition, the power to amend the list in new sections 303W(9) and 303Z18(9) directly ensures that the method by which compensation is to be paid is clear, to the individual affected, the relevant agency and to the court making the compensation order. In recognition that the power allows the Secretary of State to make amendments to primary legislation, the Government considers that it is appropriate for the regulations to be made by way of the affirmative procedure and paragraph 79 of Schedule 5 to the Bill amends section 459 of POCA to this end (the application of the affirmative procedure mirrors the position with the existing analogous power in section 302(7B) of POCA).

**Clause 14 – new section 303Y(2) of POCA: Power to modify “the minimum value” for the purposes of new Chapter 3A of Part 5 of POCA**

**Clause 15 – new section 303Z8(2) of POCA: Power to modify “the minimum amount” for the purposes new Chapter 3A of Part 5 of POCA**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* Affirmative

31. The powers for the civil recovery of listed assets are modelled to some extent on the existing procedures for the forfeiture of cash. The powers cannot be exercised in respect of listed assets below a minimum threshold in value; new section 303Y(1) sets the minimum value at £1,000 which mirrors the sum specified for the purposes of the cash forfeiture powers in Chapter 3 of Part 5 (see the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006 (SI 2006/1699)).

32. Given the wider ranging nature of these forfeiture powers in relation to personal or moveable assets compared with the existing cash forfeiture powers, the Government considers it appropriate to specify the minimum value on the face of POCA rather than leave the minimum value to be specified in regulations, as is the case with section 303 of POCA. The minimum amount clearly provides a safeguard to prevent disproportionate use of the powers and it is appropriate for

this safeguard to be fully set out in primary legislation. However, as with the provisions in Chapter 3 of Part 5 of POCA it may be necessary, in the light of experience, to change the minimum value to ensure that the powers continue to balance this safeguard with the need to maximise civil recovery. Such regulations will also enable the minimum value in new section 303Y to track the minimum amount for the purposes of Chapter 3 of Part 5 of POCA, although there may in future be an argument for specifying different amounts in relation to cash and other assets.

33. By virtue of section 459(4) and (6ZB) of POCA (as inserted by paragraph 79 of Schedule 5), the affirmative procedure applies. Given the nature of the powers conferred on law enforcement agencies by these provisions, the Government considers that any change to the threshold should be subject to debate and approval by both Houses.
34. Clause 15 provides for new powers to enable the freezing and forfeiture of money that is suspected to be or represent the benefit of unlawful conduct held in bank accounts. These powers are modelled on the existing procedures for the forfeiture of cash, which are to be found at Chapter 3 of Part 5 of POCA. As with the cash procedure, the powers contain an administrative forfeiture procedure, whereby the law enforcement agency can serve a notice of forfeiture upon the individual(s) who operate the account. If no objection is raised by the individual, the funds which are the subject of the notice will be forfeited. If an objection is raised, the law enforcement agency will either determine that no further action should be taken, or it will proceed to make an application to a magistrates' court for forfeiture of the relevant funds. Alternatively, the agency can elect to make an application to a magistrates' court instead of using the administrative forfeiture route (a reason for this approach might be because the agency considers that the forfeiture is likely to be contested).
35. The power to forfeit money in bank accounts cannot be exercised in respect of money below a minimum threshold in value; new section 303Z8(1) of POCA sets this minimum amount at £1,000. Although the cash procedure (at section 303(1) of POCA) provides for the minimum amount to be specified in regulations, the Government considers that, in the interests of greater clarity and to assist the parliamentary scrutiny of these provisions in the Bill, in this instance the minimum amount should be specified on the face of the Bill. However, the Bill includes, at new section 303Z8(2), provision to vary the sum for the time being specified in new section 303Z8(1).

**Clause 15 – new section 303Z10(1) of POCA: Power to make regulations about giving of an account forfeiture notice**

**Clause 38, Paragraph 2 of Schedule 4 – new Paragraph 10X(1) of Part 4B of Schedule 1 to the Anti-Terrorism Crime and Security Act 2001: Power to make regulations about giving of an account forfeiture notice**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* Negative

36. This delegated power also applies to the new powers to forfeit bank accounts. As noted above, the powers contain provision for the administrative forfeiture of bank accounts. This procedure begins with the relevant law enforcement agency giving an “account forfeiture notice” to the individual. If the individual objects to that notice, the agency has the option of pursuing forfeiture at court. If no such objection is made, the money will be forfeited (subject to further appeal).

37. Again, this is modelled on the existing procedures for cash. Section 297A(3) of POCA provides that the Secretary of State must make regulations about how a notice is to be given. New section 303Z10 makes similar provision in respect of administrative forfeiture notices for these powers. We consider that it is appropriate for the procedure to be set out in regulations, as it will necessarily involve some technical and detailed provisions, including to whom a notice is to be given and the manner in which it is to be given (see new section 303Z10). The regulations are expected to make similar provision to that contained in the Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) Regulations 2015 (SI 2015/857). In addition, setting the process out in regulations allows the possibility for these requirements to be readily updated as necessary.

38. By virtue of section 459(4) of POCA the regulations will be subject to the negative procedure. Given that the framework for account forfeiture notices will be set out in primary legislation, the Government considers that the negative procedure provides an appropriate level of parliamentary scrutiny for regulations setting out the administrative processes in respect of the giving of such notices. In addition, the application of the negative procedure mirrors the position in respect of the equivalent power in section 297A of POCA.

39. Clause 38, Schedule 4 makes equivalent provision within Schedule 1 to ATCSA for the forfeiture of terrorism property held in bank accounts and the justification for the power in Para 10X(1) requiring the Secretary of State to make regulations about how an account forfeiture notice is to be given is the same as for the equivalent POCA provision.

Assault and obstruction offences

**Clause 23(2) and (3) – amended sections 444(3) and 445(1)(b) of POCA: Power to make provision creating offences in relation to external requests and orders, and in relation to external investigations.**

*Power conferred on:* Her Majesty

*Power exercised by:* Order in Council

*Parliamentary Procedure:* Negative

40. Sections 444 and 445 of Part 11 (international co-operation) of POCA provide the Secretary of State with powers to make provisions to give effect to requests and orders from overseas countries, and orders and warrants in investigations, by Order in Council. These sections are amended to allow criminal offences which are equivalent to those in new section 453B to be included in those provisions. New section 453B makes it an offence to assault or wilfully obstruct an officer from the Serious Fraud Office in the exercise of his or her powers.
41. The Orders made under sections 444 and 445 provide the procedure by which officers acting in response to an external request or order can exercise their functions under POCA. These amendments allow the Secretary of State to create equivalent criminal offences where an officer is assaulted or obstructed in those circumstances, as would apply where the officer was acting in pursuance of a domestic matter. By extension, the power to create “equivalent” offences requires that the maximum penalty for any offence created through an Order in Council must also be equivalent to that provided for in new section 453B.
42. These powers are exercised by Order in Council, using the negative procedure. As the amendments are limited in scope as set out above, it is not considered necessary to amend the powers in sections 444 and 445 so that they are exercisable by affirmative procedure.

Miscellaneous Scottish provisions

**Clause 27 – new section 131ZA(7) of POCA: Power to amend section 131ZA**

*Power conferred on:*                    *The Scottish Ministers*

*Power exercised by:*                *Regulations made by Scottish statutory instrument*

*Parliamentary Procedure:*        *Affirmative*

43. Clause 27 inserts new section 131ZA into POCA to enable a court in Scotland to order any realisable property in the form of money in a bank or building society account to be paid to the appropriate clerk of court in satisfaction of a confiscation order. The power to seize money applies where the money is held in a bank or building society account by an accused person who is the subject of a confiscation order, or money which has been seized from an accused person under relevant seizure powers (as defined in subsection (9) of the new section), as evidenced by the police or HM Revenue and Customs.

44. Accounts containing easily realisable cash or cash-like financial instruments, not just money held in an account with a bank or building society should be capable of being the subject of orders made by the courts under new section 131ZA of POCA. To this end, new section 131ZA(7) confers a power on the Scottish Ministers to amend, by regulations, new section 131ZA so as to apply the money seizure power to money held by other specified financial institutions or other realisable financial instruments or products of a specified kind, for example share accounts, pension accounts or 'bitcoins'. Given the wide range of potential financial institutions and, more particularly, of products provided by the financial services industry, together with the constantly evolving nature of such products, it is considered that these are matters more appropriately left to secondary legislation. As new section 131ZA only applies to money, any extension of the power in this section to cover a financial instrument or product may need to modify the section to provide for the instrument or product to be realised into cash; new section 131ZA(7) enables regulations to be made to this end. By virtue of the amendment made to section 459 of POCA by paragraph 79(6) of Schedule 5 to the Bill, this regulation-making power is subject to the affirmative procedure as befitting a Henry VIII power of this kind. Broadly equivalent powers are contained in sections 67 and 215 of POCA in relation to England and Wales and Northern Ireland respectively.

**Clause 36(4) – new Part 2A to Schedule 1 of ATCSA: Power to forfeit terrorist cash without a court order**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative

45. Clause 36(4) inserts new Part 2A (which comprises new paragraph 5A-5F) into Schedule 1 to ATCSA which provides for the administrative (i.e. without court order) forfeiture of terrorist cash in England and Wales, Scotland and Northern Ireland. These provisions enable certain senior law enforcement officers to give a notice – referred to as a cash forfeiture notice – for the purpose of forfeiting cash which has been seized and detained under existing provisions in ATCSA, if satisfied that the cash is terrorist cash. It is the case that terrorist cash is forfeited without objection under the existing provisions of ATCSA, which require law enforcement to apply to the Court for a forfeiture order. These provisions are designed to reduce the administrative and financial burden on the courts and law enforcement by enabling such cash to be administratively forfeited instead. Where law enforcement officers are satisfied that detained cash is terrorist cash, they may give a cash forfeiture notice indicating their intention to administratively forfeit it, unless an objection is made within a specified period. New paragraph 5A(4) specifies what information the cash forfeiture notice must include. New paragraph 5A(6) requires the Secretary of State by regulations made by statutory instrument to make provision about how a cash forfeiture notice must be given. New paragraph 5A(7) provides that the regulations may *inter alia* specify: the manner in which a cash forfeiture notice may be given, allow for the notice to be given by publication, and the circumstances in which a notice is to be treated as having been given. New paragraph 5A(8) provides that regulations must ensure that the cash forfeiture notice is given to every person notified of the detention of the cash under paragraph 3(2) of ATCSA.

46. The power is modelled upon sections 297A – 297G of POCA in relation to administrative forfeiture of cash under that Act. It is considered appropriate the detail relating to the service of the forfeiture notice should be made by way of negative resolution instrument. This is a matter of practical procedure which will need to be kept under review and revised from time to time to ensure best practice. Permitting amendment to take place by way of negative resolution means that this can be achieved quickly.

Part 3 – Offences of facilitation of tax evasion

**Clause 44(4): Power to make regulations bringing into force guidance about preventing the facilitation of tax evasion offences**

*Power conferred on: The Chancellor of the Exchequer*

*Power exercised by: Regulations made by statutory instrument*

*Parliamentary Procedure: Negative resolution.*

47. Part 3 of the Bill provides for two corporate offences of failure to prevent facilitation of tax evasion. Clause 44(1) requires the Chancellor of the Exchequer to publish guidance. Such guidance will inform the “reasonable procedures” defence for each of the new offences. Where a person associated to a relevant body commits a tax evasion facilitation offence the relevant body will be guilty of the new corporate failure to prevent offence where it cannot show that it had reasonable procedures in place to prevent those associated with it from committing such offences (or where it was unreasonable to expect such procedures).

48. The duty to publish guidance is considered necessary to guide business in the formulation of reasonable procedures. Absent such guidance there is a risk that relevant bodies may take an excessively risk averse approach, adopting excessively restrictive procedures, thereby hindering economic productivity. Moreover, HM Revenue and Customs (“HMRC”) has specialist knowledge and insight into how tax evasion occurs and sharing this, in the form of guidance, will help industry implement the most effective and robust procedures possible. HMRC currently issues guidance on money laundering risks to some industries that it supervises under the Money Laundering Regulations 2007.<sup>1</sup> It might be thought somewhat unfair for HMRC to allege procedures are unreasonable whilst it needlessly keeps from industry the insight that it has accrued from its enforcement work.

49. It is not thought practical for the necessary guidance to sit within regulations or primary legislation. The guidance will often address in detail highly technical, sector specific, information and this needs to be presented in a discursive and easy to follow format.

50. The duty to publish guidance is supplemented by a power to endorse guidance published by others. This is considered necessary as it allows industry bodies to publish underlying guidance that is more closely tailored to the specific risks and practices of a particular sector of industry. It is right that those most expert in an industry help draft the guidance that addresses that industry’s particular risks. However, this guidance will only be endorsed where the guidance published is

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<sup>1</sup> <https://www.gov.uk/government/collections/money-laundering-regulations-forms-and-guidance>.

consistent with, and capable of sitting beneath, the overarching guidance issued by the Chancellor.

51. Despite section 9 of the Bribery Act 2010 providing a powerful precedent for not requiring parliamentary scrutiny of the guidance to be published, it is thought preferable to apply the negative resolution procedure in this instance given that the reasonable prevention procedures defence, informed by the guidance, plays a very significant role in the operation of the relatively broad offences. Some further support is found in relation to Codes issued under section 52B(4) of the Data Protection Act 1998, and sections 47S, 195S, 292, and 377 of POCA.
52. Whilst it is thought that parliamentary scrutiny is apt, it is not thought that the affirmative resolution procedure is required. The guidance does not change the law or impose legal duties: it is merely advisory. It does not apply to, or impose duties upon, public authorities. Moreover, relevant bodies are perfectly able and entitled to depart from the guidance and doing so gives rise to no legal liability.
53. Whilst the guidance will illustrate how the defence operates, with examples, importantly it only *informs* the defence and does not *determine* it. Whilst it provides examples of reasonable procedures derived from information provided by consultees, departure from the guidance will not render a relevant body guilty: there may well be many different approaches that are equally reasonable in the circumstances. Conversely, compliance with the guidance does not provide a safe harbour and render the relevant body immune from prosecution: formalistic but ineffective compliance does not suffice and a relevant body may face specific risks arising from its business for which it will be required to make bespoke provision. The final say on reasonableness will always rest with the criminal courts.
54. It is thus thought appropriate that that publication of guidance under clause 44 be scrutinised by Parliament via the draft guidance being laid before Parliament and coming into force by way of regulations under the negative resolution procedure. It is also thought unnecessary for the power to endorse consistent sector specific guidance published by others to be subject to any parliamentary procedure. Such underlying guidance will be consistent with the Chancellor's overarching guidance that has already been subjected to parliamentary scrutiny. Moreover, such guidance may need to be issued at speed in response to emerging threats.

Part 5 – General

**Clause 50, Schedule 5, paragraphs 11, 12 and 13 amend sections 115, 121 and Schedule 14 to the Terrorism Act 2000 (TACT) so that the Secretary of State must, under paragraph 6 of Schedule 14 of TACT, issue a code of practice about the exercise of functions under new Parts 4A and 4B of Schedule 1 to ATCSA inserted by clauses 32 and 33.**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by Statutory Instrument

*Parliamentary procedure:* Affirmative resolution

55. These amendments mean that the existing power under Para 6 of Schedule 14 to TACT must be exercised by the Secretary of State in order to issue a Code of Practice in relation to the exercise by authorised officers of powers given to them under new Parts 4A and 4B of Schedule 1 to ATCSA. These are the powers of civil recovery in respect of specified personal property and money deposited in bank and building society accounts. A Code of Practice must already be issued about the power to seize and forfeit terrorist cash in Schedule 1 of ATCSA and this amendment continues that approach. It is considered necessary to ensure that a statutory code of practice is applicable to the exercise of these potentially intrusive powers to ensure consistency of approach to the exercise of the powers and to ensure that they are used in a targeted and proportionate manner. It is considered that affirmative resolution provides the right level of parliamentary scrutiny over the content of the Code providing a high degree of parliamentary scrutiny over the practical and detailed operation of these powers.

**Clause 51(1) to (4): Power to make further consequential amendments**

*Power conferred on:* Secretary of State / the Scottish Ministers/ Northern Ireland Department of Justice

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution

56. Clause 51(1) to (4) confers power on the Secretary of State, the Scottish Ministers and Northern Ireland Department of Justice to make such consequential provision as they consider appropriate for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation (subsections (6) to (8)). The Government's view is that, in a context such as this where the Bill expressly states that a power to make consequential provision includes a power to amend primary legislation, there is a

clear implication that the power to make consequential provision also includes the power to modify primary legislation in other ways (because if there is power to make amendments there is power to do something falling short of amendments).

57. The powers conferred by this clause are wide but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions in the Bill. There are various precedents for such provisions including section 85 of the Serious Crime Act 2015 and section 61 of the Psychoactive Substances Act 2016. Schedule 4 to the Bill already includes a large number of changes to various enactments as a consequence of the provisions in the Bill but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation. If regulations under this clause do not repeal, revoke or otherwise amend primary legislation they will be subject to the negative resolution procedure (by virtue of clause 52(5), (7) and (9)). If regulations under this clause do repeal, revoke or otherwise amend provision in primary legislation it will be subject to the affirmative resolution procedure (by virtue of clause 52(4), (6) and (8)) as befitting a Henry VIII power of this type. In practice, so far as the applicable parliamentary procedure is concerned, every textual amendment of primary legislation and every other modification of primary legislation that is equivalent to a textual amendment will be included in an instrument that is subject to the affirmative procedure. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

#### **Clause 55(1) to (3) and (5): Commencement power**

*Power conferred on:* Secretary of State / the Treasury / Scottish Ministers / Northern Ireland Department of Justice

*Power exercisable by:* Regulations made by statutory instrument / Scottish Statutory Instrument / Northern Ireland Statutory Rules

*Parliamentary Procedure:* None

58. Clause 55(1) to (3) and (5) contains standard powers for the Secretary of State, the Treasury, the Scottish Ministers and the Department of Justice in Northern Ireland to bring provisions of the Bill into force by commencement regulations. As usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

59. Subsections (8) to (11) confers power on the Secretary of State, the Treasury, the Scottish Ministers and the Department of Justice in Northern Ireland to make

such saving, transitional or transitory provisions as they consider appropriate in connection with the coming into force of the provisions in the Bill. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner. Such powers are often included, as here, as part of the power to make commencement regulations (for example, section 88(9) of the Serious Crime Act 2015) and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them.

**Home Office and HM Revenue & Customs**

**28 February 2017**

## Annex A

### *Unexplained Wealth Orders*

1. As explained above at paragraph 9, Cl. 1-6 insert provisions into Part 8 of POCA which confer new investigate powers upon a range of law enforcement authorities. Existing S. 377, 377ZA, 377A and 410 of POCA require the Secretary of State, the Department of Justice, the Attorney General and the Scottish Ministers to bring into force by way of order a Code of Practice about the exercise of functions under Part 8 of POCA. Each is subject to the affirmative procedure before the relevant legislature. Each permits the relevant authority to revise Codes of Practice subject to the affirmative procedure and accordingly these powers will need to be exercised to take account of the new functions conferred by Cl. 1-6.
2. The effect of clauses 14-16 is to insert provisions into POCA which extend various powers in Parts 2, 4, 5 and 8 to the SFO and which extend powers in Part 5 to the FCA and HMRC. Sections 47S, 195S, 292, 377, and 377A require the Secretary of State (in consultation with the AGO where appropriate) to bring into force by way of order a Code of Practice about the exercise of functions under Parts 2, 4, 5 and 8 of POCA. Each is subject to the affirmative procedure before the relevant legislature. Each permits the relevant authority to revise Codes of Practice subject to the affirmative procedure and accordingly these powers will need to be exercised.

### *Accredited Financial Investigators*

*A number of provisions confer powers upon accredited financial investigators which will necessitate the exercise of the power in S. 453 of POCA. For ease of reference these are grouped together below.*

**Clause 9(4) – new section 336D(7)(h) – power to specify description of an accredited financial investigator for purpose of seeking an extension to the moratorium period.**

**Clause 12 – new sections 303C(9)(d), 303E(4)(e), 303L(5)(d), 303O(2)(d): Powers to specify descriptions of accredited financial investigator for various purposes of new Chapter 3A of Part 5 of POCA**

**Clause 13 – new section 303Z1(6), 303Z2(7) of POCA: Power to specify description of accredited financial investigator for the purposes of new Chapter 3B of Part 5 of POCA**

**Clause 50, Schedule 5, paragraph 59– new sections 378(3C)-(3F) in POCA: Power to specify description of accredited financial investigator for the purpose of detained property investigations and frozen funds investigations.**

*Power conferred on:* Secretary of State

*Power exercised by:* Order made by statutory instrument

*Parliamentary Procedure:* Negative procedure

3. New section 336D(7)(h) confers powers to seek a moratorium extension upon accredited financial investigators. It provides that the accredited financial investigator must fall within a description in an order made by the Secretary of State under S. 453 of POCA.
4. New section 303C confers search powers on a “relevant officer” for the purposes of the forfeiture powers in respect of listed assets. New section 303C(9) defines a relevant officer as an officer of Revenue and Customs, a constable, an SFO officer, or an accredited financial investigator (“AFI”) who falls within a specified description. New section 303E provides the procedure for a relevant officer to obtain prior approval to exercise the power in section 303C, including from a “senior officer”; in the context of AFIs, new section 303E(4)(f) provides that this must be an AFI who falls within a description specified in an order made under S. 453 of POCA.
5. New section 303L gives the relevant court a power to make an order for further detention of a listed asset which has been seized under new section 303J. New section 303L(5) sets out which officers may apply for this order; in the context of AFIs, new section 303L(5)(d) provides that this must be an AFI who falls within a description specified in an order made under S. 453 of POCA.
6. New section 303O sets out the procedure for an application to the court for a forfeiture order in respect of property detained under section 303L. New section 303O(1) provides that the application may be made by a person specified in section 303O(2); in the context of AFIs, new section 303O(2)(d) provides that this must be an AFI who falls within a specified description in an order made under S. 453.
7. New section 303Z1 enables a “senior officer” to apply for an account freezing order. New section 303Z1(6) includes a definition of a senior officer for these purposes; that definition again includes an accredited financial investigator who must be of a specified description in an order made under S. 453.
8. Accredited financial investigators are provided for by S. 3 of POCA as financial investigators who have been trained and accredited by the National Crime Agency to undertake certain investigation, restraint, search and seizure functions.

As a category, AFIs have access to many of the investigative and enforcement powers in POCA, and the exact nature of which investigators can use each particular power is set out in regulations. Under S. 453 of POCA, the Secretary of State may by order provide that a specified reference in POCA to an accredited financial investigator is a reference to such an investigator who falls within a specified description. Such order might provide, for example, that accredited financial investigators employed as civilian members of a police force or those in the employment of a local authority can access a particular power. Orders are made where it is necessary to define the term “senior officer” in application to an AFI.

9. The Government considers that requiring exercise of the S. 453 power in respect of the additional POCA powers conferred upon accredited financial investigators is appropriate as it corresponds to the existing approach for regulating the use of accredited financial investigators in other provisions in POCA. The ability to stipulate the description of accredited financial investigators who can use these powers by regulations ensures that changes can be made to reflect the operational needs of the organisations with an interest in pursuing civil recovery. This helps to ensure the effectiveness of the provisions. It is also appropriate for technical provisions of this nature to be dealt with in regulations.
10. Regulations made under section 453 of POCA are subject to the negative procedure. The Government does not consider that the extension of this regulation-making power warrants a change in the existing level of parliamentary scrutiny.