

**DRAFT ADDITIONS TO THE
CODE OF PRACTICE (INVESTIGATIONS)
UNDER THE PROCEEDS OF CRIME ACT 2002**

The investigation powers conferred by the Proceeds of Crime Act 2002 (POCA) may involve significant interference with the privacy and property of persons whose personal information, material or documents are seen and/or seized, whose premises are searched or whose personal information is obtained. The powers therefore need to be fully and clearly justified before they are used, and their use should be proportionate to the outcome being sought.

The purpose of the Code of Practice (Investigations) issued under POCA is to guide law enforcement officers in the lawful exercise of their functions when conducting investigations under Part 8 of POCA. The code is also of interest to persons who are subject to the powers, and the code itself makes clear that it should be widely available, for example in police stations and border control areas, where the powers are likely to be used.

The code is admissible as evidence in criminal or civil proceedings, and a court may take account of any failure to comply with the code in determining any questions(s) in the proceedings.

The two draft passages of this code that follow have been prepared to aid parliamentary scrutiny of two important provisions in the Criminal Finances Bill. One passage covers amendments to the disclosure order provisions, the other covers the use of a new power – unexplained wealth orders. These passages are an initial draft, are subject to further changes and do not constitute a fully revised code. The entire Code of Practice (Investigations), which covers all of the powers available under Part 8 of POCA, will be updated in due course.

Once updated, the code will be subject to revision following a statutory consultation period involving stakeholders and members of the public. When this consultation is complete, an updated draft will be laid before Parliament for approval under affirmative procedure.

Any queries on these draft passages can be directed to the Criminal Finances Bill Team (criminalfinancesbill@homeoffice.x.gsi.gov.uk).

**Home Office
April 2017**

UPDATED POCA CODE OF PRACTICE
DISCLOSURE ORDERS AND UNEXPLAINED WEALTH ORDERS

DISCLOSURE ORDERS

1. Persons to whom this code applies should familiarise themselves with the introduction section which sets out general matters relating to all the orders and warrants.

Definition

2. A disclosure order under section 357 authorises an appropriate officer to give to any person considered to have information relevant to an investigation, written notice under section 357(4) requiring that person to answer questions, provide information or produce documents with respect to any matter relevant to that investigation. A disclosure order is available in confiscation, money laundering and civil recovery investigations. A disclosure order is not available in detained cash, detained property or a frozen funds investigations. This code does not provide guidance on the use of disclosure notices under other legislation.
3. Once a disclosure order has been made, appropriate officers may use the power set out in section 357(4) to issue a notice throughout the investigation in respect of which the order was sought. Thus, unlike the other orders which have to be applied for separately on each occasion, a disclosure order granted by a court gives continuing powers for the purposes of the investigation. The appropriate officer must serve a written notice on any person he wishes to question or to ask to provide information or documents.
4. Under section 357(6), a person need comply with a notice only where evidence of the authority to give the notice is provided. A copy of the disclosure order authorising the serving of the notice should therefore be given to the person on each occasion a notice is served upon them.

Persons who can apply for a disclosure order

5. In relation to a confiscation or money laundering investigation, an appropriate officer must have the approval of a senior appropriate officer before making the application to court (unless that officer is a senior appropriate officer).
6. A senior appropriate officer for a confiscation investigation is:
 - a senior officer of the NCA;
 - a senior police officer who is not below the rank of superintendent;
 - an officer of HM Revenue and Customs who is not below such grade as is designated by the Secretary of State as equivalent to that rank;
 - an immigration officer who is not below such grade as is designated by the Secretary of State as equivalent to that rank; or

- an Accredited Financial Investigator (AFI) who falls within a description specified in an order made by the Secretary of State under section 453.
7. A senior appropriate officer for a money laundering investigation is:
- a senior police officer who is not below the rank of superintendent;
 - an officer of HM Revenue and Customs who is not below such grade or equivalent to such rank as is designated by the Secretary of State;
 - an immigration officer who is not below such grade as is designated by the Secretary of State as equivalent to that rank; or
 - an AFI who falls within a description specified in an order made by the Secretary of State under section 453.
8. In relation to civil recovery investigations, an officer of the NCA, an officer of HM Revenue and Customs, and an officer of the Financial Conduct Authority or the relevant Director¹ may apply for disclosure orders.
9. The functions of the Serious Fraud Office and the Director of Public Prosecutions (in relation to England and Wales) in respect of disclosure orders are covered by a code issued by the Attorney General.

Statutory requirements

10. The application must state that:
- a person specified in the application is the subject of an investigation, being carried out by an appropriate officer, into any of: civil recovery, exploitation proceeds, confiscation or money laundering; and
 - the order is sought for the purposes of that investigation.
11. The application should also set out that:
- it is considered that there are reasonable grounds for suspecting that:
 - in the case of a civil recovery investigation, the person specified in the application holds recoverable property or associated property, or has held property that was recoverable property or associated property at the time, or the property specified in the application for the order is recoverable property;
 - in the case of a confiscation investigation, the person specified in the application for the order has benefited from his criminal conduct;
 - in the case of a money laundering investigation, the person specified in the application for the order has committed a money laundering offence;
 - in the case of an exploitation proceeds investigation, the person specified in the application is a person within section 346(2A). A

¹ In relation to England and Wales, a relevant Director means the Director of Public Prosecutions or the Director of the Serious Fraud Office. In relation to Northern Ireland, it means the Director of the Serious Fraud Office or the Director of Public Prosecutions for Northern Ireland.

person is within that section if, for the purposes of Part 7 of the Coroners and Justice Act 2009 (“criminal memoirs etc.”), exploitation proceeds have been obtained by the person from a relevant offence by reason of any benefit derived by the person.

- there are reasonable grounds for believing that:
 - the person the application specifies as appearing to be in possession or control of the information so specified is in possession or control of it;
 - the information is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought; and
 - it is in the public interest for the information to be produced or for access to it be given, having regard to the benefit likely to accrue to the investigation if the information is obtained, and to the circumstances under which the person the application specifies as appearing to be in possession or control of the information holds it.

Particular action to be taken in making an application

12. An application should state:

- in the case of civil recovery, details of the property or the name of the person under investigation;
- in the case of confiscation, money laundering or exploitation proceeds investigations, the name of the person under investigation;
- that the order is sought for the purposes of that investigation;
- whether the appropriate officer is likely to require answers to questions and/or information and/or documents;
- if applicable and practicable, the name of the person or persons against whom the power may be used;
- the grounds on which the application is made (including details of the investigation); and
- why a disclosure order is required in preference to the other powers of investigation.

13. The appropriate officer should carefully consider what benefit the disclosure order may bring to the investigation, either in itself or as the lead to other avenues of investigation and whether the information could not be acquired as effectively and efficiently from material which could be obtained by other orders.

14. In view of the continuing powers conferred by a disclosure order, the Secretary of State expects that officers authorising applications should have completed and maintained formal accreditation relevant to the functions of a senior appropriate officer (as provided by the NCA under section 3 of POCA).

UNEXPLAINED WEALTH ORDERS

1. This section of the code provides for the use of unexplained wealth orders (UWOs) and contains guidance on specific provisions relating to the use of those orders. This code applies to the following enforcement authorities:
 - The National Crime Agency
 - The Financial Conduct Authority
 - HM Revenue and Customs
2. The functions of the Serious Fraud Office and the Director of Prosecutions (in relation to England and Wales) in respect of UWOs are covered by a code issued by the Attorney General.

Definition

3. A UWO is an investigation tool under Part 8 of POCA intended to assist in building evidence. It is specifically designed to support the building of a case for civil recovery under Part 5 of POCA, but can also be used for other reasons both criminal and civil (provided there is a legal basis for using such information).
4. A UWO provides an enforcement authority with the ability to require an individual or company to provide specific documents or information in order to establish whether the asset(s) in question have been legitimately obtained. As such, it provides an alternative means of obtaining information and allowing for the consideration of action against persons and their property about whom little information is available.

Persons who can apply for a UWO

5. An application for a UWO may be made, without notice, to the High Court by an enforcement authority. An enforcement authority² is:
 - The National Crime Agency
 - Her Majesty's Revenue and Customs
 - The Financial Conduct Authority
 - The Director of the Serious Fraud Office, or
 - The Director of Public Prosecutions (in relation to England and Wales) or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland).
6. An application for a UWO is made by the enforcement authority, as set out above, rather than an appropriate officer of that authority. The authority concerned should give consideration to implementing a suitable assurance and authorisation process that ensures appropriate applications will be made. The authority (or Director, as appropriate) should also ensure that properly trained and qualified members of their staff are making applications in their name.

² As defined in section 362(A)(7)

7. Consideration of costs should not influence an enforcement authority's decision to apply for a UWO. The authority should be mindful of cost capping provisions contained within the practice direction of the Civil Procedure Rules.

Statutory requirements

8. An application for a UWO should be made to the High Court. The application must specify or describe the property in respect of which the order is sought, and specify the person whom the enforcement agency thinks holds the property ("the respondent").³
9. The application should state that:
 - the respondent holds the specified property and that the aggregate value of that property is greater than £50,000;
 - there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property;
 - the respondent is a:
 - non-EEA politically exposed person (as specifically defined in POCA)⁴, or
 - there are reasonable grounds to suspect that the respondent (or a person connected with them) is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), and details as to the basis of that suspicion.

Particular action to be taken before making an application

10. The enforcement authority should carefully consider the value of evidence that may be obtained through a UWO. One of the main purposes of a UWO is to provide law enforcement with a tool to obtain information and documentation in relation to property that appears to be disproportionate to the known income of an individual or company. A fundamental aim of the power, therefore, is to access evidence that would otherwise not be available. Although not an absolute requirement, the applicant should consider whether alternative tools of investigation could be used in obtaining any relevant documents and information.
11. Whether there are reasonable grounds for suspecting that there is insufficient lawfully obtained income to explain the wealth (i.e. holding of the property) will depend on the circumstances in each case, and should be carefully considered. Applicants should be able to explain the basis for their suspicion by reference to disclosable intelligence or information about, or some specific behaviour by,

³ See section 362(A) (2). Section 362(A) specifies what an order must contain as well as the requirement to comply within an order within a certain timeframe.

⁴ Defined in section 362B (7) & (8). A politically exposed person is an individual who has been entrusted with prominent public functions by an international organisation or a state outside the UK or EEA. It also includes family members and close associates.

the individual or company concerned (including open source material from overseas where there may be public registers relating to property and public servants income).

12. Applicants should take reasonable steps to liaise with other agencies in order to:
 - establish whether they already own material that explains a person's wealth, and
 - ensure appropriate action, thereby avoiding duplicating enquiries that may already be underway.
13. In considering whether to apply for a UWO, the enforcement agency should have made reasonable attempts to:
 - establish the identity of the beneficial owner, for example in cases where a property is held in trust;
 - identify either –
 - the politically exposed person or associate of such;
 - the type of serious crime in which the respondent, or person associated with the respondent, is suspected of being involved.
14. In drafting the requirement wanted for a UWO in the application, care should be taken to list strict requests for information. The applicant should consider what precise information they require and categorise this in a structured fashion. This will assist in avoiding receiving responses that comply with the UWO but are vague or minimal.

Service of documents

15. If the enforcement authority or court is serving documents overseas, they must do so in accordance with any applicable international law. The enforcement authority should also consider the requirements (if any) of the domestic law of the recipient country (if known).

Requirements for making an application

16. In addition to fulfilling the statutory requirements at (9), above, the applicant must specify the property in respect of which the order is sought. It is immaterial whether or not other persons - in addition to the respondent - also hold the property, or whether the property was obtained by the respondent before or after the UWO provisions came into force. The information provided to the court should be sufficient to frame the requirements of the order, as the order places an obligation on the respondent to explain the source of the specified asset(s) within a time period set by the court.

Points to note

17. In coming to a decision as to whether there are reasonable grounds to suspect that the respondent's lawfully obtained income would have been insufficient to obtain the property, the Court will:
- have regard to any mortgage, charge, or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purposes of obtaining the property;
 - assume that the respondent obtained the property for a price equivalent to its market value;
 - consider income to be "lawfully obtained" if it is obtained lawfully under the laws of the country from where the income arises;
 - interpret "known" sources of the respondent's income to mean the sources of income that are reasonably ascertainable from available information at the time of making an application. This will include open source material, including from other jurisdictions;
 - consider the other lawful financial benefits available to the respondent aside from income, such as capital gains. Although not an express requirement, it is reasonable to expect the High Court to assess the full financial circumstances when considering an application.

Providing of information and production of documents

Where a respondent fails to comply with an order

18. As explained in paragraph (14), above, a respondent must respond to an order within a certain time specified by the court. This period is known as the 'response period', but different time periods may be specified in respect of different requirements made by the order.
19. If the respondent fails to comply before the response period has expired, the property concerned is presumed to be "recoverable property"⁵. In this case, the enforcement authority can consider whether to take further action against the property. This may include recovering the property using the civil recovery powers provided by Part 5 of POCA. If civil recovery proceedings are commenced, the respondent can provide evidence to rebut the presumption that their property is recoverable in those proceedings.
20. A respondent will be treated as having failed to comply with a UWO if, without reasonable excuse, he fails to comply with all of the requirements imposed by the Order. It is important to note that where a response is provided to a particular requirement in the UWO, but that response is considered to be unsatisfactory, this does not mean that he has failed to comply with the order. This would amount to "purported compliance" (see section 362D)⁶.

⁵ Recoverable property is property obtained through unlawful conduct (section 242 POCA).

⁶ An example of this would be where an individual provides nothing more than the bare minimum of information necessary to address each requirement in the order, and as a result the agency is not satisfied by

Where a respondent complies, or purports to comply, with an order

21. If, within the response period, the respondent complies or purports to comply with the requirements imposed by an order, and there is no interim freezing order the appropriate enforcement authority may (at any time) determine what enforcement or investigatory proceedings, if any, ought to be taken in respect of the property. This will include considering whether to refer any evidence to the agency that has discretion over commencing criminal proceedings. If it is determined that no further proceedings are necessary, this does not prevent such proceedings being taken subsequently.
22. It is also to be noted that knowingly or recklessly making a statement that is false or misleading is a criminal offence under section 362E of POCA.
23. The term 'purported compliance' applies in cases where a person has provided a response to each of the requirements of an order but the recipient is not wholly satisfied with the response. The provision is required to ensure clarity in the circumstances in which the presumption that the property is recoverable will arise. It is therefore incumbent on the applicant to ensure that the terms of the order are specific and clear in order to minimise the likelihood of an unsatisfactory response being provided.
24. However, if an interim freezing order (see paragraphs 29- 36 below) is in effect, the enforcement authority must make this determination within 60 days starting with the day of compliance⁷ or purported compliance.
25. Subject to certain exceptions, a statement made by a person in response to a requirement imposed by a UWO may not be used in evidence against that person in criminal proceedings. Exceptions are –
 - In case of proceedings under Part 2 or 4;
 - On a prosecution for an offence under section 362E;
 - On a prosecution for an offence under section 5 of the Perjury Act 1911 or Article 10 of the Perjury (Northern Ireland) Order 1979 (S.I. 1979/1714 (N.I. 19)) (false statements); or
 - On a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement made in response to a requirement imposed by a UWO.
26. If the enforcement authority considers that investigatory or enforcement proceedings could be appropriately taken by another agency, they need to be satisfied that there is a legal basis for sharing the information/evidence. It is also important to note that they are only passing the information/evidence to the other agency for them to take their own independent operational decision to

his explanation as to the derivation of the property. In those circumstances, the rebuttable presumption that the property is recoverable does not arise, but the enforcement agency may elect to take further civil recovery action against the property in light of the evidence (or lack of evidence) provided by the individual.

⁷ Section 362D (3) - where the requirements are complied with at different times, this means the last date upon which action to comply with the order is taken.

pursue appropriate investigations or proceedings. The enforcement agency is not tasking the other agency.

27. The enforcement authority may take copies of any documents produced by the respondent in response to the requirements of an order. Such documents (which may be originals) may be retained for as long as it is necessary to retain them in connection with an investigation of the type specified in section 341⁸. Documents may also be retained if the enforcement authority has reasonable grounds to believe that they may need to be produced for the purposes of any legal proceedings (and would otherwise be unavailable). In such circumstances, they may be retained until the proceedings are concluded.
28. The UWO provisions do not provide an express exclusion in respect of legally privileged material. This should rarely arise as it is unlikely that material and information sought by way of a UWO will include information which is privileged. The High Court will consider this issue, when relevant, both in considering the application and in proceedings that use information gathered in response to a UWO.

Interim freezing orders

Definition

29. An interim freezing order is an order that allows for the freezing of property identified as a result of a UWO. It is intended to prevent property being dissipated while it is subject to the order.

Persons who can apply for an interim freezing order

30. An application for an interim freezing order can only be made by the enforcement authority that applied for the UWO to which the interim freezing order relates.

Particular action to be taken in making an application

31. An application for an interim freezing order may be made to the High Court as part of a UWO hearing, and it should be made at the same time as a UWO. The UWO and interim freezing order may be combined in one document.
32. An interim freezing order cannot be made in advance of a UWO, nor can it be applied for as an alternative to freezing orders under other provisions.
33. The enforcement authority should consider whether to apply for an interim freezing order. This should be considered on the individual facts of the case, but could include the following factors –

⁸ Section 341 makes provision for civil recovery investigations, money laundering investigations, confiscation investigations and detained cash investigations.

- The likelihood, based on available evidence or the nature of the case, that the property may be dissipated;
 - The value of the property;
 - Other interests in the property. This may include the complexity of the ownership arrangements of the property;
 - The location of the respondent, in particular if he/she is, or is normally, overseas;
 - The ability to monitor the property by other means; for example by way of the Land Registry;
 - In relation to residential property, that there is no likelihood of the property being disposed of in the time period of the UWO.
 - A realisation that a case will be expected to progress more quickly if relevant property is frozen.
 - Consideration of costs liability
34. It is important to note that the only test for the court when considering an application for an interim freezing order is whether making the order would avoid the risk of frustrating any civil recovery order that might be subsequently made.
35. In applying for an interim freezing order, the enforcement authority should also consider the possible need for a receiver. A receiver may not be necessary if the property does not require active management or if this can be achieved in another manner.
36. The enforcement authority or any person affected by an interim freezing order can apply for the order to be varied or discharged at any time.