

EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (REFERENCES TO FINANCIAL INVESTIGATORS) (ENGLAND AND WALES AND NORTHERN IRELAND) ORDER 2021

2021 No. 640

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This Order specifies which type of accredited financial investigator can exercise which functions under the Proceeds of Crime Act 2002 (“POCA”) in England, Wales and Northern Ireland. It revokes and replaces a number of Orders. It expands the list of organisations whose accredited financial investigator staff can exercise POCA functions to include the London Fire Commissioner, the Information Commissioner’s Office, the Department for Transport and the Department for the Economy, Northern Ireland. Further changes to the revoked Orders include providing for greater consistency as to when powers are available to particular organisations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This statutory instrument is part of a wider package to implement provisions of the Criminal Finances Act 2017 (CFA) on their commencement in Northern Ireland. It will come into force on the same day as eight other statutory instruments. These instruments have a shared purpose of commencing the new CFA powers in Northern Ireland, although this order also makes changes unrelated to this.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales and Northern Ireland (apart from repeals, which have UK extent).
- 4.2 The territorial application of this instrument is England and Wales and Northern Ireland.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 POCA provides, amongst other things, for the confiscation or civil recovery of the proceeds of crime and criminal property. It is also the principal money laundering legislation for the UK.

6.2 POCA provides for a number of powers that can be exercised by an AFI, including:

- 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 relation to England and Wales and section 191 in relation to Northern Ireland);
- The power to search for, seize and detain property with a view to its future realisation. This power supports enforcement where a confiscation order following a conviction (sections 47A to 47R of POCA in relation to England and Wales and sections 195A to 195R in relation to Northern Ireland); and
- The powers to search for, seize, detain and seek the forfeiture of cash suspected of being obtained through the proceeds of crime or intended for use in unlawful conduct (sections 289 to 303A of POCA).
- The ability to apply to the court for investigation orders and warrants in certain financial investigations under Chapter 2 of Part 8 of POCA (see section 378 of POCA); and
- The power to apply for and execute search warrants in financial investigations (sections 352 and 353 of POCA).

6.3 The CFA amended POCA and provided further powers that can be exercised by an AFI, including:

- The powers to search for, seize, detain and seek the forfeiture of certain personal (or moveable) personal property suspected of being obtained through 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 obtained through the proceeds of crime or intended for use in unlawful conduct (new sections 303Z1 to 303Z19 of POCA);
- The power 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).

6.4 Section 453 of POCA allows the Secretary of State to provide that references in specific provisions of POCA to accredited financial investigators (AFIs) are to be read as references to accredited financial investigators of particular descriptions set out by order (and can do so by reference to a particular grade or training received). The

Secretary of State can provide that specified references to an AFI include staff of organisations listed in an Order made under section 453 of POCA, for some or all of the powers provided by POCA.

- 6.5 To this end, the Secretary of State made the Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2009 (S.I. 2009/975) (“the 2009 Order”). It made provision in relation to England and Wales and Northern Ireland. The 2009 Order was revoked and replaced (but only as far as it related to England and Wales) in the form of the Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2015 (S.I. 2015/1853) (“the 2015 Order”). The 2015 Order was amended in light of the CFA by the Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) (England and Wales) Order 2018 (S.I. 2018/318).
- 6.6 Before being able to exercise powers under POCA, financial investigators must first satisfy accreditation requirements. The scheme for accreditation and training of AFIs is provided by the National Crime Agency (“NCA”) in accordance with section 3 POCA.

7. Policy background

What is being done and why?

- 7.1 Financial investigators who have been trained and accredited by the NCA will fall within the definition of an AFI for the purposes of POCA. Where a POCA power applies to all AFIs, this Order limits the powers to the descriptions of AFI specified for that power. Where a POCA power only applies to an AFI specified by Order, the Order switches the power on for the descriptions specified for that power.
- 7.2 This Order simplifies the existing law by revoking and replacing the 2009 Order and the 2015 Order, thereby establishing a single order describing the AFIs able to use the powers of POCA listed therein.
- 7.3 This Order adds a number of organisations to the list of those organisation whose staff can exercise AFI powers. These organisations are the London Fire Commissioner; the Information Commissioner’s Office; and the Department for Transport and the Department for the Economy, Northern Ireland.
- 7.4 This Order also standardises the approach to executive agencies of government departments (by making it clear that a reference to a government department includes all the department’s executive agencies). The following agencies have been removed from the legislation, but will continue to be able to access the AFI powers by their parent department being listed:
- The Driver and Vehicle Standards Agency (via the Department for Transport).
 - The Intellectual Property Office (via the Department for Business, Energy and Industrial Strategy).
 - Medicines and Healthcare products Regulatory Authority (via the Department of Health and Social Care).
 - Northern Ireland Environment Agency (via the Department of Agriculture, Environment and Rural Affairs, Northern Ireland).
 - Rural Payments Agency (via the Department for Environment, Food and Rural Affairs).

- 7.5 The 2009 Order and the 2015 Order both made provision for members of staff of the Serious Fraud Office. Given the coming into force of amendments to POCA providing for SFO officers to use the powers directly on the face of the Act, it is no longer necessary to make such provision in an order such as this in respect of most powers.
- 7.6 The Order also extends the additional powers the CFA (set out in paragraph 6.3) provided AFIs to certain organisations operating in Northern Ireland, which already have some AFI powers granted by POCA. In addition to the Department for the Economy (see paragraph 7.3), a number of Northern Ireland agencies have access to the AFI powers: the Department of Agriculture, Environment and Rural Affairs; the Department for Infrastructure; the Department for Communities; and the Police Service of Northern Ireland.
- 7.7 Whilst these organisations already have access to powers set out in paragraph 6.2, they will now have access to the powers outlined in paragraph 6.3. The Department for Regional Development has changed its name since the 2009 Order. This Order reflects its new name: the Department for Infrastructure.
- 7.8 Organisations listed in this Order, who can employ AFIs, will be able to exercise the power in question directly rather than by relying on the police or other law enforcement agencies. Many of the agencies which are being granted powers for the first time in this Order (listed in paragraph 7.3) already rely on the police to recover the proceeds of crime where it is clear that large profits have been made as a result of criminal activity.
- 7.9 In a number of places, the Order reserves powers to senior officers of the organisation concerned (by specifying a minimum grade). There is no provision in the Order for the minimum grade of local authority senior officers. This is due to the varied nature of grading structures in multiple organisations. The NCA's Proceeds of Crime Centre will ensure that only appropriate individuals are trained, and senior officers will only be able to use their powers once being formally accredited.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This Order revokes and replaces the Proceeds of Crime Act 2002 (References to Financial Investigators) (England and Wales) Order 2015 (S.I. 2015/1853) and the Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2009 (S.I. 2009/975), together with Orders amending those Orders.

10. Consultation outcome

- 10.1 Although there is no statutory duty to consult on an order made under section 453 of POCA, the Home Office published a short public consultation to seek views on the inclusion of five additional organisations. Please see the following link for the consultation document: <https://www.gov.uk/government/consultations/proceeds-of-crime-act-2002-changes-to-bodies-granted-accredited-financial-investigatory-powers>

- 10.2 Following the public consultation, the Home Office decided to include the organisations set out in paragraph 7.3 in this Order, in addition to the organisations listed in the previous Orders. The consultation listed the Maritime and Coastguard Agency (MCA) and the London Fire Brigade as suggested bodies to receive AFI powers and it is the policy intention of this instrument that these powers will be exercisable by MCA and London Fire Brigade officials. Powers have accordingly been granted to the London Fire Commissioner and the Department for Transport which ensures access for the London Fire Brigade and the MCA respectively.
- 10.3 While the Home Office considers that confiscation and civil recovery powers would be helpful tools for the Service Police, the decision was taken to not include them in this Order. The Home Office will however continue to work in conjunction with the Proceeds of Crime Centre and the Service Police to agree the best course of action. This decision does not preclude the Service Police from being granted POCA powers in future.

11. Guidance

- 11.1 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.
- 11.2 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.

12. Impact

- 12.1 An Impact Assessment has not been prepared for this instrument as we have considered the overall impact of commencing the CFA in Northern Ireland rather than preparing separate assessments for each statutory instrument in this package.
- 12.2 The overall impact of the commencement of the CFA in Northern Ireland has on business, charities or voluntary bodies has been considered and is negligible.
- 12.3 The impact of the commencement of the CFA in Northern Ireland on the public sector has been considered and is negligible. Most of the agencies listed already employ AFIs and the new bodies listed will have previously relied upon the police to perform their investigations. Investigation bodies will also receive a share of money recovered to incentivise further work in recovering the proceeds of crime.

13. Regulating small business

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

14. Monitoring & review

- 14.1 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 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 ensures that actual casework is examined by the

NCA Proceeds of Crime Centre. Any incorrect use of the powers could result in the withdrawal of accredited status.

- 14.2 In conjunction with key stakeholders, the Home Office will monitor the use of this legislative change in its early stages. The approach to monitoring of this instrument thereafter will involve consideration of the effectiveness and suitability of its provisions in the event that issues arise. As mentioned in 14.1, the operational impact of expanding the list of organisations in the Order will be subject to on-going review by the Proceeds of Crime Centre.

15. Contact

- 15.1 Chloe Wootton at the Home Office, telephone: 07774 782 628 or email: chloe.wootton@homeoffice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Maria Hannan at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Baroness Williams of Trafford at the Home Office can confirm that this Explanatory Memorandum meets the required standard.