



HM Treasury

Powers of Entry review: **final report**

November 2014



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of the Protection of Freedoms Act 2012

November 2014

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Foreword

Powers of Entry are important tools that allow for the necessary enforcement of regulations, enable the effective investigation of offences and facilitate the protection of the public from harm. However, as with all enforcement powers, it is essential that Powers of Entry achieve the right balance between the need to enforce the law and preserving the rights of individuals and businesses from unnecessary intrusion.

That is why I support the government's commitment, as set out in the Protection of Freedoms Act 2012, to review all existing Powers of Entry that provide for authorised persons to legally enter domestic and business premises to undertake enforcement activities; and to determine whether they are still necessary, proportionate and contain adequate safeguards. We must ensure that we reduce, where possible, the number of unnecessary or redundant powers, and where they are deemed necessary, ensure that they contain adequate safeguards and levels of protection to limit the intrusion and burdens placed on individuals and businesses.

HM Treasury has a limited number of Powers of Entry under its remit, but they are important in ensuring the effective regulation of the UK's financial services sector. The department has reviewed a total of 10 Powers of Entry within the scope of this review. It has concluded that 1 power will be repealed and 9 powers will be retained. Of the powers retained, 6 will be modified to include additional safeguards to protect businesses and provide assurances that the powers will not be subject to abuse and will only be used as intended by the enforcing authorities.

In undertaking this review, I am grateful to the Bank of England, the Financial Services Authority, the Prudential Regulation Authority, the Office of Fair Trading and HM Revenue and Customs for their active engagement.



George Osborne
Chancellor of the Exchequer

Executive summary

The Protection of Freedoms Act 2012 (the Act) gives effect to the government's commitment to reduce more than 1,300 existing Powers of Entry (PoEs), which enable state officials to enter and inspect homes and businesses to carry out their regulatory duties. The Act stipulates that each government department must undertake a review of its existing PoEs to determine whether or not they are still necessary, proportionate and contain adequate safeguards to limit the intrusion and burdens placed on individuals and businesses.

This report sets out the outcome of HM Treasury's review of the PoEs for which it is responsible. In undertaking this review, active engagement and consultation was undertaken with the Bank of England (BoE), the Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA), the Office of Fair Trading (OFT) and HM Revenue and Customs (HMRC), who are the bodies with the authority to enforce these PoEs.

HM Treasury has identified 10 PoEs under its remit which are within scope of the review. As set out in this report, the review has concluded that:

- **3 PoEs will be retained in their current form** as they are still necessary and contain sufficient safeguards to ensure that they are used proportionately. This includes PoEs in:
 - The Banking Act 2009 (Part 5, Section 194) relating to powers for the BoE to have formal oversight of, and gather any information it requires as part of an ongoing investigation, on businesses involved in inter-bank payment systems;
 - The Financial Services and Markets Act 2000 (Part 11, Section 176) providing extensive powers of investigation and information gathering to the FCA and the PRA to support their regulatory functions in the financial services sector; and
 - The Credit Rating Agencies Regulations 2010/906 (Regulation 33) providing the FCA with investigatory powers to carry out on-site inspections of premises, under judicial warrant, where Credit Rating Agencies are conducting their business.
- **6 PoEs will be retained with additional safeguards** as they are still necessary but new safeguards are required to protect businesses and provide assurances that the powers will only be used as intended by the enforcing authorities and will not be abused. This includes PoEs in:
 - The Counter Terrorism Act 2008 (Schedule 7, Paragraphs 20 and 21) providing powers to the FCA and HMRC to enter, inspect or observe the activities in a business premises (excluding premises used solely as a domestic dwelling), where there is a reasonable cause to believe that the premises has been, or is being used in connection with terrorism activities. The additional safeguard will require the relevant enforcement officer to produce a document explaining to the occupier in plain English, the legal power under which they can enter;
 - The Money Laundering Regulations 2007 (Regulations 38(1) and 39) relating to powers for the FCA, and HMRC to enter and inspect any business premises with or without a warrant if there is reasonable cause to believe that the premises has been, or is being used for money laundering activities. The additional safeguards will require the relevant enforcement officer to produce a document explaining to the occupier in plain English, the legal power under

which they can enter; and a requirement for the enforcement officer to provide evidence of authority or identification on entry; and

- The Transfer of Funds Regulations 2007/3298 (Regulations 8(1) and 9) relating to powers for the FCA and HMRC to enter and inspect any premises being used by a Payment Service Provider with or without a warrant, if they have any reasonable cause to believe that the premises has been used in connection with money laundering and terrorist transfers. The additional safeguards will require the relevant enforcement officer to produce a document explaining to the occupier in plain English, the legal power under which they can enter; and a requirement for the enforcement officer to provide evidence of authority or identification on entry.
- **1 PoE – the Consumer Credit Act 1974 (Section 36D) – has been repealed** because the regulation of consumer credit has transferred from the OFT to the FCA, effective from 1 April 2014.

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HM Treasury review of Powers of Entry

1.1 HM Treasury has identified a total of 10 PoEs for which it is responsible and has undertaken a review in line with the government's commitment in the Protection of Freedoms Act 2012, to consider whether or not these powers are still necessary, proportionate and contain adequate safeguards. In undertaking this review, the department has engaged and consulted with the BoE, the PRA, the FCA, the OFT and HMRC, who are the enforcement bodies with the authority to use the PoEs.

1.2 This section sets out each of the PoEs that were reviewed and the decisions taken as to whether they should be retained, repealed or whether they require additional safeguards to ensure they are proportionate. The section is structured as follows:

- Part 1 – provides a summary of the 3 PoEs to be retained in their current form, as they are still necessary and have sufficient safeguards in place;
- Part 2 – outlines the 6 PoEs that will be retained with additional safeguards, because they are still necessary, but require new safeguards to protect businesses and provide assurances that they will only be used as intended by the enforcing authorities; and
- Part 3 – provides an outline of the 1 PoE that has been repealed as it is no longer necessary.

Part 1: Powers of Entry to be retained in their current form

Banking Act 2009, Part 5, Section 194

1.3 Part 5 of the Banking Act 2009 (the Act) grants the BoE a formal role in the oversight of inter-bank payment systems. Section 194 of the Act provides the power for a BoE appointed inspector to enter, under judicial warrant, any business premises where the management or operation of a recognised interbank payment systems is conducted, and gather any information it requires as part of an ongoing investigation. The existing safeguards ensure that the power cannot be abused and that it is only exercisable where one of the following conditions are met:

- There is a reason to believe that relevant information is on the premises;
- There is a reason to suspect that the request to enter would not be complied with and information would be destroyed or otherwise tampered with;
- An inspector gave reasonable notice of a wish to enter the premises, and was refused entry; or
- A person occupying or managing the premises has failed to co-operate with an inspector.

1.4 In practice, it has not been necessary for the BoE to use this power because no firm has failed to comply with the BoEs requests for information. The BoE has therefore relied on voluntary compliance rather than Section 194 to gain entry to a premise. However, following consultation with the BoE, HM Treasury has concluded that **this power is still necessary and will**

be retained as it acts as a strong incentive in encouraging businesses to comply with the BoE's information requests.

Financial Services and Markets Act 2000 (FSMA), Part 11, Section 176

1.5 FSMA provides statutory powers to the 2 regulators – the FCA and the PRA – for the regulation of financial services in the UK. It provides the framework in which all forms of financial services business, including insurance companies, banks, building societies, friendly and mutual societies, credit unions, and others, are authorised and regulated.

1.6 Part 11 of FSMA provides the FCA and PRA with extensive powers of investigation and information gathering to support their regulatory functions. Section 176 of FSMA permits, under judicial warrant, a police constable (who may be accompanied by other people), to enter premises if certain conditions are met, including:

- That a person has failed to comply with an information requirement; and
- There are documents and information on the premises that are required and specified in the warrant.

1.7 The PoE enables a police constable to obtain information that has not been provided by a business upon request, or to obtain information that is at risk of been tampered with or destroyed.

1.8 Following consultation with the FCA and PRA, HM Treasury has concluded that the existing safeguards are sufficient to ensure the power is not inappropriately used or abused. These safeguards include:

- The PoE is only enforceable on issue of a warrant by a justice of the peace (or, in Scotland, a sheriff) following an application made by a regulator; and
- The warrant is exercisable by a police constable and any specified persons who may accompany him.

1.9 The FCA and the PRA are not legally obliged to keep centralised figures of the number of searches they carry out on premises. However, records available indicate that, in the 12 months from 1 April 2013 the FCA conducted searches on 18 premises. **This PoE is an essential element of the regulators' powers of investigation where there is suspicion of misconduct or criminal activity and will therefore be retained.** The absence of this power would impair the regulators' ability to regulate and investigate compliance with financial services regulatory requirements.

Credit Rating Agencies Regulations 2010/906 (CRA), Regulation 33

1.10 CRA is the UK's implementation of EU Regulation No 1060/2009 of the European Parliament and Council, which requires the European Securities and Market Agency (ESMA) to regulate Credit Rating Agencies in the EU. Regulation 33 of CRA designates the FCA as the UK competent authority to enforce the EU regulation in the UK on behalf of ESMA. The regulation is the UK's means of meeting its legal obligation under EU rules. **The PoE therefore must be retained because it is a legal requirement under an EU Regulation which EU Member States must give effect to.**

1.11 Regulation 33 provides the FCA with investigatory powers to carry out on-site inspections of premises, under judicial warrant, where Credit Rating Agencies are conducting their business. The existing safeguard – that the power is only exercisable on the authority of a High Court where the FCA is carrying out an inspection on premises on behalf of ESMA – ensures that the power is only used as designed in the original EU regulations. The FCA has only used this power once in the past 5 years.

Part 2: Powers of Entry to be retained with additional safeguards

The Counter Terrorism Act 2008 (CTA), Schedule 7, Paragraphs 20 and 21

1.12 CTA facilitates the gathering and sharing of information for counter-terrorism and other purposes, including the disclosure of information to and by the intelligence services. Schedule 7 of CTA provides powers to the relevant enforcement authorities¹ – the FCA and HMRC – to act against terrorist financing, money laundering and other activities.

1.13 There are currently 2 PoEs under Schedule 7 of CTA. These are:

- **Paragraph 20 of Schedule 7** – permits an enforcement officer from the authorities listed above, to enter, inspect or observe the activities at a business premises (this excludes premises used solely as a domestic dwelling), and take a copy of any document found on the premises without a warrant; and
- **Paragraph 21 of Schedule 7** – provides an additional power for an enforcement officer to enter any premises, under a warrant, if they are refused entry under paragraph 20. This warrant may be issued by the Magistrates or Crown Court following an application by the enforcement authority.

1.14 Both PoEs may be exercised only if the information or documentation sought is reasonably required in connection with the enforcement authority's duties to combat terrorism activities under Schedule 7. The powers already contain safeguards, including:

- Entry is only permitted without a warrant if it takes place at a reasonable time of day;
- A requirement for the enforcement officer to show identification on entry;
- Force cannot be used to enter the premises; and
- Only enforcement officers specified in the legislation may use the power.

1.15 These powers have not yet been used by the enforcement authorities, but **will be retained as they are still necessary to ensure that the regulators can enforce regulations regarding counter terrorist financing, money laundering or nuclear proliferation**. However, in order to strengthen the protections in the existing safeguards in Paragraphs 20 and 21, **the powers will be modified to introduce an additional safeguard that the relevant enforcement officer will produce a document explaining to the occupier in plain English, the legal power under which they can enter**. The addition of this safeguard to both PoEs will ensure that the occupier of the premises readily understands why an officer is required to inspect their premises and also ensures that the powers are only exercised appropriately and will not be abused by the relevant enforcement officers.

Money Laundering Regulations 2007 (MLR), Regulation 38(1) and 39

1.16 MLR is the UK implementation of the Third European Money Laundering Directive and is part of the UK's international obligations under the Financial Action Taskforce to combat money laundering, terrorist financing and other related threats. MLR provides powers to designated statutory authorities² – the FCA, HMRC – to act against money laundering, to monitor

¹ The Office of Fair Trading (OFT) and the Department for Enterprise, Trade and Investment in Northern Ireland (DETNI) were previous designated authorities under these regulations. The OFT ceased to be on 1 April 2014 and DETNI on 1 April 2012.

² The Office of Fair Trading (OFT) and the Department for Enterprise, Trade and Investment in Northern Ireland (DETNI) were previous designated authorities under these regulations. The OFT ceased to be on 1 April 2014 and DETNI on 1 April 2012.

compliance with the regulations by the regulated businesses and to take appropriate action to improve compliance and sanction non-compliance where necessary.

1.17 There are 2 PoEs contained in MLR. These are:

- **Regulation 38 (1)** – permits an enforcement officer from the designated authorities, to enter and inspect any premises without a warrant, if the officer has reasonable cause to believe that the premises has been, or is being used for money laundering activities; and
- **Regulation 39** – provides an additional power for the designated authorities to use a warrant to enter, inspect and take copies of information, where entrance has been denied to the premises under regulation 38(1). A warrant may be issued by the Magistrates or Crown Court following an application by the enforcement authority.

1.18 Regulation 38(1) has been extensively used by the designated authorities:

- FCA – 4 times in the last 12 months and 48 times since 2009; and
- HMRC – 958 times in the last 12 months and 4,599 since 2009.

1.19 The power to enter a business premises with a warrant as set out in Regulation 39 however has not been used. This is because businesses have consented to the entry of designated authorities on a voluntary basis (under Regulation 38). However, this power is still very much necessary, in particular where the regulators believe they may be denied voluntary access to entry in the absence of it. As a result, HM Treasury has concluded that **both powers are necessary in order to facilitate regular monitoring of regulated businesses through on-site visits and will be retained.**

1.20 The PoEs may only be exercised if the information or documentation sought is reasonably required in connection with the designated authority's functions to act against money laundering under MLR. The safeguards in place for Regulations 38(1) and 39 are already quite comprehensive. As with CTA, the safeguards include:

- Entry is only permitted without a warrant if it takes place at a reasonable time of day;
- A requirement for the officer acting on behalf of the designated authority to show identification on entry;
- Force cannot be used to enter the premises; and
- Only designated authorities specified in the legislation may use the power.

1.21 However in order to strengthen the protections in these safeguards, **the powers will be modified to introduce an additional safeguard that the relevant enforcement officer will produce a document explaining to the occupier in plain English, the legal power under which they can enter.** In addition, **a further safeguard will be incorporated to Regulation 39, which will provide a requirement for the enforcement officers to produce evidence of authority or identification.** These additional safeguards will ensure that the occupier of the premises readily understand why an officer is required to inspect their premises and also ensure that the powers are only exercised by officers of the authorised designated authorities.

Transfer of Funds Regulations (2007/3298) (TFR), Regulations 8(1) and 9

1.22 TFR were implemented to provide enforcement powers in relation to the European Payments Regulation (EC Regulation 1781/2006), which forms part of the EU policy to combat money laundering and terrorist financing. The EU Regulations require Payment Service Providers

(PSPs) to ensure that electronic fund transfers (also known as wire transfers) are accompanied by complete information on the payer (that is, the customer from which the transfer originated).

1.23 TFR gives powers to designated statutory authorities – the FCA and HMRC – to monitor compliance with the regulations by the regulated businesses and take appropriate action to improve compliance and sanction non-compliance.

1.24 There are 2 PoEs contained in TFR. These are:

- **Regulation 8(1)** – permits an enforcement officer from the designated authorities to enter and inspect any premises being used by a PSP without a warrant, if they have reasonable cause to believe that the premises has been used in connection with money laundering and terrorist transfers; and
- **Regulation 9** – provides an additional power for an enforcement officer to obtain a warrant, to enter, inspect and take copies of information where entrance to the premises has been denied under Regulation 8(1). A warrant may be issued by the Magistrates or Crown Court following an application by the enforcement authority.

1.25 Regulation 8(1) has only been used once by HMRC and never by the FCA. Regulation 9 has never been used. However, **both powers are still necessary to ensure that money laundering activities through electronic fund transfers are adequately monitored and regulated and will therefore be retained**. Without these powers, HMRC and the FCA would be unable to supervise PSPs effectively, in particular to understand who the payments are coming from and to identify suspicious transactions.

1.26 Both PoEs already contain adequate safeguards for their use. As with safeguards in CTA and MLR, the existing safeguards in TFR includes:

- Entry is only permitted without a warrant if it takes place at a reasonable time of day;
- A requirement for the officer acting on behalf of the designated authority to show identification on entry;
- Force cannot be used to enter the premises; and
- Only designated authorities specified in the legislation may use the power.

1.27 However, **in order to strengthen the protections in the use of these powers, they will be modified to introduce additional safeguards that the relevant enforcement officer of the designated authority will produce a document explaining to the occupier in plain English, the legal power under which they can enter; and a requirement for the enforcement officer to provide evidence of authority or identification on entry**. These additional safeguards will ensure that the occupier of the premises readily understand why an officer is required to inspect their premises and also ensure that the power is only exercised appropriately and by an authorised officer.

Part 3: Power of Entry repealed

Consumer Credit Act 1974 (CCA), Section 36D

1.28 CCA required all businesses that lend money to consumers, offer goods or services on credit or engage in certain ancillary credit activities, to be licensed by the OFT. Section 36D provided the OFT with the power to obtain general information regarding the operation of the licensee, and to effectively undertake its regulatory responsibilities of the sector in accordance with CCA.

1.29 Section 36D was repealed on 1 April 2014 when the FCA took over regulation of consumer credit from the OFT. As detailed above, the FCA already has power under Section 176 of FSMA to enter premises and can exercise this power to obtain information in order to deliver its consumer credit regulatory role. The reasons as to why Section 176 FSMA must remain and the details as to why its existing safeguards are sufficient are provided above.

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