

Title: Criminal Finances Act – Disclosure Orders
IA No: HO0283
RPC Reference No: RPC-3496(1)-HO
Lead department or agency: Home Office
Other departments or agencies: NCA, Police Forces, HMRC, CPS, SFO.

Impact Assessment (IA)

Date: 20-06-2017
Stage: Enactment
Source of intervention: Domestic
Type of measure: Primary legislation
Contact for enquiries: public.enquiries@homeoffice.gsi.gov.uk

Summary: Intervention and Options

RPC Opinion: GREEN

Cost of Preferred (or more likely) Option				
Total Net Present Value £m	Business Net Present Value £m	Net cost to business per year (EANDCB in 2014 prices) £m	One-In, Three-Out	Business Impact Target Status Qualifying provision

What is the problem under consideration? Why is government intervention necessary

In October 2015, the Government published the National Risk Assessment for Money Laundering and Terrorist Financing (NRA), identifying a number of areas where the response to these threats could be strengthened. Disclosure Orders provide investigators with a powerful tool in the recovery of criminal assets. However, they have not been used to the extent that was originally intended, because: i) a prosecutor must authorise applications for them, creating a cumbersome decision making process, deterring investigators from seeking orders where they would be effective and appropriate; ii) prosecutors are not assigned to cases at an early stage in the investigation where a disclosure order would be sought; and iii) disclosure orders are currently unavailable in money laundering investigations, restricting the range of instances in which they can be used. A legislative solution is required to address these issues.

What are the policy objectives and the intended effects

The Government has amended the Proceeds of Crime Act 2002 (POCA) to enable disclosure order applications to be made on the authority of a senior appropriate officer rather than a prosecutor. Money laundering investigations have also been brought into the range of appropriate investigations for the purposes of making a disclosure order application. This should ensure greater use of the power at the early stages of an investigation, providing an effective means of identifying assets that may be attributable to unlawful conduct or otherwise liable to confiscation. Alongside amendments to POCA, the Government has made complementary changes to the legislation governing the law enforcement response to the threats from terrorist financing, helping to combat the raising or movement of terrorist funds and strengthening partnerships with the regulated sector.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

1. Do nothing – retain the existing provisions.
2. Amend POCA to encourage greater use of the power, and mirror these amendments in the Terrorism Act 2000 (TACT) to enhance the law enforcement response to terrorist finance

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

1. Do nothing – retain the existing provisions.
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Will the policy be reviewed? It will be reviewed. If applicable, set review date: By 03/2022

Does implementation go beyond minimum EU requirements?	N/A			
Are any of these organisations in scope?	Micro Yes			
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Small Yes			
	Medium Yes			
	Large Yes			
	Traded: Non-traded:			

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Date:

20-06-2017

Summary: Analysis & Evidence

Policy Option 1

Description: No change

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)			
			Low: Optional	High: Optional	Best Estimate:	
COSTS (£m)		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)	
Low	Optional		Optional	Optional	Optional	
High	Optional		Optional	Optional	Optional	
Best Estimate						
Description and scale of key monetised costs by 'main affected groups'						
Other key non-monetised costs by 'main affected groups' Continuing with existing provisions risks contributing to the continuation of lengthy confiscation cases. This represents a reputational risk to HMG and UK law enforcement.						
BENEFITS (£m)		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)	
			Optional	Optional	Optional	
Low	Optional		Optional	Optional	Optional	
High	Optional		Optional	Optional	Optional	
Best Estimate						
Description and scale of key monetised benefits by 'main affected groups' No monetised benefits have been identified for the 'do nothing' option.						
Other key non-monetised benefits by 'main affected groups' No monetised benefits have been identified for the 'do nothing' option.						
Key assumptions/sensitivities/risks (%)			Discount rate			
<ul style="list-style-type: none"> - Less effective investigation of money laundering and confiscation resulting in a loss of recovered criminal assets. - A useful and powerful investigative tool will remain underused. - Potential savings to law enforcement agencies and courts will not materialise. 						

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Summary: Analysis & Evidence

Policy Option 2

Description: Enact legislation

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)			
			Low: Optional	High: Optional	Best Estimate:	
COSTS (£m)		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)	
Low	Optional		Optional	Optional	Optional	
High	Optional		Optional	Optional	Optional	
Best Estimate						
Description and scale of key monetised costs by 'main affected groups'						
Other key non-monetised costs by 'main affected groups'						
Minimal familiarisation costs to law enforcement for using greater numbers of disclosure orders. There will be an increase in costs owing to the use of disclosure orders, affecting law enforcement, courts, and recipients.						
BENEFITS (£m)		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)	
			Optional	Optional	Optional	
Low	Optional		Optional	Optional	Optional	
High	Optional		Optional	Optional	Optional	
Best Estimate						
Description and scale of key monetised benefits by 'main affected groups'						
No monetised benefits have been identified.						
Other key non-monetised benefits by 'main affected groups'						
Disclosure orders provide officers with an effective tool in the investigation of complex civil recovery, confiscation and exploitation proceeds investigations. The measure will: i) Encourage greater use of disclosure orders in appropriate investigations; ii) Streamline the process for obtaining information in investigations, reducing burden on law enforcement and courts; iii) Deploy to individuals, such as associates of money launderers, previously not possible. The number of production orders will reduce compared to the baseline option, reducing cost to affected groups.						
Key assumptions/sensitivities/risks (%)			Discount rate			
- An increase in disclosure orders will displace existing production orders.						

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Evidence Base (for summary sheets)

A. Strategic Overview

A.1 Background

1. Financial profit is the driver for almost all serious and organised crime, and other lower-level acquisitive crime. The UK drugs trade is estimated to generate revenues of nearly £4bn each year and HMRC estimate that over £5bn was lost to attacks against the tax system in 2012/13. Criminals launder their money – moving, using and hiding the proceeds of crime – to fund their lifestyles and to reinvest in their criminal enterprises. The best available estimate¹ of the amounts laundered globally are equivalent to 2.7% of global GDP, or US\$1.6 trillion in 2009, while the National Crime Agency assesses that billions of pounds of proceeds of international corruption are laundered into or through the UK. This threatens the integrity and reputation of our financial markets.
2. In October 2015, the Government published the National Risk Assessment for Money Laundering and Terrorist Financing (NRA), identifying a number of risks and areas where the regimes that combat those threats could be strengthened. The Action Plan for anti-money laundering and counter-terrorist finance, published in April 2016, contained a range of measures to build on the UK's risk-based approach to addressing these areas. The Criminal Finances Act is a core part of our approach to achieving that objective.
3. Part 8 of the POCA provides a set of investigatory powers to be used in connection with a range of investigations as specified in section 341, namely confiscation, civil recovery, detained cash, money laundering and exploitation proceeds investigations.
4. A disclosure order is a powerful investigative tool that enables an appropriate officer, through issuing a written notice, to require a person to answer questions, provide information or produce documents on any matter that is relevant to the investigation. The order remains in force for the duration of an investigation. It is available for confiscation, civil recovery and exploitation proceeds investigations, but it was not available for detained cash or money laundering investigations.
5. Investigatory powers are generally exercised by 'appropriate officers' and 'senior appropriate officers'. These are defined separately depending on the type of investigation being conducted, but the majority of orders may be sought by an appropriate officer provided the necessary level of authorisation has been given. However, the approach for applying for disclosure orders differs in that an application may only be made by the relevant authority (i.e. a prosecutor) at the request of an appropriate officer.

A.2 Groups Affected

6. The groups affected by this policy are:
 - HM Courts and Tribunal Service (HMCTS)
 - Operational and prosecutorial stakeholders, including:
 - The National Crime Agency (NCA)
 - The Serious Fraud Office (SFO)
 - Police
 - HM Revenue & Customs (HMRC)
 - The Crown Prosecution Service (CPS)
 - Financial institutions and other businesses in the regulated sector

¹ *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes*, UNODC 2011

A.3 Consultation

Within Government

7. We consulted with the NCA, police forces, CPS, HMRC and SFO.

Public Consultation

8. The Action Plan for anti-money laundering and counter-terrorist finance (April 2016) included a consultation on proposals to amend investigative powers within POCA.
9. Following the introduction of the Bill, consultation with law enforcement agencies to ensure that they could continue to provide their views and shape this measure during the Bill's passage.

B. Rationale

10. The Action Plan for anti-money laundering and counter-terrorist finance ('the Action Plan') identified the need for a more robust law enforcement response to tackle money laundering in all its forms, including creating aggressive new legal powers and building new capabilities for law enforcement agencies.
11. The Home Office, in line with Government policy, has an ongoing commitment to review existing powers and propose changes that will remove blockers to effective asset recovery.
12. Disclosure orders provide officers with an effective tool in the investigation of complex civil recovery, confiscation and exploitation proceeds investigations. However, the previous statutory requirement for an investigating agency to seek the authority of a prosecutor – in effect a separate agency – resulted in a complicated, resource-intensive and slow decision making process that discouraged use of the power. Additionally, these previous requirements prevented an appropriate officer – who would have greater knowledge of the investigation - from making an application to court.
13. A disclosure order was not previously available in a money laundering investigation. When POCA was enacted, it was held that money laundering, as the one type of criminal investigation in the Act, made it distinct from others listed in Part 8. Confiscation investigations were considered to be ancillary to the criminal investigation which gave rise to it. It was also considered that notices under a disclosure order in a money laundering investigation would be served on the defendant and the rules against self-incrimination would undermine the use of any evidence gained.
14. However, operational experience prompted a review of disclosure orders in respect of money laundering investigations. Information or material obtained under a disclosure order or other investigatory powers can, with care, be used as evidence to build a case relating to money laundering offences under POCA. In money laundering investigations, family members or associates of the defendant may be in a possession of relevant information. Requiring such persons - together with similarly associated legal and financial advisors – to provide relevant information or material is a powerful tool which has now been made available in money laundering investigations. An additional benefit of disclosure orders is the opportunity to deploy them against individuals, some of whom may be associates of suspects. This opportunity is not provided by any other POCA power. POCA provides safeguards against self-incrimination which are fully articulated in an associated code of practice. The SFO has access to a similar power, with similar safeguards, under other legislation.

C. Objectives

15. POCA has been amended to change the definition of 'relevant authority' from 'prosecutor' to 'appropriate officer on the authority of a senior appropriate officer'. An amendment to POCA has also been made to bring money laundering investigations into the scope of investigations for which

disclosure orders may be sought. A further amendment has changed the definition of relevant authority for disclosure orders in money laundering cases.

16. These changes should result in:

- A more efficient and streamlined process for applying for disclosure orders resulting in greater use of the power, and
- A new power enabling applications for disclosure orders in money laundering and terrorist finance investigations.

D. Options

17. The following options have been considered:

- Option 1 is to make no changes (do nothing).
- Option 2 is the preferred option.

Amend POCA to provide law enforcement with better access to disclosure orders and to enable effective investigation of complex money laundering cases and mirror these amendments in the Terrorism Act 2000 to enhance the law enforcement response to terrorist finance

E. Appraisal (Costs and Benefits)

GENERAL ASSUMPTIONS & DATA

18. There is limited data available on the number of disclosure orders made per year. However, the NCA has confirmed that it has applied for, and been granted, twelve disclosure orders since April 2014. The NCA uses the disclosure order provisions more frequently than other agencies because of its comparatively large civil recovery caseload. The responses from stakeholders, including the CPS indicate that this total is unlikely to be surpassed by any other agency or by a combined police figure. The SFO – who were only granted the power to apply for disclosure orders in 2015 – have only applied for one disclosure order.

19. The baseline number of disclosure orders (except for money laundering) is therefore assumed to be seven per year.

20. One source of change in volumes will be the potential increase in use of disclosure orders where they are currently available, because the process is more streamlined. Another source of volume change will be their use in money laundering cases, where previously production orders were required. Volume and impact assumptions are subject to uncertainty, despite requests to gain further information.

21. A small rise in the use of disclosure orders is likely to result in a drop in the number of production order² applications being made. Law enforcement and the court service are likely to experience a saving in cases where disclosure orders are sought in place of multiple production orders. Once an initial disclosure order has been obtained, the officer – subject to internal supervisory processes – can issue notices without returning to court. The SFO offer an example money laundering case which necessitated 91 production orders obtained through 19 court applications. Had a disclosure order been available in this case, repeated applications to court would have been unnecessary and significant investigation time would have been saved. The same agency advises that a typical production order application requires 2-3 days of an experienced officer's time.

² Production orders allow appropriate officers to obtain information about the financial affairs of a person subject to a confiscation, civil recovery, money laundering or detained cash investigation. Production orders differ from disclosure orders in a number of respects, the principal difference being that applications have to be made on each occasion that material is required. A disclosure order is only applied for once and gives extensive powers throughout an investigation.

22. The information needed by law enforcement agencies during investigations is currently obtained through the production order process. Disclosure orders may be the vehicle for obtaining this information for greater numbers of investigations following the measure – this continues to provide the legal cover that businesses require to share information. The number of investigations is unchanged by this measure, and therefore the amount of information recipients of the orders need to share is unchanged.

OPTION 2 – Legislate

Costs

23. The preferred option is unlikely to result in increased net costs to law enforcement or courts. However, there will be gross costs from the increase in disclosure order use for law enforcement (primarily NCA & SFO) and HMCTS. The potential change in court costs are being agreed with Ministry of Justice.
24. There will be one off acclimatisation costs to the public sector in switching from production orders to disclosure orders, and from using the CPS to using a senior appropriate officer in making the application. These are expected to be minimal since the sector is already familiar with the existence and impact of disclosure orders. The proposed authorisation process is already known as it is the one used in relation to customer information orders.
25. Businesses are currently required to respond to requests for information and material specified in a production order within a stated timescale. This places an administrative burden on financial institutions and other businesses who may be required to respond to a number of production orders. However, a disclosure order is expected replace production orders. There is not expected to be an increase in direct or indirect cost to businesses required to produce information for an investigation.

Benefits

26. The primary intended benefit of changing the scope and application route of disclosure orders is to ensure that the tool is used in appropriate investigations.
27. The measure provides the opportunity for investigators to deploy orders against individuals, including associates of the suspect/defendant. There was hitherto no such tool available to investigators.
28. Disclosure orders are a more efficient process compared to production orders. Investigators will not be required to apply for a production order on each and every occasion that new material is required, nor will the court be burdened with a series of applications connected to the same investigation. Getting a piece of information in investigations will therefore become less of a burden.
29. The public sector burden will also be reduced by allowing the senior appropriate officer be empowered to make the application, rather than the prosecutor. This will cut out a layer in the process. CPS have advised that the amount of time needed to make a disclosure order application is comparable to that required for a restraint order – around 10-15 hours plus the investigator's time. For seven disclosure orders a year, this can be monetised as a saving of £4,000 to £7,000 per year.³
30. The process should be more flexible, and encourage greater cooperation between investigators and recipients of the orders, for example in negotiating timescales or using interviews. They offer the advantage of a power to demand answers to questions, thereby clarifying and explaining the documents and potentially saving time for the investigator and the recipient of the notice.

BUSINESS IMPACT TARGET

³ Based on CPS scales of cost as of 1 September 2009. This has not been used for NPV purposes.

31. There are no additional net direct costs to business.

SMALL AND MICRO BUSINESS ASSESSMENT

32. The measure will potentially affect small and micro businesses, who may become subject to a disclosure order. They are already potentially subject to production orders, so there is not expected to be a net increase in costs. It is not appropriate to exempt them as they may hold information necessary for an investigation, and require legal cover to share the information with law enforcement.

F. Risks

OPTION 2 – legislate

33. There are risks that:

- The change in legislation may encourage a disproportionate use of the power, and
- An unforeseen growth in applications for disclosure orders could place a burden on the regulated sector.

34. These risks will be managed by a revised code of practice emphasising the intrusive nature of the power, the need to consider its use proportionately and incorporating a recommendation that the relevant authority be suitably qualified. Use of the power is not, by legislation alone, restricted to the investigation of organised and/or complex crime. However, the need to consider proportionality, combined with the relatively high authority level, will effectively limit the use of the power to the investigation of such cases.

G. Enforcement

35. Implementation will be accompanied by comprehensive training directed at those investigators likely to use the power. The NCA Proceeds of Crime Centre have a statutory duty to provide training to financial investigators to operate under POCA.

36. The Home Office is responsible for conducting a post-implementation review of all powers to be introduced under this legislation.

H. Summary and Recommendations

37. The table below outlines the costs and benefits of the proposed changes.

Table H.1 Costs and Benefits		
Option	Costs	Benefits
2	Minimal familiarisation costs to law enforcement for using greater numbers of disclosure orders. There will be an increase in costs owing to the use of disclosure orders, affecting law enforcement, courts, and recipients	An effective law enforcement tool is used in appropriate investigations Less burdensome process for information requests

38. Option 2 is the preferred option.

I. Implementation

39. The powers will be commenced by order , subject to operational needs and the passage of any necessary secondary legislation/publication of statutory guidance. Where appropriate, this will be on a common commencement date.

J. Monitoring and Evaluation

40. The use of the powers will be monitored by the Criminal Finances Working Group and the Criminal Finances Board.

K. Feedback

41. Feedback will be provided through ongoing consultation with law enforcement partners.