INTRODUCTION

This replaces Guidance issued in November 2009. Section 2A of the Proceeds of Crime Act 2002 provides that the Secretary of State (Home Office), the Treasury, the Attorney General and Advocate General for Northern Ireland can issue guidance on the use of the powers in POCA. The guidance is issued in respect of the National Crime Agency, Serious Fraud Office, Financial Conduct Authority, Her Majesty’s Revenue and Customs, the Crown Prosecution Service and Public Prosecution Service in Northern Ireland. These are referred to below as ‘relevant authorities’.

Despite this Guidance being issued to cover relevant authorities’ functions under POCA, it is recommended that all agencies that are or could be involved in asset recovery and financial investigation under the Proceeds of Crime Act 2002 are aware of this guidance.

The Criminal Finances Act 2017 introduced new asset recovery and investigation powers in POCA, and made amendments to existing powers. Not all of these provisions will be commenced on the issuing of this Guidance; notably the forfeiture of certain personal (or moveable) property and the expansion of the definition of “cash” are due to be commenced on 16 April 2018, in England and Wales and Scotland. None of the new provisions in the 2017 Act will be commenced in Northern Ireland until a Legislative Consent Motion is obtained from the Assembly. Relevant authorities and agencies need to be satisfied that the powers have been commenced, and should seek advice in advance of the use of a particular power or provision if this is not clear.

The powers in POCA to recover assets are –

- Confiscation order – an order made against a defendant by the Crown Court following a criminal conviction. The order is for a defendant to pay a sum equivalent to their proceeds of crime from any available assets. The order can be made for the full amount of criminal benefit, capped at the value of the assets available to the Defendant to satisfy the order, no matter what value that amounts to.
- Civil recovery order – an order made in civil proceedings by the High Court against property which can be shown to be the proceeds of crime.
- Tax Assessments – NCA can adopt the revenue functions of Her Majesty’s Revenue and Customs and raise tax assessments in relation to income, gains and profits arising or accruing as a result of criminal conduct.
- Cash forfeiture order – an order for the summary forfeiture of cash of £1,000 or more, in the magistrates’ court. This applies to cash which derives from, or is intended for use in, unlawful conduct.
- Forfeiture of certain personal (or moveable) property – an order made by the magistrates’ court for the forfeiture of certain listed items of property (detailed list contained in POCA section 303B) that has a
combined value of £1,000 or more. The listed items must derive from, or be intended for use in, unlawful conduct.

- Forfeiture of money held in bank and building society accounts – the summary forfeiture of money held in a bank or building society account of £1,000 or more, in the magistrates’ court. The funds must derive from, or be intended for use in, unlawful conduct.

There are also supporting investigation powers – namely production orders, search and seizure warrants, disclosure orders, customer information orders, account monitoring orders and unexplained wealth orders.

The relevant authorities are also encouraged to promote the use of these powers to other law enforcement and prosecution agencies (notably the police, but inclusive of all agencies that have a law enforcement interest and function). Relevant authorities should also have processes in place to provide support or take on cases from other agencies. This has the aim of encouraging agencies to use the powers themselves or to refer cases.

A relevant authority must exercise its functions under POCA in the way which it considers is best calculated to contribute to the reduction of crime. The reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. In the event of a criminal conviction, a confiscation order would be available in cases where asset recovery is being considered. Relevant authorities should also note the importance of all the asset recovery methods which cause disruption to criminality, including seizure and forfeiture of criminal assets and civil recovery proceedings.
THE GUIDANCE

General

Relevant authorities, all law enforcement agencies (police etc.), financial investigators and prosecution agencies should be considering asset recovery and financial investigation action in every case of identified criminality. Asset recovery includes criminal and civil powers (forfeiture, civil recovery and taxation). Relevant authorities should support this process. Although confiscation is the obvious method of asset recovery in cases where criminal investigations and criminal proceedings are being considered or pursued, civil powers may also be available.

Consideration of asset recovery and financial investigation should not be limited to cases where there is an early suspicion of seizeable assets in the case. Relevant authorities should, where possible, encourage other agencies to consider asset recovery opportunities and financial investigation in all cases.

Asset recovery and financial investigation should be considered at an early stage in every case, including consideration of the non-conviction based powers of forfeiture, civil recovery and taxation action. Cases where no other action is to be taken should still be considered for asset recovery action. Relevant authorities should encourage agencies to adopt these into all of their case considerations. This includes the ability to refer the asset recovery aspect of a case for civil recovery and/or taxation powers in POCA to a relevant agency that possesses the powers to take such action.

Agencies should also consider other powers not provided in POCA that could result in the disruption of the flow of criminal assets, denial and recovery of the proceeds of crime; e.g. real time taxation (VAT and PAYE), bankruptcy/insolvency procedures, serious crime prevention orders and other available forfeiture powers. Enforcement of any potential orders should be an early consideration and relevant authorities and other agencies should be aware of the powers, their options and any relevant guidance.

Relevant authorities should ensure they have routes of engagement and points of contact with all law enforcement and prosecution agencies for them to provide advice and operational support in respect of financial investigation and asset recovery on individual cases. Relevant authorities should ensure that these exist, are reviewed regularly throughout the life of the investigation and that they are routinely used.
NON-CONVICTION BASED ASSET RECOVERY POWERS

Background

Confiscation orders consequent on a criminal conviction are an obvious use of the asset recovery powers in POCA. They are rightfully considered and used in cases where there is a criminal investigation and proceedings. It is significant to note however, that there is not a strict hierarchy of the use of asset recovery powers under POCA. While the reduction of crime is best secured through conviction, the legislation does not preclude the use of non-conviction based asset recovery as an alternative to confiscation before a criminal case is considered or is ongoing but not concluded. However, the use of civil powers where there are connected criminal investigation(s) or proceeding(s) should be carefully considered in order to avoid any adverse effect on those criminal matters.

The non-conviction based asset recovery powers available under POCA can make an important contribution to the reduction of crime where:

(i) it is not feasible to secure a conviction,
(ii) a conviction is obtained but a confiscation order is not made,
(iii) readily identifiable assets (including cash) can be seized and forfeited effectively, or
(iv) the public interest will be better served by using those powers rather than by seeking a confiscation order (irrespective of there also being a connected criminal investigation/proceedings).

POCA states that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. A criminal conviction can obviously lead to a confiscation order but the wider context is that it is vital to retain public confidence in the criminal justice system as a whole, and this is enhanced by the fair and proper use of the non-conviction based powers. However, care must be taken not to allow the use of non-conviction based powers as an easy alternative to criminal investigation and prosecution.

Use of the powers

This includes civil recovery, cash forfeiture, forfeiture of certain personal (or moveable) property and forfeiture of money held in bank and building society accounts under Part 5 of POCA and taxation under Part 6. There are also the investigation powers under Part 8 which support building a case for asset recovery. For the purpose of the below the term “forfeiture” includes forfeiture of certain personal (or moveable) property and forfeiture of money held in bank and building society accounts.

For illustrative purposes only, the following is a non-exhaustive list of circumstances in which use of the non-conviction based powers might be appropriate:

- the only known criminality is overseas, and there is no extra-territorial jurisdiction to pursue a criminal case in the courts of England and Wales, Scotland or Northern Ireland.
- there is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction.
• proceeds of crime can be identified or have come to the attention of law enforcement but cannot be linked (immediately) to any individual suspect or offence.
• cash or other property can be identified and seized or frozen in an effective and immediate manner.
• assets are identified as the proceeds of conduct by a public official that constitutes gross human rights abuse or violations. This is torture or inhuman, cruel or degrading treatment of a person on the grounds that they have been obtaining, exercising, defending or promoting human rights, or have sought to expose gross human rights abuse conducted by a public official.
• a law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction
• a criminal investigation has been conducted but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction
• a prosecution has been conducted but has not resulted in a conviction
• where an unexplained wealth order has identified evidence (or triggered the presumption) that shows assets to be the proceeds of crime but where a criminal conviction is not viable

Again for illustrative purposes only, the following is a non-exhaustive list of circumstances in which a conviction is feasible, but use of the non-conviction based powers might better serve the overall public interest:
• using non-conviction based powers better meets an urgent need to take action to prevent or stop offending which is causing immediate harm to the public, even though this might limit the availability of evidence for a future prosecution
• it is not practicable to investigate all of those with a peripheral involvement in the criminality, and a strategic approach must be taken in order to achieve a manageable and successful prosecution
• non-conviction based asset recovery represents a better deployment of resources to target someone with significant property which cannot be explained by legitimate income.
• the offender is being prosecuted in another jurisdiction and is expected to receive a sentence

In using the non conviction-based powers, relevant authorities must have regard to, and seek to minimise, any potential prejudice to a parallel or potential criminal investigation or criminal proceedings. So far as it is practicable to do so, the relevant authority should:
• Liaise with any relevant law enforcement and/or prosecuting authorities before exercising any of its operational functions in order to enquire whether doing so would prejudice a criminal investigation or criminal proceedings, and give due weight to any advice so received
• Keep under review the extent to which taking, continuing or refraining from any course of action has a potential to prejudice a criminal investigation or criminal proceedings and avoid such prejudice where possible; and
• Ensure where possible that information relevant to a criminal investigation or criminal proceedings is disclosed to the relevant law enforcement or prosecution authority at the earliest practical opportunity.
Regular communication should take place between the prosecution and enforcement authorities accordingly.

A relevant authority may agree to accept a reduced sum in satisfaction of a civil recovery claim if satisfied that:

- The sum is reasonable, having regard to all relevant circumstances including the chances of recovering the full amount claimed and the time and public funds likely to be expended in attempting to do so; and
- Accepting the reduced sum would not damage public confidence