

Unexplained Wealth Orders Webinar

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Presenters

Jason Sugarman QC | Foundry Chambers and RS Legal Strategy

Jason Sugarman QC has been a practising Barrister specialising in white-collar commercial fraud cases for some 26 years. Jason's expertise extends to corporate criminal matters such as Intra-Community Carousel fraud, Serious Fraud Office Prosecution and defending commercial wrongdoing cases, Financial Service Regulation and corruption cases.

Jason has over 20 years' experience of dealing with government departments. Jason practices as a Queen's Counsel from Foundry Chambers also is a founding partner of R S Legal Strategy Business which is a BSB regulated entity specialising in white collar crime with international dimensions.

What is an Unexplained Wealth Order?

An Unexplained Wealth Order (UWO) is designed to confiscate the proceeds of crime by using civil powers instead of criminal powers. The power was introduced by section 1 of the Criminal Finances Act 2017. This Act has amended the Proceeds of Crime Act 2002 (POCA).

From 31 January 2018, relevant enforcement authorities will be able to apply to require a person to explain and account for the origins of their assets. Namely, Unexplained Wealth Orders will be used where the assets owned by the person are inconsistent with their income level.

It is estimated £90bn of illegal cash is laundered in the UK each year. Unexplained Wealth Orders, force wealthy people to explain the source of their assets if there is reason to suspect corruption.

Who can obtain an Unexplained Wealth Order?

Unexplained Wealth Order can be obtained upon application by one of the following enforcement authorities:

- The National Crime Agency
- Her Majesty's Revenue and Customs
- The Financial Conduct Authority
- The Director of the Serious Fraud Office
- The Director of Public Prosecutions.

Law Enforcement Agencies including the NCA, SFO and HMRC are all looking for early opportunities to measures introduced in the Criminal Finances Act 2017 which includes UWO.

To whom do Unexplained Wealth Orders apply

A UWO requires a person who is reasonably suspected of involvement in, or of being connected to a person involved in, serious crime to explain the nature and extent of their interest in particular property, and to explain how the property was obtained, where there are reasonable grounds to suspect that the respondent's known lawfully obtained income would be insufficient to allow the respondent to obtain the property. The test for involvement with serious crime is by reference to Part 1 of the Serious Crime Act 2007.

A UWO can also be applied to politicians or officials from outside the European Economic Area (EEA), or those associated with them i.e. Politically Exposed Persons (PEPs). A UWO made in relation to a non-EEA PEP would not require suspicion of serious criminality.

Politically Exposed Persons (PEPs)

UWO measure applies to *Politically Exposed People* (PEPs). A PEP is a non-EEA politicians/officials or those associated with them. The measure is intended to address concerns about overseas corrupt PEPs laundering through UK. A UWO for a non-EEA PEP does not require suspicion of serious criminality.

A Politically Exposed Person” (“PEP“) is someone entrusted with prominent public functions by an international organisation or any country other than the United Kingdom or another EEA state. The CFA extends the UWO measure to a person who is a family member, a close associate or a connected person of a PEP.

It is probable that some of the interested parties may fall into the new extended criteria for PEPs.

How do they obtain it?

The party against whom the UWO is issued is called the respondent. In order to apply to the court to order an Unexplained Wealth Order, the following conditions must be satisfied:

- The respondent must hold the asset.
- The value of that asset must be greater than £50,000.
- There are reasonable grounds for suspecting the known source of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the asset.
- The respondent is a politically exposed person or there are reasonable grounds for suspecting that:
 - the respondent is, or has been involved in serious crime (in the UK or elsewhere)
 - a person connected with the respondent is, or has been, so involved

How does the respondent respond?

Such an order, will require the respondent to provide a statement within a time specified by the court, which:

- sets out the nature and extent of their interest in the relevant asset
- explains how the asset was obtained.

What happens if the respondent fails to respond?

If the respondent fails to comply with an Unexplained Wealth Order, the following conditions may apply:

1. The concerned asset may be presumed to be a recoverable asset – for the purposes of any proceedings taken in respect of the asset under Part 5 of POCA it will be presumed that the asset is recoverable unless the respondent can prove otherwise.
2. An offence may be committed – if the respondent in purported compliance with the order recklessly or knowingly makes a false or misleading statement, they could be convicted of an offence which may result in a sentence of up to two years imprisonment or a fine or both.

What happens if the respondent fails to respond?

3. An Interim Freezing Order may be made – where an application has been made to obtain an Unexplained Wealth Order the UK High Court may make an Interim Freezing Order, if the court considers it necessary to avoid the risk of the respondent disposing of the asset concerned, before complying with the terms of the order.
4. External assistance could be sought – if an Unexplained Wealth Order or Interim Freezing Order is made against any asset believed to be outside the UK, a request may be made via the Secretary of State to the government of the receiving country to prevent any person dealing with the concerned asset.

What are the concerns regarding Unexplained Wealth Orders?

The new investigative power is designed to address concealment of the proceeds of serious crime, however, that is not to say the new powers are without challenges and the following should be carefully considered:

- 1. Reversal of the burden of proof:** the introduction of Unexplained Wealth Orders shifts the burden of proof in respect of the legitimacy of the assets from the investigating authority to the asset owner. This raises concerns as to the evidence upon which Unexplained Wealth Orders are sought. As a result, the court and enforcement agencies will need to ensure they comply with the Human Rights Act. In particular, Article 6, which protects a person's right to a fair trial and Article 8 which protects the right to privacy.
- 2. No conviction is required:** the confiscation is not conviction based. As a result, there is no requirement to prove the asset owner has committed a predicate criminal offence. However, the implication of non-compliance with an Unexplained Wealth Order without reasonable excuse can result in the respondent's asset being subject to recovery proceedings.

What are the concerns regarding Unexplained Wealth Orders?

3. What are reasonable grounds? It is clear the evidence to obtain an Unexplained Wealth Order ("reasonable grounds" for believing) is not the same as the level of evidence required in a criminal trial ("beyond reasonable doubt"). It is not currently clear what must be proven to show reasonable grounds. To date, neither the Crown Prosecution Service nor any other agency has provided any guidance on this or the circumstances in which an Unexplained Wealth Order may be used.
4. Subject to challenge: If applications are made without notice and in the absence of the respondent, these decisions may be subject to challenge, either on the ground of material non-disclosure or that the judge has simply 'got it wrong'.
5. Risk of widening the civil law: It has not yet been made clear whether in order to obtain a Unexplained Wealth Order, criminal prosecution must first be deemed impossible. The concern is that criminal conduct will effectively be dealt with by a civil recovery order.

Any Questions?

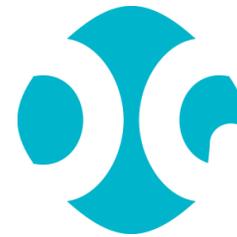
Contact Details

FOUNDRYCHAMBERS

T: 0207 400 1800
E: clerks@foundrychambers.com
W. <https://www.foundrychambers.com/>



T: 020 3655 7801
E: info@rslegalstrategy.co.uk
W. <https://rslegalstrategy.co.uk/>



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Services for Lawyers

T: 01509 214 999
E: admin@dglegal.co.uk
W. <https://dglegal.co.uk>