EXPLANATORY MEMORANDUM TO

THE ADMINISTRATIVE FORFEITURE OF CASH (FORFEITURE NOTICES) (NORTHERN IRELAND) REGULATIONS 2016

2016 No. 70

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 instrument supports the provisions in section 297A to 297G of the Proceeds of Crime Act 2002 (c. 29) ("POCA") relating to the forfeiture of detained cash. Those provisions provide that a senior officer can give a "forfeiture notice" to persons with an interest in cash that has been seized and detained, informing them of the intention to forfeit that cash without a hearing before a magistrates' court.

2.2 The Administrative Forfeiture of Cash (Forfeiture Notices) (Northern Ireland) Regulations 2016 sets out to whom and how this "forfeiture notice" is to be given and what it must contain. It replicates in Northern Ireland the Regulations already made in respect of England and Wales, see The Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) Regulations 2015 (SI 2015 No. 857) ("The England and Wales Regulations").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The England and Wales Regulations were amended to include provisions relating to overseas service of a forfeiture notice (see the Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) (Amendment) Regulations 2015 (SI 2015 No. 1854)). The current Regulations do not include equivalent provisions, because the Committee criticised the drafting of those provisions. The Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) (Amendment) Regulations 2015 were reported in the 14th report of the 2015- 2016 session, dated 14 January 2016. We are currently considering how to rectify the drafting in response to the Committee's concerns, and the same approach will be taken in a subsequent amendment to these current Regulations.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to Northern Ireland.

3.3 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Chapter 3 of Part 5 of POCA makes provision for the recovery of cash in summary proceedings before the magistrates' court. The cash must be the proceeds of crime or

intended for use in, unlawful conduct. These legal proceedings are civil in nature, and are against the cash not a person ("in rem" proceedings). It is not necessary for a criminal conviction to be made before these proceedings can be brought.

4.2 Sections 289 to 293 of POCA make provision for search powers and related safeguards necessary to support the powers to seize cash under section 294. Sections 295 and 296 make provision relating to the detention of cash and section 298 provides the magistrates' courts with the power to order forfeiture of the cash if it is satisfied that the cash is the proceeds of, or intended for use in, unlawful conduct.

4.3 Sections 297A to 297G of POCA make provision for the administrative forfeiture of cash without a hearing before the magistrates' court. The cash must have been seized and detained by order of the magistrates' court under section 295. A senior officer (as defined in section 297A(6) and (7)) in the agency that seized the cash can give a "forfeiture notice" for the purposes of forfeiting the cash.

4.4 Section 297A(3) of POCA requires that the Secretary of State make Regulations as to how the forfeiture notice is to be given. By section 297A(5), the notice must be given, where possible, to every person who was given notice of a previous order made by the magistrates' court to detain the cash. Under section 297A(4), the Regulations can make provision for various matters. These Regulations apply to Northern Ireland only, and Regulations in respect of England and Wales came into force on 1 June 2015; see The England and Wales Regulations. The provisions do not extend to Scotland.

4.5 Sections 297A to 297G of POCA are inserted by section 65 of the Policing and Crime Act 2009 (c. 26), which is being commenced in relation to giving forfeiture notices in Northern Ireland on 1st March 2016. The provisions were commenced in England and Wales only on 1st June 2015, see The Police and Crime Act 2009 (Commencement No. 10, Transitional Provision and Savings) Order 2015 (SI 2015 No. 983).

5. Extent and Territorial Application

5.1 The extent of this instrument is Northern Ireland.

5.2 The territorial application of this instrument is Northern Ireland.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 Chapter 3 of Part 5 of POCA makes provision for the summary recovery of criminal cash in civil proceedings before the magistrates' courts. This applies to cash which is seized and detained under the powers set out above, where there are reasonable grounds for suspecting that the cash derives from, or is intended for use in, unlawful conduct. Many of these cases are uncontested and so the expense and time of court hearings to decide on the matter of forfeiture is nugatory. In not contesting these cases, those with an interest have implicitly admitted to the criminal taint of the relevant cash. It is usual for a magistrates' court to order the forfeiture of the cash in these uncontested cases.

7.2 Section 65 of the Policing and Crime Act 2009 inserted sections 297A to 297G into POCA to allow for the administrative forfeiture of cash in uncontested cases. These provisions build in safeguards to ensure that those with any interest in the cash have their rights protected. These include, as set out in these Regulations, express detailed rules on how notice of the intention to forfeit the cash is given. Section 297B sets out what a forfeiture notice must contain.

7.3 The forfeiture notice must provide a period of at least 30 days for objections to the forfeiture to be made. If there is an objection made by anyone (regardless of whether they were a recipient of a forfeiture notice or not) and the law enforcement agency wishes to continue with forfeiture, the matter must go forward to be heard before a magistrates' court. The legislation also provides for an aggrieved person to be able to apply to set aside the forfeiture (section 297E).

7.4 These provisions and the Regulations will not remove the right for those wishing to contest cases from having the matter heard before the courts. It is also not the policy intention of these provisions to encourage persons not to contest these cases.

7.5 The ability for law enforcement agencies to process these cases quickly will encourage law enforcement agencies to use this method of asset recovery. This will then assist in more effective recovery of the proceeds of crime and the addressing of criminal finance more generally. The provisions contain numerous safeguards to ensure proportionate use, and to protect the rights of persons with an interest in the cash.

7.6 The Regulations provide for a forfeiture notice to be given by way of post or by means of electronic communication, where the notice is being given to a person. In some cases, it may not be possible to give a notice to a person. For example, if cash has been seized when unattended, no person may have been identified as having an interest in it. Or, perhaps only a person's name is known but it has not been possible to find that person's address, so a notice cannot be given by post. In those cases, the notice may be given by way of publication in the Belfast Gazette.

7.7 Where the person to whom a forfeiture notice must be given is a child or a person lacking sufficient mental capacity to understand the nature of a forfeiture notice, then a notice must be given to a person falling within regulation 7 on their behalf. If there is no such person, then administrative forfeiture cannot be used. Forfeiture will have to be sought by way of a court order instead. This protects the interests of children and those who lack mental capacity, and does not affect the ability of the law enforcement agency to forfeit cash by way of court proceedings, as they can do now. The definition of a "protected person" in these Regulations is not the same as the definition which applies in The England and Wales Regulations. That definition was made by reference to the Mental Capacity Act 2005 (c. 9), the relevant provisions of which do not extend to Northern Ireland. The definition used in these Regulations is taken from proposed legislation in Northern Ireland, which is not yet enacted. These Regulations will be amended as necessary to reflect the final version of the definition when the provision becomes law in Northern Ireland.

Consolidation

7.8 There is no need for consolidation. This is a free-standing set of Regulations in relation to Northern Ireland for a specific set of provisions in primary legislation.

8. Consultation outcome

8.1 No formal public consultation has been carried out.

9. Guidance

9.1 No guidance will be issued in relation to this instrument; however it will form part of a package of learning issued by the Proceeds of Crime Centre in the National Crime Agency. They have responsibility for the training and monitoring of all financial investigators.

10. Impact

10.1 The additional impact on business, charities or voluntary bodies is nil. Chapter 3 of Part 5 of POCA already applies to business, charities and voluntary bodies, this new provision will not add to the impact.

10.2 The additional impact on the public sector is nil. Forfeiture cases would still be undertaken by the public sector and forfeiture notices would need to be served on persons in any event. These Regulations set out the applicable procedure.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 Chapter 3 of Part 5 of POCA already applies to activities that are undertaken by small business, this instrument will not add to the impact.

12. Monitoring & review

12.1 The Home Office together with the Proceeds of Crime Centre in the National Crime Agency will monitor these cases in their initial stages.

13. Contact

13.1 Stephen Goadby at the Home Office Telephone: 0207 035 1559 or email: Stephen.goadby@homeoffice.x.gsi.gov.uk can answer any queries regarding this instrument.