EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (INVESTIGATIVE POWERS OF PROSECUTORS: CODE OF PRACTICE) ORDER 2018

2018 No.

1. Introduction

1.1 This explanatory memorandum has been prepared by the Attorney General's Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order is made under the Proceeds of Crime Act 2002 (c. 29) ("POCA") and brings into operation on 31st January 2018 a revised code of practice providing guidance on the exercise of certain functions under POCA. The revised code is required because of amendments to POCA by the Criminal Finances Act 2017 (c. 22) ("the 2017 Act"). These amendments to POCA change certain existing functions and create new functions. The date on which the revised code is brought into operation is the date that the amendments to POCA will be brought into force.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this Order includes Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

3.3 The provisions in the 2017 Act which have led to amendments of this code will initially be commenced only in relation to England and Wales. Where this code applies to Northern Ireland, the code reflects the fact that amendments to POCA made by the 2017 Act have not been commenced in relation to Northern Ireland.

4. Legislative context

4.1 This Order brings into operation a revised code of practice for prosecutors in England, Wales and Northern Ireland. This code replaces the earlier code of practice issued under section 377A of POCA on 1st March 2016 (SI 2016/222). Section 27 of the Justice (Northern Ireland) Act 2002 provides that the Attorney General for England and Wales shall, by virtue of that office, also be Advocate General for Northern Ireland. An equivalent code will be made by the Scottish Ministers. The code of practice provides guidance on the exercise of certain functions under POCA as further detailed below.

4.2 The code of practice made by the Attorney General and the Advocate General for Northern Ireland ("the Attorney General") under section 377A of POCA applies to the exercise of functions under Chapter 2 of Part 8 of POCA by the Director of Public Prosecutions, the Director of the Serious Fraud Office, and the Director of Public

Prosecutions for Northern Ireland ("the relevant Directors"), as well as officers of the Serious Fraud Office.

4.3 Chapter 2 of Part 8 of POCA concerns investigation powers in England, Wales and Northern Ireland. Amendments to Chapter 2 Part 8 of POCA have been made primarily by Chapter 1 of Part 1 of the 2017 Act as well as Schedules 1 and 5 to the 2017 Act. There are four main changes which relate to the code made by the Attorney General under section 377A of POCA.

4.4 Section 1 of the 2017 Act inserted a new section 362A into POCA which created "unexplained wealth orders". An "unexplained wealth order" is an order requiring a specified person to explain the nature and extent of their interest in identified property, how they obtained it, the details of the settlement where it is held by the trustees of a settlement, and to set out other information in connection with the property as may be specified in the order. Section 2 of the Act inserted a new section 362J into POCA which created "interim freezing orders". An "interim freezing order" is an order made in respect of property subject to an "unexplained wealth order" when necessary to avoid the risk of any recovery order that might subsequently be made being frustrated.

4.5 Section 7 of the 2017 Act amended sections 357 to 362 of POCA which concern "disclosure orders". The Director of the Serious Fraud Office and an officer of the Serious Fraud Office are able to apply for a "disclosure order" in a confiscation investigation, a civil recovery investigation, and a money laundering investigation. The Director of Public Prosecutions in England and Wales and the Director of Public Prosecutions in Northern Ireland are only able to apply for a disclosure order in a civil recovery investigation.

4.6 Schedule 1 to the 2017 Act extended the powers of members of staff of the Serious Fraud Office. It made an officer of the Serious Fraud Office, defined as a member of staff of the Serious Fraud Office under a new section 454A to be inserted into POCA by paragraph 26 of Schedule 1 to the 2017 Act, an "appropriate officer" in relation to a confiscation investigation, a civil recovery investigation, a detained cash or property investigation, a money laundering investigation, and a frozen funds investigation, and the Director of the Serious Fraud Office a "senior appropriate officer" in relation to those investigations.

4.7 Paragraph 39(3) of Schedule 5 to the 2017 Act inserted a new section 341(3B) into POCA which created a "detained property investigation" as well as a new section 341(3C) which created a "frozen funds investigation". A "detained property investigation" is an investigation for the purposes of Chapter 3A of Part 5 of POCA into the derivation of property, or part of it, detained under that Chapter, or whether such property is intended to be used in unlawful conduct. A "frozen funds investigation" is an investigation for the purposes of Chapter 3A of Part 5 of POCA into the derivation of money, or part of it, held in an account in relation to which an account freezing order has been made under the new section 303Z3 inserted into POCA by section 16 of the 2017 Act, or whether money held in a frozen account, or whether money held in a frozen account, or part of it, is intended to be used in unlawful conduct.

4.8 This Order is linked to four other instruments made by the Secretary of State required because of amendments made to POCA by the 2017 Act, namely:

(i) The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) Order 2018;

(ii) The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2018;

(iii) The Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2018; and

(iv) The Proceeds of Crime Act 2002 (Searches for Certain Personal (or Moveable) Property: Code of Practice) (England and Wales and Scotland) Order 2018.

5. Extent and territorial application

5.1 This Order extends to England, Wales and Northern Ireland.

5.2 This Order applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 The Attorney General, Jeremy Wright QC, has made the following statement regarding Human Rights:

"In my view, the provisions of the Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) Order 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Codes of practice are made under POCA to provide guidance to the persons exercising relevant functions under POCA to ensure that the functions concerned are exercised lawfully. The codes are also of interest to persons who are the subject of the powers, and the codes themselves make clear that they should be made widely available, for example in police stations and border control areas, where the powers are likely to be used.

7.2 When functions covered by the code of practice issued by the Attorney General under section 377A of POCA are revised, or new functions are created, the code must be revised or a new code made as necessary.

7.3 Each of the amendments to the POCA investigation provisions requires additional guidance in the relevant code of practice. This ensures that prosecutors will use their investigative powers in a consistent, fair and focussed manner. This is particularly important in relation to the execution of search and seizure warrants and other coercive measures. The code ensures that full consideration is given before forced entry and search is used, and that, if used, the power is exercised in a proportionate and transparent manner, with a full public record being made.

Consolidation

7.4 There is no need for consolidation as this code replaces the earlier code of practice issued in its entirety.

8. Consultation outcome

8.1 A draft of the code of practice was subject to a public consultation from 31st July to 25th August 2017 jointly with the public consultation on the related codes of practice. See www.gov.uk/government/consultations/proceeds-of-crime-act-2002-and-anti-terrorism-crime-and-security-act-2001-codes-of-practice. Two responses were received. They were considered and the draft code of practice was amended as appropriate. A formal response to the consultation has not been published.

9. Guidance

9.1 The code of practice brought into operation by this Order constitutes guidance.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An impact assessment has not been prepared for this Order as it has no direct impact on business, charities or voluntary bodies. The code of practice provides guidance on the use of powers under POCA by bodies in the public sector, and incorporates existing best practice, but it does not require any greater use of those powers which could result in an additional impact.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring and review

12.1 The code will be reviewed whenever issues arise as to its operation in practice, and also whenever amendments are made to POCA which require a revised or new code of practice to be produced.

13. Contact

13.1 Robert Earl at the Attorney General's Office (telephone: 020 7271 2503; email: robert.earl@attorneygeneral.gsi.gov.uk) can answer any queries regarding the Order made by the Attorney General.