EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (INVESTIGATIVE POWERS OF PROSECUTORS: CODE OF PRACTICE) ORDER 2021

2021 No. [XXXX]

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 28th June 2021 a revised code of practice providing guidance and procedural requirements for the exercise of certain functions under POCA. The revised code is required due to the commencement of the remainder of the Criminal Finances Act 2017 (c. 22) ("the 2017 Act"), which amended POCA, in Northern Ireland. The provisions grant additional investigative powers to prosecutors in Northern Ireland, which are already available to prosecutors in England, Wales and Scotland. The date on which the revised code will be 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.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this Order is England and Wales and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this Order is England and Wales and Northern Ireland.

4.2 The territorial application of this Order is England and Wales and Northern Ireland.

5. European Convention on Human Rights

5.1 The Attorney General, Michael Ellis QC MP, 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 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 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 31st January 2018 (SI 2018/93). The code of

practice provides guidance on the exercise of certain functions under POCA as further detailed below.

6.2 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.

6.3 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, as well as officers of the Serious Fraud Office.

6.4 Chapter 2 of Part 8 of POCA concerns investigation powers in England, Wales and Northern Ireland. Amendments to the investigative powers of prosecutors in Chapter 2 of Part 8 of POCA have been made 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 to POCA under the 2017 Act, which are now being commenced in relation to Northern Ireland, having already been commenced in England and Wales, and which have required the code of practice to be revised.

6.5 First, 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 2017 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.

6.6 Secondly, 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 may 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 may only apply for a disclosure order in a civil recovery investigation.

6.7 Thirdly, 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.

6.8 Fourthly, paragraph 39(3) of Schedule 5 to the 2017 Act inserted a new section 341(3B) into Chapter 1 of Part 8 of 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 part of it, is intended to be used in unlawful conduct.

6.9 Under POCA, equivalent codes of practice can be made by the Scottish Ministers and the Department of Justice in Northern Ireland in respect of the use of its powers by certain law enforcement agencies in those territories. Equivalent codes of practice can also be made by the Secretary of State in respect of certain law enforcement agencies in certain territories. The Department of Justice in Northern Ireland and the Secretary of State will update equivalent codes of practice to coincide with the commencement of the relevant provisions of the 2017 Act in Northern Ireland. 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 2021;

(ii) The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2021;

(iii) The Proceeds of Crime Act 2002 (Recovery of Listed Assets: Code of Practice) Regulations 2021; and

(iv) the Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order 2021.

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 and to establish procedural requirements to ensure that the functions concerned are exercised lawfully, proportionately, consistently and in a focussed manner. 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 The codes include detailed and clear explanation of the powers and the legal requirements that must be met before they are exercised. They set out guidance on how to consider those legal requirements, on balancing the need for using intrusive powers against the interference with a person's privacy or possessions, and what further issues should be considered when using the powers. The codes require those contemplating using the powers to consider the impact on the community of their use, balanced against the public interest and the benefit the use of the powers would add to the case. The codes also contain direct operational guidance or procedural requirements in relation to various aspects of the actual use of the powers, including the time of day at, and the manner in, which they should be used. This is intended to ensure effective use of the powers is recorded and to clarify the need to justify the use of the powers thereby ensuring public and judicial accountability.

7.3 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 appropriate. The codes are therefore being amended in

light of the commencement in Northern Ireland of the remainder of the 2017 Act, which amends POCA.

7.4 Royal Assent of the 2017 Act took place on 27th April 2017. The suspension of the Northern Ireland Assembly in February 2017 until its reconstitution in January 2020, prevented the Home Office from seeking the approval of the Northern Ireland Assembly to commence the relevant provisions of the 2017 Act in Northern Ireland, as it had committed to do during the passage of the Bill. Certain reserved aspects, such as the counter terrorism financing parts of the 2017 Act, were commenced. Following the reconstitution of the Assembly, the Home Office has secured the approval for commencement from the Northern Ireland Assembly, and brought forward the necessary secondary legislation, including this instrument, to commence the outstanding provisions in Northern Ireland.

7.5 The revised code includes the necessary references to Northern Ireland throughout, in order to reflect the introduction of the new powers to Northern Ireland. This includes removing references to certain powers in the 2017 Act not being available in Northern Ireland.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 A consolidation will not be taking place.

10. Consultation outcome

10.1 A draft of the code of practice was subject to a nine-week public consultation from 1st December 2020 to 22nd January 2021 jointly with the public consultation on the related codes of practice. See: https://www.gov.uk/government/consultations/consultation-on-amendments-to-the-attorney-generals-code-of-practice-issued-under-section-377a-of-the-proceeds-of-crime-act-2002.

10.2 No responses were received to the consultation. The Home Office received two responses from law enforcement agencies on their separate consultation on four related codes of practice. One of these responses highlighted minor technical drafting issues with implications for the code of practice issued by the Attorney General under section 377A of POCA and corrections to this code have since been made. The remainder of the two responses received by the Home Office were outside of the scope of the consultation which only sought views on the amendments of the codes in relation to the commencement of the 2017 Act in Northern Ireland. In order to ensure that those suggested changes are consulted on adequately, such changes will be considered as part of any future amendments to the codes.

11. Guidance

11.1 The code of practice brought into operation by this Order contains guidance and operational requirements as to the use of the powers to which they relate.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because its impact has been considered as part of the whole package of legislation to be implemented in order to commence the 2017 Act in Northern Ireland.

13. Regulating small business

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

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that the codes are reviewed whenever issues arise as a matter of their operation in practice, but also where amendments are made to POCA which require a revised or new Code of Practice to be produced.

15. Contact

15.1 Robert Earl at the Attorney General's Office (robert.earl@attorneygeneral.gov.uk) can answer any queries regarding the Order.

15.2 Rebecca Handler, Deputy Director for the Public Law and Litigation Team, at the Attorney General's Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Michael Ellis QC MP, the Attorney General, can confirm that this Explanatory Memorandum meets the required standard.