EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (SEARCH, SEIZURE AND DETENTION OF PROPERTY: CODE OF PRACTICE) (ENGLAND AND WALES) (NO. 2) ORDER 2016

2016 No. [XXXX]

THE PROCEEDS OF CRIME ACT 2002 (CASH SEARCHES: CODE OF PRACTICE) ORDER 2016

2016 No. [XXXX]

THE PROCEEDS OF CRIME ACT 2002 (INVESTIGATIONS: CODE OF PRACTICE) (ENGLAND AND WALES AND NORTHERN IRELAND) ORDER 2016

2016 No. [XXXX]

AND

THE PROCEEDS OF CRIME ACT 2002 (SEARCH, SEIZURE AND DETENTION OF PROPERTY: CODE OF PRACTICE) (NORTHERN IRELAND) ORDER 2016

2016 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 These four orders are made under the Proceeds of Crime Act 2002 (c. 29) ("POCA") , and provide that three revised codes of practice and one new code of practice providing guidance on the exercise of certain functions under POCA come into operation on 1st March 2016. The revised and new codes are required because of amendments to POCA made by the Serious Crime Act 2015 (c. 9) ("the 2015 Act"). They are also required to allow for commencement of amendments to POCA in relation to Northern Ireland made by the Policing and Crime Act 2009 (c. 26) ("the 2009 Act") and the Crime and Courts Act 2013 (c. 22) ("the 2013 Act"); see also the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order (SI 2015/798). These amendments to POCA extend certain existing functions and create new functions. The commencement date of the orders 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 The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property (Code of Practice) (England and Wales) (No 2) Order 2016 – this entire instrument applies only to England and Wales.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent provisions in relation to the relevant territory were included in an Act of the relevant devolved legislature.

3.4 Disregarding minor or consequential changes, the territorial application of the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2016 includes Scotland and includes Northern Ireland.

3.5 Disregarding minor or consequential changes, the territorial application of the Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales and Northern Ireland) Order 2016 includes Northern Ireland.

3.6 Disregarding minor or consequential changes, the territorial application of the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2016 includes Northern Ireland.

4. Legislative Context

4.1 All four orders bring into operation either a new code of practice (in the case of the code of practice concerning search, seizure and detention of property in Northern Ireland), or revised codes of practice (in the case of the other three codes of practice). Equivalent codes are made by the Scottish Ministers and the Department of Justice Northern Ireland. The codes of practice provide guidance on the exercise of certain functions under POCA as further detailed below.

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) (No. 2) Order 2016.

4.2 Section 55 of the 2009 Act inserted sections 47A to 47S into POCA. Section 55 is the England and Wales equivalent to section 57 for Northern Ireland, see paragraphs 4.18 to 4.20 below. These new provisions provide for search and seizure powers in England and Wales to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. Section 47C contains the seizure powers, while sections 47D to 47F contain the search powers. Property may be seized in anticipation of a confiscation order being made. If a confiscation order is made, the property may be sold in order to satisfy the confiscation order. These provisions were commenced on 1 June 2015 and a related code of practice was brought into force by the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) Order 2015 (SI 2015/730).

4.3 Each of the search powers in sections 47D to 47F and the seizure power in section 47C may only be exercised with appropriate approval unless in the circumstances, it is not practicable to obtain such approval in advance. Appropriate approval is the prior approval of a justice of the peace or (if this is not practicable) of a senior officer, and section 47G specifies who is a senior officer. The appropriate officers who may exercise the functions are specified in section 47A and are an officer of Revenue and

Customs, an immigration officer, a constable or an accredited financial investigator. Section 47G(3) sets out who is a senior officer in respect of each type of appropriate officer.

4.4 The power in section 47C is for an appropriate officer to seize certain property if it may otherwise be made unavailable for satisfying any confiscation order made under section 6 of the Act, or the value of the property may otherwise be diminished.

4.5 Sections 47D to 47F contain search powers, which allow an appropriate officer to conduct searches of premises, people and vehicles for property which the officer has reasonable grounds for suspecting may be found and which may be seized under section 47C.

4.6 The functions under sections 47C to 47F may only be carried out with the appropriate approval under section 47G, unless in the circumstances it is not practicable to obtain it. Section 47H requires that an appropriate officer must give a written report to a person appointed by the Secretary of State in any case where either the officer seizes property under section 47C without the approval of a justice of the peace and any of the property seized is not detained for more than 48 hours, or where the search powers under sections 47D to 47F are exercised without the approval of a justice of the peace but no property is seized.

4.7 Sections 41A, 44A and 47J to 47P concern the detention of property which has been seized by an appropriate officer. Appropriate officer has a wider definition in relation to sections 41A and 44A than section 47A: see section 41A(3) of the Act. It includes additionally a National Crime Agency officer, and a member of staff of the relevant director (within the meaning of section 352(5A), being, in relation to England and Wales, the Director of Public Prosecutions or the Director of the Serious Fraud Office).

4.8 Section 13 of the 2015 Act changed the test for exercising the search and seizure powers and added a seniority of National Crime Agency officer to provide approval for the use of those powers. The existing code of practice required revision to address these amendments.

4.9 This revised code of practice replaces the recent one that came into force in June 2015 (SI 2015/730). The code has also been slightly restructured to make it easier to read and understand.

The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2016

4.10 Chapter 3 of Part 5 of POCA provides for the search, seizure and detention of cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and for the forfeiture of such cash, in the United Kingdom. Section 289 of POCA, which contains the power to conduct searches, has been amended by section 63 of the 2009 Act so that searches can be conducted of vehicles as well as of premises and of persons. This provision was commenced in England and Wales on 1st June 2015 and a revised code of practice was brought into operation to provide guidance – see The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) (England and Wales and Scotland) Order 2015 (SI 2015/705). The revised code of practice brought into operation by this order extends this guidance to Northern Ireland so as to cover searches of vehicles as well as of premises and of persons. The code has also been restructured to make it easier to read and understand.

4.11 The revised code of practice under section 292 of POCA applies to officers of Revenue and Customs exercising functions in England, Wales, Scotland and Northern Ireland, but in relation to accredited financial investigators and constables it applies in relation to the exercise of functions in England and Wales only. By virtue of section 24 of the UK Borders Act 2007 (c. 30), Chapter 3 of Part 5 of POCA is applied in relation to immigration officers as it applies to constables, but with the removal of the territorial restriction of the exercise of the powers in England and Wales only. Therefore the revised code also applies to immigration officers exercising the functions in England and Wales, Scotland and Northern Ireland.

4.12 The revised code of practice will replace both the revised code issued in relation to England, Wales and Scotland (SI 2015/705) and the revised code issued in 2008 that relates to Northern Ireland (SI 2008/947).

The Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales and Northern Ireland) Order 2016

4.13 Part 8 of POCA concerns investigation powers in the United Kingdom. The nature of confiscation investigation was widened by the 2015 Act, so that an investigation can be undertaken after a confiscation order has been made so as to assist in enforcement. The investigation powers can be used to identify the extent or whereabouts of property that might be realised to satisfy a confiscation order (see section 38 of the 2015 Act).

4.14 The nature of a civil recovery investigation was widened by the 2013 Act, so that an investigation may begin with a person and, as property is identified and more is known about the property, become an investigation into property (see the amendments made to section 341(2) of POCA by paragraph 2 of Schedule 19 to the 2013 Act). Equally, an investigation may begin with property, and as more information about its ownership emerges, become an investigation into a particular person. The provisions were commenced in England and Wales on 1 June 2015. This revised code of practice applies to the exercise of these powers in Northern Ireland in addition to England and Wales.

4.15 Section 66 of the 2009 Act transferred applications for a production order and a search and seizure warrant for a detained cash investigation (which assist in the preparation of a case for forfeiting cash seized under Chapter 3 of Part 5 of POCA) from the High Court to the Crown Court in Northern Ireland. The change was commenced in England and Wales on 1 June 2015. The revised code of practice reflects these changes and has also been restructured to make it easier to read and understand.

4.16 The code of practice made under section 377 of POCA applies to the exercise of functions of the following persons under Chapter 2 of Part 8 of POCA:

a) the Director General of the National Crime Agency;
b) National Crime Agency officers;
c) accredited financial investigators;
d) constables;
e) officers of Revenue and Customs; and
f) immigration officers.

4.17 Chapter 2 of Part 8 of POCA applies to England and Wales and Northern Ireland. The revised code of practice will replace both the recent one issued in relation to England

and Wales only (SI 2015/729) and the revised code issued in 2008 that relates to Northern Ireland (SI 2008/946).

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2016

4.18 Section 57 of the 2009 Act inserts new sections 195A to 195S into Part 4 of POCA (Part 4 concerns confiscation of the proceeds of crime in Northern Ireland). These new provisions provide for search and seizure powers in Northern Ireland to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. Section 195C contains the seizure power, while sections 195D to 195F contain the search powers. Property may be seized in anticipation of a confiscation order being made. If a confiscation order is made, the property may be sold in order to satisfy the order.

4.19 Each of the search powers in sections 195D to 195F and the seizure power in section 195C may only be exercised with appropriate approval unless, in the circumstances, it is not practicable to obtain such approval in advance. Appropriate approval is the prior approval of a lay magistrate or, if that is not practicable, of a senior officer. Senior officer is defined in section 195G. The appropriate officers who may exercise the functions are specified in section 195A and are an officer of Revenue and Customs, an immigration officer, a constable or an accredited financial investigator. Section 195G(3) sets out who is a senior officer in respect of each type of appropriate officer.

4.20 The code issued under section 195S relates only to the functions of senior officers as defined in section 195S(1A) (i.e. officers of revenue and Customs and immigration officers). Note that the Department of Justice issues a code of practice under section 195T in relation to constables and accredited financial investigators – see article 18(2)(m) of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) 2012 (SI 2012 No. 2595).

4.21 Sections 190A and 193A were inserted by section 54 of the 2009 Act and along with sections 195J to 195P concern the detention of property which has been seized by appropriate officers. In relation to section 190A, appropriate officer is defined in subsection (3) of that section, and in addition to the list of officers in paragraph 4.8 above, includes also a National Crime Agency officer and a member of staff of the relevant director (within the meaning of section 352(5A), being, in relation to Northern Ireland, the Director of Public Prosecutions for Northern Ireland or the Director of the Serious Fraud Office).

4.22 This is a new code of practice under section 195S of POCA. The structure is similar to the revised codes.

5. Extent and Territorial Application

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) (No 2) Order 2016

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2016

5.3 The extent of this instrument is England and Wales, Scotland, and Northern Ireland.

5.4 The territorial application of this instrument is England, Wales, Scotland, and Northern Ireland.

The Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales and Northern Ireland) Order 2016

5.5 The extent of this instrument is England and Wales and Northern Ireland.

5.6 The territorial application of this instrument is England, Wales and Northern Ireland.

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2016

5.7 The extent of this instrument is Northern Ireland.

5.8 The territorial application of this instrument is Northern Ireland.

6. European Convention on Human Rights

6.1 The Minister of State for the Home Department, Mike Penning, has made the following statement regarding Human Rights:

"In my view the provisions of the following orders are compatible with the Convention rights:

a. the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2016,

b. the Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales and Northern Ireland) Order 2016,

c. the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2016, and

d. the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) (No. 2) Order 2016."

7. Policy background

What is being done and why

7.1 Codes of practice are made under POCA to provide guidance to the officers exercising the functions under POCA, to ensure that the functions concerned are exercised lawfully, proportionately, consistently and in a focused 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 When functions covered by the codes of practice are revised, or new functions are created, the codes must be revised or made as necessary.

7.3 Each of the codes has been restructured to make them easier to follow. All 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 and possessions, and what further issues should be considered when using the powers. The code also requires an officer who is

contemplating using the powers to consider the impact on the community in 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, in relation to various aspects of the actual use of the powers, including guidance as to the time of day at which the powers should be used and the manner in which they should be used. This is intended to ensure effective use with minimal inconvenience. The codes also set out the requirements for the use of the powers to be recorded, and provide guidance as to the need to justify the use of the powers, ensuring public and judicial accountability.

7.4 In order to assist the Committee in understanding the policy, and the operational application of the codes of practice, the following paragraphs will give some context as to how it is anticipated the powers will be used, and the types of cases to which they apply.

Search, Seizure and Detention of Property Codes

7.5 A confiscation order can only be made after a criminal conviction. Following conviction, a court can proceed to make a confiscation order if asked to do so by the prosecution, or if the court believes it is appropriate to do so. It usually forms part of the sentencing process.

7.6 POCA contains powers to prevent a suspect from dissipating their assets during a confiscation investigation. Suspects may hide or dispose of their property when they realise that their property and assets are at risk from future confiscation proceedings.

7.7 A restraint order can be made by the court to prevent the subject of the order from dealing with property, provided that the conditions set out in the statutory regime are met. Prior to the amendments made by the Policing and Crime Act 2009 and commenced last year, there was no power for the prosecution to retain property which was the subject of a restraint order. The property often remained in the hands and control of the suspect, but the suspect was prevented from dealing with the property, such as by selling it or removing it from the country. A restraint order is an effective interim measure in respect of businesses and immovable property and assets such as houses, but it is less effective with portable assets such as cars, jewellery, electric goods and clothing; these assets are often of high value and are easily moved, hidden and sold.

7.8 The new power to seize and retain property addresses this issue with portable assets (see sections 47B to 47M). They will then be available for sale once a confiscation order has been made.

7.9 The new powers to search for, seize and retain property are intrusive and therefore guidance is necessary to ensure their lawful, effective and proportionate use. There are specific issues which the code addresses to safeguard the use of these powers.

7.10 The period of time that this process could take may be lengthy. The time between a criminal investigation commencing and the suspect being charged, prosecuted and a conviction being secured, will vary according to the complexities and specific issues raised in each case. This can take a significant amount of time in difficult cases and complicated offences (for example, investigations and prosecution in fraud and money laundering cases can take years).

7.11 In cases where the law enforcement agency is also considering recovering the proceeds of crime, they may start an investigation into the financial affairs of the suspect at the same time as the criminal investigation and may want to seize property

under these new powers once a person is arrested. The financial investigation is known as a confiscation investigation, and this can also be a lengthy process depending on the complexity of the matter. The confiscation investigation is important to ensure that the accused's benefit can accurately be assessed by the court, if a conviction is secured and a confiscation order is to be made. The seizure of the property could be important to ensure that assets are secured, so that they are available to be sold once the confiscation order is made. It is necessary to provide safeguards relating to the period of time for which a person may be deprived of their property.

7.12 The code also addresses circumstances in which it is not possible to obtain the prior approval of a justice of the peace, or a senior officer, in advance of the powers being used. There may be several reasons why this is not possible, but in essence these will arise where there is a risk of the property being dissipated or hidden. An officer may happen upon relevant property in the course of their investigation, in circumstances where this could not have been predicted such as when they stop or interview a person. In those circumstances the need to act immediately is clear, otherwise the property of interest will be lost, and so the officer may use the powers to search, and potentially seize, the property without obtaining prior approval. The Home Office would expect that in most cases, and in particular those that are intelligence-led and have a degree of planning, prior approval will be obtained. It is of note that if prior approval is not obtained, then there is the safeguard of either the court considering the continued detention of the property or a report being filed with the independent Appointed Person. This report details why the officer considered that the powers were exercisable and why it was not practicable to obtain the approval of a justice of the peace. This issue is set out in detail in the codes, ensuring that officers will fully consider the implications of their actions.

7.13 The Appointed Person is another important safeguard in the use of these powers and the codes provide guidance as to how officers should contact him. The Appointed Person is an independent officer who oversees the use of the search and seizure powers, in order to ensure that they are being used in a proportionate, effective and focused manner. In cases where approval has been given or the case progresses to further detention there is independent oversight; a justice of the peace will have considered the facts of the case in giving their approval and/or a court will consider the case in granting further detention beyond 48 hours (see below). So, in all cases where the powers are exercised, their use will be considered by an independent person; a judge, justice of the peace or the Appointed Person.

7.14 Another important issue addressed by these codes is the return of property within 48 hours of it being seized. Section 47J(2) of POCA provides that property may be detained for an initial period of 48 hours. Property will be returned within 48 hours if it becomes apparent that the ongoing detention cannot be justified. For example, an officer may seize property in time-sensitive circumstances as set out above, but after further consideration conclude that detention of the property is not justified, or that it must be returned as the legal test for future ongoing retention of the property is not met. Alternatively, the suspect may provide a reasonable explanation as to why the property should be returned. The 48 hour period allows for a suitable period between an administrative seizure and obtaining judicial approval for retention of the seized property.

7.15 The codes also address other circumstances that could arise in the operational application of the powers including a requirement for a senior officer to formally review the continued retention of seized property every three months.

Cash search code

7.16 Chapter 3 of Part 5 of POCA provides powers to search for, seize, detain and seek the forfeiture of cash which is either the proceeds of crime or suspected of being intended for use in crime. This is a civil procedure in respect of the cash itself in the magistrates' courts, and does not require a criminal conviction.

7.17 The powers of search have been amended to provide a specific power to search a vehicle as well as a person and property. This is to address the scenario in which a suspect has been searched and their car is in the vicinity. In those circumstances, it would be reasonable for the enforcement agencies to have the power to search the vehicle where the officer has reasonable grounds to suspect that the vehicle contains cash which would be recoverable using the powers above. For example, this might apply in circumstances where a suspected drug dealer was stopped by police as he was returning to his vehicle.

7.18 The code provides, as it did previously for searches of the person and property, detailed ordered guidance on considering the use of the power, the actual search and requirements afterwards including making a record of the search (to be available to the public).

7.19 The code also provides, similar to paragraph 7.12 above, guidance on communicating with the Appointed Person who oversees the use of the search powers.

7.20 The code also addresses various other issues that arise when using the powers, for example the procedure when a record of a search is made electronically. The code also emphasises the need to ensure an effective, proportionate and transparent use of the search powers.

Investigation Code

7.21 Part 8 of POCA provides various investigation powers to help build a case to be taken for either prosecuting money laundering or recovering the proceeds of crime. These powers include production orders and search and seizure warrants.

7.22 POCA has been amended to provide that an investigation to identify property that can be recovered in the High Court by civil proceedings can be targeted against a person as well as property. So, if property has been identified as being the proceeds of crime and liable to civil recovery, investigation orders can then be made against the owner of that property in order to identify any other property that may be the proceeds of crime. This allows for a full ability to construct a civil recovery case.

7.23 The definition of confiscation investigation has been expanded to allow for the identification of property that could be used to settle an outstanding confiscation order. Previously, there were no investigation powers available once a confiscation order has been made. This will combat the uncooperative defendant who, on having a confiscation order made against him, then proceeds to hide or sell his property; the police and other agencies will be able to trace the property.

7.24 The venue for obtaining investigation orders to support cash forfeiture proceedings (see paragraph 7.16 above) has been changed from the High Court to the Crown Court. This will allow for orders to be obtained more quickly, as the police and other

agencies will be more familiar with the relevant court procedure. It is also in keeping with the current practice, as forfeiture proceedings are brought at magistrates' court level.

7.25 Each of the amendments to the POCA investigation provisions requires additional guidance in the relevant code of practice. This ensures that investigators will be using their powers in a consistent, fair and focused manner. This is particularly of relevance in relation to the execution of a search and seizure warrant. The codes ensure 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

7.26 There is no need for consolidation.

8. Consultation outcome

8.1 Previous drafts of these codes of practice were subject to a twelve week public consultation from 10th July 2015 to 2nd October 2015. See ***https://www.gov.uk/government/consultations/codes-of-practice-issued-under-the-proceeds-of-crime-act-2002-poca***.

9. Guidance

9.1 The codes of practice brought into operation by these orders constitute 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. The National Crime Agency will devise a training programme to cover all amendments to POCA and the codes of practice will be one component of that programme. The overall cost of this training is likely to be less than £5,000.

10.3 Impact Assessments have not been prepared for these instruments.

11. Regulating small business

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

12. Monitoring & review

12.1 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.

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 these instruments.