EXPLANATORY MEMORANDUM TO

THE MAGISTRATES' COURTS (DETENTION AND FORFEITURE OF CASH) (AMENDMENT) RULES 2012

2012 No. 1275 (L. 4)

1. This Explanatory Memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Rules amend the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, so as to allow a magistrates' court to treat as ineffective the service of notice of the proceedings if the respondent demonstrates that he or she did not receive that notice.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Section 144 of the Magistrates' Courts Act 1980 allows the Lord Chief Justice to make rules regulating and prescribing the practice and procedure of magistrates' courts, except in relation to any criminal cause or matter, or family proceedings. The Lord Chief Justice may do so only on the advice of, or after consulting, the magistrates' courts rule committee appointed under that section. He may do so only with the concurrence of the Lord Chancellor.

4.2 Section 294 of the Proceeds of Crime Act 2002 empowers customs officers, constables and accredited financial investigators to seize and detain cash which they reasonably suspect to be property obtained through unlawful conduct, or property intended for use in unlawful conduct. After 48 hours, the continued detention of such cash requires the approval of a magistrates' court: section 295. A person from whom such cash is seized, or the owner, if different, may apply for its release: sections 297 and 301. The authority by whose officers the cash was seized may obtain an order from a magistrates' court for its forfeiture, if that authority can satisfy the court that it is indeed property obtained through, or intended for use in, unlawful conduct: section 298. The court's decision on a forfeiture application is susceptible to appeal to the Crown Court, but any such appeal must be made within 30 days of that decision: section 299.

4.3 The Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002 govern (among other things) the procedure on an application for forfeiture under section 298 of the 2002 Act.

5. Territorial extent and Application

5.1 This instrument applies to England and Wales.

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 In its judgment in *R (Harrison) v Birmingham Magistrates' Court and Chief Constable of West Midlands Police* [2011] EWCA Civ 332, the Court of Appeal expressed concern that, unlike other comparable procedure rules, the 2002 Rules contained no explicit provision allowing a respondent to demonstrate that service of notice of the proceedings had been ineffective, and so to ask for a forfeiture order to be set aside. The court described it as being in accordance with 'the most elementary principle of natural justice' that in such circumstances a respondent should be able to retrieve the opportunity to participate in the proceedings.

7.2 To meet that concern, these rules amend rule 9 of the 2002 Rules (which prescribes how notices of proceedings may be served) so as to introduce a presumption of effective service, but one which can be set aside.

- ***Consolidation***

7.3 On the next occasion on which any substantial amendment to the 2002 Rules is made, the amendment made by these rules will be consolidated.

8. Consultation outcome

8.1 In accordance with section 144 of the Magistrates' Courts Act 1980 (see paragraph 4.1 above), the Lord Chief Justice consulted with the magistrates' courts rule committee. Though these are not rules of criminal procedure, an application for the forfeiture of seized cash may be made at the same time as a prosecution for an alleged criminal offence (as happened in the case of *Harrison*). In view of that possibility, the Lord Chief Justice consulted also with the Criminal Procedure Rule Committee. Neither committee objected to the proposal.

9. Guidance

9.1 The amendment will be drawn to the attention of magistrates' courts and their legal advisers, and to the attention of representatives of the most likely other users of the rules, including the Law Society and the Bar Council. Arrangements will be made for it to be published by the editors of relevant legal journals.

10. Impact

10.1 These rules have no impact on business, charities or voluntary bodies.

10.2 These rules have no impact of themselves on the public sector. However, they allow for disputes about service of notice of forfeiture proceedings to be determined promptly in magistrates' courts, instead of by application to the High Court for judicial review, at greater public expense.

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

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring and review

12.1 The amendment was prompted by judicial comment. Any further such comment will be monitored by the Ministry of Justice. Reports of the operation of the amended rule will be gathered by Her Majesty's Courts and Tribunals Service.

13. Contact

Jonathan Solly at the Ministry of Justice can answer any queries regarding the instrument. Telephone: 020 3334 4031, or e-mail: jonathan.solly@justice.gsi.gov.uk.