EXPLANATORY MEMORANDUM TO

THE MAGISTRATES' COURTS (FREEZING AND FORFEITURE OF MONEY IN BANK AND BUILDING SOCIETY ACCOUNTS) RULES 2017

2017 No. 1297 (L. 27)

1. Introduction

1.1 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 The purpose of this instrument is to create court rules to underpin the operation of sections 303Z1- 303Z19 in Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 (POCA). Chapter 3B makes provision for the freezing and forfeiture of bank and building society accounts, where those accounts contain the proceeds of unlawful conduct (i.e. criminality), or funds which are intended for use in unlawful conduct. Please see below for a more detailed description of the legislation.

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 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 Section 144 of the Magistrates' Courts Act 1980 (c. 43) provides for rules regulating and prescribing the practice and procedure of magistrates' courts, except in relation to any criminal cause or matter, or family proceedings, to be made by the Lord Chief Justice with the concurrence of the Lord Chancellor. Since proceedings in relation to freezing and forfeiture of money in bank and building society accounts are neither criminal nor family proceedings, these Rules are made under section 144.

4.2 Sections 303Z1 – 303Z19 were inserted as new Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 ("POCA") by section 16 of the Criminal Finances Act 2017 (c. 22), and make provision for the freezing and forfeiture of bank and building society accounts, where those accounts contain the proceeds of unlawful conduct (i.e. criminality), or funds which are intended for use in unlawful conduct. The provisions build on and partly mirror existing powers in Chapter 3 of Part 5 of POCA to seize and recover cash that is the proceeds of unlawful conduct or is intended for use in such conduct.

4.3 Applications for orders under Chapter 3B of POCA will be heard in the magistrates' court. Accordingly, these Rules are based on the existing procedure for cash claims in

the magistrates' court, and are intended to provide the procedure by which these powers will operate.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application is 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 Prior to the amendments made by the Criminal Finances Act 2017, the contents of bank and building society accounts could be confiscated following a conviction, or recovered under civil recovery powers in POCA where the value was more than £10,000. Where neither of these conditions applied, there was no formal mechanism for recovering the funds. There are two major areas where this is a concern. Firstly, banks that identify accounts that they believe to contain illicit funds can inform the National Crime Agency of this through a disclosure under Part 7 of POCA. However, for many accounts, no action can be taken as there is no specific power for law enforcement agencies to use. Secondly, law enforcement agencies may wish to take action on an account as part of their general operations, where there is reasonable suspicion that the funds derive from, or are intended for use in, unlawful conduct.

7.2 The account forfeiture provisions are similar to the cash forfeiture procedure. This is because, whilst criminals continue to use cash in significant amounts, there is a distinct need to be able to take action against criminals transferring and retaining illicit wealth through other means. Basing these procedures on those already in existence will assist in this, meaning that rules for the magistrates' court are required, which will be similar to the existing rules for the detention and forfeiture of cash in the magistrates' court (see S.I 2002/2998).

7.3 Unlike the cash forfeiture procedure, there are no search powers or detention powers. Accordingly, these Rules only make provision for the freezing and forfeiture of funds.

Application for account freezing order and application to vary or set aside account freezing order

7.4 Section 303Z3 of POCA sets out the procedure for the court to follow when making an Account Freezing Order ("AFO"). It also contains a number of restrictions on the circumstances in which an AFO might be granted, including where an account is excluded, or where the amount is below the minimum amount (defined as £1,000 in section 303Z8 of POCA).

7.5 The court may make an AFO if it is satisfied that the funds in the account (whether all or in part), are either recoverable property, or are intended for use in unlawful conduct. The court sets the timeframe for the freezing order which must be no more than two years. The court can make an order to vary or set aside an account freezing

order at any time, and can also do so upon application by any person affected by such an order (see section 303Z4 of POCA).

7.6 Section 303Z9 of POCA sets out the procedure to allow a senior officer to issue an "account forfeiture notice", assuming an AFO has already been served, and they are satisfied that the funds derive from or are intended to be used in unlawful conduct. The period for any objections must be at least 30 days and can be made by anyone in writing. If no objection is received, at the end of the period the amount of money stated in the account forfeiture notice will be forfeited, without court order ("administrative forfeiture"). Any money forfeited under an account forfeiture notice is paid into the Consolidated Fund.

7.7 Section 303Z12 sets out the procedure for applying for an administrative forfeiture to be set aside. The court must consider whether the forfeiture should be set aside, and if the court determines that the funds should not be forfeited it must order the release of that money.

Application for forfeiture of frozen money

7.8 Section 303Z14 of POCA provides that the law enforcement agency can apply to the magistrates' court for the forfeiture of money held in a frozen account. Rule 5 of these Rules specifies the court to which forfeiture applications should be sent, and makes provision in respect of how notice of a forfeiture application is to be given. Rule 5 also provides that a directions hearing is to be listed by the court to manage the forfeiture application.

Application to set aside forfeiture

7.9 Section 303Z12 of POCA provides that an application can be made to the magistrates' court to set aside an administrative forfeiture of money held in a frozen account. Rule 6 of these Rules makes provision in respect of such an application, and sets out to whom copies of the application must be sent.

Director of Public Prosecutions appearing in Proceedings

7.10 Section 303Z19 of POCA provides that the Director of Public Prosecutions can agree to appear in proceedings under Chapter 3B of Part 5 of POCA, on behalf of a law enforcement agency. Rule 7 of these Rules makes provision in respect of notifying the court in these circumstances.

Application for compensation

7.11 An application to court for compensation can be made by the person by or for whom the account is operated under section 303Z18 providing that an account freezing order is made and none of that money is later forfeited. The amount of compensation is the amount the relevant court thinks reasonable, having taken into account the loss suffered and any other relevant circumstances.

Notice and documents

7.12 Rules 9 to 14 of these Rules make provision as to how notices and documents in connection with these procedures are to be given. This may be by post (rule 10), by electronic communication (rule 11), or by any alternative method authorised by the court (rule 12). In addition, rules 13 and 14 set out how documents are to be given to children and protected persons.

Transfer of proceedings

7.13 Any person party to proceedings may make an application to the court requesting that they be transferred to a different local justice area. The court may grant the application if it is satisfied that it would be more convenient or fairer for proceedings to be transferred to a different local justice area. Rule 15 of these Rules makes provision to allow this.

Procedure at hearings

7.14 Rule 16 of these Rules makes provision for how hearings of applications under Chapter 3B of Part 5 of POCA are to be conducted, including who may attend and be heard on the question of whether the application should be granted.

Consolidation

7.15 No consolidation of the rules is planned at present.

8. Consultation outcome

8.1 The Home Office consulted with relevant stakeholders on the provisions themselves, inviting and reviewing suggestions and observations amongst the groups potentially affected by this legislative change. No consultation has been undertaken with regard to these rules specifically, although they have been reviewed by persons experienced in magistrates' courts procedure in non-criminal matters (some technical amendments being made in response to comments received as part of that process).

9. Guidance

9.1 The Home Office will issue a formal Circular to relevant stakeholders, offering policy guidance on the use of these powers in Chapter 3B of Part 5 of POCA. There is no guidance planned with regard to the use of these Rules specifically.

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 instrument.

11. Regulating small business

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

12. Monitoring & review

12.1 The Home Office will monitor the use of the powers in Chapter 3B of Part 5 of POCA. Any reports of the operation of these powers can be gathered by Her Majesty's Courts and Tribunal Service and reported to the Home Office. The National Crime Agency, which monitors the performance of financial investigators will also report issues to the Home Office.

13. Contact

13.1 Amrita Dhaliwal can answer any queries regarding this instrument (Telephone: 0203 334 6306 or email: amrita.dhaliwal@justice.gov.uk).