EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (INVESTIGATIVE POWERS OF PROSECUTORS: CODE OF PRACTICE) (ENGLAND AND WALES) ORDER 2015

2015 No. 612

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"). It provides that a revised code of practice providing guidance on the exercise of certain functions under POCA come into operation on 1st June 2015. The revised code is required because of the amendment of POCA, mainly by the Policing and Crime Act 2009 (c. 26) ("the 2009 Act") and the Crime and Courts Act 2013 (c. 22) ("the 2013 Act"), extending certain existing functions and creating new functions. The commencement date of the order (1st June 2015) is the date that the amendments to POCA will be brought into force for England and Wales and Scotland only.

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

3.1 None.

4. Legislative Context

4.1 This Order is related to three other Orders made by the Secretary of State, namely:

i. the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) (England and Wales and Scotland) Order 2015,
ii. the Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales) Order 2015, and
iii. the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) Order 2015.

4.2 These three Orders concern new (in the case of the instrument listed at (iii)) and revised (in the case of the instrument listed at (i) and (ii)), codes of practice brought into operation by these instruments. The codes of practice provide guidance on the exercise of certain functions under POCA as further detailed below.

The Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) (England and Wales) Order 2015

4.3 Amendments to Part 8 of POCA have been made, primarily by Schedule 19 to the 2013 Act and the 2009 Act. The main changes which relate to the code made by the Attorney General under section 377A POCA are—

a) changes to the definition of a civil recovery investigation to clarify that the focus of an investigation can be a person or property and also to clarify that there can be an investigation into property that has not yet been clearly identified (see paragraph 2 in Part 1 of Schedule 19 to the 2013 Act);
b) change of jurisdiction from the High Court to the Crown Court in relation to detained cash investigations, see section 66 of the 2009 Act;
c) sections 375A and 375B of POCA are inserted by paragraph 26 in Part 2 of Schedule 19 to the 2013 Act. Section 375A makes provision for evidence to be obtained from a court, tribunal, government or authority outside the United Kingdom if a person or property is subject to a civil recovery investigation, a detained cash investigation or an exploitation proceeds investigation (as defined in section 341 of POCA). The Director of Public Prosecutions and the Director of the Serious Fraud Office ("the relevant Directors") may make a direct request for assistance if it is thought that there is relevant evidence in a country or territory outside of the United Kingdom. Section 375B provides that evidence obtained by a request for assistance must not be used for any other purpose other than for the purpose of the investigation for which it was obtained or for the purposes of certain proceedings, unless the court, tribunal, government or authority that received the request and provided the evidence consents to the use of the evidence for other purposes;
d) Part 3 of Schedule 19 to the 2013 Act makes consequential amendments to the provisions of POCA, as amended by Parts 1 and 2 of that Schedule, to insert references to immigration officers and officers of the National Crime Agency.

4.4 The code of practice made by the Attorney General under section 377A POCA applies in connection with the exercise by—

a) the relevant Directors of functions they have under Chapter 2 of Part 8 of the Act; and
b) any other person, who is the relevant authority by virtue of section 357(9) of the Act in relation to a confiscation investigation, of functions the person has under Chapter 2 of Part 8 of the Act in relation to England and Wales as the relevant authority.

By section 2C of POCA, members of staff of the relevant Directors and persons providing services under arrangements made by the relevant Directors may exercise the functions of the relevant Directors under Part 8 of POCA, provided they have been appropriately authorised. In these circumstances, the members of staff and persons providing services are also covered by the code of practice as they are exercising the functions of the relevant Directors.

4.5 Under section 357(9) of POCA, the Secretary of State can by order specify a person as a prosecutor. A specified person is a relevant authority under section 357 of POCA and is able to apply to court for a disclosure order under that section in relation to a confiscation investigation.

4.6 Chapter 2 of Part 8 of POCA applies to England and Wales and Northern Ireland. The previous version of the code of practice will continue to apply in Northern Ireland, as commencement of the amendments to POCA for Northern Ireland is being dealt with separately. The code of practice for Northern Ireland will be revised at a future date as part of the programme for commencing the amendments in Northern Ireland.

4.7 The following paragraphs contain material taken from the relevant joint explanatory memorandum concerning the three instruments made by the Secretary of State, for ease of reference for readers.

The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) (England and Wales and Scotland) Order 2015

4.8 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, 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. The revised code of practice therefore has been extended to also cover searches of vehicles as well as of premises and of persons, and has been restructured somewhat to make it easier to read and understand.

4.9 The revised code of practice under section 292 of POCA applies to officers of Revenue and Customs exercising functions in England, Wales and Scotland, but in relation to accredited financial investigators and constables it applies in relation to the exercise of functions in England and Wales only. By 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 and Scotland.

4.10 Although Chapter 3 of Part 5 of POCA applies to the United Kingdom, the previous version of the code of practice will continue to apply in Northern Ireland. This is because commencement of the amendments to POCA for Northern Ireland is being dealt with separately. The code of practice for Northern Ireland will be revised at a future date as part of the programme for commencing the amendments in Northern Ireland.

The Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales) Order 2015

4.11 Part 8 of POCA concerns permitted investigations in the United Kingdom. The nature of a civil recovery investigation has been 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.

4.12 Section 66 of the 2009 Act has 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 England and Wales. The revised code of practice reflects these changes and has also been restructured somewhat to make it easier to read and understand.

4.13 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.

4.14 Chapter 2 of Part 8 of POCA applies to England and Wales and Northern Ireland. The previous version of the code of practice will continue to apply in Northern Ireland, as commencement of the amendments to POCA for Northern Ireland is being dealt with separately. The code of practice for Northern Ireland will be revised at a future date as part of the programme for commencing the amendments in Northern Ireland.

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) Order 2015

4.15 Section 55 of the 2009 Act inserts new sections 47A to 47S into Part 2 of POCA (Part 2 concerns confiscation of the proceeds of crime in England and Wales). 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 power, 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 order.

4.16 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 that is not practicable, of a senior officer. Senior officer is defined in section 47G. 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) and (4) sets out who is a senior officer in respect of each type of appropriate officer.

4.17 Sections 41A and 44A were inserted by section 52 of the 2009 Act and along with sections 47J to 47P concern the detention of property which has been seized by appropriate officers. In relation to section 41A, appropriate officer is defined in subsection (3) of that section, and in addition to the list of officers in paragraph 4.10 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 England and Wales, the Director of Public Prosecutions or the Director of the Serious Fraud Office).

4.18 This is a new code of practice under section 47S of POCA. The structure is similar to the two revised codes.

5. Territorial Extent and Application

5.1 The Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) (England and Wales) Order 2015 extends to England and Wales.

5.2 The following information is taken from the joint explanatory memorandum relating to the instruments mentioned:

(i) the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) (England and Wales and Scotland) Order 2015 extends to England and Wales and Scotland.

(ii) the Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales) Order 2015 extends to England and Wales.

(iii) the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) Order 2015 extends to England and Wales.

6. European Convention on Human Rights

The Attorney General, Jeremy Wright, 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) (England and Wales) Order 2015 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 codes of practice are revised, or new functions are created, the codes must be revised or made as necessary.

- Consolidation

7.3 There is no need for consolidation.

8. Consultation outcome

8.1 Previous drafts of the three codes of practice made by the Home Office were subject to a seven week public consultation from 10th July 2013 to 30th August 2013. Updated, improved drafts have been subject to a further three week public consultation from 24th November to 14th December 2014. See https://www.gov.uk/government/consultations/proceeds-of-crime-act-2002-codes-of-practice-consultation. Five responses – from The Serious Fraud Office, National Crime Agency, Metropolitan Police, Department for Work & Pensions, West Yorkshire Police and the Office of the Police and Crime Commissioner, West Yorkshire - were received to the 2014 consultation. Three responses were received to the 2013 consultation, from HM Revenue and Customs, Dorset Police and Durham Constabulary. All responses were focussed on technical details of the codes, in particular the clarity and meaning of certain points, rather than concerns about the fundamental content. Minor amendments were made to the Codes to address these matters.

8.2 A draft of the code of practice made by the Attorney General, the Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) (England and Wales) Order 2015, was subject to a public consultation from 15th December to 30th December 2014. See https://www.gov.uk/government/consultations/proceeds-of-crime-act-2002-codes-of-practice-consultation--2. There were no additional responses to this consultation. The fourth code of practice is very similar in terms of the guidance given to those to whom the code applies to that given by the Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales) Order 2015. The differences lie mainly in who the two respective codes apply to.

9. Guidance

9.1 The codes of practice brought into operation by these orders constitute guidance.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is minimal. The National Crime Agency will devise a training programme to cover all amendments to the 2002 Act and the Codes of Practice will be only one component of that programme. The overall cost of this training is likely to be less than £20,000.

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 business.

12. Monitoring & review

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

13. Contact

Richard Nunn at the Attorney General's Office Tel 020 7271 2503 or email: richard.nunn@attorneygeneral.gsi.gov.uk can answer any queries regarding the instrument made by the Attorney General.