

EXPLANATORY MEMORANDUM TO

THE MAGISTRATES' COURT (DETENTION AND FORFEITURE OF CASH) (AMENDMENT) RULES 2017

2017 No. 1291 (L. 23)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice with the assistance of the Home Office 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 ("the 2002 Rules"), so as to make detailed provision for the service of notices. These provisions are modelled on provisions under the Civil Procedure Rules.
- 2.2 The Rules also make consequential amendments to the 2002 Rules required due to amendments to the Proceeds of Crime Act 2002 (c. 29) ("POCA") made by the Serious Crime Act 2007 (c. 27), the UK Borders Act 2007 (c. 30), the Policing and Crime Act 2009 (c. 26) and the Criminal Finances Act 2017 (c. 22).

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 the negative 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 detention and forfeiture of cash are neither criminal nor family proceedings, these Rules are made under section 144.
- 4.2 Section 294 of POCA empowers certain law enforcement officers to seize cash which they reasonably suspect to be the proceeds of crime, or to be intended for use in crime. After 48 hours, the continued detention of such cash requires the approval of a magistrates' court; see section 295. A person from whom such cash is seized, or the owner, if different, may apply for its release: see 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 cash obtained through, or intended for use in, unlawful conduct; see 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; see section 299. Alternatively, after cash has been detained, in cases which are not contested, a senior officer of a law enforcement agency can issue a forfeiture notice under section 297A which provides that cash will be forfeit unless any person objects within the period given in that notice. Forfeiture notices under section 297A can be set aside by court order under section 297E.

- 4.3 The 2002 Rules govern (among other things) the procedure on giving notice for the making of various applications relating to the detention and forfeiture of cash under POCA. They currently apply to the officers who were originally provided with the powers, namely constables and customs officers (officers of HM Revenue and Customs).

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 Various amendments have been made to the provisions relating to the recovery of cash in summary proceedings under Chapter 3 of Part 5 of POCA which mean that it is necessary to update the 2002 Rules. The relevant amendments are:
- The powers to search for, seize, detain and apply for the continued detention and forfeiture of cash have been extended to accredited financial investigators (AFIs), see section 79 and Schedule 11 to the Serious Crime Act 2007. AFIs are investigators who are trained and accredited to perform functions under POCA by the National Crime Agency (or one of the precursor agencies) under section 3 of POCA.
 - The powers of prosecutors to appear in cash recovery proceedings, see section 302A of POCA, as inserted by section 84 of the Serious Crime Act 2007.
 - The powers have been extended to immigration officers under section 24 of the UK Borders Act 2007, which states that immigration officers can access the cash forfeiture powers as if they were constables, but with certain modifications.
 - Sections 297A to 297G of POCA, as inserted by section 65 of the Policing and Crime Act 2009. contain an alternative procedure for seeking forfeiture of detained cash in cases which are not contested without the need for a magistrates' court hearing. This has created a new court procedure in cases where administrative forfeiture is to be set aside by order of the magistrates' court (see section 297E of POCA).
 - The cash powers have been extended to SFO officers under section 17 of the Criminal Finances Act 2017.

- New powers to seize, detain and forfeit listed items of property and to freeze and forfeit money in bank or building society accounts have been introduced by sections 15 and 16 of the Criminal Finances Act 2017 (see new chapters 3A and 3B of Part 5 of POCA) (“the new forfeiture powers”).
- 7.2 Rule 3 of these Rules amends the interpretation provision in the 2002 Rules, to introduce new definitions required as a result of the amendments made by Rule 10 of these Rules (see below).
- 7.3 Rules 4 and 7 of these Rules make amendments to the effect that applications for the further detention of cash or for cash forfeiture can be sent to the applicant’s local court, or to a court which has made an order in relation to a matter under the new forfeiture powers involving the same grounds for suspicion as the cash forfeiture application.
- 7.4 In rule 5 and throughout these Rules, references to “justices’ clerk” and “designated officers” in the 2002 Rules have been removed, and replaced with references to actions being taken by “the court”, in order to provide a less prescriptive approach to court procedure.
- 7.5 In respect of the changes above in relation to AFIs, consequential additions are made by these Rules to rule 6 (application for the release of detained cash) and rule 8 (application for compensation) of the 2002 Rules. This makes provision to ensure that notice of applications are sent to the agency on whose behalf the AFI conducted the seizure and detention of the cash. These changes are made by rules 6 and 8 of these Rules respectively. Equivalent changes are also made as a consequence of the powers being extended to SFO (Serious Fraud Office) officers, immigration officers and officers of the National Crime Agency (for circumstances where they are using the powers as an AFI or have been designated with the powers of a constable etc.).
- 7.6 Cash that is subject to administrative forfeiture without a court hearing is detained under bespoke provisions (sections 297C and 297D). Section 297F provides that an application can be made to the magistrates’ court to release cash detained under these provisions. These rules make a consequential amendment to the existing provisions in the 2002 Rules which provide for the release of detained cash (see Rule 9 of these Rules, which introduces new rule 8A).
- 7.7 In relation to the ability of prosecutors to appear in these civil proceedings, rule 9 of these Rules inserts rule 8B to the 2002 Rules to provide that the court must be notified if a prosecutor is appearing in the proceedings. This ensures that various notices will be served on the relevant prosecutor.
- 7.8 Provisions relating to the giving of notice were set out in rule 9 of the 2002 Rules. These are now considered not to be of sufficient detail, in particular when compared to the provisions in Part 6 of the Civil Procedure Rules. Also, the giving of notice by senior officers in relation to the administrative forfeiture of cash have been set out as required in regulations made under section 297A(3) of POCA (see The Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) Regulations 2015, SI 2015 No. 857). Those Regulations set out in detail the requirements for serving administrative forfeiture notices as the procedure is carried out by senior officers, and the courts are not involved. These Rules amend the 2002 Rules to include a similar procedure for giving documents where forfeiture is to be handled by the Courts.

- 7.9 The amendments made by rule 10 in these Rules to the 2002 Rules therefore set out in detail the procedure for the giving of notice and documents. This includes the giving of documents by post, by means of electronic communication, by an alternative method or at an alternative place, to a child or protected person and to a person outside the United Kingdom.
- 7.10 Rule 11 of these Rules makes some consequential amendments to the court forms in the Schedule to the 2002 Rules, so that the forms can be used by any officer who is authorised to use the cash forfeiture powers in POCA.

Consolidation

- 7.11 No consolidation of the rules is planned at present.

8. Consultation outcome

- 8.1 The Home Office consulted with relevant stakeholders on the provisions in the Criminal Finances Act 2017, 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 amendments made by these Rules to the 2002 Rules are consequential on amendments made to POCA. The Home Office has already issued a formal Circular in May 2015 to the police and others offering operational guidance on these powers. Also, the giving of notice provisions in the Rules reflect the established rules in Part 6 of the Civil Procedure Rules and so will be familiar to the courts, law enforcement agencies and prosecutors. Guidance will be issued on the Financial Investigators Support System to make the police and other financial investigators aware of the provisions in the rules.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is nil.
- 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 are undertaken by small businesses.

12. Monitoring & review

- 12.1 The amendments were prompted by amendments to POCA. The Home Office will monitor the use of these powers. Any reports of the operation of the amended rules 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).