FROM STRENGTH TO STRENGTH: FINANCIAL SANCTIONS

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Government Enforcement Alert

On 7 March 2016, the new Police and Crime Bill (the "Bill") received its second reading in Parliament. The stated aims of the Bill are to bring consistency to all penalties across the UK financial sanctions regimes, increase the penalties for breaches of financial sanctions and to introduce a more flexible set of powers to penalise contravention. Financial sanctions prohibit firms from carrying out transactions with particular persons or organisations and, in some cases, a financial sanction order may prohibit a firm from providing any financial services to the person or organisation.

BACKGROUND

Financial sanctions play an increasing role in the foreign policy imperatives of both the UK Government, and the European Union. The Government is placing increasing emphasis on their importance, implementation and enforcement. The maximum criminal penalty for breaching a domestic terrorist asset freeze is seven years imprisonment on conviction on indictment. Currently, breaches of financial sanctions implemented by EU Regulations and other UK domestic financial sanctions attract, by contrast, a maximum criminal penalty of two years imprisonment.

In its factsheet to the new Bill, the Government has highlighted a raft of concerns with the current sanctions regime. These concerns include the fact that UN sanctions are given effect in the UK by way of an EU Regulation and that the EU has taken an average of four weeks to adopt sanctions regulations implementing UN asset freezes. The Government is concerned that this delay increases the risk of asset flight (whereby assets are removed from the UK before the sanctions are imposed) which could put the UK in breach of its international obligations. As a result, the Government has identified that new legislation is required to expedite the process, as well as offering the regulator a more flexible set of powers to deal with breaches. Following on from our recent UK and EU sanctions update, a summary of the proposed Financial Sanctions measures in Chapter 8 of the new Bill is set out below.

HARMONISATION OF CRIMINAL PENALTIES

Currently the maximum custodial penalty that can be applied for breaches of financial sanctions is 2 years. The Bill provides that the maximum penalty for an offence be increased to seven years on conviction on indictment. This will bring the financial sanctions regime into line with the Terrorist Asset Freezing etc. Act 2010. However, the maximum penalty remains lower than the 10 year maximum available under the Export Control Order 2008 for breach of trade sanctions. It remains to be seen whether the increase in available sentences is matched by an

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increase in enforcement activity and a determination to prosecute. The Treasury has not pursued convictions in recent years.

DEFERRED PROSECUTION AGREEMENTS (DPAS)

DPAs, which were introduced last year for offences under the Fraud Act 2006, the Proceeds of Crime Act 2002 and the Bribery Act 2010 as well as other economic crimes, are agreements concluded between a corporate which could be prosecuted and the prosecutor, under the supervision of a judge. In order for a DPA to be entered into, the prosecutor must be satisfied that there is sufficient evidence for them to be able to prove beyond reasonable doubt that a criminal offence has been committed by the organisation. The agreement allows a prosecution to be suspended for a defined period provided the corporate meets certain specified conditions. DPAs are only available for corporates, not individuals. The first ever DPA in the UK was entered into in December 2015. Please click here to learn more about DPAs.

The Bill amends Schedule 17 to the Crime and Courts Act 2013 to include financial sanction breaches in the list of offences for which a DPA may be entered into.

SERIOUS CRIME PREVENTION ORDERS (SCPOS)

The Bill also amends Schedule 1 to the Serious Crime Act 2007 to include financial sanctions breaches in the list of offences for which a SCPO may be imposed. SCPOs are civil orders, imposed by a court on the civil standard of proof, and devised to prevent or deter serious crime. SCPOs can be very broad and include targeted prohibitions, restrictions or other requirements that the court considers appropriate for the purpose of restricting or disrupting further involvement in serious crime. The Government has identified SCPOs as an appropriate and effective method of ensuring that all corporates, not just those regulated by the FCA, manage the risk of financial crime.

MONETARY PENALTIES

The Bill also introduces a new monetary penalties regime, which is a formidable alternative to the options set out above. The Bill sets the maximum penalty at £1 million or 50% of the total value of the breach, whichever is the greater. This higher level of potential fine will increase the effect of the penalties. In order to increase the incentive to remedy poor compliance, the Bill also provides that the details of any penalties imposed will be published. Monetary penalties are to be administered by the new Office of Financial Sanctions Implementation (OFSI), which will sit within HM Treasury.

A penalty will only be imposed in situations where the OFSI is satisfied, on the balance of probabilities, that a breach had been committed and that the person involved knew, or had reasonable cause to suspect, that their actions were in breach of sanctions.

IMPLEMENTATION OF UN SANCTIONS

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In order to address the delay between implementation of UN sanctions and adoption by the EU and national governments, the Bill proposes a new power of "temporary implementation", which allows the UK to rush through the implementation of UN sanctions before the adoption of the necessary legislation by the EU. HM Treasury would be able to implement any UN sanction initially for 30 days, and then for a further 30 days before any action at an EU level. The temporary implementation only relates to freezing funds or other economic resources, or to preventing funds or economic resources being made available to, or for the benefit, of persons designated by the UN sanctions regime.

WHAT SHOULD CLIENTS DO?

The introduction of more severe penalties for non-compliance is designed to encourage corporates to make greater efforts to ensure compliance with the financial sanctions regime. Many international corporates already have robust procedures in place to ensure that they do not contravene any financial sanctions, including US sanctions. However, the introduction of this legislation will act as a warning shot across the bows to companies which have not previously met their sanctions obligations or have weak compliance in place.

All companies should implement appropriate systems and controls. An appropriate compliance regime will have several limbs. Companies should conduct comprehensive risk assessments, based on a good knowledge of the financial sanctions regime, which assess the risks that may be posed by particular clients, transactions, services, products and jurisdictions. The risk assessments should also take into account associated parties, such as directors and beneficial owners. All risk assessments should be properly documented with the rationale for the approach taken clearly set out. It is also important that corporates implement policies and procedures that clearly set out the organisation's approach to complying with its legal and regulatory requirements in this area. These must be supported by the senior management and, where appropriate, should involve board approval and responsibility. The policies and procedures should ensure that senior management is notified where the due diligence identifies any matches with sanctioned parties and that they are informed of all breaches of financial sanctions, in an appropriate and timely manner. An effective compliance regime should also include frequently refreshed training and awareness programmes, which are tailored to employees' particular roles. The training should aim to test that employees have a good understanding of financial sanctions risks and procedures and provide for ongoing monitoring of employees' work to ensure continuing understanding and adherence.

The new penalties proposed in the Bill act as a loud warning to organisations to ensure that they have appropriate systems and controls in place to reduce the risk of breach. Failure to implement effective policies will result in an increased risk of punitive enforcement action. We can assist organisations in devising appropriate and proportionate compliance controls.

WHAT NEXT?

The Bill has received its second reading in the House of Commons and will now be scrutinised in Committee. This is scheduled to conclude by 14 April 2016, when the Bill will return to the floor of the House of Commons for further debate. We will issue further updates on any major developments following the Committee's report and the Government's response.

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