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UPDATE

Sanctions Compliance – Key issues for Trustees and Financial Institutions

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The increased use of financial sanctions against individuals and companies adds to a complex regulatory landscape, with there being several fundamental issues trustees and financial institutions should be aware of when dealing with sanctions compliance.

Introduction

With the increasing prominence of financial sanctions as a foreign policy tool we have seen an increase in the number of sanctions regimes being enforced against individuals and companies across a broad range of sectors. This rise in the use of financial sanctions poses particular compliance risks and below we explore some of the fundamental issues that arise for trustees and financial institutions in the Bailiwick of Guernsey in complying with the various Guernsey sanctions regimes.

Legal Framework

The primary piece of legislation in relation to economic sanctions in Guernsey is the Sanctions (Bailiwick of Guernsey) Law 2018 (the Sanctions Law). The Sanctions Law gives the Policy & Resources Committee the power to domestically enforce UN, EU and UK sanctions regimes, as well as the ability to impose independent sanction regimes as required.

In practice Guernsey adopts the sanctions regimes as enforced by the UK Government through the Sanctions (Implementation of UK Regimes) (Bailiwick of Guernsey) (Brexit) Regulations, 2020 (the UK Regulations). A list of current regimes is maintained on the States of Guernsey website.

While the Sanctions Law allows for the imposition of a wide range of sanctions, Guernsey's position as a leading financial centre means that financial sanctions are the most relevant to businesses in the Bailiwick. Financial sanctions are broad and can include a wide variety of measures such as asset freezes as well as prohibitions on making funds available to designated entities or individuals.

Meeting Reporting Obligations

The Sanctions Law imposes a general reporting obligation at s.14 which is similar to obligations in relation to money laundering and terrorist financing. These obligations apply to "relevant" institutions as defined within the section, with financial service businesses being captured.

So what exactly needs to be reported in order to meet obligations under the Sanctions Law?

It is important to understand that s.14 does not just cover circumstances where it is believed that a breach of sanctions has taken place. The obligation is much broader and a report needs to be made in circumstances where it is known or suspected that an individual or entity is a sanctioned person or is linked to a sanctioned person. This is regardless of whether any activity that would be a breach of sanctions has been undertaken or is contemplated.

Reporting obligations under the Sanctions Law are also not limited to persons or entities that are clients of a relevant institution. An obligation to make a report would arise in circumstances where it is known or

suspected that a sanctioned person or entity is linked to one of its clients; such as through beneficial ownership.

Once it has been established that a report is required, this should be made to the Policy & Resources Committee. Generally there is no need to make a report to the Financial Intelligence Service unless there are additional suspicions around the involvement of money laundering or terrorist financing.

Identifying Sanctioned Individuals and Assets Subject to Sanctions

The key to ensuring that sanction risks are identified in a timely manner is a robust and effective screening and alert system that captures and suitably highlights potential hits. These should be tested on an ongoing basis to ensure that risks are not being missed. Any breach of the provisions of the Sanctions Law, even inadvertently, can be stark with criminal liability attaching to most offences.

The use of complex structures in Guernsey means that once a potential sanctions risk has been identified, it can be difficult to ascertain what assets within a structure will fall under the ambit of a sanctions regime and what should be done with those assets.

While the technical analysis of the status of assets should be subject to legal advice there are broad principles to be taken into account. When reviewing a structure two key questions should be asked at the outset:

1. Are there any assets within the relevant structure that are owned, held or controlled by the designated person or entity?
2. Would dealing with the assets make them available either directly or indirectly to the designated person or entity?

Clear evidence that assets are "owned, held or controlled" by or would be made available to a designated person or entity is not necessary – if there is a suspicion that an individual or entity has breached, or is subject to sanction measures, or that one of the above two points apply, this can ignite obligations under the Sanctions Law.

What is meant by "owned, held or controlled"?

While the Sanctions Law does not provide us with a definition, the effect of the Sanctions Law is to transpose the requirements of the UK Regulations into Guernsey law and the definitions in the UK Regulations provide some guidance.

The UK Regulations generally take a broad approach to the definition of what amounts to ownership or control over assets. It includes legal or equitable interest in assets, and will extend to both direct and indirect interests. For example, the holder of a bank account will clearly be an owner of funds in that account.

The question of indirect ownership or control, where a company or trustee owns and holds the assets, may require closer examination. The UK Regulations provide a corporate person (C) is owned, held or controlled by another person (being the designated person) (P) if either of the following two conditions are satisfied;

- P holds more than 50% of the shares or voting rights in C or P holds the right to appoint or remove a majority of the board of C, or;
- it is reasonable to expect that P (if P chose to do so) would be able to, in most cases or significant respects, whether directly or indirectly achieve the result of C conducting its affairs in accordance with the wishes of P.

Similar principles apply for individuals. The question of whether a person exercises "control" over another person requires an objective assessment to be carried out as to the risk that, if one individual wished, they could ensure that the affairs of another individual or entity would be carried out as they saw fit. This can be a difficult question to answer and various factors can be taken into account when considering this point such as the involvement of a sanctioned individual or entity in a relevant structure as well as broader points such as any familial or business ties that may indicate a risk of indirect control. It is an important feature in the context of sanctioned individuals structuring their affairs in order to have assets appear at arms-length.

Approaching requests to deal with Sanctioned Assets

How should a request for access to assets that are, or are suspected to be subject to sanctions be approached, and what constitutes dealing with the assets?

On this point the Sanctions Law provides a definition at s.5(2) which is broad and encompasses a wide variety of activities and would constitute most forms of transactions. This includes a prohibition on anything to;

- use, alter, move or allow access to or transfer;
- deal with the funds in any other way that would result in any change in their volume, amount, location, ownership, possession, character or destination; or
- make any other changes that would enable the use of the funds, including by way of, or in the course of, portfolio management, and
- in relation to economic resources, exchange, or use in exchange, for funds, goods or services.

While there may be pressure to arrive at a decision on dealing with sanctioned assets promptly, it is important to consider the situation from all angles to avoid being manoeuvred into a position where you are in breach of the Sanctions Law or its provisions on circumvention.

Where an asset or set of assets meet the relevant tests to be frozen under a Guernsey sanctions regime any deviation from those measures require a licence, which is in effect written permission from the Policy & Resources Committee allowing an activity that would otherwise be prohibited by sanctions measures. There are limited grounds on which a licence may be granted and these vary between different sets of sanction measures. There are limited grounds on which a licence may be granted and these vary between different sets of sanction measures with an application for a licence needing to be made through the Policy & Resources Committee.

Conclusion

Sanctions compliance can be a difficult area to navigate and will only become more complex as the use of sanctions increases globally. Should you require any advice in relation to distinct sanctions regimes or on sanctions compliance more generally please do not hesitate to reach out to a member of the Mourant team.

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