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Mr Paul Philip

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Dear Paul

OPBAS view on the SRA's Consultation on Financial Penalties

In our letter to the SRA of 8 March 2021, we set out our view that the SRA's fining powers in relation to solicitors and traditional law firms were limited, which materially reduces the overall effectiveness of the SRA's enforcement framework. We encouraged you to further explore ways in which the SRA could address this limitation. We welcome the proactive steps taken in bringing this Consultation on Financial Penalties ("the Consultation") and in requesting views and feedback from OPBAS.

Overview

Ensuring the effectiveness of financial crime controls and reducing financial crime risk is a key priority for the FCA. The National Risk Assessment 2020 (NRA) estimates that serious and organised crime costs the UK economy £37 billion a year. OPBAS views the SRA, and all Professional Body Supervisors (PBSs), as having an essential role to play in reducing the risk of money laundering in the legal and accountancy sectors through the effective supervision of your members. In the [OPBAS report 2020/21](#) we observed that gaps remained in most PBSs enforcement frameworks. An effective enforcement framework, includes our expectation that all PBSs, in adherence to Regulation 49 (d) of the [Money Laundering Regulations 2017](#) (MLRs), make arrangements to ensure that their members are liable to effective, proportionate, and dissuasive disciplinary action. As part of an effective enforcement deterrent, we expect the SRA (and PBSs more generally) to establish a credible and robust fining framework.

We are encouraged by the direction that the SRA has taken in reviewing its approach to fines but consider that the reforms should go further than proposed and have included some reflections for you to consider alongside our expectations below. We would be happy to further discuss any of the points raised.

It is important for the SRA to ensure it considers the MLRs in relation to financial penalties and enforcement holistically, to deliver the highest possible standards in members and sectors supervised.

Enforcement framework

Relationship between the SRA and the Solicitors Disciplinary Tribunal (SDT)

The SRA states that it faces significant cost and time implications in a referral to the SDT. We encourage the SRA to take this opportunity to consider not just the fining powers but more generally the overall effectiveness of its enforcement framework. For example, does the SRA have compelling evidence that the current structure of two different methods of processing cases is the most effective approach to delivering a robust and credible anti-money laundering (AML) enforcement framework? We encourage the SRA to be ambitious when evaluating its current enforcement framework and proposing potential changes to its approach.

Discrepancies in fine approach

We understand that as a result of the Legal Services Act 2007 the SRA can impose a fine on a manager or an employee of an Alternative Business Structure (ABS) up to £50 million; and fine the ABS itself up to £250 million. In contrast, under the Solicitors Act 1974, the SRA can only fine 'traditional' law firms up to £2,000 without the need for a referral to the SDT.

In proposing changes to its approach, it was unclear to us why the SRA would maintain a variation between the levels of fines it can impose on ABSs, and traditional law firms and individuals. As per the [OPBAS Sourcebook](#), enforcement action should be applied in a fair and consistent manner. The SRA should carefully consider and evidence whether and why the variation between fining of different member structures should remain; appreciating there may be aspects beyond the direct control of the SRA, or a need to engage other stakeholders (including the Ministry of Justice (MoJ)) within this.

Criteria applied in referrals

While the Consultation justifies why the current £2,000 fine cap for traditional solicitors should increase, the justification of the revised proposed limit of £25,000 is less clear. It seems to be based on an analysis of SDT penalties, and that the majority of fines imposed by SRA of up to £25,000 in the recent past were by agreed outcome (page 20). But these do not seem compelling arguments, for the case that £25,000 would deliver a more effective, proportionate, and dissuasive deterrent for AML breaches. The SRA should consider the risk of anchoring bias by tying future caps to past fines.

We are also unable to readily understand from the Consultation, the specific criteria to be applied in deciding whether cases would fall within the remit of the SRA or the SDT. The Consultation document (page 21) states that "*the majority of cases in the bracket up to £25,000 would, [you] suggest, not fall within the very serious or complex categories*". It is unclear what factors cause AML cases to be regarded as more or less serious and so warranting referral. This consultation is an opportunity to think more broadly about criteria for referral and suitability of penalties. We are concerned that current proposals will see the SRA continue to remain constrained in the action it can take and that the fines overall in the legal sector will remain low.

Assessment of turnover

The Consultation proposes a maximum proportion of turnover to be considered when applying financial penalties across the various levels of seriousness at 5%. It is unclear to us how the figure of 5% was reached and why the SRA has gained comfort that 5% would deliver an effective enforcement deterrent. We note that as a comparator, three of the

four regulators cited in Annex 1 of the Consultation have a materially higher maximum penalty ranging from 10% to 20%. We encourage you to revisit the methodology which underpins the figure of 5%, to consider whether this figure would be sufficiently dissuasive, especially for significant AML breaches, given the penalty ranges used by other regulators. If you do intend to maintain an approach which is significantly different to that of others, we would expect you to document a sound rationale for doing so.

Fixed penalties

The SRA proposes the introduction of fixed penalties for certain, less serious breaches. Fixed penalties can be a useful element of a framework of proportionate, effective, dissuasive actions provided they are effectively implemented and applied. If these proposals are adopted, we would encourage the SRA to assess whether the changes are achieving their desired outcomes, incorporating success measures.

The illustrative actions proposed in the Consultation may result in a fixed penalty fine of £800 or less for a first offence and up to £1,500 for any subsequent offence. PBSs that introduce fixed penalties should have clear criteria for when such a penalty would be imposed, for example considering the significance and severity of an AML breach. We encourage PBSs to have processes that allow for flexibility when appropriate and we are encouraged that the SRA has stated in some instances matters would be escalated for more severe and targeted action. We encourage PBSs to have an accompanying list of aggravating and mitigating factors when considering if a fixed penalty is appropriate.

Next Steps

We would be happy to arrange a meeting to discuss any of the points raised in this letter with you.

Yours sincerely

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Head of Department, OPBAS