New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Ministry of Foreign Affairs and Trade

on the

Consultation Document: *Russia Sanctions Act Statutory Review*

16 December 2024

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank (New Zealand) Limited
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank N.A.
- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- MUFG Bank Ltd
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Ministry of Foreign Affairs and Trade (**MFAT**) on the Consultation Document: *Russia Sanctions Act Statutory Review* (**Consultation**). NZBA commends the work that has gone into developing the Consultation.

5. We have prepared our response in line with the topics and questions provided in the response form as published by MFAT.

6. If MFAT has any questions on the contents of our response, we would be happy to discuss these further.

Topic 1: General questions about the RSA

Question 1: How is the RSA operating and is it achieving its purpose?

7. NZBA submits that the RSA is an important and necessary piece of legislation, noting the absence of an appropriate response from the United Nations as a result of Russia's position within the body. This means that New Zealand cannot rely on the approach adopted historically in combating significant breaches in international law.

8. Although the RSA does not materially change the way that most of our members operate due to compliance with like-minded international sanctions regimes, it is an important tool to ensure broader coverage in the domestic market for other duty holders who may not necessarily hold a similar international approach to sanctions compliance.

9. However, further ambiguity and confusion have been introduced in the domestic sanctions regulatory environment by basing a sanctions programme on an AML regime. This was likely accentuated by what we see as a highly contestable domestic regulatory environment, with the primary regulator having expertise and experience in AML but not sanctions.

10. As a result, New Zealand's current approach is potentially at odds with standard practice of sanctions programmes globally (noting that for some of our members, their New Zealand obligations likely form less than 10% of their total sanctions obligations). This would not be an issue if "best intent" was the standard banks were held to, but does cause problems for what are strict liability offences.

11. In our view, there should be a separate sanctions regime from the AML/CFT regime with dedicated resources and subject matter experts to supervise sanctions.

Question 2: Are there any areas of risk that the RSA does not appropriately deal with?

12. Broadly speaking there are no material areas of risk identified that are not appropriately dealt with. Specific commentary on areas of improvement are detailed in the relevant sections below.

Question 3: What is working in respect of the RSA and what is not?

13. NZBA notes that duty holders may find it challenging, based on the broad definitions in the RSA, to effectively monitor for associates of designated individuals and entities (collectively referred to as **designated persons** from here on out) where these associates have not specifically been identified by MFAT and do not appear on a list for duty holders to screen against.

14. Similarly, the practicalities of complying with trade measures is challenging, noting the potential complexity of evasion techniques applied by designated persons to circumvent sanctions. This is particularly relevant where transactions are conducted outside of a specific trade offering.

15. Please see also our comments at Question 1 above.

Question 4: Are there areas that are particularly challenging to comply with?

16. Please see our comments at Question 3, and Questions 22 – 24.

Question 5: What could we do to improve the operations of the RSA?

17. NZBA submits that MFAT considers expansion of the lists provided to include known associates with the concept of strict liability being removed where activity is conducted with an associate that previously has not been identified by MFAT and replaced with strict liability with reason to know.

18. It would be of material assistance for MFAT to issue more detailed and iterative guidance to decrease the compliance burden. For instance, MFAT could publish responses to FAQs, as does OFAC, based on analysis it completes in relation to applications for indicative assessments and permits. It would also be helpful to include further guidance for individuals and entities who are subject to asset freezing processes and their options and how to engage with MFAT.

    18.1. Generally, additional definitions and clarity will assist duty holders in effectively operationalising the RSA.

19. In particular, we would appreciate further guidance on:

    19.1. **Regulation 10A(3)(e):** This regulation can be interpreted broadly to include financial instruments such as ETFs, index and investment funds, where the basket contains securities of a sanctioned person. Guidance on the practical

implications of this regulation and a pragmatic way for the industry to approach this would be welcome.

19.2. **Regulation 10A(3)(d):** Similar to the above, we would appreciate further clarity through the regulations and guidance to advise whether settlement method (cash-settled/physical-settled) of derivatives where the underlying components contain securities of a sanctioned person, would be deemed to be "dealing with securities of a sanctioned person".

Question 6: Would the RSA benefit from additional statutory objectives or purpose? If so, what would they be?

20. NZBA appreciates that the expansion of the RSA to a full autonomous sanctions regime is out of scope of this review. However, we would encourage MFAT to consider this question more broadly at the appropriate time (as noted under Question 1 above). However, as a tool specifically to respond to Russia's invasion of Ukraine, NZBA does not believe that any further purpose or objective is required in the RSA.

Topic 2: Institutional Arrangements and interaction with other Agencies

Interaction between the AML/CFT and the RSA

21. As a general comment, NZBA does not support amending the AML/CFT Act to support the implementation of the RSA. Further information relating to this has been provided directly to the Ministry of Justice as part of its consultation on AML/CFT reforms.

22. Sanctions and AML are fundamentally different concepts. They have different objectives and employ different compliance methods.

23. AML is intended to maintain the integrity of financial systems by requiring duty holders to detect activities that may constitute the crime of money laundering. How that is achieved is highly regulated.

24. At its core AML is essentially passive: banks are required to observe and report so that the government can take further action.

25. In contrast, sanctions are a tool of foreign policy intended to influence international relations and states' behaviour. While there is globally accepted best practice (see OFAC Five Essential Elements or similar), how duty holders meet that objective is largely at the discretion of the individual institution. We do note that banks, like international relations, operate on a rules-based system and maintaining the confidence of other banks is crucial to maintaining operations.

26. At their core, sanctions programmes are essentially active. Banks are required to actively block or freeze assets directly with impacted customers on behalf of the government.

27. Our view is they should have wholly independent legislative frameworks recognising the clear core differences between their relative objectives and compliance methods.

Question 7: Given reporting entities under the AML/CFT Act 2009 are duty holders under the RSA, do you think the RSA is sufficiently clear about the link between the two regimes?

28. NZBA notes the current interaction between the RSA and AML/CFT Act and the necessity to create this interaction at the time of enactment to allow for an appropriately swift response but does not support this interaction persisting beyond the statutory review of the RSA.

29. Although there are some similarities and synergies that can be achieved between AML/CFT processes and sanctions processes, the risks and approach to compliance is fundamentally different. Additionally, by connecting the two regimes in the manner that has been done in the RSA, MFAT has limited its ability to expand the scope of duty holders beyond AML/CFT reporting entities.

30. NZBA recommends that MFAT undertake an appropriate risk assessment of activities or sectors that can be utilised by designated persons to circumvent the purpose of the RSA and specifically define these as duty holders under the RSA. It would be beneficial if duty holders were defined under the RSA, ensuring that not only reporting entities under the AML/CFT Act are captured, but a wider range of appropriate entities are captured under the definition of duty holders (for example, exporters).

31. For future clarity, it would assist if the link between "duty holders" and the AML/CFT Act was removed. Instead, we consider that duty holders under the RSA should be specified. This would remove any confusion on understanding connections between the two pieces of legislation, and enable both to operate independently.

32. Additionally, if coverage of the RSA is expanded beyond AML/CFT reporting entities MFAT should consider a more appropriate reporting mechanism than the goAML portal.

33. NZBA does not believe that reporting through this mechanism is appropriate. It places an additional burden on NZ Police FIU resources and may compromise their ability to respond to intelligence provided by AML/CFT reporting entities relating to ML/TF activity. MFAT should consider whether a reporting mechanism monitored by itself would be more appropriate.

Question 8: Should AML/CFT supervisors have an express sanctions role under the RSA or the AML/CFT Act to be able to help ensure RSA duty holders comply with their sanctions obligations?

34. NZBA does not believe that it is appropriate for supervision of RSA duty holders to be undertaken by the DIA.

35. Additionally, NZBA does not believe that the DIA is currently resourced to undertake the additional responsibility, noting that DIA will be undertaking a significant uplift in AML supervisory responsibility with RBNZ and FMA supervised entities moving to DIA supervision in 2026.

36. NZBA supports supervision and public sector support for sanctions compliance being established, but recommends that this is established alongside the policy intent of the RSA either within MFAT itself or in a newly established government agency with the appropriate expertise and resourcing to provide timely and effective support to the private sector to facilitate sanctions compliance.

37. In the absence of a specialist government agency, we consider that sanctions are foreign policy tools that require an understanding of the broader international sanctions landscape, operation and supervision of the RSA should remain with MFAT.

38. Sanctions are a difficult landscape to navigate. They require specialist expertise in foreign policy, diplomacy, and international coordination. They also require specialist understanding of the applicable laws and regulations.

39. Removing MFAT or sharing MFAT's jurisdiction with other governmental entities would create unnecessary complication, increased compliance cost, and operational burden. It would result in duty holders needing to deal with a new immature regulatory body, which again, causes unnecessary operational burden, compliance cost, and complication. Further, MFAT's jurisdiction is broadly consistent with the Australian regime.

    39.1. An alternative option might be a specialist Financial Crime supervisor responsible for AML and sanctions (and potentially other activities within the remit of financial crime). We note that any such proposal for a specialist supervisor would require robust consultation with affected entities.

40. See also our comments on expanding the RSA out to a fully autonomous sanctions regime under Part 1 above.

Question 9: In order to better support RSA duty holders with their compliance obligations, should there be more guidance from AML/CFT supervisors about compliance with the RSA? If yes, what guidance would you like to see, and should there be a statutory obligation on duty holders to have regard to this guidance?

41. NZBA supports more guidance being established to assist with more effective outcomes in line with the purpose of the RSA. However, we stress (for the reasons set out under Question 8 above) that this responsibility should not sit with the DIA.

42. Guidance should be specifically targeted at sectors which may not be as familiar or established in sanctions compliance, in particular around avoidance and evasion techniques being employed, expectations around customer and transaction due diligence and what an appropriate sanctions compliance programme should entail.

43. Duty holders should be required to have regard to the guidance issued by a suitable supervisory body. NZBA also recommends that the appointed supervisor undertakes appropriate industry consultations on any guidance prior to issuing to leverage sanctions expertise that already exists in the banking and other sectors.

44. See also our comments on additional guidance at paragraph 18.

Question 10: Should reporting entities have any further obligations (beyond risk assessment) that they must implement specific to the mitigation of risks relating to Russia sanctions evasion? If so, what?

45. NZBA does not consider that a prescriptive approach in relation to further obligations would be the most effective approach. Such an approach may place a

disproportionate compliance burden on duty holders that are currently captured by the RSA but may have little sanctions risk.

46. As noted under Question 7 above, if the definition of "duty holders" is widened, increased obligations may overburden certain industries, depending on the industry, size and exposure.

47. NZBA supports guidance being issued that describes how duty holders can design a sanctions compliance programme that appropriately responds to the risks that they can reasonably expect to face in the ordinary course of their business.

Question 11: If the RSA or AML/CFT Act were to be amended to provide a mandate to AML/CFT supervisors to have oversight and provide guidance to RSA duty holders, which are also reporting entities under the AML/CFT Act, would that raise compliance costs disproportionally?

48. NZBA does not support t supervision similar to that in the AML/CFT Act. Presumably, similar obligations would significantly increase compliance burden on reporting entities. This will be most significantly experienced on smaller duty holders who may not have a material sanctions risk.

49. Please also refer to our above responses under Part 1 (in relation to establishing a separate sanctions regime) and our responses to Questions 7, 8 and 10 under this Part 2.

Question 12: Are there situations where you believe the RSA should prohibit the disclosure of information contained in a SAR report?

50. Our response is based on the assumption that this question is targeted at prohibiting disclosure to the subject of the SAR, and not the New Zealand government. This is, however, unclear.

51. NZBA does not support this proposal. Placing a prohibition on disclosing information contained in a SAR would potentially limit the ability for duty holders to determine whether the activity being conducted is prohibited under the RSA and similarly, recourse for the impacted customer to have their assets released.

52. Limiting the ability to disclose information may place duty holders in a challenging position on how to explain to customers why their funds have been frozen, or why a particular transaction does not appear in their account. This prohibition would be inefficient and out of step with other sanctions regimes.

53. Further, and as previously foreshadowed, the AML/CFT Act and sanctions fundamentally differ:

    53.1. The AML framework is designed to simultaneously prevent criminals from using private individuals, banks, and other financials to launder the proceeds

of crime and to detect those criminals who have successfully used the system to launder those proceeds. At a high-level, the obligation on duty holders is to undertake due diligence and report suspicious activity. Reporting suspicious activity is governed by a prohibition against disclosing the contents or existence of a suspicious activity report.

53.2. In contrast, sanctions are a foreign policy tool designed to reflect a state's position on acts states deem contrary to their political interests and values. Because persons are designated as sanctioned persons, they have a right to challenge a designation; therefore, duty holders should be able to be transparent that potential assets such as payments may be frozen.

54. We submit that a duty-holder must be permitted by the legislation to be transparent with customers that funds have been frozen in accordance with the RSA and in some instances, their contractual obligations. In the event funds are frozen, duty holders should be able to discuss these matters, including their rationale, at the time of the freezing. If this were to be prohibited, there is a high likelihood that formal complaints would increase.

Topic 3: Clarity around the scope of the RSA

Duty to report

55. As a general note, we observe that questions on scope of the RSA focus largely on reporting. This is telling and suggests a reliance on an AML regime not designed to address sanctions issues. Reporting is primarily the domain of AML programme while sanctions programmes are characterised by blocking and freezing assets.

Question 16: Are the circumstances where duty holders have an obligation to report under the RSA clear? If not, how could they be made clearer?

56. Please see our response to Question 17 below.

Question 17: Is the timeframe of reporting within 3 days of forming reasonable grounds to suspect a sanctions breach an appropriate timeframe? If not, why?

57. We consider the 3-day timeframe is appropriate.

58. Prohibiting a transaction, freezing and reporting the activity is not a breach of the RSA but the RSA operating as designed.

Question 18: Is the threshold for duty holders to report on reasonable grounds to suspect clearly understood within your business?

59. Yes. See also our response to Question 17.

Question 19: When a report is submitted to the Commissioner of Police using GoAML, should there be a requirement for RSA duty holders to also notify MFAT at the same time?

60. NZBA questions the value of the reports being submitted to the Commissioner of Police. It would be beneficial for sanctions reporting to be in a separate single reporting mechanism (e.g. to MFAT) instead of reporting SAR (to FIU).

61. For example, having one reporting duty under the RSA, then having an additional reporting duty under another specific section of the regulations is onerous and inefficient. Under Reg 11(4), there's already a separate requirement to report to MFAT on top of FIU (through SARs).

Question 20: Is the purpose of SAR reporting for RSA breaches and how that information will be used clear?

62. Generally, the purpose for SAR reporting and how that information will be used is clear. However, it is not clear as to why the reporting is undertaken through the FIU rather than directly to MFAT noting that the RSA is intended to be a foreign policy tool.

63. Additionally, differentiating between “breach” and “complying with the Act / Regulations” and defining them will be beneficial. In practice, many duty holders use “breach” when something is not being complied with. Therefore, duty holders enacting the requirements of the RSA (to comply with the obligations) and reporting this should not be worded/considered as ‘reporting an RSA breach’.

64. We also note the unusual situation that currently arises when funds are blocked under the RSA and a SAR is also submitted under the AML Act. Customers must be informed when funds are blocked (even if not informed it will be evident to them). Banks must submit an SAR when funds are blocked (even though to block funds they have moved beyond ‘suspicion’). Banks cannot acknowledge to customers that they have submitted an SAR but the RSA clearly (publicly) states that banks have 3 days to do so.

Question 21: Should the RSA be amended to include a positive obligation for non-duty holders to report if they form reasonable grounds to suspect a sanctions breach has occurred?

65. NZBA supports an amendment to include a positive obligation for non-duty holders to report to MFAT/FIU, noting our previous response in paragraph 60.

66. However, the expansion will likely create operational challenges to the reporting of a SAR, as reporting via goAML is limited to AML reporting entities. NZBA would not be supportive of the use of goAML to be expanded beyond AML reporting entities and the original intended purpose of the solution.

Associates and Relatives

Question 22: Should the concept of Associates be retained as part of the RSA and RSR?

67. The concept of associates is inconsistent with other international sanctions whereby one must be designated in order to be sanctioned or meet a relevant rule like the 50% rule for OFAC in the case of entities.

68. We understand the intent of the concept, but believe it is flawed in practice. Sanctions encompass a strict liability offence, and the current inclusion of unnamed and unknown associates and family members could see banks held liable for something they had no knowledge of or control over.

69. NZBA recommends that, to the extent that the concept of associates remains, those associates should be specifically identified on a publicly available register (e.g. designated and listed in Schedule 2 of the RSR). The register would need to be adequately maintained and monitored (including the main sanctions list) with sufficient regulator resources to complete this work.

70. Alternatively, this issue could be addressed in guidance on evasion methods, where associates and family members could be considered as having met the various legal thresholds under the RSR that pertain to concepts such as ownership and control and senior management.

71. If the current broader definition were to remain, we submit that the concept of strict liability should be removed for non-listed associates and instead be replaced with a concept of strict liability with reasonable grounds to know.

Question 23: If yes, are the current definitions and guidance on the different types of Associates adequate for the identification of the different types of Associates? If no, please specify which type of Associate creates issues from a compliance perspective and why?

72. The concept and definitions for associates are clearly defined. The challenge in relation to associates occurs where the designated person is not a customer of a duty holder and may be the beneficiary or originator of a transaction that a duty-holder's customer is engaged in. The ability to determine whether the other party is an associate where they do not specifically appear on a list is extremely challenging due to operational processes (in particular in larger automated duty holders) and information available is limited.

Designation Notices

Question 25: Is the status of designation notices sufficiently clear?

73. NZBA has no concerns regarding the status of designation notices.

Question 26: Are the designation notices on the MFAT website useful?

74. Yes. NZBA submits that the published designation notices need to be consistent with those being emailed to prescribed parties.

Topic 4: Extraterritoriality

Question 27: Is the extraterritorial application of the RSA appropriate?

75. NZBA submits that the extraterritoriality of the RSA is appropriate and is consistent with other global sanctions regimes. MFAT has queried if there should be a nexus to New Zealand. We note that without a nexus New Zealand banks have no role to play.

76. Ultimately the answer to that question may also depend on what MFAT consider constitutes a nexus. We would recommend expanding this further. Specifically:

    76.1. Include any overseas business operating in New Zealand in respect of their activities carried out in New Zealand, as not all overseas businesses are required to register in New Zealand. Additionally, this could be expanded to capture other entities that have a New Zealand nexus e.g. a foreign trust operated and managed from New Zealand.

    76.2. Additionally, MFAT could consider expanding the definition of ordinarily resident to include individuals who are ordinarily resident in New Zealand or have obtained New Zealand Residency.

    76.3. Consideration should be given to capturing overseas businesses that are wholly owned or controlled by a business registered in New Zealand.

    76.4. MFAT could include the use of NZD by parties that otherwise have no link to New Zealand.

Question 28: Is the extraterritorial nature of the RSA, including its application to New Zealanders resident overseas, stated with sufficient clarity?

77. Yes, noting our comments in response to Question 27 above.

Question 29: Are the exceptions listed in regulation 12 of the RSR, and the process for the revocation, amendment, or exemption in section 13 of the RSA, in respect of extraterritorial application operating adequately? If not, how might they be improved?

78. We submit there should be a general exception included in Reg 12 of the RSR that permits MFAT or a relevant authority to issue individual exemptions or a permits system (similar to Australia, the USA and the UK) to cover circumstances that were not intended to be captured by the RSA for matters after its inception, but which inadvertently have been.

79. Due to the strict liability nature of the prohibitions in Regs 10, 10A and 11, we consider that a general exception should be included in any amended regulations.

80. We also consider that, without a permits regime afforded by the RSA or RSR, the New Zealand sanctions landscape lacks completeness and is inconsistent with other international sanctions regimes.

Question 30: Should there be a nexus to New Zealand in order for an entity to be regulated (see - sections 4 and 26)?

81. Yes, without an appropriate nexus to New Zealand enforcement of the RSA may become impractical.

Topic 5: Investigation and Enforcement

Question 31: Is the RSA sufficiently clear about the respective roles of New Zealand Police, Customs, AML/CFT Supervisors and MFAT in terms of investigations of potential sanction breaches?

82. We submit that in relation to investigations of potential sanctions breaches, the RSA and RSR, the delineation between the roles of MFAT and the Commissioner could be clarified. While we consider there could be improvements made as to MFAT's jurisdiction, we maintain that the AML/CFT Supervisors have no jurisdiction in this area.

83. See also our comments above at paragraphs 21 – 27 that AML/CFT and sanctions are fundamentally different activities with different objectives and different compliance methods.

Question 33: When duty holders submit a SAR which is unclear or ambiguous as to whether it relates to a breach of the AML/CFT Act or the RSA would it be appropriate for that information reported under one regime, to be used for the purpose of the other regime?

84. No. This ambiguity has been created by the RSA utilising a reporting mechanism intended for AML/CFT purposes. The AML/CFT Act requires relatively passive reporting, rather than the standard practice from a sanctions perspective which is focused on actively blocking and freezing assets on behalf of the Government. This is likely compounded by the active role of AML supervisors. We consider there should be a clear delineation of formal reporting obligations associated with RSR and the AML/CFT Act.

85. Where ambiguity exists, the FIU could seek further clarity from the reporting entity as to whether the SAR relates to AML or sanctions. NZBA's preferred approach would be to establish a reporting mechanism outside of the AML SAR process. This would resolve any current ambiguity in reporting. Our current assumption is that once information is submitted to NZ Police, it would use that information to investigate as appropriate.

Topic 6: Review and Oversight of Sanctions

Review and oversight of Decisions made pursuant to the RSA

86. NZBA has no material comments relating to questions 34 – 36.

Review and oversight of Duty Holder compliance with the RSA

Question 37: Should other oversight bodies (e.g. under the Banking Ombudsman Scheme) have jurisdiction in respect of RSA-related matters? If yes, how should such bodies best liaise with MFAT and NZ Police, in light of their responsibilities under the RSA?

87. NZBA does not believe that BOS or similar oversight bodies are appropriate to consider the application of the RSA and that this should remain the responsibility of MFAT or a dedicated supervisory body that may be appointed in the future.

88. The jurisdiction of alternative dispute resolution forums on matters directly caught by the RSA and which are subject to Police investigations (such as the Banking Ombudsman and the Insurance and Financial Services Ombudsman) should, in our view, be ousted by special provision requiring that:

    88.1. A court and specialist regulatory division has sole jurisdiction to determine matters caught by the RSA (with appeal rights allowed), or

    88.2. Recommendations or determinations by ADR forums are appealable to a court or specialist regulatory division (with appropriate appeal rights being permitted for natural justice reasons).

89. This applies, for example, where banks are required to freeze assets to comply with the RSA but the banks' actions result in customers complaining and taking up matters with ADR forums. For banks, there are time and cost factors, operational overhead factors, and professional services costs such as legal fees having to deal with complaints.

Question 38: Do you have any other comments about the interaction between the RSA's regulatory framework and other oversight bodies (including in respect of non-duty holders)?

90. See our response to Question 37 above.

Topic 7: Prohibitions

91. As a general comment, we note that the current focus on reporting reinforces confusion between AML and sanctions and potentially undermines sanctions practices. Our view is that the focus of the RSA should be on freezing, but with an avenue for reporting as required left available. This would be more consistent with wider global regimes.

92. As previously noted, New Zealand sanctions obligations form a small part of banks' global obligations. Permitted activities under the RSA do not create an obligation on banks to do so. In the interests of clarity, we note that banks may not take certain actions, even if permitted under the RSA, if those actions are at odds with their risk appetite positions or obligations in other jurisdictions.

Asset Freeze

Question 39: Should there be a more explicit obligation to freeze assets or services, in addition to the prohibitions not to deal with assets and services? If yes, why?

93. Yes. Providing clear direction as to obligations to freeze assets or services would provide greater clarity and create helpful efficiencies for duty holders on how assets identified as belonging to designated persons should be treated. The obligations should be explicit as to how assets are to be frozen and any obligations relating to maintenance of the asset.

Question 40: Should there be an explicit obligation to freeze assets or services in circumstances where there are reasonable grounds to suspect? If yes, do you foresee any issues with such an approach?

94. If this threshold is met, we are supportive of explicit freezing obligations coming into effect. We do not envision any material issues with this approach as this would be largely consistent with how sanctions processes are currently operationalised.

Question 41: Should there be statutory processes that specify how to deal with the range of assets that may be frozen e.g. super yachts and cash? If yes, do you have any suggestions about any appropriate processes?

95. Yes. Asset freezing provisions and carve outs are required in relation to dealing with assets. Given the wide scope of "dealing with assets and services" provisions, banks may need to transfer assets (i.e. funds) between accounts to effect the freeze (i.e. from a Nostro account to a dedicated suspense account).

96. The option for the duty-holder to charge reasonable administrative fees or interest should be permitted, which is consistent with other international sanctions regulations, such as the equivalent U.S. regulations.

97. In relation to financial assets, these should be held on trust separate to the customers assets and the duty holders' own assets.

Prohibited Exports

Question 42: Are the terms "indirectly", "for use in" and/or "for the benefit of" sufficiently clear as to the type of activity captured?

98. We consider these definitions as broad in nature, and further clarity would be welcomed. For example, in relation to "for the benefit of" – are there any ownership thresholds that apply when determining benefit?

99. Additionally, consideration should be given to the concept of ultimate in relation to benefit.

Question 43: Are there any other terms in the export prohibitions that could be improved either by amendment or further guidance?

100. We consider it would be simpler to navigate the regulations if the definitions were detailed in a consistent manner – i.e., if all were contained in reg 5(1) or 13, rather than split across both.

Prohibited Imports

Question 44: Is it clear what is meant by importing "indirectly" and the type of activity captured?

101. NZBA submits that further examples in guidance may be useful to expand the understanding more broadly.

Question 45: Is it clear what is meant by "Russian origin"?

102. We consider further clarification can be provided to further explain the concept of origin – in particular, where the raw material utilised to produce the product was of Russian origin but has subsequently been transformed into a new product in another jurisdiction.

103. NZBA believes that the origin of the transformed goods would assume the jurisdiction where the transformation was undertaken, however it would be beneficial to have this clarified in the regulations to ensure a consistent approach was applied by duty holders.

104. We note there is a Russian Energy Products Guidance Notes specifically in relation to origin of energy products, but duty holders could benefit from a general definition of Russian Origin.

Question 46: Should there be an exception to the prohibition of Russian imported goods for goods exported from Russia prior to 1991?

105. We have no comment on this question.

HS Codes

Question 47: Is the current usage of the HS code system for the purposes of the RSA appropriate and clear?

106. Yes, however the process is challenging for duty holders to conduct due diligence where the service provided to the customer does not specifically relate to a trade product.

107. In the ordinary course of business, it is unlikely that a duty holder would obtain sufficient information to determine the HS code, country of origin or final destination of the goods purchased or sold where this is occurring through a normal wire transfer process and does not involve a designated person or destined directly to or originated directly from Russia or Belarus.

Question 48: Are there any HS Codes which you believe should not be included in any of the Schedules related to the import and/or export prohibitions under the RSA? If so, why?

108. We have no comment on this question.

Question 49: If the regulations did not use HS codes, then an alternative would be to have a list of prohibited goods, similar to the Export Controls Strategic Goods List. What are your views on such an approach?

109. NZBA is generally comfortable with the existing HS code approach. A list of goods accompanied by the HS code would also be an appropriate option.

Sanctions Evasion

Question 50: Should the RSA/RSR include an express prohibition of sanctions evasion?

110. While we are not opposed, in principle, to an express prohibition, there is a real risk that including such a prohibition will create greater compliance obligations on duty holders in terms of meeting the associated due diligence requirements to determine whether sanctions evasion may have occurred.

111. We consider that MFAT is best placed to determine what should constitute sanctions evasion, with further consultation to be undertaken on this concept as required.

Question 51: If yes, how would such a prohibition impact compliance?

112. We consider that impact on compliance will depend on how the prohibition is scoped, and the obligations that flow from the provision.

113. We would welcome further clarification on the subject. The expectation between "do not participate in sanctions evasion" and "ensure you identify and prevent sanctions evasion" would lead to significant differences in respect of compliance impacts.

Exceptions from the application of sanctions

114. NZBA has no material comments relating to questions 52 – 55 and is broadly comfortable with how regulation 12 is currently operating, noting that concerns relating to the drafting and impact of regulation 12 have become less relevant as the since the commencement date of the RSA.

Exceptions to Export and Import Prohibitions

Question 56: Are there any issues with the exceptions described above?

115. If the intent of the humanitarian exception is specifically for the benefit of humanitarian organisations under Reg 18, then, in our view, Reg 14(1) should clearly state this.

116. If the Reg 14(1) exception is broader than Reg 18, then it should clearly define the following and be specific: (a) good faith, (b) humanitarian purpose, (c) personal effect, (d) doing so is consistent with these regulations.

Question 57: Are there any other situations that should be added to the exceptions in regulation 14 and 14B?

117. We do not have any comments at this time.

Humanitarian Organisations Exception – Regulation 18

Question 58: Do you have any views on the definition of humanitarian organisation in regulation 18(2)? Are there any other bodies you think should be added?

118. Although NZBA does not have a specific view as to any additional humanitarian organisations to be included in Reg 18(2), it may be too restrictive to have this limited to organisations accredited under the New Zealand Disaster Response Partnership.

119. We submit this could be expanded to include other organisations not listed where an appropriate level of due diligence has been completed and reporting entities have reasonable grounds to believe that the organisation is undertaking a legitimate humanitarian operation in relation to the Russia/Ukraine conflict.

120. NZBA considers it would be beneficial to clarify whether duty holders have a duty to report in relation to a prohibited activity that has been conducted under the Reg 18(1)

exception. Additionally, it would be beneficial to more clearly define the meaning of humanitarian activities, i.e. can all activities being conducted by entities considered in Reg 18(2) be considered humanitarian in nature?

121. See also our response to Question 56 above.

Other Exceptions:

Question 59: In addition to the situations listed above, we would be interested in any other comments regarding the use of exceptions in the RSR.

122. NZBA submits that MFAT should consider a mechanism to administer immediate relief for unintended targets of the sanctions – for example, through temporary licenses or exceptions.

Topic 8: Definitions and Terminology

123. Please note that we have adopted a more general approach to our submission in respect of definitions, as opposed to responding to specific questions in the Consultation.

"Dealing with" definitions

124. We consider the structuring of the "dealing with" definitions is not clear and requires further clarification for certainty. They should also, in our view, include carve outs to allow New Zealand persons to comply with the RSA's freezing requirements. The deceptive simplicity of the RSA has, at times, presented challenges and costly legal burden when seeking to understand the prohibitions in place and their applicability to transactions and relationships involving parties or activities that may be subject to sanctions.

125. This means that duty holders must seek legal advice from external counsel, and where there is still no clarity, seek an indicative assessment from MFAT (which MFAT does not consider legal advice). This burden could be eased through better defined or clearly understood terms within the RSR.

126. Cross-border transactions routed through correspondent banking relationships will be subject to the sanctions regimes administered by those regions. Adopting a consistent approach will assist with payments from or to New Zealand persons being processed more efficiently. This benefits financial institutions, their customers, and the broader economy.

    126.1. We note that globally, the standard would be "blocking and freezing" rather than "not dealing with".

"For the benefit of"

127. The phrase "for the benefit of" seems reasonably clear at face value but could benefit from an expansion to reference "control" or a similar concept. We also suggest it is expanded into the area of associates and family members.

128. While this phrase may be clear on face value, its application is potentially far-reaching. It effectively means that there can be many degrees of separation between the transaction, trade, or service and the sanctioned person depending on how the transaction is structured.

129. Whether a bank can determine the degrees of separation will be subject to the information and evidence available to it, its due diligence, and the cooperation of its customers to provide that information sought (emphasising the latter can often cause customer dissatisfaction and little response). Even then, it will be difficult to eliminate

the possibility of a sanctions or prohibited trade nexus and can largely be out of the bank's hands in terms of future dealings in the subject matter.

130. We are aware that the s 17 immunity provision has a part to play in this regard, but it would be helpful if more guidance were issued on this immunity and how it would apply if an issue arose regarding regs 10, 10A, or 11 of the RSR.

"Designated"

131. Current definitions about which persons, assets, and services are 'designated' are clear although arguably not helpful – particularly when relating to categories of designated person like associates and family.

132. As a strict liability offence, it is unreasonable to potentially prosecute banks for an activity they hold no information on. Ignoring the practical implications of collecting data on customers' families it would likely result in a backlash from customers and wider domestic regulators expectations.

Sanction and Sanctioned Person

133. We note that any distinction between an individual subject to Trade and Economic Sanctions or Travel Ban is likely to be lost in the banking context. To meet third party and contractual obligations, banks are often asked to confirm we do not provide banking services to designated individuals. The nature or subtleties of that designation is not relevant.

134. Separately, we consider that consistent use of definitions between the RSA and RSR would mitigate the confusion between "designated person" and "sanctioned person". While reg 4 of the RSR attempted to remediate this issue, we believe multiple definitions used for the same purpose are confusing and better rectified by future amendments to the RSA and RSR.

General comments on defined terms

135. As a general comment, we submit that duty-holders will benefit from as many terms as possible being clearly defined.

136. For terms like, 'asset', 'indirectly', 'for the benefit of' and 'owned or controlled', we recommend use of non-exhaustive guidance, consistency with partner jurisdictions, introducing a percentage threshold to guide when a person 'indirectly' makes assets available to a designated person and the introduction of new terms including concepts like 'comingled' funds. For example, there is no clear definition for an intangible asset.