



McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

John W. Boscariol
Partner
Direct Line: (416) 601-7835
Direct Fax: (416) 868-0673
Email: jboscariol@mccarthy.ca

Assistant: Di Pasquale, Terry
Direct Line: 416-601-8200 (542144)

February 5, 2019

Confidential

Hon. Chrystia Freeland
Minister of Foreign Affairs
Parliament of Canada
House of Commons
Confederation Building
Suite 117
Ottawa ON K1A 0A6

Dear Hon. Minister Freeland:

**Re: Freezing Assets of Corrupt Foreign Officials Act - Ukraine Regulations
Andriy Portnov**

We are counsel for Andriy Volodymyrovych Portnov, a person currently listed as a politically exposed foreign person in the schedule to the *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations* (the "Ukraine Regulations"). In this regard, please find attached a counsel authorization signed by Mr. Portnov.

All regulations under FACFOA expire after a five year period, and to have continued force they must be renewed by a new regulation. The Ukraine Regulations are set to expire on March 5, 2019. We respectfully submit that if the Minister chooses to renew the Ukraine Regulation, that Mr. Portnov not be included as a listed person therein.

Listing Mr. Portnov would violate Canada's commitment to due process and rule of law given the extensive evidence of his lack of culpability for any crime set out in FACFOA as a basis for an individual to be listed. To assist the Minister, we have provided below a fulsome synopsis of the current situation. The purpose of this submission is to highlight new and relevant information obtained by Mr. Portnov in late 2018 and in January of 2019.

There is abundant evidence, much of which has already been shared with the Minister's office at other times, that Mr. Portnov has not misappropriated any funds from Ukraine. It is our view that no reasonable person could conclude that Mr. Portnov has misappropriated funds, and that as such he should be excluded from any future listing.

Initial Listing: A Single Letter

Mr. Portnov was initially listed on the FACFOA Ukraine Regulations due to a letter provided to Canada from the Prosecutor General of Ukraine dated March 3, 2014 (the "2014 Letter"). While this letter has never been provided to either Mr. Portnov or our office, a copy of what we believe

CONFIDENTIAL

to be a similar letter provided by the Prosecutor General of Ukraine to the European Union (“EU”). That letter stated that:

“law enforcement agencies of Ukraine have launched a number of criminal proceedings to investigate facts of crimes committed by former senior officials.”

The 2014 Letter further indicated that these investigations are related to an alleged theft of state funds. It provided no evidence of misappropriation by Mr. Portnov, or details as to the extent or length of the investigation. We have included a copy of the 2014 Letter as **Annex A**. We understand similar versions of this letter were provided to a number of governments to freeze the funds of the individuals listed therein.

The signatory (and presumed author) of the 2014 Letter, former Prosecutor General Oleg Makhnitsky, has since recanted and described the letter as being written by activists and not professionals within his office. We have included a copy of these statements, together with a notarized translation of that letter, as **Annex B**.

Since the 2014 letter, Mr. Portnov has consistently disputed the accuracy of the 2014 Letter and has pursued the matter with a high level of diligence with Canada’s allies, including the EU.

Canada’s Allies De-List Mr. Portnov

As noted above, numerous Canadian allies also listed Mr. Portnov following receipt of the Prosecutor General’s letter. However, in the following years, these allies have gradually, but consistently, removed Mr. Portnov from any restrictive measures. This includes decisions by the governments of Switzerland, the United Kingdom, Monaco, Norway, Liechtenstein, and Luxembourg.

Importantly, Mr. Portnov also sought the opinion of the European Court of Justice regarding whether his being subject to restrictive measures imposed by the EU was compliant with EU law. The EU proceeded to withdraw the restrictive measures against Mr. Portnov; however, Mr. Portnov continued with his case due to the reputational harm he had suffered. The European Court of Justice held in favour of Mr. Portnov finding that:

“...It is not even established that, at the time when the contested acts were adopted, the applicant was the subject of genuine ‘criminal proceedings’, or even a mere preliminary inquiry. It follows that inclusion of the applicant’s name on the list as a ‘person subject to criminal proceedings’ is incorrect. Furthermore, when questioned, at the hearing, about the withdrawal of the restrictive measures against the applicant, the Council did not provide any explanation justifying that withdrawal.”

The Court determined that not only had continued maintenance of the restrictive measures been unjustified, but that the evidence causing Mr. Portnov to be subject to restrictive measures was so scant as to be unreasonable. For that reason Mr. Portnov was awarded a 15,000EUR costs award. A copy of that judgment is attached as **Annex C**.

CONFIDENTIAL

Ukrainian Government's Confirms No Investigations

Mr. Portnov also retained legal counsel in Ukraine to determine whether he was actually under investigation for any criminal acts, and to clear his name from any alleged wrongdoing. To that end, in early 2016, he contacted each of the following agencies:

- Security Service of Ukraine;
- Chief Investigation Department of Ukraine;
- State Fiscal Service of Ukraine;
- National Anti-Corruption Bureau of Ukraine; and
- General Prosecutor's Office.

Each of these entities responded to Mr. Portnov's inquiry with a clear and unequivocal response – he was not under investigation for any crimes. Copies of the responses of each of these investigatory bodies is attached as **Annex D**.

In late 2018, Mr. Portnov sought further confirmation from the Ministry of the Interior and the Prosecutor General's office as to whether he is the subject of any ongoing criminal proceedings. Both entities confirmed that he is not. These confirmations are attached as **Annex E**.

At this stage, Mr. Portnov has exhausted inquiries with every investigatory body in Ukraine which could be investigating a criminal offence. We also note that, throughout this entire process, Ukraine has apparently taken no steps to investigate Mr. Portnov. There have been no requests for an interview, there have been no warrants served, and there have been no asset freezes or any other restrictive measures imposed against Mr. Portnov by Ukraine.

The 2018 Ukraine Letter

Mr. Portnov just recently obtained a copy of a letter sent by the Ambassador of Ukraine to the Minister back on January 11, 2018 (the "2018 Letter"). A copy of the 2018 Letter is attached as **Annex F**.

The 2018 Letter continued to insist that Mr. Portnov was subject to investigations related to the misappropriation of funds. The letter could charitably be described as "sparse". The 2018 Letter contained no details as to the status of the investigations, no reference number or charging documents, and no details as to Mr. Portnov's role in any alleged misappropriation (other than describing him as a member of the Yanukovich government). There was no indication of when this investigation would conclude, if or when criminal charges would be filed, or any judicial endorsement or authorization for the investigation.

CONFIDENTIAL

Indeed, the 2018 Letter itself noted that it will provide “additional information” regarding the investigation. However, it has been a year without any further documentation or evidence having apparently been provided.¹

Ongoing Response to the 2018 Letter

Mr. Portnov received a copy of the 2018 Letter through his Ukrainian counsel. After receiving a copy, Mr. Portnov acted immediately to respond to the libelous allegations contained therein. As a result of his actions, the Ukrainian ambassador is currently under criminal investigation. We have attached a copy of the official court documents commencing the criminal investigation as **Annex G** proving that an investigation is actually underway. We note that no similar document was included regarding any alleged investigation of Mr. Portnov in any of the 2014, 2016, or 2018 Letters.

In addition, Mr. Portnov wished to resolve any investigation where he may be a subject as quickly as possible. Mr. Portnov therefore sent a letter to the Prosecutor General’s office offering to appear for any interviews and provide any documents that the Prosecutor General may require to conclude its investigation. As noted by Mr. Portnov’s counsel, if he is actually designated as a suspect in a criminal proceeding he is directly guaranteed the right to be interrogated. We have included a copy of that letter as **Annex H**.

Significantly, on January 28, 2019, the Prosecutor General denied the request for an interrogation, a copy of which is attached as **Annex I**. The Prosecutor General confirmed that the Special Investigations Administration of his office conducted investigations into the relevant criminal proceeding. However, Mr. Portnov would not be granted an interrogation as:

“Portnov A.V. is not a suspect in this proceeding and therefore, there are no grounds for interrogating him as a suspect.”

Despite clearly not being a suspect in any investigation, Mr. Portnov has continued to voluntarily offer to appear for an interrogation to assist the government in any investigation in which he is (directly or indirectly) associated. This offer has not been accepted.

Mr. Portnov’s FACFOA Inclusion is Inappropriate

We respectfully submit that the inclusion of Mr. Portnov on any renewal of the FACFOA Ukraine Regulations would be inappropriate. There is not only no evidence Mr. Portnov engaged in the misappropriation of funds, but considerable evidence exists that there is currently no investigation into Mr. Portnov and that he is not a suspect in any crime.

Mr. Portnov has repeatedly been completely open with the Canadian and Ukrainian government. Mr. Portnov offered to submit himself to interrogation by Ukrainian authorities if it would assist in concluding any existing investigation – only to be told that there was no investigation underway.

¹ We note that no further evidence was provided during the ongoing Federal Court litigation with Mr. Portnov where it would have been relevant evidence and ought to have been disclosed if it existed. As such, we must infer that no further additional information has been provided.

CONFIDENTIAL

Mr. Portnov has also been removed from the restrictive measures of Canada's allies. This includes a judgment by the European Court of Justice that not only was his continued presence on the restrictive measures list inappropriate, but that he never should have been listed in the first place.

By contrast, the Ukrainian government has supplied no evidence of Mr. Portnov's wrongdoing, or even that an actual investigation is occurring. The government has not charged Mr. Portnov. The government has not interrogated Mr. Portnov because, according to them, he is not a suspect. In the five years since the alleged investigation began the Ukrainian government has repeatedly denied that any investigation is ongoing to all persons except for the Minister through the 2014, 2016, and 2018 Letters. Indeed, even these letters must be relied upon only warily as they are themselves subject to ongoing criminal investigations in Ukraine.

Respectfully, continuing to apply restrictive measures to Mr. Portnov is wrongful and incompatible with basic concepts of due process and the rule of law. Canada should not and cannot continue to essentially hold Mr. Portnov's life in limbo because of an ephemeral "investigation" that apparently has no ongoing processes and no conceivable end point.

As such, we request that if you decide to renew the FACFOA Ukraine Regulations, that you exclude Mr. Portnov from the list of designated persons therein. Our office is happy to meet with you or any member of your staff to discuss the above circumstances. Mr. Portnov is also willing to speak with you or your staff via video-conference to assist in concluding this matter.

Yours truly,

McCarthy Tétrault LLP



John W. Boscarol

JWB/km
Enclosures

c: Andriy Portnov
Robert A. Glasgow, McCarthy Tétrault LLP