HM Treasury

The process for imposing monetary penalties for breaches of financial sanctions:

consultation response

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Foreword

1.1 The Policing and Crime Act 2017 ('the 2017 Act') changed the legal framework for enforcing the financial sanctions regulations. Among other things, the 2017 Act created powers for HM Treasury to impose monetary penalties for financial sanctions breaches. The Office of Financial Sanctions Implementation (OFSI) is the part of the Treasury responsible for deciding whether or not to impose these penalties.

1.2 The 2017 Act states (at section 149):

> 149 Monetary penalties: supplementary
>
> *(1) The Treasury must issue guidance as to—*
>
> *(a) the circumstances in which it may consider it appropriate to impose a monetary penalty under section 146 or 148, and*
>
> *(b) how it will determine the amount of the penalty.*

1.3 OFSI held an 8 week consultation, which closed on 26 January 2017, on the proposed draft guidance for the imposition of monetary penalties. As part of the consultation Treasury officials met a wide range of representatives from financial services, the legal profession, industry professionals and representative bodies, and hosted roundtable events.

1.4 There were 34 written responses to the consultation. These, together with the views expressed during the roundtable events, form the basis of this consultation response. We appreciate the written responses and the participation in the roundtable events.

How this document is structured

1.5 The draft guidance in the consultation document was divided into sections, which each had closed and/or open questions after it. The roundtable events followed the same structure, and this response is arranged in the same way.

1.6 The closed questions have provided statistical information about whether the section contained enough information. These are included at the start of the relevant section.

1.7 Responses and comments to the open questions have been analysed and collated into broad themes. These are listed under the section of the original consultation structure to which they most closely relate.

1.8 Every comment and question was considered individually. Many of the comments were similar or covered similar points; where that was so we have only included one example of the general point, aggregated into a broad thematic response. However, where specific questions or issues were raised that we thought needed a longer response, we have included them individually. Broadly, we have provided longer answers where the issue raised has led to changes in the guidance or where we wanted to explain why no changes have been made.

1.9 Respondents also raised a large number of questions which were in some way already covered by the guidance or which didn't require amending it. We have not captured those questions in this response, but will use them to improve our main financial sanctions guidance and develop further FAQs.

1.10 This response should be read with the guidance on monetary penalties for financial sanctions breaches, which is published alongside it. The guidance incorporates all the changes that this response discusses.

1.11 We have made some consequential changes (e.g. updating references to the 2017 Act with the final numbering of the sections as enacted and minor restructuring, like moving some early sections into a preface). We have also redrafted to correct errors and misinterpretations. All references in this document to sections of the guidance are to the new numbering in the final guidance, not as it appeared in the consultation document.

1.12 The respondents to the consultation are listed at Annex B and the industries/sectors that participated in the roundtables are listed at Annex C. All respondents and participants gave us their comments on a non-attributable basis, as was set out in the consultation criteria. We have not attributed views discussed in this response.

1.13 Several respondents raised issues that were not directly relevant to this consultation. We have captured all of these, and will use them to help develop OFSI best practice.

1.14 OFSI welcomes continuing feedback on our guidance. You can email or write to OFSI at the address at the end of this document. We will consider any issues raised and may use them to improve our guidance in future.

Office of Financial Sanctions Implementation
HM Treasury

April 2017

1 Introduction

Part 1: Introduction

1.1 The introductory section of the draft guidance explained the financial sanctions clauses of the Policing and Crime Act, which create powers for HM Treasury to impose monetary penalties. It explained what financial sanctions are, described where to find additional guidance, outlined the permitted maximum penalty levels, and stated on whom penalties may be imposed.

We asked the following questions:

Consultation Question 1. Do these introductory sections give you enough information to understand the scope of the law on monetary penalties? (yes/no)

1.2 44% chose yes, and 32% chose no and 24% did not answer.

What else would be useful (open)

1.3 The following issues were relevant to the guidance discussed in this section.

OFSI powers

1.4 Respondents asked questions about the powers to impose monetary penalties. One respondent asked for clarity on the legal basis for OFSI's role in assessing breaches of financial sanctions; what actions would be taken to prevent breaches of the law; what actions short of a penalty OFSI might take to address sanctions breaches; and if we would provide a summary of the other enforcement powers OFSI would exercise. Another respondent said a member of OFSI's legal team should review and approve penalty decisions. Finally, a respondent suggested we should not act as 'judge and jury'.

Our response

1.5 HM Treasury is assigned the role of competent authority for financial sanctions for the UK by the legislation that establishes financial sanctions regimes. OFSI is the part of Treasury that exercises this function. We are responsible for implementing and enforcing financial sanctions in the UK.

1.6 When OFSI becomes aware of a potential breach of the financial sanctions legislation, we can contact the parties concerned and explain our view that the action may breach sanctions.

1.7 OFSI can request information about how persons who breach financial sanctions intend to improve their compliance in the future, using powers in EU[1] and UK legislation. This action contributes to our aim of improving sanctions compliance. This is an example of 'action short of a penalty' that the guidance refers to.

1.8 OFSI will seek legal advice as appropriate, but decisions on whether cases should have a penalty applied will be made by the most senior OFSI official.

1.9 OFSI does not act as 'judge and jury'. OFSI assesses the circumstances of a breach, takes the views of the relevant parties into account, and makes a decision whether or not to impose a monetary penalty. But that is not the end of the story – any such decision will be subject to

[1] On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

review by the minister, and can be appealed to an independent court. The imposition of monetary penalties by administrators, which are then subject to review or challenge, is not unusual and does not deprive anybody of their right to challenge the decision.

What we have done

1.10 We have revised paragraph 3.10 on action short of a penalty to make clear what this may entail.

Interaction between civil regime and criminal enforcement

1.11 Some respondents asked us to explain the interaction between civil and criminal financial sanctions enforcement. One respondent noted that breaches of the prohibitions were criminal offences, and did not see why OFSI should impose civil penalties for criminal offences. Another asked what would happen if we referred a case for criminal investigation but the law enforcement authority disagreed.

Our response

1.12 Breaches of financial sanctions are criminal offences, punishable upon conviction by up to 7 years in prison. However, it may not be appropriate in each instance to pursue a criminal case. It may sometimes be appropriate to take other actions – for example, a warning or caution. At other times it might not be in the public interest to prosecute, but still be appropriate to take action short of a prosecution. The monetary penalties regime we administer provides an alternative to criminal action for breaches of the financial sanctions legislation. This is not an unusual approach to enforcement.

1.13 OFSI will work closely with law enforcement agencies to ensure that breaches of financial sanctions are dealt with in the most appropriate way. We will seek to reach agreement with them where possible, but recognise that sometimes an independent prosecutor may choose not to take forward a prosecution. The 2017 Act also provides additional options for prosecutors when dealing with financial sanctions breaches.

What we have done

1.14 We have explained this in more detail in the guidance.

Definition of 'officer'

1.15 The guidance said that monetary penalties could be imposed on 'an officer' of a body as well as the body itself. Several respondents asked us to define who was an 'officer' in this context.

Our response

1.16 Section 148 of the Policing and Crime Act 2017 defines who is to be considered an officer of a body.

What we have done

1.17 We have added the definition to the guidance in paragraph 1.20.

Prohibitions

1.18 The draft guidance said OFSI will construe prohibitions widely, as do other EU member states. One respondent asked us to confirm those member states' practices.

Our response

1.19 The UK approaches the interpretation of law in the same way as other member states. It considers the purpose of the law, which in the case of financial sanctions is to ensure prohibited activities do not take place. A wide construction assists this purpose. The UK also considers any interpretation of the law by the UK and EU courts. To date, all such interpretations have been consistent with our construction.

What we have done

1.20 We have not changed the guidance following this point.

Scope – imports/exports

1.21 One respondent asked whether imports and exports are covered by financial sanctions.

Our response

1.22 Financial sanctions are often part of a wider sanctions regime that will include trade sanctions aimed at import and export. Financial sanctions may apply to persons who are engaged in importing and exporting, and may affect whether contracts can be entered into, goods can be made available or whether funds can be transferred. Each financial sanctions regime sets out what it covers. You should make yourself aware of the position if you are transacting in a country or with a regime where financial sanctions apply, or with persons who are subject to them.

1.23 It is not sufficient simply to satisfy any trade sanctions requirements (seeking a licence from the Department of Trade, for example). Financial sanctions requirements are separate and you must ensure you have satisfied those as well, if they apply. Read our main guidance for how to do this.

What we have done

1.24 We have not changed the guidance following this point.

OFSI plans to introduce sector-specific factsheets and is updating its main guidance document.

Scope – dealings with designated persons before they were designated

1.25 One respondent suggested that if a party was dealing with a designated person or entity before they were sanctioned, any breach should be dealt with leniently.

Our response

1.26 We have assumed this means 'continuing to deal with them after they have been sanctioned', as dealings with a person before they are designated is not a breach of financial sanctions or an offence. Financial sanctions are widely publicised, and everyone should ensure they follow the law. It may be possible to rely on an exemption or apply for a licence regarding dealings with a person before their designation. We will assess each potential breach according to the facts of the case. We will consider the person's level of knowledge of financial sanctions and their relationship with any designated persons when we assess the case.

What we have done

1.27 We have not changed the guidance following this point.

Scope – double jeopardy

1.28 One respondent asked whether a monetary penalty being imposed on a person would prevent the person being subject to other civil or criminal enforcement of the same conduct.

Our response

1.29 OFSI will not seek to impose a monetary penalty on a person who has been convicted of a criminal offence for the same matter. However, if more than one person is involved in a breach, a conviction for one party does not preclude the potential for monetary penalties for other parties.

What we have done

1.30 We have not changed the guidance following this point.

2 Our compliance and enforcement approach

2.1 The draft guidance then outlined OFSI's compliance and enforcement approach: **promote, enable, respond, change,** in a short summary section.

We asked the following questions:

Consultation Question 2. What are your views on OFSI's compliance and enforcement approach? (open)

2.2 There were various comments on the approach. One respondent welcomed OFSI's compliance and enforcement approach and thought the model seemed reasonable. Five respondents asked us to include education, and another thought preventative education and advice should be more of a focus, rather than punitive measures. Another thought we could reframe the model as outcomes that OFSI seeks to achieve, as the Financial Conduct Authority does.

2.3 One respondent thought it switched between the OFSI compliance approach and the private sector's compliance approach, and could be clearer. One respondent welcomed our holistic approach to compliance. Another thought it should be assessed regularly to ensure it remained fit for purpose, while another said we should respond to experience.

2.4 A further respondent wanted us to be aware of the sizes of businesses when considering proportionality. Another thought the approach was too high level. One welcomed the focus on using prevention/capacity development as the first stage in an enforcement approach. They thought it would encourage firms to engage proportionately and constructively with targeted sanctions, rather than gold-plating them and avoiding doing any business with a jurisdiction.

2.5 During the roundtable events, most of those who attended said the compliance and enforcement approach was equitable, though other views were expressed.

Our response

2.6 We are grateful to all respondents for their comments. We will review these and use them to help us improve our overall approach to compliance and enforcement, and may update future guidance accordingly.

Consultation Question 3. Is there anything else you would expect a compliance model to tackle? (yes/no and open)

2.7 53% chose yes, 21% chose no and 27% did not answer.

3 Case assessment

3.1 The guidance document then gave a high-level overview of OFSI's proposed case-assessment approach. It described the legal standards for monetary penalties and showed how we would establish knowledge or reasonable cause to suspect. It discussed the concept of a UK nexus, our intention to be fair and proportionate, and the factors we might consider when assessing a case. Finally, we introduced the concept of seriousness and discussed the distinctions the OFSI will make between 'serious' and 'most serious' cases.

We asked the following questions:

Consultation Question 4. Do you understand our proposed case assessment approach? (yes/no)

3.2 50% chose yes, 21% chose no and 29% did not answer.

Consultation Question 5. What are your views on our proposed case-assessment approach? (open)

3.3 The following issues were relevant to the guidance discussed in this section.

Requirement to provide information on financial sanctions breaches

3.4 One respondent asked us to explain the basis for always treating failure to report breaches of financial sanctions as more serious, arguing that it was inappropriate to penalise a failure to voluntarily disclose when there was no legal responsibility to do so.

Our response

3.5 The EU regulations that create the financial sanctions regimes also include a duty on everyone in the jurisdiction to give the relevant competent authority (which in the UK is HM Treasury, within which OFSI carries out its functions) any information that indicates breaches of financial sanctions. Not to do so is a breach of EU law.[1]

3.6 The UK legislation that provides for enforcement of financial sanctions regulations imposes a specific duty on 'relevant institutions' (as defined in that legislation, and includes credit and financial institutions such as banks) to report information to the competent authority. Failure to comply with this specific duty is a criminal offence. However, if a person is not a 'relevant institution', they must still give information under EU law. So it is reasonable and proportionate to treat cases of failure to voluntarily disclose as more serious, as the duty to report information has been broken.

What we have done

3.7 We have amended paragraph 3.36 to clarify the separate obligations, and described how OFSI will respond to breaches of the law for information offences.

[1] The EU's best practice guide (http://data.consilium.europa.eu/doc/document/ST-7383-2015-REV-1/en/pdf) says this:
"All persons and entities subject to the Union jurisdiction are obliged to inform the competent authorities of any information at their disposal which would facilitate the application of the financial restrictive measures. This includes details of any accounts frozen (account holder, number, value of funds frozen), and other details which may be useful e.g., data on the identity of designated persons or entities and, where appropriate, details of incoming transfers resulting in the crediting of a frozen account in accordance with the specific arrangements for financial and credit institutions, **attempts by customers or other persons to make funds or economic resources available to a designated person or entity without authorisation, and information that suggests the freezing measures are being circumvented."**

'Serious' and 'most serious'

3.8 Many respondents asked for more clarification about the concepts of 'serious' and 'most serious' cases. Some noted that these concepts were not defined in the guidance and that they do not appear in the legislation.

Our response

3.9 The use of 'serious' and 'most serious' is part of our internal case-management process. They are administrative rather than legally defined terms. They should be read as having their ordinary meaning. They are intended to help us ensure we treat each case proportionately.

3.10 Every case that meets the criteria for a monetary penalty can be said to be serious. But it is also true that the nature of some cases – for example, a very high-value or blatant flouting of the law, or severe or lasting damage to the purposes of the sanctions regime – is clearly more serious than others. It is appropriate to recognise that relatively higher seriousness.

3.11 It will generally be obvious why we have considered a case to be of the 'most serious' type, but we will explain why we came to this view both to the person we intend to penalise and when we publish a case summary.

What we have done

3.12 The guidance now includes an explanation of this issue consistent with the above.

Aggravating and mitigating factors

3.13 Some respondents asked us to spell out how many aggravating factors might mean a case becomes more serious, and whether mitigating factors might mean a case does not meet the criteria.

Our response

3.14 We always look at every case on its facts, including all aggravating and mitigating features. No set level or number of any given feature would be required before we would regard a case as more serious. For example, only one aggravating feature may be present, but it may be so large that it makes the case more serious by itself. In the same way, there may be several aggravating features and only one mitigating feature, but that mitigation might be so important as to influence OFSI's decisions on penalties.

3.15 We will always take mitigating factors into account when considering whether a penalty is appropriate.

What we have done

3.16 The guidance now includes an explanation of this issue consistent with the above.

Relationship between balance of probabilities and reasonable cause to suspect

3.17 Several respondents asked about how 'reasonable cause to suspect' and 'balance of probabilities' worked with each other, and to explain this for non-lawyers. One respondent questioned why the standard of proof was 'balance of probabilities' and not 'beyond reasonable doubt'. Finally, another respondent asked us to confirm whether the test for 'reasonable cause to suspect' was objective or subjective.

Our response

3.18 The 2017 Act sets the standard of proof for imposing monetary penalties at the civil standard, 'on the balance of probabilities,' not the criminal one, 'beyond reasonable doubt.' This only applies to monetary penalties. It does not apply where one of our law enforcement partners seeks to prosecute for a breach of financial sanctions.

3.19 In deciding 'on the balance of probabilities', OFSI will take a view on whether it is more likely than not that the person knew or had reasonable cause to suspect that their actions breached financial sanctions regulations. Whether there was reasonable cause to suspect will depend on the facts.

3.20 The way our definition used the term 'higher standard' could have been clearer. We have removed it and reworded this section as follows, based on a suggestion from a respondent:

> "It refers to an objective test that asks whether there were factual circumstances from which an honest and reasonable person should have inferred knowledge or formed the suspicion that the conduct amounted to a breach of sanctions."

What we have done

3.21 We have revised the definition of 'reasonable cause to suspect' in the guidance. In one instance we used 'reasonable suspicion' as a synonym for 'reasonable cause to suspect'. To avoid doubt that this might mean something different, we have changed this.

Case factors – definition of circumvention

3.22 One respondent asked for a clearer definition of 'circumvention'. Another felt we had paraphrased the definition of circumvention found in the regulations, risking inaccuracy. Several respondents asked us to provide advice on how we would treat circumvention in particular scenarios.

Our response

3.23 Our guidance does not create new interpretations or definitions of financial sanctions regulations. It only sets out how we will consider penalising breaches of existing law using the new powers to impose monetary penalties.

3.24 'Circumvention' is not defined in the regulations or the 2017 Act. It should have its ordinary meaning, which is 'to go around or bypass, to avoid'.

3.25 We cannot give guidance in this document on the range of scenarios provided, but we will consider these when refreshing our main guidance.

What we have done

3.26 We have redrafted the guidance to use 'circumvention' as it appears in the UK statutory instruments that enable financial sanctions in the UK.

Mistakes

3.27 One respondent asked us to clarify whether "a mistake, unless accompanied by reasonable cause to suspect that activity could result in a breach, is not capable of amounting to a breach".

Our response

3.28 We understand this question as intending to ask whether a mistake, where there is no reasonable cause to suspect that the activity could result in a breach, could result in a monetary penalty being imposed.

3.29 It is possible for a mistake to cause a breach of financial sanctions legislation – for example making funds available to a designated person. But without either the knowledge that the action would be a breach (in which case it is difficult to see how the action could be a mistake), or any reasonable cause to suspect this, the matter would not meet the legal standard for us to impose a penalty.

What we have done

3.30 We have added a paragraph 3.25 to explain this.

Professional facilitation

3.31 A respondent asked us to clarify whether continued engagement with a client necessarily equates to a sanctions breach, and to distinguish between services that actively assist a breach, and services during the provision of which a professional happens to discover a potential breach.

Our response

3.32 Broadly, OFSI wants to ensure we understand where professional facilitation amounts to deliberate assistance to breach financial sanctions (that is, the professional facilitator knows their actions are enabling a breach of the law) or whether the facilitator has reasonable cause to suspect their actions breach the law. We are not trying to penalise professionals going about their normal business.

3.33 We recognise that professionals may have an obligation of confidentiality towards their client, and in particular that some client relationships are covered by legal professional privilege. However, all professionals have an obligation not to break the law, and some may have professional duties which require them to cease acting if there is a conflict between obeying their client's instructions and obeying the law. It is not a matter for OFSI how persons with such professional obligations fulfil them.

3.34 Simply discovering a potential breach does not make someone party to that breach. However, a person may become party to it by their subsequent actions if they breach sanctions themselves, help another person to breach sanctions, or take action to circumvent sanctions. Anyone who discovers a potential breach of financial sanctions should report it to OFSI.

What we have done

3.35 We have revised paragraph 3.27 to make these points clear.

UK nexus

3.36 There were several questions about the concept of 'UK nexus'. Generally, respondents wanted us to clarify this to make it clearer when a transaction might come within UK jurisdiction, and that OFSI would not seek to bring within the jurisdiction of UK courts matters that were not properly already within it. There was also some concern that this definition meant that OFSI has extraterritorial reach in financial sanctions matters. Finally, respondents wanted some clarity on what OFSI's position might be if a suspected breach of financial sanctions came within the jurisdiction of more than one competent authority (for example, the UK and the US).

Our response

3.37 The scope of UK financial sanctions has not changed as a result of the legislation that brings in the monetary penalty powers or this guidance. No other changes in law or procedure have expanded their scope. The concept of UK nexus, as set out in this guidance, only describes how UK authority is engaged now.

3.38 We use UK nexus to describe a connection to the UK. The position is very clear when persons in the UK are carrying out activities in the UK. However, they might also be carrying out activities in the UK or other EU member states, or elsewhere. Some examples are set out in the guidance – these are not exhaustive. 'UK nexus' is a concept rather than a test or a legally defined term. It enables OFSI to identify cases that have a UK element where it is proper for UK enforcement action to be taken.

3.39 One of the most common questions was whether the actions of an international subsidiary company might cause a parent company in the UK to become subject to UK financial sanctions by their actions. This will depend on the facts of the case and particularly the structure of the governance or ownership. As with other cases, OFSI will seek to work out what happened, which parties were involved and aware of the breach, and what connection there is or has been with the UK.

3.40 OFSI will take a common sense approach to deciding whether any particular action does have a link to the UK and whether an individual or company is party to a breach of financial sanctions where it might be appropriate to impose a penalty in the UK. If we impose a penalty, we will make it clear to the person concerned why we think our powers are engaged. The person will have the opportunity to make representations to the contrary should they so wish – to OFSI, to the minister, and ultimately to a court.

3.41 When it seems more appropriate that another competent authority should consider whether to take action, OFSI will refer the matter to them. Financial sanctions regimes contain provisions that require and enable us to pass on information that would assist compliance in other jurisdictions.

3.42 In cases where enforcement action has already been taken in another jurisdiction, OFSI will consider whether it is appropriate to take further action in the UK. When doing so, we will always take the other enforcement action into account.

3.43 One question asked what 'an international transaction clearing or transiting through the UK' meant and how it created a UK nexus. Clearing of payments is necessary to settle transactions. When parties use central clearing services in the UK, even if the parties themselves never set foot in the UK, doing so is sufficient to create a UK nexus that engages UK financial sanctions authority.

What we have done

3.44 We have redrafted paragraph 3.7 to make clear this refers to transactions clearing in the UK. The other points are already reflected in the guidance. We have also amended the overseas subsidiary point.

Disclosure – relevance of Saunders v UK precedent in financial sanctions enforcement

3.45 One respondent asked whether our use of information-gathering powers in assessing a case (under which we may request the production of information about financial sanctions breaches, and failure to do so may be a criminal offence), conflicted with the principle established in the 1997 case of Saunders v UK, that "any information obtained using compulsory powers cannot be relied on in criminal proceedings as evidence against the person

who provided the information". They suggested that to avoid prejudicing the possibility of criminal enforcement action, OFSI would need to investigate potential breaches through means other than using these powers.

Our response

3.46 In Saunders, the court held that the use in criminal proceedings of information provided by a person as responses to questioning – where failure to reply was punishable by a fine or imprisonment – impaired that person's right to a fair trial.

3.47 However, the court also said this impairment was not present in relation to the use of "material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant…"

3.48 OFSI accordingly considers that the principle established in Saunders does not mean that information given to OFSI as the result of compulsory powers cannot be used to determine whether the person providing it might be liable to a monetary penalty. For example, copies of documents such as bank statements do not exist simply because of OFSI's request to see them. OFSI will carefully consider the information it is given under the power to request information, and will proceed in a way that accords with the law and respects any person's rights to a fair decision.

3.49 We will also work closely with law enforcement agencies to ensure that any action we take does not impair a potential criminal prosecution.

What we have done

3.50 We have not changed the guidance as a result of this point.

Disclosure – co-operation and self-incrimination

3.51 One respondent thought the expectation that all persons involved in a breach would co-operate in our assessment, even if that meant they may be subject to enforcement action, amounted to a requirement to self-incriminate.

Our response

3.52 The answer to the question in the Saunders case above also applies here. It is not unusual or inappropriate for investigatory authorities to have powers to obtain evidence, or for attempts to frustrate their investigations to be penalised. If a person feels they have suffered injustice, they can request that the situation be rectified by the minister on review or by an independent court.

3.53 However, the sentence to which this respondent referred actually added nothing to the guidance, so to avoid doubt we have deleted it.

What we have done

3.54 We have deleted the sentence.

Disclosure – race to disclose and supplementary facts

3.55 Several respondents were concerned that the incentive to voluntary disclosure, and the restrictions on not gaining the benefit of another party's disclosure, meant there would be a 'race to disclose' where several parties were involved in a beach.

Our response

3.56 OFSI aims to ensure that the reduction in penalty only applies when there is genuinely voluntary disclosure and does not apply to individuals who only disclose when they have been 'found out' or otherwise did not intend to make a disclosure. That will not necessarily be affected by the fact that another party has already disclosed. We would not seek to penalise somebody for making a genuine and voluntary disclosure within a reasonable amount of time just because another party had done so sooner. We will, however, keep this under review to consider whether a different approach would be better.

What we have done

3.57 We have redrafted paragraph 3.31 to set out when we will not regard a disclosure as voluntary and to make clear that voluntary disclosures may, within reason, be supplemented by further information.

Disclosure – timeliness vs material completeness

3.58 One respondent was concerned there was a conflict between these two concepts. Another wanted clarity that it would be acceptable to request extra time to seek legal advice if required.

Our response

3.59 OFSI will take a common sense approach to these issues – we do not see them as being in conflict. We know it takes time to establish facts, and sometimes not all the facts will be available immediately. We are looking for a good-faith disclosure and willingness to work with us, and will support approaches to these issues made in that spirit.

What we have done

3.60 We have updated paragraphs 3.35 and 3.36 accordingly.

Public interest

3.61 Several respondents expressed views on OFSI's use of a public-interest test in our case-assessment process. One respondent asked for the justification of treating more severely cases which were novel, contentious, or which raised important points of principle. Another asked if OFSI used the same public-interest test as appears in the Code for Crown Prosecutors (found here: https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html). A further respondent drew a distinction between the concept of public interest and matters that interest the public, and offered their own model for a public-interest test.

Our response

3.62 OFSI is not a prosecuting authority so we do not follow the Code for Crown Prosecutors. However, the public-interest test in that Code is a useful indicator of the kinds of things we might take into account. There are several public-interest tests in various public activities, for example that for Freedom of Information Act requests, found here: https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

3.63 The FoI guidance gives some good examples of the public interest, but also makes the important point that "the public interest can take many forms". This is why OFSI has not chosen to comprehensively define the public interest in our guidance, but only to provide some examples. We will always seek to act in the public interest in deciding what to do in a case, but what form this takes will depend on the facts.

3.64 One respondent wanted to know what a 'novel or contentious' case would be. We used the term to capture our proposed response to unusual cases. Two examples of unusual cases are where it appears the parties are trying to find new ways of contravening or circumventing sanctions, or where a party is testing weaknesses in systems. Such cases could be of relatively low value, but their wider implications might make a high penalty a proportionate response.

3.65 We have redrafted paragraph 3.37 to 3.39 to say more about OFSI's view of public interest, without seeking to define or circumscribe it. We have also removed the phrase novel and contentious, as it didn't add anything to this explanation.

Case factors – strategic priority

3.66 One respondent was concerned that OFSI would take into account the strategic priority that the government places on a particular regime when considering the public interest. They thought identical circumstances in breaches of two different sanctions regimes should bring the same response. They were concerned that a different approach between regimes weakened the culture of compliance, and were concerned that political considerations might determine a person's punishment.

Our response

3.67 OFSI follows the government's strategy for sanctions, which sets what the government is trying to achieve. Different regimes have different priorities – to prevent nuclear proliferation, to change behaviour, to prevent misappropriation of funds, and so on, as set out in our main guidance. What the government is trying to achieve with a sanctions regime is relevant in all cases. It is therefore right that OFSI follows the government's overall strategic approach, as it is set from time to time. So while it is in the public interest to ensure we follow the strategy, in the context of the rest of this section the original lines gave the wrong impression that this was a variable factor in each case.

What we have done

3.68 We have redrafted this section to state the position correctly. We have also moved it from the public interest section to paragraphs 3.40 to 342.

Information offences – information held under legal privilege

3.69 A respondent asked us to confirm that no offence can be committed by failing to disclose information protected by legal professional privilege, and asserted that OFSI cannot consider disclosure as incomplete if there is a valid claim to legal professional privilege.

Our response

3.70 We recognise that some documents are protected by legal professional privilege. An offence is only committed if a person fails to produce a document "without reasonable excuse". We consider that legal professional privilege could be such a reasonable excuse not to disclose a document. We know that parties may be willing to waive privilege in some circumstances, and where privilege has been waived we would expect documents to be disclosed.

What we have done

We have included the above points in the guidance on voluntary disclosure.

Case factors – use of terms 'due diligence' and 'know your customer'

3.71 Some respondents suggested that the use of these terms meant that the section on 'severity' either tried to apply standards in the regulated financial sector to everyone, or that this section only applied in that sector.

Our response

3.72 This interpretation was not intended, and on reflection the paragraph in which these terms appeared was confusing. We have redrafted the guidance to remove the concept of severity as a combination of value and risk of harm, and instead use it only to refer how we will assess the overall impact of the breach of financial sanctions. Instead we have listed them as separate factors we will take into account. We will consider them in every case. We do not seek to apply standards to everyone that only apply in the regulated financial sector.

What we have done

3.73 We have redrafted the guidance as described.

Case factors – developed compliance procedures

3.74 One respondent asked us to define what we meant by "developed compliance procedures" when discussing how we might take them into account. They were concerned that smaller firms might be more vulnerable to penalties if OFSI viewed expensive or complex compliance systems as required to reduce the liability to a monetary penalty.

Our response

3.75 Compliance procedures are a matter for the person or body concerned. It is not OFSI's role to set requirements for compliance systems, and this paragraph was not intended to impose a particular standard. People conducting their business in the UK should consider their risk of breaching financial sanctions and form their own view of what is reasonable for them to manage that risk.

3.76 What is reasonable in compliance procedures may differ in different circumstances. In an example suggested by one of the responses, a global bank may have a sophisticated electronic compliance system that monitors millions of transactions a day, while a boutique bank with a few hundred customers might do it all on paper by checking every transaction manually. Both methods might be sufficiently developed for their circumstances. We will consider the facts if there is a breach of financial sanctions. In reviewing this section we have decided that the emphasis on compliance knowledge in "sectors" was too broad. We have recognised this and made some changes.

What we have done

3.77 We have redrafted the heading of this section, above paragraph 320, to make it clearer, to remove the reference to sectors, and to change it in the next paragraph to 'businesses'.

3.78 We have also added a line to explain that businesses should make their own assessment of what is reasonable and necessary for their particular circumstances.

3.79 Finally, we have changed the phrasing where we had said we would be unlikely to issue a penalty if a person merely fell from a high standard. This was too definitive and risked prejudging a case. The paragraph at 3.22 now says we will consider whether it is proportionate to do so.

Case factors – 'incorrect legal interpretation'

3.80 One respondent noted that we refer to 'incorrect legal interpretation' in the section on behaviour and queried whether this automatically constituted a breach or attracted a penalty.

Our response

3.81 OFSI will try to understand the behaviour of people involved in a potential breach. An incorrect interpretation of the legal position may be a causal factor in a breach, either if someone personally interprets the law incorrectly, or they rely on incorrect or inapplicable advice given by a legal professional. Whether knowledge or reasonable cause to suspect is present, and therefore whether monetary penalties are accessible, will depend on the facts.

What we have done

3.82 We have not changed the guidance following this point.

Case factors – more detail and alternative suggestions

3.83 Respondents requested more detail on the factors we use in case assessment. Several offered their own suggestions for the factors we should take into account.

Our response

3.84 We do not plan to publish detailed guidance on how we assess a case as the core reasoning will be set out in the guidance. The case-assessment factors we have set out cover, we believe, most potential cases. However, we can take any relevant factors into account when considering the facts, and will do so. The guidance already covers this point.

What we have done

3.85 We have not changed the guidance following this point.

Outcomes – timeliness and certainty

3.86 One respondent asked for a detailed timeline covering each step of the process from initial reporting until the issue of the penalty notice. They were concerned it was inequitable for a listed company not to have clarity on when it can expect to learn OFSI's findings.

Our response

3.87 We cannot provide a standard timeline that will apply to all cases. We have internal review processes to ensure we deal with cases in a timely manner. How long a case takes to assess depends on many things, including the complexity of the facts, the volume of information, any requirement for additional research or advice, and similar matters.

3.88 Some parts of the process have timescales indicated in the guidance and we will always try to meet them.

What we have done

3.89 We have not changed the guidance following this point.

Powers – 'safe harbours' and engagement with OFSI

3.90 One respondent asked for clear guidance on what may constitute 'safe harbours' – examples of acceptable practices or engagement with OFSI to resolve complex matters so that all sides can have the assurance they need. They noted that the Office of Foreign Asset Control (OFAC, OFSI's equivalent in the US Treasury) use this model.

Our response

3.91 OFSI cannot clear transactions before they are processed or offer assurance that practices are acceptable. The people engaging in these transactions are responsible for identifying their

obligations under financial sanctions legislation and complying with them. It is not appropriate for OFSI to act as a strategic or legal advisor: our role is to monitor compliance and take enforcement action. This proposal would reduce OFSI's ability to assess breaches of financial sanctions equitably, and could set unwelcome precedents. OFAC works under a different legal system, and the two systems, though related, are not directly comparable.

What we have done

3.92 We have not changed the guidance following this point.

Scope – interaction between OFSI and FCA; and OFSI and other agencies

3.93 One respondent asked to understand the interaction between OFSI and FCA particularly, and other agencies generally.

Our response

3.94 The FCA has a responsibility for overseeing the extent to which financial services firms comply with their obligation to have systems and controls to prevent financial crime, including how those systems and controls help them meet their obligations under the UK financial sanctions regime. The FCA does not however have responsibility for enforcing against specific sanctions breaches which is the role of OFSI. Whilst the roles of the FCA and OFSI are therefore separate and distinct we will look to work together on cases, where appropriate, to ensure overall compliance with the sanctions regime.

3.95 OFSI works closely with other parts of government and law enforcement agencies that deal with sanctions, and will also work closely with others to ensure that breaches of financial sanctions legislation are addressed. We will normally engage early with law enforcement partners to decide on the most appropriate way of dealing with a case.

3.96 OFSI has a discretionary power to disclose information. The power means we can disclose information, for the purposes of facilitating compliance with sanctions, to other competent authorities, regulatory bodies, and prosecution agencies. These include such bodies within the UK, in the Crown Dependencies and British Overseas Territories, and in the EU. This enables us to co-operate with these bodies to ensure sanctions are not breached. If there are parallel enforcement actions for other matters, we will ensure we work with the agency concerned to take the most appropriate action overall.

What we have done

3.97 We have not changed the guidance following this point.

4 The penalty process

4.1 In this part the guidance document explained the circumstances where a monetary penalty might be issued. It stated the maximum penalty that can be issued, how we intended to work out the penalty level, and explained that the penalty will be discounted if a party has voluntarily disclosed information.

We asked the following questions:

Consultation Question 6. Does this guidance give you enough information to help you understand how a penalty is calculated? (yes/no)

4.2 29% chose yes, 41% chose no and 29% did not answer.

Consultation Question 7. OFSI will reduce the level of penalty if there is voluntary disclosure. What are your views on OFSI's approach to this? (open)

4.3 The following issues were relevant to the guidance discussed in this section.

Penalty process – reductions in the penalty process

4.4 A number of issues were raised about the proposed penalty process. Several respondents thought the proposed process was clear. One respondent thought the guidance did not clarify whether the proposed reduction for voluntary disclosure was automatic, and at what point the reduction occurred.

4.5 A respondent asked how persons could access the proposed penalty reduction of up to 15% if there was no voluntary disclosure and the case was not of the 'most serious' type.

Our response

4.6 The reductions for voluntary disclosure are available once a person confirms that their disclosure is materially complete. This will be 50% in 'serious' cases and up to 30% in 'most serious' cases. The order of the penalty assessment process is as follows:

- determine the value of the breach
- determine the maximum penalty: the possible penalty is based on the value of the breach (£1milllion or 50%, whichever is higher)
- apply the seriousness determination: either 'serious' or 'most serious', depending on the facts
- determine the baseline: this is also based on the facts of the case and what level of penalty under the relevant maximum would be reasonable and proportionate
- determine if a reduction applies: either yes, or no. If yes, apply the relevant percentage reduction to the baseline

4.7 The reduction of up to 15% in cases where there is no voluntary disclosure, but the case is not of the 'most serious' type, was included in the guidance to distinguish between the two kinds of case when there was no voluntary disclosure. However, considering respondents' views, and reconsidering the intention of this section, we have decided to remove this. On reflection it gives the wrong message to set a standard reduction when there has been no voluntary disclosure.

What we have done

4.8 We have removed the 'up to 15%' reduction, and included the bullet list above to clarify the penalty process.

Penalty process – general process questions

4.9 A respondent asked whether we could make it clear that we would only impose a penalty for voluntary disclosures that turn out to be false if they are materially false. Respondents asked us to clarify whether a case being of the 'most serious' type meant that any mitigating factors were excluded. Another asked how the GBP value of the breach was calculated. Several asked us to clarify whether penalties for information offences would apply to the same breach, and how we would calculate such penalties.

4.10 Respondents asked for more clarity about how connected breaches would be treated, and how we would assess their monetary value, either singly or as one breach. Another respondent asked us to explain how we would take reasonableness and proportionality into account.

Our response

4.11 We will take any mitigating factors (and for that matter, aggravating factors) into account in every case. If we decide that a case is of the most serious type, both mitigating and aggravating factors will have been part of this decision.

4.12 We generally know (or can work out) the value of a breach from the facts of the case – these are financial transactions, and there is often a clear record of the transaction value. Where this does not exist, the 2017 Act enables OFSI to make a reasonable estimate of the value. If we do this, we will make it clear to the person(s) we impose a penalty on that we have done so and how we have estimated its value. We will then give them an opportunity through the representations process to challenge this estimate or provide an alternative one.

4.13 When multiple breaches have been reported to us, part of the case assessment is to consider whether they are sufficiently connected to be processed as one case, or whether they are a series of separate cases that we should assess separately. How we view this will depend on the facts. We will generally consider such factors as how regular the transactions are; whether they seem to be consistent; the methodology; and the parties involved.

4.14 What is reasonable and proportionate will be decided by OFSI's internal casework process.

What we have done

4.15 We have updated the guidance to make clear that we mean materially false. We have also updated it to make clear that in every case we take into account all mitigating and aggravating factors in the information available to us.

Penalty process – penalties for both legal and natural persons

4.16 One respondent asked us to clarify whether both legal and natural persons (for example, a body and someone employed by the body) could be separately liable for a penalty in a single case, or whether both parties would be liable for a single penalty.

Our response

4.17 The Act allows us to apply penalties to bodies and individuals. It specifically allows officers of a body to be penalised separately from the organisation. OFSI will examine the facts to decide what penalties are appropriate for each party, given their respective actions and contributions. It

is possible for one person involved to receive a monetary penalty and for another to be prosecuted, if the facts warrant it.

What we have done

4.18 We have updated the guidance to reflect the above.

Penalty process – request for examples

4.19 Several respondents asked for real-life examples of how penalties might be applied.

Our response

4.20 OFSI has not given examples in this document of how the process may work. The case process depends on the facts in a particular case; notional examples are unlikely to cover any but the most general relevant circumstances. However, as penalties begin to be applied, OFSI will consider whether they provide good examples of these principles and may update our guidance with examples.

What we have done

4.21 We have not changed the guidance following this point.

Penalty process – circumstances specific to a particular sector

Some respondents put forward issues that were specific to their particular sector, and asked us to clarify the guidance regarding those circumstances.

Our response

4.22 We will always consider specific circumstances when assessing the facts of a case, and may take specialist advice to ensure we understand the situation correctly. We may also ask for more information from those involved.

What we have done

4.23 We have included the above point under 'Other relevant factors'.

Penalty process – disincentive to voluntarily disclose

4.24 Several respondents wondered whether the imposition of penalties was a disincentive to voluntary disclosure. One respondent pointed out that, as there have been increases in the criminal penalties, there would eventually be sentencing guidelines for the criminal offences. They wondered whether, if the OFSI penalty is greater than a penalty imposed by a court, this would act as a disincentive to voluntary disclosure.

Our response

4.25 Voluntary disclosure is an important way to improve compliance with financial sanctions. We have tried to incentivise this by reduced penalties and making disclosure a mitigating factor in case assessment. We will keep this under review to make sure the process is working as intended, and may make changes to our process in future. We will also review the position regarding any other enforcement action, such as prosecutions, to ensure the two regimes work appropriately together.

What we have done

4.26 We have not changed the guidance following this point, but will keep this issue under review.

Penalty process – first offences and the financial means of the penalised person

4.27 One respondent thought it was unfair to penalise otherwise law-abiding persons for first offences. Another thought we should take into account the financial means of a person when calculating the level of penalty.

Our response

4.28 OFSI will consider all relevant factors in a case when making our assessment – this is already part of the guidance. Previous good character and financial means are both relevant circumstances, but they may not by themselves determine the final decision. Any person who may be liable to a monetary penalty will be given the opportunity to make these points to us during the process, and we will take them into account. Any person on whom a monetary penalty is imposed will also be able to make these points when requesting a ministerial review and, ultimately, to an independent court.

What we have done

4.29 We have not changed the guidance following this point.

5 The procedure for imposing penalties

5.1 We asked the following question:

Consultation question 8. Is the process for imposing a penalty and making representations clear from this guidance? (yes/no)

47% chose yes, 27% chose no and 27% did not answer.

The following issues were relevant to the guidance in this part.

Representations – general process

5.2 One respondent asked us to clarify that we would not unreasonably withhold an extension of the representations period, and that we would inform the person if we needed more than 28 days to consider the representations, giving an estimate of when we expected to respond. A respondent asked if representations could include telling OFSI about mitigating factors.

Our response

5.3 All these points are already covered by the guidance, but we have clarified the first two. Representations can be about anything relevant – mitigating factors would certainly be relevant.

What we have done

5.4 We have amended paragraph 5.4 accordingly.

Representations – representations in person

5.5 One respondent thought the inability to make representations in person created a costly legal burden that would disproportionately affect small businesses, and that written representations made it more difficult for an individual to demonstrate their attitude, approach and knowledge of the issues.

Our response

5.6 OFSI does not impose particular requirements for legal representation and will bear in mind the need to take sufficient care when dealing with persons who are not legally represented. OFSI does not consider it unreasonable to require representations in writing. It is not generally onerous for a person to set out in writing, clearly and briefly, their main points and the evidence we should consider. This also has the advantage of being more easily recorded for later examination by a minister in reviewing the case and the court, if that is required. Nonetheless, OFSI is happy to consider particular circumstances in which it would be more appropriate to make representations in person. In these circumstances we will take a note of points made during the meeting and ask the person to agree the content before it forms part of the case record.

What we have done

5.7 We have redrafted this section of the guidance to clarify the issues around written representations and requests to make representations in person.

Representations – vexatious or irrelevant representations

5.8 A respondent asked us to clarify what representations may be considered vexatious or irrelevant, which OFSI may disregard.

Our response

5.9 Representations are an opportunity to tell us what is relevant to the case. Representations are most easily understood when they are clear and succinct, so that we understand the points and can properly take them into account.

5.10 The representations process is important, not just for the person who may be subject to a monetary penalty, but for us. Ensuring that a person has a full opportunity to make meaningful representations also ensures that our decision is fair, robust and appropriate.

5.11 It is possible that a person on whom a penalty may be imposed may seek to frustrate or delay the penalty process through representations that make irrelevant points or unjustified accusations, or are designed to prolong and frustrate the process. We will try to ensure this does not happen, so we may disregard representations that do not add value to the process.

5.12 Considering respondents' feedback, we have decided that 'vexatious' is not the best term to use, and have removed it.

What we have done

5.13 We have removed 'vexatious'. If we disregard any representations, we will tell the person why – paragraph 5.5 now says this.

Representations – information provided to the person before representations

5.14 A respondent asked what supporting information or evidence we will make available to the person receiving the notification that we will impose a penalty. They argued that if OFSI relies on information from third parties, we should disclose that information to the person we are considering penalising. They argued that not to provide it may breach human-rights law.

Our response

5.15 When we inform someone that we are considering imposing a penalty, we will set out in a summary our reasons for thinking they have breached sanctions and that a penalty is appropriate. This will be detailed enough for the person to clearly understand what has happened and why we think they have broken the law, so they can make meaningful representations. In most circumstances, they will already have the original documents or evidence – for example, they will be able to get bank statements for any transactions we consider to be a breach, or emails they have sent or received that we say are relevant. We will not normally disclose original documents or information from third parties. This is because we will have already included that information in our reasoning and we do not think this level of disclosure is normally required to enable a person to see the case against them and make meaningful representations against it.

5.16 In all our interactions with a person on whom we may impose a penalty, we will be conscious of and respect the person's legal and human rights. If the matter goes to appeal, the material we have used to reach our decision becomes subject to the court's usual rules of disclosure.

What we have done

5.17 We have not changed the guidance following this point.

Representations – appointment of agent

5.18 A respondent queried why OFSI required written evidence that an agent or representative has been properly appointed, suggesting that courts do not require this.

Our response

5.19 It is reasonable for OFSI to ensure that someone purporting to act for a person is actually appointed by the person to do so. This protects the person's information and ensures we can assume that anything the agent does is at the person's behest, without reference back to them. It is usual practice for government departments to require appointment in writing – for example, HM Revenue & Customs requires the completion of Form 64-8 before dealing with a tax agent, and DWP requires the completion of form BF56 before discussing benefit matters with an agent. OFSI will normally only require a signed authority, but is happy to discuss alternatives if this is not possible.

What we have done

5.20 We have amended paragraph 5.8 to include that we are happy to discuss alternative evidence of authority to act.

6 Ministerial review

6.1 The guidance document describes the process of seeking a ministerial review of OFSI's decision.

We asked the following questions:

Consultation Question 9. Do you understand the guidance on seeking a ministerial review? (yes/no)

6.2 62% chose yes, 9% chose no and 29% did not answer.

Consultation question 10. What are your views on the process for seeking a ministerial review? (open)

6.3 The following issues were relevant to this question.

Ministerial review – general process questions

6.4 One respondent asked why the ministerial review stage came before the appeal stage. Another thought it was unclear why new material cannot be introduced at ministerial review stage. The same respondent asked us to clarify how wide the minister's discretion to talk to officials was in the review stage and if there were circumstances where the minister would not take legal advice when considering a review. They also asked what material the person (rather than OFSI) should submit for the ministerial review. Another respondent asked whether there were any grounds that would not be sufficient for a review to take place. One respondent thought the ministerial review process was "excellent".

Our response

6.5 The 2017 Act prescribes that ministerial review comes first, and then there is a right of appeal. OFSI has no discretion to act in any other way.

6.6 New material cannot normally be introduced at the review stage as this is a review of OFSI's original decision. The person who is subject to a penalty will have had the opportunity to introduce new material with their previous representations, and should do so then. However, if there are good reasons why this material could not have been disclosed earlier, then exceptionally it may be possible. We consider that the guidance already allows for this. If new information comes to light at any stage, the person should contact us immediately.

6.7 The legislation requires that the minister carries out the review personally. As part of that minister has full discretion to talk to officials, seek legal advice etc. However, officials will always ensure that the minister is aware of the need to make his or her own decision, and OFSI will set up arrangements to isolate the original decision-makers from this process.

6.8 The person who has been given a penalty does not need to submit any material for the ministerial review except their reasons for seeking it. This is because OFSI will already have that material and will ensure it is supplied to the minister. OFSI will submit a report outlining the case and the decision process together with the case papers that led to its decision to impose the penalty. The minister will also have access to all representations on the case.

6.9 A person subject to the penalty has a right to seek a ministerial review; there are no grounds refuse one.

What we have done

6.10 We have added a line at paragraph 6.5 to clarify that no further material is required from the person for the ministerial review, but that if something urgent arises the person should contact OFSI who will be able to put any new material before the minister if necessary.

Ministerial review – right of access and loss of right

6.11 One respondent asked whether if the person failed to make representations within 28 days, and the decision on a penalty was made without their representations, they then lose the right to seek a ministerial review.

Our response

6.12 The right to seek a ministerial review does not depend on having made representations. However, if the person does not make representations within 28 days (and has not sought an extension), they cannot normally use the ministerial review process as a way of introducing new evidence. The ministerial review process is a review of OFSI's decision based on the facts of the case available to OFSI at the time of the decision.

What we have done

6.13 We have not changed the guidance following this point.

Ministerial review – self-review by HM Treasury

6.14 One respondent asked whether the fact that OFSI is part of HM Treasury, and the review will normally be undertaken by a Treasury minister, meant there were insufficient safeguards against self-review.

Our response

6.15 The Act gives the power to impose a monetary penalty to the Treasury, and gives persons on whom penalties have been imposed the right to seek a ministerial review. The Economic Secretary to the Treasury is the minister within whose portfolio financial sanctions matters currently sit and will normally be the minister who undertakes the review. It will, however, be possible for the Economic Secretary to delegate to another minister (they cannot delegate to an official). A ministerial review is a robust and independent first review of the decision.

6.16 OFSI is conscious of the perception of 'self-reviewing' and is clear that it would be inappropriate. We are not involved in the minister's review except to provide a report and case material (including any representations) to the minister and to make ourselves available to answer questions if required. We will not ask the minister to support our decision; we will let our case stand or fall on its own merits.

What we have done

6.17 We have expanded the section on the ministerial review to capture some of the above assurance.

7 Publication of monetary penalty imposition

7.1 The guidance set out our process and rationale for publication of summary reports and case studies of cases where we impose monetary penalties. We also set out how much detail we would normally publish. We asked the following questions:

Consultation question 11. Does this guidance clearly explain why and how OFSI will publish information on penalties imposed for breaches of financial sanctions regulations? (yes/no)

7.2 47% chose yes, 24% chose no and 29% did not answer.

What are your views on the level of information OSFI will publish? (open)

7.3 The following issues were relevant to this question.

Publication – general approach and disproportionate impact

7.4 Many views were expressed on the publication of details of monetary penalties. Some respondents thought it was useful to publish details of penalties to allow lessons to be learned, and promoted the idea of firms dealing openly and honestly with enforcement bodies and regulators. Others were concerned about the potential for a disproportionate impact on the reputation and goodwill associated with a business, the potential for being disqualified for bidding for contracts, and the level of the summary information to be published.

7.5 Respondents asked us to clarify at what stage of the process publication would take place, and whether there would be an opportunity to make representations regarding publication.

Our response

7.6 Breaches of financial sanctions are a serious criminal offence and as such there is an important public interest in cases being seen to be addressed. There is also an opportunity for others to learn from these cases, to ensure that compliance can be improved across the whole financial sanctions regime. These two principles underpin our approach to publication.

7.7 Throughout the guidance, OFSI has emphasised that we want to be reasonable, proportionate and fair. We recognise the concern that publication of non-anonymised information about monetary penalty cases may, in some instances, be disproportionate to the facts of the case or disproportionately affect some individuals.

7.8 Any person that OFSI intends to penalise will be informed in advance and have the opportunity to make representations. Representations may include the effect that imposition and publication of the penalty may have. However, even if these are not made when we are considering the penalty decision, it may still be possible to make them before publication. As with any other representation, we will consider this before deciding our final course of action. This decision will include whether we will publish a non-anonymised summary.

7.9 We will only publish non-anonymised case reports if a penalty is actually imposed. We may use anonymised information in statistics and thematic reporting.

7.10 As breaches of financial sanctions are criminal offences, the bar for not publishing because of disproportionality is likely to be set high. If a penalty has been imposed, it is more likely than not that we will publish a summary.

7.11 When we do not publish a summary, information about the case may be exempt from disclosure under the Freedom of Information Act 2000 ('FoI'). However, we will treat any FoI requests on their own merits.

What we have done

7.12 We have changed paragraph 5.4 to make clear that persons may make representations on the effect of publication, and that it is within OFSI's power not to publish case summaries if it would be disproportionate to do so.

7.13 We have also clarified the publication timescales. See also the question on the form of reporting below.

Publication – form of reports

7.14 One respondent noted that the 2017 Act requires OFSI to publish reports at appropriate intervals about the imposition of penalties, and thought that the guidance envisaged a different scheme to the publication of the detail of each penalty. They thought it was not clear why OFSI had chosen to depart from the statutory scheme.

Our response

7.15 The 2017 Act says, at section 149:

> *The Treasury must, at such intervals as it considers appropriate, publish reports about the imposition of monetary penalties under section 146 or 148*

7.16 It does not set down any detailed rules on what may be published, or when it is published; this is left to OFSI's discretion. OFSI has decided that we will normally fulfil this by publishing a summary (a report) of each monetary penalty case after it concludes (the interval we consider appropriate). If we do not publish a summary report because of concerns about disproportionate impact, we will still fulfil this requirement by ensuring the case is included (in anonymised case study form or as statistical information) in overall reports on the imposition of monetary penalties that we will publish from time to time. We regard this as a reasonable and proportionate way of publishing reports. We will of course keep this under review and change it if it we think there are better ways to publish reports.

What we have done

7.17 We have not changed the guidance following this point.

Publication – third-party rights

7.18 A respondent suggested that third parties could be identified and prejudiced by the publication of the details of monetary penalties, and felt that consideration should be given to a process for third parties to make representations on what is said about them. They thought this would be equivalent to the 'third party rights' process in FCA enforcement.

Our response

7.19 As stated above, OFSI intends the published reports to be case summaries. They will not include every detail and if references to a third party might be unfair or cause a disproportionate impact, OFSI can remove them. Our intention to be fair to parties involved in breaches of financial sanctions extends to third parties, so we are happy to consider (and potentially invite) their representations if this would make the process fairer to them.

What we have done

7.20 We have not changed the guidance on this issue, but will ensure we act on it. We may amend the guidance in future if it appears we should set this out in more detail.

8 Guidance document

Consultation question 12. Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties? (yes/no)

8.1 18% chose yes, 15% chose no and 70% did not answer.

Appeals – impact on small businesses

8.2 A respondent thought it unlikely that small businesses could afford to take a case to appeal, which might leave them more likely to "settle without an admission of guilt" and be left with an "unanswered breach on their record". They were concerned this might significantly affect their reputation and ability to contract with many organisations.

Our response

8.3 There are several important points here: the ability to access justice; the potentially disproportionate impact of a monetary penalty on individuals and small business compared to large corporates; and what a monetary penalty implies about 'guilt' for an offence.

8.4 The appeal to the upper tribunal creates an appeal route in which appeals can be made "on any ground". This enables a person who has been penalised to argue we got the decision wrong (for whatever reason) rather than just that there was a legal error (as would be the case if the decision was challenged by applying for judicial review). This creates a strong safeguard against OFSI taking the wrong decision and provides greater protection than otherwise.

8.5 It is for the person considering an appeal to the tribunal to decide whether or not to exercise their right to do so, for whatever reasons. OFSI can have no role in this and cannot offer advice on it. The person may appeal without legal representations, and the tribunal has procedures in place to ensure unrepresented parties are not disadvantaged.

8.6 OFSI recognises there can be different reputational impacts on different individuals and organisations should a penalty be imposed. Any person can tell us about the effect that imposing or publicising a penalty would have on them at the representations stage, and we will consider this. However, breaches of financial sanctions remain criminal offences, even when the case is dealt with by imposing a penalty, not prosecution. While it is important we clearly understand and take into account the effect of a penalty, we must also take into account the public interest in breaches of the law being properly addressed.

8.7 OFSI does not seek admissions of "guilt" as part of our case assessment process, nor do we "settle" cases with negotiated outcomes. We try to understand what has happened and establish, on the balance or probabilities, whether the person has breached financial sanctions regulations in circumstances that meet the standard for a monetary penalty instead of other enforcement options. We will clearly set out the facts that led us to this decision when we impose the penalty. If the person uses their right to a ministerial review and later an appeal, this decision will be robustly tested. We also recognise the difficulties that may be faced by small businesses who have fewer resources to deal with this process, and we will act fairly towards them.

8.8 Persons can prevent the impact of a penalty by ensuring they do not breach financial sanctions.

What we have done

8.9 We have not changed the guidance following these points.

A Consultation response data

Responses to closed questions.

Some parties responded to these questions in detail but did not answer the closed questions. Their responses are captured in the main body of the document.

Question	Yes	No	Total
1	44.1%	32.4%	23.5%
3	52.9%	20.6%	26.5%
4	50%	20.6%	29.4%
6	29.4%	41.2%	29.4%
8	47.1%	26.5%	26.5%
9	61.8%	8.8%	29.4%
11	47.1%	23.5%	29.4%
12	17.6%	14.7%	67.6%

Source: OFSI

B List of respondents

B.1 The government received 34 responses to the consultation on 'The process for imposing monetary penalties for breaches of financial sanctions'. Respondents are listed below.

- ABTA Ltd
- Association of British Insurers
- Association of International Couriers and Express Services
- Baker McKenzie
- Barclays
- BBA
- BDO LLP
- Ben Kingsley
- Bovill Ltd
- Chartered Institute of Legal Executives
- Circle UK Trading Limited (Circle Internet Finance)
- Derchert LLP
- Earthport plc
- Fieldfisher LLP
- Holman Fenwick Willan LLP
- HSBC
- Ince & Co LLP
- Institute of Chartered Accountants in England and Wales
- Kirkland Business Solutions
- Latham and Watkins LLP
- Lloyd's, the Lloyd's Market Association and the International Underwriting Association of London
- MS Amlin Underwriting Ltd
- National Association of Estate Agents (NAEA)
- Overseas Development Institute
- Pinsent Masons LLP
- Prudential plc
- Richard Simms
- Robinson Reade Ltd

- RSA Insurance Group plc
- Sanctions Practitioners Group
- The Law Society
- Virgin Holdings (UK) plc
- William McDougall
- Worldpay

C Roundtable events and meetings

Roundtable events and meetings

8.10 Treasury officials held meetings with representatives from the following sectors.

- Travel
- Banking
- Charity
- Housing
- Accountancy
- Import/export
- Insolvency
- Oil and gas
- Legal

HM Treasury contacts

This document can be downloaded from www.gov.uk

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