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Private and Confidential

Office of Financial Sanctions Implementation
HM Treasury
Horse Guards Road
London
SW1A 2HQ

26 January 2017

Direct line:
Email:

By email

Dear Sirs

Response to Proposals for Implementing Monetary Penalties for Breaches of Financial Sanctions

We welcome the opportunity to comment on the proposals for implementing monetary penalties for breaches of financial sanctions. Our comments on the questions raised in the consultation are set out below. The numbering in our response refers to the numbers of the consultation questions. Where we have referred to any specific proposal we have identified the paragraph in which it is found.

As a preliminary point, we are not aware that any formal consultation was made in respect of the relevant statutory provisions which give legislative effect to the penalty regime. We apologise if we missed it, but it was not something that we were alerted to. Accordingly, some of the comments we are making on the guidance may in fact be driven by the primary legislation.

Question 1

We would say that the introductory sections provide a brief review of the sanctions regime. It does not address the scope of the law on monetary penalties other than to set out the draft legislative provisions. However, as the scope of the penalty regime is addressed later on, this is not significant.

Question 2 and 3

The proposed approach to be taken by OFSI does not seem unreasonable, but we do not believe that the compliance approach is complete. The proposal is that significant penalties can be levied on private sector businesses who fail to comply with their obligations under the financial sanctions regime. Accordingly, we would expect clear guidance providing examples of "safe harbours" and of what is and is not acceptable. The OFAC model provides a template of this. Whilst the penalties for breaches imposed by OFAC are severe, it publishes detailed guidance as well as very useful FAQs and some general licences which reduce the administrative burden on all sides. OFAC are also willing, in some cases, to engage with businesses to resolve complex matters in a way that provides all sides with the assurance they need. We understand that OFSI

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does not propose to follow this model and that it will not be possible to pre-clear transactions in areas of doubt. We believe this is a lacuna.

Dealing with sanctions compliance is extremely complex. Each set of sanctions and each type of sanction varies. Those who may or may not be in scope can also be difficult to determine in some cases. In any case where we have identified a possibility that a licence may be required, the costs of compliance have, as a matter of routine, been high. We are concerned with the wording of Section 131 Policing and Crime Act 2017 and the discussion in paragraph 2.7. The guidance states that if OFSI makes a judgement that it is more likely than not that there has been a breach of sanctions, it will then go on to consider whether the person making the breach knew or had reasonable grounds to suspect that there would be a breach. Our reading of this is that there could be a considerable amount of doubt as to whether the basic law was broken. It is our view that if the breach of the financial sanctions regime is so opaque that whether or not there has been a breach can only determined on a "more likely than not basis" there is a fundamental problem with the regime. In these circumstances consider that being held to have been in breach of sanctions, even if no penalty is levies is unacceptable.

We accept that there will be further assessment and case management to decide whether or not a penalty is levied, but this is irrelevant to us, as the mere finding that OFSI judged that there had been a breach of the prohibitions would have a serious, adverse commercial and reputational impact for us. Many tenders require us to disclose if we have breached sanctions. Disclosure, even where there is no culpability, is almost certain to disqualify our bid. We are therefore strongly of the view that it is essential that whether or not a breach has occurred should be thoroughly and properly determined.

Accordingly, unless the process and the Guidance can provide a means of screening out "innocent" circumstances before the determination that a breach has occurred - ie where all due steps have been taken and there is a genuine difference in interpretation, the costs of compliance will be significantly increased, and/or bona fide transactions may not occur. This would be a detriment to the UK economy. The likelihood of this is increased if there is no advance clearance mechanism and the publication of each set of sanctions is not accompanied by detailed FAQs or other guidance indicating where the safe harbours are. This is not to undermine the well understood convention that sanctions are expected to be interpreted broadly. Businesses err on the side of caution. It is worth noting that many of the cases where sanctions may be relevant to our work arise in relation to insolvency or litigation support.

Question 4

The explanation of how cases are assessed is clear. However, it would be helpful in the discussion on severity to include guidance on how "serious" and "most serious" will be determined/distinguished.

Question 5

Our only comment on the proposed approach is that monetary value should not be the only factor in determining severity of a breach albeit that it is an easy one to measure. There can be serious deliberate breaches where the monetary value is relatively low if the fact pattern is particularly egregious. By contrast a high monetary amount may arise in circumstances where there are other mitigating factors. It should also be clear how the monetary amount is to be measured. For example, if there is a derivative with a very high notional principle amount, but the actual cashflows are significantly lower, what is the monetary amount which will be taken?

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Question 6

The text is relatively clear and reasonably comprehensive. The box still is not particularly informative. However, it would be helpful to have some indication of the impact of aggravating or mitigating factors on the baseline penalty calculation so that there is transparency and also the ability to demonstrate even-handedness in decisions in particular cases.

The comments in relation to discretion not to impose a penalty are somewhat gnomic, so we would be grateful for some worked examples of how a case could get to the stage of penalties when the resulting penalty is too small to be in the public interest to levy.

Additionally, the comments (para 2.11.18) regarding coercion or blackmail read oddly and we would query whether this should be dealt with at an earlier stage eg considering whether in fact there has been a breach of sanctions.

Question 7

We welcome the reduction in penalty for voluntary disclosure.

Question 8

The process for imposing a penalty is clear. However, further information may be required regarding what kind of written evidence may be demanded to demonstrate someone is representative or agent of the person subject to the penalty deliberations.

Question 9

We understand the guidance in relation to Ministerial review.

Question 10

We have concerns about the Ministerial review process. We have concerns about any process which involves someone in executive office undertaking a review of a decision imposing penalties as this role is of a quasi-judicial nature. In particular, we would wish to ensure there are effective safeguards against the threat of self-review by HM Treasury. The lack of involvement of OFSI officials is not a particularly strong safeguard. We understand this process is set out in the primary legislation which is not subject to consultation.

We would find it useful to have further information about circumstances in which the minister would not seek legal advice in reaching a decision. We also note that although officials may be consulted, there is no facility for the business/person to respond or be consulted. (See paragraph 2.12.22)

As noted above, the determination that a breach of sanctions has occurred with or without the imposition of penalties is damaging for any business. Hence the absence of judicial oversight until late in the process and the significant amount of discretion given to HM Treasury in the process is of serious concern.

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If you have any questions about this letter please do not hesitate to contact

Yours faithfully