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

Consultation response form

Name: [REDACTED]
Organisation: [REDACTED]
☒ Please tick if you are responding on behalf an organisation
Name of organisation (if applicable) [REDACTED]
Address: [REDACTED] Email: [REDACTED] Telephone: [REDACTED]
1. Do these introductory sections give you enough information to understand the scope of the law on monetary penalties? ☒ Yes ☐ No What else would be useful? - Paragraphs 2.2.2, 2.2.3 and 2.4.1 provide guidance on the application of financial sanctions. A significant problem for businesses and their professional advisers is that the EU Regulations can be written in vague and unclear terms. Significantly more detailed guidance about the operation of sanctions, particularly those related to "economic resources" and the restrictions under the Russian sanctions regime, is necessary if the sanctions are to be understood and any penalty regime is to be applied fairly. - Many of the EU Regulations impose financial restrictions and export related restrictions and prohibitions. OFSI should define clearly the sanctions that it is responsible for and which trade based sanctions are within the remit of HMRC for enforcement purposes. For example, financial assistance under the Russian sanctions - would that fall under OFSI's civil penalty regime or is that a matter entirely for HMRC? - Paragraph 2.6.1 – it is noted that regulated professionals and bodies may be referred to their regulators. The penalty regime should provide guidance on the approach that will be taken by OFSI to avoid a situation where a regulated professional or body is penalised twice – once by OFSI and also by its regulator or a disciplinary tribunal.
2. What are your views on OFSI's compliance and enforcement approach? It seems reasonable but it is vague when compared, for example, to the detailed information given by the FCA on its enforcement approach.
3. Is there anything else you would expect a compliance model to tackle? ☐ Yes ☒ No

(if yes please explain what below)

Click here to enter text.

4. Do you understand our proposed case assessment approach?
☒ Yes ☐ No

(if no please explain why below)

5. What are your views on our proposed case assessment approach?
- In broad terms the approach is fair and reasonably clear. However, greater specificity would be helpful. In particular, the guidance should explain the UK and EU Regulations it applies to and it should be updated when new Regulations are introduced.

- Paragraph 2.6 - we disagree with the statement that more detail on how OFSI assesses potential breaches of financial sanctions regulations will help persons who intend to evade or circumvent the law by allowing them to structure a breach so that it would not be discovered or would be treated less seriously. It is difficult to understand the way in which more detail on the approach to enforcement would encourage evasion or circumvention. It should serve to deter misconduct. We note that at paragraph 2.8 circumvention is noted to be a serious aggravating factor. We also note that Chapter 6 of the FCA Handbook on Penalties gives detailed guidance on the FCA's approach to comparable penalties.

- Paragraph 2.7.4 – an example of a UK nexus that gives rise to jurisdiction is "action by a local subsidiary of a UK parent company". It would be helpful for that to be explained further as it is unclear to us that such a situation would give rise to a breach within OFSI's jurisdiction given that corporations have separate legal personality and an overseas subsidiary would, on the face it, be outside the jurisdiction of UK and EU sanctions.

- Paragraph 2.8 – under Severity – the criteria for assessing severity is vague. More detailed information on this component of the assessment criteria would be welcomed. We note that the FCA's penalty regime has 5 levels of severity and it sets out the criteria for assessing which level a case will fall within. A similar approach is taken in Sentencing Guidelines for Fraud, Bribery, and Money Laundering Offences.

- Paragraph 2.8 – under Circumvention and Professional Facilitation – it would be helpful for OFSI to give examples of what can amount to circumvention/professional facilitation and to explain whether OFSI considers there to be a difference between circumvention/professional facilitation and the lawful structure of transactions intended to avoid sanctions being breached. For example, is it acceptable for a UK parent company to permit or to not prevent a non-EU based subsidiary which has no British or EU nationals working for it to trade with a designated person? If it is not acceptable, OFSI should explain why not given that the non-EU company is outside the jurisdiction of UK/EU sanctions and the UK company is not itself doing anything that has the object or effect of circumventing the sanctions.

- Para 2.8 - "*Knowledge and compliance standards in the sector ....it is also true that some sectors have more developed compliance systems and processes than others*". In the interests of transparency it would be helpful to understand OFSI's views on the sectors it considers relevant to this point given that it is a factor that will be taken into account in deciding whether or not a civil penalty is appropriate. Separately, detailed guidance from OFSI on the compliance steps that companies should take, particularly those outside the FCA regulated sector, would be helpful - we understand that to be OFSI's intention.

- Para 2.8 – under "Reporting of breaches to OFSI". Given that there is not a requirement in all cases to report a financial sanctions breach to OFSI, we would question the use of "must be reported"; "should be reported" would reflect OFSI's expectations regarding engagement.

- Para 2.8 – under "Voluntary disclosure" – the example given of "a joint disclosure provided by one party on behalf of all" as being insufficient for all parties to benefit from the disclosure is confusing. There will be situations where a company makes a disclosure on behalf of a company and the employees involved, or a joint venture will submit a disclosure on behalf of the joint venture participants. We would suggest that in those situations each person covered by the disclosure should benefit from the disclosure. An approach which requires each "person" to individually disclose is potentially cumbersome and disproportionate.

- Reference is made to "other relevant factors" being taken into account. Are the financial resources of the relevant entity/person a factor that will be taken into account? We submit that this is a relevant factor.

6. Does this guidance give you enough information to help you understand how a penalty is calculated?
☐ Yes ☒ No

The term "value of the breach" is unclear. With the provision of funds, we assume it means the value of the funds provided to a designated person. However, an alternative view may be that the value of the breach, in those circumstances, is the profit derived by the provider of the funds. The term becomes more opaque when one is considering the provision or receipt of economic resources and financial market restrictions. What is the value of the breach in those circumstances? Greater clarity and worked examples would be helpful.

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

As a matter of principle, we consider it to be the correct approach. However, we consider that greater assurance is required that a voluntary disclosure will lead to a civil penalty rather than a criminal prosecution. Alternatively, OFSI should undertake that the content of a voluntary disclosure will not be used as evidence in a subsequent criminal prosecution of the person(s) who made the disclosure. Without such assurance, the making of a voluntary disclosure may be viewed as a risky option given the disclosure could subsequently be used as evidence in a criminal prosecution. Thereis also the potential from friction between the fundamental right to not self-incriminate unless an assurance about the use of a voluntary disclosure is provided for.

With respect to the levels of reduction, we consider the maximum reduction of 50% to be insufficient to incentivise voluntary disclosures, particularly by companies that are not regulated. In other areas, including customs and competition enforcement, reductions of up to 100% are given for voluntary disclosures and co-operation. If an objective is to promote compliance and to prevent recurrence, we would suggest that greater credit should be available for the making of a voluntary disclosure.

It would also be helpful if more detail was given on the % reductions achievable in return for co-operation with OFSI, agreeing the penalty, and effective remediation.

We do not understand the rationale for providing a 50% reduction for voluntary disclosures in "serious" cases but only a 30% reduction for disclosures in the "most serious" cases. The value of the disclosure in both categories will be the same.

Moreover, the categorisation of cases as "serious" and "most serious" is unclear and without a sliding scale of transparent criteria there is a risk of inconsistent assessments being applied. This may end up being a fertile ground of appeal which could be avoided by setting out more objective criteria in the guidance.

Paragraph 2.11.8 and 2.11.11 - the maximum discount for "serious" cases where there is no voluntary disclosure is 15%. In the "most serious" cases, there is no discount proposed unless there is a voluntary disclosure. That approach may lead to the categorisation of a case as "most serious" being disputed and to more penalties being appealed. We would recommend that consideration is given to some element of discount for agreeing to an early settlement of the penalty, co-operation and remediation, including for the "most serious" cases.

Para 2.11.10 – there is a need for the person making the disclosure to affirm that the "voluntary disclosure is materially complete". For businesses this can be challenging because organisations may not be in a position

to collate all relevant facts, for example, because personnel have left the business or individuals may be advised not to co-operate with the organisation's investigation. For organisations, we suggest the wording should be "You have automatic access to the voluntary disclosure reduction once you affirm that your voluntary disclosure is materially complete <u>to the best of the organisation's knowledge having made reasonable inquiries</u>."

8. Is the process for imposing a penalty and making representations clear from this guidance?
   ☐ Yes ☒ No

Paragraph 2.12.2 – it is noted that the person to be penalised will normally be notified in writing. The guidance should set out the precise means by which a business will be notified. To reduce the risk of letters not being received by the persons in a business who have the authority to respond we would suggest that:

- for companies, the letter is sent to the company secretary at the company's registered office and to a named director at the company's headquarters. This is necessary because the registered office may be the address of a law firm or company formation business and there may be a delay in the company actually being notified of the proposed penalty;
- for partnerships and LLPs, the letter should be sent to a named partner/member.

Paragraph 2.12.11 – related to the above point:

- We consider that 28 calendar days to make representations is an insufficient period. Many businesses will need to review the facts (that may entail a forensic investigation of financial and electronic records), engage external lawyers to give legal advice, and prepare detailed representations. Those steps can be time consuming. We consider that a period for making representations of 35 <u>working</u> days would be more realistic. It would reduce the need for businesses to seek extensions for the period to make representations and it would ensure that representations are more likely to be complete.
- The Guidance should set out the date from which the period starts and ends - does the period start from the date of the letter or the day after the letter is posted? does the period end on the 28th day or the following day?
- If calendar days are proceeded with instead of working days, the proposed calendar day period should exclude bank holidays.

9. Do you understand the guidance on seeking a Ministerial review?
   ☒ Yes ☐ No

10. What are your views on the process for seeking a Ministerial review?

Paragraph 2.12.22- provides that OFSI will prepare a report for the Minister and that the Minister <u>may</u> review "arguments provided during the representations." It is unclear whether OFSI will be required to provide the Minister with the representations received. In our submission, the unedited and complete representations made should be provided to the Minister.

Paragraph 2.12.23 – it is noted that the Ministerial review period may be extended without notice. That creates uncertainty that could impact on a company's financial statements. Notice of an extension of the period should be given.

11. Does this guidance clearly explain why and how OFSI will publish information on penalties imposed for breaches of financial sanctions regulations?
    ☒ Yes ☐ No

What are your views on the level of information OFSI will publish?
12. Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties? Yes but, as noted, we would welcome more detail. As a final point, we note that penalties are to be paid within 28 days of the penalty notice (paragraph 2.16). We recommend that the Guidance should contain provision for "time to pay" so that payment by instalments is permitted in appropriate circumstances
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