HM Treasury

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) Click here to enter text.

Address: [REDACTED]
Email: [REDACTED] Telephone: [REDACTED]
Email: [REDACTED] [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?

Further clarification and detail is required on the scope and application of the law. Listed below are some general comments and suggestions for clarification:

a) The guidance would benefit from illustrations of the calculations of penalties.
b) Further clarification is required on how EU sanctions will apply.
c) A more detailed definition of "UK nexus" is required, including further clarification on the extent it will apply to subsidiaries, branches, parent companies including where based overseas (for overseas, where a non-UK national is the only party involved in the transaction and not dealing in GBP – for example an American [REDACT] based in a subsidiary office in the US dealing in USD).
d) Guidance will be required on the responsibility of a company for financial sanctions breaches, and the extent to which firms are allowed to rely on third parties' financial crime controls. For example, [REDACT]s may delegate their authority to enter into contracts of [REDACT] to an intermediary known as a coverholder. The general principle is that the coverholder acts as an agent of the [REDACT].Therefore what would be the expectations where authority has been delegated to a coverholder or a third-party [REDACT] administrator. A second example would be a subscription risk under a lineslip, where a lead [REDACT] is able to bind the following market subscribing to the lineslip for any risks attaching to it, without referral to the followers
e) The potential application of scope to a non-EU person/entity appears to be a shift from the current position.

f) Whilst acknowledging that these are maximum and not automatic penalties, clarification is required on Section 131, (3) (a) and (b). Where it states that "*the permitted maximum is the greater of (a) £1,000,000* ***and*** *(b) 50% of the estimated value of the funds or resources*"; is the use of "**and**" stating that both amounts will apply as a penalty or is the intent that the maximum penalty would be the greater of £1,000,000 **or** 50% of the estimated value of the funds or resources?

g) For [REDACT] policies, clarification is also required on what funds or economic resources would be valued for the purposes of applying a monetary penalty in cases where a transaction is incidental to a wider global [REDACT] [REDACT]. For example in the case of a transaction causing a less serious breach, which is transacted under a global marine open cargo [REDACT], where cover is accepted for all cargo handled worldwide by a shipping/container company, but where without the [REDACT]s' knowledge the shipping company handles containers with cargo belonging to a sanctioned entity. In such a case, would the funds or economic resources be estimated on the value of (i) the overall premium (multiple transactions), (ii) the premium etc. allocated to that transaction only, (iii) the anticipated profit on the overall premium or (iv) the anticipated profit on the premium allocated to that transaction only.

h) The draft guidance requires banks to block payments that it considers falls foul of its risk appetite. Many banks are more restrictive in their risk appetite than other sectors for which they provide banking services. This leads to two concerns: (i) There could be situations where an [REDACT] [REDACT] is entered into legally and in compliance with sanctions, but where one party's bank refuses to process payments linked to the contract due to having a more restrictive risk appetite – OFSI should provide clarity for the industry as to what is expected of the original parties to the contract, e.g. should the parties cancel the [REDACT] [REDACT]? And (ii) The risk that banks are forced to become de facto regulators of their customers.

2. What are your views on OFSI's compliance and enforcement approach?

a) At section, 2.4.1, the location of where to find the latest version of the law should be explicit.
b) With regard to Section 2.4.3, does this include advice being provided on all information available at the time?
c) Where at section 2.5.1 it states that "*we will enable compliance by making it easier to comply and providing customers with guidance and alerts to help them discharge their own compliance responsibilities*", OFSI' guidance needs to be issued quickly and should also be tailored for relevant sectors. Industry specific guidance should be sent to the relevant industry for consultation.
d) The existing financial sanctions FAQs should be extended to highlight case scenarios for each industry sector that OFSI have dealt with to provide further clarity (as per OFAC's FAQs).
e) In some instances, existing guidance may need to be crystallised e.g. ownership percentages regarding asset freeze targets.
f) Is there an intention by either OFSI or the FCA to carry out assurance reviews of a firm's sanctions screening tools and will a risk based approach still be applicable to sanctions screening, following implementation of the Act?
g) What will OFSI's approach be if a firm operates controls considered by the FCA to be appropriately risk-based but where a breach still occurs?
h) What will be the impact of sharing information with other regulators? Could this lead to multiple penalties in different jurisdictions. Likewise, would there be an arrangement between UK regulators, such as FCA, OFSI, SFO, to take the lead on enforcement rather than multiple enforcement actions?
i) Will there be specific requirements as to what should be included within a sanctions compliance framework/policies and procedures?
j)

3. Is there anything else you would expect a compliance model to tackle?
   ☒ Yes ☐ No

   It would be helpful if OFSI set out their expectations of what should be included in a compliance model for firms to undertake a gap analysis if appropriate.

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

   (if no please explain why below)

a) The guidance on the case assessment approach requires more detail. In its present form it is quite vague. A work flow may be helpful.
b) It considers that sector specific case handlers with knowledge of the sector are required.
c) Are sufficient resources are in place at OFSI to deal with prospective licensing issues / queries that may arise from many different sectors following implementation? Delays may lead to commercial disadvantage for firms / sectors while waiting to hear on a point of clarification.
d) At section 2.8, there is reference to "*indirect provision of resources*" and we would welcome a definition of "indirect provision".
e) At section 2.8 what is the standard for "*reasonable cause to suspect*"?
f) At section 2.8, there is statement that swift remediation of a fall in standards may result in less punitive action but that nevertheless enforcement action could still be taken if other factors outweigh this mitigating factor. What could be the other mitigating factors?
g) In what circumstances will cases be referred to the NCA for criminal investigation and then back to OFSI?
h) It is not clear as to what would constitute a "*serious*" case and a "*more serious*" one and it would be helpful to clarify these definitions.
i) How will reliance on information provided by a third-party be treated? For example if an [REDACT] has satisfied itself that there is not a sanctions issue by placing reliance on an external legal opinion, provided by a third-party such as the [REDACT] broker or client, would that be viewed as a mitigating factor? What would be the expectations on a firm in relying on third party information as part of their due diligence process?
j) With regard to the timeliness of VSDs, consideration may need to be given to the unique features of the London Subscription Market. Where there is a lead [REDACT] with following subscribing [REDACT]s participating on the same [REDACT] risk, as well as the [REDACT] broker, each party to the contract may be aware of information relating to a breach at different times and therefore may disclose such matters at different times. If a following subscribing [REDACT] discloses later than others, consideration should be given to the unique structure of that [REDACT]- for example it may be that its corporate structure requires more time to investigate and or it may not receive information at the same time as the lead [REDACT]. In fact, there are many market structures in which the lead [REDACT] is able to bind following subscribing [REDACT]s to individual policies within certain parameters. The practical implication of the draft guidance to these sorts of structures is that the lead [REDACT] could put the following [REDACT]s in breach, but then get greater credit for a VSD than the other [REDACT]s whom the lead itself has caused to be in breach.
k) Where there could be a breach of the CTSA and financial sanctions, e.g. the payment of funds to a designated terrorist, would one set of legislation take precedent?
l) Would penalties increase if the case related to an offence previously committed?

5. What are your views on our proposed case assessment approach?

Please see the comments made at 4 above.

6. Does this guidance give you enough information to help you understand how a penalty is calculated?

☐ Yes ☒ No

The basis of the calculation requires further clarification.

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

a) Further clarification is required on how a penalty is calculated. For example there appears to be disproportionate discounting regarding active cooperation with a limit of 50% and also then a 15% discount for a serious case but no disclosure and a most serious case with a disclosure potentially achieving a 30% discount. In our view, this requires further consideration and clarification. We would also reiterate the point made about the subscription market and how by default an [REDACT] participating on a risk as a follower may have less information about a potential breach than a lead [REDACT], meaning that they are not able to make a disclosure at the time the lead does. The subscription market would need to ensure there is a mechanism for avoiding any such disadvantages. Overall we do not feel that the lack of a voluntary disclosure should automatically be an aggravating factor.
b) Clarification as to the practicalities of submitting a disclosure are required.
c) How will OFSI decide when a breach has been committed with the "connivance" of an officer of a company, or where such breach is due to the "neglect" of said officer?
d) With regard to a disclosure involving the company and its employees, there is a potential for conflicted interests during the course of an investigation.

8. Is the process for imposing a penalty and making representations clear from this guidance?

☐ Yes ☒ No

(if no please explain why below)
It is not clear if the representation/appeal process should be exhausted prior to a publication of any penalty.

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?

For a fair review, the minister in question should have some knowledge of sanctions and or the sector in 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

What are your views on the level of information OFSI will publish?

It would be helpful to specifically confirm that penalty notices will only be published once the appeal and representation stages have been exhausted. This would be in accordance with due process and would not (potentially unnecessarily) harm the reputation of an entity under review.
12. Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties? The guidance requires further enhancements to ensure the rationale and approach is clear.
Please e-mail this form to: OFSIConsultation@hmtreasury.gsi.gov.uk

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