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) REDACTED
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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?

1.1 The guidance makes some rather broad statements on the scope of EU/UK sanctions provisions, including as regards the jurisdiction of those measures and the meaning of terms such as "reasonable cause to suspect". The guidance also states that OFSI "construes prohibitions widely". In this regard, we note that EU and UK financial sanctions provisions include terms which are not defined and are yet to be tested in the courts. In the context of the balance of probabilities test, and given that companies are encouraged to disclose, it would be useful for OFSI to provide greater clarity (and practical examples) as to their intended interpretation of key sanctions provisions.

1.2 While we understand that the Policing and Crime Act 2017 uses the term "value", instead of a term such as "amount", it would be helpful for OFSI to set out what difference, if any, it sees between the value of funds or economic resources, and the amount of funds or economic resources.

1.3 In our view it would be helpful for all future UK sanctions measures to state explicitly that they are "financial sanctions legislation" under and in accordance with Section 131(1)(a).

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

2.1 We broadly agree with OFSI's compliance and enforcement approach as it is set out in the the relevant part of the guidance.

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

3.1 One of OFSI's stated objectives is to promote compliance by companies through a variety of methods (for example by providing companies with guidance and alerts to help them discharge their own compliance obligations). Another way to promote compliance would be for OFSI to provide further guidance and incentives to companies to introduce and/or improve good compliance programmes.

This could be achieved by:
a) Providing further guidance on what OFSI views as best practice for a sanctions compliance programme, in a similar manner as set out in the Export Control Organisation's "Compliance Code of Conduct".
b) Giving reductions on the amount of the fine to companies that have good compliance programmes at the time of the infringement as well as to companies that agree to either introduce a state of the art compliance programme or to improve their existing compliance programmes (as per OFSI's suggestions) after they have breached the rules.

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

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

5.1 At para 2.6.1, page 9, the guidance refers to the steps OFSI could take; this includes "issuing enforcement correspondence requiring better compliance practices". Can OFSI assure companies that such correspondence will not be made public? Otherwise, this may discourage voluntary disclosure, especially given that the law is not always clear.

5.2 At Para 2.8, page 11, OFSI lists a number of "case factors" that "will aggravate or mitigate". In some cases, it is not clear whether the factor is intended to be viewed as an aggravating or mitigating factor. Some factors could arguably go either way (such as "incorrect legal interpretation"; this could e.g. range from a genuine reading of an ambiguous sanctions provision, to an intentional interpretation intended to allow unlawful activity to proceed). It would be useful to have further clarification on whether and in what circumstances OFSI will view each factor as either aggravating or mitigating.

5.3 At Para 2.8, page 11, OFSI rightly focusses on circumvention, and states that it takes it "very seriously". However we would ask OFSI to provide more detailed guidance (including practical examples) on what it considers to constitute "circumvention". Examples to address may include how OFSI would view referrals by UK persons of sales leads to non-EU/UK parties; restructuring a business to isolate EU/UK nexus from transactions; or providing legal advice on whether or not different structures are within the jurisdiction of EU/UK financial sanctions.

5.4 At Para 2.8, page 12, under "Knowledge and compliance standards in the sector " OFSI states "some sectors have more developed compliance systems and processes than others, because of the kind of work they do. OFSI believes it is reasonable to take into account if and how this may apply and be evidenced when it considers the case." Again, it would be helpful to understand how OFSI will assess this factor. If an industry has a strong compliance culture, or specific expertise, it would be seen as unfair to use this as an aggravating factor if a breach occurs. If these industries see that compliance practices are being used in this way, they may reduce their efforts. However, if a strong compliance culture is seen as a mitigating factor, then we see that this is a helpful point. We also refer to our comment above as regards whether OFSI may consider giving guidance as to elements it would like to see as part of companies' compliance programmes.

5.5 At Para 2.8, page 12, OFSI states that: ' We expect regulated professionals to meet regulatory and professional standards. We may consider their failure to do so an aggravating factor.'. This is wrong in principle and approaches 'double jeopardy' territory. If a company is in breach of its regulatory and professional standards then there are consequences for that (fines etc). Companies should not-on top of that-receive a higher fine/punishment for a separate offence. This should be dropped as an aggravating factor.

5.6 At Para 2.8, page 12, OFSI states "We have divided behaviours into several broad categories that we believe reflect compliance in the financial sanctions regime." It does not then appear to set out these categories.

5.7 At para 2.8, page 14, OFSI suggests that novel or contentious cases might result in "more serious action than the value of the case seems to warrant". This appears to be perverse in that a novel case implies that the rules are not clear, or at least that the situation is not clearly within the rules and that persons acting in good faith may have simply made an error of judgment, or there may be remaining ambiguity as to the legality of the conduct. If a case raises

novel/contentious issues then it should not be treated more seriously than an obvious breach, rather it should be treated more leniently. Treating cases where the law is unclear more seriously could also discourage disclosure.

5.8 One of the points not addressed in the OFSI guidance is the impact that the seniority of individuals involved in the offending conduct should have on the amount of the fine. We believe that if there is a minor offence and only junior employees are invlolved then this shoud be considered as a mitigating factor.

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

6.1 OFSI should provide more guidance on what is the dividing line between "serious" and "most serious" cases. We accept that OFSI may be reluctant to provide an exact distinction between the two, but in order to give clients appropriate advice as to the likely conduct of their case, advisers need to have some guidance as to what factors are taken into consideration. This is particularly the case when this difference may account for up 20% of the reduction for any voluntary disclosure;

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

7.1 We are of the view that the proposed regime in relation to voluntary disclosures has a number of issues that will affect the willingness of entities to disclose:

7.2 The maximum discount for voluntary disclosure of a "serious" violation is 50%, and 30% for a "most serious" violation. A maximum of 50% reduction may appear overly harsh on an entity that is considering admitting voluntarily a breach. We note that by way of comparison, Notice 301 issued by HMRC waives a civil penalty entirely, even in cases where the breach results in lost revenue (although that lost revenue must be paid). Section 3.2 states "You will not receive a penalty if you discover and disclose a contravention voluntarily." While we accept that a breach, whether disclosed voluntarily or not, should result in some detriment (though not necessarily in the form of a financial penalty), a reduction of only 50% seems overly harsh.

7.3 While OFSI acknowledges at 2.11.18 that imposition of a penalty is not automatic, and subject to discretion, an entity that discovers a breach and is considering disclosure will need to understand prior to disclosure what level of discount will or is likely to be given.

7.4 OFSI states at page 13 under "Materially complete disclosure and good faith" that: "We also expect that all persons involved in the breach will co-operate with us in concluding our assessment, even if that means the person may be subject to enforcement action." On the face of it, this appears to be a draconian step since it implies that an individual must cooperate, even if that results in self-incrimination. This would obviously be unfair and arguably unworkable where a company making the disclosure voluntarily will receive the benefit of that disclosure, but any employee required to cooperate does not, and may indeed be subject to enforcement action.

Further, an entity disclosing a violation voluntarily to OFSI is not always in a position to guarantee that all individuals involved in a breach can or will cooperate. For example, in cases involving breaches of employment contracts by employees, companies may feel obliged to discipline or even dismiss individuals in breach. In those cases, it may be difficult if not impossible for the company to insist that the employee cooperates.

Further, it may be that a supplier or agent will, for whatever reason, not cooperate with the disclosing entity. Therefore, we would welcome a statement from OFSI as to whether the failure of employees or third parties involved in the breach to cooperate would in any way impact the company.

7.5 A disproportionate significance is given to an affirmation that the disclosure is "materially complete". If this assertion is given, then access to the maximum reduction (whether for "serious" or "most serious") is stated at 2.11.10 to be "automatic". However, if "you decline to do so", then OFSI will "treat the case as if no voluntary disclosure has been made, and apply the appropriate penalty." It is therefore vital to understand what OFSI sees as being materially complete, and what it sees as declining to make such affirmation. So, for example, would a disclosure be "materially complete" if:

- the period over which breaches might have occurred is 10 years, but the entity only goes back 5 years because its electronic records do not go beyond that in line with corporate retention policies?
- a senior executive involved in a breach has been dismissed and refuses to cooperate in any disclosure?
- a foreign subsidiary does not provide information to the disclosing entity, citing "data protection" laws in their home country?
- A party to a transaction is in fact a Designated Person, and it is necessary to get information from that person?

It would therefore be useful for companies to know that taking robust investigatory steps will be taken into account, despite the fact that there may be factors beyond its control in seeking to ensure the disclosure is "materially complete".

Further, what is an affirmation that the disclosure is materially complete? If a disclosing party wishes to add to or qualify a disclosure, would that be seen as declining to make an affirmation, and so losing the benefit of a reduction?

7.6 There does not seem to be a significant difference between a situation where a party fails to disclose a "serious breach" (up to 15% reduction) and where a party voluntarily discloses a "most serious" breach (up to 30%). In our view, there should be a premium placed on disclosing voluntarily, as opposed to the severity of the breach.

7.7 At 2.11.14, OFSI states that "OFSI will consider applying a monetary penalty [where a] person has provided information in a voluntary disclosure or otherwise, but we discover it to be false or made in bad faith." It would be helpful for OFSI to clarify whether this monetary penalty for false or misleading information provided voluntarily is in addition to the removal of the reduction above where the disclosure is not "materially complete" or not affirmed as such.

7.8 Although not directly related to a decision to disclose, we also note with some concern the statement at 2.8, page under the heading "Voluntary Disclosure" where OFSI states: "Accordingly, failure to voluntarily disclose a breach of financial sanctions is an aggravating factor, meaning we will tend to regard the breach as more serious than otherwise." There is no general obligation under UK law to disclose a breach of financial sanctions. If a decision, for whatever reason, is taken not to disclose, the party is still acting lawfully, and presumably, as a consequence, is happy to give up its right to obtain a discount under OFSI policy. However, we do not see any reason to then treat that decision also as an aggravating factor, which presumably will increase the level of the penalty.

7.9 At para 2.8, page 13, OFSI also notes that if multiple parties are involved in a breach, it will expect disclosure from each. It would be useful if OFSI could clarify its approach to situations involving multiple parties. For example, could OFSI clarify that parties will still gain the relevant credit for disclosing and co-operating even if another company happens to have alerted the same conduct to OFSI more quickly? This is particularly important given the need for disclosures to be materially complete; firms will wish to ensure they have properly investigated relevant conduct internally before making a full disclosure, rather than racing to disclose first.

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

8.1 At Para 2.12.11, OFSI states that '*The person has **28 calendar days to make written representations** from the date of our initial letter. We will not normally accept late representations. Persons or their representatives **may ask us to extend this period** and must provide evidence that it is reasonable to do so. **We have complete discretion** whether or not to accept the request.*'. While good and timely management of procedures is a positive step for OFSI, establishing a set timetable for all cases, including complex cases involving corporations, may be going too far, and OFSI may wish to retain flexibility on time limits and provide further guidance on when it will provide an extension to these time limits for serious and complex cases.

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?

We have no comments.

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?

11.1 According to OFSI, an entity that discloses will have details of that breach, and the penalty imposed, published, including the name of the entity. While "naming and shaming" may play a part in any deterrent effect of a penalty, it will not encourage voluntary disclosure, and may, in difficult or finely balanced cases, cause persons not to disclose. OFSI should be aware that suppliers to and customers of disclosing parties will take breaches by that disclosing parties into account when supplying to or buying from that party (e.g. banks or those in secure supply chains (e.g. military or aerospace)). If publication of the identity of the disclosing party results in a disruption of supply or loss of sales, then, arguably, the disclosing party will have suffered a second, commercial, penalty as a result of their disclosure. Where a disclosure is voluntary, future deterrence is arguably redundant, and should not result in unforeseen detriment. Therefore, we would ask OFSI to reconsider this part of the policy. By way of comparison, HMRC does not publish the names and details of persons subject to compound penalties for customs, export control or sanctions breaches under the Customs and Excise Management Act, and we are not aware of any proposals to change this policy.

12. Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties?

12.1 The document does not establish how the policy interacts with other policies or laws. In particular, there is no clear guidance on:

- When information provided to OFSI as part of a voluntary disclosure might be provided to or discussed with another UK regulator for the purposes of (i) criminal; or (ii) related administrative proceedings. In a number of cases involving both goods and funds, both HMRC and OFSI will have jurisdiction over different parts of the same transaction, and so we assume that as today, each will continue to work with the other. However, as to (i) will OFSI for example provide details of disclosures to the NCA, or even CPS? As to (ii) will OFSI for example provide details of disclosures to the FCA or Law Society? While each may be appropriate in certain situations, it is important that the questions of how and when such information might be passed to other agencies are explained;

- When information provided to OFSI as part of a voluntary disclosure might be provided to another non-UK regulator for any purpose. While the OFSI may be under some form of legal obligation to assist other regulators, again it is important that the questions of how and when such information might be passed to other non-UK agencies are explained.

12.2 At 2.11.13, OFSI sets out its approach to information offences. While not directly raised by the OFSI consultation, we would note that the information offences typically found in UK sanctions measures do not make it clear that providing information in accordance with an order made by a relevant body cannot be used to incriminate the party providing that information. In most UK measures we have seen, a requirement to disclose information is balanced by a right against self-incrimination. In cases where such information has been ordered, it would not be unreasonable for a party to withhold such information until assurances about its use have been provided. Obviously, OFSI may take the view that it is not required to give any such assurances, this then becomes a matter for the review of UK Courts. However, to the extent that OFSI accepts that this information cannot be used to incriminate the entity providing it, it would be helpful to ensure that current policy (and all future legislation) confirms that point.

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