[REDACTED]

To: HM Treasury,
Horse Guards Rd,
London SW1A 2HQ

26th January 2017

Response to the HMT Consultation on the Process for Imposing Monetary Penalties for Breaches of Financial Sanctions

1. [REDACTED
2. The [REDACTED] and members are pleased to respond, as below, to this crucial consultation on the process for imposing "monetary penalties for breaches of financial sanctions". This response has been developed through consultation with the [REDACTED]

3. At the outset we wish to highlight that this guidance and consultation process is an extremely welcome development. The engagement of OFSI with [REDACTED] members is an important avenue of dialogue, and we look forward to continuing this by way of follow-up discussion on the areas highlighted within this response.

4. Our response is intended to set out, on behalf of members, themes which are viewed as particularly important to the overall effectiveness and implementation of the UK's sanctions regime. We also offer an attached annex setting out in greater detail a commentary on the guidance and areas, where we feel further clarity is required. In addition, the main points that members would like the [REDACTED] to reinforce are specifically categorised below.

5. **Clarification of OFSI's jurisdiction:** The scope of OFSI's remit appears inconsistent within the guidance and against existing UK legislation – within the annex we have suggested amendments to clarify the position of what may constitute a "UK Nexus" [2.7.4]. As a result of [REDACTED] member engagement with OFSI on the assessment of the breach form, it is recognised that there is already a range of views on reporting. OFSI have agreed to provide a matrix of their information requesting powers – this will drive clarity as to what OFSI expect to be reported to them as a breach versus what information is merely reportable (but doesn't constitute a breach) under the relevant UK statutory instrument. <u>This exercise is essential and needs to be referenced within the guidance.</u>

6. **Penalty calculation and rights of appeal:** How OFSI will determine the penalty to apply to a breach or breaches, remains unclear. For instance the process OFSI will use to calculate the value of the funds, or economic resources have not been defined, nor has the method of how penalties will be calculated for "non-quantifiable" failures, e.g. failure to report, or failure to comply with licensing requirements. Importantly the statute does not provide for public censure as a penalty in the absence of a monetary fine. If this is OFSI's intention and there is no appeal, this appears inconsistent with the appeals process for contesting the monetary penalties.

7. **Concurrent Investigations:** The guidance needs to recognise the interplay of investigatory authorities within the UK and overseas [2.7.13]. OFSI's interaction with other UK and international agencies is paramount. When considering penalties, how

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OFSI interacts with other enforcement agencies, who may be investigating the same breaches or different aspects of a case, the guidance needs to articulate what impact this will have on OFSI's approach. Such an approach should ensure concurrent investigations are pursued collaboratively. This is to minimise the cost and time of the investigations, for both the potential offender and the regulators involved, thereby ensuring any fines are jointly agreed and that aggregated fines are not disproportionate.

8. **Timeliness and material completeness of voluntary disclosures:** Other regulatory guidance (e.g. Payment Service Regulator consultation on the "Draft guidance on our approach to handling applications, under sections 56 and 57 FSBRA" carried out Summer 2016) sets out the following: 1) required timeframes for each step of the process, 2) what is required from each party at each step, 3) the criteria for appealing, and 4) the criteria for assessing appeals once referred. A similar approach would be helpful for all sectors within this guidance (particularly less regulated sectors). For instance, confirming what is considered "timely" disclosure, as well as acknowledgement of the practical steps. Specifically, where OFSI will permit voluntary disclosure to be supplemented with additional facts, rather than the current requirement that indicates all submissions need to be "materially complete".

9. In verbal dialogue, OFSI have confirmed that the relevant 'discount' for voluntary disclosure will apply to all those following this procedure, and not just the 'first to disclose'. As previously discussed with OFSI there will be many legitimate instances whereby a financial institution had every intention of imminently disclosing but may not have been the first to do so. For example, some institutions further down a payment chain may only be aware after others so may not have the opportunity to at least disclose at the same time. Clarity is required in this guidance on how the discount(s) will be applied. We would further urge against creating a 'race to disclose' environment.

10. **Definition Challenges:** Throughout the guidance document a number of areas require further expansion with respect to definition and scope. We have highlighted a number of these within the annex but have drawn specific attention to the following:

    - To better understand OFSI's approach to potential liability, a clear definition of 'neglect' should be provided. This will help clarify the objective standard, the industry is to be held to. Illustrative examples of what acts or omissions constitute neglect would assist greatly in this regard.

    - Establishing "reasonable suspicion", the term "reasonable cause to suspect" can also be found, amongst other places, in the Proceeds of Crime Act 2002 (POCA 2002), and has also been the subject of interpretation by the courts in relation to money laundering. It would be helpful to clarify whether such case law can be applied when interpreting the same term in section 131 of the Policing and Crime Act 2017. This clarification would be useful as the interpretation provided in section 2.7.2, appears to be broader than that suggested by case law. In addition, the guidance states that "reasonable cause to suspect" is "a higher standard" but it is unclear what this statement is in reference to. Confirmation that interpretation of "reasonable cause to suspect" is being drawn from case law established in relation to money-laundering (under POCA 2002), will allow the bank to utilise existing training material and expertise of suspicious activity reporting. If clarity on the definition of "reasonable cause to suspect" is not provided, OFSI should provide practical examples of behaviours that might be captured by "reasonable cause to suspect".

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- 'Serious' versus 'most serious'. As previously advised there is a need for the guidance to further quantify what constitutes a division between these two categories. This will be an important factor in determining how breaches will be treated by OFSI, and the associated application of monetary penalties. Likewise, a further articulation would be helpful on when imposition of penalties would be against the public interest (for instance inadvertent breaches arising during the course of supporting humanitarian activity).

- In the context of case factors set out in paragraph 2.8, we offer the following observation: Direct and indirect provision of funds is treated equivalently in the various EU sanctions programmes. We would therefore expect indirect provision of resources to be considered alongside direct provision, and not under the severity assessment. Failure to freeze property should also be referenced alongside direct and indirect provision of funds.

- Definition of 'circumvention', as appropriate the guidance places considerable importance on the seriousness of circumvention. However, and as discussed with OFSI, there is a lack of any further clarification on what might constitute circumvention. We therefore advise that the guidance is expanded to offer case study scenarios.

- Reliance on the 'balance of probabilities' approach requires further articulation. If OFSI makes a judgement call on whether it is more likely, than not, that there has been a breach, there is still uncertainty, with regard to whether there has been a breach.

- The circumstances in which the actions of a subsidiary of a UK company would fall under the jurisdiction of OFSI requires further clarification (unless that subsidiary was itself carrying out business in the UK). Overall the UK Nexus should be expanded as it is not clear, and some of the terms or descriptions lack clarity. For example, what is meant by a "UK company working overseas"? Should this be defined as a company that has an individual working overseas? What is meant by "action by a local subsidiary of a UK parent company?" What is the purpose of the word 'local' in that sentence? Reference should also be made to the EU guidance on 50% ownership.

11. **Alignment with legislation/consistency of terms**: The use of terms throughout the guidance is inconsistent with UK legislation. For example the use of "person" to refer to individuals but not corporate entities who are also captured by the legislation. We suggest a glossary of terms to be incorporated within the guidance, specifically aligned to the legislation.

12. **Factors in assessing repeated, persistent or extended breaches:** OFSI should acknowledge that a single incorrect, compliance decision taken in good faith, at a moment in time, can result in multiple incidents, which could subsequently be determined a breach. This should be a factor in determining how OFSI will deal with repeat breaches, following one such good faith decision. In particular these circumstances can arise due to the ambiguity, or the complex nature of the sanctions program, (e.g. introduction of the Russian sectoral sanctions and later extension of the definition of financial assistance to include provision of payment services).

13. **Case study examples**: In its current context the document appears overly focused on breaches of targeted asset freezing requirements, versus wider financial sanction

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prohibitions. This matter has been raised verbally with OFSI and we understand that the guidance will be re-positioned to include wider case study examples. We recommend that OFSI set out, e.g. in the context of paragraph 2.4.2, a list of the different financial sanctions offences to which the guidance will apply. This is recommended in addition to the frequently referenced obligation to freeze assets and to not make funds available, directly or indirectly, to designated persons. One example would be the capital market restrictions in Article 5 of Regulation 833/2014 as amended.

14. **Company versus individual cooperation**: [REDACTED] members recognise the importance placed on the meaningful cooperation of all persons involved in a potential breach. Our members fully accept this position but would flag that individual disclosure may also involve self-incrimination and wider legal considerations. In such instances a divergence of financial institution versus employee interests may occur. The guidance should seek to ensure inclusion of suitable language, to promote equal protection for all concerned parties.

15. **Publication of FAQs:** We recommend that the guidance is updated more frequently than on an annual basis, e.g. in the event of a significant legal change or trigger event. We further suggest that OFSI issue regular FAQs in response to specific thematic issues or sanction programmes. For instance, it would be helpful to understand whether OFSI will enforce the prohibition on providing technical and financial assistance in Articles 2 and 3 of Regulation 833/2014, and in the context of various arms embargoes. If not enforced by OFSI, would breaches of these prohibitions attract penalties under the Policing and Crime Act 2017?

16. **Promotion of collaborative information sharing:** OFSI's aims and intentions for their exercise of the power to issue monetary penalties should be made clear in the guidance issued. Through discussions with the [REDACTED], and as part of separate dialogues, OFSI have noted that they are seeking to target certain sectors more than others, given the differing standards of compliance environments. The guidance would benefit from making the intention to foster a collaborative approach where information sharing closes the gaps which permit sanctions breaches to occur. At present this is not separated from the more punitive aspect of the measures to be introduced.

17. Given the increasing complexity of sanctions, members feel the guidance requires further expansion and streamlining across a range of areas. This is to enable a greater understanding of the scope of the law on monetary penalties. We trust our response helps inform the re-drafting process and as ever we stand ready to assist with OFSI's deliberations.

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Annex – The Process for Imposing Monetary Penalties for Breaches of Financial Sanctions

1. Do these introductory sections give you enough information to understand the scope of the law on monetary penalties?

What else would be useful?

There are a number of areas where the guidance is unclear or requires further clarification:

- Section 131 (4) of the 2017 Act refers to a permitted maximum of £1,000,000 "In any other case." It is assumed that this refers to where it is not possible to estimate the value of the funds or economic resources, however, confirmation of this would be welcome.

- In section 2.4.1 of the guidance there is reference to positive obligations applying to the regulated sector where, for example, they are required to notify HM Treasury if they have dealings with a designated person, or if they suspect that financial sanctions are being breached. This could imply to non-regulated sectors that they do not have the same obligation.The standard provision regarding reporting included in relevant European Union sanctions regulations states that such reporting obligations apply to "natural and legal persons, entities and bodies". The example provided within the standard provision "accounts and amounts frozen" would in practice only apply to the regulated sector. The standard obligation is "any information which would facilitate compliance with this regulation" which can extend beyond just the regulated sector.

2.2.1 The last bullet point should be amended to read "specific person, group, sector, territory or country" to ensure it captures all sanctions targets in line with the legislation.

Section 2.4.1 of the guidance states that "it is an offence not to abide by [a licence granted by OFSI] or not to take any actions that a licence requires". While we understand that when operating under licence you are required to comply with the terms of that licence, having a licence does not compel a person to carry-out the activity that the licence provides for (e.g. if a designated person has a licence to make a payment to another person, a bank is not compelled to facilitate such a transaction just because there is a licence permitting the activity). We assume that "actions that a licence requires" is a reference to, for example, reporting requirements, rather than an obligation to, for example, process the payment under the licence. We think the wording of this section could be amended to make the position clearer.

2.4.2. The guidance should clarify that OFSI's powers to impose civil penalties applies to all relevant UK sanctions regimes.

We view as particularly important the need for further clarification on how OFSI will impose and calculate breaches for failure to comply with reporting obligations, under statutory instruments for the relevant UK sanctions regimes. For instance it is unclear within the guidance how penalties will be applied for:

- Failure to report.
- Breach of a prohibition including circumvention and failure to obtain necessary licences.
- Failure to comply with a specific information request submitted by OFSI.

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We recommend the guidance is updated more frequently than on an annual basis, e.g. if there is a significant legal change or trigger event (e.g. in response to FAQs).We propose an updating of this section to read:

"From time to time OFSI will review this guidance in response to feedback and as we learn from using our powers. The guidance applies from April 2017 and we will review annually or more frequently as required."

[REDACTED] members would welcome clarity on if there will be further opportunity to feed into any changes to the case assessment processes in 2.7?

Given the necessary use of technology to assist in mitigating the risk of breaching sanctions, it would be helpful to improve understanding of OFSI's approach to potential liability, via provision of a clear definition of 'neglect'. This will help clarify the objective standard the industry is to be held to, and illustrative examples of what acts or omissions constitute neglect would assist greatly in this regard. It might also be beneficial for OFSI to comment on some of the issues raised by the granting of new powers to OFSI. For example, would OFSI be in a position to explain why enforcement actions under the Policing and Crime Act 2017 are to be dealt with outside of the mainstream criminal justice system? The right of review by a Minister of State raises the potential to perceive a conflict of interest. Likewise, an appeal to the Upper Tribunal does not promote the same confidence to be found within an appeal to the Court of Appeal and Supreme Court. These higher courts would therefore arguably be better placed to consider whether a financial institution has undermined the foreign policy aspirations of the UK.

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

The content of this guidance is high level so the extent to which the compliance and enforcement approach can be analysed is limited by content provided, however, we would note the following:

- Section 2.5.1 - With regards to the "promote" element of the approach, it would be beneficial for OFSI to ensure sanctions awareness and compliance are effectively promoted to individuals and smaller businesses. From the perspective of the bank, it is within these categories of customer that suspected breaches of sanctions are more likely to occur on the basis of a less sophisticated compliance function/capability. Indeed the guidance states that it will provide "customers with guidance and alerts to help them discharge their own compliance responsibilities", however it is unclear what is meant by "customers" in this context.
- As part of OFSI's commitment to the "promote" element, we wondered whether OFSI may consider offering an advisory service, whereby additional guidance on general compliance issues might be sought. This would be particularly helpful for the non-regulated sector which may not have the sanctions expertise and experience that the regulated sector has.
  In section 2.5.1 there is reference to: "we will respond to non-compliance by intervening to disrupt attempted breaches", however there are no details regarding what this means and how it would work in practice, particularly considering it implies that OFSI will intervene in respect of controls which in the regulated sector are the domain of the FCA. Section 2.6.1 appears to provide a list of steps OFSI may take in response to a breach but does not consider the position in the case of an attempted breach. Further

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clarification as to what actions can be taken by OFSI in response to non-compliance in relation to an attempted breach would therefore be helpful. A further observation is that this section appears to switch between the OFSI's compliance approach, and the compliance approach of private sector needs to be clearer. This section seems to focus particularly on the private sector (see 2.5.4), although presumably this covers all entities and persons who may be liable to civil monetary penalties. An upfront clarification of how OFSI classifies the "private sector" is required.

3. Is there anything else you would expect a compliance model to tackle?

OFSI could frame the compliance model more effectively. This could be by defining outcomes OFSI seek to achieve (similar to what the FCA does), to demonstrate what it expects firms/individuals to do. This will assist in understanding what "good" looks like in the context of their strategic objectives.

Little guidance has been provided as how the various enforcement agencies and regulators reach a decision as to which enforcement body/regulator (e.g. OFSI, NCA, FCA) should consider a particular case, and how it should be resolved (i.e. whether civil or criminal penalties are appropriate). Guidance on how such decisions are made would make the process more transparent and ensure consistency of approach.

In keeping with OFSI's aspiration to help financial institutions 'learn from the case' in circumstances where enforcement has occurred and to avoid sanctions being breached again, will OFSI be publishing typologies of sanctions breaches to demonstrate more sophisticated evasion or circumvention mechanisms?

Regarding the statement: "An effective compliance approach responds to non-compliance consistently, proportionately, transparently, and effectively..." Will there be independent review/oversight of the execution of performance of OFSI's duties by a separate body?

The guidance should include details and a timeline covering each step of the process, from initial reporting of the breach to OFSI, up until the issuance of penalty notice or taking any of the actions listed in section 2.6.1. For instance it is inequitable for a listed company not to have clarity on when it can expect to learn OFSI's findings and be in a position to disclose this to the market (and its shareholders).

Details of the process should highlight any potential touch points/interaction between the party reporting the breach and OFSI, specifically:

- Whether firms will be able to make representations to OFSI. Why a fine should not be imposed and how? (2.7.7 "If we can impose a penalty, we will not automatically do so...")
- How a firm can submit mitigating factors it wishes OFSI to take into account prior to OFSI issuing the Penalty notice? Is there a process to follow? How will firms be able to do this? (2.7.8)
- The timeframe for OFSI to go through the assessment process including quality assurance and taking any action. (2.7.12)
- How OFSI interacts with other UK regulators (e.g. FCA) or external agencies (OFAC/DoJ) when imposing a monetary penalty, and whether there will be a coordinated approach with other agencies to ensure the final outcome remains "proportionate and reasonable"?

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2.8 (i-reporting breaches to OFSI):
- Will OFSI permit, voluntary disclosure to be supplemented with additional facts as they are learned?
- Will it be acceptable to disclose to OFSI/HMT early and follow-up with complete disclosures once the reporter has further information?
- Will there be an impact on voluntary disclosure credit if it takes the firm time to gather the material facts? The requirement for timeliness of disclosure section seems to suggest that credit will not be given for initial disclosures based on limited knowledge.
- Will all parties receive credit if they submit voluntary disclosures?
- How does a person affirm that the voluntary disclosure is materially complete (2.11.10)? This should require a positive affirmation, of the information or knowledge the person has, at that point in time. Will OFSI penalise a person if they discover information following the affirmation which they believe is relevant for OFSI to consider?

In order to meet OFSI's objective to prevent future breaches it might be essential in some cases for the reporting party to provide early disclosure, with limited details to prevent/limit further breaches. This will be followed by further disclosure which will be materially complete. The firm making the early disclosure should get credit for this report.

Finally, will the compliance framework also seek to encourage and provide protections for information sharing between entities seeking to understand and establish the nature of a breach? Many potential breaches will involve payments with numerous touchpoints across multiple entities and jurisdictions. To gain a fuller picture, information sharing may prove useful. However, currently there are limited protections for entities seeking to do this, and therefore this practice is not widely adopted.

4. Do you understand our proposed case assessment approach?

Overall [REDACTED] members felt they did not understand the proposed case assessment approach.
There are a number of points of clarity that are required, most of which have been detailed in other sections.

5. What are your views on our proposed case assessment approach?
There are a number areas where further clarity is required:

Publication of OFSI's response to non-compliance
As noted above, section 2.6.1 provides four steps OFSI could take in response to a breach. However, it is unclear from this section, or indeed Part 4 of the guidance ("publication of civil penalty imposition"), whether details of all OFSI responses taken (e.g. issuing enforcement correspondence) will be published. It is the bank's view that behaviour which draws a response which is less severe than a monetary penalty, (i.e. referring to a professional body or issuance of enforcement correspondence requiring better compliance practices) does not warrant publication. Where a referral is made to another professional body, and they take action against the person, this will likely be published in any event.

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Establishing "reasonable suspicion"
The term "reasonable cause to suspect" can also be found, amongst other places, in the Proceeds of Crime Act 2002 (POCA 2002), and has been subject to interpretation by the courts in relation to money laundering. It would be helpful to clarify whether such case law can be applied when interpreting the same term in section 131 of the Policing and Crime Act 2017. This clarification would be useful as the interpretation provided in section 2.7.2 appears to be broader than that suggested by case law. In addition, the guidance states that "reasonable cause to suspect" is "a higher standard" but it is unclear what this statement is in reference to. Confirmation that "reasonable cause to suspect" is drawn from interpretation of case law established in relation to money-laundering (under POCA 2002), will allow banks to utilise existing training material and expertise of suspicious activity reporting. If clarity on the definition of "reasonable cause to suspect" is not provided, OFSI should provide practical examples of behaviours that might be captured by "reasonable cause to suspect". As OFSI will be aware the Money Laundering Regulations 2007 has a more limited application and does not apply to individuals generally. This guidance therefore needs to take into account and define OFSI's expectations more clearly and how it will address breaches by those not in scope of the MLR 2007.

We note that in this section (under the 'Severity' heading), guidance states "we may still regard as severe an indirect provision of resources that we believe the breaching party could have discovered in advance – e.g. through common due diligence or know-your customer processes. Such indirect provision may still meet the standard for "reasonable cause to suspect". We are concerned that this example may be read as suggesting that (i) an individual ought to have conducted customer due diligence/KYC to a standard that would have allowed him to form the relevant suspicion; rather than (ii) based on the customer due diligence/KYC conducted, there were reasonable grounds for the individual to form suspicion. The Money Laundering Regulations 2007 (and appropriate industry guidance, such as JMLSG guidance) set the appropriate standard of customer due diligence to be conducted and, if there is non-compliance in this respect, our understanding is that it is the responsibility of the relevant supervisor stipulated in those regulations to take action, rather than OFSI.

Section 2.7.6 provides that where the "knowledge" or "reasonable suspicion" tests are not met in a particular case, OFSI "may be able to take other action short of a penalty that would respond effectively to the matter". It is unclear what action OFSI could take in such circumstances and so clarification on this point would be helpful.

Circumvention of sanctions
Previous Guidance on Financial Sanctions included examples of the circumvention of sanctions; however, this appears to have been removed in the latest version of guidance published by OFSI. We would suggest such examples be included in this guidance.

Knowledge and compliance standards
Section 2.6.1 states that OFSI may, in response to a breach, issue enforcement correspondence requiring better compliance practices. As responsibility for oversight of systems and controls sits with the FCA, it would be helpful if OFSI could clarify how it will co-ordinate with FCA in this respect.

In section 2.8 (Knowledge and compliance standards in the sector), OFSI states that "...it is also true that some sectors have more developed compliance systems and processes than others, because of the kind of work they do". It would be helpful if OFSI could confirm which sectors it is referring to, particularly as OFSI states that "OFSI believes it is reasonable to take into account if and how this may apply and be evidenced when it considers the case", suggesting that such

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sectors may be subject to a higher standard than those where compliance systems and processes are less developed.

OFSI also states, "we wish to encourage strong compliance cultures and will not seek to punish companies that simply fall below a high standard if that is the only distinguishing factor in a case". Two queries arise from this statement; (i) is OFSI intending to cooperate with the FCA to issue additional guidance as to what is meant by "high standard" in this context or what is OFSI's engagement model with the FCA to determine this on a case by case basis? (ii) will existing processes and procedures which do meet the relevant standard be taken into account as a mitigating factor?

It would be helpful for OFSI to set out the level of "Knowledge and Compliance Standards" within a sectors/industry? For instance is this tied to any best practice/industry standards adopted by the sector? This is particular important given the complexity of sanctions compliance and reliance on technological solutions for screening and identifying potentially prohibited activity.

Clarification on how assessment will be carried out in sectors that do not have published standards relating to sanctions compliance is required (for example the Charity sector). Should this section also include a reference to the failure to have a compliance programme, being an aggravating factor for sectors where the entity is expected to have such a programme? Furthermore, does the existence of an adequate compliance programme count as a mitigating factor? We recommend including the following wording:

"Everyone must ensure they know the law, and ignorance of the law is no defence. But it is also true that some sectors have more developed compliance systems andprocesses than others, because of the kind of work they do. Firms are expected to have in place a compliance programme appropriate to their business model, sector and jurisdictions in which they operate, including all applicable sanctions laws. OFSI believes it is reasonable to take into account if and how this may apply and be evidenced when it considers the case. "

Can OFSI provide additional details on what is meant by this statement and how will this be applied? "*..will not seek to punish companies that simply fall below a high standard if that is the only distinguishing factor in a case*".

Materially complete disclosure
It would helpful if OFSI could clarify what is meant by "materially complete", as while companies will be in a position to provide information that is available to them, there may be difficulty in confirming certain facts, e.g. those relating to third parties and/or persons in other jurisdictions.

Public interest, strategic priority and future compliance effect
The guidance states that "...we may choose to take more serious action than the value or the case appears to warrant. Examples may include if the case raises an important point of principle or is in some way novel or contentious, and the public interest requires this to be tested". We feel that is it inappropriate to treat cases more seriously solely because they raise novel questions given there is limited case law in relation to financial sanctions and so many cases will raise novel questions.

Publication of FAQs

More broadly, the case assessment approach would benefit greatly from OFAC style FAQs being published. Whilst this has not always been possible with European regulations which impose sanctions prohibitions, the current proposals stem from a UK statute which may be seen

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as a standalone instrument. Moreover, post Brexit, the UK regulated financial sector will benefit significantly from clear and regular guidance in a FAQ format which will enable the high-level prohibitions within the consultation document to be more readily understood in practice.

For example, it is stated in section 2.8 regarding knowledge and compliance standards in the sector, that OFSI expects regulated professionals to meet regulatory and professional standards, and that OFSI may consider their failure to do so an aggravating factor. It is not clear without further guidance how this would work in practice. In any case where there is a breach of sanctions, the likelihood is that there will also have been some degree of breach of regulatory and professional standards. This could mean every case of breach by an institution in the regulated sector stands to be considered by OFSI to have aggravated factors, with possible implications for any enforcement action and the imposition of any penalty.

By way of further example (again with reference to section 2.8), it would be helpful to have guidance on (a) how OFSI would treat the direct provision of funds to an entity owned or controlled by a designated person in circumstances where the entity itself is not designated and the designated person nexus is otherwise unknown at the time funds are provided; and (b) what OFSI understands to constitute circumvention, for instance: would structuring a transaction to avoid the use of GBP (where there is no other UK nexus) constitute circumvention?

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

[REDACTED] members are of the view there is scope for additional clarity in the following respects:

Section 2.11.1 Where the statutory threshold is met, a penalty will be imposed if one of more of the additional criteria listed in that section is present. This includes "...a case nonetheless assessed by OFSI to meet the standard for a serious case using the factors set out at section 2.8". In practice, given the breadth of the factors set out in section 2.8, our view is OFSI will have considerable discretion to impose a monetary penalty and should clarify how they intend to use this discretion.

Section 2.11.1 This section contains conditions by which the penalty threshold is reached. One of the points states "The breach has involved funds or economic resources being made available directly to a designated person. The financial sanctions regimes are designed to prevent this." Confirmation is required on whether the omission of funds being made available indirectly is intentional.

When calculating the percentage of reduction applicable in respect of voluntary disclosure, OFSI states that it is relevant whether the case is "serious" or "most serious". Clarity as to the meaning of "serious" and "most serious" would be helpful. In circumstances where a firm has submitted a voluntary disclosure but a third party has submitted a report on the same issue previously will this have any impact on the penalty to be applied. As stated elsewhere in this response we welcome OFSI's verbal clarification that the benefit of voluntary disclosure will apply to all regardless of who is 'first to disclose'.

On what basis would a firm qualify for a 15% reduction? Is this relevant to the existence of mitigating factors, such as cooperation with OFSI, or is it an automatic reduction?

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Section 2.11.12 How does OFSI assess cooperation throughout an investigation if a person has failed to voluntarily disclose the breach? Is voluntary disclosure essential to obtain any cooperation credit?

Section 2.11.13-18 It is not clear from the guidance whether OFSI is referencing information request powers it already has under statutory instruments or whether the guidance is intended to go beyond existing regulations? If it is the latter what is the legal basis for doing so?

It is also unclear whether only one party may benefit from a voluntary disclosure reduction in respect of the same behaviour. Is it the case that any party, who makes a voluntary disclosure in respect of the behaviour, prior to OFSI opening its investigation, may benefit from the reduction? Regardless, there appears to be potential for something of a "race to disclose" which could jeopardise the materially completeness of reports.

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

[REDACTED] members welcome the approach that parties are rewarded for making a voluntary disclosure to OFSI. But OFSI does need to offer further clarity on the steps parties are required to take when making a voluntary disclosure (e.g. initial notification, followed by a subsequent materially complete report). Clarifying the requirement that disclosures be "materially complete", should avoid parties disclosing before they have conducted sufficient internal investigation of the facts. This is, of course, subject to the points made above, that further guidance is required as to the meaning of "materially complete" and concerns on creating an unintended 'race to disclose' situation.

We would further highlight the following aspects that should be considered and clarified within the guidance:

- Does OFSI assess the timing of the disclosure relative to the breach or the discovery of the breach? It is not clear whether a firm conducting a lookback that unearths an earlier breach will be able to rely upon the voluntary disclosure reduction.
- What would constitute voluntary disclosure at the margins? E.g. in cases where disclosure of a breach is made to OFSI by a third party before the party in breach has had the opportunity to discover and voluntarily disclose its breach, or where voluntary disclosure is made to another regulatory body but not to OFSI. Would the party in breach still be able to benefit from the voluntary disclosure reduction?
- As per section 2.11.10, if confirmation is provided that voluntary disclosure is materially complete, will the reduction still be available if further facts (which were not available at the time of the confirmation) come to light and are disclosed at a later stage?
- Section 2.12, OFSI should make clear in the guidance that representations do not constitute an admission of wrongdoing to ensure firms can be open with OFSI.
- Section 12.12.11, the guidance states that if no representations are made within the 28 calendar days period stated in paragraph 2.12.11, the penalty is finalised and becomes payable. If the person doesn't make representations, does the person lose their right to seek a later Ministerial review? Will there be exceptional circumstances where, for example, new information comes to light after the time limit has expired? If so, can OFSI clarify this and the process?
- The guidance talks about the GBP value which implies funds, but what about economic resources? How are they calculated?

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

One aspect on which further clarity is needed is in relation to the period of time a person has to make representations to OFSI. While section 2.12.12 states that "the person has 28 calendar days to make written representations from the date of our initial letter", section 2.12.2 states that the OFSI letter will "explain that the person is entitled to make representations, and specify how long they have to do so". The latter statement appears to suggest that the period for making representations may not always be 28 days. If this is not the intention of OFSI, we would suggest that the guidance is amended to clarify this point. In addition, we consider that 28 days may not be sufficient time for the party receiving the letter to fully consider its merits, particularly where the case raises complex issues. Therefore, OFSI may wish to offer the ability to extend this deadline in respect of complex cases.

9. Do you understand the guidance on seeking a Ministerial review?

The request for Ministerial review requires "a brief summary of why they seek the review". Given this is a formal appeal, can OFSI clarify in the guidance what is likely to be accepted for a Ministerial Review i.e. what criteria? e.g. specific grounds for appeal will be applied. Clarity is also required regarding the material that should be submitted for a Ministerial Review, including whether this should include the written representations made to OFSI? For instance, confirming what is considered "timely" disclosure, as well as acknowledgement of the practical steps where OFSI will permit voluntary disclosure to be supplemented with additional facts, rather than the current requirement that the submission needs to be "materially complete".

The Payment Service Regulator consultation on the "Draft guidance on our approach to handling applications under sections 56 and 57 FSBRA" carried out Summer 2016 set out the required timeframes for each step of the process, what is required from each party at each step, the criteria for appealing and the criteria for assessing appeals once referred. A similar approach would be helpful for all sectors in this guidance.

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

The process for ministerial review (and the ability to appeal to the Upper Tribunal) appears to be a satisfactory means of challenging the decision to impose a monetary penalty by OFSI. In particular, we welcome a separation of decision-making and review processes.

We would however appreciate further clarity on who determines if OFSI has made a procedural mistake? Is this at OFSI's discretion and against what criteria will this be assessed? Will the penalised person have the right to raise the issue of a potential OFSI's procedural mistake? The guidance should include the process for this. Does this occur in the Ministerial review, during the representation phase, or at any other time a mistake is discovered?

With reference to section 2.12.22 and the mention of internal measures to ensure separation of decision-making and review, what, if any, additional measures do OFSI propose to put in place to: a) provide appropriate transparency; and b) to safeguard that separation is upheld in practice?

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11. Does this guidance clearly explain why and how OFSI will publish information on penalties imposed for breaches of financial sanctions regulations?

While we are generally comfortable with the level of information to be published, as noted above, it is unclear to us whether OFSI will also publish details of actions it takes which fall short of a monetary penalty (for example, the responses set out in section 2.6.1). Clarity on this point would be helpful.

In addition, it would be advantageous if OFSI could publish high level information about the number of breaches investigated by OFSI, the number of cases where no action, enforcement correspondence, or a penalty was imposed (including high level summary of breakdown/totals), referrals for criminal prosecution, the number of cases which benefitted from voluntary disclosure reductions and any trends in the breaches investigated.

We seek clarification on whether the affected entity will have the opportunity to review the proposed publication of any penalties that are imposed by OFSI before it is released into the public domain.

This section should include a statement that "OFSI will consider applicable confidentiality laws, and will consult with the penalised party about their confidentiality obligations before publishing the case summary".

Listed companies may need to notify stock exchanges of any penalty. Will the OFSI work with the company to ensure it can comply with its obligations?

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

[REDACTED] members welcome the efforts to set out OFSI's approach to imposing monetary penalties. We would, however, stress that as currently structured the guidance leaves a number of questions regarding the details of any potential enforcement scenario. While the need to avoid providing excessive detail, so as to avoid telegraphing sanctions evasion tactics to would-be sanctions evaders is understood, it nonetheless would be helpful to have additional guidance on specific scenarios in the form of FAQ responses, and further opportunity for the regulated sector to liaise with OFSI, e.g. via an advisory committee. It is also worth noting that since OFSI will publish its decisions and therefore the basis of the penalty, it would make sense for OSFI to consider giving more clarity in this guidance.

On balance our members view is that the guidance lacks key details regarding the OFSI enforcement approach. Particularly a lack of clarity on the split of responsibilities between OFSI and the FCA, and the meaning of "reasonable cause to suspect". [REDACTED] members have stressed the critical importance of OFSI providing further clarity on how it will co-operate with other regulators in respect of assessing cases, and in determining the value of monetary penalties so as to ensure censures from multiple authorities remain proportionate. In other areas the information only provides a high level description, which limits the extent to which the appropriateness of OFSI's approach can be fully assessed.

The guidance should include a definition of key terms used throughout. Proposed key terms include, but not limited to: "Proportionate", "Fair", "Person" (to include an individual or corporate

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entity), "Serious", "Most Serious", "Reporting Party", "Subject Party" (which might be different than the party submitting the breach to OFSI), "Vexatious" all aligned to the applicable legislation.

We suggest use of defined term "Person" to indicate both natural and legal person that might be considered under this guidance.

Suggest that "Proportionate" is defined to take into consideration firm size, sector, level of regulation (a regulated sector would likely have a more sophisticated compliance approach), enforcement history among other factors.

It should be clear that a term carries the same meaning/definition wherever used in the guidance. For example, the guidance defined "Reasonable" in section 2.11.6, however, it is not clear if this definition applies to earlier reference to "reasonable" in section 2.8.

Generally, the guidance must align with the existing legislation to avoid confusion.

The guidance does not distinguish between the regulated and non-regulated sector. As such, there is significant variance in the interpretation of key elements of the document (e.g. Behaviour, Knowledge, Compliance Standard, Regulatory interaction), limiting its applicability outside the regulated sector.
This also extends to variance in approach between different regulated sectors.