



HM Treasury

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

Consultation response form

Name: [REDACTED]	
Organisation: REDACTED	
<input checked="" type="checkbox"/> Please tick if you are responding on behalf an organisation	
Name of organisation (if applicable) REDACTED	
Address: REDACTED	Telephone: REDACTED
Email: REDACTED	
<p>1. Do these introductory sections give you enough information to understand the scope of the law on monetary penalties? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>What else would be useful?</p> <p>The guidance should make clear whether or not a civil penalty under the new regime is an end to the matter or whether a person who is the subject of a civil penalty could later be prosecuted for a criminal offence arising from the same facts.</p> <p>If a person could be prosecuted for an offence arising from the same facts, the guidance should make clear what credit the person will be given for the civil penalty in the criminal proceedings.</p> <p>The guidance should make clear whether or not information disclosed to the OFSI by a person accused of wrongdoing can subsequently be used in criminal proceedings.</p> <p>The OFSI should be required to make clear at the earliest opportunity, and in any event, before representations are made, its intention to prosecute both a corporate body and individual office holder of that corporate body.</p> <p>We note that paragraph 2.3.1 refers to the right to appeal to the Upper Tribunal. It is not clear what the scope of the availability of appeal will be. Will the appeal have to be by way of Judicial Review such that the penalised person will have to establish that the decision to impose a penalty was illegal, irrational or procedurally improper?</p> <p>We note that paragraph 2.4.1 refers to an offence of failing to comply with a requirement to produce information or an OFSI request for information. This is the most egregious part of the guidance. It is not clear what the process will be for determining objections to disclosure on the grounds of privilege, the right to silence or the right against self-incrimination. This provision should not override a person's fundamental rights.</p>	

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

We do not understand what is meant in paragraph 2.5 about the OFSI's holistic approach to the regime and in particular the suggestion that action will be taken before a law is broken. In a survey of our contacts 75% of respondents agreed that the guidance should make clear that the OFSI does not have the power to impose monetary penalties in anticipation of a sanctions breach.

In a survey of our clients 50% of respondents agreed that information provided by a corporate body should not be made available to individual office holders without giving the corporate body an opportunity to make representations about the proposed disclosure.

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

Yes No

(if yes please explain what below)

The guidance should make clear which office holders at the OFSI have the power to make the decision to impose a financial penalty and which office holders at the OFSI have the power to decide the level of the penalty. Where a penalised person notified of a penalty wishes to make representations in relation to that penalty, the office holder considering those representations should not be the same person who made the original decisions.

Further guidance should be given on the offence of failing to comply with a requirement to produce information or an OFSI request for information. It is not clear what the process will be for determining objections to disclosure on the grounds of privilege, the right to silence or the right against self-incrimination. This provision should not override these fundamental rights.

4. Do you understand our proposed case assessment approach?

Yes No

(if no please explain why below)

Further clarity should be given on the jurisdiction of the OFSI particularly in relation to the actions of a UK subsidiary of a UK parent. What % shareholding must the UK have in an overseas subsidiary for the overseas subsidiary to be within the OFSI's jurisdiction? Is the level of control relevant? Does the shareholding have to be held directly by the UK entity or is an indirect shareholding sufficient? How will joint ventures be dealt with?

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

The guidance suggests that cases involving circumvention of sanctions will always be treated as the most serious cases. Where a company is being penalised, a distinction should be made between the attempts of an employee to circumvent sanctions and those of the directing mind and will of the company. Only the latter should be relevant.

In cases where there has been a course of dealing between the penalised person and the sanctioned entity prior to sanctions coming into force, the penalised person should be treated more leniently.

There should be a defence for any person who can demonstrate that they had in place adequate procedures to prevent breaches of sanctions.

We note that under the heading "Severity" the OFSI states that it may still regard as severe an indirect provision of resources the it thinks the breaching party could have discovered in advance through "common due diligence or know-your customer processes". The OFSI should state what due diligence processes it would expect a company to carry out, particularly where the company is high in the supply chain.

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

(if no please explain why below)

It is not clear whether the approach to determining the level of penalty will be taken consecutively against each alleged wrongdoer or if the overall penalty would be split between wrongdoers. In our view the level of penalty recovered by the OFSI should be apportioned between wrongdoers so as not to enable double recovery.

It is not clear how the value of the breach will be calculated – will this be by reference to the value of the funds or economic resources made available in breach of sanctions, the profit to be gained from the breach, the turnover of the contract in the context of which the breach took place? 100% of respondents in our survey of clients agreed that a consistent approach should be taken to valuing the breach across different sanctions regimes.

The proposal to impose a penalty on a person accused of wrongdoing for failing to provide information is the most egregious part of the guidance on the OFSI's processes. It appears to ride a coach and horses through a citizen's fundamental rights when accused of a crime. Insufficient information is given on the process for determining whether a fine for failure to provide information will be imposed where the penalised party objects to disclosure on the basis that the information is legally privileged or the penalised party (as the alleged wrongdoer) relies on their right to silence or their rights against self-incrimination. Further, the guidance that the process for determining the level of the fine for failure to provide information is the same as that for other sanctions breaches is misconceived unless the starting point for all such penalties is intended to be the wholly disproportionate threshold of £1m.

The following safeguards should be introduced when the OFSI is considering whether a penalty is to be imposed for failing to provide information:

- The fines for information breaches should be considerably lower than those for substantive breaches (e.g. in the region of a maximum of £10,000)
- The OFSI should not be entitled to impose a fine in circumstances where there is a claim to legal privilege in the information and that claim is more than frivolous.
- When a person is entitled to withhold disclosure pursuant to their right to silence or their right against self-incrimination, the OFSI must not impose a penalty for breach of an obligation to provide information.

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

A discount for voluntary disclose is welcomed. However to encourage self-reporting the discounts should be applied after establishing what a reasonable and proportionate penalty would be. To apply the discount before this stage of the process is to render the level of discount immaterial. Further, the level of discount for self-reporting, even in the most serious cases should be greater than the discount available for a guilty plea.

The following safeguards should be implemented to protect persons who self-report:

- Limitations on how the OFSI can use the disclosed material
- The terms of all press releases concerning the penalty should be agreed by the fined party and the OFSI prior to publication
- The civil penalty should be an alternative to a criminal penalty for the same behaviour

As with Deferred Prosecution Agreements, discounts of 50% should be available to persons who did not self-report but who did cooperate fully with the OFSI after the OFSI became aware of the breach.

<p>8. Is the process for imposing a penalty and making representations clear from this guidance? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>(if no please explain why below) The following factors should be taken into account when assessing the level of the fine:</p> <ul style="list-style-type: none"> <input type="checkbox"/> The impact of the fine on the ability of the company to continue in business <input type="checkbox"/> The impact of the fine on innocent employees <input type="checkbox"/> The existence of adequate procedures to prevent sanctions breaches <input type="checkbox"/> The period of time over which the breach occurred <input type="checkbox"/> The level of due diligence carried out on the recipient of the funds or economic resources <input type="checkbox"/> The history of dealing between the parties <input type="checkbox"/> The industry of the wrongdoer
<p>9. Do you understand the guidance on seeking a Ministerial review? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>10. What are your views on the process for seeking a Ministerial review? A person should be entitled to make new representations to the Minister not previously made to the OFSI. Such a safeguard is essential in circumstances where a person is being fined without a civil or criminal trial. The guidance should require the OFSI's report to the Minister to be disclosed to the person who is being penalised.</p>
<p>11. Does this guidance clearly explain why and how OFSI will publish information on penalties imposed for breaches of financial sanctions regulations? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>What are your views on the level of information OFSI will publish? The guidance states that the OFSI will normally publish a case summary at least 28 days after it has issued the monetary penalty. This would clearly be inappropriate where an appeal to a Minister has been made and the time limit for bringing an appeal to the Upper Tribunal has not yet expired.</p> <p>To encourage self-reporting it is strongly suggested that a person who self-reports should be given the opportunity to agree the form of case summary with the OFSI and the timing of its publication.</p>
<p>12. Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties? Further clarification is required in line with the comments above.</p>
<p>Please e-mail this form to: OFSIConsultation@hmtreasury.gsi.gov.uk</p>

Or post to OFSI Consultation, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ