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HM Treasury

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

Consultation response form

Name:
Organisation:
☒ Please tick if you are responding on behalf an organisation
Name of organisation (if applicable)
Address: Email: Telephone:

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?

The introduction provides some useful background to the legislation, but the critical question is what comprises 'reasonable cause to suspect' as set out in s131(1)(b) of the 2017 Act. Without understanding precisely what is meant by this phrase, businesses will not be in a position to understand the full scope of the law.

I is concerned that the short timetable for likely implementation of the Act may affect the OFSI's ability to publish fully workable guidance by the deadline of April 2017. It is unclear from the introduction and guidance whether OFSI intends that there will be a 'grace period' following initial implementation, where OFSI will promote the guidance and enable compliance, without issuing monetary penalties. We would welcome clarity in this regard.

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

welcomes the holistic approach to compliance that has been proposed by the OFSI. This type of approach should generally raise awareness levels of the OFSI, the financial sanctions regime and the law on civil monetary penalties.

OFSI's stated compliance and enforcement approach is to promote, enable, respond and change. has seen no evidence that the represents a specific 'risk area' in relation to breaches of financial sanctions and we would welcome further clarity from the OFSI in this regard.

view is that, initially, the OFSI should consult further with the and, in particular, recognise the different business models in operation, which may involve lengthy distribution chains between the business and the ultimate beneficiary of funds paid under contract.

is happy to work with the OFSI to try and facilitate discussions with Members concerning examples of specific issues which may arise in relation to financial sanctions in the sector and to understand potential costs of compliance.

In order to enable compliance, there needs to be clarity on the due diligence process expected from businesses before the OFSI begins enforcing financial penalties.

For example, in a situation where a "designated person" is listed under one country but could own businesses in other (non-sanctioned) destinations, how would, say, be expected to identify the sanctioned benefical ownership of a company in a destination that is not on the sanctions list? How does such a scenario fit within OFSI's objective of making it easier to comply with financial sanctions and minimising the opportunities for non-compliance?

There are also scenarios where company may purchase services via a third party company, for example with no opportunity to control or be aware of the contracts which sit behind the through to the ultimate supplier.

Taking into account our examples, we would call on OFSI to consider whether the same compliance and enforcement approach would be appropriate for .

We would urge the OFSI to develop some guidance specific

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

   (if yes please explain what below)

As part of the 'promote' element of the compliance and enforcement approach, is also calling on the OFSI to publish anonymised examples of issues in the which may lead to, or have led to, non-compliance, including how OFSI will address such issues under the new regime. These case studies could then be used to inform and advise of risk areas they should be aware of,

making it easier for those companies to comply with the guidance, and put in place appropriate compliance and risk management infrastructures.

Again, we would reiterate that has seen no evidence to suggest that the is a risk area in relation to breaches of financial sanctions, and would welcome clarity from the OFSI in this regard.

4. Do you understand our proposed case assessment approach?

☐ Yes ☒ No

(if no please explain why below)

understands the broad process that OFSI has proposed but does not consider that the draft guidance goes far enough towards supporting businesses which wish to comply. Please see further comments on case assessment approach below in response to question 5.

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

broadly welcomes the information provided within the case assessment section of the guidance (Part 3) and understands that the OFSI wishes to guide businesses in how they would assess potential breaches.

However, it is difficult to understand how paragraph 2.6 of the guidance reflects the intention to enable compliance as set out in paragraph 2.5.1.

believes the key area for businesses will be to understand OFSI's approach to interpreting 'reasonable cause to suspect' in Section 131(1)(b) of the 2017 Act.

The current guidance at paragraph 2.7.2 does not offer sufficient clarity and businesses reading this would not be in a position to understand what is required from them in order to comply.

The heading between 2.7.2 and 2.7.3 refers to 'reasonable suspicion' rather than 'reasonable cause to suspect'. To avoid additional confusion, recommends that the wording in the heading should mirror that used in the legislation. i.e. 'reasonable cause to suspect'.

Paragraph 2.7.6 also requires further clarification. In the event that any activity falls outside the scope of activity for which the Treasury may impose a monetary penalty, what is the Treasury's legal authority for taking other action? The guidance should identify where this is found and set out the other actions which may be appropriate in those circumstances.

In the section on severity (under case factors, paragraph 2.8), reference is made to 'common due diligence' or 'know your customer' processes. However, in the following paragraph OFSI clearly recognises that each sector has different compliance systems and processes from others, because of the kind of work they do. There is therefore no shared due diligence / know your customer processes between sectors. would strongly encourage the use of sector-specific guidance, which clarifies

the OFSI's position in relation to expected due diligence processes in specific scenarios relevant to

In relation to the publication of changes to the case assessment process, would welcome clarification of where this information would be published and, depending on the changes, whether any grace period would be permitted for compliance with the updated process and, if so, how long this grace period would be.

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)

Please note cross-referencing in paragraph 2.11.2 should refer to section 2.11.18.

Although welcomes the effort to explain the process behind calculating the penalty, businesses would not be in a position to understand from the guidance, for example, what would be 'reasonable' in terms of a baseline penalty in any specific scenario. It would be helpful to publish case studies to illustrate the interpretation of 'reasonable' and 'proportionate' with reference to the case factors which were considered in each example.

Paragraph 2.11.7 states that a 50% reduction would be made in the event of voluntary disclosure in "serious" cases, whereas a reduction of 30% would be made in "most serious" cases. Are these terms defined within the 2017 Act? If not, the guidance should be clear on how a case could be judged to fall within these categories. And what would happen in a case which was neither deemed serious, nor most serious, for example, a technical breach with no significant aggravating case factors?

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

welcomes the general approach to recognising voluntary disclosure as a sign of co-operation and good faith. However, clarity is needed, particularly in relation to the categorisation of cases as "serious" and "most serious" and other cases which might fall outside these categories (where it is presently unclear whether the business would gain any benefit from voluntary disclosure).

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

☐ Yes ☒ No

(if no please explain why below)

The guidance is relatively clear, although some amendments would be useful:

2.12.11 - it should be clarified that permission for an extension would not be unreasonably withheld

2.12.14 - it should be clarified that, in circumstances where OFSI requires an extension of time beyond 28 calendar days, they would notifiy the person of the reason for seeking an extension and give an estimate of expected reponse time.

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

The guidance is relatively clear, although some clarification would be useful.

Note that the cross-referencing in paragraph 2.12.18 should refer to paragraph 2.13.

Paragraph 2.12.20 states that the Ministerial review will 'not normally' be a way of introducing new material. It would be helpful to clarify what this means in practice.

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

does not have any views on the process for seeking a Ministerial review

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?

believes the guidance requires clarification that publication will only take place where a monetary penalty has been imposed (paragraph 2.17.2).

understands the deterrent effect of publication, but notes this could have a significant impact on the reputation and goodwill associated with a business and suggests it should therefore be used very carefully. S134(2) of the Act states that the Treasury must publish reports, but does not state any requirements for the content of the report, which allows the OFSI discretion to consider the potential harm to any business of publishing the information set out at 2.17.2 in every case.

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

The guidance is welcomed in setting out some background to the OFSI's proposed approach to imposing monetary penalties. As noted above, welcomes OFSI's aims for transparency and to ensure that financial sanctions are properly understood but notes, as above, that the guidance requires clarification in order to be useful to .

The development of a guidance specific to the would assist in understanding their legal obligations under the 2017 Act.

We call on the OFSI to provide any evidence it may have identifying the as a risk area. Case studies of issues that may lead to or have led to non-compliance, as well as how OFSI will address these

issues under the new regime, are useful for informing and advising of potential risk areas. We call on the OFSI to consider including these case studies in the updated guidance. Finally, have raised concerns over the lack of clarity on what constitutes a "reasonable cause to suspect". We call on the OFSI to specify their expectations in relation to this key area of the legislation with a sector specific guidance.
Please e-mail this form to: OFSIConsultation@hmtreasury.gsi.gov.uk

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