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

ICAEW welcomes the opportunity to comment on the *The process for imposing monetary penalties for breaches of financial sanctions: consultation* published by HM Treasury on 5 December 2016, a copy of which is available from this link.

Given a consultation period of less than 12 weeks, there may be limitations on the ability to draw valid conclusions from the exercise. We draw attention to government guidance regarding consultations https://www.gov.uk/government/publications/consultation-principles-guidance

This ICAEW response of 26 January 2017 reflects consultation with the Business Law Committee (BLC) and its Money Laundering Sub Committee (MLSC), which include representatives from public practice and the business community. The BLC is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies. The MLSC Committee is responsible for ICAEW policy on Anti-Money Laundering and related matters.

The Institute of Chartered Accountants in England and Wales
Chartered Accountants' Hall
Moorgate Place
London
EC2R 6EA UK

T +44 (0)20 7920 8100
F +44 (0)20 7920 0547
DX 877 London/City
icaew.com

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 147,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

For more information, please contact representations@icaew.com

icaew.com

MAJOR POINTS

1. It is not clear what the financial sanctions breaches are that the framework is trying to resolve. A mechanism therefore seems to have been developed without identifying the scale of the problem. The evidence base to support the regime should be published in the form of case studies.

2. It is a fundamental principle of our legal system that a clear breach of law is established before assessing mens rea behind the breach. In the absence of this clear guidance is required as to how liability will be assessed, particularly in the case of an inadvertent breach.

3. The regime could focus more on preventative education and advice. There should therefore be some facility to liaise with OFSI in cases that are less clear cut. OFAC (Office of Foreign Assets Control) in the US allows such a facility, as well as publishing FAQs. There should also be the opportunity to make representations in person.

4. OFSI should make it clear what is meant by 'public interest' means in the context of sanctions breaches and enforcement.

5. It is not clear why fresh material cannot be introduced at Ministerial review nor representations made in person at tribunal stage.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do these introductory sections give you enough information to understand the scope of the law on monetary penalties? What else would be useful?

6. Our key concern is that the law states that a breach only has to be determined on the balance of probabilities and only then is knowledge or reasonable grounds for suspicion sought to be established. Should a clear breach of the law not be established before assessing mens rea? The prevalence of judgement in the process suggests that the law is or has been unclear. We would like to see clear guidance on how such judgement might apply to an individual faced with a set of complex facts and rules and trying to do the right thing.

7. We believe that supplementary guidance in the form of alerts, FAQs and case studies would be extremely helpful. By way of example, the equivalent US regulatory body the Office of Foreign Assets Control (OFAC) has published a wide range of FAQs and other supplementary material. Some of the money recovered from penalties could be used to fund such an education agenda.

8. Further guidance on the definitions of 'UK Nexus' and 'officer' (possibly with a list of examples) would be helpful.

Q2: What are your views on OFSI's compliance and enforcement approach?

9. We understand that discretion is to be used to determine whether a breach attracts a monetary penalty, criminal investigation or onward referral and the distinction will be based on a number of factors. It would appear that having adequate procedures to identify and address sanctions breaches would be a mitigating factor. It would therefore be useful to provide further guidance as to what OFSI regards as 'developed compliance systems and processes' and the extent to which their presence would impact on the compliance and enforcement approach, possibly along the same lines as the Ministry of Justice Bribery Act guidance.

10. Of particular concern is that application to small practitioners who may not necessarily have expensive or complex systems to deal with sanctions compliance. Government guidance on, for example, the concept of inadvertent breaches and dealing with false 'positives', would be most welcome. We feel that smaller firms are more vulnerable in these areas.

Q3: Is there anything else you would expect a compliance model to tackle?

11. The model should have education and advice, rather than penalisation, at its heart. The ability to liaise with HMT would therefore be an important addition to the regime. Under the current proposals it appears that representations can only be made in response to penalties being issued, but not prior. There should therefore be some facility to liaise in cases that are less clear cut. OFAC allows such a facility. This is especially important where the enquirer is aware of a breach that might take place if a particular service is provided.

12. By way of example a UK firm was appointed as administrators to a company with assets in a sanctioned country. The firm had an obligation to creditors to maximise their return. Whilst there was no desire to breach sanctions the firm equally had no control over what had happened before it was appointed. It was able to work out what payments it thought it could accept for various assets and put that to OFAC who were prepared to have open dialogue around what they would accept as appropriate. This was efficient for all involved as creditors (including the tax authorities) were paid without the firm worrying about breaching sanctions. The UK stance seems to be to not comment, hence the assets sit idle.

Q4: Do you understand our proposed case assessment approach?

13. Paragraph 2.6 onwards makes continuing references to potential breaches. It is not clear whether that means a breach that may have happened but is yet to be assessed or a breach that might happen in the future. This should be made clear.

Q5: What are your views on our proposed cases assessment approach?

14. The phrase ‘public interest’ features prominently in both the ‘case factors’ and ‘decision to impose a penalty’ sections of the consultation document. A framework that lays down what the public interest means in the context of sanctions breaches is therefore required as the notion, whilst important, is somewhat abstract and associated with the public benefit, rather than matters in which the public is interested. It is a topic in which ICAEW has taken great interest as our charter of incorporation refers to the public benefit as the core rationale for the Institute to be brought into existence. We believe standards that reflect the public interest need to respond to changes in social and commercial norms, and this might be particularly challenging with this regime. We have proposed a framework of matters to consider when justifying an action as being in the public interest. Using such a framework will allow those advocating an action in the public interest to understand what they mean, and, if explained, will allow those assessing the action or proposal to determine whether they can support the measure as being in the public interest. We hope this is useful as a model that OFSI could use to determine what ‘public interest’ means in the context of sanctions and case assessment.

15. A flowchart for decision processes would also make the guidance more helpful, especially when considering case factors such as professional facilitation. Continued engagement with a client does not necessarily equate to a sanctions breach. For example, an auditor would not facilitate a sanctions breach because the service is not one of representation or advocacy, and it may not be feasible to resign from a statutory audit. The correct course of action would therefore be disclosure. In defining professional facilitation it is important to distinguish between services that actively assist a breach, and services during the provision of which a professional happens to discover a potential breach. A business could also be misled by an unprofessional adviser.

16. The guidance could also discuss the distinction between complicity and simple mistake/honest error, and the effect on case assessment, in more detail. A good example of a graduated approach to penalties is the UK tax penalty regime.

17. We would like to re-emphasise the importance of a pre-discovery assessment or disclosure process to provide clarity and consistency in the case assessment process, as well as certainty for all parties involved in the case assessment process.

Q6: Does this guidance give you enough information to help you understand how a penalty is calculated?

18. The penalty matrix on page 17 could be clearer. Our understanding from the guidance is that various interacting factors are considered to determine cases that are 'serious' or 'most serious'. At present it appears as if a breach classified as 'most serious' would attract no mitigating factors except voluntary disclosure. The matrix therefore makes the penalty assessment process appear considerably more 'black and white' than the wording in paragraph 2.8 would suggest. The only box that appears to allow any level of flexibility is the most serious box. The penalty matrix should therefore allow for mitigating factors to reduce starting point, or aggravating factors to increase it.

19. This section of the draft guidance also appears to contain the first use of the terms 'serious' and 'most serious'. We understand that if a breach is deemed not to be serious then it would not enter the penalty regime. This could be clearer, as could the definitions of, and distinctions between, 'serious' and 'most serious'

Q7: OFSI will reduce the level of penalty if there is voluntary disclosure. What are your views on OFSI's approach to this?

20. This would seem to be a reasonable approach and consistent with other economic crime frameworks. That said, unintended consequences may arise as defendants might not make the voluntary disclosure until the very final opportunity. There is a reference to 'prompt' in the guidance, but that is not a word with a legal definition and there is the added complication of when a defendant should have known of the breach.

Q8: Is the process for imposing a penalty and making representations clear from this guidance?

21. We believe the inability to make representations in person creates a costly legal burden that will have a disproportionate impact on small business. Written representations make it far more difficult for an individual to demonstrate attitude, approach and knowledge of the issues.

Q9: Do you understand the guidance on seeking a Ministerial review?

22. Paragraph 2.12.25 is misleading as it fails to mention the further step of seeking review before a tribunal.

Q10: What are your views on the process for seeking a Ministerial review?

23. We note that the ministerial review stage precedes the tribunal stage. This seems somewhat unusual and impractical, as well as burdensome for ministers. The guidance fails to explain the rationale for this approach. Furthermore there is no opportunity for fresh material to be introduced or representations in person. Whilst there is an opportunity to progress to appeal before an Upper Tribunal, it is likely that a small business could not afford to take a matter this far, this exacerbates the risk that smaller firms are more likely to settle without admission of guilt and be left with an unanswered breach on their record. This could have a significant impact on reputation and ability to contract with many organisations.

24. In paragraph 2.12.22 it is unclear how wide the Ministerial discretion to speak to officials and seek legal advice is, nor which officials might be spoken to. Questions therefore remain around subject matter expertise and independence within the process.

Q11: Does this guidance clearly explain why and how OFSI will publish information on penalties imposed for breaches of financial sanctions regulations? What are your views on the level of information OFSI will publish?

25. We regard compliance lessons as the most important element of any case summary.

Q12: Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties?

26. It is not clear from what the financial sanctions breaches are that the framework is trying to resolve. A mechanism therefore seems to have been developed without identifying the scale of the problem. If there is indeed an evidence base to support the regime then it would be helpful to publish this, possibly in the form of case studies.