

Evolution of UK enforcement strategies in OFSI updated monetary penalty guidance for financial sanctions breaches

Issue	Substantive Changes	Analysis
<p><u>Jurisdiction</u></p>	<p><u>Chapter 3: Case Assessment</u></p> <ul style="list-style-type: none"> 2018 Guidance, paragraph 3.8: “[OFSI] <i>will not artificially bring something within UK authority that does not naturally come under it.</i>” Removed in 2021 Guidance. 	<p>Although the practical implications remain to be seen, this change may signify OFSI’s intent to adopt a more expansive approach to jurisdiction going forward. It remains to be seen whether enforcement follows in cases where significant aspects of the relevant conduct take place outside of the United Kingdom but where, for example, funds are routed via UK institutions.</p>
<p><u>Penalties</u></p>	<p><u>Chapter 1: Introduction</u></p> <ul style="list-style-type: none"> 2018 Guidance, paragraph 1.22: OFSI states it “<i>will not normally impose a penalty on any person who has already been prosecuted.</i>” Removed in the 2021 Guidance. <p><u>Chapter 4: The Penalty Process</u></p> <ul style="list-style-type: none"> 2018 Guidance, paragraph 4.21: OFSI provides a non-exhaustive list of circumstances in which it will “<i>reserve the right not to impose a penalty</i>”, namely, where a penalty would have no meaningful effect, would be perverse, or it would not be in the public interest to do so. Removed in the 2021 Guidance. 2021 Guidance, paragraph 4.8: Clarification that a proportionate penalty requires a relationship “<i>between the value of the proposed penalty and a holistic assessment of all the other factors present.</i>” Includes further clarification that such a penalty should not “<i>necessarily be either a specific percentage or multiple of the breach amount</i>”. <p><u>Chapter 9: Publication of Penalty Details</u></p> <ul style="list-style-type: none"> 2021 Guidance, paragraph 9.3: Clarifies the value of the breach in the summary published as the “<i>aggregated GBP value of the transactions which are in breach</i>”. 2021 Guidance, paragraph 9.9: Adds that monetary penalty reports will be published at https://www.gov.uk/government/collections/enforcement-of-financial-sanctions. 	<p>These changes provide OFSI with greater flexibility to assess baseline penalties and indicate a greater focus on a more ‘holistic assessment’ of the facts of each case. However, it remains to be seen if a more subjective approach to penalties may come under criticism for lacking certainty that other regimes such as OFAC provide, and whether there will be any corresponding impact on self-disclosure.</p> <p>Unsurprisingly, OFSI has also opted to retain a fairly broad discretion on when it may choose to impose a penalty.</p>
<p><u>Case Factors & Assessment Process</u></p>	<p><u>Chapter 3: Case Assessment</u></p> <ul style="list-style-type: none"> 2018 Guidance, paragraph 3.16: Aggravating factors – OFSI is “<i>likely to treat a case that directly and openly involves a</i> 	<p>The significant updates to the case assessment process and “case factors” indicate a shift</p>

	<p><i>designated person more seriously</i>" than one that <i>"does not make funds or economic resources available to a designated person"</i>. Removed in 2021 Guidance.</p> <ul style="list-style-type: none"> • 2018 Guidance, paragraph 3.22: Mitigation if a <i>"person simply falls below a high standard"</i> as the only distinguishing factor and if a <i>"person has acted swiftly to remedy the case of the breach"</i>. Removed in 2021 Guidance. • 2018 Guidance, paragraph 3.20: Requirement that <i>"A person should make their own assessment of what is reasonable and necessary for their particular circumstances"</i>. Removed in 2021 Guidance with inclusion of <i>"kind of work"</i> done and <i>"exposure to financial sanctions risk"</i> as factors taken into account. • 2018 Guidance, paragraph 3.45: <i>"OFSI follows the government's strategy for sanctions...as it is set from time to time."</i> Removed in 2021 Guidance. • 2021 Guidance, paragraph 3.2: OFSI adds that measures may be imposed on <i>"potential"</i> breaches and that it <i>"may undertake several of"</i> such measures. • 2021 Guidance, paragraph 3.10: Clarifies that where a person does not have reasonable cause to suspect he or she was in breach, OFSI <i>"will not"</i> (instead of <i>"cannot"</i>) impose a monetary penalty and adds that OFSI may opt for <i>"more proportionate remedial action"</i>. • 2021 Guidance, paragraph 3.46: 'most serious' type cases involve <i>"particularly poor, negligent or intentional conduct"</i> instead of <i>"blatant flouting of the law"</i> in the 2018 Guidance. 	<p>by OFSI toward a more expansive and flexible approach, but it remains to be seen if these changes will significantly affect the range of penalties that OFSI may impose in future cases.</p>
<p><u>Self Reporting</u></p>	<p><u>Chapter 3: Case Assessment</u></p> <ul style="list-style-type: none"> • 2018 Guidance, paragraph 3.34: Required voluntary disclosures <i>"to be materially complete on all relevant factors that evidence the facts."</i> 2021 Guidance, paragraph 3.33: Requires disclosures to <i>"include all evidence relating to all the facts"</i>. • 2018 Guidance, paragraph 3.34: OFSI takes seriously any <i>"disclosures made in bad faith."</i> 2021 Guidance removes this and substitutes with disclosures that <i>"did not include relevant information"</i>. • 2021 Guidance, paragraph 3.30: Introduces mitigating factor that OFSI <i>"values co-operation throughout its investigations"</i>. • 2021 Guidance, paragraph 4.10: Retains that <i>"voluntary disclosure reduction"</i> may be applied but introduces that the person must have <i>"made a complete disclosure"</i>. 	<p>These changes indicate the evolution of OFSI to echo the stance many other regulatory bodies take to encourage self-reporting and cooperation. The changes also curb any attempts to disclose the bare minimum of relevant information to avoid enforcement. It also demonstrates that OFSI expects disclosures to be full and frank, and that firms should ensure that they gather all relevant information available at that time prior to self-reporting. OFSI expects this cooperation to continue throughout an investigation.</p>

APPENDIX

<u>Ministerial Review</u>	<u>Chapter 6: The Right of Ministerial Review</u> <ul style="list-style-type: none"> 2021 Guidance, paragraph 6.3: Time period for requesting ministerial review increased from 28 calendar days to 28 working days and further extension may be granted in “<i>exceptional circumstances</i>” to be considered on a “<i>case by case basis</i>”. 2021 Guidance, paragraph 6.9: Time period for HM Treasury to conclude ministerial reviews increased from “<i>within 28 calendar days</i>” in 2018 Guidance to “<i>2 months</i>”. 	Increased flexibility on the timeline to request and conclude a ministerial review.
<u>Time Frame</u>	Global change extending most time frames in the 2018 Guidance from 28 calendar days to 28 working days.	