

Money Laundering Regulations 2007:

Interim penalty policy

May 2011 (updated September 2011)

OFT1271

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1 INTRODUCTION

- 1.1 The Money Laundering Regulations cover businesses at a high risk of being used for money laundering and terrorist financing and place requirements on those business that are designed to protect them from being used for those purposes. The Office of Fair Trading (OFT) is required effectively to supervise businesses carrying on estate agency work¹ or acting as a consumer credit financial institution² (CCFI) and ensure that they comply with the Regulations. Sanctions for non compliance include prosecution as well as the imposition of civil financial penalties.
- 1.2 The OFT launched a consultation on its future supervisory approach under the Regulations in February 2010. This included a section on the way the OFT will exercise its power to impose civil financial penalties. Responses to the consultation were published in December 2010.³
- 1.3 In the consultation the OFT stated its preference for a case by case approach to penalties for breaches of the Regulations but stated that some offences, such as trading whist unregistered, would lend themselves to a fixed penalty type approach. Respondents in general supported this approach.
- 1.4 This interim penalty policy has been developed in line with those responses and pending the development and implementation of a full policy with further targeted consultation with businesses and business representatives.

¹ Estate agency work as defined by section 1 of the Estate Agents Act 1979.

² Those businesses engaged in consumer credit lending requiring a standard category A consumer credit licence which are **not** authorised by the Financial Services Authority (FSA) or supervised by HM Revenue and Customs (HMRC) as a money service business.

³ www.offt.gov.uk/shared_offt/consultations/oft1157res.pdf

- 1.5 The Regulations require that a CCFI or business carrying on estate agency work:
- does not carry on the business in question unless it is included in the register maintained by the OFT, and
 - complies with the requirements of the Regulations which cover:
 - procedures to verify the identify of customers on entering into a business relationship or transaction and to carry out ongoing monitoring during the business relationship
 - record keeping
 - staff training in the relevant procedures and law
 - the appointment of a nominated officer whose role includes reporting to the Serious Organised Crime Agency (SOCA) suspicions of money laundering activity
 - putting in place and the maintenance of policies and procedures covering the above requirements.
- 1.6 The OFT has the power to impose a civil penalty if there is a failure to meet these requirements. In addition, a person who fails to comply with these requirements commits an offence and may be liable to imprisonment for up to two years and/or an unlimited fine. Parts 2 and 3 give details of how a civil penalty will be calculated.

2 IMPOSING A FINANCIAL PENALTY

2.1 The OFT's power to impose penalties for non compliance⁴ allows it to set a penalty of such amount as it considers 'appropriate' and goes on to say that 'appropriate' means effective, proportionate and dissuasive.

2.2 In applying a penalty the OFT will act in accordance with its published AML Enforcement Principles⁵ and its published approach to applying penalties more generally.⁶

2.3 Before a financial penalty is applied the OFT will issue a formal notice to the business proposing the imposition of a penalty and stating the amount. The formal notice will contain the following information:

- a statement of the proposal to impose a financial penalty
- the reasons for imposing the penalty
- the amount of the proposed penalty including details of how it has been calculated and a copy of this policy
- an invitation to submit representations to the OFT within 28 days, and
- information on how to make representations.

2.4 An OFT Adjudicator will consider representations, make the decision on whether to apply a penalty, and the amount of that penalty, based on the information contained in the notice, and any representations. Their decision will then be given in writing and give notice of:

- the decision not to impose a penalty, or

⁴ Regulation 42

⁵ www.offt.gov.uk/shared_offt/business_leaflets/general/oft1094.pdf

⁶ www.offt.gov.uk/shared_offt/AML/penalty-statement

- the decision to impose a penalty, giving details of the amount, the reasons for the decision and the right to appeal.

2.5 Any appeal against the Adjudicators decision will be heard by the First-tier Tribunal (Consumer Credit). Your rights of appeal, and the procedures for doing so, are explained on the Tribunal website: www.consumercreditappeals.tribunals.gov.uk.

The First-tier Tribunal (Consumer Credit) can be contacted at:

HM Courts & Tribunals Service
First-tier Tribunal (Consumer Credit)
General Regulatory Chamber
PO Box 9300
Leicester LE1 8DJ
Telephone: 0300 123 4504
E-mail: consumercreditappeals@tribunals.gsi.gov.uk

3 IMPOSING A FINANCIAL PENALTY FOR TRADING WHILST UNREGISTERED

3.1 The OFT will:

- **provide advice and information:** to business on when and how to register primarily through its website at www.offt.gov.uk/registration.
- **issue a written warning:** if a business is found to be carrying on business as an estate agent or CCFI whilst unregistered, it will be issued with a written warning advising that continuing to do so will lead to further action by the OFT. The business will be given a period of 21 days to apply for registration, or to provide a substantive response detailing why the business is not required to register with the OFT
- **issue a formal notice:** if the business fails to apply for registration within the specified period, or provide a response which raises substantive issues as to whether it is required to register, the OFT will issue a formal notice to the business proposing the imposition of a financial penalty and stating the amount.

Penalty calculation

3.2 Any penalty imposed must be effective, proportionate and dissuasive. The OFT has decided, after taking into account responses received from the recent consultation, that it is appropriate to set a financial penalty at **a starting point of £2,000** for this breach of the Regulations.

3.3 **Step 1 – Adjustment for size of business:** The penalty which each business pays is adjusted upwards from the starting point of £2,000 to take account of the size of the business. The size of business measured is that relevant to the supervised market not global size. A sum of £1,000 for each additional premise will be added to the £2,000 starting point to calculate the base penalty rate for each business.

Examples:

- The financial penalty for a business with one premise would be £2,000.
- The financial penalty for a business with two premises would be £3,000.
- The financial penalty for a business with five premises would be £6,000.
- The financial penalty for a business with 50 premises would be £51,000.

3.4 **Step 2 – Adjustment for aggravating and mitigating factors:** The base penalty rate may be increased to reflect aggravating factors which may include the fact that previous action has been taken against the business or other undertakings in the same group or that such businesses have been subject to penalties previously. Mitigating factors advanced by the business will be considered and could possibly result in a reduction. However, the OFT does not currently anticipate any circumstances that would warrant a reduction in the financial penalty, as businesses will have been given a reasonable opportunity to apply for registration in advance of a penalty being imposed. In particular, they will have been given a 21-day grace period described at paragraph 3.1 above.

4 IMPOSING A FINANCIAL PENALTY FOR OTHER BREACHES OF THE REGULATIONS

4.1 The OFT has adopted a four step process for setting financial penalties for breaches of the Regulations other than for trading whilst unregistered. The penalty to be applied will be assessed on a case by case basis using these steps as a guide. These are:

step 1 – deciding percentage of relevant turnover as a penalty

step 2 – adjustment for duration of non compliance

step 3 – adjustment for aggravating and/or mitigating factors

step 4 – consideration of whether the level of penalty is appropriate.

4.2 These steps are broadly consistent with the approaches adopted by fellow supervisors such as the Financial Services Authority (FSA) and HM Revenue and Customs (HMRC) and takes into account the OFT's own penalty setting regime under the Competition Act 1998.

Relevant turnover

4.3 In order to embark on step one of the process 'relevant turnover' has to be determined.

4.4 Turnover itself is the revenue received or accrued during a given period, for consumer credit lenders turnover is the revenue from the credit lending activity, for example – this may be the interest, charges and fees earned on transactions but would not include repayment of the principal amount loaned.

4.5 'Relevant turnover' arises from business activity covered by the Regulations within the UK market. For businesses supervised by the OFT this will be:

- estate agency as defined in section 1 of the Estate Agents Act 1979,⁷ and/or
- category A consumer credit lending⁸ carried out by lenders that are not authorised by the FSA or registered with HMRC as a money service business.

4.6 The OFT will clarify 'relevant turnover' in each case as appropriate. The CCFI sector in particular contains many different business models and 'relevant turnover' will need to be assessed in the light of these different models and the circumstances of the individual case. In addition, wherever possible the AML team will obtain from the business its assessment of its turnover.

4.7 The OFT preference is to use actual figures for 'relevant turnover' for the period of non compliance. Where the OFT cannot identify the total period of non compliance and/or turnover figures for that period it will use the best available proxy.

Step One - Starting Point (applicable percentage of turnover)

4.8 In order to apply an appropriate penalty, a judgement has to be made as to the seriousness of the breaches of the Regulations.

4.9 In the absence of a statutory cap on penalty levels the OFT will use a penalty scale of up to 15 per cent of the relevant turnover of the business to reflect the seriousness of the breaches uncovered. The table below shows the factors that may be taken into account in deciding upon the relevant penalty level.

⁷ An estate agent may carry on estate agency work, auction real property and livestock and provide estate management services. In such cases the relevant turnover would arise only from the estate agency work and real property auctions as this is activity supervised by the OFT under the Regulations.

⁸ Businesses requiring a licence to carry on a consumer credit business under section 21 of the Consumer Credit Act 1974.

Percentage of Turnover	Factors indicative of the level of seriousness
15%	<ul style="list-style-type: none"> • the business was itself directly involved in money laundering, terrorist financing or other financial crime such as fraud • financial crime was intentionally facilitated by the breach • the breach created a significant risk that money laundering, terrorist financing or other financial crime would be facilitated
10%	<ul style="list-style-type: none"> • significant profits were intended to be made or losses avoided as a result of the breach • the breach caused a significant loss or risk of loss to individual consumers • the breach revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business • senior management at the firm were aware, or should have been aware of the breach • the breach was committed deliberately or recklessly • the activity of the business involved threats or actual violence or abuse to consumers
5%	<ul style="list-style-type: none"> • little, or no, profits were intended to be made or losses avoided as a result of the breaches • there was no or little loss or risk of loss to consumers • there is no evidence that the breach indicates a widespread problem or weakness at the firm • senior management had taken steps to avoid the breach, but had been subverted by individuals in the

Percentage of Turnover	Factors indicative of the level of seriousness
	business <ul style="list-style-type: none"> • the breach was committed inadvertently
0%	<ul style="list-style-type: none"> • minor breach committed in error

Step Two – Adjustment for duration of non compliance

4.10 Adjustment can be made for the duration of non compliance. If the business supplies the actual turnover figures for the relevant period of non compliance, these can be used in the starting point calculation.

Step Three - Adjustment for Aggravating/Mitigating factors

4.11 An adjustment can be made for aggravating factors such as:

- the level of involvement, negligence or incompetence of senior managers in setting the business' AML regime in place and monitoring its effectiveness where this goes beyond the simple awareness referred to in the table in step one above
- the potential level of profit anticipated from its supervised activity
- how open the business is to being used to obtain fraudulent loans as these could be used to fund terrorism
- how open the business is to being used by organised crime groups obtaining multiple fraudulent loans.

4.12 An adjustment can be made for mitigating factors such as:

- level of co-operation of the business with the OFT once the non compliance was raised, for example providing all requested information in a timely fashion

- remedial action taken.

Step Four- Is the proposed penalty appropriate?

- 4.13 This step allows the OFT to review the level of penalty arrived at in step three and so it may at this point raise or lower the penalty to ensure that it is appropriate for that business.
- 4.14 The level of financial penalty should take into account the requirement for it to be dissuasive and act as an effective deterrent to failure to comply with the Regulations but it must also be proportionate.
- 4.15 The penalty has to be large enough to be dissuasive when set against any actual or potential profits of the supervised activity of the business. The financial penalty also has to act as a deterrent to other similar businesses in the UK market.

5 PAYMENT OF THE PENALTY

- 5.1 Once the penalty has been set and the appeal process completed, the OFT will invoice the business, giving it 30 days to pay the penalty and also providing details of how it may be paid.
- 5.2 If the business does not pay the penalty imposed, the OFT has the power to recover the amount through the civil courts as a debt. Interest may accrue on top of the level of the financial penalty imposed.
- 5.3 If a business continues to carry out estate agency work or act as a CCFI without registering, or in any other way continues trading in breach of the Regulations, in addition to seeking to recover the penalty further financial penalties may be imposed or a prosecution may be taken.