



Consultation Paper No. 1 2019

Civil Financial Penalties: Revised Statement of Principles and Processes

A consultation on proposals to revise the JFSC's Statement of Principles and Processes for civil financial penalties (incorporated within its published Decision-Making Process document).

Consultation Paper

The Jersey Financial Services Commission (**JFSC**) invites comments on this consultation paper by **Friday 12 April 2019**. If you require any assistance, clarification or wish to discuss any aspect of the proposal prior to formulating a response, it is of course appropriate to contact the JFSC.

The JFSC contact is:

Stephen de Gruchy

Senior Analyst, Enforcement
Jersey Financial Services Commission
PO Box 267
14-18 Castle Street
St Helier
Jersey
JE4 8TP

Telephone: +44 (0) 1534 822110
Email: s.degruchy@jerseyfsc.org

Alternatively, Lisa Springate at Jersey Finance Limited (**JFL**) is coordinating an Industry response that will incorporate any matters raised by local businesses. Comments should be submitted to JFL by **Friday 12 April 2019**.

The JFL contact is:

Lisa Springate

Head of Technical
Jersey Finance Limited
4th Floor, Sir Walter Raleigh House
48-50 Esplanade
St Helier
Jersey
JE2 3QB

Telephone: +44 (0) 1534 836029
Email: lisa.springate@jerseyfinance.je

It is the policy of the JFSC to make the content of all responses available for public inspection (unless specifically requested otherwise by the respondent).

It is the policy of JFL (unless otherwise requested or agreed) to collate all responses and share them verbatim with the JFSC on an anonymised basis (with reference made only to the type of respondent, e.g. individual, law firm, trust company etc.). This collated, anonymised response will, typically, be placed in JFL's permanent electronic archive which is currently open to all JFL members.

Glossary of Terms

Defined terms are indicated throughout this document as follows:

Amendment Law	Financial Services Commission (Amendment No. 7) (Jersey) Law 2018
Codes of Practice (or Codes)	<p>One or more of the <i>JFSC</i> Codes of Practice for:</p> <ul style="list-style-type: none"> • deposit-taking business; • fund services business; • general insurance mediation business; • insurance business; • investment business; • money service business; • trust company business; • alternative investment funds and AIF services business; <p>and</p> <ul style="list-style-type: none"> • the Handbook for the prevention and detection of money laundering and the financing of terrorism for financial services business regulated under the regulatory laws
Commission Law	Financial Services Commission (Jersey) Law 1998
DMP	The <i>JFSC's</i> Decision-Making Process document
JFL	Jersey Finance Limited
JFSC	Jersey Financial Services Commission
principal person	<p>Has the meaning (as inserted by the <i>Amendment Law</i>) in Article 1 of the <i>Commission Law</i>, namely:</p> <p>with respect to a contravention of a <i>Code of Practice</i> issued by the <i>JFSC</i> under –</p> <ul style="list-style-type: none"> (a) Article 19A of the Banking Business (Jersey) Law 1991, means a director, controller or manager (within the meaning given by Article 1 of that Law); (b) Article 42 of the Insurance Business (Jersey) Law 1996, means a chief executive or shareholder controller (within the meaning given by Article 1(1) of the Law) or any individual acting as a director of a permit holder (within the meaning given by Article 1(1) of that Law); (c) Article 19 of the Financial Services (Jersey) Law 1998, has the same meaning as in Article 1(1) of that Law; (d) Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, has the same meaning as in Article 1(1) of that Law; (e) Regulation 22 of the Alternative Investment Funds (Jersey) Regulations 2012, has the same meaning as in Regulation 2 of those Regulations, <p>and includes a person who was a principal person within the meaning given by sub-paragraph (a), (b), (c), (d) or (e).</p>

registered person	Has the meaning in Article 1 of the <i>Commission Law</i> , namely: <ul style="list-style-type: none">• a registered person within the meaning of the Banking Business (Jersey) Law 1991;• a permit holder within the meaning of the Insurance Business (Jersey) Law 1996 other than the holder of a Category A permit (within the meaning of Article 5(2) of that Law);• a registered person within the meaning of the Financial Services (Jersey) Law 1998, other than a person registered under that Law to conduct general insurance mediation business falling within Class R or Class S as set out in the Schedule to the Financial Services (Financial Services Business) (Jersey) Order 2009;• a service provider within the meaning of Regulation 2 of the Alternative Investment Funds (Jersey) Regulations 2012.
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1 Executive Summary

1.1 Overview

- 1.1.1 Since March 2015, the *Commission Law* has provided the *JFSC* with the power to impose a civil financial penalty on a *registered person* where the *JFSC* is satisfied that the *registered person* has, to a significant and material extent, contravened a *Code of Practice*.
- 1.1.2 On 26 October 2018, the *Amendment Law* came into force. That law amended the *Commission Law* to provide the *JFSC* with the power to also impose a civil financial penalty on a *principal person* where the *JFSC* is satisfied that a *registered person* has, to a significant and material extent, contravened a *Code of Practice* and that the contravention by the *registered person* was:
 - 1.1.2.1 Committed with the consent or connivance of, or is attributable to neglect on the part of a *principal person*, or
 - 1.1.2.2 Aided, abetted, counselled or procured by a *principal person*.
- 1.1.3 Under the civil financial penalties regime provided for by the *Commission Law*, the *JFSC* is required to publish a **statement** setting out:
 - 1.1.3.1 The **principles** it will apply in determining the imposition and amount of a financial penalty; and
 - 1.1.3.2 The **processes** it will follow when exercising the power to impose a financial penalty
- 1.1.4 The *JFSC*'s statement of principles and processes for civil financial penalties is incorporated within its published *DMP*.

1.2 What is proposed and why?

- 1.2.1 Currently, the *JFSC*'s statement of principles and processes in the *DMP* covers the imposition of civil financial penalties on *registered persons*. As a consequence of the widening of the civil financial penalties regime to *principal persons*, the statement needs to be consequentially amended
- 1.2.2 As well as those consequential amendments, a number of other minor amendments to the statement of principles and processes, unrelated to the widening of the civil financial penalties regime, are proposed: the details are set out in section 4.3 of this paper
- 1.2.3 This consultation paper seeks feedback on the proposed amendments as shown in the marked-up version of the *DMP* in Appendix B.

1.3 Who would be affected?

- 1.3.1 The proposals in this consultation paper have the potential to affect *registered persons* and *principal persons*.

2 Consultation

2.1 Basis for consultation

- 2.1.1 The *JFSC* has issued this consultation paper in accordance with:
- 2.1.1.1 Article 8(3) of the *Commission Law*, as amended, under which the *JFSC* “may, in connection with the carrying out of its functions ...consult and seek the advice of such persons or bodies whether inside or outside Jersey as it considers appropriate”; and
 - 2.1.1.2 Article 21B(6) of the *Commission Law*, as amended, which requires the *JFSC* to consult on proposed revisions to its statement of principles and processes under the civil financial penalties regime.

2.2 Responding to the consultation

- 2.2.1 The *JFSC* invites comments in writing from interested parties on the proposals set out in this consultation paper. Where comments are made by an industry body or association, that body or association should also provide a summary of the type of individuals and/or institutions that it represents
- 2.2.2 Comments should be received by the *JFSC* or *JFL* no later than **Friday 12 April 2019**.

2.3 Next steps

- 2.3.1 Following this consultation, the *JFSC* will publish feedback to this Consultation Paper and publish a revised *DMP*.

3 The JFSC

3.1 Overview

- 3.1.1 The *JFSC* is a statutory body corporate established under the *Commission Law*. It is responsible for the supervision and development of financial services provided in or from within Jersey.

3.2 JFSC’s functions

- 3.2.1 The *Commission Law* prescribes that the *JFSC* shall be responsible for:
- 3.2.1.1 The supervision and development of financial services provided in or from within Jersey;
 - 3.2.1.2 Providing the States, any Minister or any other public body with reports, advice, assistance and information in relation to any matter connected with financial services;
 - 3.2.1.3 Preparing and submitting to the Chief Minister recommendations for the introduction, amendment or replacement of legislation appertaining to financial services, companies and other forms of business structure;
 - 3.2.1.4 Such functions in relation to financial services or such incidental or ancillary matters:

- › As are required or authorised by or under any enactment, or
 - › As the States may, by Regulations, transfer; and
- 3.2.1.5 Such other functions as are conferred on the *JFSC* by any other Law or enactment.

3.3 Guiding principles

- 3.3.1 The *JFSC*'s guiding principles require it to have particular regard to:
- 3.3.1.1 the reduction of risk to the public of financial loss due to dishonesty, incompetence, malpractice, or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;
 - 3.3.1.2 The protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
 - 3.3.1.3 The best economic interests of Jersey; and
 - 3.3.1.4 The need to counter financial crime in both Jersey and elsewhere.

4 Proposals

4.1 Introduction

4.1.1 With the coming into force of the *Amendment Law*, Article 21A(1) of the *Commission Law* now provides that if the JFSC is satisfied that a *registered person* has, to a significant and material extent, contravened a *Code of Practice* and that the contravention by the *registered person* was:

4.1.1.1 Committed with the consent or connivance of, or is attributable to neglect on the part of a *principal person*, or

4.1.1.2 Aided, abetted, counselled or procured by a *principal person*,

The *JFSC* may impose on that *principal person* a financial penalty.

4.1.2 The maximum penalty that may be imposed on a *principal person* is set out in the Financial Services Commission (Financial Penalties) (Jersey) Order 2015, as amended by the *Amendment Law*. There are four penalty bands, which are summarised below:

Penalty Band	Nature of the contravention by the <i>registered person</i> (summary)	Maximum penalty that may be imposed on a <i>principal person</i>
1	A failure to notify the JFSC of certain matters specified in a <i>Code of Practice</i> .	£10,000
2	A contravention of a <i>Code of Practice</i> not falling into Band 2A or Band 3 below and not rectified to the satisfaction of the JFSC within the timeframe determined by the JFSC.	£200,000
2A	A contravention of a <i>Code of Practice</i> committed negligently.	£300,000
3	A contravention of a <i>Code of Practice</i> committed either intentionally or recklessly.	£400,000

4.1.3 As explained earlier, under the civil financial penalties regime provided for by the *Commission Law*, the *JFSC* is required to publish a **statement** setting out:

4.1.3.1 The **principles** it will apply in determining the imposition and amount of a financial penalty; and

4.1.3.2 The **processes** it will follow when exercising the power to impose a financial penalty.

4.1.4 The *JFSC's* statement of principles and processes is incorporated within its published *DMP*. Currently, the *JFSC's* statement of principles and processes in the *DMP* covers the imposition of financial penalties on *registered persons*. As a consequence of the widening of the civil financial penalties regime to *principal persons*, the statement needs to be consequentially amended.

4.2 The Statement of Principles

- 4.2.1 The Appendix to the *DMP* presently contains a statement of the principles that the *JFSC* will apply in determining the imposition and amount of a financial penalty on a *registered person*
- 4.2.2 A statement of the principles that the *JFSC* intends to apply in determining the imposition and amount of a financial penalty on a *principal person* has been inserted into the Appendix in the proposed revised *DMP* shown in Appendix 2.

4.2.3 Question 1

Do you have any observations on, or concerns about, the proposed statement of principles that the *JFSC* will apply in determining the imposition and amount of a financial penalty on a *principal person*? If you do, please state in detail what your observation or concern is and the reason for it.

4.3 The Statement of Processes

- 4.3.1 In essence, the body of the *DMP* (i.e. Sections 1, 2 and 3 thereof) incorporates the statement that the *JFSC* is statutorily required to publish setting out the processes that it will follow when exercising its statutory power to impose a civil financial penalty. Currently that statement only covers the imposition of a civil financial penalty on a *registered person*
- 4.3.2 The processes that the *JFSC* will follow when it is proposing to exercise its statutory power to impose a civil financial penalty on a *principal person* will not be any different to those that apply when the *JFSC* is proposing to impose a civil financial penalty on a *registered person*
- 4.3.3 The proposed revisions to the statement of processes in the *DMP* are shown as red-lined text in Appendix B. The majority of the revisions fall into two categories:
 - 4.3.3.1 Firstly - consequential amendments that are needed to accommodate the widening of the scope of the civil financial penalty regime to *principal persons*; and
 - 4.3.3.2 Secondly - as a result of experience gained in using the *DMP* over the past few years - amendments to enhance or make clearer the *JFSC*'s statement of processes for a person subject to the *DMP*. (The majority of the proposed revisions in this category are self-explanatory but where an explicit explanation has been thought necessary, a comment box has been inserted next to the amended text in the revised *DMP* shown in Appendix B.)
- 4.3.4 In addition, an amendment is proposed (new footnote 13 to the *DMP*) to provide for the delegation of decisions on the imposition of Band 1 civil financial penalties (where the maximum penalty is £10,000) to a committee of the Board of Commissioners. The present process for a Band 1 financial penalty – involving hearings by the full Board of Commissioners – is considered disproportionately bureaucratic for what is, in essence, an administrative pecuniary penalty for late or missing notifications required under a *Code of Practice*
- 4.3.5 Finally, one minor change is proposed to Part 4 of the *DMP*, which covers settlements i.e. cases where a regulatory contravention is admitted and agreement reached with the person concerned on the regulatory action to be taken by the *JFSC*.

- 4.3.6 Part 4 of the *DMP* provides that in cases where a person subject to the *DMP* acknowledges a significant and material contravention of a *Code of Practice* and is thus potentially liable to the imposition of a financial penalty under Article 21A of the *Commission Law*, the amount of the financial penalty to be imposed by the *JFSC* will incorporate a discount reflecting: (a) how early in the decision-making process the settlement agreement is signed; and (b) whether the contravention of the *Code of Practice* is remediated to the satisfaction of the *JFSC* before the settlement agreement is signed. The *DMP* states that the discount will be applied against the amount of the financial penalty that the *JFSC* would otherwise have expected to impose had the decision-making process been taken through to its conclusion (i.e. as a contested case).
- 4.3.7 A new footnote (number 15) to the *DMP* is proposed that will make it clear that the *JFSC* considers it inappropriate for the settlement discount to apply to any amount included in the financial penalty in application of:
- 4.3.7.1 The principle in Article 21B(3)(f) of the *Commission Law* (“*the principle of ensuring that registered persons cannot expect to profit from contravention of the Codes*”); or
- 4.3.7.2 The principle in Article 21B(3A)(c) of the *Commission Law* (“*the principle of ensuring that principal persons cannot expect to profit from contravention of the Codes*”).

4.3.8 **Question 2**

Do you have any observations on, or concerns about, the proposed amendments to the statement of processes incorporated in the *DMP*? If you do, please state in detail what your observation or concern is and the reason for it.

5 Summary of Questions

Page	Question
9	<p>Question 1:</p> <p>Do you have any observations on, or concerns about, the proposed statement of principles that the <i>JFSC</i> will apply in determining the imposition and amount of a financial penalty on a <i>principal person</i>? If you do, please state in detail what your observation or concern is and the reason for it.</p>
10	<p>Question 2:</p> <p>Do you have any observations on, or concerns about, the proposed amendments to the statement of processes incorporated in the <i>DMP</i>? If you do, please state in detail what your observation or concern is and the reason for it.</p>

Appendix A: List of representative bodies and other persons who have been sent this consultation paper:

- › Association of English Solicitors Practising in Jersey
- › Channel Islands Financial Ombudsman
- › Chartered Institute for Securities & Investments
- › Institute of Chartered Secretaries and Administrators, Jersey branch
- › Institute of Directors, Jersey branch
- › Insurance Institute of Jersey
- › Jersey Association of Trust Companies
- › Jersey Bankers' Association
- › Jersey Chamber of Commerce and Industry Incorporated
- › Jersey's Chief Minister
- › Jersey Compliance Officers Association
- › Jersey Consumer Council
- › Jersey Finance Limited
- › Jersey Funds Association
- › Jersey International Insurance Association
- › Jersey Society of Chartered and Certified Accountants
- › Law Society of Jersey
- › Personal Finance Society
- › Society of Trust and Estate Practitioners (STEP), Jersey branch
- › Chartered Financial Advisors (UK)
- › Jersey Association of Directors and Officers

Appendix B: Draft revised *DMP*

Click here to view the draft revised DMP <https://www.jerseyfsc.org/media/2413/20190121-consultation-paper-dmp-update-for-pp-civil-penalties-appendix-b.pdf>