

FEEDBACK ON CONSULTATION PAPER NO. 2 2012

CIVIL PENALTIES

Consultation on the introduction of a power for the Commission to impose civil penalties for serious, uncorrected or recurring breaches of the Codes of Practice.

CONSULTATION FEEDBACK

This Feedback Paper sets out input received by the Jersey Financial Services Commission (the “**Commission**”) on Consultation Paper No. 2 of 2012 on the introduction of a power for the Commission to impose civil penalties for serious, uncorrected or recurring breaches of the Codes of Practice (the “**Consultation Paper**”).

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Glossary of terms

BB(J)L	means the Banking Business (Jersey) Law 1991.
Codes of Practice	means the Codes of Practice for: <ul style="list-style-type: none">• deposit-taking business;• funds services business;• general insurance mediation business;• insurance business;• investment business;• money service business; and• trust company business.
Commission	means the Jersey Financial Services Commission.
Commission Law	means the Financial Services Commission (Jersey) Law 1998.
Consultation Paper	means Consultation Paper No. 2 of 2012 on the introduction of a power for the Commission to impose civil penalties for serious, uncorrected or recurring breaches of the Codes of Practice.
FSA	means the UK Financial Services Authority.
FS(J)L	means the Financial Services (Jersey) Law 1998.
GFSC	means the Guernsey Financial Services Commission.
IB(J)L	means the Insurance Business (Jersey) Law 1996.
Jersey Finance	means Jersey Finance Limited.
licence	a generic term to cover a: <ul style="list-style-type: none">• registration granted under the BB(J)L;• registration granted under the FS(J)L; and• permit granted pursuant to the IB(J)L.
RDC	means the Regulatory Decisions Committee under the Financial Services and Markets Act 2000.
relevant income	refer to sections 4.5 and 4.6 of the Consultation Paper.
registered person	means a person holding a licence, including sole traders, at the time any breach of the Codes of Practice is committed, excluding: <ul style="list-style-type: none">• category A insurers who do not have a local presence; and• classes R and S general insurance mediation business.
Regulatory Laws	is the collective name for the: <ul style="list-style-type: none">• BB(J)L;• FS(J)L; and• IB(J)L.
recurring breach	means an inadvertent breach of the Codes of Practice previously identified and remedied but which re-occurs at a later date.
Royal Court	means the Royal Court of Jersey.

serious breach	means a breach of the Codes of Practice that is comprised of any of the elements set out in the proposed Bands 2 and 3 on page 16 of the Consultation Paper.
Subject	means the subject of an investigation, as described in the Guidance Note on the Commission's Decision-Making Process.
uncorrected breach	means an inadvertent breach of the Codes of Practice that has not been remedied to the satisfaction of the Commission, within timeframes specified by the Commission.
UK	means the United Kingdom.

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1 Overview

1.1 Background

- 1.1.1 This paper details, and responds to, feedback received on the Consultation Paper. The Consultation Paper sought views on the introduction of a power to impose civil penalties for serious, uncorrected or recurring breaches of the Codes of Practice.
- 1.1.2 Before moving on to the detail of the responses, the Commission wishes to provide clarification in respect of four matters.
- 1.1.3 The Consultation Paper was an exercise by which to try to understand what a civil penalties regime, if introduced, might look like. There are various ways in which any civil penalties regime could be operated. Having considered numerous options internally, the Commission was keen to understand Industry's preferences in this area. The quality and details of the responses received have assisted the Commission greatly in this regard. The Commission is, however, aware that there appears to be a misconception circulating that the Consultation Paper represented a determinative position on any civil penalties regime. The Commission wishes to reassure Industry this is not the case; the Consultation Process marked the start of a process, which will continue to involve further Industry consultation and discussion.
- 1.1.4 The Commission would like to respond to questions raised as to why its current powers are considered insufficient. Some respondents have expressed the view that with the power to revoke licences and ban individuals from working in the Industry, the Commission cannot be in need of further enforcement tools. The Commission therefore wishes to further explain the role it foresees civil penalties could play. In the most serious of cases involving a registered person, the decision the Commission usually has to take is between the sanction of a public statement or the decision to revoke a licence. The revocation of a licence is a substantive measure that results in the loss of employment both to individuals and to the Island. The application of a civil penalty in serious cases would permit a regulated business to continue trading. In short, a civil penalty power would provide the Commission with a wider range of sanctions, which can be used proportionately to the circumstances of a given case.
- 1.1.5 The Commission would like to address the perception that the introduction of civil penalties would make Jersey a less competitive jurisdiction. This goes hand in hand with observations by some respondents that Jersey is already 'over-regulated' and that the introduction of civil penalties would compound that further. In putting together the Consultation Paper, the Commission considered a number of jurisdictions and the operation of their civil penalties regimes. By way of example, civil penalty/fining regimes operate for financial service regulators in Australia, Hong Kong, Singapore, the United States, the UK and Guernsey. The Isle of Man is currently consulting on extending its ability to fine to cover certain regulatory conduct. It is fair to say that Jersey is something of an exception in not having a civil penalties power. An alternative perspective to the view described above is that business is attracted to Jersey by virtue of its good regulation and that the introduction of a civil

penalties power would further enhance Jersey's reputation in that regard. The case for the proposal is further made when considering that international bodies, such as the IMF in its 2008 Assessment of Jersey, have advocated that the Commission give consideration to the introduction of such a power.

- 1.1.6 And finally, the Commission wishes to clarify that any civil penalties regime introduced in the future would not apply retrospectively. In other words, it would only apply to breaches of the Codes of Practice that occurred after a future date, set down by legislation.

1.2 Feedback

- 1.2.1 The Commission received 27 responses to the Consultation Paper, both directly and via Jersey Finance. The Commission is grateful to respondents for taking the time to consider and comment on the Commission's proposals and the feedback has certainly been invaluable in helping to develop the proposals.
- 1.2.2 A summary of the comments received can be found in Sections 2 to 4 of this Feedback Paper, together with the Commission's consideration of the comments received.
- 1.2.3 A list of respondents is given in Appendix A.

1.3 Next Steps

- 1.3.1 From the responses set out below, it is evident that the Commission is undertaking some further work in certain areas – particularly in respect of the calculation of any civil penalty. The Commission has contacted a number of respondents to the Consultation Paper to ask for their further assistance in this regard.
- 1.3.2 The Commission envisages that any civil penalties regime would need to be introduced by a combination of provisions in primary and secondary legislation, supported by published guidance. Thus in conjunction with the further work outlined at 1.3.1, the next step will be for the Commission to commence work on producing law drafting instructions and drafting guidance. Any draft legislation and draft guidance will be consulted on at a later date. It is difficult to put a definitive time frame on that work but further consultation is unlikely to take place before Q3 2013.

2 Summary of Responses

2.1 Structure

- 2.1.1 The questions posed in the Consultation Paper, together with a summary of the answers received and the Commission's response, are grouped into two Sections:
 - 2.1.1.1 Section 3 - responses to set questions in the Consultation Paper; and
 - 2.1.1.2 Section 4 - responses to other issues raised.
- 2.1.2 Responses to the set questions in the Consultation Paper have been grouped as follows:
 - 2.1.2.1 breaches of the codes of practice (3.1);
 - 2.1.2.2 level of civil penalty (3.2);
 - 2.1.2.3 relevant income (3.3);
 - 2.1.2.4 aggravating and mitigating factors (3.4);
 - 2.1.2.5 payment (3.5);
 - 2.1.2.6 late payment fee (3.6);
 - 2.1.2.7 reduction for early settlement (3.7);
 - 2.1.2.8 benefits of any civil penalties (3.8); and
 - 2.1.2.9 public statements (3.9).
- 2.1.3 The other issues raised by respondents and responded to by the Commission have been grouped into the following areas:
 - 2.1.3.1 appeals process (4.1);
 - 2.1.3.2 due process/checks and balances (4.2);
 - 2.1.3.3 independent oversight (4.3);
 - 2.1.3.4 interpretation of the Codes of Practice (4.4); and
 - 2.1.3.5 branches and subsidiaries (4.5).

3 Responses to set questions in the Consultation Paper

3.1 Breaches of the Codes of Practice

Question from the Consultation Paper

4.3.8	Do you agree that any civil penalty regime should apply to serious, uncorrected or recurring breaches of the Codes of Practice? If not, why not? What alternative approach would you suggest?
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3.1.1 The majority of respondents supported a regime that deterred and sanctioned the most egregious of misconduct but felt that the definitions of 'serious', 'uncorrected' and 'recurring' required more clarification. For example, one respondent queried whether a reoccurrence of a breach would take into account third party actions or the volume or frequency of activity.

<u>Commission Response</u>	
3.1.2	Taking into account feedback, the Commission has reviewed the proposal. At present it is favouring re-configuring the proposals so that the terms 'serious', 'uncorrected' and 'recurring' are no longer used. It is hoped this will provide greater clarity.
3.1.3	This would be achieved by re-configuring Bands 1, 2, and 3 proposed in the Consultation Paper, for ease of reference set out in Appendix B. In other words, what constitutes a breach would be clearly set out in Bands 1, 2 and 3. The Commission's current working draft of the revised bands is outlined in Appendix C.

3.2 Level of Civil Penalty

Question from the Consultation Paper

4.4.8	Would you prefer the level of any civil penalty to be determined by reference to: (i) a prescribed penalty per breach; (ii) a discretionary approach; or (iii) relevant income over a defined period, with aggravating and mitigating factors taken into account?
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3.2.1 There were mixed responses to this question. This was evidenced not only in the responses received directly to the Commission from registered persons but also in the responses received from some of the representative bodies, where it had proved difficult for the members of the representative bodies to reach a unified view. Overall the preferred options were (ii) or (iii). A number of those respondents who supported a discretionary approach (option (ii)), suggested the discretionary approach should sit alongside published guidance from the Commission. There was also some support for option (i) (a prescribed penalty) from larger organisations. This is understandable given that for a larger organisation a civil penalty tied to relevant income would equate to a larger sum than for a smaller organisation. The impact of

the use of the 'relevant income' on larger organisations, however, was taken into account by the Commission in formulating the original proposals and was the driver for imposing a maximum financial limit in Band 1.

Commission Response

3.2.2 The Commission proposes to move forward on the basis of seeking a discretionary power, provided for by primary law, to issue civil penalties. The Commission then envisages the combined use of secondary law in the form of either Regulations or a Ministerial Order, as well as published guidance to set the detail around any civil penalties scheme. Option (iii), in conjunction with the revised bandings referred to in Appendix C, will be further considered when it comes to the drafting of any secondary legislation and guidance. As outlined at 1.3.2, any draft legislation and guidance will be subject to further consultation at a later date.

3.3 Relevant Income

Questions from the Consultation Paper

4.5.6	Should relevant income be assessed as set out in Appendix B?
4.5.7	Can you foresee any problems, other than those highlighted above, with the definition of relevant income as set out in Appendix B? What, if any, changes would you recommend?
4.5.11	Should relevant income be assessed as set out in Appendix C?
4.5.12	Can you foresee any problems with defining relevant income as set out in Appendix C? What, if any, changes would you recommend?
4.5.13	What, if any, alternative approach to defining relevant income, other than as set out in Appendices B and C, would you recommend?

3.3.1 The majority of respondents preferred the approach set out in Appendix C of the Consultation Paper, which tied relevant income to the business line in which any breach of the Codes of Practice took place. A number of respondents expressed the view that a large organisation, with a number of registered businesses, should not face a penalty calculated by reference to income across all areas when a failing had only occurred in one area.

3.3.2 One respondent felt there would be difficulties with linking a civil penalty to the relevant income of a particular business line, if a breach occurred in an area of the business not generating income such as within the compliance function. For the sake of clarity, the reference to business lines was a reference to the business line forming the basis of the registration with the Commission (e.g. trust company business, deposit-taking business) rather than to business areas such as compliance. So if a breach of the Codes of Practice took place as a result of the compliance function in a trust company business, the relevant income from the trust company business only would form the basis of the assessment of any civil penalty. For a registered person holding multiple licences with the Commission (for example trust company, investment business and deposit-taking licences) this means that only the income from one of those business lines would form the basis of any civil penalties

assessment, unless breaches were to occur across more than one business line.

- 3.3.3 An alternative suggestion made was to utilise licence fees to assess relevant income. Licence fees are tailored to the size of the business already but are also capped in certain circumstances. Respondents felt that such an option might reflect the size of the organisation when calculating a civil penalty, whilst providing some certainty to Industry on the potential levels of civil penalty.
- 3.3.4 Some respondents wished to understand how the longevity of any breach would be provided for, for example if the breach occurred over a prolonged period.

<u>Commission Response</u>	
3.3.5	The Commission is giving further consideration, and working alongside registered persons, to understand whether a multiplier of licence fees could be used as a guideline to setting civil penalties. If that is not a viable option, the Commission will consider further the Appendix C option – relevant income in the business line – in formulating any future guidelines or legislation.
3.3.6	In terms of the longevity of the breach, the Commission is aware that other regulators assess the penalty by reference to the period of the breach e.g. the FSA. The Commission is reluctant to take such an approach as it may not always be apparent exactly how long a breach has occurred. However, the Commission envisages that the longevity of the breach could be considered as part of the analysis of aggravating and mitigating factors.

Questions from the Consultation Paper

4.5.20	Which of the three options put forward do you prefer for defining the period of relevant income to be taken into account in assessing any civil penalty?
4.5.21	Can you recommend an alternative for defining the period of relevant income?

- 3.3.7 There were mixed responses in this area, with each of the three options receiving relatively equal support.

<u>Commission Response</u>	
3.3.8	The Commission’s view is that the fairest approach would be achieved by assessing relevant income in the 12 months prior to notification given by the Commission in respect of the breach. Further thought will therefore be given to that approach, as well as considering whether a multiplier of a licence fee is a viable alternative.

Questions from the Consultation Paper

4.6.6	Do you agree with the three percentage bands set out above? If not, why not?
4.6.7	Do you agree with the factors set out? If not, why not? Are there any other factors that should be taken into account?

3.3.9 The percentage bands as set out in the Consultation Paper are set out in Appendix B.

3.3.10 Respondents expressed broad views in this area. Roughly half of the respondents on this point were in agreement with the suggested approach.

3.3.11 Other respondents suggested alternative options for the bandings, albeit they were not fully formulated in terms of the percentages/amounts that might apply or the factors that would be incorporated.

3.3.12 One suggestion put forward was:

3.3.12.1 Band 1 – prescribed fixed penalty;

3.3.12.2 Band 2 - prescribed fixed penalty bands, depending on severity and relevant income; and

3.3.12.3 Band 3 - discretionary approach up to a prescribed maximum percentage of relevant income.

3.3.13 Two respondents felt that Band 1 should not be captured at all but should perhaps be subject to other enforcement powers, such as warnings or directions, rather than a civil penalty.

Commission Response

3.3.14 The Commission has given further thought to the bandings and is proposing revised bandings as set out in Appendix C. The Commission would use its other powers as it considered appropriate.

3.4 Aggravating and Mitigating Factors

Question from the Consultation Paper

4.7.4	Do you agree with making allowance for aggravating and mitigating factors? If not, why not?
4.7.5	Are there any other aggravating or mitigating factors that you would add to a non-exhaustive published list? If so, please explain why.
4.7.6	Are there any factors listed above that you do not think should be included in a non-exhaustive published list? If so, please explain why.

3.4.1 All respondents agreed with the aggravating and mitigating factors set out in the Consultation Paper.

- 3.4.2 A couple of additional suggestions for aggravating and mitigating factors were put forward.
- 3.4.3 Additional aggravating factors suggested were:
 - 3.4.3.1 failing to implement recommendations of the MLRO or MLCO; and
 - 3.4.3.2 an absence of procedures.
- 3.4.4 Additional mitigating factors suggested were:
 - 3.4.4.1 that the breach was beyond the control of the registered person; and
 - 3.4.4.2 that local regulations differed from Jersey regulations.

<u>Commission Response</u>	
3.4.5	As the aggravating and mitigating factors set out in the Consultation Paper received support by all respondents, they will be borne in mind in formulating any future civil penalties regime.
3.4.6	The Commission would be content to add the absence of procedures as an aggravating factor.
3.4.7	The Commission can see the appropriateness of a further additional aggravating factor being that a registered person fails to implement the recommendations of its MLRO or MLCO. However, the Commission would wish to see such a factor caveated so that it only applied in respect of recommendations made in order to ensure compliance with the Codes of Practice.
3.4.8	The Commission intends to make further enquiries to better understand what types of breaches might be considered beyond the control of the registered person, before reaching a view on whether that might be an appropriate mitigating factor.
3.4.9	The Commission has considered carefully the position where local regulations differ from Jersey regulations. Jersey registered persons are required to implement the Jersey requirements, unless the registered person has been granted variances from doing so under the Codes of Practice. The Commission does not agree that a difference in local requirements should be a mitigating factor. The Commission is concerned that making such an addition to the mitigating factors might be perceived by some as implicit acceptance that Jersey requirements are not, or are of less, relevance.
3.4.10	Further to the proposed revision of bandings at Appendix C, the Commission proposes to add to the aggravating and mitigating factors: <ul style="list-style-type: none">3.4.10.1 a breach of the Codes of Practice that results in a number of clients experiencing a significant loss; and3.4.10.2 a breach of the Codes of Practice that results in the registered person making a significant profit or avoiding significant loss.

3.4.10.3 The term 'significant' would be given its ordinary meaning, namely 'important; of consequence', which would depend on the facts in any given case.

3.5 Payment

Question from the Consultation Paper

4.9.3	Do you agree that a civil penalty should be paid within 30 days, subject to any appeal? If not, why not?
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3.5.1 The majority of respondents felt that 30 days was too short a period within which to pay, especially if a civil penalty were substantive. A number of respondents suggested a 60 day period instead.

Commission Response

3.5.2 The Commission would be content to set the payment period for any civil penalty at 60 days.

3.6 Late Payment Fee

Question from the Consultation Paper

4.9.4	Should a late payment fee be applied where a civil penalty has not been paid within a specified period?
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3.6.1 All those who responded were supportive of a late payment fee.

Commission Response

3.6.2 The Commission will look to incorporate a late payment fee in any future legislation concerning the introduction of civil penalties.

3.7 Reduction for Early Settlement

Question from the Consultation Paper

4.10.4	Should there be a reduction in the amount of a civil penalty for early settlement?
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3.7.1 There were a range of responses to this question. Some respondents felt this may result in a registered person feeling pressurised to settle a case. One respondent stated that early settlement would not be fair if it preceded the appeal stage and other respondents queried how the early settlement process would work in conjunction with the appeal process. Another respondent felt registered persons should not have to consider 'buying off the threat of further investigations' and be put in the position of deciding whether to settle a case before the facts are established.

Commission Response

- 3.7.2 The Commission is mindful that some of the respondents to the Consultation Paper may not have fully understood the settlement process, as it currently exists in respect of actions subject to the Commission’s Decision-Making Process.
- 3.7.3 Settlement discussions take place at a point where:
- 3.7.3.1 the Commission has established the facts on which it intends to act; and
 - 3.7.3.2 those facts have been disclosed to the registered person; and
 - 3.7.3.3 the registered person has been given the opportunity to put forward their version of events.
- 3.7.4 The settlement process is a two-way process, which follows recognition by a registered person of their failings. If a registered person does not wish to settle, it has the option of proceeding with the full Decision-Making Process in order to have the matter decided before the Board of Commissioners.
- 3.7.5 In respect of the interaction between settlement and appeals, a registered person that agrees to settle its case forfeits its right of appeal.
- 3.7.6 In the Commission’s view, the comment that settlement is a case of ‘buying off further investigations’ is misguided. Any investigation takes place prior to settlement discussions. Settlement discussions are concerned with the consequences following investigation, as opposed to the investigation itself.

Question from the Consultation Paper

4.10.5	Do you agree with the percentage reductions proposed for early settlement? If not, why not?
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- 3.7.7 The percentage reductions proposed in the Consultation Paper were:
- 3.7.7.1 Phase 1 of the Decision-Making Process – prior to the Review Committee exercising delegated powers or referring the matter to the Board. 20%
 - 3.7.7.2 Phase 2 of the Decision-Making Process – prior to the Board advising it is minded to take particular action. 10%
- 3.7.8 The majority of respondents were in agreement with the percentage reductions proposed. A couple of respondents felt the reductions should be higher with values of 50% and 30% proposed. Another respondent felt the reductions proposed were too generous and should be reduced to 10% and 5%.
- 3.7.9 There was also a suggestion that there should be an incentive for self-reporting a breach.

Commission Response

3.7.10 The Commission is of the view that any percentage figures for early settlement should be as set out in the Consultation Paper. However, in addition the Commission agrees that there should be an added incentive to self-report breaches. Therefore, the Commission proposes settlement at:

3.7.10.1 Phase 1 - increase from 20% to 30% in cases self-reported. This would be where self-reporting takes place within 14 days of a registered person being notified by the Commission it is the subject of an investigation.

3.7.10.2 Phase 2 - increase from 10% to 20% in cases self-reported.

Question from the Consultation Paper

4.10.7	Should the right to a percentage reduction for early settlement be lost if a civil penalty is not paid within a specified period?
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3.7.11 The majority of respondents were in agreement that a percentage reduction for early settlement should be lost if a penalty is not paid within a specified period. Two respondents queried how this would work in practice and whether in fact the settlement should fall away entirely if a civil penalty is not paid within a specified period.

Commission Response

3.7.12 The Commission is minded to make it a condition of any settlement agreement that payment of a civil penalty would be made by a specified date, in order for the settlement agreement to be binding on all parties.

3.8 Benefits of any Civil Penalties

Question from the Consultation Paper

4.11.3	Should the benefits of any civil penalties recovered be applied to the relevant Industry sector? If not, what other model would you propose?
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3.8.1 The majority of respondents were in agreement with the approach proposed, on the basis that any benefit would be passed to licence holders. One respondent felt any monies recovered should not be kept by the Commission, as to do so would leave the Commission open to the accusation that its fining policy reflected its wish to produce healthy accounts. It was instead suggested that the money should go to a separate body but there was no indication given as to whom that separate body should be. Other respondents felt consideration should be given to applying a proportion to the relevant Industry sector and the remainder Industry wide, to reflect that some sectors may be more susceptible to penalties than others. It was noted that this suggestion came solely from the banking sector. It was also commented that there should be some sort of smoothing mechanism to ensure licence fees do not spike up and down based on revenue from civil penalties - again this was a comment from the banking sector.

Commission Response

- 3.8.2 The Commission is minded to pursue an approach of applying any civil penalties income to the relevant Industry sector. The concept of using half for the sector and half Industry wide was considered. However, such an approach does not sit easily with the Commission’s stance of requiring each sector to be self-funded (through licence fees).
- 3.8.3 Of course, there is always the chance that people may accuse the Commission of levying penalties in order to bolster its accounts but, as stated at the outset of the Consultation Paper, that is not the Commission’s intention. By applying the money to the benefit of licence holders, the Commission hopes that it will aid understanding that, as an organisation, the Commission **is not** seeking to utilise civil penalties as an income generator.
- 3.8.4 Thought has already been given to the need to manage spikes in licence fees. Paragraph 4.11.2 of the Consultation Paper said *“it is proposed that the benefit of any civil penalties would be taken into account when a sector’s fees came up for review”*. For the majority of licensed areas, fees are reviewed on a cyclical basis every two or three years. The exception to this is deposit-taking business, where fees are set on an annual basis. If the deposit-taking sector is concerned about potential spikes in fee levels, thought can be given to setting fees on a cyclical, rather than annual, basis. This point will be followed up through the Jersey Banking Association.

Question from the Consultation Paper

4.11.5	Should a registered person subject to a civil penalty benefit from any reduction in licence fees in that sector, as a result of civil penalties levied?
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- 3.8.5 There were mixed responses to this question. A number of respondents felt they should not benefit. A number of other respondents felt that to not apply a reduced fee to a registered person subject to a civil penalty might be seen as punishing a registered person twice. Other respondents questioned whether the cost of administering this arrangement would be greater than any benefit derived.

Commission Response

- 3.8.6 The Commission is conscious that operating this arrangement would require additional administration. Taking into account the comments, the Commission does not intend to operate a different fee system for those who have been subject to a civil penalty.

3.9 Public Statements

Question from the Consultation Paper

4.12.2	Do you agree that the imposition of a civil penalty should be accompanied by a public statement, save in exceptional circumstances? If not, why not?
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- 3.9.1 A number of respondents felt a public statement for minor breaches would not serve to benefit either Industry or the public. Some suggested a public statement should be reserved for only the highest bandings.
- 3.9.2 Other respondents felt that the publishing of such statements allowed other firms to understand breaches and learn from them.
- 3.9.3 Some respondents queried what the process would be for the removal of a public statement issued and whether it would happen after a set period of time. Those respondents were concerned that a firm should not remain 'publically shamed' if it has expended time and resources rectifying its problems. One respondent suggested a time period of three - five years before removal.

Commission Response

- 3.9.4 The civil penalties concept, as consulted on, was designed to target the most serious of breaches of the Codes of Practice, as well as breaches that are not resolved by registered persons. In essence, therefore, the only occasion where 'minor' breaches might be subject to a public statement would be where they continue to be unresolved.
- 3.9.5 The Commission has issued a policy on the use of its public statements. The Policy Statement can be found at:
http://www.jerseyfsc.org/pdf/PS_Commission's_use_of_Public_Statements_March_2011.pdf.
- 3.9.6 The Policy Statement distinguishes between Type 1 and Type 2 public statements. Type 1 public statements are effectively issued as, or as part of, a regulatory sanction. Type 2 public statements are to give warnings in respect of unauthorised business, or in similar circumstances, where the best interests of the public could be adversely affected. Public statements in respect of civil penalties levied against regulated persons are likely to be Type 1 public statements. The factors the Commission will currently have regard to in issuing a Type 1 public statement are as follows, whether:
- 3.9.8.1 the non-compliance was committed intentionally or recklessly, rather than inadvertently;
- 3.9.8.2 the Commission has previously issued a specific warning in relation to the type of non-compliance that has occurred;
- 3.9.8.3 [there is a pattern of poor compliance with requirements set by or under the Regulatory Laws or the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 – *not relevant for purposes of civil penalties*];
- 3.9.8.4 there has been any attempt to conceal the non-compliance from the Commission or to mislead the Commission about it;
- 3.9.8.5 the person concerned has been cooperative in admitting the non-compliance and in taking remedial action; and
- 3.9.8.6 it is appropriate to advise the Industry of poor practice and provide education on the standards of conduct expected.

- 3.9.7 With the exception of 3.9.8.3, the Commission proposes that the factors listed above for Type 1 public statements would also be applicable to whether to issue a public statement in conjunction with a civil penalty. It is interesting to note that the proposed EU 4th Money Laundering Directive which has recently been published, advocates the a public statement should accompany every administrative sanction imposed by a regulatory authority.
- 3.9.8 At present, a person who is subject to a public statement can apply at any point for the public statement to be removed from the Commission's Website. If that application is successful, the public statement is removed. However, the person's name remains published in the 'Public Statements - Archive Area' of the Commission's Website.
- 3.9.9 The Commission would prefer not to apply arbitrary periods to removal and to instead consider applications for removal on a case by case basis, taking into account the facts peculiar to the particular application.

Question from the Consultation Paper

4.12.4	In your view, would it be beneficial for a public statement connected to a civil penalty to disclose the band of breach and the amount of the civil penalty? If not, why not?
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- 3.9.10 Of the eight respondents to this question, all were supportive of an approach of disclosing the band of any civil penalty. All but two respondents were also in favour of disclosing the amount of any civil penalty. Respondents in favour expressed the view that the public reporting of such information would act as a deterrent, aid Industry's understanding on the penalties being set and also help to ensure a consistent approach. Respondents not in favour of disclosing the amount of the civil penalty did not provide reasons for holding that view.

Commission Response

- 3.9.11 The Commission intends to move forward on the basis of disclosing both the band and amount of any civil penalty, in any public statement issued.

4 Responses to other issues raised

4.1 Appeals Process

- 4.1.1 Eight respondents raised queries on the appeals process. The majority of those respondents were requesting more detail on the appeals process and wished to understand what would happen to a civil penalty subject to an appeal. One respondent expressed concern that an appeal to the Royal Court would be an unrealistic option for registered persons, due to the expense involved.

Commission Response

- 4.1.2 The appeals process envisaged for civil penalties would be the same that currently exists. A decision of the Commission, for example to issue a public statement, can be appealed at present on the basis of the decision being unreasonable, having regard to all the circumstances of the case. The same test would apply to civil penalties. This would mean that a registered person could appeal a decision to issue a civil penalty, or the quantum of any civil penalty levied, on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case.
- 4.1.3 The right of appeal from a decision of the Commission is to the Royal Court. The Royal Court rules and procedures on appeals apply. For more information on the process for administrative appeals see Part 15 of the Royal Court Rules 2004 (available on www.jerseylaw.je).

4.2 Due Process/Checks and Balances

- 4.2.1 Four respondents expressed the need for clear checks and balances and a fair and robust process. One respondent asked for more information on the governance process that would be applied. A couple of respondents expressed concerns about the need for consistent decision making. Three respondents expressed the view that some form of criminal due process or process involving the courts should be adopted.

Commission Response

- 4.2.2 The Commission is not a judicial body and thus court rules and processes do not apply to its decision making. The Commission does, however, recognise that it must act fairly and in accordance with the rules of natural justice in taking administrative decisions. Consequently, the Commission has a clear, robust and published process that applies to its administrative decisions. This published process applies to any type of decision against which a Subject could exercise a statutory right of appeal to the Royal Court in Jersey, on the grounds of unreasonableness.
- 4.2.3 This process is called the Decision-Making Process, and a copy of a document detailing the process is available in full at:
http://www.jerseyfsc.org/the_commission/general_information/policy_statements_and_guidance_notes/index.asp

4.2.4 The Decision-Making Process sets out the current governance process applied, for example, where the Commission decides to refuse an application for a licence or object to the appointment of a principal person. It is envisaged the same governance process would be applied to civil penalties. The Decision-Making Process is structured in such a way as to try and ensure consistency of decision making. The Commission also keeps a record of the decisions taken by the Board of Commissioners under the Decision-Making Process.

4.3 Independent Oversight

4.3.1 Ten respondents expressed a preference for building some form of independent oversight into the civil penalties process. Options suggested were:

4.3.1.1 to appoint an independent adjudicator on the sum to be levied;

4.3.1.2 for the first right of appeal to be to an independent tribunal;

4.3.1.3 for Jurats to adjudicate on the sum to be levied;

4.3.1.4 for a form of appeal involving the Royal Court at the first stage (the Commission assumes this means before the Board of Commissioners forms a view but this was not clear from the response);

4.3.1.5 for the involvement of an independent board of senior non-executive directors, beyond the involvement of the current Board of Commissioners whom (with the exception of the Director General) are equivalent to non-executive directors; and

4.3.1.6 that there should be greater oversight by the Minister for Economic Development in this area.

4.3.2 The preferences expressed for greater independent oversight appear to be linked to the desire to see a greater separation of powers and/or to avoid any perceived conflicts of interest i.e. that the Commission has a vested interest in the financial outcome of a civil penalty.

Commission Response

4.3.3 The separation of powers between the Commission's investigative and decision making functions is an area that the Commission continues to keep under review, in respect of all administrative decision making.

4.3.4 The current Decision-Making Process, is designed to ensure that a degree of separation of powers exists coupled with various checks and balances and the Commission's approach in this regard has been considered and endorsed by the Royal Court in cases such as *Anchor Trust Company Ltd v JFSC* [2005] JLR 428. In addition, it is worth recognising (as the Royal Court did in the *Anchor Trust* case) that the right of appeal to the Royal Court, counters any perceived structural lack of independence on the part of the Board of Commissioners.

- 4.3.5 Some respondents advocated for an independent tribunal, akin to the Regulatory Decisions Committee (the “RDC”) in the UK. However, such a response tends to evidence a misconception about the RDC’s role. In July 2005, the FSA published an Enforcement Process Review. The Review made the following observation at paragraph 6.5: *“It is easy to fall into the trap of thinking of the RDC (or any other decision maker) as a tribunal, akin to an independent body making a judicial determination between two sides: the FSA staff and the firm or individual. The decision maker must be part of the FSA and take a decision on behalf of the FSA, not make a determination as between two or more parties. If the firm or individual wishes to challenge the FSA’s decision, it can refer the matter to the tribunal.”*
- 4.3.6 The Commission considers it important that the distinction between the role of a decision-maker and the role of any tribunal or court in reviewing a decision taken by a decision-making body is fully understood. The current structure has worked well and commented on favourably by the Royal Court and in the circumstances the Commission is of the view that the creation of an RDC is unnecessary.

4.4 Interpretation of the Codes of Practice

- 4.4.1 Nine respondents expressed concerns about the need to interpret the Codes of Practice, in order to avoid the issuance of a civil penalty. In summary, those respondents felt that the interpretation of a Code was not always certain. Consequently respondents expressed the view that this might result in the Commission being asked to express views on interpretation more frequently and to provide further assistance in this regard. A number of the nine respondents referred to the FSA Handbook, which was viewed as having more clarity in comparison to the Commission’s Codes of Practice. A representative body expressed the view that differences of opinion may exist within the Commission as to how provisions in the Codes are to be interpreted and applied.

Commission Response

- 4.4.2 The Commission is keen to ensure that its regulatory regime remains principles based, and does not become overly prescriptive. The Commission has considered the concerns expressed very carefully. Firstly, the Commission wishes to make it clear that it is always willing to respond to questions on the Codes of Practice.
- 4.4.3 In addition, the revised bandings (see Appendix C) mean that a registered person will have the opportunity to remedy a breach of the Codes of Practice before any civil penalty is considered, unless the breaches are so serious as to fall within Band 3. In practice, this means that if the Commission highlights a Band 2 breach as part of its examination programme, the registered person will be given the opportunity to remedy the breach before there is any consideration of civil penalties. This also means that where there is a difference in interpretation, there is opportunity for the differing interpretations to be discussed, an agreed view to be reached and for remedial action to be taken, if required.

4.5 Branches and Subsidiaries

- 4.5.1 Two respondents sought clarification on the application of any civil penalties to a branch or subsidiary.

Commission Response

- 4.5.2 Paragraph 4.1.2 of the Consultation Paper stated that: *“In a group structure, where there is more than one registered person, it is proposed that any civil penalty would be levied at the specific registered person that committed the breach, depending on the facts of the individual case.”*
- 4.5.3 Whether a civil penalty would apply to a subsidiary will depend on the legal structure adopted and who, legally, the registered person is. If both the subsidiary and the parent company are both registered persons in Jersey, the civil penalty would be applied to the registered person responsible for the breach. If only the subsidiary or the parent company is a registered person in Jersey, the civil penalty would apply accordingly. Appendix B and C to the Consultation Paper also indicated that in respect of a registered person that operates in Jersey through a branch, a civil penalty would only be calculated by reference to the branch income of the Jersey operation. In respect of Jersey companies with branches overseas, the income of the relevant branch only would be taken into account.

Appendix A

List of respondents

- IFG Fund Administration (Jersey) Limited
- James Hay Insurance
- Barclays Wealth
- Standard Bank Jersey Limited
- RBC Wealth Management
- Vantage Limited
- HSBC Bank plc; Jersey Branch, HSBC Bank International Limited; and HSBC Private Bank (CI) Limited, Jersey Branch (collectively)
- HSBC Bank Middle East Limited
- Advocate David Le Quesne (responding in a personal capacity)
- Mr Hamish Ramsay
- Jersey Banking Association
- Jersey Banking Association, trust sub-committee
- Jersey Association of Trust Companies
- Jersey Compliance Officers Association

- 13 additional responses were received via Jersey Finance.

Appendix B

Band	% of Relevant Income
1	<p>Up to 4% of relevant income or £250,000, whichever is the lesser amount</p> <p>Inadvertent breach that is uncorrected or recurs, so long as none of the factors determined in Bands 2 or 3 are present.</p>
2	<p>Up to 6% of relevant income</p> <p>A breach of the Codes of Practice where any of the following factors are present:</p> <ul style="list-style-type: none"> • reckless breach of the Codes of Practice; • more than an insignificant loss or risk of loss to clients; • more than an insignificant profit made or costs avoided as a result of the breach; or • significant risk that financial crime would be facilitated, occasioned or otherwise attributable to the breach, <p>so long as none of the factors determined in Band 3 are present.</p>
3	<p>Up to 8% of relevant income</p> <p>A breach of the Codes of Practice where any of the following factors are present:</p> <ul style="list-style-type: none"> • a deliberate breach; • an attempt to conceal a breach; • breach results in substantial number of clients being exposed to potential risk of, or actual, significant loss; • significant profit made or costs avoided as a result of the breach; or • systemic weaknesses in the registered person's procedures or internal controls relating to all, or part, of the registered person's business leading to multiple breaches.

Appendix C

Band	Civil Penalty
1	<p>Up to 4% or £10,000, whichever is the lesser amount (subject to further work)</p> <p>Failing on more than one occasion over a two year period to provide any notification, as required under a Code of Practice, to the Commission provided it does not fall within band 2 or 3.</p> <p>For example, failing to notify that a compliance officer is temporarily unable to fulfil his or her functions.</p>
2	<p>Up to 6% of relevant income (subject to further work)</p> <p>A breach of a Code of Practice that:</p> <ul style="list-style-type: none"> • is identified either by the registered person or the Commission; and • is not rectified to the satisfaction of the Commission, within the time frame determined by the Commission (following discussion with the registered person) and the breach is therefore ongoing; and • does not fall within band 3.
3	<p>Up to 8% of relevant income (subject to further work)</p> <p>A wilful or reckless breach(es) of the Codes of Practice that:</p> <ul style="list-style-type: none"> • poses a reputational risk to the Island and or • is caused for commercial reasons; or • results in systemic weaknesses in the registered person's procedures or internal controls, either throughout or in a part of the registered person's business.

The Commission is undertaking further work on the percentage levels and the maximum level in Band 1, in conjunction with registered persons.

In respect of Band 2, guidance would be issued to ensure that before a timeframe is determined by the Commission, a proposed timeframe is discussed with a registered person to ensure the timeframe proposed is reasonable. Furthermore, timeframes could be adjusted with the agreement of both the Commission and the registered person, if appropriate in the particular circumstances.