

FEEDBACK ON CONSULTATION PAPER NO. 2 2014

CIVIL FINANCIAL PENALTIES: DRAFT PRIMARY LEGISLATION

Feedback to a consultation on primary legislation to provide the Commission with the power to impose civil financial penalties for contraventions of Codes of Practice.

CONSULTATION FEEDBACK

Please note that terms in italics are defined in the Glossary of Terms.

This paper reports on the responses received by the *Commission* on the *CP*.

Further enquiries concerning the consultation may be directed to:

Barry Faudemer

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

Telephone: +44 (0) 1534 822137
Email: b.faudemer@jerseyfsc.org

or

Stephen de Gruchy

Senior Manager, Policy & Strategy
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

GLOSSARY OF TERMS

AIF	means an alternative investment fund as defined in the <i>AIF Regulations</i> .
AIF Regulations	means the Alternative Investment Funds (Jersey) Regulations 2012.
Amendment Law	means the draft Financial Services Commission (Amendment No. 6) (Jersey) Law 201-.
AML/CFT	means anti-money laundering/countering the financing of terrorism.
AML/CFT Handbook	means the <i>Commission's Handbook</i> for the prevention and detection of money laundering and the financing of terrorism for financial services business regulated under the <i>regulatory laws</i> .
BBJL	means the Banking Business (Jersey) Law 1991.
Codes of Practice (or Codes)	means the Codes of Practice for: <ul style="list-style-type: none">• alternative investment funds and AIF services business;• deposit-taking business;• fund services business;• general insurance mediation business;• insurance business;• investment business;• money service business;• trust company business; and <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	means the Jersey Financial Services Commission.
Commission Law	means the Financial Services Commission (Jersey) Law 1998.
CP	means the <i>Commission's Consultation Paper No. 2</i> of 2014.
ECHR	means the European Convention on Human Rights.
FCA	means the <i>UK's Financial Conduct Authority</i> .
FSJL	means the Financial Services (Jersey) Law 1998.
FSMA	means the <i>UK's Financial Services and Markets Act 2000</i> .
GFSC	means the Guernsey Financial Services Commission.
IBJL	means the Insurance Business (Jersey) Law 1996.
Jersey Finance	means Jersey Finance Limited.
licence	means a registration or permit (as applicable) held by a <i>registered person</i> .

registered person	means - <ul style="list-style-type: none">• a person registered under the <i>BBJL</i>;• a person registered under the <i>FSJL</i>¹;• a Category B permit holder under the <i>IBJL</i>;• a service provider within the meaning of the <i>AIF Regulations</i>.
regulatory laws	means - <ul style="list-style-type: none">• the <i>AIF Regulations</i>;• the <i>BBJL</i>;• the <i>FSJL</i>;• the <i>IBJL</i>; and• the <i>SBJL</i>.
SBJL	means the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008.
UK	means the United Kingdom.

¹ Other than a person registered to conduct Class R or Class S general insurance mediation business.

Contents

GLOSSARY OF TERMS	4
Contents	6
1 EXECUTIVE SUMMARY	7
1.1 Overview	7
1.2 Feedback received	7
1.3 Next Steps	7
2 SUMMARY OF RESPONSES	8
2.1 Structure of this section	8
2.2 General comments	8
2.3 Article 21A of the <i>Commission Law</i> – Power to impose civil financial penalties.....	11
2.4 Article 21B of the <i>Commission Law</i> – Level of financial penalty and criteria for imposition	11
2.5 Article 21C of the <i>Commission Law</i> – Notification of imposition of a financial penalty	15
2.6 Article 21D of the <i>Commission Law</i> – Restrictions on imposition of the financial penalty	17
2.7 Article 21E of the <i>Commission Law</i> – Late payment surcharge and enforcement.....	18
2.8 Article 21F of the <i>Commission Law</i> – Appeal against imposition of a financial penalty	19
2.9 Article 21G of the <i>Commission Law</i> – Proceeds of financial penalties	19
2.10 The Schedule to the <i>Amendment Law</i>	21
3 POST-CONSULTATION CHANGES TO THE DRAFT LEGISLATION	23
3.1 Description of the changes	23
APPENDIX A	24
List of respondents to the Consultation Paper.....	24
APPENDIX B	25
Final draft of the <i>Amendment Law</i>	25

1 EXECUTIVE SUMMARY

1.1 Overview

- 1.1.1 In the *CP* the *Commission* sought views on draft legislation - the *Amendment Law* - which would amend the *Commission Law* to introduce statutory provisions to enable the *Commission* to impose civil financial penalties on *registered persons* for contraventions of the *Codes of Practice*.
- 1.1.2 The purpose of this paper is to feedback on the responses received to the *CP*.
- 1.1.3 Whilst no fundamental changes to the *Amendment Law* have been considered necessary as a result of the responses received, some 'fine-tuning' of the draft legislation has been done, as described in chapters 2 and 3.

1.2 Feedback received

- 1.2.1 Respondents provided comments either directly to the *Commission* or indirectly via *Jersey Finance*.
- 1.2.2 *Jersey Finance* provided the *Commission* with consolidated comments it had received from three banks, one trust company and two brokers. Five respondents provided comments directly to the *Commission*. A full list of respondents is given in Appendix A.
- 1.2.3 Section 2 of this Feedback Paper presents a summary of the comments received with the *Commission's* (and in a few cases, the Chief Minister's Department's) response, as appropriate, to each.
- 1.2.4 The *Commission* is grateful to respondents for taking the time to consider and comment on the proposals. Each respondent has been sent a copy of this Feedback Paper.

1.3 Next Steps

- 1.3.1 On 22 September 2014 the Chief Minister lodged the draft *Amendment Law* (in the form shown in Appendix B) for debate by the States on 25 November 2014.
- 1.3.2 If adopted by the States the *Amendment Law* will come into force one month after it has been registered in the Royal Court, which can only take place once the Privy Council has sanctioned it. It usually takes around three months for the sanction of the Privy Council to be granted.
- 1.3.3 Separately, a draft Order that would be made under Article 21B (of an amended *Commission Law*) to set the financial penalty 'tariff' is being prepared and will be consulted on shortly.

2 SUMMARY OF RESPONSES

2.1 Structure of this section

- 2.1.1 This section summarises the comments received on the *Amendment Law*, and the *Commission's* response to those comments (and, in a few cases, the response of the Chief Minister's Department).
- 2.1.2 The *CP* posed one question – “Do you have any observations or concerns on any aspect of how the civil financial penalties framework would be implemented by the *Amendment Law*? If so, please state in detail what your observation or concern is and explain the reason for it.”
- 2.1.3 The comments that were received can be split into those of a general nature and then those that referred to specific provisions in the *Amendment Law*. This chapter is structured on those lines. For ease of reference, paragraphs 2.3 onwards refer to the Articles that the *Amendment Law* would insert into the *Commission Law* to implement a civil financial penalties regime.

2.2 General comments

- 2.2.1 Three respondents, whilst supportive of the principle of civil financial penalties, felt that the ultimate decision to impose a financial penalty should be taken by a body independent of the *Commission*. The Royal Court as the decision-taker, or the establishment of a new independent tribunal/panel to perform that role, were suggested.
- 2.2.2 The respondents' arguments for an independent decision-taker appear to primarily stem from: (i) a concern over a potential conflict of interest (i.e. would the *Commission* have a tendency to levy a financial penalty to address financial constraints?); and (ii) their opinion that regulatory decisions should be taken by a body independent of the *Commission* as investigator.

Commission response

- 2.2.3 The *Commission* considers that an independent decision-taking body is unnecessary (and would add unnecessary additional cost) because there would be adequate safeguards in place to address any actual or perceived conflict:
- 2.2.3.1 a decision to levy a financial penalty would be taken by members of the Board of Commissioners, which is non-executive (whilst the Director General is a member of the Board he would take no part in the decision) in line with the *Commission's* published decision-making process;
- 2.2.3.2 a decision to levy a financial penalty would be appealable to the Royal Court: the Anchor case² confirmed that such a right of appeal counters

² Anchor Trust Company Limited v Jersey Financial Services Commission [2005] JRC 148 (and confirmed on appeal – see the Court of Appeal judgment [2006] JCA040).

any perceived lack of structural independence between the Executive of the *Commission* and the Board of Commissioners;

2.2.3.3 the Law Officers' Department has confirmed that the right of appeal to the Royal Court ensures that the requirements of Article 6 of the *ECHR* for a "fair and public hearing ... before an independent tribunal..." are met;

2.2.3.4 the *Commission* is accountable to the States through the Chief Minister: should he or she have any concerns as to how the *Commission* is operating the financial penalty regime, the Chief Minister would have the power under Article 21B(7) to prescribe by Order the processes the *Commission* must follow when exercising the power to impose a financial penalty.

2.2.4 One respondent expressed the view that the *Commission* has appropriate enforcement powers to deter and detect non-serious regulatory breaches and opined that the financial penalties regime should be reserved for the deterrence of breaches that are serious.

Commission response

2.2.5 Under Article 21A(1) (as amended post-consultation, see paragraph 2.3.5) the financial penalties regime would only apply where a *registered person* has, "to a significant and material extent", contravened a *Code of Practice*.

2.2.6 A respondent, who is a fund manager to a number of Jersey Recognized Funds, asked for clarification as to which sections of the *Codes of Practice* for alternative investment funds and AIF services business apply to a Recognized Fund.

2.2.7 Another respondent suggested that where a self-managed AIF contravened a *Code of Practice* that the carry interest or bonus pool of the management responsible for the contravention could be targeted.

Commission response

2.2.8 As set out in Part 1 of the *Codes of Practice* for alternative investment funds and AIF services business, only sections 3 and 4 (with the exception of paragraph 19) thereof apply to a Recognized Fund.

2.2.9 The suggestion for targeting the carry interest or bonus pool in respect of a self-managed AIF might be considered as a future enhancement, but for the time being and, as previously indicated, the financial penalty regime would not apply to natural persons³.

³ Except where a natural person is a *registered person* in their own right (for example, where he/she is registered to carry on Class G business (acting as a director) under the Financial Services (Financial Service Business) (Jersey) Order 2009).

2.2.10 Another respondent commented that the *Codes of Practice* are open to interpretation in a number of areas and this could involve the *Commission* in significant and lengthy disputes with a firm if a financial penalty is proposed.

Commission response

2.2.11 The *Commission* accepts that differences of opinion about the interpretation of *Code* provisions might become more frequent or acute when *registered persons* could be subject to financial penalties.

2.2.12 However, the *Commission* would like to emphasise that it is always willing to respond to questions on the meaning of a *Code* provision. In addition, before the implementation of the financial penalty regime, the *Commission* would review the *Codes* to ensure that questions of interpretation are minimised.

2.2.13 A respondent suggested that the time period for complying with new requirements set by a revised *Code* may well involve a *registered person* in developing and changing systems and procedures. As a consequence, the respondent opined that implementation dates should allow sufficient time for the design, development, implementation and use of amended systems and procedures before contraventions of the new requirements fall into the financial penalty regime.

Commission response

2.2.14 The *Commission* acknowledges the issue identified by the respondent and would ensure that appropriate transitional arrangements are built into revised *Codes*.

2.2.15 The same respondent observed that, ultimately, it is the shareholders, customers and clients who would indirectly and over time fund any penalties imposed. The respondent opined that those responsible for contraventions may probably not be directly affected and that it may be difficult to properly attach blame to an individual.

Commission response

2.2.16 Whilst the financial penalty regime would not apply to individuals initially⁴, where an individual in a *registered person* is directly responsible for the contravention the *Commission* has a range of other sanctions it can use. These include issuing directions to limit the activities of the individual in the finance industry (e.g. a 'banning direction') and/or issuing a public statement.

⁴ Except where a natural person is a *registered person* in their own right (for example, where he/she is registered to carry on Class G business (acting as a director) under the Financial Services (Financial Service Business) (Jersey) Order 2009).

2.3 Article 21A of the *Commission Law* - Power to impose civil financial penalties

- 2.3.1 A respondent noted that the heading of the Article referred to “civil financial penalties” but nowhere else in the legislation was it clear that the financial penalty was “civil” in nature. The respondent considered that the position should be made clearer.

Commission response

- 2.3.2 The definition of “penalty” shown in Article 1 of the *Amendment Law* has been amended to mean, “a civil financial penalty imposed by the *Commission* under Article 21A”.

- 2.3.3 One respondent commented on the wording in paragraph (1) of Article 21A which provided for the financial penalty regime to apply where a *registered person* had, “to a material extent”, contravened a *Code of Practice*.

- 2.3.4 The respondent opined that the expression was presumably used to prevent a financial penalty being imposed where a contravention was solely “technical” in nature but expressed the view that the position was not clear.

Commission response

- 2.3.5 The expression, “to a material extent”, has been amended to read, “to a significant and material extent”.

- 2.3.6 This will give greater clarity to the threshold that applies. For example, if a *registered person* failed to file a document/notification on time as required by a provision in a *Code of Practice* that would clearly be a “material” contravention. But the contravention would have to be “significant” as well for the financial penalty regime to apply. So, if the filing was 1 day late and it was not critical that the particular document/notification was in the hands of the *Commission* on day 1 then the contravention would not be “significant” and the financial penalty regime would not apply.

2.4 Article 21B of the *Commission Law* - Level of financial penalty and criteria for imposition

- 2.4.1 Noting that Article 21B(1) provides for the financial penalty ‘tariff’ to be set by Ministerial Order, several respondents made observations on how the tariff might be constructed.

Commission response

- 2.4.2 The draft Order will shortly be consulted on separately. In view of this, the *Commission* does not intend to respond at this time to the observations made by

respondents. However, the comments received will inform *Commission* discussions with the Chief Minister's Department as to what tariff it might be appropriate to propose in the draft Order.

- 2.4.3 One respondent commented that financial penalties imposed by the *Commission* may need to be proportionate to the level or scale of fines that a court could impose for criminal offences under the Companies (Jersey) Law 1991.

Commission response

- 2.4.4 Whilst the *Commission* does not consider that the penalties for criminal offences under the Companies (Jersey) Law 1991 would necessarily be an appropriate yardstick in every case, a financial penalty would need to be "reasonable in all the circumstances of the case" otherwise the Royal Court would find against the *Commission* on appeal (see Article 21F).

- 2.4.5 A number of respondents commented on the proposed provisions in paragraphs (3) and (4) of Article 21B, which set out matters that the *Commission* would be required to take into account when considering whether to impose a financial penalty and its amount. These are discussed in paragraphs 2.4.6 to 2.4.27.

- 2.4.6 One respondent considered that in addition to having to consider, "the seriousness of the contravention" (sub-paragraph (a) of Article 21B(3)), the *Commission* should have to take into account, "the importance of the particular aspect of the *Code* contravened".

- 2.4.7 Another respondent considered that the requirement to take into account, "the seriousness of the contravention", was a subjective and inappropriate criterion upon which to determine the amount of a financial penalty.

Commission response

- 2.4.8 The *Commission* does not consider that it would be appropriate to insert into Article 21B(3) a requirement for the *Commission* to have to take into account, "the importance of the particular aspect of the *Code* contravened". The importance, per se, of a particular requirement in a *Code of Practice* may not be uniform: the importance of the particular requirement will depend on the circumstances of the *registered person* concerned.

- 2.4.9 For example, the failure of a *registered person* to meet the *Code* requirement to give the *Commission* advance notification that it is to be subject to a summary winding up would be significant where it has a large and active client base but less so where a firm had already completely run down its operations.

- 2.4.10 In response to the second respondent's comment, whilst "the seriousness of the contravention" would inevitably be a subjective judgement, it is important that it is a factor that the *Commission* should be required to take into account.

2.4.11 Indeed, where a public body is considering the imposition of a financial penalty, it is normal for it to be required to take into account the seriousness of the contravention: for example, see Article 39(6)(a) of the Gambling (Jersey) Law 2012; Article 11D(2)(b) of the Financial Services Commission (Bailiwick of Guernsey) Law 1987; FCA Handbook - Decision Procedure and Penalties Manual (DEPP) 6.5.3.

2.4.12 One respondent commented on the proposed requirement in sub-paragraph (b) of Article 21B(3)) for the *Commission* to have regard to, “whether or not the *registered person* knew, or ought to have known, of the contravention”. The respondent considered that this was a subjective and inappropriate criterion.

Commission response

2.4.13 The context in which the respondent’s comment was given seems to indicate that it thought that, “ought to have known”, refers to knowing whether something was a requirement of a *Code* or not.

2.4.14 In fact, sub-paragraph (b) would require the *Commission* to take into account whether the *registered person* knew, or ought to have known, that it had contravened a particular requirement of a *Code*. When deciding upon this, the *Commission* would take into account such matters as whether the *registered person* had appropriate procedures and processes in place to minimise the risk that it could contravene a *Code* without becoming aware of it.

2.4.15 One respondent welcomed the notable degree of consistency between the matters that the equivalent Guernsey legislation required the *GFSC* to have regard to when deciding whether to impose a financial penalty and those set out in paragraph (3) of Article 21B.

2.4.16 However, the respondent noted that the equivalent of sub-paragraph (d) in the Guernsey legislation (which reads, “what efforts if any have been made to rectify the contravention or non-fulfilment and to prevent a recurrence”) enabled the *GFSC* to take into account slightly wider considerations than the proposed Jersey legislation would permit.

Commission response

2.4.17 The wording of sub-paragraph (d) has been amended to make it materially the same as that in the Guernsey legislation.

2.4.18 One respondent commented on sub-paragraph (e) of Article 21B(3), which would require the *Commission* to have regard to the, “likelihood of any further contravention”. The respondent opined that it would be unfair to penalise a *registered person* for something it had not yet done.

Commission response

2.4.19 The *Commission* considers this to be a fair comment. Sub-paragraph (e) has

therefore been deleted.

- 2.4.20 One respondent commented that the legislation should require the *Commission*, when considering the imposition of a financial penalty, to have regard to the likely financial impact on the *registered person*, so, for example, it would not be forced to close as a consequence of paying a financial penalty.
- 2.4.21 Another respondent, referring to sub-paragraph (f) of Article 21B(3), suggested that the considerations should also include the impact on employees of the registered person.

Commission response

- 2.4.22 With regard to the first respondent's comments, the Commission considers that the point is already met by the requirement in sub-paragraph (f) of Article 21B(3) for the *Commission*, when considering whether to impose a financial penalty, to have regard to, "the potential financial consequences to the *registered person* and to third parties (including customers and creditors of the *registered person*)".
- 2.4.23 The Commission was not entirely clear what the second respondent meant by its comment but, on the assumption that it is alluding to the fact that redundancies could occur if the consequences of a financial penalty were to make the business financially stressed, the Commission considers that sub-paragraph (f) of Article 21B(3) already covers the point. Employees would be one class of "third party", the consequences to whom the *Commission* would have to take into account when considering the imposition of a financial penalty.
- 2.4.24 Sub-paragraph (g) of Article 21B(3) would require the *Commission* to have regard to, "the principle of ensuring that *registered persons* cannot expect to profit from contravention of the *Codes*". One respondent suggested that this would be better phrased as, "not expect to retain excess profits attributable to contraventions of the *Codes*."

Commission response

- 2.4.25 Such a change would not be appropriate because it would not cover a scenario where a *registered person* had not actually made a profit but had prevented, or reduced, losses by contravening a *Code*.
- 2.4.26 One respondent suggested that Article 21B(3) should provide that where a registered person had been penalised in one jurisdiction it should not be subject to a financial penalty in Jersey for the same infringement.

Commission response

- 2.4.27 The *Commission* considers that such a provision would be inappropriate, not

least because:

- 2.4.27.1 a different set of clients or customers are likely to have been impacted, or potentially impacted, by the contravention;
- 2.4.27.2 the reputation of both Jersey and the other jurisdiction may have been damaged by the contravention;
- 2.4.27.3 the reputation of Jersey as a respectable and responsible financial centre may be damaged if the possibility of imposing a financial penalty was excluded because of applying the principle suggested by the respondent;
- 2.4.27.4 the *Commission* may disagree with the sanction imposed in the other jurisdiction. Very often regulators are in possession of different facts and it creates difficulties in trying to assess if the sanction imposed in one jurisdiction is for the same conduct that occurred locally. So the respondent's suggestion would not be achievable in practice.

2.4.28 Paragraph (8) of Article 21B would require the Chief Minister to consult the *Commission* before making any Order under Article 21B. A respondent considered that the Chief Minister should also be required to consult *registered persons*.

Commission response

2.4.29 The *Commission* has discussed this comment with the Chief Minister's Department. It considers that imposing such a requirement in law would be inappropriate because, in contrast to the *Commission*, the Chief Minister is democratically elected into an executive function and accordingly has the discretion to decide whether or not to consult such parties as *registered persons* (or, more practically, their representative bodies) in accordance with normal government consultation procedures

2.5 Article 21C of the *Commission Law* - Notification of imposition of a financial penalty

2.5.1 Referring to the provisions of paragraph (1)(b) of Article 21C, one respondent commented that:

- 2.5.1.1 in imposing a financial penalty the *Commission* should be required to have, "more than mere 'grounds to believe' [there has been a contravention of a *Code*]";
- 2.5.1.2 the amount of the financial penalty should be stated to be objectively fair and reasonable in all the circumstances; and
- 2.5.1.3 the onus of proof should be stated (whether it is the civil burden of proof or otherwise).

Commission response

- 2.5.2 The *Commission* considers that the respondent's first two points are already adequately addressed by the appeal process that would be established by Article 21F, whereby the Royal Court could order the *Commission* not to impose a financial penalty, or to impose a financial penalty of a different amount to that proposed by the *Commission*, where the Royal Court considers that the decision of the *Commission* was unreasonable having regard to all the circumstances of the case.
- 2.5.3 The respondent's third point has been addressed by the amendment to the definition of "penalty" (see paragraph 2.3.2) which now makes it clear that it would be a "civil" financial penalty and thus the burden of proof would be the civil one ("on the balance of probabilities").
- 2.5.4 Rather than the one month period set out in paragraph (1)(c) of Article 21C, a respondent suggested that it would be more reasonable for a *registered person* to be given a period of 60 days in which to make representations against a notice of intent [to impose a financial penalty] issued by the *Commission*.
- 2.5.5 The same respondent opined that any representation made should be considered by persons independent of the initial assessment.
- 2.5.6 Another respondent asked how the one month time limit compared to the time limit in the financial penalty regime operated by the *FCA*.

Commission response

- 2.5.7 Given that the *Commission* would have had discussions with a *registered person* about the alleged contravention well before a notice of intent was issued, the *Commission* considers that a period of 60 days would be excessive.
- 2.5.8 The *Commission* would also draw attention to the fact that the standard period set out in the *regulatory laws* in which a *registered person* must appeal against the imposition of some other form of sanction (e.g. a public statement) is one month.
- 2.5.9 The *Commission* considers that it would be unnecessary for a representation to be considered by independent persons given that, ultimately, any decision to impose a financial penalty could be appealed to the Royal Court.
- 2.5.10 Where the *FCA* issues a 'warning notice' about regulatory action that it proposes to take (such as the imposition of a financial penalty) it must give the recipient no less than 28 days in which to make representations (*FSMA* Section 387).

- 2.5.11 In paragraph 4.3.24 of the *CP*, the *Commission* acknowledged that certain of the requirements of the *Codes of Practice* will overlap with statutory requirements or build on such requirements and it is therefore possible that conduct by a *registered person* could amount to both a contravention of a *Code* and the commission of a criminal offence.
- 2.5.12 In the *CP* the *Commission* explained that if a successful criminal prosecution were to be brought and a sanction imposed by the criminal courts, then a financial penalty would not be imposed by the *Commission* for the same conduct. However, if a prosecution were to be unsuccessful, the *Commission* would, where appropriate, have the discretion (subject to due process and the *registered person's* statutory right of appeal to the Royal Court) to impose a financial penalty in respect of the conduct that had been the subject of the prosecution. This would only take place if the misconduct had been serious and the civil standard of proof was met.
- 2.5.13 In response to this, one respondent commented that it would difficult to pursue such a policy without a clear definition of what constitutes serious misconduct and what meeting the civil standard of proof entailed.

Commission response

- 2.5.14 Whilst each case would have to be considered on its merits the financial penalty regime would only apply where the contravention of a *Code* had been “significant and material” (see paragraph 2.3.5).
- 2.5.15 See paragraph 2.5.3 for an explanation of the civil standard of proof.

2.6 Article 21D of the *Commission Law* – Restrictions on imposition of the financial penalty

- 2.6.1 A respondent noted that an appeal to the Royal Court against the imposition of a financial penalty would have to be lodged within one month. The respondent asked how this compared to the *FCA* regime.
- 2.6.2 Another respondent queried what the position would be where the contravention of a provision in the *Commission's AML/CFT Handbook* was one which amounted to both a criminal offence and a contravention to which a financial penalty could be imposed by the *Commission*.

Commission response

- 2.6.3 In the *UK*, an appeal against a decision of the *FCA's* Regulatory Decisions Committee to impose a financial penalty must be made within 28 days.
- 2.6.4 As the *Commission* stated in the *CP*, it recognises that there may be circumstances where conduct by a *registered person* could amount both to the contravention of a *Code* (an example of which is the *Commission's AML/CFT Handbook*) and the commission of a criminal offence.

- 2.6.5 As is the protocol now, where the contravention of a *Code* makes a *registered person* liable to a regulatory sanction - and the contravention is also a criminal offence - the *Commission* and the Attorney General would discuss who should take forward any enforcement action in the first instance.
- 2.6.6 If it were to be decided that the *Commission* should take regulatory action in the first instance, the Attorney General would take into account that regulatory action when he was subsequently determining if the public interest would be best served in also pursuing a criminal prosecution.
- 2.6.7 This existing protocol would be followed under the financial penalty regime.
- 2.6.8 However, where the Attorney General did bring a prosecution and secured a criminal conviction the *Commission* would not seek to impose a financial penalty in respect of the same conduct that had resulted in the contravention of a *Code*.
- 2.6.9 However, if a criminal prosecution were to be unsuccessful the *Commission* would retain the discretion to impose a financial penalty (subject to due process and the *registered person's* right of appeal to the Royal Court). The *Commission* considers that this approach is correct in principle, where the misconduct had been serious.

2.7 Article 21E of the *Commission Law* – Late payment surcharge and enforcement

- 2.7.1 A respondent suggested that the legislation should provide that the method of raising funds to pay a financial penalty should have to be considered. The respondent gave an example of where illiquid assets might need to be realised by a *registered person*.
- 2.7.2 Another respondent, quoting case law, suggested that the 5% late payment fee would be disallowed in commercial contracts as a matter of public policy enforced by the courts.
- 2.7.3 A third respondent asked whether the 5% would be compounded in successive months or still calculated on the basis of the original amount of the financial penalty.

Commission response

- 2.7.4 With regard to the first comment, whilst the legislation would set when a late payment fee would become payable, the *Commission* would have discretion as to how quickly it enforces payment and will take into consideration reasonable requests for short delays. In addition, the draft legislation has been amended to give the *Commission* discretion to waive or reduce a late payment fee (see paragraph 3.1.3).
- 2.7.5 With respect to the second respondent's comment, the case law alluded to by the respondent has no direct relevance to the payment of a late payment fee, which is not a contractual matter. The figure of 5% has been chosen for

consistency with the *Commission's* Fees Notices in relation to the late payment of annual *licence* fees (where the 5% figure is itself based on statutory precedents going back many years e.g. see R&O 9410 of 1999).

2.7.6 Finally, the *Commission* can confirm that the legislation would not permit the 5% late payment fee to be compounded.

2.8 Article 21F of the *Commission Law* - Appeal against imposition of a financial penalty

2.8.1 One respondent suggested that a period of 60 days in which to lodge an appeal would be more reasonable, rather than the one month period proposed in the draft legislation.

Commission response

2.8.2 One month is the standard period in the *regulatory laws* for appeals to the Royal Court against regulatory sanctions.

2.8.3 A one month period is considered reasonable given that an appeal would only be made after the *registered person* had been given a final notice (to impose a financial penalty). And before the issue of such a final notice a *registered person* would have first been given a notice of intent (to impose a financial penalty) and had 28 days in which to make representations on that notice.

2.9 Article 21G of the *Commission Law* - Proceeds of financial penalties

2.9.1 There were a number of comments on the provisions in paragraphs (3) and (4) of Article 21G that would, respectively:

2.9.1.1 allow the *Commission* to voluntarily pay the proceeds of financial penalties to the States where the application of the financial penalties to reduce *licence* fees would result in a substantial reduction in the fees;

2.9.1.2 allow the Chief Minister to make an Order prescribing circumstances in which the *Commission* would be required to pay the proceeds of financial penalties to the States.

2.9.2 Respondents were unenthusiastic about these two provisions and suggested a number of alternatives for using 'excess' funds. These included: a general cash refund to all *registered persons*; to fund training of *registered persons*; to promote the Island as a finance centre; to establish a compensation fund for victims of contraventions.

Commission response

- 2.9.3 The general principle, set out in Article 21G(2), that financial penalties paid to the *Commission* should be used to reduce or mitigate any required increase in *licence* fees of the class of *registered person* on whom the financial penalties were imposed, is in line with a proposal in the *Commission's* 2012 consultation paper on a framework for civil financial penalties and which received strong support from respondents.
- 2.9.4 The *Commission* has discussed with the Chief Minister's Department respondents' comments on the two statutory provisions referred to in 2.9.1.1 and 2.9.1.2. In situations where the *Commission* imposes very substantial financial penalties in a particular period, which could result in far more money being received than would be necessary to achieve a reasonable reduction in *licence* fees, the Chief Minister considers it appropriate that there is a power whereby the *Commission* may pay over the 'excess' monies to the States. What the States do with such monies would be a matter for the States to decide bearing in mind the particular relevant circumstances.
- 2.9.5 As regards the provision that would provide the Chief Minister with the power to make an Order prescribing circumstances in which the *Commission* would be required to pay the proceeds of financial penalties to the States, the Chief Minister considers that the Order-making provision would provide a proportionate response to a situation where the application of the proceeds of financial penalties would result in a substantial reduction in *licence* fees. Regulation is not simply a cost without benefits because many businesses are required to be regulated in order to sell their products. Given the benefits of regulation, the Chief Minister does not consider that it would be seen as appropriate to reduce *licence* fees below a certain reasonable level.

- 2.9.6 One respondent, whilst noting that 'excess' funds could be paid to the States, considered that there should be some mechanism whereby at least part of the excess funds could be utilised in defraying the costs of the Enforcement Division of the *Commission*, which might have the effect of reducing *licence* fees generally.

Commission response

- 2.9.7 The costs of the Enforcement Division are *pro rated* across the various divisions within the *Commission* and a sector in which financial penalties are levied most frequently are likely to incur the more significant enforcement costs. As money received from penalties for each class of *registered person* would be taken into account when the level of *licence* fees is set for the corresponding class of *registered person*, there is likely to be a significant element of off-setting the costs of the Enforcement Division for that class of *registered person*.
- 2.9.8 That said, directly subsidising enforcement costs through a financial penalty regime is not considered appropriate: it could give rise to suggestions that enforcement action by means of financial penalties was being driven by the need to recover enforcement costs generally.

- 2.9.9 One respondent sought confirmation that the primary aim of the financial penalty regime was to act as a deterrent to those *registered persons* who persistently or seriously contravene the *Codes*.
- 2.9.10 The same respondent stated that it would welcome continuing guidance from the *Commission* through the publication of examples of best practice.

Commission response

- 2.9.11 The *Commission* can confirm that the primary aim of the financial penalty regime is to act as a deterrent to those *registered persons* who persistently or seriously contravene the *Codes*.
- 2.9.12 The *Commission* intends to continue issuing guidance to Industry on best practice, as a follow-up to its annual on-site examination programmes.

2.10 The Schedule to the *Amendment Law*

- 2.10.1 There were a number of comments on the provisions in the Schedule, which would make some minor and consequential amendments to the *regulatory laws*.
- 2.10.2 Noting that one amendment would enable a *registered person's licence* to be revoked for non-payment of a financial penalty, a respondent asked at what stage of the process would failure to pay become grounds for revocation, considering the *Commission* would have the power to sue to enforce payment.

Commission response

- 2.10.3 The statutory provision would permit the *Commission* to revoke a *licence* if the financial penalty was not paid on the due date. However, unless there were exceptional reasons for doing otherwise, the *Commission* would not revoke a *licence* before attempting to enforce payment of the financial penalty (as an outstanding debt) through the courts.

- 2.10.4 The same respondent commented on the amendment that would allow the *Commission* to make a public statement when it issued a *registered person* with a final notice to pay a financial penalty. The respondent considered that it would be appropriate to only make a public statement once a financial penalty had been paid and therefore not subject to any appeal.

Commission response

- 2.10.5 The *Commission* does not consider that it would be appropriate to defer the making of a public statement until a financial penalty had been paid (because a *registered person* might not pay the financial penalty on its due date, despite not lodging an appeal.)
- 2.10.6 However, the respondent implicitly makes the point that a public statement should not be made if an appeal had been lodged with the Royal Court. The

Commission considers that this is a fair point and the draft legislation has been amended so that a public statement concerning the serving of a final notice may not be issued during the one month period permitted for an appeal to be made to the Royal Court or - where such an appeal is made - before the day on which the appeal is determined by the Royal Court or withdrawn. (See new Article 21D(3).)

- 2.10.7 One respondent commented on the proposed amendment to the *regulatory laws* that would amend the *Code*-making provision to state that the *Codes* set, “detailed requirements that must be complied with....”.
- 2.10.8 The respondent considered that this would fundamentally alter the significance of the *Codes*. The respondent was of the view that the *Codes* are principles supported by guidance as to their practical application, with room for registered persons to interpret them as appropriate for their own business. The respondent considered that they were not *de facto* rules, a breach of which would open a *registered person* up to regulatory action.
- 2.10.9 The same respondent sought reassurance that no officer of the *Commission* would be given targets for generating financial penalties from identified *Code* contraventions when conducting regulatory examinations or have their performance assessment in any way linked to that.

Commission response

- 2.10.10 The *Commission* disagrees that the amendment would “fundamentally alter [the *Codes*]’ significance”.
- 2.10.11 The respondent does not appear to appreciate that the *Codes* already set enforceable regulatory requirements. This is evidenced by the fact that contraventions of the *Codes* already make a *registered person* liable to regulatory sanctions (e.g. the issuing of a public statement by the *Commission* or the revocation of its *licence*).
- 2.10.12 The *Commission* can confirm that no officer of the *Commission* would be given targets for generating financial penalties from identified *Code* contraventions or have their performance assessment linked to that.

3 POST-CONSULTATION CHANGES TO THE DRAFT LEGISLATION

3.1 Description of the changes

- 3.1.1 All except one of the substantive changes made to the draft *Amendment Law* post-consultation have already been described in the previous chapter. That one exception is an amendment that has been made to Article 21E.
- 3.1.2 That Article has been amended so that the late payment fee - now called a 'surcharge' - would automatically be applied if the financial penalty is not paid on the due date. Previously the Article made application of the surcharge discretionary.
- 3.1.3 However, as described in paragraph 2.7.4, the *Commission* would be given a statutory discretion to waive or reduce the surcharge in appropriate circumstances (for example, where the late payment was not the fault of the *registered person*).
- 3.1.4 A number of other minor changes have been made to the draft *Amendment Law* to ensure consistency or to make the legislation clearer.
- 3.1.5 The final version of the draft *Amendment Law* as lodged by the Chief Minister is shown in Appendix B.

APPENDIX A

List of respondents to the Consultation Paper

- Advocate Anthony Dessain (in a personal capacity)
- Jersey Association of Trust Companies
- *Jersey Finance* (which consolidated comments it had received from three banks, one trust company and two brokers)
- SWM Limited
- The Royal Bank of Scotland International Limited
- One other respondent who did not wish any public attribution of its comments

APPENDIX B

Final draft of the *Amendment Law*

(Pages are separately numbered)

APPENDIX B



Jersey

FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

Report

Explanatory Note

This Law would amend the Financial Services Commission (Jersey) Law 1998 (“the 1998 Law”) so as to provide a civil financial penalty regime.

Article 1 amends the 1998 as follows. Paragraph (2) inserts some new definitions. Paragraph (3) adds the proceeds from penalties that the Commission is to keep to its resources. Paragraph (4) requires the Commission to include in a report it is required to make before publishing fees any extent to which penalties have reduced the level of fee that would otherwise have been proposed.

The main provisions concerned with the new penalty regime are inserted into the 1998 Law by paragraph (5) as Articles 21A to 21G.

Article 21A provides a power for the Commission to impose penalties for significant and material contraventions of codes of practice under the regulatory legislation set out in that Article.

Article 21B limits the penalty to the maximum that may be prescribed by Order of the Chief Minister and sets out the criteria that the Commission must have regard to in deciding whether to impose a penalty and the amount of the penalty. It has to publish a statement setting out these and other principles it will apply and there is also power for the Chief Minister to publish principles and processes for the Commission to follow.

Article 21C requires the Commission to issue and serve on the registered person a notice of intent where it is minded to impose a penalty, setting out the grounds and inviting the registered person to make representations. After considering any representations, the Commission may issue and serve on the registered person a final notice which must include a number of matters including the date by which payment must be made, how it may be made and advising as to the power to impose a surcharge, to enforce the penalty and the registered person’s right of appeal.

Article 21D prevents the issuing of a notice of intent, subject to 2 limited exceptions, in respect of a contravention of a code of practice occurring before the commencement of the civil penalty regime or more than 3 years after the contravention came to the

APPENDIX B

attention of the Commission. There is also a prohibition on issuing public statements except in the case of final notices and these only after the period for appealing has expired or any appeal made is concluded.

Article 21E requires the Commission to impose a surcharge of 5% of the amount unpaid for every month it remains unpaid after the date specified in the final notice. However, any time during the currency of the appeal process is disregarded and the Commission has a discretion to waive or reduce the amount of the surcharge. Penalties (including any surcharge) are enforceable as debts owed by the registered person to the Commission.

Article 21F provides for an appeal to the Royal Court against the imposition of a penalty or the amount of the penalty.

Article 21G enables the Commission to retain the penalties. The money must be treated as fees paid by registered persons of the same class as the person paying the penalty, and applied so as to reduce the level of fees that would otherwise be charged. However, if this would reduce the level of fees substantially the money or a proportion of it may be paid to the States. There is also power for the Chief Minister to prescribe the circumstances in which the money derived from penalties must be paid to the States.

Article 2 introduces the *Schedule*, which makes a series of amendments to various regulatory Laws and some Regulations consequential upon the new provisions. In addition the provisions concerned with codes of practice are revised and assimilated.

Article 3 gives the Law its short title and provides for it to come into operation one month after registration.



APPENDIX B



Jersey

FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

Arrangement

Article

1	Amendment of Financial Services Commission (Jersey) Law 1998.....	5
2	Amendments to related enactments.....	11
3	Citation and commencement.....	11

SCHEDULE

12

AMENDMENTS TO RELATED ENACTMENTS

12

1	Collective Investment Funds (Jersey) Law 1988	12
2	Banking Business (Jersey) Law 1991	12
3	Insurance Business (Jersey) Law 1996	13
4	Financial Services (Jersey) Law 1998.....	14
5	Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008	15
6	Alternative Investment Funds (Jersey) Regulations 2012.....	16

APPENDIX B

APPENDIX B



Jersey

FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

A LAW to amend further the Financial Services Commission (Jersey) Law 1998 so as to introduce a civil financial penalty regime and to make minor amendments to related enactments.

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Amendment of Financial Services Commission (Jersey) Law 1998

- (1) The Financial Services Commission (Jersey) Law 1998 is amended in accordance with this Article.
- (2) In Article 1 –
 - (a) in paragraph (1) after the definition “Minister” there shall be inserted the following definitions –
 - “ ‘penalty’ means a civil financial penalty imposed by the Commission under Article 21A;
 - ‘prescribed’ means prescribed by Order made by the Minister;
 - ‘registered person’ means –
 - (a) a registered person within the meaning of the Banking Business (Jersey) Law 1991;
 - (b) 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);
 - (c) 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

APPENDIX B

- business falling within Class R or Class S as set out in the Schedule to the Financial Services (Financial Services Business) (Jersey) Order 2009;
- (d) a service provider within the meaning of Regulation 2 of the Alternative Investment Funds (Jersey) Regulations 2012;”;
- (b) for sub-paragraph (2) there shall be substituted the following sub-paragraph –
- “(2) The States may by Regulations amend the definition ‘registered person’ in paragraph (1).”.
- (3) in Article 14(c) there shall be deleted the word “and” and after that paragraph there shall be inserted the following paragraph –
- “(ca) the amount of any penalty paid to the Commission that is not paid or to be paid to the States under Article 21G; and”.
- (4) After Article 15(3)(b) there shall be inserted the following sub-paragraph –
- “(ba) details of the extent (if any) to which any penalties received have reduced the level of fee that would otherwise have been proposed;”.
- (5) After Article 21 there shall be inserted the following Articles –

“21A Power to impose civil financial penalties

- (1) If the Commission is satisfied that a registered person has, to a significant and material extent, contravened a Code of Practice to which this Article applies, the Commission may impose on that person a penalty to the extent permitted by the following provisions of this Law.
- (2) This Article applies to the Codes of Practice issued by the Commission under –
- (a) Article 19A of the Banking Business (Jersey) Law 1991;
- (b) Article 42 of the Insurance Business (Jersey) Law 1996;
- (c) Article 19 of the Financial Services (Jersey) Law 1998;
- (d) Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008; and
- (e) Regulation 22 of the Alternative Investment Funds (Jersey) Regulations 2012.

21B Level of penalty and criteria for imposition

- (1) The penalty that the Commission may impose must not exceed the maximum level of penalties prescribed for the particular type of contravention.
- (2) The Order may prescribe those levels by reference to a fixed amount, a percentage of the registered person’s income or such other criteria as the Minister considers appropriate.

APPENDIX B

- (3) In considering whether to impose a penalty and the amount of penalty to be imposed the Commission must have particular regard to the following matters –
 - (a) the seriousness of the contravention of the Code of Practice;
 - (b) whether or not the registered person knew, or ought to have known, of the contravention;
 - (c) whether or not the registered person voluntarily reported the contravention;
 - (d) whether or not the registered person has taken steps to rectify the contravention and to prevent its recurrence;
 - (e) the potential financial consequences to the registered person and to third parties (including customers and creditors of the registered person) of imposing the penalty;
 - (f) the principle of ensuring that registered persons cannot expect to profit from contravention of the Codes;
 - (g) the penalties imposed by the Commission in other cases;
 - (h) the principles mentioned in paragraph (4) (other than those set out in this paragraph).
- (4) The Commission must publish a statement setting out –
 - (a) the principles (including the matters set out in paragraph (3)(a) to (g)) it will apply in determining the imposition and amount of the penalty, including within those principles what are the aggravating and mitigating factors, which must be stated not to be exhaustive; and
 - (b) the processes it will follow when exercising the power to impose a penalty.
- (5) The Commission must review the statement from time to time and revise it when it considers it necessary to do so.
- (6) Before publishing or revising the statement the Commission must consult the Minister, registered persons and such other persons as the Commission considers appropriate.
- (7) The Minister may prescribe the principles and processes the Commission must follow when exercising the power to impose a financial penalty in prescribed circumstances, and such principles and processes shall override anything in the Commission's published statement that is inconsistent with them.
- (8) The Minister must consult the Commission before making any Order under this Article.

21C Notification of imposition of penalty

- (1) Before imposing a penalty the Commission must issue and then serve on the registered person a notice (a 'notice of intent') informing the registered person –

APPENDIX B

-
- (a) that the Commission proposes to require the registered person to pay a penalty;
 - (b) of the Commission's grounds for believing –
 - (i) that the registered person has contravened a Code of Practice,
 - (ii) that the contravention should give rise to a penalty,
 - (iii) that the amount of penalty should be as specified in the notice; and
 - (c) that the registered person may make representations to the Commission regarding the imposition of the penalty or its amount within one month of the date of service.
 - (2) The Commission must include within its grounds under paragraph (2)(b) –
 - (a) details of any provision of the Code alleged to have been contravened; and
 - (b) how the proposed penalty has been calculated by reference to any Order made under Article 21B(1).
 - (3) The Commission must consider any representations made within the period specified under paragraph (1)(c) and if it considers that it is still appropriate to impose a penalty as proposed in the notice of intent, or as modified in light of any such representations, it may issue and then serve on the registered person a notice (a 'final notice') requiring the registered person to pay a penalty.
 - (4) The final notice must –
 - (a) include the matters mentioned in paragraph (1)(b) but modified as the Commission considers appropriate in the light of any representations made;
 - (b) specify the date by which payment of the penalty must be made, being a date not less than 2 months after the date of service of the final notice;
 - (c) specify how payment must be made;
 - (d) advise the registered person of the surcharge that may be imposed under Article 21E(1) in the event of late payment;
 - (e) advise the registered person of the Commission's power to enforce the penalty under Article 21E(4); and
 - (f) advise the registered person of the right of appeal against the imposition or amount of the penalty under Article 21F.
 - (5) When issuing a notice under this Article the Commission need not specify –
 - (a) any reason that would, in its opinion, involve disclosing confidential information the disclosure of which would be prejudicial to a third party; or
 - (b) the same reasons, or reasons in the same manner, when issuing notices to different registered persons about the same matter.

APPENDIX B

21D Restrictions on powers of Commission in respect of notices

- (1) The Commission may not issue a notice of intent under Article 21C(1) –
 - (a) in respect of a contravention of a Code of Practice that occurred before the commencement of Article 21A; or
 - (b) more than 3 years after the contravention giving rise to the notice came to the attention of the Commission.
- (2) However –
 - (a) in the case of a contravention falling within paragraph (1)(a) that was continuing at the time of the commencement of Article 21A, a notice of intent may be issued in respect of such part of the contravention that continued after such commencement;
 - (b) the Commission may apply to the Royal Court for an extension of time for issuing a notice of intent beyond the time limit set out in paragraph (1)(b) and the Royal Court may grant such extension if it considers the Commission has a reasonable excuse for not issuing the notice within that time limit.
- (3) The Commission may not issue a public statement about the issue or service of notice under Article 21C except in the case of a final notice and then only –
 - (a) where the period within which an appeal against the imposition of a penalty may be lodged has expired without an appeal having been lodged; or
 - (b) if such an appeal has been lodged, after it is determined by the court or withdrawn.
- (4) The States may by Regulations amend the time limit set out in paragraph (1)(b).
- (5) In this Article ‘public statement’ means a statement issued under any of the enactments mentioned in Article 21A(2).

21E Late payment surcharge and enforcement

- (1) If any part of a penalty imposed by the Commission remains unpaid after the date for payment specified in the final notice under Article 21C(3), the amount unpaid attracts a surcharge of 5% for each complete month that it remains unpaid.
- (2) However –
 - (a) in computing the surcharge, the time from when any appeal is lodged under Article 21F till the appeal is determined by the court or withdrawn, must be disregarded;
 - (b) the Commission has a discretion to waive, or reduce the amount of, any surcharge.

APPENDIX B

- (3) The Minister may by Order, on the recommendation of the Commission, vary the percentage set out in paragraph (1).
- (4) A penalty, including any surcharge imposed under this Article, may be enforced as if it were a debt owed by the registered person to the Commission.

21F Appeal against imposition of penalty

- (1) A registered person may appeal to the Royal Court against the imposition of a penalty or the amount of penalty imposed only on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case.
- (2) The appeal must be lodged with the Royal Court no later than a month after the date of service of the final notice under Article 21C(3).
- (3) Once an appeal has been lodged the Commission must not take any action to enforce payment of the penalty until the conclusion of the appeal.
- (4) On hearing the appeal the Royal Court may confirm or rescind the imposition of the penalty, substitute a penalty of a different amount or make such other interim or final order as it thinks fit.

21G Proceeds of penalties

- (1) Subject to this Article the Commission may retain any sum of money it receives in respect of a penalty as part of its income.
- (2) The money must be treated as if it were part of the fees due from registered persons of the same class (with reference to the various meanings of 'registered person' set out in Article 1 and the various classes of financial service business in respect of which a person may be registered as mentioned in paragraph (c) of that definition) as the registered person on whom the penalties were imposed so as to reduce the level of fees that would otherwise have been charged to those registered persons.
- (3) However, if the result of the application of paragraph (2) would be to reduce substantially the level of fees that the Commission would otherwise have charged, the Commission may pay the money, or a proportion of it, to the States.
- (4) An Order may prescribe the circumstances in which money received by the Commission in respect of a penalty must be paid to the States.
- (5) The Order may be made –
 - (a) only to the extent that the Commission has not already applied the money so as to reduce the level of fees that would otherwise be charged; but
 - (b) irrespective of when the money was received or is due to be received by the Commission.

APPENDIX B

-
- (6) Before making an Order under this Article the Minister must consult the Commission and take account of the requirement under Article 15(2)(c) for the Commission to maintain a reserve and its need to meet contingent liabilities, in particular those relating to the costs of investigations or litigation.”

2 Amendments to related enactments

The Schedule has effect.

3 Citation and commencement

- (1) This Law may be cited as the Financial Services Commission (Amendment No. 6) (Jersey) Law 201-.
- (2) This Law comes into force one month after the day on which it is registered.

APPENDIX B

SCHEDULE

(Article 2)

AMENDMENTS TO RELATED ENACTMENTS

1 Collective Investment Funds (Jersey) Law 1988

- (1) The Collective Investment Funds (Jersey) Law 1988 is amended as follows.
- (2) For Articles 7(6)(f) and 8B(7)(f) there shall be substituted in each case the following sub-paragraph –
 - “(f) the Commission has reason to believe that the applicant has at some time contravened a code of practice;”.
- (3) In Article 15 –
 - (a) in paragraph (1)(a) for the words “for the purpose of establishing sound principles and providing practical guidance” there shall be substituted “setting out the principles and detailed requirements that must be complied with”;
 - (b) for paragraph (3) there shall be substituted the following paragraph –
 - “(3) The contravention of a code of practice –
 - (a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but
 - (b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.”.
- (4) In Article 17(2)(b) for the words “failed to comply with” there shall be substituted the word “contravened”.

2 Banking Business (Jersey) Law 1991

- (1) The Banking Business (Jersey) Law 1991 is amended as follows.
- (2) For Article 10(3)(f) there shall be substituted the following sub-paragraphs –
 - “(f) the Commission has reason to believe that person A has at some time contravened a code of practice;
 - (fa) person A has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998 (including any surcharge imposed under Article 21E(1) of that Law);”.
- (3) In Article 19A –
 - (a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –



APPENDIX B

- “(a) prepare and issue a code of practice setting out the principles and detailed requirements that must be complied with in the conduct of deposit-taking business;”;
- (b) for paragraph (3) there shall be substituted the following paragraph –
 - “(3) The contravention of a code of practice –
 - (a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but
 - (b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.”.
- (4) For Article 48(2)(b) there shall be substituted the following sub-paragraph –
 - “(b) a public statement with respect to the serving of a final notice on a registered person under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a code of practice by that person; or”.

3 Insurance Business (Jersey) Law 1996

- (1) The Insurance Business (Jersey) Law 1996 is amended as follows.
- (2) For Article 7(4)(i) there shall be substituted the following sub-paragraphs –
 - “(i) the Commission has reason to believe that the applicant has at some time contravened a code of practice;
 - (j) the applicant has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998 (including any surcharge imposed under Article 21E(1) of that Law).”.
- (3) In Article 11(7)(c) for the words “registered person” there shall be substituted the words “permit holder”.
- (4) In Article 42 –
 - (a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –
 - “(a) prepare and issue a code of practice setting out the principles and detailed requirements that must be complied with in the conduct of insurance business;”;
 - (b) for paragraph (3) there shall be substituted the following paragraph –
 - “(3) The contravention of a code of practice –
 - (a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

APPENDIX B

- (b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.”;
 - (c) in paragraph (4)(a) and (b) for the words “relevant provision” there shall be substituted the word “requirement”.
- (5) In Article 43 –
 - (a) after paragraph (1)(g) there shall be added the following sub-paragraph –
 - “(h) a code of practice.”;
 - (b) for paragraph (2)(b) there shall be substituted the following sub-paragraph –
 - “(b) a public statement with respect to the serving of a final notice on a permit holder under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a code of practice by that permit holder; or”.

4 Financial Services (Jersey) Law 1998

- (1) The Financial Services (Jersey) Law 1998 is amended as follows.
- (2) For Article 9(3)(f) there shall be substituted the following sub-paragraphs –
 - “(f) the Commission has reason to believe that the applicant has at some time contravened a Code of Practice;
 - (fa) the applicant has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998 (including any surcharge imposed under Article 21E(1) of that Law);”.
- (3) In Article 19 –
 - (a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –
 - “(a) prepare and issue a Code of Practice setting out the principles and detailed requirements that must be complied with in the conduct of financial service business;”;
 - (b) for paragraph (3) there shall be substituted the following paragraph –
 - “(3) The contravention of a Code of Practice –
 - (a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but
 - (b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.”.
- (4) In Article 25 –
 - (a) in paragraph (b) for the words “failed to comply with” there shall be substituted the word “contravened”;

APPENDIX B

(b) after paragraph (b) there shall be inserted the following paragraph –

“(ba) a public statement with respect to the serving of a final notice on a registered person under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a Code of Practice by that person;”.

5 Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008

(1) The Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 is amended as follows.

(2) In Article 18(1) –

(a) in sub-paragraph (f) for the words “not complied with” there shall be substituted the word “contravened”;

(b) after sub-paragraph (f) there shall be inserted the following sub-paragraph –

“(fa) if the registered person has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998 (including any surcharge imposed under Article 21E(1) of that Law);”.

(3) In Article 22 –

(a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –

“(a) prepare and issue a Code of Practice setting out the principles and detailed requirements that must be complied with in order to meet certain requirements of this Law and anti-money laundering and counter-terrorism legislation, by persons in relation to whom that body has supervisory functions;”;

(b) for paragraph (4) there shall be substituted the following paragraph –

“(4) The contravention of a Code of Practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.”;

(c) in paragraph (5)(a) and (b) for the words “relevant provision” there shall be substituted the word “requirement”.

(4) In Article 23(1)(b) for the words “failed to comply with” there shall be substituted the words “contravened”.

(5) After Article 26(b) there shall be inserted the following paragraph –

APPENDIX B

Financial Services Commission (Amendment No. 6) (Jersey)
Law 201-

SCHEDULE

“(ba) a public statement with respect to the serving of a final notice on a person under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a Code of Practice by that person;”.

6 Alternative Investment Funds (Jersey) Regulations 2012

- (1) The Alternative Investment Funds (Jersey) Regulations 2012 are amended as follows.
- (2) In Regulation 9(7)(f) for the words “there has been failure on the part of the applicant to follow” there shall be substituted the words “the applicant has contravened”.
- (3) In Regulation 22 –
 - (a) in paragraph (1)(a) for the words “for the purpose of establishing sound principles and providing practical guidance” there shall be substituted “setting out the principles and detailed requirements that must be complied with”;
 - (b) for paragraph (3) there shall be substituted the following paragraph –

“(3) The contravention of a code of practice –

 - (a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but
 - (b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.”.
- (4) In Regulation 24 –
 - (a) after paragraph (1)(g) there shall be added the following sub-paragraph –

“(h) a code of practice.”;
 - (b) for paragraph (2)(b) there shall be substituted the following sub-paragraph –

“(b) a public statement with respect to the serving of a final notice on a service provider under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a Code of Practice by that service provider;”.

