



**Jersey Financial  
Services Commission**

# **Feedback on Consultation Paper**

## **No. 6 2017**

Feedback to a consultation on maintenance amendments to Codes of Practice, and other amendments to address regulatory concerns and to ensure Jersey's compliance with international regulatory standards

Issued: December 2017

## Consultation feedback

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

This paper reports on responses received by the *JFSC* to its Consultation Paper No.6 2017 – Amendments to Codes of Practice.

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## Glossary of terms

AIF Code	Code of Practice for Alternative Investment Funds
AIF Regulations	Alternative Investment Funds (Jersey) Regulations 2012
Banking Code	Code of Practice for Deposit-taking Business
BBJL	Banking Business (Jersey) Law 1991
Certified Funds Code	Code of Practice for Certified Funds
CIFJL	Collective Investment Funds (Jersey) Law 1988
CIFO	Channel Islands Financial Ombudsman
Codes of Practice (or Codes)	collectively, the <ul style="list-style-type: none"> <li>• <i>AIF Code;</i></li> <li>• <i>Certified Funds Code;</i></li> <li>• <i>Banking Code;</i></li> <li>• <i>FSB Code;</i></li> <li>• <i>GIMB Code;</i></li> <li>• <i>IB Code;</i></li> <li>• <i>Insurance Code;</i></li> <li>• <i>MSB Code;</i></li> <li>• <i>TSB Code.</i></li> </ul>
CP	<i>JFSC Consultation Paper No.6 2017</i>
FSB Code	Code of Practice for Fund Services Business
FSJL	Financial Services (Jersey) Law 1998
GIMB Code	Code of Practice for General Insurance Mediation Business
JATCo	Jersey Association of Trust Companies
Jersey Finance	Jersey Finance Limited
JFSC	Jersey Financial Services Commission
IB Code	Code of Practice for Investment Business
IBJL	Insurance Business (Jersey) Law 1996
Insurance Code	Code of Practice for Insurance Business
MSB	money service business

MSB Code	Code of Practice for Money Service Business
registered person	a person who is registered, or holds a permit or certificate, as applicable, under one or more of the <i>regulatory laws</i>
regulatory laws	the <i>AIF Regulations</i> , the <i>BBJL</i> , the <i>CIFJL</i> , the <i>FSJL</i> and the <i>IBJL</i>
TCB	trust company business
TCB Code	Code of Practice for Trust Company Business

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# 1 Executive summary

## 1.1 Overview

- 1.1.1 The *CP* sought views on amendments to the *Codes of Practice* issued by the *JFSC*. The amendments proposed in the *CP* fall, broadly, into three categories:
- 1.1.1.1 amendments that could be termed ‘routine maintenance’ - for example, to improve the clarity of certain provisions in the *Codes*;
  - 1.1.1.2 amendments that will modify regulatory requirements in order to address issues that the *JFSC* has identified during the course of supervising *registered persons*; and
  - 1.1.1.3 amendments to ensure that the *JFSC*’s regulatory requirements comply with international regulatory standards.
- 1.1.2 The purpose of this paper is to provide feedback on the responses received to the *CP*.

## 1.2 Feedback received

- 1.2.1 Respondents provided comments either directly to the *JFSC* or indirectly via *Jersey Finance*.
- 1.2.2 *Jersey Finance* provided the *JFSC* with comments it had received from: one trust company business, one accountancy firm, one fund administrator and one law firm. 13 other respondents provided comments directly to the *JFSC*. A full list of respondents is given in Appendix A.
- 1.2.3 Section 2 of this paper presents a summary of the substantive comments received and the *JFSC*’s response.
- 1.2.4 The *JFSC* is grateful to respondents for taking the time to consider and comment on the proposals. Each respondent has been sent a copy of this paper.

## 1.3 Next steps

- 1.3.1 Amended Codes (in the form consulted on, save for the changes described later in this paper) will be issued shortly and come into force two months thereafter.

## 2 Consultation feedback

### 2.1 Feedback received

- 2.1.1 This section summarises the substantive comments received in response to the *CP*. Whilst not every comment received is individually listed, this section contains summaries of the most commonly made and pertinent comments in relation to each question posed and, as appropriate, the *JFSC*'s response to those comments.
- 2.1.2 The comments that were received can be split into those responding to a specific question posed in the *CP* and those on other matters. This section is structured on those lines.
- 2.1.3 Where the specific comments of a "respondent" are summarised, the respondent will have been a *registered person* (or represented a group of *registered persons*).

### 2.2 Question 1: Do you have any observations on, or concerns about, any of the proposed generic amendments to the *Codes*?

#### Reviewing corporate governance arrangements

- 2.2.1 One respondent raised a query on the proposed new *Code* requirement for a *registered person* to regularly review its corporate governance arrangements to ensure their continuing adequacy in light of the *registered person's* "business activities and risk profiles ....". Given the use of "risk profiles" in the plural, rather than the singular, the respondent queried whether a *registered person* could have more than one risk profile.

#### **JFSC response**

- 2.2.2 The use of "risk profiles" in the plural reflects the fact that where a *registered person* carries on multiple types of business (e.g. where a firm is registered to carry on trust company business and fund services business) the risk profile for each may well be different.

- 2.2.3 Three respondents had observations on the proposed new requirement for a *registered person* to carry out "a periodic self-assessment of the board's effectiveness".
- 2.2.4 The first respondent opined that a board may not always be able to view its effectiveness impartially and, consequently, a "self-assessment" may not identify relevant issues.
- 2.2.5 Another respondent asked for "periodic" to be quantified.
- 2.2.6 One further respondent asked if the *JFSC* would be issuing guidance on what matters such a self-assessment should consider.

#### **JFSC response**

- 2.2.7 The *JFSC* recognises that a self-assessment may not always be the most appropriate form of review but does acknowledge that the proposed wording of the new *Code* requirement did not explicitly provide for an external assessment to be carried out where a *registered person* considered that it would be more effective than a self-

assessment. To address this, the wording of the new *Code* requirement will be amended (see underlining) to read:

*“All aspects of corporate governance arrangements must be subject to appropriately regular review to ensure their continuing adequacy in light of the registered person’s business activities and risk profiles and include a periodic self-assessment, or external assessment, of the board’s effectiveness.”*

2.2.8 The frequency with which such an assessment should be carried out will depend on the complexity of the *registered person’s* business. A *registered person* should be prepared to provide the *JFSC* with the rationale for the frequency of reviews it has decided upon.

2.2.9 In terms of what matters a self-assessment should consider, the *JFSC* does not propose to issue specific guidance. There is already much guidance in the public domain from governance organisations/professional advisors, etc.

#### Notification of qualified audit

2.2.10 Three respondents commented on the proposed new requirement for a registered person to notify the *JFSC* of any decision by its auditor to qualify its audit report on the *registered person’s* financial statements or to raise a matter of emphasis therein.

2.2.11 Two of the respondents suggested that this new requirement was unnecessary given that a *registered person* is already obliged to provide its audited financial statements to the *JFSC*.

2.2.12 The third respondent asked what “emphasis of matter” means.

#### *JFSC* response

2.2.13 Because many *registered persons* have the same financial year-end (31 December) and, therefore, the same filing deadline, a considerable number of financial statements are filed with the *JFSC* each year over a short time period. Requiring explicit notification where an audit report is qualified (or has an emphasis of matter paragraph in it) will enable the *JFSC* to prioritise the review of the relevant financial statements in line with its risk-based approach to supervision.

2.2.14 An “emphasis of matter” is defined in International Standard on Auditing 706 as, “a paragraph included in the auditor’s report that refers to a matter appropriately presented or disclosed in the financial statements that, in the auditor’s judgment, is of such importance that it is fundamental to users’ understanding of the financial statements.”

#### Maintenance of “up-to-date” records

2.2.15 No respondents raised any concerns about the amendment to section 3 of the Codes<sup>1</sup> to require a registered person to maintain “up-to-date” records.

2.2.16 However, one respondent noted an inconsistency in language between the *MSB Code* and other *Codes*, where paragraph 3.2.2.3 of the *MSB Code* presently requires records to be “timely” rather than “up-to-date”.

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<sup>1</sup> With the exception of the *AIF Code* for the reasons explained in the *CP*.

**JFSC response**

2.2.17 The *MSB Code* will be amended to require “up-to-date” records to be maintained.

**Definition of “complaint”**

2.2.18 In the *CP*, the *JFSC* proposed that the *Codes* would be amended to include a formal definition of “complaint” as, “*any oral or written expression of dissatisfaction whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide a service that relates to [the type of regulated business] carried on by the registered person*”.

2.2.19 Whilst some respondents were content with the proposed definition, the majority considered that it was too subjective and would result in trivial matters having to be dealt with under the formal complaints-handling process mandated by the *Codes*. Many of these respondents considered that the definition should require the complainant to allege that he/she had suffered (or may suffer) financial loss, material distress or material inconvenience.

**JFSC response**

2.2.20 To address the concerns of respondents the definition of “complaint” will be amended (see underlining) to read:-

*“any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of a person about the provision of, or failure to provide a service that relates to [the type of regulated business] carried on by the registered person, which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience.”*

2.2.21 This revised definition has been discussed with *CIFO* who is supportive of it. It will ensure that the *JFSC* definition is substantively the same as that used by *CIFO* in its “Model complaint-handling procedure for financial services providers”<sup>2</sup>.

2.2.22 This revised definition will also be materially the same as that used by the Guernsey Financial Services Commission (see The Licensees (Conduct of Business) Rules 2016<sup>3</sup>), which should be helpful to those *registered persons* with operations in both jurisdictions.

**Risk identification and management**

2.2.23 Principle 3 of the *Codes*<sup>4</sup> requires, amongst other things, that a *registered person* be able to demonstrate the existence of adequate risk management systems. Because some *registered persons* have erroneously regarded the reference to “risk” to only cover that associated with money laundering and terrorist financing, the *CP* proposed that a note would be inserted in the *Codes* explaining that, in the context of Principle 3, “risk” refers to all the risks that a *registered person* faces, or may face, as a business enterprise.

<sup>2</sup> <https://www.ci-fo.org/wp-content/uploads/2015/11/151116-CIFO-model-complaint-procedure.pdf>

<sup>3</sup> <https://www.gfsc.gg/sites/default/files/uploads/Licensees%20Conduct%20of%20Business%20Rules%20-%202016.pdf>

<sup>4</sup> Not applicable in the case of the *AIF Code*.

- 2.2.24 One respondent thought it would be helpful for the *JFSC* to explain its expectations in relation to a *registered person* documenting its assessment of risks that were unrelated to money laundering and terrorist financing.
- 2.2.25 Another respondent suggested that the *JFSC* consider issuing guidance on which non-money laundering/terrorist financing risks should, at the very least, be considered.

**JFSC response**

- 2.2.26 Using the *TCB Code* as an example - existing paragraph 3.1.3 requires a *registered person* to have “*documented procedures sufficient to facilitate the effective management of risk by the board of directors and senior management.*” Proposed new *TCB Code* paragraph 3.1.4 will require that, “*all aspects of [a registered person’s] corporate governance arrangements must be subject to appropriately regular review to ensure their continuing adequacy in light of the registered person’s business activities and risk profiles .....*”.
- 2.2.27 In order to be able to satisfy these *Code* provisions the *JFSC* will expect a *registered person* to periodically undertake a risk assessment covering not only its money laundering and terrorist financing risks but also its other risks. The periodicity of such an assessment will depend on the complexity of the *registered person’s* business. A *registered person* should be prepared to provide the *JFSC* with the rationale for the periodicity it has decided upon.
- 2.2.28 Such a risk assessment would not need to follow the same format as the business risk assessment (BRA) required for money laundering and terrorist financing risks but the *JFSC* will expect a *registered person*, if requested, to produce documentary evidence of an assessment showing (amongst other things) what non-money laundering/terrorist financing risks had been identified and what mitigating measures had been put in place.
- 2.2.29 Given that the principles of risk management are well known and there is a considerable amount of publicly available information on identifying and mitigating risks, the *JFSC* does not consider that specific guidance is needed at this time. However, a ‘watching brief’ will be maintained and if experience indicates that specific guidance relating to the activities of *registered persons* would be helpful the *JFSC* will consider issuing some.

**Dealing with the JFSC in an open and co-operative manner**

- 2.2.30 In relation to the additional note being added in the guidance under Principle 6 of the *Codes*, one respondent asked what “timely” would mean in the context of the requirement for, “*the timely provision [by a registered person] of data required in connection with a registered person’s regulatory fees and the timely payment of fees due.*”

**JFSC response**

- 2.2.31 “Timely” will depend on the circumstances but will be clear. When requesting data, the timescale it must be submitted in will be specified. And the timescale in which fees must be paid will also be specified when the request for payment is issued.

### Use of the JFSC's online portal

- 2.2.32 The CP proposed that the Codes be amended to:
- 2.2.32.1 require a *registered person* to notify, or provide information, by means of the JFSC's online portal where the JFSC so specifies; and
  - 2.2.32.2 if, because of a systems failure of any kind, a *registered person* was unable to access the online portal to make a relevant notification or provide required information it would be required to notify the JFSC in writing within one business day of the systems failure being identified.
- 2.2.33 No respondents raised any objections to these requirements.
- 2.2.34 However, some comments/queries were received:
- 2.2.34.1 one respondent considered that a requirement to notify the JFSC of a systems failure within one business day would be a little restrictive: it suggested three business days instead;
  - 2.2.34.2 another respondent queried if the one business day notification requirement only applied where it would result in a *registered person* missing a submission due date or whether it applied whenever a submission through the portal was being attempted;
  - 2.2.34.3 another queried whether the notification requirement applied only if the systems failure appeared to be at the JFSC end;
  - 2.2.34.4 another asked if the JFSC expected notification of every system 'glitch' or just a complete failure of the portal.
- 2.2.35 Two respondents commented that it would be helpful for access to the JFSC's portal be granted to more than one person in a firm.

#### JFSC response

- 2.2.36 The JFSC considers a one business day notification period to be necessary (regardless of whether the relevant submission is being made before the necessary deadline) so that a problem can be resolved as soon as possible.
- 2.2.37 The notification obligation will apply even if the relevant *registered person* considers that the failure is at its end. This is because early notification will enable the JFSC to confirm (or otherwise) that the failure at the registered person's end has not been inadvertently occasioned because of anything done at the JFSC end (such as a systems update).
- 2.2.38 Whilst the notification requirement will not apply in respect of every system 'glitch' the JFSC would appreciate being advised of such matters so that they can be resolved speedily and thus minimize any inconvenience to *registered persons*.
- 2.2.39 On access to the portal, the intention is that, as functionality is further extended during 2018, access will be possible by more than one person in a firm.

## 2.3 Question 2: Do you have any observations on, or concerns about, any of the proposed amendments to the *Banking Code*?

### Reviewing corporate governance arrangements

- 2.3.1 One bank queried whether the existing requirements of paragraph 3.1.11 of the *Banking Code* applies to banking branches as well as Jersey-incorporated banks.

**JFSC response**

2.3.2 The *JFSC* can confirm that existing paragraph 3.1.11 (i.e. the first sentence thereof) applies to all “registered persons” as defined in the *Banking Code* i.e. to both branches and Jersey-incorporated banks.

2.3.3 For the avoidance of doubt, the new requirement for a “periodic self-assessment of the board’s effectiveness” applies only to a “Jersey bank” as defined in the *Banking Code* i.e. a Jersey-incorporated bank.

**Outsourcing**

2.3.4 One bank, noting the proposed amendment to the *MSB Code* to require compliance with the *JFSC*’s policy on outsourcing, suggested that such a requirement was missing from the *Banking Code* and should be included.

**JFSC response**

2.3.5 The *Banking Code* already requires a bank to comply with the policy on outsourcing (see paragraph 3.1.13 therein).

**2.4 Question 3: Do you have any observations on, or concerns about, any of the proposed amendments to the *FSB Code*?**

- 2.4.1 No concerns were raised by respondents
- 2.4.2 One law firm suggested an additional amendment to the *FSB Code* to clarify the position for managed entities which are also to be appointed to act as a service provider to a Jersey Private Fund pursuant to the Jersey Private Fund Guide.

**JFSC response**

2.4.3 A managed entity under the *FSB Code* is established for the purpose of acting for Qualifying Funds and therefore is subject only to the core principles of the *FSB Code* to the extent described in the Guidance Note for a Manager of a Managed Entity and Certain Managed Entities issued by the *JFSC*. The definition of a Qualifying Fund under the *FSB Code* does not include a related Jersey Private Fund.

2.4.4 Upon written request in accordance with existing practice, the *JFSC* Funds Authorisation Team will consider and confirm in writing that a managed entity will continue to be subject only to the core principles of the *FSB Code* where the managed entity is to act for a related Jersey Private Fund.

2.4.5 Any amendment to the *FSB Code* or the Jersey Private Fund Guide in relation to this query will be considered during Phase II of the Funds Regime Review together with other amendments which may be required as part of that project.

## 2.5 Question 4: Do you have any observations on, or concerns about, any of the proposed amendments to the *IB Code*?

### Disclosure of terms on which client assets are held

- 2.5.1 One respondent asked if the *JFSC* would consider it acceptable for clients to be notified of the interest rate on client money on request only, rather than clients having to be notified of the actual interest rate on client money each time it changes.
- 2.5.2 Another respondent requested more information on what is meant by disclosure of, “*the terms on which [client money] is held*”.

#### ***JFSC* response**

- 2.5.3 Notification of interest rates on request will be acceptable.
- 2.5.4 At a minimum, the *JFSC* considers that disclosure should include advising clients whether or not client money will earn interest, whether interest will be paid to clients and, if so, the frequency of payment.

### Reconciliation of movements in client assets

- 2.5.5 One respondent asked if position – rather than transaction – reconciliation would be considered to meet the proposed new requirement in paragraph 3.2.1.1.4 of the *IB Code*.
- 2.5.6 The same respondent asked the *JFSC* to outline its expectations as regards the frequency of reconciliations.

#### ***JFSC* response**

- 2.5.7 The *JFSC* can confirm that position reconciliations will be acceptable.
- 2.5.8 The appropriate frequency of reconciliations will depend on the complexity of the *registered person's* business and volumes. *Registered persons* are reminded that Article 19 of the Financial Services (Investment Business (Client Assets)) (Jersey) Order 2001 requires reconciliations to take place not less than once every 6 months.

## 2.6 Question 5: Do you have any observations on, or concerns about, any of the proposed amendments to the *MSB Code*?

- 2.6.1 No respondents had any observations on, or raised concerns about, any of the proposed amendments to the *MSB Code*.

## 2.7 Question 6: Do you have any observations on, or concerns about, any of the proposed amendments to the *TCB Code*?

### Rationale for the incorporation of a company, etc.

- 2.7.1 One respondent queried the intention of the proposed amendments to paragraphs 3.2.6.2.1 and 3.2.7.1.1 of the *TCB Code*.

**JFSC response**

- 2.7.2 The current versions of those paragraphs require a *registered person* to “understand” the rationale for providing a ‘hold correspondence’ service. The amendment will simply require the *registered person* to “document” that understanding.

**Reconciliation of movements in customer assets**

- 2.7.3 The *CP* proposed an amendment to paragraph 3.2.1.1.5 of the *TCB Code* to require a *TCB* to maintain documented systems, controls and procedures for, “reconciling movements in trust company business assets”.
- 2.7.4 One respondent wondered whether “movement” would include matters such as a change in value of an asset.

**JFSC response**

- 2.7.5 A “movement” is a transaction (such as a sale, purchase or transfer to another person). It does not include changes in value of an asset.

**Disclosure of terms of business**

- 2.7.6 In order to comply with a provision in the *GIFCS Standard* the *CP* proposed an amendment to section 4 of the *TCB Code*, which would require a *registered person* to provide its terms of business to its “customers”.
- 2.7.7 “Customer” is already defined in the *TCB Code* as:
- (a) a person who has entered into an agreement for the provision of services to be provided by the *registered person* when carrying on trust company business; or
  - (b) a person who has received or may receive the benefit of services to be provided or arranged by the *registered person* when carrying on trust company business.<sup>5</sup>
- 2.7.8 *JATCo* and one other respondent were concerned that this definition of customer would prove problematic in the context of the proposed new requirement. They noted that the definition could include persons (such as beneficiaries, protectors, etc.) who would not ordinarily be the party contracting with the *TCB*. As a consequence, they were concerned that a *TCB* would be required to send its terms of business to an inappropriately wide constituency of persons with whom it may have contact but not necessarily a contractual relationship.

**JFSC response**

- 2.7.9 The *JFSC* acknowledges the validity of the concerns raised and has engaged with *JATCo* with a view to finding a solution that would address them but still ensure that the relevant *GIFCS Standard* is complied with.
- 2.7.10 As a result of those further discussions with *JATCo*, an alternative form of words has been agreed.
- 2.7.11 Rather than requiring terms of business to be supplied to a “customer” as defined in the *TCB Code*, the revised *TCB Code* will require them to be supplied to, “a person to

<sup>5</sup> This definition of “customer” is the same as that used in the Financial Services (Trust Company and Investment Business (Accounts, Audits and Reports)) (Jersey) Order 2007.

whom [the *TCB*] provides a service set out in Article 2(4) of the *FS(J)L* ..... (accepting in the case of Article 2(4)(h) of the *FS(J)L* that the identity and existence of a person to whom the service is provided will be dependent upon such terms and circumstances as might prevail at any particular point during the lifecycle of an express trust”.

## 2.8 Question 7: Do you consider a lead-in period of two months to be adequate?

2.8.1 The vast majority of respondents were content with the proposed lead-in period of two months.

### **JFSC response**

2.8.2 The amended *Codes* will come into force two months after they are issued.

## 2.9 Other comments

### **Definition of “trust company business employee”**

2.9.1 One respondent noted that in Consultation Paper No. 9 of 2017 (on *TCB* fees for 2018) the JFSC was proposing to amend the definition of “trust company business employee” used in the *TCB* fees notice (the number of such employees is used as a metric to calculate a *TCB*’s fee). The respondent noted that the definition of “trust company business employee” used in the *TCB Code* was presently the same as that used in the *TCB* fees notice: the respondent asked if the definition in the *TCB Code* would be aligned with the revised definition proposed in Consultation Paper No. 9.

### **JFSC response**

2.9.2 As explained in paragraph 2.1.8 of our Feedback Paper to the consultation on *TCB* Fees<sup>6</sup>, it was not our intention to change the meaning of “trust company business employee” in the *TCB Code*. Accordingly, the glossary definition of that term in the *TCB Code* will be amended to break the link to the fees notice and thus maintain the status quo for *TCB Code* purposes.

<sup>6</sup> See <https://www.jerseyfsc.org/media/1635/consultation-feedback-paper-gimb-msb-tcb-fees-december-2017.pdf>

## Appendix A – List of respondents to the CP

- Affinity Trust Limited/APW Investors Limited
- Barclays Bank PLC
- BNP Paribas S.A.
- EFG Fund Services
- HSBC
- Ipes (Jersey) Limited
- Jersey Association of Trust Companies
- Jersey Consumer Council
- Jersey Finance Limited (whose response consisted of comments it had received from one trust company business, one accountancy firm, one fund administrator and one law firm)
- Pinnacle Trustees Limited
- R&H Trust Co (Jersey) Limited
- RBS International
- Standard Bank Jersey Limited

In addition, a response was received from a trust company and fund services business that wishes to remain anonymous.