



Jersey Financial
Services Commission

Feedback Paper on Consultation Paper No. 1 2019

Civil Financial Penalties:

Revised Statement of Principles and Processes

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

Issued: July 2019

Consultation Feedback

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

This paper reports on responses received by the *JFSC* to Consultation Paper No. 1 2019 published on 21 January 2019.

Further enquiries concerning the consultation may be directed to:

Stephen de Gruchy

Senior Analyst, Enforcement

Jersey Financial Services Commission

PO Box 267

14-18 Castle Street

St Helier

Jersey

JE4 8TP

Telephone: +44 (0) 1534 822110

Email: s.degruchy@jerseyfsc.org

Glossary of Terms

Defined terms are indicated throughout this document as follows:

Amendment Law	Financial Services Commission (Amendment No. 7) (Jersey) Law 2018
Codes of Practice (or Codes)	<p>One or more of the <i>JFSC</i> Codes of Practice for:</p> <ul style="list-style-type: none"> › Deposit-taking business › Fund services business › General insurance mediation business › Insurance business › Investment business › Money service business › Trust company business › Alternative investment funds and AIF services business › The Handbook for the prevention and detection of money laundering and the financing of terrorism for financial services business regulated under the regulatory laws
Commission Law	Financial Services Commission (Jersey) Law 1998, as amended
CP	Consultation Paper No. 1 2019
DMP	The <i>JFSC's</i> Decision-Making Process document
Jersey Finance	Jersey Finance Limited
JFSC	Jersey Financial Services Commission
principal person	<p>Has the meaning (as inserted by the <i>Amendment Law</i>) in Article 1 of the <i>Commission Law</i>, namely:</p> <p>with respect to a contravention of a <i>Code of Practice</i> issued by the <i>JFSC</i> under –</p> <ul style="list-style-type: none"> (a) Article 19A of the Banking Business (Jersey) Law 1991, means a director, controller or manager (within the meaning given by Article 1 of that Law); (b) Article 42 of the Insurance Business (Jersey) Law 1996, means a chief executive or shareholder controller (within the meaning given by Article 1(1) of that Law) or any individual acting as a director of a permit holder (within the meaning given by Article 1(1) of that Law); (c) Article 19 of the Financial Services (Jersey) Law 1998, has the same meaning as in Article 1(1) of that Law; (d) Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, has the same meaning as in Article 1(1) of that Law; (e) Regulation 22 of the Alternative Investment Funds (Jersey) Regulations 2012, has the same meaning as in Regulation 2 of those Regulations, <p>and includes a person who was a principal person within the meaning given by sub-paragraph (a), (b), (c), (d) or (e).</p>

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

1.1 Overview

- 1.1.1 On 21 January 2019 the *JFSC* issued the *CP*, which sought views on revisions to the *JFSC's* "statement of principles and processes" for civil financial penalties that is incorporated within its published *DMP*.
- 1.1.2 The majority of the revisions to the statement fall into two categories:
 - 1.1.2.1 Firstly - consequential amendments that are needed to accommodate the widening of the scope of the civil financial penalty regime to *principal persons*
 - 1.1.2.2 Secondly - as a result of experience gained in using the *DMP* over the past few years - amendments to enhance or make clearer the *JFSC's* statement of processes for a person subject to the *DMP*.
- 1.1.3 The purpose of this paper is to provide feedback on the responses received to the *CP*.
- 1.1.4 In light of the feedback received, the *JFSC* will be implementing the revisions to its statement of principles and processes in the form consulted on.
- 1.1.5 Contemporaneously with the publication of the revised statement (incorporated in an updated *DMP*¹), the *JFSC* will publish a methodology that sets out the *JFSC's* guideline approach to how it will determine the amount of a civil financial penalty to be imposed on a *principal person* in any particular case.

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:
 - 1.2.2.1 One trust company business
 - 1.2.2.2 One trade association
 - 1.2.2.3 One law firm.
- 1.2.3 Four other respondents provided comments directly to the *JFSC*. A full list of respondents is given in Appendix A.
- 1.2.4 Section 2 of this paper presents a summary of the substantive comments received and the *JFSC's* response.
- 1.2.5 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 The revised statement of principles and processes for civil financial penalties (incorporated in an updated *DMP*) will shortly be published on the *JFSC's* website, together with the methodology referred to in paragraph 1.1.5 above.

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 General comments

- 2.2.1 Two respondents stated that they had no observations or concerns about the proposals in the *CP* and that they full supported the extension of the civil financial penalties regime to *principal persons*.

JFSC response

- 2.2.1 The two respondents' support for the proposals is noted.

2.3 Question 1: Do you have any observations on, or concerns about, the proposed statement of principles that the JFSC will apply in determining the imposition and amount of a financial penalty on a principal person? If you do, please state in detail what your observation or concern is and the reason for it.

- 2.3.1 Two of the three respondents to this question indicated that they were content with the proposed revisions to the statement of principles and had no comments on it.
- 2.3.2 The third respondent had three main comments:
 - 2.3.2.1 Firstly, that greater clarity should be provided on the application of the principle of “*ensuring that principal persons cannot expect to profit from contravention of the Codes [of Practice]*” (that principle being set out in Article 21B(3A)(c) of the *Commission Law*);
 - 2.3.2.2 Secondly, that the proposed statement of principles did not take into account the statutory threshold that must be met before the *JFSC* may consider imposing a civil financial penalty, nor was it clear how the statutory criteria for the imposition of a financial penalty on a *principal person* interact with the criteria for the imposition of a financial penalty on a *registered person*;
 - 2.3.2.3 Thirdly, that the proposed statement of principles did not recognise that different *principal persons* in the same *registered person* may have a greater or lesser degree of accountability for the relevant contravention(s) than others.

.JFSC response

- 2.3.3 The JFSC notes the support from the two respondents referred to above.
- 2.3.4 With respect to the comments of the third respondent, the JFSC's responses are set out below, taking the three issues in turn.
- 2.3.5 The respondent's first point will be dealt with by the methodology that the JFSC will use to determine the amount of a financial penalty to be imposed on a *principal person* (see paragraph 1.3.1 above). Step 3 of the methodology addresses the principle set out in Article 21B(3A)(c) of the *Commission Law*. Under that step in the methodology the JFSC will consider, amongst other things, whether the *principal person* received an identifiable quantum of income, avoided a reduction in income or avoided incurring expense as a result of the contravention of the relevant *Code*.
- 2.3.6 Turning now to the respondent's second point. The JFSC's *DMP*, as well as setting out the process to be followed when a civil financial penalty is being considered, also covers the decision-making process for numerous other "regulatory sanctions" (as defined in the *DMP*) such as public statements, directions, licence revocations, etc. The legislation that the JFSC operates under sets out the threshold that must be met before the JFSC may consider imposing the relevant sanction (whether that be a sanction on a *registered person* and/or a *principal person*). Given that those thresholds are set out in law, the JFSC considers it unnecessary for them to be repeated in the *DMP*. The important point to note is that if the JFSC decides to impose a regulatory sanction it must be satisfied that the statutory threshold for imposing the relevant sanction has been met (and, if an appeal against the sanction is made, the JFSC would have to satisfy the court that the threshold has been met).
- 2.3.7 The other limb to the respondent's second point concerns the interaction of the statutory criteria for the imposition of a financial penalty on a *principal person* with those covering the imposition of a financial penalty on a *registered person*. Where the JFSC is considering the imposition of a civil financial penalty on a *principal person*, the law will require it to first be satisfied that the contravention of the relevant *Code* by the *registered person* has met the statutory criteria (for example, the contravention was "negligent" (Band 2A) or "reckless/intentional" (Band 3)ⁱⁱ). If it does, the JFSC would then need to be satisfied that the statutory criteria for imposing a financial penalty on a *principal person* has been met (for example, that the contravention of the *Code* by the *registered person* was committed with the consent or connivance of the *principal person*).
- 2.3.8 On the respondent's third point, the JFSC considers that the proposed statement of principles does take differing levels of accountability into account. The statement requires the JFSC to take into account aggravating and mitigating factors, which the statement specifies will include the following:

Aggravating:

"A failure by the principal person to take action appropriate to his or her position with the registered person on becoming aware of the contravention (determination of the level of aggravation under this factor will take into account, amongst other things, the extent to which the principal person has executive management responsibility for the part of the registered person's business affected by the contravention and/or for the particular matter that was the subject of the contravention)."

Mitigating:

“The principal person taking action appropriate to his or her position with the registered person on becoming aware of the contravention.”

2.4 Question 2: Do you have any observations on, or concerns about, the proposed amendments to the statement of processes incorporated in the DMP? If you do, please state in detail what your observation or concern is and the reason for it.

- 2.4.1 One of the three respondents who answered this question indicated that they were content with the proposed amendments and had no comments to make on them.

JFSC response

- 2.4.2 The *JFSC* notes the support of that respondent for the amendments.

- 2.4.3 Two respondents considered that the proposed delegation of decisions on Band 1 financial penalties to a committee of the Board of Commissioners should be delayed until the full Board had considered a few cases.

JFSC response

- 2.4.4 Whilst the *JFSC* considers that the point made by the two respondents is not unreasonable, it is of the view that the proposed delegation to a committee of Commissioners is reasonable and proportionate given that the maximum potential penalty under Band 1 is £10,000. Notwithstanding such delegation however, the Board of Commissioners will have oversight of the work of the committee in determining Band 1 penalty levels.

- 2.4.5 One respondent sought confirmation that *JFSC* policy would be to issue a public statement when a civil financial penalty is imposed. Another respondent commented that the *JFSC* should not underestimate the impact a public statement about the imposition of a civil financial penalty (even one in Band 1) may have on the *registered person* or *principal person* concerned.

JFSC response

- 2.4.6 Save where there are exceptional reasons to consider otherwise, *JFSC* policy will be to issue a public statement where a civil financial penalty is imposed.
- 2.4.7 The *JFSC* considers that the issuing of a public statement will support the deterrent effect that the civil financial penalty regime is designed to have.
- 2.4.8 The *JFSC* has issued many public statements over the years and does not underestimate the potential effect that one may have on the person involved: the *JFSC* is always careful to ensure that the content is reasonable and proportionate to the seriousness of the regulatory contravention involved. In addition, it is important to bear in mind that the interests of a person potentially subject to a public statement are safeguarded by the right of appeal they have to the Royal Court against its issuance.

- 2.4.9 One respondent expressed concern at the description in the *CP* of a Band 1 financial penalty as being, “*an administrative pecuniary penalty for late or missing*

notifications". They were concerned that this might indicate that civil financial penalties would be imposed for *Code* contraventions that were not serious.

JFSC response

2.4.10 The *Commission Law* allows the *JFSC* to impose a civil financial penalty only where the contravention of the relevant *Code* was "significant and material"ⁱⁱⁱ, which by definition means that a penalty cannot be imposed for trivial contraventions.

2.4.11 One respondent sought confirmation that, "*should the JFSC decide to apply a civil financial penalty, that it would not then seek to pursue criminal proceedings against the same registered person or principal person in relation to the same contravention*".

JFSC response

2.4.12 The civil financial penalty regime covers non-criminal offences (i.e. contraventions of the *JFSC's Codes of Practice*). That said, there may be occasions where the behaviour of a person may constitute both a contravention of a *Code* and a criminal offence. In such circumstances any decision to pursue a criminal prosecution would be a matter for the Attorney General and not the *JFSC*.

Appendix A – List of respondents to the CP

Name of Respondent	Type of Business
Affinity Trust Limited / APW Investors Limited	Trust company business / investment business
Barclays Bank PLC, Jersey branch	Deposit-taker, fund services business, general insurance mediation business, investment business and money service business
HSBC Bank PLC, Jersey branch	Deposit-taker, fund services business, general insurance mediation business, investment business and money service business
Jersey Finance Limited	The response consisted of comments Jersey Finance Limited had received from one trust company, one trade association and one law firm

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

ⁱ N.B. The Board of Commissioners has decided that one change to the *DMP* proposed in the *CP* (paragraph 4.3.7 therein refers), which would have excluded the application of the settlement discount in full in certain circumstances, will not be implemented at this time.

ⁱⁱ For a full description of the various penalty bands, see the Financial Services Commission (Financial Penalties) (Jersey) Order 2015, as amended.

ⁱⁱⁱ See Article 21A of the *Commission Law*.