



Jersey Financial
Services Commission

Decision-Making Process

DRAFT

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Glossary of Terms

For the purposes of this policy statement, the following terms should be understood to have the meaning shown by this table.

<i>AIF Regulations</i>	The Alternative Investment Funds (Jersey) Regulations 2012, as amended.
<i>authorized auditor</i>	An individual or a firm authorized by the <i>JFSC</i> pursuant to Article 113D(6) of the <i>Companies Law</i> to carry out an audit of the accounts of a company that is not a market traded company ¹ .
<i>BB(J)L</i>	Banking Business (Jersey) Law 1991, as amended.
<i>Board</i>	The Board of Commissioners of the <i>JFSC</i> constituted as set out in Article 3 of the <i>Commission Law</i> .
<i>CIF(J)L</i>	Collective Investment Funds (Jersey) Law 1988, as amended.
<i>COBO</i>	Control of Borrowing (Jersey) Order 1958, as amended.
<i>Code of Practice</i>	One or more of the Codes of Practice referred to in Article 21A(2) of the <i>Commission Law</i> . ²
<i>Commission Law</i>	Financial Services Commission (Jersey) Law 1998, as amended.
<i>Companies Law</i>	Companies (Jersey) Law 1991, as amended.
<i>Board DMP Committee or Committee</i>	The committee of the <i>Board</i> responsible for making a determination in relation to the imposition of a <i>regulatory sanction</i> , as set out in Part 2 of this document.
<i>Executive</i>	One or more officers of the <i>JFSC</i> , including the Director General, acting individually or together, as appropriate, exercising responsibilities delegated to them by the <i>Board</i> .
<i>FS(J)L</i>	Financial Services (Jersey) Law 1998, as amended.
<i>IB(J)L</i>	Insurance Business (Jersey) Law 1996, as amended.
<i>heightened supervision</i>	<p>The application to a particular <i>Subject</i> (or potential <i>Subject</i>)³ of one or more regulatory measures, such as restrictions, controls and additional reporting requirements, whether on a consensual basis or by the use of enforcement powers.</p> <p>Circumstances in which such temporary measures may be employed include where concerns of a regulatory nature arise and the <i>JFSC</i> needs to act in the discharge of its functions whilst remedial action is taken by the <i>Subject</i>/potential <i>Subject</i>.</p>
<i>JFSC</i>	The Jersey Financial Services Commission.
<i>key person</i>	Has the meaning assigned in Article 1 of each of the <i>Regulatory Laws</i> and the <i>Supervisory Bodies Law</i> .

<p><i>licence</i></p>	<p>Includes:</p> <ul style="list-style-type: none"> › A certificate granted in accordance with Regulation 9 of the <i>AIF Regulations</i> › A registration granted in accordance with Article 9 of the <i>BB(J)L</i> › A permit granted in accordance with Article 7 of the <i>CIF(J)L</i> › A certificate granted in accordance with Article 8B of the <i>CIF(J)L</i> › A consent granted in accordance with any of Articles 1 to 5 and 7 to 11 of the <i>COBO</i> › A registration granted in accordance with Article 9 of the <i>FS(J)L</i> › A permit granted in accordance with Article 7 of the <i>IB(J)L</i> › A registration under Article 14 or Article 15 of the <i>Supervisory Bodies Law</i>.
<p><i>Notice of Intent</i></p>	<p>A notice informing the <i>Subject</i> what <i>regulatory sanction</i> is proposed and the reason(s) why.</p>
<p><i>principal person</i></p>	<ul style="list-style-type: none"> › With respect to the <i>AIF Regulations</i> has the meaning assigned to it in Regulation 2 of the <i>AIF Regulations</i> › With respect to the <i>BB(J)L</i> means a director, controller and manager as defined in Article 1 of the <i>BB(J)L</i> › With respect to the <i>CIF(J)L</i>, <i>FS(J)L</i> and <i>Supervisory Bodies Law</i> has the meaning assigned to it in Article 1 of the respective law › With respect to the <i>IB(J)L</i> means a chief executive and shareholder controller as defined in Article 1 of the <i>IB(J)L</i> and any individual intending to act, or acting, as a director. <p>Save that ‘principal person’ shall have the meaning given in Article 1 of the <i>Commission Law</i> where the decision relates to the imposition of a financial penalty.</p>
<p><i>recognized auditor</i></p>	<p>An individual or a firm who may carry out an audit of the accounts of a market traded company by virtue of their name having been entered on the Register of Recognized Auditors by the <i>JFSC</i> pursuant to Article 111 of the <i>Companies Law</i>.</p>
<p><i>registered person</i></p>	<p>Includes:</p> <ul style="list-style-type: none"> › The holder of any <i>licence</i> › An applicant for a <i>licence</i> › A former holder of a <i>licence</i> › An <i>authorized auditor</i> or <i>recognized auditor</i>. <p>Save that ‘registered person’ shall have the meaning given in Article 1 of the <i>Commission Law</i> where the decision relates to the imposition of a financial penalty.</p>
<p><i>Regulatory Laws</i></p>	<p>The collective name for the <i>AIF Regulations</i>; the <i>BB(J)L</i>; the <i>CIF(J)L</i>; the <i>FS(J)L</i>; the <i>IB(J)L</i>; and the <i>Supervisory Bodies Law</i>.</p>

<i>regulatory sanction</i>	One or more of the decisions referred to in paragraph 9 where the decision is to be taken as a form of penalty for a prior or ongoing breach of a <i>Regulatory Law</i> or other regulatory requirement.
<i>Subject</i>	The subject of any decision that may be taken in accordance with the decision-making processes described in this document. The Subject may be a natural person or a legal person. The Subject may be singular or plural.
<i>Supervisory Bodies Law</i>	Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, as amended.

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Part A - Overview

Important Note:

Words in *italics* are defined in the Glossary of Terms.

Introduction

1. The purpose of this document is to explain the process that the *JFSC* will follow when it takes administrative action that could result in the imposition of a *regulatory sanction*.
2. The *JFSC* is not a judicial body. Court rules and procedures do not apply to the decisions that it takes. The *JFSC* takes administrative decisions in accordance with powers vested in it that are set out in the legislation that it administers. In so doing, the *JFSC* will act as supervisor, investigator and decision-maker.
3. The *JFSC's* decision-making process is designed to ensure that the final decision taken by it:
 - › is one that the *JFSC* is lawfully empowered to take;
 - › is one that is made in accordance with statutory obligations imposed on the *JFSC*;
 - › has been arrived at fairly; and
 - › is proportionate and reasonable based on all relevant information before the decision-maker at the time.
4. Part B of this document sets out the decision-making process that the *JFSC* will normally follow. However, it is impossible for any published administrative decision-making process to anticipate all circumstances. Subject to any statutory obligations that it has, the *JFSC* is responsible for setting its own procedures and to ensure the sound administration of a case it may, on occasions, be necessary to vary or supplement the process set out in this document to better serve achieving any or all of the objectives set out in paragraph 3.
5. This document incorporates the information that must be included in a statement published by the *JFSC* pursuant to Article 21B(4) of the *Commission Law* setting out the principles it will apply in determining the imposition and amount of a financial penalty and the processes it will follow when exercising the power to impose a financial penalty.

Delegation of *JFSC* powers

6. Under Article 11 of the *Commission Law*, the *Board* is able to delegate any of its functions or powers wholly or partly, to the Chairman, one or more Commissioners, or an officer of the *JFSC*.
7. The *Board* has decided to routinely delegate the taking of any decision to which this document applies (see next section) to a committee of three Commissioners (the *Board DMP Committee*). (Note that, although an *ex-officio* Commissioner, the Director General will not sit on the *Board DMP Committee*.)

8. However, this delegation by the *Board* does not preclude the *Board* from deciding in any particular case, whether for operational reasons or otherwise, that a decision to impose a *regulatory sanction* may be taken by a committee of Commissioners consisting of less, or more than, three Commissioners or that the decision be taken by the *Board* itself (without the Director General). Nor does it preclude the *Board DMP Committee* in any particular case referring the matter up to the *Board* for a decision should the *Committee* feel that is the appropriate course of action in the circumstances.

Decisions to which this document applies

9. The decision-making process set out in this document will apply in respect of the following administrative decisions of the *JFSC*:
- › revoking⁴ a *licence*, or a *recognized auditor's* registration or an *authorized auditor's* permission to audit⁵;
 - › objecting to the continuing appointment of a *principal person, key person*, or an actuary;
 - › publishing a public statement censuring the *Subject* and/or publicising the imposition of a *regulatory sanction*;
 - › issuing a direction to require a person, who has not already taken that decision voluntarily, to cease operations and to wind up its affairs;
 - › issuing a direction to prevent or restrict the employment of an individual by a *registered person*;
 - › refusing an application to withdraw or vary, in whole or in part, a direction that has been issued pursuant to this document¹;
 - › withdrawing approval under the Companies (Audit) (Jersey) Order 2010 of the rules of a recognized professional body that govern the conduct of the audit of market traded companies⁶;
 - › imposing a financial penalty.

¹ The *JFSC* will refuse to consider applications to withdraw or vary a direction that it considers are vexatious or repetitious.

When this document will not apply

10. The process described by this document will not apply where the circumstances require urgent action to be taken.⁷ In addition, without limitation, this document will not apply to any decision where:
 - › the decision is taken by the *Executive* as part of normal or *heightened supervision*;
 - › the decision is taken with the agreement of the relevant firm or individual;
 - › legislation provides that a decision will have immediate effect (as is the case for most types of direction);
 - › the *JFSC* intends to exercise a power to reduce the period of notice of a decision (such as for some public statements warning the public of scam websites);
 - › an application is to be made by the *JFSC* to the Royal Court.
11. For the avoidance of doubt, the decision-making process in this document does not include any decision that may be taken under the *Companies Law* (other than those relating to *recognized or authorized auditors*).

Part B – The Decision-Making Process

Important Note:

Words in *italics* are defined in the Glossary of Terms.

Introduction

12. This Part B explains the various steps involved in the *JFSC*'s decision-making process.
13. It is important to note that where a firm or individual (the *Subject*) becomes subject to the decision-making process it is not inevitable that a *regulatory sanction* will be the resulting outcome. At any stage, the decision-making process will be terminated if it is determined that no further action is required, or that the matter should be addressed through normal or *heightened supervision*, or the *JFSC* and the *Subject* have agreed a course of action.
14. In addition, the decision-making process may be temporarily suspended where the *JFSC* takes a decision to do something that is not covered by this document, such as enter into discussions with the *Subject* with a view to settlement (see the *JFSC*'s separate policy statement on Regulatory Settlements); or to refer related matters to the Attorney General to review, investigate and potentially prosecute any criminal conduct; or for any other reason of pressing public interest.

Stage 1: Investigation

15. Normally, the first step in the decision-making process will be the opening of an investigation case by the *Executive*.
16. This will happen where the *JFSC* becomes aware of an issue or behaviour that gives rise to concern in relation to the *Subject*. The investigation may be resourced by the *JFSC*'s own staff, contracted staff or third parties, as considered appropriate.
17. When an investigation is opened, the *Executive* will provide the *Subject* with a written note of the scope of the investigation. Should it be necessary to amend the scope of the investigation as matters progress, the *Executive* will provide the *Subject* with a note of the revised scope.
18. During an investigation, the *JFSC* will often use statutory powers that it has to require persons to attend for compulsory interviews or to provide information and documents to assist in its investigation.
19. At an appropriate point those investigating will prepare a draft report, which will set out the facts of the case as they understand them to be (in essence - what took place, who was involved and when).
20. The *Subject* will be provided with an opportunity to comment on the draft report in order to clear up any misunderstandings or to correct factual inaccuracies.

Stage 2: Review of the case by the *Executive*

21. Once the investigation has been concluded the case will be reviewed by the *Executive*.
22. If the *Executive* then determines that the case merits consideration by the *Board DMP Committee* the case will be referred to the *Committee*. The *Subject* will be notified that the case has been referred to the *Committee*.

Stage 3: Consideration of the case by the *Board DMP Committee*

23. Upon receiving a referral from the *Executive*, the *Board DMP Committee* will meet to consider the case.
24. If the *Board DMP Committee* reasonably believes that upon the basis of the material placed before it by the *Executive* the *Subject* may be found to have contravened regulatory requirements in respect of which a *regulatory sanction* could be imposed, the *Committee* will issue a *Notice of Intent* to the *Subject*.
25. The *Notice of Intent* will inform the *Subject* what *regulatory sanction* is proposed and the reason(s) why.

Stage 4: Determination of the case by the *Board DMP Committee*

26. In advance of the *Board DMP Committee* meeting to determine the case the *Subject* will be given an opportunity to make a written representation to the *Committee* on the *Notice of Intent*.
27. The *Board DMP Committee* will invite the *Executive* to comment on the *Subject's* written representation. A copy of the *Executive's* comments will be provided to the *Subject*.
28. When the *Board DMP Committee* meets to determine the case, the *Subject* may choose to make an oral representation to supplement its previous written representation. The focus of the *Subject's* oral representation should be on explaining why it considers the proposed *regulatory sanction* would be inappropriate or not justified.
29. The *Subject* may be accompanied at the meeting with the *Board DMP Committee* by their legal adviser and may request that their legal adviser speak on their behalf.
30. The meeting of the *Board DMP Committee* is intended to be interactive rather than adversarial. The *Subject* may be required to answer questions from the *Committee* or clarify issues.
31. The *Executive* will be present during the *Subject's* oral representation and may be asked by the *Board DMP Committee* to comment on it. The *Executive* may also be required to answer questions from the *Committee* or clarify issues.
32. If, during the meeting, new information is introduced by the *Subject* that was not previously made available to the *JFSC* the *Board DMP Committee* may decide to defer making a decision until the information has been evaluated.

33. Once the *Board DMP Committee* has received all submissions any person who is not a member of the *Committee* will leave the meeting (except for the *Committee's* legal adviser (if one has been instructed) and the Commission Secretary who will remain to take the minutes) whilst the *Committee* deliberates.
34. In reaching its decision, *the Board DMP Committee* will have regard to the written and oral representations received and all other information in the documents before it. It is for the *Committee* to decide which, of the matters before it, it accepts and which it does not.
35. As soon as reasonably practicable after the meeting, the *Subject* will be given written notice of the *Board DMP Committee's* decision.
36. If the decision is to impose a *regulatory sanction* the relevant statutory notice will be served on the *Subject* and will include the reasons for the decision and particulars of the *Subject's* right of appeal to the Royal Court.

Appendix

(see paragraph 5)

Financial Penalties on *registered persons*: Statement of Principles

Where the *JFSC* is satisfied that a *registered person* has, to a significant and material extent, contravened a *Code of Practice*, the principles that the *JFSC* will apply in determining the imposition and amount of a financial penalty on the *registered person* are:

- › The seriousness of the contravention of the *Code of Practice*
- › Whether or not the *registered person* knew, or ought to have known, of the contravention
- › Whether or not the *registered person* voluntarily reported the contravention
- › Whether or not the *registered person* has taken steps to rectify the contravention and to prevent its recurrence
- › The potential financial consequences to the *registered person* and to third parties (including customers and creditors of the *registered person*) of imposing the penalty
- › The principle of ensuring that *registered persons* cannot expect to profit from contravention of the *Codes of Practice*
- › The penalties imposed by the *JFSC* in other cases
- › Factors that the *JFSC* considers aggravate or mitigate the contravention of the *Code of Practice* (see below).

Factors that the *JFSC* will regard as aggravating a contravention of a *Code of Practice* by a *registered person* include (i.e. this is a non-exhaustive list):

- › A failure to bring promptly and completely the contravention to the attention of the *JFSC*
- › A business model that encourages a disregard for requirements of the *Codes of Practice*
- › A poor compliance record (this will include a failure to follow any direction(s)⁸ issued)
- › A failure to pay appropriate attention to relevant guidance issued by the *JFSC*
- › A failure to follow its own procedures
- › An absence of relevant procedures
- › A failure to implement recommendations made by the *registered person's* compliance officer or money laundering compliance officer in order to ensure compliance with the relevant *Code of Practice* requirement
- › Clients of the *registered person* experiencing a significant loss as a result of the contravention or not making a profit that would otherwise have accrued absent the contravention.

Factors that the *JFSC* will regard as mitigating a contravention of a *Code of Practice* by a *registered person* include (i.e. this is a non-exhaustive list):

- › The contravention being brought promptly and completely to the attention of the *JFSC*
- › Co-operating fully with any investigation
- › An evidenced previously strong compliance record
- › The *registered person's* procedures were amended to address the contravention
- › Swift resolution of any client losses arising as a result of the contravention or swift payment of compensation to make good a profit that the client would otherwise have accrued absent the contravention.

Financial Penalties on *principal persons*: Statement of Principles

Where the *JFSC* is satisfied that a *registered person* has, to a significant and material extent, contravened a *Code of Practice*, and that the contravention was –

- (i) Committed with the consent or connivance of, or is attributable to neglect on the part of a *principal person*, or
- (ii) Aided, abetted, counselled or procured by a *principal person*,

The principles that the *JFSC* will apply in determining the imposition and amount of a financial penalty on a *principal person* are:

- › The seriousness of the contravention of the *Code of Practice*
- › The potential financial consequences to the *principal person* and to third parties (including creditors of the *principal person*) of imposing the penalty
- › The principle of ensuring that *principal persons* cannot expect to profit from contravention of the *Codes of Practice*
- › The penalties imposed by the *JFSC* on *principal persons* in other cases
- › Factors that the *JFSC* considers aggravate or mitigate the position of the *principal person* (see below).

Factors that the *JFSC* will regard as aggravating the position of the *principal person* include (i.e. this is a non-exhaustive list):

- › 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)

- › The *principal person* supporting (whether implicitly or explicitly) a business model that encourages a disregard for requirements of the *Codes of Practice*
- › The *registered person* having a poor compliance record (this will include a failure to follow any direction(s)⁹ issued) and the *principal person's* past actions or inactions being a contributory factor to that record
- › A failure by the *principal person* to pay appropriate attention to relevant guidance issued by the *JFSC*
- › A failure by the *principal person* to follow the *registered person's* own procedures
- › A failure by the *principal person*, where it was his or her responsibility, to ensure that the *registered person* had in place relevant procedures.

Factors that the *JFSC* will regard as mitigating the position of the *principal person* include (i.e. this is a non-exhaustive list):

- › The *principal person* taking action appropriate to his or her position with the *registered person* on becoming aware of the contravention
- › The *principal person* co-operating fully with any investigation
- › Where the *registered person* has an evidenced previously strong compliance record, the *principal person's* contribution to that.

¹ 'Market traded company' is defined in Article 102 of the *Companies Law*.

² Note that the definition of 'Codes of Practice' includes the *JFSC's* "Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism for Financial Services Business regulated under the Regulatory Laws".

³ Heightened supervision is not applicable to auditors: authorized auditors are not subject to supervision; and for more information on the oversight regime for *recognized auditors*, please see the *JFSC's* website: <https://www.jerseyfsc.org/industry/guidance-and-policy/recognised-auditors/>

⁴ Or suspending a *licence* or registration where the relevant law allows it.

⁵ Except where: (1) the revocation is at the request of the holder of the *licence* or registration; (2) the holder of the *licence* or registration has not commenced the relevant activity within one year of being granted the *licence* or registration; (3) the holder of the *licence* or registration has ceased to perform the relevant activity.

⁶ Except for the power to withdraw approval in the circumstances set out in endnote 5 where a reference to 'holder of the *licence* or registration' should be read as though it is a reference to 'recognized professional body'.

⁷ For example: to safeguard the assets of investors; or in the best interests of customers, beneficiaries, investors or the public where the financial resources of the *registered person* do not comply with regulatory requirements; or where statute vests in the *JFSC* the right to apply to Court for relief.

⁸ A direction issued under Article 23 of the *FS(J)L* or under the equivalent provision in one of the other *regulatory laws*.

⁹ A direction issued under Article 23 of the *FS(J)L* or under the equivalent provision in one of the other *regulatory laws*.