



# Consultation Paper No. 4 2021

## Decision-Making Process

A consultation on proposals to revise the decision-making process that the JFSC follows when taking administrative action that could result in the imposition of a regulatory sanction

Issued: July 2021

## Consultation Paper

The Jersey Financial Services Commission (**JFSC**) invites comments on this consultation paper by **1 September 2021**. If you require any assistance, clarification or wish to discuss any aspect of the proposal prior to formulating a response, it is of course appropriate to contact the [JFSC](#).

The [JFSC](#) contact is:

**Stephen de Gruchy**

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

Telephone: +44 (0) 1534 822000  
Email: [s.degruchy@jerseyfsc.org](mailto:s.degruchy@jerseyfsc.org)

Alternatively, Lisa Springate at Jersey Finance Limited (**JFL**) is coordinating an Industry response that will incorporate any matters raised by local businesses. Comments should be submitted to [JFL](#) by **1 September 2021**.

The [JFL](#) contact is:

**Lisa Springate**

Head of Legal and Technical  
Jersey Finance Limited  
4<sup>th</sup> Floor, Sir Walter Raleigh House  
48-50 Esplanade  
St Helier  
Jersey  
JE2 3QB

Telephone: +44 (0) 1534 836029  
Email: [lisa.springate@jerseyfinance.je](mailto:lisa.springate@jerseyfinance.je)

**It is the policy of the [JFSC](#) to make the content of all responses available for public inspection (unless specifically requested otherwise by the respondent).**

**It is the policy of [JFL](#) (unless otherwise requested or agreed) to collate all responses and share them verbatim with the [JFSC](#) on an anonymised basis (with reference made only to the type of respondent, e.g. individual, law firm, trust company etc.). This collated, anonymised response will, typically, be placed in [JFL](#)'s permanent electronic archive which is currently open to all [JFL](#) members.**

## Glossary of Terms

Defined terms are indicated throughout this document as follows:

Board	The Board of Commissioners of the <a href="#">JFSC</a> constituted as set out in Article 3 of the <a href="#">Commission Law</a> .
Board DMP Committee	The committee of the <a href="#">Board</a> responsible for making a determination in relation to the imposition of a <a href="#">regulatory sanction</a> . It will have a rotating membership of three Commissioners.
Commission Law	Financial Services Commission (Jersey) Law 1998, as amended.
Executive	One or more officers of the <a href="#">JFSC</a> , including the Director General, acting individually or together, as appropriate, exercising responsibilities delegated to them by the Board.
JFL	Jersey Finance Limited.
JFSC	Jersey Financial Services Commission.
present DMP	The <a href="#">JFSC</a> 's Decision-Making Process policy statement issued 8 July 2019, a copy of which is shown in <b>Appendix B</b> .
proposed revised DMP	The <a href="#">JFSC</a> 's proposed revised Decision-Making Process policy statements shown in <b>Appendices C and D</b> .
regulatory sanction	Has the same meaning as in the <a href="#">present DMP</a> and the <a href="#">proposed revised DMP</a> (for example: the issuing of a public statement; the imposition of a civil financial penalty; the issuing of a direction banning a person from holding certain positions in a business regulated by the <a href="#">JFSC</a> , etc).
Subject	The business or individual who is the subject of any decision that may be taken in accordance with the <a href="#">present DMP</a> or the <a href="#">proposed revised DMP</a> .

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# 1 Executive Summary

## 1.1 Overview

- 1.1.1 This consultation paper seeks feedback on proposals to revise the decision-making process that the [JFSC](#) follows when taking administrative action that could result in the imposition of a [regulatory sanction](#).

## 1.2 What is proposed and why?

- 1.2.1 The [JFSC](#) first published information on its decision-making process in 2006. Since then, the published process has been revised a number of times to take into account experience gained from cases that have gone through it and to reflect statutory changes made to the [JFSC's](#) powers (most notably in 2015 when the [JFSC](#) was given the statutory power to impose civil financial penalties for significant and material contraventions of [JFSC](#) Codes of Practice).
- 1.2.2 Concern has been expressed that over time, as a result of these multiple revisions, the [JFSC's](#) decision-making process has become unnecessarily lengthy and certain elements quite cumbersome. In essence, the process is not as efficient as it could be.
- 1.2.3 This results in cases that are subject to the decision-making process taking longer than is necessary to reach a conclusion (whether that conclusion be the imposition of a [regulatory sanction](#) or, indeed, no further action).
- 1.2.4 Consequently, the [JFSC](#) has undertaken an internal holistic review of its decision-making process with the aim of developing a revised process that will be more efficient for both the [JFSC](#) and for those businesses or individuals that become subject to it – whilst, importantly, still being a process that adheres to the principles of fairness, in particular ensuring that the relevant business or individual will receive a full and fair hearing before the persons who will determine their case.
- 1.2.5 A more efficient decision-making process will be less expensive for the [JFSC](#) to operate (and, thus, less expense for Industry to fund via [JFSC](#) licence fees). It will also reduce the direct costs of those businesses or individuals that find themselves subject to the decision-making process.
- 1.2.6 This consultation paper, and the [proposed revised DMP](#) shown in **Appendix C**, represents the output of the [JFSC's](#) internal review.
- 1.2.7 Another version of the [proposed revised DMP](#) is shown in **Appendix D**, this version illustrates statements of principles for financial penalties if the changes in the Government of Jersey's July 2021 consultation are approved by the States Assembly (see 1.3).
- 1.2.8 A legal review of the [proposed revised DMP](#) has been carried out by a leading Queen's Counsel who has opined that the process will meet the requirements of a fair process and also satisfy the right of a person to a fair determination of their civil rights as per Article 6 of the European Convention on Human Rights.

## 1.3 Government consultation on the *Commission Law*

- 1.3.1 At the same time as this consultation paper is open for feedback, the Government of Jersey are consulting on revisions to the *Commission Law* <https://www.gov.je/Government/Consultations/Pages/JFCCivilPenalties.aspx>.

- 1.3.2 If Government's proposed revisions are approved by the States Assembly, the civil financial penalties regime will be extended to key persons and persons who perform or have performed a senior management function, and it will also be applicable in respect of breaches of the Money Laundering (Jersey) Order 2008.
- 1.3.3 In light of the possible extension of the civil financial penalties regime described above, a second version of the [proposed revised DMP](#) is included within this consultation paper at **Appendix D** showing how the JFSC proposes that its statement of principles in respect of the imposition of civil financial penalties will be introduced.

## 1.4 Who would be affected?

- 1.4.1 The proposals in this consultation paper have the potential to affect any business or individual falling within the regulatory ambit of the [JFSC](#).
- 1.4.2 Legal advisers to such businesses or individuals are also likely to be interested in the proposals.

## 2 Consultation

### 2.1 Basis for consultation

- 2.1.1 The [JFSC](#) has issued this consultation paper in accordance with Article 8(3) of the [Commission Law](#) under which the [JFSC](#) “may, in connection with the carrying out of its functions ... consult and seek the advice of such persons or bodies whether inside or outside Jersey as it considers appropriate”.
- 2.1.2 The [JFSC](#)’s [present DMP](#) incorporates the information that Article 21B of the [Commission Law](#) requires the [JFSC](#) to publish in a statement setting out, amongst other things, “the processes it will follow when exercising the power to impose a [civil financial] penalty”.
- 2.1.3 Before revising its published statement, Article 21B(6) of the [Commission Law](#) requires the [JFSC](#) to consult the Minister for External Relations and Financial Services, registered persons (as defined in Article 1 of the [Commission Law](#)) and such other persons as the [JFSC](#) considers appropriate. The publication of this consultation paper fulfils that statutory obligation.

### 2.2 Responding to the consultation

- 2.2.1 The [JFSC](#) invites comments in writing from interested parties on the proposals set out in this consultation paper. Where comments are made by an industry body or association, that body or association should also provide a summary of the type of individuals and/or institutions that it represents.
- 2.2.2 Comments should be sent to either [JFL](#) or the [JFSC](#) by no later than **1 September 2021**.

### 2.3 Next steps

- 2.3.1 Following this consultation, the [JFSC](#) will publish feedback to this consultation paper together with its finalised revised Decision-Making Process policy statement.

## 3 The JFSC

### 3.1 Overview

- 3.1.1 The [JFSC](#) is a statutory body corporate established under the [Commission Law](#). It is responsible for the supervision and development of financial services provided in or from within Jersey.
- 3.1.2 The [Commission Law](#) prescribes that the [JFSC](#) shall be responsible for:
- 3.1.2.1 the supervision and development of financial services provided in or from within Jersey;
  - 3.1.2.2 providing the States, any Minister or any other public body with reports, advice, assistance and information in relation to any matter connected with financial services;
  - 3.1.2.3 preparing and submitting to the Minister for External Relations and Financial Services recommendations for the introduction, amendment or replacement of legislation appertaining to financial services, companies and other forms of business structure;
  - 3.1.2.4 such functions in relation to financial services or such incidental or ancillary matters:
    - › as are required or authorised by or under any enactment, or
    - › as the States may, by Regulations, transfer; and
  - 3.1.2.5 such other functions as are conferred on the [JFSC](#) by any other Law or enactment.

### 3.2 Guiding principles

- 3.2.1 The [JFSC](#)'s guiding principles require it to have particular regard to:
- 3.2.1.1 the reduction of risk to the public of financial loss due to dishonesty, incompetence, malpractice, or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;
  - 3.2.1.2 the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
  - 3.2.1.3 the best economic interests of Jersey; and
  - 3.2.1.4 the need to counter financial crime in both Jersey and elsewhere.

## 4 Proposals

### 4.1 Introduction

- 4.1.1 The [JFSC](#)'s present decision-making process is set out in a policy statement dated 8 July 2019 ([the present DMP](#)), a copy of which is shown in **Appendix B**.
- 4.1.2 In broad terms, the [present DMP](#) covers two categories of decision:
- 4.1.2.1 the first are referred to as "Executive decisions", which, in essence, are licensing decisions that the [Board](#) has delegated to the [Executive](#);
- 4.1.2.2 the second are referred to as "Board decisions": these are decisions that may result in a [regulatory sanction](#) being imposed and may only be taken by the [Board](#).
- 4.1.3 The focus of this consultation and the [proposed revised DMP](#) is on the second category of decision i.e. those that may result in a [regulatory sanction](#) being imposed.<sup>1</sup>
- 4.1.4 It is important to note that the decisions covered by this consultation are those for "contested cases" i.e. those cases where the business or individual concerned is not prepared to enter into a settlement agreement with the [JFSC](#) in relation to the [regulatory sanction](#) to be imposed.<sup>2</sup>
- 4.1.5 The [present DMP](#) refers to the business or individual that is subject to the [JFSC](#)'s decision-making process as "**the Subject**". That terminology will be used throughout the remainder of this consultation paper.
- 4.1.6 All of the administrative decisions of the [JFSC](#) covered by the [present DMP](#) and the [proposed revised DMP](#) may be appealed by the [Subject](#) making application to the Royal Court of Jersey in the event that the [Subject](#) considers that the decision is unreasonable having regard to all the circumstances.

### 4.2 Overview of the present DMP

- 4.2.1 Readers of this consultation paper are encouraged to review the full text of the [present DMP](#) (shown in **Appendix B**) to understand the existing process. However, in order to assist readers to understand what changes are proposed to that process and why, an overview of the [present DMP](#) follows.
- 4.2.2 The [present DMP](#) explains that, where the [JFSC](#) is taking administrative action that could result in the imposition of a [regulatory sanction](#), the process will involve four stages, as summarised in Box 1:

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<sup>1</sup> In practice, very few "Executive decisions" are made: where an applicant for a licence comes to the conclusion that its application may fail, it will generally withdraw the application, thus negating the need for a formal decision to be taken by the [JFSC](#). Going forward, the intention is that the revised DMP will only cover decisions that may result in a [regulatory sanction](#) being imposed. That notwithstanding, the [JFSC](#) will continue to deal with licensing applications in a manner consistent with its statutory obligations and the principles of natural justice.

<sup>2</sup> Or where, because of the circumstances of the case, the [JFSC](#) has not offered settlement discussions.

Box 1: summary of the [present DMP](#)

Stage	Summary
<p><b>Stage One</b> - Disclosure and verification of information</p>	<p>Disclosure to the <a href="#">Subject</a> of the information which will be the basis of the decision to be taken by the <a href="#">Board</a>.</p> <p>Normally, the information will be presented to the <a href="#">Subject</a> in the form of a draft Investigation Report prepared by the allocated case officers in the <a href="#">JFSC</a>'s Enforcement Unit.</p>
<p><b>Stage Two</b> – Review Committee</p>	<p>Consideration of the case by a formal committee of senior <a href="#">JFSC</a> officers who will decide if the case merits referral to the <a href="#">Board</a> with a recommendation to impose a <a href="#">regulatory sanction</a>.</p> <p>If the Review Committee makes such a recommendation, the <a href="#">Subject</a> is invited to make a representation on it.</p>
<p><b>Stage Three</b> – First meeting of the <a href="#">Board</a></p>	<p>The meeting of the <a href="#">Board</a> at which it will decide whether it is “minded to” impose a <a href="#">regulatory sanction</a> based on the papers before it (which will include any written representation from the <a href="#">Subject</a> on the Review Committee’s recommendation).</p> <p>If the <a href="#">Board</a> is minded to impose a <a href="#">regulatory sanction</a> it will notify the <a href="#">Subject</a> by letter, which will include the reason(s) why.</p>
<p><b>Stage Four</b> – Second meeting of the <a href="#">Board</a></p>	<p>The meeting of the <a href="#">Board</a> at which the <a href="#">Subject</a> is able to make an oral representation to the <a href="#">Board</a> on the content of its “minded to” letter.</p> <p>At the conclusion of this second meeting the <a href="#">Board</a> will determine whether a <a href="#">regulatory sanction</a> should be imposed or not.</p>

### 4.3 Key issues with the present DMP that the internal review has identified

- 4.3.1 The [JFSC](#)'s internal review of the [present DMP](#) has identified several key issues with it, which results in the process not being as efficient as it could be. In particular, that:
  - 4.3.1.1 overall, the decision-making process is convoluted and unnecessarily complex in places. Consequently, cases take far too long to get through the process;
  - 4.3.1.2 over time, more and more of the [JFSC](#)'s internal processes have unnecessarily been written in to the [present DMP](#). This has resulted in an excessively lengthy text, which can make it difficult for a [Subject](#) to navigate and comprehend;

- 4.3.1.3 in addition, the writing in to the [present DMP](#) of many [JFSC](#) internal processes often mistakenly leads a [Subject](#) to consider that they should make early and lengthy - but unnecessary - representations to the [Executive](#) during the decision-making process (for example, to the Review Committee) when, in practice, those representations should be reserved for making to the decision-maker – the [Board](#). (In many cases, because the [Subject](#) will have engaged a lawyer to make those unnecessary early representations to the [Executive](#), they will have incurred legal expenses at an unduly early stage);
- 4.3.1.4 the Review Committee stage (Stage Two) is excessive and slow; and
- 4.3.1.5 the routine hearing of cases by the full [Board](#) means that cases must, as a matter of practicality, be dealt with during the normal board cycle of meetings. Because those meetings are generally held on a monthly basis, there can be hiatuses in the decision-making process of several weeks between Stages Two and Three, and between Stages Three and Four.<sup>3</sup>

#### 4.4 The proposed revised DMP

- 4.4.1 The text of the [proposed revised DMP](#) is shown in **Appendix C**.
- 4.4.2 In order to address the issues identified with the [present DMP](#) a number of changes to the decision-making process are proposed, which will make it more efficient, yet – importantly – still be a process that adheres to the principles of fairness. In particular, ensuring that the [Subject](#) will have a full and fair hearing before the persons who will determine their case.
- 4.4.3 Overall, the revised process has been designed to be less complex, less bureaucratic and easier for a [Subject](#) to understand. It should enable cases to progress through the decision-making process more quickly – to the benefit of [Subjects](#) and the [JFSC](#) - whilst not diluting the fairness of the process.
- 4.4.4 This more efficient decision-making process will be less expensive for the [JFSC](#) to operate (and, thus, less expense for Industry to fund via [JFSC](#) licence fees). It will also reduce the direct costs of those businesses or individuals that find themselves subject to the decision-making process.
- 4.4.5 The key changes that the [proposed revised DMP](#) will make to the present process are as follows:
  - 4.4.5.1 the Review Committee system (Stage Two of the [present DMP](#)) will be replaced with a less formal, and quicker, internal review process (the detail of which will be set out in internal [JFSC](#) procedures rather than in the [proposed revised DMP](#));
  - 4.4.5.2 Stage Three of the [present DMP](#) (First meeting of the [Board](#)) will be replaced with a stage where a committee of three Commissioners (**the [Board DMP Committee](#)**) – rather than the full [Board](#) – will consider the case.

If the [Board DMP Committee](#) reasonably believes that upon the basis

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<sup>3</sup> As an interim measure to improve efficiency, pending finalisation of the [proposed revised DMP](#), the Board is now routinely delegating Stage 3 and Stage 4 actions under the [present DMP](#) to a rotating committee of five Commissioners who can met on an ad hoc basis.

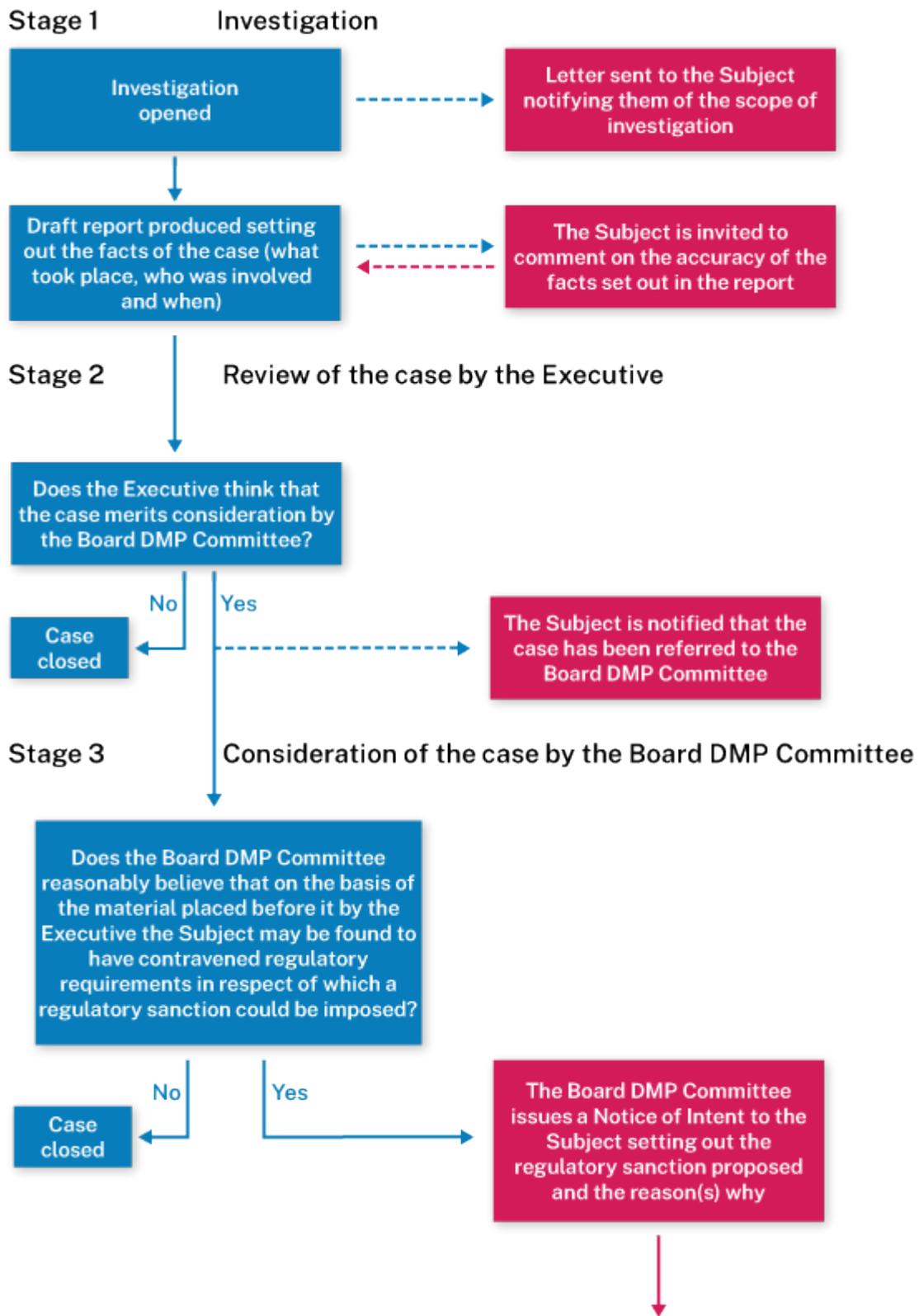
- of the material placed before it by the [Executive](#) the [Subject](#) may be found to have contravened regulatory requirements in respect of which a [regulatory sanction](#) could be imposed, the Committee will issue a “Notice of Intent” to the [Subject](#) setting out what [regulatory sanction](#) is proposed and the reason(s) why;
- 4.4.5.3 the final determination of a case will be made by the [Board DMP Committee](#) who will consider any written and/or oral representation made by the [Subject](#) on the Notice of Intent and consider the [Executive’s](#) comments on any such representation(s);
  - 4.4.5.4 meetings of the [Board DMP Committee](#) will be arranged on an ad hoc basis to ensure that cases are heard as quickly as practicable;
  - 4.4.5.5 when fairness and good decision-making require it, the JFSC may decide to do something that is not covered by [proposed revised DMP](#) and the process may be temporarily suspended. For example, on entering into settlement discussions with the [Subject](#).
- 4.4.6 The schematic in Box 2 on pages 13 and 14 sets out the key elements of the proposed revised decision-making process, although readers of this consultation paper are encouraged to review the complete text of the [proposed revised DMP](#) shown in **Appendix C**.
- 4.4.7 **Appendix D** is an alternative version of the [proposed revised DMP](#) to that at **Appendix C** with the difference being that it illustrates statements of principles for the imposition of civil financial penalties if the Government of Jersey’s July 2021 consultation on amendments to the civil financial penalties regime are introduced and approved by the States Assembly.
- 4.4.8 A legal review of the [proposed revised DMP](#) has been carried out by a leading Queen’s Counsel who has opined that the process will meet the requirements of a fair process and also satisfy the right of a person to a fair determination of their civil rights as per Article 6 of the European Convention on Human Rights.
- 4.4.9 Finally, a note on regulatory settlements. Readers of this paper who are familiar with the [present DMP](#) will note that the [proposed revised DMP](#) does not include text setting out the [JFSC’s](#) settlement policy. The [JFSC’s](#) intention is to publish a discrete and updated policy statement on settlements at the same time as the finalised version of the [proposed revised DMP](#) is published.

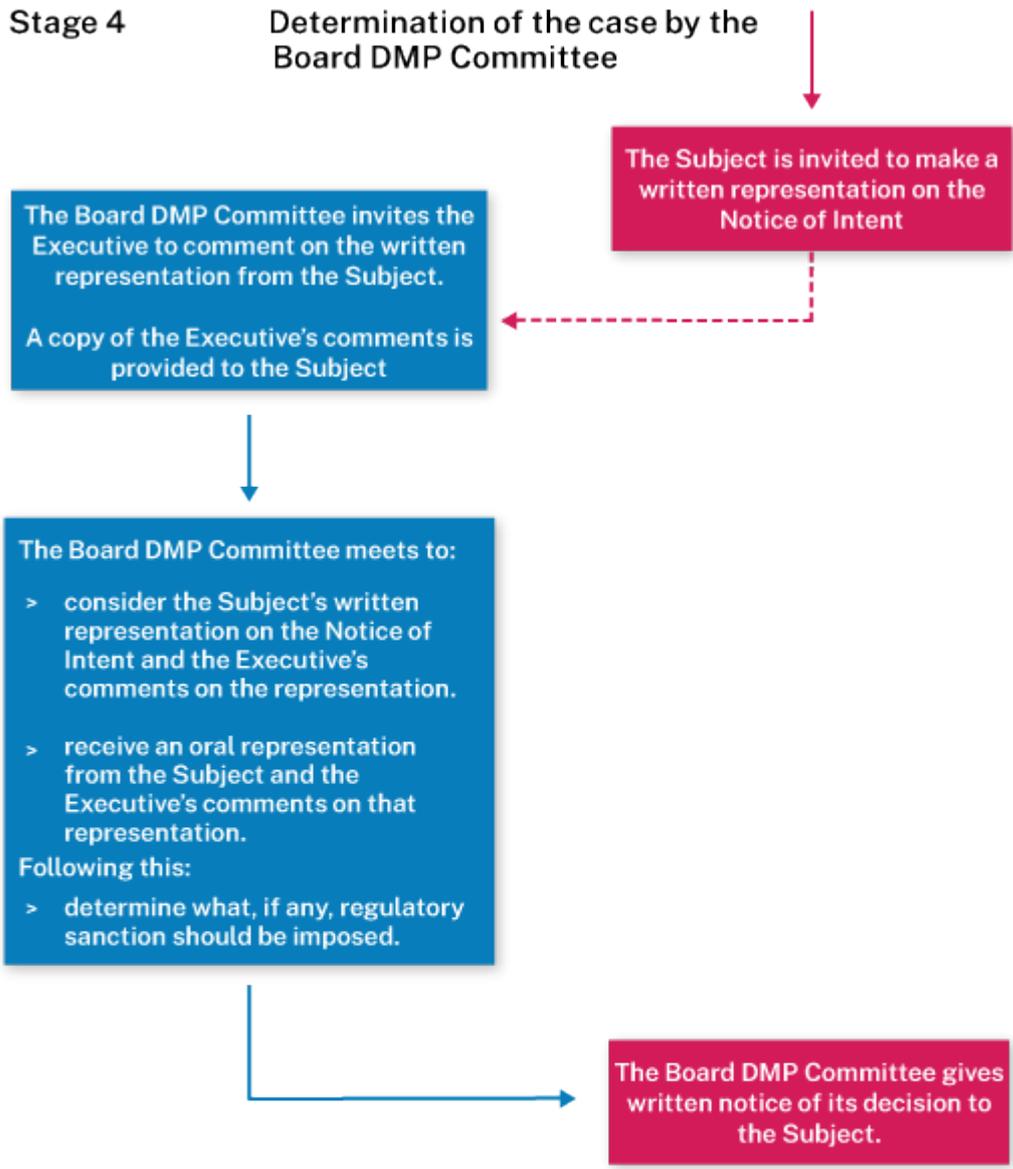
4.4.10 **Question 1**

Do you have any issues or concerns with the [proposed revised DMP](#)?

If you do, please set out what your issue or concern is and how you consider it should be addressed.

Box 2: Schematic of the key elements of the [proposed revised DMP](#)





## 5 Summary of Questions

Page	Question
11	<p>Question 1:</p> <p>Do you have any issues or concerns with the <a href="#">proposed revised DMP</a>?</p> <p>If you do, please set out what your issue or concern is and how you consider it should be addressed.</p>

## Appendix A:

### List of representative bodies and other persons who have been sent this consultation paper

- › Association of Investment Companies
- › Association of Jersey Charities
- › Chartered Financial Advisors (UK)
- › Chartered Institute for Securities & Investments
- › Institute of Chartered Secretaries and Administrators, Jersey branch
- › Institute of Directors, Jersey branch
- › Insurance Institute of Jersey (Chartered Insurance Institute)
- › Minister for External Relations and Financial Services
- › Jersey Association of Directors and Officers
- › Jersey Association of Trust Companies
- › Jersey Bankers' Association
- › Jersey Chamber of Commerce and Industry Incorporated
- › Jersey Compliance Officers Association
- › Jersey Consumer Council
- › Jersey Estate Agents Association
- › Jersey Finance Limited
- › Jersey Funds Association
- › Jersey International Insurance Association
- › Jersey Motor Trades Federation
- › Jersey Society of Chartered and Certified Accountants
- › Law Society of Jersey
- › Personal Finance Society
- › Society of Trust and Estate Practitioners (STEP), Jersey Branch

## Appendix B:

[The present DMP](#)

# Appendix C:

[The proposed revised DMP](#)

## Appendix D:

The [proposed revised DMP](#) showing differences to Appendix C subject to the July 2021 Government consultation on civil financial penalties.

This appendix illustrates the proposed revised DMP if the Government of Jersey's July 2021 consultation on amendments to the *Commission Law* are approved by the States Assembly. The content of the proposed revised DMP is the same as at **Appendix C** except that there are:

1. Two additions to the glossary; and
2. The Statement of Principles in respect of the imposition of Financial Penalties is a single statement rather than two separate statements covering the principles to be applied to the imposition of financial penalties on *registered persons* and *principal persons*.

## Additions to the glossary

<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> .  <b>Save that 'key 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.</b>
<i>person who performs or performed a senior management function</i>	<b>Means a person who performs or has performed a "senior management function" and "senior management function" has the meaning given in Article 1 of the <i>Commission Law</i>.</b>

## Single Statement of Principles

### Financial Penalties: Statement of Principles

Where the JFSC is satisfied that a registered person has, to a significant and material extent, contravened a relevant enactment or Code of Practice it will apply the following principles in determining the imposition and amount of the penalty.

Where the JFSC is satisfied that the contravention was committed with the consent or connivance of, or is attributable to neglect on the part of a principal person, key person, or any person who performs or performed a senior management function; or was aided, abetted, counselled or procured by that person these principles will also apply in determining the imposition and amount of the penalty on that person.

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

- › The seriousness of the contravention
- › Whether or not the person knew, or ought to have known, of the contravention
- › Whether or not the person voluntarily reported the contravention
- › Whether or not the person has taken steps to rectify the contravention and to prevent its

recurrence

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

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

- › A failure by the person to take action appropriate to their position 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 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 person supporting (whether implicitly or explicitly) a business model that encourages a disregard for requirements of a relevant enactment or the Codes of Practice
- › The person having a poor compliance record (this will include a failure to follow any direction(s) issued) and the person’s past actions or inactions being a contributory factor to that record
- › A failure by the person to pay appropriate attention to relevant guidance issued by the JFSC
- › A failure by the person to follow relevant internal procedures
- › An absence of relevant internal procedures to prevent the contravention
- › A failure to implement internal recommendations to ensure compliance with a relevant enactment or Code of Practice where it was the person’s responsibility to implement such recommendations.
- › Clients, customers or funds experiencing a material 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 include (i.e. this is a non-exhaustive list):**

- › The contravention being brought promptly and completely to the attention of the JFSC
- › The person taking action appropriate to their position on becoming aware of the contravention
- › The person co-operating fully with any investigation
- › An evidenced previously strong compliance record
- › Procedures were promptly amended to address the contravention

- › Swift resolution of any client, customer or fund losses arising as a result of the contravention, or swift payment of compensation to make good a profit that would otherwise have accrued absent the contravention.

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<sup>i</sup> A direction issued under Article 23 of the *FS(J)L* or under the equivalent provision in one of the other *regulatory laws*.