

FEEDBACK ON CONSULTATION PAPER NO. 1 2015

CIVIL PENALTIES: DRAFT TARIFF

Feedback to a consultation on draft secondary legislation that would set the financial penalties tariff for contraventions of Codes of Practice.

ISSUED JUNE 2015

CONSULTATION FEEDBACK

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

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

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GLOSSARY OF TERMS

AIF Regulations	means the Alternative Investment Funds (Jersey) Regulations 2012.
Amendment Law	means the Financial Services Commission (Amendment No. 6) (Jersey) Law 2015, which came into force on 20 March 2015.
BBJL	means the Banking Business (Jersey) Law 1991.
CIFJL	means the Collective Investment Funds (Jersey) Law 1988.
Code of Practice (or Code)	means the Codes of Practice for: <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; and <ul style="list-style-type: none">• the Handbook for the prevention and detection of money laundering and the financing of terrorism for financial services business regulated under the regulatory laws.
Commission	means the Jersey Financial Services Commission.
Commission Law	means the Financial Services Commission (Jersey) Law 1998.
CP	means the <i>Commission's</i> Consultation Paper No. 1 of 2015.
FSJL	means the Financial Services (Jersey) Law 1998.
IBJL	means the Insurance Business (Jersey) Law 1996.
Jersey Finance	means Jersey Finance Limited.
registered person	means - <ul style="list-style-type: none">• a person registered under the <i>BBJL</i>;• a person registered under the <i>FSJL</i>¹;• a Category B permit holder under the <i>IBJL</i>;• a service provider within the meaning of the <i>AIF Regulations</i>.
regulatory laws	means - <ul style="list-style-type: none">• the <i>AIF Regulations</i>;• the <i>BBJL</i>;• the <i>FSJL</i>;• the <i>IBJL</i>; and• the <i>SBJL</i>.
SBJL	means the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008.
Tariff Order	means the draft Financial Services Commission (Financial Penalties) (Jersey) Order 201-.

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

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1 EXECUTIVE SUMMARY

1.1 Overview

- 1.1.1 The *Amendment Law* came into force on 20 March 2015. That law amended the *Commission Law* to provide the *Commission* with the power to impose civil financial penalties on *registered persons* that commit serious contraventions of a *Code of Practice* (contraventions that the *Commission Law* defines as “significant and material”).
- 1.1.2 In the *CP* the *Commission* sought views on draft secondary legislation - the *Tariff Order* - which would set the tariff for civil financial penalties.
- 1.1.3 The purpose of this paper is to provide feedback on the responses received to the *CP*.
- 1.1.4 Whilst the *Commission* did not consider that any fundamental changes to the *Tariff Order* were necessary as a result of the responses received, Band 1 has been refined (see paragraph 2.3.14) and some other minor changes made to the draft legislation to improve its functionality.²

1.2 Feedback received

- 1.2.1 Respondents provided comments either directly to the *Commission* or indirectly via *Jersey Finance*.
- 1.2.2 *Jersey Finance* provided the *Commission* with consolidated comments it had received from one bank, one investment manager, one trust company business and one independent director. *Jersey Finance* also provided some comments of its own based on oral discussions with some members of Industry. Four respondents provided comments directly to the *Commission*. A full list of respondents is given in Appendix A.
- 1.2.3 Section 2 of this Feedback Paper presents a summary of the substantive comments received with the *Commission's* response to each.
- 1.2.4 The *Commission* is grateful to respondents for taking the time to consider and comment on the proposals. Each respondent has been sent a copy of this Feedback Paper.

1.3 Next Steps

- 1.3.1 The *Commission* has recommended to the Chief Minister that he make a *Tariff Order* in the form shown in Appendix B.

² Note that the Chief Minister has taken the decision to set a cap of £4 million for Bands 2 and 3 in the *Tariff Order* he made on 16 June 2015. The full text of the *Order* made can be viewed at <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cROFiles%5cR%26OYear2015%2fR%26O-071-2015.htm>.

2 SUMMARY OF RESPONSES

2.1 Structure of this section

- 2.1.1 This section summarises the substantive comments received on the *Tariff Order*, and the *Commission'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 of a general nature. This section is structured on those lines.

2.2 Question 1 [paragraph 4.3.13 of the *CP*]

Do you have any observations or concerns on how “relevant income” is defined or how it would be calculated?

If so, please state in detail what your observation or concern is and explain the reason for it.

- 2.2.1 Three respondents opined that “relevant income” should be limited to the income arising under the specific business licence to which the contravention of the *Code of Practice* relates.
- 2.2.2 One of those respondents also considered that the calculation of relevant income should be restricted to the particular business activity under the relevant licence.
- 2.2.3 Another respondent disagreed with a penalty being based on a percentage of “relevant income”. It considered it a, “*blunt stick and ... could lead to unintended consequences*”, (although the respondent did not state what those might be).

Commission response

- 2.2.4 In relation to the first point, the policy intention of Article 2(2) of the *Tariff Order* as consulted upon was that it would actually achieve what the three respondents suggested. However, a post-consultation review of the text of the consultation version of the Article revealed that it would not meet the policy intent in all cases (specifically where a *registered person* was regulated for more than one business activity but under just one of the *regulatory laws*, rather than under multiple laws). The wording of the Article has been revised to resolve that issue.
- 2.2.5 In relation to the second point, the *Commission* considers that it would be inappropriate to adopt the suggestion made by the respondent. Firstly, most *registered persons* will not hold the data on “relevant income” for a particular business activity (e.g. the sale of a particular product). So to base the penalty tariff on a percentage of such a figure would cause practical difficulties. Secondly, the “relevant income” figure for the ‘product line’ might be small but the contravention serious (for example, as a result of governance failures in the business), so a proportionate financial penalty would not be possible. The rationale of using the “relevant income” of the licensed activity (e.g. deposit-

taking) - and not a sub-set representing the relevant income of a particular product line - is to ensure that a penalty proportionate to the economic size of the *registered person* can be imposed.

2.2.6 In response to the third point, the *Commission's* view is that "relevant income", as defined in the *Tariff Order*, represents a reasonable indicator of a *registered person's* economic size and its likely ability to pay a financial penalty. It also has the benefit, for both *registered persons* and the *Commission*, of being relatively easily calculated and verified (if need be).

2.2.7 Two respondents considered it inappropriate that the proposed definition of "relevant income" for banks would include 'income' which results from accounting requirements to undertake the "fair value" revaluation of financial instruments such as interest rate swap instruments - but which did not produce any realized gain. One respondent suggested that the definition of "relevant income" should be slimmed down to mean, "net interest income plus net income from banking fees, charges and commission".

Commission response

2.2.8 "Relevant income" is a metric that is being used as an indicator of the economic size of the relevant *registered person* and to provide a basis for penalties to be imposed that are proportionate to that size. In the *Commission's* view, to change the definition as suggested by the respondents would result in a metric that would not appropriately achieve that. It is important to note that, whilst "relevant income" provides an indicator of a *registered person's* likely ability to pay, when proposing a financial penalty the primary legislation will require the *Commission* to have regard to the actual ability to pay the proposed amount (see Article 21B(3)(e) of the *Commission Law*).

2.2.9 One respondent considered that "relevant income" should be based on net income rather than gross income (broadly, turnover). The respondent cited as the reason for this his own firm's position (an investment/fund manager) whereby it sub-contracts certain work to other professionals and pays for that from gross fee income received. He claimed that a penalty at the maximum of 8% of the firm's gross income could, "destroy the firm at a stroke".

Commission response

2.2.10 The *Commission* considers that using net income for the "relevant income" calculation would be inappropriate given that it could be too easily manipulated to artificially lower the figure.

2.2.11 In relation to the respondent's assertion that a penalty calculated as a percentage of gross income could, "destroy the firm at a stroke", it is important to bear in mind that the *Commission* will be statutorily obliged to be proportionate in its actions. In particular, the primary legislation will require the *Commission* in considering whether to impose a financial penalty to (inter alia), "have regard to the potential financial consequences [of the penalty] to the *registered person* and to third parties (including customers and creditors)" - as per Article

21B(3)(e) of the *Commission Law*.

- 2.2.12 One trust company business considered that the calculation of “relevant income” should only be that of the participating member of the affiliation that contravened the relevant *Code of Practice*, rather than the relevant income of the whole affiliation being used as the metric.

Commission response

- 2.2.13 The *Tariff Order* uses the “relevant income” of all participating members of the affiliation, otherwise the figure used would not properly reflect the economic size of the trust company business as a whole.

- 2.2.14 One respondent suggested that the *Tariff Order* should more clearly message that the penalty was linked to the level of turnover. The respondent suggested that “relevant income” should instead be termed, “*relevant adjusted gross income*”.

- 2.2.15 Another respondent queried whether the wording of Article 2(i) meant that the calculation of the five year average of “relevant income” was up to the last full financial year before the year of notification of the relevant contravention.

Commission response

- 2.2.16 In relation to the first matter, the *Commission’s* view is that such a renaming of “relevant income” is unnecessary given that its meaning is specifically defined in Article 1 of the *Tariff Order*.

- 2.2.17 On the second matter, the *Commission* can confirm that Article 2(i) does mean that the five year average would be calculated up to the last full financial year before notification of the relevant contravention.

2.3 Question 2 [paragraph 4.4.11 of the CP]

Do you have any observations or concerns about how the bands are constructed or the maximum level of penalty that would apply to each? If so, please state in detail what your observation or concern is and explain the reason for it.

- 2.3.1 In relation to Band 1 contraventions, one respondent noted that the *Codes of Practice* use a number of different phrases to set out when a notification is required (for example: “promptly”; “within a reasonable timeframe”; “as soon as the *registered person* becomes aware”). The respondent suggested that this might result in some of the requirements being ambiguous and uncertainty could follow. The respondent also noted that the *Codes* do not always specify how a notification should be given. It suggested that the *Codes* should stipulate that all notifications should be made in writing.

Commission response

2.3.2 The *Commission* considers that the respondent's comments are very valid. As part of the project introducing the financial penalties regime the *Commission* intends to undertake a review of the *Codes*. This will include reviewing the notification requirements to maximise consistency and clarity in order to avoid ambiguity.

2.3.3 One respondent opined that Band 1 should be deleted on the basis that because such contraventions must, by definition, be "significant and material" anyway, they would be likely to also fall into Band 2 or 3.

Commission response

2.3.4 The *Commission* does not agree with this respondent's analysis.

2.3.5 Two respondents suggested that a £10,000 minimum for Band 1 was too low.

Commission response

2.3.6 These respondents are mistaken. Band 1 provides for a penalty of up to 4% of "relevant income" or £10,000, whichever is the lower figure.

2.3.7 One respondent expressed the view that Band 1 lacked balance and that the opportunity had been, *"lost to encourage good, if latent behaviour, by over-emphasising the tariff applies to all mistakes forgetting an honest but late reported breach is better behaviour than no observance at all"*.

Commission response

2.3.8 The *Commission* would emphasise that, firstly, the contravention would have to be "significant and material" before a Band 1 penalty could be considered (and the imposition by the *Commission* of a financial penalty for a contravention is discretionary, not mandatory, as the respondent implied). Secondly, the circumstances of the contravention (such as the "honesty" of a mistaken late notification, as the respondent puts it) would be taken into account by the *Commission* when considering mitigating factors.

2.3.9 One respondent noted that only contraventions that occurred after the enabling legislation came into force (20 March 2015) would be potentially subject to the financial penalty regime. In relation to Band 1, the respondent questioned whether this meant that both the first and second contraventions must have occurred after 20 March 2015 or whether a contravention that occurred before that date could be counted as the first failure and a penalty imposed if the second contravention occurred after that date.

Commission response

2.3.10 Both contraventions must have occurred after, or one or both of the contraventions have been continuing, on 20 March 2015.

2.3.11 This is because Article 21C(2)(a) of the *Commission Law* (as inserted by the *Amendment Law*) requires the *Commission's* notice to impose a financial penalty to refer to both contraventions and Article 21D prohibits the *Commission* from issuing a notice in respect of a contravention that occurred before the commencement of the enabling legislation (20 March 2015) unless the contravention was continuing at the time the *Amendment Law* came into force.

2.3.12 Also on Band 1, another respondent questioned what would happen if there were two concurrent (and possible connected) contraventions or what the case would be if a *registered person* had been unaware of a previous contravention. The respondent was concerned that whilst a *registered person* might not consider a matter a clear contravention at the time, it could later be regarded as such by the *Commission*.

2.3.13 The same respondent questioned how long a contravention might be considered relevant i.e. if a financial penalty was imposed on a *registered person* for its second contravention, would both the first and second contraventions be 'cleansed' for all purposes, or would the second contravention remain 'alive' as a pending first contravention for the purposes of future decisions?

Commission response

2.3.14 The *Commission's* intention as regards Band 1 contraventions was that a *registered person* would be warned by the *Commission* when the first missed or late notification occurred. This would in effect be a 'first warning' so that the *registered person* was on notice that if a second notification was missed or was late within a 2 year period, it would be liable to a Band 1 penalty. However, when reflecting on the wording of Band 1 in the light of the respondent's comment, the *Commission* concluded that it could be improved so as to align with this policy intention. The wording of Band 1 now requires the *Commission* to explicitly notify a *registered person* when a first missed or late notification has occurred. The *registered person* will thus be on notice that should, in the following two year period, another notification be late or missed, a Band 1 financial penalty may be imposed.

2.3.15 In relation to the respondent's second point, the *Commission* can confirm that, if a financial penalty is imposed under Band 1 for two contraventions, it would not regard the second of those contraventions as remaining 'alive' and pending as a first contravention for the purposes of future decisions.

- 2.3.16 One respondent expressed some reservations concerning the practical effectiveness of Band 2. Whilst noting that the financial penalty regime was designed to apply to businesses that contravene a *Code of Practice* to a significant and material extent the respondent considered that, “*the unambiguous message emerging from Band 2 is that those transgressors should not worry unduly, given they will be permitted time to rectify their deficiencies*”.
- 2.3.17 The respondent suggested that, if such a temperate approach has to be taken, perhaps consideration could be given to a form of “suspended penalty” being imposed.
- 2.3.18 The same respondent also noted that the *Commission* would need to be clear as to when a contravention of a *Code* identified by a supervision team during an on-site examination would be considered to be of a nature that a financial penalty should be considered.

Commission response

- 2.3.19 The *Commission* considers that Band 2 will provide a proportionate way to respond to those types of contravention, which whilst serious, are not so egregious as needing to be dealt with under the “intentional or reckless” category of Band 3.
- 2.3.20 The suggested concept of a suspended penalty is an interesting one but is not something that the legislation would currently permit.
- 2.3.21 The respondent’s point about contraventions identified during an on-site examination is well made and will be addressed by protocols agreed between the *Commission’s* supervision and enforcement divisions.

- 2.3.22 In relation to Band 3, under which a financial penalty could be imposed for an “intentional or reckless” contravention, a respondent noted that it may not always be straightforward to determine the state of mind of the relevant person when the contravention occurred.
- 2.3.23 The same respondent opined that there appeared to be a substantial leap between Band 2 contraventions (where a financial penalty would be imposed only if remediation did not occur within a reasonable timeframe) and a Band 3 contravention, where it would have had to have been intentional or reckless. The respondent observed that a serious contravention (but which was not intentional or reckless) that resulted in financial loss to the public would not result in a financial penalty if the *registered person* had satisfactorily remediated the contravention.

Commission response

- 2.3.24 In relation to the respondent’s first point, the *Commission* recognises that determining the state of mind of a person may not always be straightforward but its experience is that there will often be documentary evidence indicating whether a contravention was intentional or reckless.

2.3.25 On the second point, the *Commission* considers that, until such time as *registered persons* have had time to adjust to this new financial penalty regime, it is not unreasonable for them to be given an opportunity to remediate a contravention without penalty (Band 2), provided that the contravention was not intentional or reckless (Band 3). Once the new regime has bedded down, the *Commission* would anticipate seeking the inclusion of negligent contraventions in Band 3.

2.3.26 One respondent suggested that the proposed *Tariff Order* was unclear on the accumulation of financial penalties. It gave as an example a situation where a contravention was common across a number of licenced activities of the same *registered person* and asked whether there would be the multiple application of tariffs beyond the percentage cap in each band.

Commission response

2.3.27 There would not be multiple applications of tariffs. Where the same contravention is common to several licensed activities of the same *registered person* (i.e. there has been the same contravention of a requirement in several *Codes of Practice*) Article 2(2)(a) provides that the amount of the financial penalty would be calculated as a percentage (not beyond the maximum permitted under each band) of the aggregate “relevant income” of all the *registered person’s* licensed activities in relation to which the contravention occurred.

2.3.28 In relation to Band 3, one respondent suggested that it was quite likely that there would also have been Band 1 contraventions and asked whether a penalty under both bands would be imposed.

Commission response

2.3.29 The wording at the end of Band 1 means that a contravention can only incur a Band 1 penalty if it does not fall into either Band 2 or Band 3.

2.3.30 On conditions (a) to (e) in Band 3, one respondent commented that there was a significant difference between something that “*might have happened*” and something that actually “*did happen*” as a result of a contravention. The respondent suggested that this reinforced the need for independent oversight (internal or external) of the financial penalty regime to ensure proportionality.

2.3.31 On a similar note, another respondent suggested that there should be a distinction drawn in the tariff bands between contraventions that caused actual risk to Jersey’s reputation and/or loss by clients, as opposed to contraventions that posed such reputational risk/loss.

2.3.32 The same respondent considered that condition (d) in Band 3 (an intentional or reckless contravention that, “jeopardized or risked jeopardizing the need to counter financial crime ...”), should be changed to refer to, “significant financial crime”.

Commission response

- 2.3.33 In relation to the first respondent's comment on independent oversight, the *Commission* would draw attention to the fact that Commissioners will oversee the imposition of financial penalties proposed by the *Executive*.
- 2.3.34 In relation to the second respondent's point, the *Commission* considers that the structure of the bands, with penalties of up to a maximum percentage, combined with the factors that will be considered as aggravating or mitigating a contravention (and thus affect the percentage penalty imposed) will enable the level of penalty to reflect whether there was, for example, actual loss to a client, rather than just a risk of loss.
- 2.3.35 On the comment about condition (d), the *Commission* considers that such a change would be inappropriate. That condition (as are the others in Band 3) is designed to be consistent with the wording of the guiding principles set for the *Commission* by Article 7 of the *Commission Law*. It would therefore be inappropriate to introduce an inconsistency. In addition, because Band 3 would enable a financial penalty of up to 8% to be imposed, the actual penalty can be below that maximum, to a greater or less extent, to reflect the seriousness of the financial crime facilitated.

- 2.3.36 Four respondents commented on condition (e) in Band 3 (an intentional or reckless contravention that, "took place for commercial reasons").
- 2.3.37 Two of those respondents questioned the likelihood of a contravention under condition (e) not also falling under one or more of conditions (a) to (d).
- 2.3.38 The other two respondents questioned the reason for including condition (e) at all. They cited as the reason for their query the fact that all business/transactions are carried out for commercial benefit anyway.

Commission response

- 2.3.39 The purpose of condition (e) is to make it absolutely clear that where a *registered person* intentionally or recklessly contravenes a *Code of Practice* in the pursuit of profit or to avoid (or reduce) a loss it would otherwise have incurred, such a contravention will be regarded as falling into the most serious category.
- 2.3.40 The *Commission* accepts that a contravention of that nature would be expected to meet one of the other conditions in Band 3 – most likely condition (b): "damage to Jersey's reputation". However, evidencing damage to Jersey's reputation (for example) is likely to be less straightforward than evidencing that the contravention was commercially driven.
- 2.3.41 The two respondents who questioned the reason for including condition (e) appear to have mistakenly overlooked the fact that the condition is referring to contraventions that took place for commercial reasons, rather than transactions that took place for commercial reasons.

2.3.42 Several respondents considered that there should be a common approach to financial penalty regimes across the Crown Dependencies.

Commission response

2.3.43 The *Commission* considers that the Guernsey regime with a maximum penalty of £200,000 is not one that enables adequately proportionate financial penalties to be imposed, or for the penalties to be at a level to result in meaningful deterrence for larger firms.

2.3.44 Whilst there are some differences between how the proposed tariffs in the Isle of Man and Jersey are constructed, the *Commission* considers that the proposed approach in Jersey is not substantively out of line with what is currently proposed in the Isle of Man.

2.4 Question 3 [paragraph 4.4.16 of the CP]

Do you consider that a cap should be set for Band 2 or Band 3 (or both)?

If so, please state what figure(s) you consider would be appropriate and the reason for it.

2.4.1 Several respondents considered that the bands should have a fixed monetary cap. Whilst not all respondents suggested a figure, where one was it varied between £200,000 (the current Guernsey maximum) and £1,000,000.

2.4.2 Arguments advanced by respondents for setting a cap included:

2.4.2.1 to ensure consistency with our nearest competitor jurisdiction, Guernsey;

2.4.2.2 that the threat of a financial penalty calculated on gross income which might be, "*an existential threat*" to a *registered person*, could potentially discourage full disclosure, compared to a regime with a known monetary cap;

2.4.2.3 a fixed cap would enable a *registered person* to put in place an adequate provision, particularly where imposition of a penalty is considered over a lengthy period (for example, where it is subject to an appeal to the Royal Court);

2.4.2.4 uncapped penalties could be a deterrent to high value/low risk businesses, such a family offices, when deciding in which jurisdiction to base themselves.

Commission response

2.4.3 The *Commission* does not consider that setting a fixed monetary cap would be appropriate.

2.4.4 The 6% (Band 2) and 8% (Band 3) maxima are themselves a cap, which would

enable a penalty to be imposed that is proportionate to the economic size of the *registered person*. Contrary to what one respondent asserted, by having percentage maxima (rather than a fully discretionary approach as in some jurisdictions) a *registered person* would be able to calculate a quantum and thus make adequate provision for a potential penalty.

- 2.4.5 A fixed monetary cap could mean that for larger firms (even at the £1,000,000 figure suggested by one respondent) the imposition of adequately proportionate financial penalties would not always be possible, nor could a penalty necessarily be imposed of sufficient quantum to be a meaningful deterrent to poor behaviour.
- 2.4.6 The *Commission* does not agree that the absence of a fixed monetary cap would mean that a penalty could result in “*an existential threat*” to a *registered person*. As mentioned earlier, the *Commission* will be statutorily obliged to be proportionate in its actions. In particular, the primary legislation will require the *Commission* in considering whether to impose a financial penalty to (inter alia), “have regard to the potential financial consequences [of the penalty] to the *registered person* and to third parties (including customers and creditors)”.
- 2.4.7 Nor does the *Commission* consider that high-quality business would be put off from establishing themselves in Jersey because of the absence of a fixed monetary cap. In the *Commission’s* view, the proposed tariff levels would enhance the outside world’s perception of Jersey as taking regulation seriously: indeed, Jersey’s good regulatory reputation is often quoted by quality businesses as being one of the reasons they were attracted here.³

2.5 General comments

- 2.5.1 One respondent asked where the *Commission* would expect the “relevant income” figure to be extracted from. It also expressed the view that some smaller entities might have to undertake a separate exercise to identify income from a particular licensed business activity.
- 2.5.2 The same respondent also asked if, when considering whether a *registered person* has sufficient resources to pay a financial penalty, the *Commission* will look at the resources of the *registered person* as a whole or just the resources associated with the relevant business line.

Commission response

- 2.5.3 Ordinarily, the *Commission* would expect to rely on data from the *registered person’s* audited financial statements. But, if not available, the *Commission* would be prepared to utilise management accounts, although it would reserve the right to have the “relevant income” figure independently verified at the

³ Note that the Chief Minister has taken the decision to set a cap of £4 million for Bands 2 and 3 in the Tariff Order he made on 16 June 2015. The full text of the Order made can be viewed at <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cROFiles%5cR%26OYear2015%2fR%26O-071-2015.htm>.

expense of the *registered person*.

2.5.4 Whilst it is accepted that some smaller entities might need to undertake an exercise to identify “relevant income” from a separately licensed business activity, this is expected to be uncommon. In any event, the data required is not complex.

2.5.5 When considering ‘ability to pay’, the *Commission* will, as per Article 21B(3)(e) of the *Commission Law*, consider the resources of the *registered person* as a whole.

2.5.6 One respondent thought it might be helpful for the *Commission* to give examples of what it considered would be “immaterial” contraventions of the *Codes of Practice*, which would not be subject to the financial penalty regime. Another respondent thought it might be helpful for the *Commission* to give further clarification on, or examples of, “material and substantial”⁴ contraventions.

Commission response

2.5.7 The *Commission* does not consider that it would be appropriate to do as suggested. This is because whether a contravention is material and substantial, or not, will depend on the particular circumstances of the case, and the range of mitigating and aggravating factors that will need to be carefully considered.

2.5.1 One respondent (a bank) sought reassurance that there would be a level playing field in terms of the equity of the financial penalty regime across all *registered persons* regardless of their economic size. It opined that, otherwise, Jersey could be exposed to the risk of potential malpractice in smaller firms if there was a view that financial penalties would not apply to them or would not be enforced consistently for those types of firms.

Commission response

2.5.2 The *Commission* is happy to confirm that it intends to take a consistent approach and treat all *registered persons* equally (subject, of course, to the statutory requirement placed on the *Commission*, when proposing a financial penalty, to (inter alia), “have regard to the potential financial consequences [of the penalty] to the *registered person* and to third parties (including customers and creditors)”).

2.5.1 Whilst not directly related to consultation on the draft tariff, one respondent expressed the view that public statements about the imposition of a financial penalty should only be used where a Band 3 penalty was imposed.

⁴ “material and substantial” is the threshold test for a contravention to fall within the scope of the financial penalty regime. See Article 21A(1) of the *Commission Law*.

Commission response

- 2.5.2 The *Commission* considers that the deterrent effect of financial penalties will be enhanced by a standard policy of issuing a public statement in all cases, unless there are exceptional reasons to do otherwise.
- 2.5.3 The issuing of a public statement will also be in the interests of customers and clients of firms that are subject to a financial penalty. There will also be a benefit to Industry in the issuing of public statements because they will provide transparency in relation to, and thus public scrutiny of, decisions of the *Commission* to impose civil financial penalties.

3 POST-CONSULTATION CHANGES TO THE DRAFT LEGISLATION

3.1 Description of the changes

- 3.1.1 Whilst the Commission did not consider that any fundamental changes to the *Tariff Order* were necessary as a result of the responses received, Band 1 has been refined (see paragraph 2.3.14) and some other minor changes made to the draft legislation to either correct typographical issues or improve its functionality.⁵
- 3.1.2 The *Commission* has recommended to the Chief Minister that he make a *Tariff Order* in the form shown in Appendix B.

⁵ Note that the Chief Minister has taken the decision to set a cap of £4 million for Bands 2 and 3 in the *Tariff Order* he made on 16 June 2015. The full text of the Order made can be viewed at <http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cROFiles%5cR%26OYear2015%2fR%26O-071-2015.htm>.

APPENDIX A

List of respondents to the Consultation Paper

- Barclays
- Cyan Regulatory Services Limited
- Jersey Association of Trust Companies
- Jersey Finance Limited (Its response consolidated comments it had received from one bank, one investment manager, one trust company business and one independent director. It also provided some comments of its own based on oral discussions with some members of Industry.)
- The Royal Bank of Scotland International Limited

APPENDIX B

Final draft of the *Tariff Order*⁶ as recommended to the Chief Minister by the Commission

(Pages are separately numbered)

⁶ Draft 7 - 16 April 2015.



Jersey

FINANCIAL SERVICES COMMISSION (FINANCIAL PENALTIES) (JERSEY) ORDER 201-

Arrangement

Article

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SCHEDULE **8**

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Jersey

FINANCIAL SERVICES COMMISSION (FINANCIAL PENALTIES) (JERSEY) ORDER 201-

Made [date to be inserted]
Coming into force [date to be inserted]

THE CHIEF MINISTER, in pursuance of Articles 21B and 22 of the Financial Services Commission (Jersey) Law 1998 and after having consulted the Jersey Financial Services Commission, orders as follows –

1 Interpretation

(1) In this Order –

“affiliation”, in respect of trust company business, means a group of persons carrying on or intending to carry on that business who have agreed that one member of the group will be the affiliation leader;

“contravention” means a contravention of a Code of Practice to which Article 21A of the Financial Services Commission (Jersey) Law 1998 applies;

“licensed”, in relation to a registered person, means registered or holding a permit (as the case may be) to carry on a business activity regulated by the Commission;

“net interest income” means interest income received or accrued (including income accrued in respect of the amortisation of discounts and premiums on the purchase of fixed maturity investments not held for dealing) minus interest paid or payable;

“total banking income” means the sum total of –

- (a) net interest income;
- (b) the net income derived from revaluations of foreign exchange positions and, where identifiable, fees and commissions relating to foreign exchange business;
- (c) the net income derived from investments not included in paragraph (e);
- (d) net income from banking fees, charges and commissions; and
- (e) any net gains derived from the revaluation of investments other than those arising from the sale of investments in subsidiary or

associated companies, trade investments or the amortisation of discounts or premiums on the purchase of fixed maturity investments not held for dealing.

- (2) Unless the context otherwise requires, words and phrases used in this Order that are not defined in or for the purposes of this Order have the same meaning as in the Financial Services (Jersey) Law 1998.

2 Meaning and calculation of relevant income

- (1) In this Order “relevant income” means the income derived from the business activities in respect of which the registered person is licensed, namely –
- (a) in the case of a registered person regulated under the Banking Business (Jersey) Law 1991, total banking income;
 - (b) in the case of a permit holder regulated under the Insurance Business (Jersey) Law 1996, the gross income premium earned in respect of any insurance business to which Article 5(1) of that Law applies, reduced by –
 - (i) any rebates, refunds and reinsurance commission payable by the registered person, and
 - (ii) the gross amount of any premiums for reinsurance ceded by the insurer;
 - (c) in the case of a registered person carrying on trust company business or money service business, any fees or commission received (net of any refunds) in respect of any such business; and
 - (d) in the case of a registered person carrying on general insurance mediation business, fund services business or investment business, any fees or commission retained (net of any refunds) in respect of any such business,
- calculated to be the higher of –
- (i) the average of that income over the financial years since the registered person has been carrying on the business for which the person is licensed, up to a maximum of the last 5 financial years, but excluding, from both the sum of total and number of years used to calculate the average, any financial year in which the income was a negative amount; and
 - (ii) that income in the registered person’s last complete financial year before the registered person notified the Commission of the contravention, or the Commission notified the registered person of the contravention, as the case may be.
- (2) In calculating the relevant income for the purposes of this Order –
- (a) if the registered person undertakes more than one business activity, the income to be calculated is the total relevant income derived from each business activity in respect of which a Code of Practice has been contravened by the registered person;
 - (b) if the registered person operates in Jersey through a branch of its business the main operation of which is elsewhere, only relevant

income derived from the business activity giving rise to the contravention, in so far as it is undertaken through that branch, may be brought into account;

- (c) in the case of trust company business in respect of which there is an affiliation, relevant income derived from the business activity giving rise to the contravention from all members of the affiliation must be brought into account.

3 Level of penalties

The Commission may impose penalties on registered persons only up to the maximum level set out in the table in the Schedule for the appropriate band of penalty, determined according to the nature of the contravention.

4 Citation and commencement

- (1) This Order may be cited as the Financial Services Commission (Financial Penalties) (Jersey) Order 201-.
- (2) This Order comes into force on

SCHEDULE

(Article 3)

MAXIMUM LEVEL OF PENALTIES

Band	Nature of contravention	Maximum level of penalty
1	<p>A failure, on more than one occasion in any period of 2 years, to notify the Commission of any matter required by a Code of Practice (whether or not the subject matter is the same on each occasion), such failures comprising either or both of the following –</p> <p>(a) a notification not being made at all;</p> <p>(b) a notification not being made within the timeframe required by the Code,</p> <p>provided that –</p> <p>(1) the Commission has notified the registered person in writing after the first contravention that the registered person has failed to make the required notification or has not made the notification within the required timeframe; and</p> <p>(2) the contravention does not fall into either band 2 or band 3 below.</p>	4% of relevant income or £10,000, whichever is the lower amount.
2	A contravention not falling into band 3 below and not rectified to the satisfaction of the Commission within the timeframe determined by the Commission after discussion with the registered person concerned, which timeframe must be reasonable.	6% of relevant income.
3	<p>A contravention committed either intentionally or recklessly that satisfied one or more of the following, namely that it –</p> <p>(a) caused or risked causing financial loss to the public;</p> <p>(b) damaged or risked damaging the reputation and integrity of Jersey in commercial and financial matters;</p> <p>(c) damaged or risked damaging the economic interests of Jersey;</p> <p>(d) jeopardized or risked jeopardizing the need to counter financial crime both in Jersey and elsewhere;</p> <p>(e) took place for commercial reasons.</p>	8% of relevant income.

