

# **FEEDBACK ON CONSULTATION PAPER NO. 2 2015**

## **CIVIL PENALTIES: STATEMENT OF PRINCIPLES AND PROCESSES**

Feedback to a consultation on a proposed Commission statement setting out the principles it will apply and the processes it will follow under the new civil financial penalties regime.



# 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.
BBJL	means the Banking Business (Jersey) Law 1991.
Board	means the Board of Commissioners of the Commission.
CIFJL	means the Collective Investment Funds (Jersey) Law 1988.
Code(s) of Practice (or Code(s))	Means one or more of the Codes of Practice for: <ul style="list-style-type: none"><li>• deposit-taking business;</li><li>• fund services business;</li><li>• general insurance mediation business;</li><li>• insurance business;</li><li>• investment business;</li><li>• money service business;</li><li>• trust company business;</li><li>• alternative investment funds and AIF services business;</li></ul> and <ul style="list-style-type: none"><li>• the Handbook for the prevention and detection of money laundering and the financing of terrorism for financial services business regulated under the regulatory laws.</li></ul>
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. 2 of 2015.
Executive	means one or more officers of the <i>Commission</i> , including the Director General whether or not that person is also a Commissioner, acting individually or together, as appropriate.
existing DMP	means the <i>Commission's</i> document titled, "Guidance Note: Decision-Making Process", first published in May 2009 and revised in August 2011.
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"><li>• a person registered under the <i>BBJL</i>;</li><li>• a person registered under the <i>FSJL</i><sup>1</sup>;</li><li>• a Category B permit holder under the <i>IBJL</i>;</li><li>• a service provider within the meaning of the <i>AIF Regulations</i>.</li></ul>
Regulatory Sanctions DMP	means the <i>Commission's</i> proposed document titled, "Regulatory Sanctions: Decision-Making Process", as shown in Appendix B.

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

Tariff Order means the Financial Services Commission (Financial Penalties) (Jersey) Order 2015.

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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”).
- 1.1.1 Article 21B(4) of the *Commission Law* requires the *Commission* to publish a statement setting out:
  - 1.1.1.1 the principles it will apply in determining the imposition and amount of a financial penalty; and
  - 1.1.1.2 the processes it will follow when exercising the power to impose a financial penalty.
- 1.1.2 In the *CP* the *Commission* sought views on a draft statement, which would be incorporated into an amended version of the *existing DMP*, to be known as the *Regulatory Sanctions DMP*.
- 1.1.3 The purpose of this paper is to provide feedback on the responses received to the *CP*.

## 1.2 Feedback received

- 1.2.1 Respondents provided comments either directly to the *Commission* or indirectly via *Jersey Finance*.
- 1.2.2 *Jersey Finance* provided the *Commission* with consolidated comments it had received from one investment and fund management business, and one trust company business. Five other respondents (one of whom was a trade body) 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 Other than for the addition of one clarificatory footnote and some minor typographical changes there have been no post-consultation amendments made to the statement of principles and processes as incorporated in the proposed *Regulatory Sanctions DMP*.

- 1.3.2 The final version of the *Regulatory Sanctions DMP*, as shown in Appendix B, will be formally published shortly by the *Commission* on its website.

## 2 SUMMARY OF RESPONSES

### 2.1 Structure of this section

- 2.1.1 This section summarises the substantive comments received on the proposed statement of principles and processes, and the *Commission's* response to those comments. (Minor comments received on the drafting and style of the proposed statement have been considered by the *Commission* but are not referred to in this summary section.)
- 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 4.3.4 of the *CP*]

**Do you consider that there are any other principles that the *Commission* should apply in determining the imposition and amount of a financial penalty?**

**If so, please state in detail what the additional principle(s) is(are) and the rationale for suggesting it(them).**

- 2.2.1 One respondent suggested that when determining whether to impose a financial penalty, and, if so, in what amount, the *Commission* should apply the principle that if a *registered person* has been penalised in another jurisdiction for a regulatory contravention, then they would not be subject to a financial penalty in Jersey for the same contravention.
- 2.2.2 The same respondent suggested that the discount scheme for early settlement should have been included in the set of principles to be published by the *Commission* pursuant to Article 21B(4) of the *Commission Law*.
- 2.2.3 Another respondent, referring to the fact that the *Commission* would have to take into account, "whether or not the *registered person* knew, or ought to have known, of the contravention", suggested that this would enable the *Commission* to argue that every *registered person*, in hindsight, should have known about the contravention. It argued that this was unfair on Industry and should be removed.
- 2.2.4 One other respondent advised that they had no comments to make in response to this question.

#### *Commission response*

- 2.2.5 The *Commission* considers that it would be inappropriate to make the change suggested by the first respondent because:
- 2.2.5.1 a different set of clients or customers are likely to have been impacted, or potentially impacted, by the contravention;

- 2.2.5.2 the reputation of both Jersey and the other jurisdiction may have been damaged by the contravention;
- 2.2.5.3 the reputation of Jersey as a respectable and responsible financial centre may be damaged if the possibility of imposing a financial penalty was excluded because of applying the principle suggested by the respondent;
- 2.2.5.4 the *Commission* may disagree with the sanction imposed in the other jurisdiction. Very often regulators are in possession of different facts and it creates difficulties in trying to assess if the sanction imposed in one jurisdiction is for the same conduct that occurred locally. So the respondent's suggestion would not be achievable in practice.
- 2.2.6 On this respondent's second point, the *Commission* does not consider that it would be appropriate to include the early settlement scheme itself in the set of principles, not least because the principles include factors that the *Commission* would take into account when determining what level of discounted financial penalty would be appropriate. An example would be whether the contravention had been voluntarily reported and whether it had been remediated.
- 2.2.7 The requirement referred to by the second respondent is placed on the *Commission* by primary legislation – Article 21B(3) of the *Commission Law*. The *Commission* does not consider it to be an unfair provision. Its purpose is to enable the *Commission* to take into account such matters as whether the *registered person* had appropriate procedures and processes in place to minimise the risk that it could contravene a *Code* without becoming aware of it.

## 2.3 Question 2 [paragraph 4.3.5 of the CP]

**Do you have any observations or concerns on the list of factors that the *Commission* will consider as aggravating or mitigating a contravention of a *Code of Practice*?**

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

- 2.3.1 Only one respondent replied to this question and advised that they had no comments to make in response to it.

### *Commission response*

- 2.3.2 Noted.

## 2.4 Question 3 [paragraph 4.3.6 of the CP]

Do you consider that there are other factors that the *Commission* should consider as either aggravating or mitigating a contravention of a *Code of Practice*?

If so, please state what you consider should also be included and explain why.

- 2.4.1 One respondent suggested that another mitigating factor should be where a contravention occurred because, “..... local regulations significantly differ from Jersey [*Code of Practice requirements*].”
- 2.4.2 The same respondent suggested that the *Commission* consider including in the list of mitigating factors a contravention that occurred, “due to non-controllable (i.e. beyond the control of the registered person) factors”.
- 2.4.3 This respondent also noted that the *Commission* would consider as an aggravating factor, “a failure to bring promptly and completely the contravention to the attention of the *Commission*”. It requested clarification as to the timeline that would determine the promptness of reporting.
- 2.4.4 One respondent considered there were no other factors that the *Commission* should list as aggravating or mitigating a contravention.

### **Commission response**

- 2.4.5 In response to the respondent’s first suggestion, the *Commission* considers that it would be inappropriate to include a conflict with non-Jersey requirements as a mitigating factor. Where a firm considers that such a conflict may arise, it should request the *Commission* to consider allowing an appropriate derogation from the standard requirement of the relevant *Code*.
- 2.4.6 On the respondent’s second point, the *Commission’s* view is that it would be inappropriate to accommodate the suggested addition to the list of mitigating factors. If a business is well-managed with good procedures, the occasions when a contravention of a *Code* occurs due to events outside of its control should be extremely rare. However, because the list of mitigating factors to be set out in the *Regulatory Sanctions DMP* is stated to be non-exhaustive, the *Commission* would be able to take into account any event that was genuinely outside the control of the *registered person*.
- 2.4.7 In terms of how the *Commission* would interpret “prompt” reporting of a contravention, the *Commission* would apply the ordinary dictionary definition i.e. a *registered person* would be considered to have brought a contravention to the attention of the *Commission* promptly where it did so as soon as it became aware of it.

## 2.5 Question 4 [paragraph 4.4.8 of the CP]

**Do you have any observations or concerns on the proposed statement of processes for the financial penalties regime as set out in the *Regulatory Sanctions DMP*?**

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

- 2.5.1 One respondent noted that, when categorising findings from an on-site inspection, it would be important for the *Commission* to exercise care to ensure clear categorisation of those findings that warranted heightened supervision and those that merited consideration of a financial penalty.
- 2.5.2 Another respondent was of the view that the proposed process would mean that whoever decides to instigate an investigation also decides the financial penalty.
- 2.5.3 The same respondent commented that there would not be full disclosure of the information the *Commission* holds, only the disclosure of the information the *Commission* will use [in its case against a *registered person*] (compared to a criminal prosecution where all information must be revealed).
- 2.5.4 Another respondent considered that the *Commission* would provide a *registered person* with adequate notice on the relevant stages of the process. However, they did ask whether there is any minimum timeframe between each stage.
- 2.5.5 One other respondent confirmed that they had no observations or concerns on the statement of processes.

### ***Commission response***

- 2.5.6 The first respondent's point is well made and will be addressed by protocols to be agreed between the Enforcement and Supervision divisions.
- 2.5.7 The second respondent's first point is mistaken. Whilst the *Executive* would instigate an investigation, the *Board* (in contested cases) or two Commissioners (in settlement cases) will determine whether, and if so, in what amount, a financial penalty should be imposed.
- 2.5.8 In relation to the point on disclosure, the protocol that the *Commission* follows, whilst designed to ensure fairness to the person who is potentially subject to a regulatory sanction, is also designed to be proportionate, in particular to avoid administrative cases becoming excessively lengthy or expensive.
- 2.5.9 The *Commission's* disclosure protocol has recently been challenged in the Royal Court and was found by the court to be appropriate. It is also relevant to note that the *Commission's* disclosure protocol is consistent with the Rules of the Royal Court where, in appeals against administrative decisions of a public body, the disclosure requirements on the public body, as respondent, are for:
- "a statement of the [administrative] decision from which the appeal is brought; and

- the facts material to the decision and the reasons for it and exhibiting all documentary evidence relating thereto.”

2.5.10 On the question of the timeframe between each stage, this will be case-dependent. The timeframe between each stage will differ for each case depending on its breadth and complexity. But the *Commission* is committed to giving *registered persons* a clear indication during the process of likely timescales.

## 2.6 Question 5 [paragraph 4.4.9 of the CP]

**Do you have any observations or concerns on the proposed discount scheme for settlements as set out in the *Regulatory Sanctions DMP*?**

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

2.6.1 One respondent questioned why members of the non-executive *Board* would be involved in the decision-making process in non-contested cases where a financial penalty was proposed.

2.6.2 The same respondent questioned whether the *Regulatory Sanctions DMP* was adequately worded to accommodate early settlement at the Preliminary Review Stage. They also questioned why, if a settlement agreement was signed, section 3.2.10 of the *Regulatory Sanctions DMP* refers to “imposing” a financial penalty, when the signing of such an agreement is voluntary.

### *Commission response*

2.6.3 Given that civil financial penalties will be a new form of sanction for the *Commission*, the requirement for two Commissioners to approve any settlement involving such a penalty will provide the *Board* with comfort that the process is subject to sufficient oversight. Where a settlement is reached, the two Commissioners will be able to brief the *Board* on it post-event so that the *Board* can reflect on the outcome and the terms of the settlement in order to provide policy direction, if necessary, for future settlement cases.

2.6.4 In terms of the second point made by the respondent the *Commission* has reviewed the wording of the *Regulatory Sanctions DMP* and is satisfied that it is appropriately worded. The *Regulatory Sanctions DMP* refers to “imposing” a financial penalty because, although the signing of a settlement agreement is voluntary, the payment of a financial penalty is not: it would be a financial penalty imposed under law.

2.6.5 The same respondent also questioned whether it would be appropriate for the *Commission* to impose a financial penalty as part of a settlement agreement in circumstances where the contravention had been remediated to the satisfaction of the *Commission*.

- 2.6.6 This respondent also noted that Article 21C(2) of the *Commission Law* requires the *Commission* when imposing a financial penalty to give details to the *registered person* of the contravention “alleged”. The respondent questioned whether that requirement remained relevant in the context of a settlement where the *registered person* admitted the contravention.
- 2.6.7 The final comment of this respondent was on Article 21C of the *Commission Law*, which prescribes the process whereby the *Commission* has to provide a *registered person* with a ‘notice of intent’ [proposing a financial penalty] containing details of the alleged contravention and the calculation of the amount of the financial penalty. The respondent opined that it was unclear as how that prescribed process would work in circumstances:
- where there is an early settlement (by agreement);
  - where a *registered person* is given an opportunity to rectify the contravention (under Band 2 of the *Tariff Order*).

### ***Commission response***

- 2.6.8 In response to the respondent’s first comment, the *Commission* would note that just because a contravention had been satisfactorily remediated it would not necessarily mean that the imposition of a financial penalty would not be justified. It would depend on the circumstances.
- 2.6.9 On the respondent’s second comment concerning Article 21C(2), the *Commission* can confirm that the statute will indeed require the *Commission* to state what the “alleged” contravention is. But in the settlement agreement the *registered person* would confirm that the allegation is indeed correct.
- 2.6.10 On the two matters raised in the respondent’s final comment, the *Commission* would note that:
- even in a settlement case the requirements of the *Commission Law* to firstly issue a ‘notice of intent’ [proposing a financial penalty] and then a ‘final notice’ [imposing the financial penalty] would have to be followed. As experience is gained in the operation of the financial penalty regime the *Commission* might consider recommending, to the Chief Minister, an amendment to the *Commission Law* to streamline the process in settlement cases;
  - a notice of intent would not be issued in cases where the *Commission* considers that, if the contravention were to be remediated satisfactorily within a reasonable timeframe, a financial penalty would not be appropriate.
- 2.6.11 Whilst welcoming the proposed discount scheme, one respondent asked if the *Commission* had benchmarked the proposed discount scheme for early settlement against other jurisdictions. It noted that under the Isle of Man’s current proposals a discount of 30% to a final penalty would be given at the conclusion of the decision-making process if an agreed remediation plan was completed to the satisfaction of the regulator.

**Commission response**

2.6.12 A direct like-for-like comparison with other jurisdictions is not straightforward due to the often discretionary nature of discounts, although the proposed Isle of Man model is one that the Commission has examined carefully.

2.6.13 Substantively, the *Commission's* scheme will provide the same flexibility as the proposed Isle of Man model, although the *Commission* offers a higher (up to 50%) discount if settlement is agreed at the Preliminary Review stage, i.e. before Stage One (Disclosure and verification of information relating to the alleged contravention), which is generally the most time-consuming and expensive part of an investigation.

2.6.14 Two respondents suggested that a discount on a financial penalty could only be taken before seeing the full basis (i.e. the evidence) for the *Commission's* case against the *registered person*.

**Commission response**

2.6.15 These respondents are mistaken.

2.6.16 Whilst the discount scheme is designed to encourage settlement prior to Stage 1 by being set at 50% (maximum), a *registered person* can choose to settle post- before Stage 2 (the Review Committee stage) when it would have received a copy of the information/facts that the *Executive* intends to use as the basis for its case (the discount will drop to a maximum of 25% for settlement at that stage in the process).

2.6.17 One respondent sought clarification on one aspect. It asked whether a *registered person* would need to apply for a discount when settling or whether the *Commission* would automatically apply the discount.

**Commission response**

2.6.18 The *Commission* will automatically apply the discount.

2.6.19 The final respondent advised that they had no observations or concerns on the proposed discount scheme.

**Commission response**

2.6.20 Noted.

## 2.7 General comments

- 2.7.1 One respondent suggested that the text in the introduction to the *Codes* (and other relevant *Commission* documents) should be revised to reflect the new financial penalties regime.

**Commission response**

- 2.7.2 The *Commission* will be reviewing the *Codes* and other published documents to see what consequential updating might be necessary.

- 2.7.3 Two respondents suggested that the *Commission* should provide a more detailed description of what a “serious” contravention of a *Code* would be.

- 2.7.4 One of those respondents noted that, when considering whether to impose a financial penalty and in what amount, Article 21B(4) of the *Commission Law* would require the *Commission* to take into account, what steps (if any) the *registered person* had taken to rectify the contravention. The respondent asked whether that would apply only to “material” contraventions or to recurring non-material contraventions as well.

**Commission response**

- 2.7.5 The *Commission* does not consider that it would be appropriate to try and attempt to provide a detailed definition of a serious contravention (which the statute refers to as a “significant and material” contravention). This is because whether a contravention was serious or not will depend on the particular circumstances of the case.

- 2.7.6 Any initial contravention, or recurring contravention, would need to meet that threshold level of being “significant and material” in order for the financial penalty regime to apply.

- 2.7.7 One respondent asked for clarification on two points. The first was whether the financial penalties regime will apply to subsidiaries of a *registered person*. The second was whether the regime would be retrospective.

**Commission response**

- 2.7.8 The regime will not apply to a subsidiary unless the subsidiary is a *registered person*.

- 2.7.9 The regime will not be retrospective. Article 21D of the *Commission Law* prohibits the *Commission* from imposing a financial penalty in relation to a contravention that occurred before the commencement of the enabling legislation (20 March 2015), unless the contravention was continuing at that date.

2.7.1 One respondent considered that the amendments made to the existing decision-making process document to incorporate the financial penalty regime did not work and that the *Regulatory Sanctions DMP* therefore needed to be re-worked.

**Commission response**

2.7.2 The *Commission* does not agree with this view, nor did any other respondent make a similar comment.

2.7.3 The final respondent commented that the statement consulted upon was helpful in providing context on the decision-making process and protocols that the *Commission* will follow under the civil financial penalty regime.

**Commission response**

2.7.4 Noted.

## 3 NEXT STEPS

### 3.1 Publication

- 3.1.1 Other than for the addition of one clarificatory footnote, as described below, and some minor typographical changes there have been no post-consultation amendments made to the statement of principles and processes as incorporated in the proposed *Regulatory Sanctions DMP*.
- 3.1.2 The new footnote, which is on page 22, makes it clear that where settlement discussions are unsuccessful, any Commissioner that had been involved in the process to that point would be treated as conflicted going forward and would take no part in deciding upon the matter as a “contested” case.
- 3.1.3 The final version of the *Regulatory Sanctions DMP*, as shown in Appendix B, will be formally published shortly by the *Commission* on its website.

# APPENDIX A

## List of respondents to the Consultation Paper

- Barclays
- Cyan Regulatory Services Limited
- HSBC
- Jersey Association of Trust Companies
- Jersey Finance Limited (which consolidated comments it had received from one investment and fund management business, and one trust company business)
- The Royal Bank of Scotland International Limited

# APPENDIX B

## Final version of the *Regulatory Sanctions DMP*

(Pages are separately numbered)



Jersey Financial  
Services Commission

**REGULATORY SANCTIONS:  
DECISION-MAKING PROCESS**

Issued: June 2015

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## GLOSSARY OF TERMS

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

AIF Regulations	the Alternative Investment Funds (Jersey) Regulations 2012, as amended.
authorized auditor	an individual or a firm authorized by the <i>Commission</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 <sup>1</sup> .
<i>BB(J)L</i>	Banking Business (Jersey) Law 1991, as amended.
<i>Board</i>	the Board of Commissioners of the <i>Commission</i> . <sup>2</sup>
case officer(s)	the officer(s) of the <i>Commission</i> referred to in paragraph 6.2.
CIF(J)L	Collective Investment Funds (Jersey) Law 1988, as amended.
COBO	Control of Borrowing (Jersey) Order 1958, as amended.
Code of Practice	one or more of the Codes of Practice referred to in Article 21A(2) of the <i>Commission Law</i> . <sup>3</sup>
Commission	the Jersey Financial Services Commission.
Commission Law	Financial Services Commission (Jersey) Law 1998, as amended.
Companies Law	Companies (Jersey) Law 1991, as amended.
Executive	one or more officers of the <i>Commission</i> , including the Director General whether or not that person is also a Commissioner, acting individually or together, as appropriate.
FS(J)L	Financial Services (Jersey) Law 1998, as amended.
IB(J)L	Insurance Business (Jersey) Law 1996, as amended.
heightened supervision	the application to a particular <i>Subject</i> (or potential <i>Subject</i> ) <sup>4</sup> of one or more regulatory measures, such as restrictions, controls and additional reporting requirements, whether on a consensual basis or

<sup>1</sup> 'market traded company' is defined in Article 102 of the Companies Law.

<sup>2</sup> For the avoidance of doubt, it should be noted that there will be occasions when, for operational reasons (such as when a number of Commissioners are conflicted), the *Board* will establish a sub-committee of the *Board* to hear, and decide upon, a case where the imposition of a *regulatory sanction* is being considered. In such cases, the decision of the sub-committee (the members of which will all be Commissioners) will be the decision of the *Board*.

<sup>3</sup> Note that the definition of 'Codes of Practice' includes the Commission's "Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism for Financial Services Business regulated under the Regulatory Laws".

<sup>4</sup> Heightened supervision is not applicable to auditors: authorised auditors are not subject to supervision; and for more information on the oversight regime for *recognized auditors*, please see the *Commission's* website: [http://www.jerseyfsc.org/the\\_Commission/recognized\\_auditors/general\\_information.asp](http://www.jerseyfsc.org/the_Commission/recognized_auditors/general_information.asp)

	<p>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>Commission</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>
key person	has the meaning assigned in Article 1 of each of the <i>Regulatory Laws</i> and the <i>Supervisory Bodies Law</i> .
licence	<p>includes:</p> <p>a certificate granted in accordance with Regulation 9 of the <i>AIF Regulations</i>;</p> <p>a registration granted in accordance with Article 9 of the <i>BB(J)L</i>;</p> <p>a permit granted in accordance with Article 7 of the <i>CIF(J)L</i>;</p> <p>a certificate granted in accordance with Article 8B of the <i>CIF(J)L</i>;</p> <p>a consent granted in accordance with any of Articles 1 to 5 and 7 to 11 of the <i>COBO</i>;</p> <p>a registration granted in accordance with Article 9 of the <i>FS(J)L</i>;</p> <p>a permit granted in accordance with Article 7 of the <i>IB(J)L</i>; and</p> <p>a registration under Article 14 or Article 15 of the <i>Supervisory Bodies Law</i>.</p>
NPO	a non-profit organization as defined in the Non-Profit Organizations (Jersey) Law 2008, as amended.
principal person	<p>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>;</p> <p>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; and</p> <p>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>
recognized auditor	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>Commission</i> pursuant to Article 111 of the <i>Companies Law</i> .
registered person	<p>includes:</p> <p>the holder of any <i>licence</i>;</p> <p>an applicant for a <i>licence</i>;</p> <p>a former holder of a <i>licence</i>; and</p> <p>an <i>authorized auditor</i> or <i>recognized auditor</i>.</p> <p>Save where the <i>regulatory sanction</i> referred to is a financial penalty in which case <i>registered person</i> shall have the meaning given in Article 1 of the <i>Commission Law</i>.</p>

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Regulatory Laws	the collective name for - the <i>BB(J)L</i> ; the <i>CIF(J)L</i> ; the <i>FS(J)L</i> ; and the <i>IB(J)L</i> .
regulatory sanction	one of the decisions of the <i>Commission</i> referred to in paragraph 3.2.
Subject	the subject of the investigation and any decision then taken in accordance with the process described in this document. The <i>Subject</i> may be a natural person or a legal person. The <i>Subject</i> may be singular or plural.
Supervisory Bodies Law	Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, as amended.

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## SECTION ONE – GENERAL INFORMATION

### IMPORTANT NOTE

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

The principal purpose of this document is to enable those potentially subject to *regulatory sanctions* by the Commission to understand the decision-making process that the Commission follows.

#### 1 Introduction

- 1.1 This document incorporates the information that must be included in a statement published by the *Commission* 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.
- 1.2 The *Commission* is not a judicial body. Court rules and procedures do not apply to the decisions that it takes. The *Commission* takes administrative decisions in accordance with powers vested in it that are set out in the legislation that it administers. In so doing, the *Commission* will act as supervisor, investigator and decision-maker.
- 1.3 The point at which an administrative decision is taken to impose a *regulatory sanction* is reached via a series of stages that are described in Section Two of this document. Each stage includes a number of distinct steps that collectively are designed to ensure that the final decision taken:
- 1.3.1 is one that the *Commission* is empowered to take;
  - 1.3.2 is one that is made in accordance with statutory obligations imposed on the *Commission*;
  - 1.3.3 has been arrived at in accordance with principles of natural justice; and
  - 1.3.4 is proportionate and reasonable based on all relevant information before the *Commission* at the time.
- 1.4 In taking a decision, the *Commission* is continually mindful of the primary regulatory test that persons<sup>5</sup> carrying on the business of financial services in or from within Jersey are “fit and proper”: in this, the *Commission* is “performing an administrative role conferred by statute which involves acting in the public interest whilst having regard to the need to be fair to individual applicants”<sup>6</sup>, or *registered persons*, as the case may be.

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<sup>5</sup> In this context “person” refers to both natural and legal persons.

<sup>6</sup> Paragraph 109 of the Royal Court judgment, 2005 JLR 428 - Anchor Trust Company Limited v. Jersey Financial Services Commission.

## 2 Delegation of *Commission* Powers

- 2.1 Under Article 11 of the *Commission Law*, the *Commission* 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 *Commission*. Pursuant to that Article, the *Board* has published its Policy on how it determines which powers are routinely delegated to the *Executive* and which are not<sup>7</sup>. In accordance with that Policy, some of the decisions to which this document refers, will be taken by the *Board*, whilst others will be taken by the *Executive*, or by one or more Commissioners, under delegated authority from the *Board*.
- 2.2 Notwithstanding the general policy, any decision involving the use of delegated powers may be referred to the *Board* if those who may act under delegated authority consider it appropriate to do so. Furthermore, the general policy does not preclude the *Board* deciding that a particular matter may be determined by one or more Commissioners or by the *Executive* and delegating the necessary authority in that case.
- 2.3 However, no decision to impose a financial penalty under Article 21A of the *Commission Law* will be delegated by the *Board* to the *Executive*. (Note: where a *registered person* has agreed to the imposition of a financial penalty under the terms of a settlement agreement, approval of the agreement on behalf of the *Commission* will be by two Commissioners<sup>8</sup> – see paragraph 4.9.)

## 3 Scope of this document

### Decisions to which this document applies

- 3.1 The particular type of administrative decision that is covered by this document is one that allows the *Subject* a statutory right of appeal to the Royal Court of Jersey in the event that the *Subject* considers that the decision is unreasonable having regard to all the circumstances.
- 3.2 Except when the circumstances require that urgent action is essential (see paragraph 3.5 below), the decision-making process described in this document will apply to decisions that may be taken by the *Commission* to:
- 3.2.1 refuse an application for a *licence*;
  - 3.2.2 refuse to register an applicant as an *NPO*;
  - 3.2.3 revoke a *licence*, or a *recognized auditor's* registration or an *authorized auditor's* permission to audit, where that decision is not taken at the request of the *registered person/auditor*;
  - 3.2.4 attach a condition to a *licence* or a *recognized auditor's* registration or an *authorized auditor's* permission to audit; or substitute, vary or revoke any existing condition, where the *registered person* has not consented to such action;

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<sup>7</sup> Policy Statement: Delegation of Powers of the *Commission*:

[http://www.jerseyfsc.org/the\\_Commission/general\\_information/policy\\_statements\\_and\\_guidance\\_notes/index.asp](http://www.jerseyfsc.org/the_Commission/general_information/policy_statements_and_guidance_notes/index.asp).

<sup>8</sup> One of whom would typically be the Director General.

- 3.2.5 object to the appointment, or continued appointment, of a *principal person, key person*, or an actuary;
  - 3.2.6 publish a public statement<sup>9</sup>;
  - 3.2.7 issue a direction to require a person, who has not already taken that decision voluntarily, to cease operations and to wind up its affairs;
  - 3.2.8 issue a direction to prevent or restrict the employment of an individual by a *registered person*;
  - 3.2.9 refuse an application to withdraw or vary, in whole or in part, a direction that has been issued pursuant to this document; and
  - 3.2.10 impose a financial penalty on a *registered person*.
- 3.3 With regard to this latter *regulatory sanction*, Article 21B(4) of the *Commission Law* requires the *Commission* to publish a statement setting out the principles it will apply in determining the imposition and amount of the penalty. The *Commission's* statement is shown in Appendix A.

**When this document will not apply**

- 3.4 Administrative decisions taken as part of normal or *heightened supervision* will not follow the staged approach set out in this document.
- 3.5 The process described by this document will also not apply where the circumstances require urgent action to be taken.<sup>10</sup> In addition, without limitation, this document will not apply to any decisions where:
  - 3.5.1 legislation provides that a decision will have immediate effect (as is the case for most types of direction);
  - 3.5.2 the *Commission* intends to exercise a power to reduce the period of notice of a decision (such as for some public statements warning the public of bogus websites; and public statements in respect of certain types of directions); or
  - 3.5.3 an application is to be made by the *Commission* to the Royal Court.
- 3.6 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 the normal or heightened supervisory process.
- 3.7 In addition, the decision-making process may be temporarily suspended where the *Executive* takes a decision to do something that is not covered by this document, such as

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<sup>9</sup> See also the Policy Statement: The *Commission's* use of Public Statements:

[http://www.jerseyfsc.org/the\\_Commission/general\\_information/policy\\_statements\\_and\\_guidance\\_notes/index.asp](http://www.jerseyfsc.org/the_Commission/general_information/policy_statements_and_guidance_notes/index.asp).

<sup>10</sup> 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 *Commission* the right to apply to Court for relief.

enter into discussions with the *Subject* with a view to settlement (see paragraph 4 below); or refer the case to the Attorney General to review, investigate and potentially prosecute any criminal conduct; or refer a case to the Royal Court.

- 3.8 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*).

## 4 Settlement

- 4.1 **Early acknowledgement by a *Subject* of breaches of regulatory requirements - which effectively saves time and investigative resources - will always be considered favourably by the *Commission*.**

- 4.2 In such cases, and where the *Commission* is reasonably satisfied that it is both consistent with discharging its statutory functions in accordance with its guiding principles, and it is expedient to do so, the *Commission* may enter into discussions ("**settlement discussions**") with the *Subject*, with a view to entering into a written agreement (the "**settlement agreement**"), concerning the nature of non-compliance by the *Subject* and the action to be taken by the *Commission*.

- 4.3 In this context, settlements are not the same as 'out of court' settlements in the litigation context. All settlement discussions will be conducted on a "without prejudice" basis. All without prejudice correspondence and other material shall not be relied upon at a later stage should the negotiations fail and settlement is not achieved.

- 4.4 In cases where the *Subject* acknowledges a significant and material contravention of a *Code of Practice* and is thus potentially liable to the imposition of a financial penalty under Article 21A of the *Commission Law*, the amount of the financial penalty to be imposed by the *Commission* will incorporate a discount reflecting: (a) how early in the decision-making process the settlement agreement is signed; and (b) whether the contravention of the *Code of Practice* is remediated to the satisfaction of the *Commission* before the settlement agreement is signed. The discount will be applied against the amount of the financial penalty that the *Commission* would otherwise have expected to impose on the *Subject* had the decision-making process been taken through to its conclusion. The following discounts will apply:

4.4.1 settlement before Stage One - a maximum discount of 50%.

4.4.2 settlement before Stage Two - a maximum discount of 25%.

4.4.3 settlement before Stage Three - a maximum discount of 5%.

- 4.5 If a *Subject* chooses not to accept the opportunity to commence settlement discussions when first it is offered by the *Commission*, the *Commission* may decline to enter into settlement discussions at a later stage. If the *Commission* does agree to negotiate the terms of a settlement agreement later, the terms offered may be adjusted to reflect the delay.

- 4.6 Until the settlement agreement has been executed by both the *Commission* and the *Subject* the settlement agreement (including any attachments such as a direction or public statement), shall remain a working draft document that is without prejudice to the rights of any party concerned. Once the settlement agreement has been executed by each of the parties, the without prejudice nature of the settlement agreement will fall away and will no longer apply to the settlement agreement or any attachment but will continue to apply to the discussions and correspondence that led to it.
- 4.7 The *Subject* will be encouraged to be accompanied at each meeting by a legal adviser. Further, the *Subject* will be recommended to take legal advice before entering into a settlement agreement.
- 4.8 The *Commission* will set a clear and reasonable time frame for the completion of settlement discussions to ensure that they result in a prompt and clear outcome and do not delay the discharge of the *Commission's* statutory functions.
- 4.9 Approval on behalf of the *Commission* of the draft agreement and any attachments will be by either:
- 4.9.1 a Review Committee constituted as at paragraph 8 below; or
  - 4.9.2 two Commissioners<sup>11</sup> (this option will always apply in cases where a financial penalty is proposed).
- 4.10 Note that in the event of a settlement being agreed that involves the imposition of a financial penalty, the *Commission* would still be required to follow the formal notification procedure set out in Article 21C of the *Commission Law*.

#### **Unsuccessful Settlement Discussions**

- 4.11 In the event that discussions cannot be concluded with an agreement executed by all parties, the regulatory issue will be dealt with in accordance with the process described in Section Two of this document.<sup>12</sup> The Stage at which the decision-making process will be applied will depend upon the nature of the breach of regulatory requirements, and the point at which settlement discussions commenced.

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<sup>11</sup> One of whom would typically be the Director General.

<sup>12</sup> Where settlement discussions are unsuccessful, any Commissioner that has been involved in the process to that point would be treated as conflicted going forward and would take no part in deciding upon the matter as a “contested” case.

## SECTION TWO – THE STAGED PROCESS

### 5 Overview

5.1 The *Commission's* decision-making process falls into either two or four key stages, in either case, preceded by a preliminary review stage:

5.1.1 The Preliminary Review;

5.1.2 Stage One – Disclosure and Verification of Information;

5.1.3 Stage Two – Review Committee;

#### **Decision taken by the Board**

5.1.4 Stage Three – First Meeting of the *Board*; and

5.1.5 Stage Four – Second Meeting of the *Board*.

5.2 A flow chart depicting these stages is attached at Appendix B.

### 6 The Preliminary Review

6.1 The Preliminary Review is not part of the decision-making process but is the point at which a determination is made, from a range of possible options, as to what appears from the information presented to be the most appropriate way of dealing with the matter.

6.2 The review involves consideration of information presented by the officer(s) investigating the matter, with particular attention given to:

6.2.1 matters indicating non-compliance;

6.2.2 any known mitigating factors;

6.2.3 any known aggravating factors; and

6.2.4 the degree of confidence that the *Commission* may have in the reliability of the information.

6.3 Wherever possible, the Preliminary Review will be conducted by the Director of the relevant Division, and the Director, Enforcement. In the event that either cannot act for any reason, alternative arrangements will be made, providing that there are at least two persons, one of whom is a Director.

6.4 If it appears, to those conducting the review, that the information presented indicates a reasonable probability that non-compliance has occurred in relation to which the *Commission* may wish to impose a *regulatory sanction*, the Preliminary Review may:

6.4.1 authorise the start of settlement discussions – see paragraph 4 above; or

- 6.4.2 initiate the decision-making process by directing that arrangements be made for disclosure and verification of the information under Stage One (see paragraph 7 below).
- 6.5 If those conducting the preliminary review conclude that neither of the options under paragraph 6.4 above is appropriate at that time, or at all, they may direct any other action deemed to be appropriate and that is within their delegated powers. Without limiting the scope of such action, it may be one, or a combination of the following:
- 6.5.1 that the matter requires no further action, and the investigation should be discontinued;
- 6.5.2 that further investigation is necessary;
- 6.5.3 that *heightened supervision* should be introduced/continued, either pending or instead of further investigation.

## 7 Stage One – Disclosure and Verification of Information

- 7.1 This Stage involves the disclosure to the *Subject* of the information which will be the basis of the decision to be taken by the *Commission*. The objectives of this Stage are:
- 7.1.1 to ensure that the *Subject* is provided with all the information on which the *Commission* will rely in making its decision; and
- 7.1.2 for that information to be examined as reliable and complete in all material respects before any decision is taken.
- 7.2 The *Subject* will be requested to consider the information that has been provided and respond to the *Commission*, in writing:
- 7.2.1 confirming that the facts as presented are correct or, if not, suggesting what changes might be made so that they are correct; and
- 7.2.2 providing any additional information considered material or relevant in any way to the matter.
- 7.3 In determining the date by which the response should be provided (which will be not less than 21 days hence), the *Commission* will take account of the nature and volume of information and the extent to which individual items have been previously available to the *Subject* for review and comment.
- 7.4 The collation of all comments and a summary of all factors relevant to the proposed decision is an important part of the process, so all comments received will be carefully considered and evaluated.
- 7.5 Following collation, the document package, amended as necessary in the light of the comments received, will be presented to a Review Committee (Stage Two). At the same time, the *Subject* will be provided with a copy of any new and revised information from that previously provided. The *case officer(s)* may, at this point, recommend a specific

*regulatory sanction(s)* (where the recommended sanction is the imposition of a financial penalty the *case officer(s)* will specify the proposed amount). Any recommendation of the *case officer(s)* will be sent to the *Subject* who will be invited to comment on it.

- 7.6 It is not usually necessary to provide for more than one round of disclosure and verification. An exception might be a complex investigation involving numerous parties.

## 8 Stage Two – Review Committee

- 8.1 The Review Committee is not a standing committee of the *Commission*. It is convened on a “case by case” basis, with membership dependent upon the matter under consideration.

- 8.2 The Review Committee will normally include the following officers:

- 8.2.1 the Director General (who will chair the Review Committee); if the Director General is not available, the meeting will be chaired by one of the following:

8.2.1.1 the Chief Operating Officer; or

8.2.1.2 the Director, Policy & Strategy.

In the event that none of these is available, the meeting will be chaired by a suitably senior member of the *Executive* who is sufficiently independent of the issue being considered;

- 8.2.2 the Director, Enforcement (or, in his absence, the Deputy Director, Enforcement);

- 8.2.3 a relevant<sup>13</sup> *Commission* Director (Banking, Investment Business, Insurance, Funds and Fiduciary, or Anti-Money Laundering), or, in the absence of a Director, the corresponding Deputy Director or Senior Manager; and

- 8.2.4 at least one other Director or Deputy Director not directly connected with the case.

- 8.3 The *case officer(s)* will attend the meeting to present the facts and to answer any questions or clarify issues raised.

- 8.4 The Commission Secretary, or alternate that is acceptable to the chair of the meeting, will also attend to make a written record of the decision of the meeting.

- 8.5 The Review Committee will review the document package provided, taking account of the responses of the *Subject* at Stage One and the related comments of the *case officer(s)*; consider any proposed recommendation for further action or for the imposition of a *regulatory sanction*; and, without limitation, may take any, or a combination, of the following decisions:

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<sup>13</sup> A Director will be a “relevant” Director where the case involves a person that is connected to the Division for which they have responsibility in the *Commission*. There may be more than one relevant Director.

- 8.5.1 whether or not any further investigation is necessary;
  - 8.5.2 that the investigation may be discontinued and either no further action taken or that some other action be taken that is not subject to the decision-making process (such as *heightened supervision* be introduced/continued; or a formal warning issued);
  - 8.5.3 the nature of any further action that may be taken under delegated powers; or
  - 8.5.4 to refer the matter to the *Board*.
- 8.6 Where settlement discussions have been entered into the Review Committee may, at this stage, and if within its delegated powers, approve on behalf of the *Commission* the draft settlement agreement and any attachments thereto (see paragraphs 4.1 to 4.10 above).
- 8.7 There may be more than one meeting of the Review Committee for example:
- 8.7.1 if the decision taken is that further enquiries are needed; or
  - 8.7.2 if the Review Committee is minded to exercise its delegated powers in a way that would result in the imposition of a *regulatory sanction* that is more severe than that recommended by the *case officer(s)* or the Review Committee is minded to make a recommendation to the *Board* to impose a *regulatory sanction* that is more severe<sup>14</sup> than that recommended by the *case officer(s)*, as advised to the *Subject* at the previous Stage: in such cases the Review Committee will delay taking a final decision and provide an opportunity for the *Subject* to make representations to the *Commission* regarding the action contemplated.
- 8.8 The Review Committee will refer the matter to the *Board* if any of the following circumstances apply:
- 8.8.1 the action that the Review Committee deems to be appropriate requires the exercise of any powers that the *Board* has not delegated (see paragraph 2.1 above), for example, where the imposition of a financial penalty is recommended by the Review Committee;
  - 8.8.2 any aspect of the case is deemed of significant importance warranting a referral;  
or
  - 8.8.3 in making public the action taken (e.g. that a direction has been issued), it may be necessary to include any mention of the reasons for the decision or any other comment or opinion.

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<sup>14</sup> For example, where the Review Committee is minded to recommend to the *Board* the imposition of a financial penalty which is of a higher amount than that recommended by the *case officer(s)*.

- 8.9 In determining whether a case is of significant importance, the Review Committee will have due regard for:
- 8.9.1 cases that are considered likely to have a significant effect on the reputation and integrity of Jersey as a financial centre, including, but not limited to, possible conflict between the appropriate level of *regulatory sanction* and the best interests of the public or others;
  - 8.9.2 the seriousness of the case and the issues presented; and
  - 8.9.3 in the case of a direction of the kind that restricts an individual being employed by a *registered person* the Review Committee decides to recommend that an application be made to the Royal Court for the statutory notice period to be varied.
- 8.10 A written record of the decision of the Review Committee shall be made and a copy provided to the *Subject*. Where the decision is to recommend to the *Board* that a *regulatory sanction* be imposed the *Subject* will be invited to make written submissions on that decision to the first meeting of the *Board* (see below).

## 9 Stage Three - First meeting of the *Board*

- 9.1 After considering the package of documents presented by a member of the Review Committee, the *Board* may:
- 9.1.1 request further information;
  - 9.1.2 decide that it is minded to take the recommended action, or some other action; or
  - 9.1.3 delegate the authority to take the appropriate action (see paragraph 2.1) (except where the imposition of a financial penalty is proposed – see paragraph 2.3).
- 9.2 If the *Board* is minded to exercise one or more of its statutory powers to impose a *regulatory sanction*, the *Subject* will be notified in writing of that fact (where the *Board* is minded to impose a financial penalty notification will be by means of a ‘notice of intent’ issued under Article 21C of the *Commission Law*) and be provided with a copy of the document package, as sent on behalf of the *Executive* to the *Board*, including the memorandum prepared by the *Executive* in order to present the matter to the *Board*. The *Subject* will, therefore, have all the information placed by the *Executive* before the *Board*.
- 9.3 The notification referred to in the previous paragraph will:
- 9.3.1 state the date on which the second meeting of the *Board* will meet to consider whether or not to adopt the proposed recommendation(s);
  - 9.3.2 offer the *Subject* an opportunity to make a written submission to the *Board* within a specified time frame;

- 9.3.3 request that the *Subject* advises the *Board* within a specified time frame whether the *Subject* intend(s) to make an oral submission and, if the *Subject* will be accompanied (e.g. by a legal adviser), the name of that person; and
- 9.3.4 set out the consequences of failing to respond within the time frame set.
- 9.4 Where a written submission is made by, or on behalf of, the *Subject* within the *Commission's* specified time frame, the *Executive* may prepare comments on the submission. If considered appropriate, the *Executive* will give reasons for any recommendation to reject points made in the submission. The comments of the *Executive* and reasons for recommending the rejection of any points will be submitted to the *Board* and disclosed to the *Subject* prior to the second meeting of the *Board*.

## **10 Stage Four - Second meeting of the Board**

- 10.1 Prior to the second meeting, the *Board* and the *Subject* will be provided with:
- 10.1.1 any information or documents that have been added to the package since the first *Board* meeting;
- 10.1.2 any written submissions made by, or on behalf of, the *Subject*; and
- 10.1.3 comments of the *Executive* on any written submission, including the reasons for any recommendation that any of the submissions be rejected or disregarded.
- 10.2 The *Board* will meet on the date advised to the *Subject* in the notification referred to in paragraph 9.3<sup>15</sup>. Members of the *Executive* may attend the meeting. The *Board* may also invite anyone else that it considers will assist it in its deliberations, such as the *Commission's* legal adviser.

### **Oral submissions to the Board**

- 10.3 If the *Subject* elects to make an oral submission to the *Board*:
- 10.3.1 The oral submission by, or on behalf of, the *Subject* should explain why the proposed decision is inappropriate or not justified.
- 10.3.2 Following the oral submission, the *Subject* may be required to answer questions from the *Board* and clarify issues that may arise.
- 10.3.3 Members of the *Executive* may be invited to comment on any matter raised by the *Subject*; to answer questions from the *Board* or clarify issues.

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<sup>15</sup> Or on such reasonable later date that the *Board* may, in its discretion, agree to (for example at the request of the *Subject* or to accommodate operational considerations). Except where the *Subject* has requested the particular revised date, the *Subject* will be given at least one month's prior notice of the revised date of the meeting.

- 10.3.4 In exceptional circumstances, if information is introduced by the *Subject* during the oral submission that has not previously been made available to the *Commission*, the *Board* may decide to defer taking a decision to allow more time for the *Executive* to comment on the information and to disclose any such comments to the *Subject*.
- 10.3.5 The process is intended to be interactive rather than adversarial in nature. For the avoidance of doubt, court rules, process and procedures do not apply.
- 10.3.6 The meeting will be formally recorded through the use of audio equipment: one of the audio copies made at the meeting will be provided on written request by, or on behalf of, the *Subject*.

#### **Deliberations of the Board**

- 10.4 When the *Board* has received all submissions, the *Subject*, all officers of the *Executive* (including the Director General<sup>16</sup>), any legal advisers<sup>17</sup>, and all other persons who are not Commissioners or the Commission Secretary (or any alternate), will leave the meeting.
- 10.5 If any new information or matters emerge during the *Board's* deliberations, the *Subject* and the *Executive* will be given an opportunity to comment thereon. In such a case, the *Board* will delay taking its final decision for a reasonable period to allow the person(s) concerned to make comments.
- 10.6 In reaching its decision, the *Board* will have regard to the written and oral submissions received and all other information in the documents before it. It is for the *Board* to decide which, of the matters before it, it accepts and which it does not.
- 10.7 As soon as reasonably practicable, the *Subject* will be given written notice of the *Board's* decision. If that decision is to exercise one or more of its statutory powers to impose a *regulatory sanction*, the notice will be that required by the relevant law (in the case of the imposition of a financial penalty this will be a 'final notice' issued under Article 21C of the *Commission Law*) and will include the reasons for the decision and particulars of the rights of appeal.

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<sup>16</sup> Whether or not the Director General is also a Commissioner.

<sup>17</sup> Whilst the *Board's* legal adviser will not be present during the *Board's* deliberations, the *Board* will retain the right to call upon its legal adviser for advice should it be needed.

**APPENDIX A**  
**(see paragraph 3.3)**

**Financial Penalties - Statement of Principles**

Where the *Commission* is satisfied that a *registered person* has, to a significant and material extent, contravened a *Code of Practice*, the principles that the *Commission* will apply in determining the imposition and amount of a financial penalty 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*;
- the penalties imposed by the *Commission* in other cases;
- factors that the *Commission* considers aggravate or mitigate the contravention of the *Code of Practice* (see below).

Factors that the *Commission* 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 *Commission*;
- 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)<sup>18</sup> issued);
- a failure to pay appropriate attention to relevant guidance issued by the *Commission*;
- 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;

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<sup>18</sup> A direction issued under Article 23 of the *FS(J)L* or its equivalent in the other *Regulatory Laws*, and the *Supervisory Bodies Law*, administered by the *Commission*.

- 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 *Commission* 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 *Commission*;
- 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 Services Commission – Decision-making Process



