

JFSC PUBLISHES CONSULTATION ON CIVIL PENALTIES

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INTRODUCTION

The Jersey Financial Services Commission has published a consultation paper proposing a regime of civil (financial) penalties for specified registered persons who repeatedly and seriously breach the Codes of Practice.

The consultation is premised on the bases that:

1. The proposal to grant it the power to impose financial penalties would be widely supported within the regulated sector; and
2. Its range of sanctions has fallen behind that of other comparable regulatory bodies.

Respondents will wish to address the question of whether there is support for the proposed measure as well as (or instead of) exploring how such a regime might work. The prevailing trend is firmly in favour of civil penalties, however: the key questions are likely to be 'when' / 'how' and not 'if'.

BACKGROUND

In 2008 the International Monetary Fund found that the range of sanctions available to the Commission had fallen behind those of neighbouring and local regulatory bodies, including the UK Financial Services Authority, the Guernsey Financial Services Commission and the Jersey Competition Regulatory Authority.

A Deloitte survey conducted in Jersey in 2011 found that over 70% of the compliance officers surveyed said they would support action to give the Commission the power to impose financial penalties in order to punish companies that 'seriously breach regulations'. The consultation paper asserts that members of industry are also supportive of such a regime owing to a widespread view that those who comply with the regulatory framework end up paying for those who do not.

THE PROPOSALS

Who would be affected?

The proposed civil penalty regime would only apply to registered persons. It would therefore affect the following sectors:

- deposit-taking business;
- funds services business;
- general insurance mediation business;
- insurance business;
- investment business;
- money service business; and
- trust company business.

In a group structure with more than one registered person the penalty would be levied on the

specific person found to have committed the breach.

Who would not be affected?

Those not subject to the Codes of Practice issued under the regulatory laws of Jersey comprise:

- designated non-financial businesses and professionals;
- recognised funds and their functionaries;
- Class R and S general insurance mediation businesses; and
- Class A insurers who do not have a local presence and are subject to regulation in their home jurisdiction.

Certified funds will also not be covered, in order to protect investors from the impact of any civil penalty.

What activities would incur penalties?

Civil sanctions will not befall those who commit inadvertent, non-serious breaches, those who are subject to post examination monitoring or those who remedy breaches to the Commission's satisfaction and within the required time frame.

The proposed sanctions are aimed at cases where there have been **serious, uncorrected or recurring breaches of the Codes of Practice**.

'Serious breaches' are defined as breaches of the Codes of Practice that encompass any of the following:

- an attempt to conceal a breach;
- a reckless or deliberate breach;
- exposure of clients to potential or actual loss;
- profit made or costs avoided by breach; or
- systematic weakness.

'Uncorrected breaches' comprise the situation in which, following a warning, an inadvertent breach of the Codes has not been remedied to the satisfaction of the Commission within the specified timeframe.

'Recurring breaches' are the recurrence of at a later date of an inadvertent breach of the Codes which had previously been identified and remedied.

What would the penalties be?

The consultation paper describes various methods considered by the JFSC for calculating the amount of any civil penalty and makes the following suggestions:

- calculation by reference to a percentage of the relevant income of the registered person over a defined period;
- a prescribed penalty per breach eg £1000; or

BRIEFING

- a discretionary approach having regard to the registered person's financial position and the relevant circumstances of the breach (this is the approach of the GFSC, where the cap is £200,000)

This is the aspect of the consultation which appears to be most open to debate.

NEXT STEPS

The deadline for responses to the consultation is 29 June 2012. The Commission encourages respondents to prioritise their comments and to be as specific as possible (for example, by including figures when referring to costs).

If after consultation the JFSC decide to proceed with a civil penalties regime, changes to the financial regulatory legislation would be drafted, as would any policy necessary to implement a new regime. The fourth quarter of 2012 is pencilled in for consultation on this. It is also likely that amendments will need to be made to the Codes of Practice; a date has yet to be set for consideration of these changes.

The proposed civil penalty regime would grant the Commission an additional weapon. It would be a mistake to imagine that Jersey will not deploy it when warranted. Persistent or egregious mistakes could become expensive.