



Consultation on amendments
under the Financial Services
Commission (Jersey) Law 1998
regarding the civil financial
penalties regime

Response Paper

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Background

1. On 7 July 2021, the Government of Jersey published a [Consultation Paper](#) seeking feedback on proposed amendments (the “**Amendments**”) to the Financial Services Commission (Jersey) Law 1998 (the “**FSC Law**”) and the Financial Services Commission (Financial Penalties) (Jersey) Order 2015 (the “**FP Order**”).
2. As part of the consultation process, Government and the Jersey Financial Services Commission (the “**JFSC**”) hosted a public [webinar](#) on 21 July 2021, moderated by Jersey Finance.
3. The consultation closed on 1 September 2021. Government received 22 direct responses to the consultation and one consolidated, anonymised industry response via Jersey Finance. On 20 October 2021, Government and the JFSC hosted a panel event for consultation respondents, moderated by Jersey Finance.
4. Since then, Government has considered all the feedback received as part of its policy formation. The responses to the consultation are summarised below and Government has stated its final policy position in relation to each question posed in the Consultation Paper.
5. Further questions or comments relating to this Response Paper may be directed to:

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Question 1: Do you agree with the proposed way in which Article 21A of the FSC Law is amended to include significant and material contraventions of the MLO? If not, please provide details.

1. The Consultation Paper explained that in order to achieve better compliance with FATF Recommendation 35, the remit of the JFSC to impose civil financial penalties for anti-money laundering and countering the financing of terrorism (“**AML/CFT**”) contraventions needs to be extended beyond breaches of the existing Codes of Practice and include significant and material contraventions of the Money Laundering (Jersey) Order 2008 (the “**MLO**”).
2. Some responses noted that further guidance regarding what would constitute “significant and material” contraventions of the MLO would be required. At the panel event on 20 October 2021 (referenced in paragraph 3 above) the JFSC explained that whether a contravention is regarded by it as “significant and material” will depend on the particular circumstances: consequently, no single definition covering all scenarios is possible. That said, the JFSC indicated that when considering whether a contravention is “significant and material” it adopts a risk-based approach, and its consideration focusses on the consequences or potential consequences of the contravention. By way of example, the JFSC indicated that when deciding whether a contravention of the MLO should be regarded as “significant and material” its consideration would include assessing what impact the contravention had on the firm’s ability to adequately manage or mitigate the risk of money laundering.
3. One response argued it to be inappropriate for the JFSC to determine whether a contravention of the law has occurred, and that such determination should be reserved for the Royal Court. However, it is international best practice to enable civil enforcement of contraventions of the law by regulatory bodies. For example, contraventions of legal AML/CFT requirements are regularly subject to civil financial penalties by supervisory bodies in other jurisdictions, as outlined in the Consultation Paper. This is also not a new concept to Jersey, where for example the Data Protection Authority (Jersey) Law 2018 enables the Office of the Information Commissioner to impose administrative fines for contraventions of the Data Protection (Jersey) Law 2018.
4. However, a large majority of responses supported the proposed extension to include material and significant contraventions of the MLO for which the JFSC could impose a civil financial penalty. Hence, Government considers it appropriate to continue with this proposal as consulted on in furtherance of Jersey’s overriding policy objective of implementing FATF Recommendation 35 in full.

Question 2: Do you agree with the proposed way to amend the definition of registered persons to include DNFBPs? If not, please provide details.

5. The Consultation Paper explained that in order to achieve better compliance with FATF Recommendation 35, the JFSC needs to be able to impose civil financial penalties for AML/CFT contraventions on Designated Non-Financial Businesses and Professions (“**DNFBPs**”), like casinos, real estate agents, accountants, and lawyers.
6. Almost all responses supported the proposed extension to include DNFBPs in the civil financial penalties regime. Only two responses indicated that further guidance would be required. The

additional guidance requested was in relation to inhouse legal counsel as well as the availability of AML/CFT handbooks for DNFBPs. Government would expect the JFSC to provide such guidance where required but notes that the JFSC has already published AML/CFT handbooks for the main DNFBP-sectors like estate agents, lawyers, and accountants.

7. Since almost all responses supported the proposed extension to include DNFBPs in the civil financial penalties regime, Government considers it appropriate to continue with this proposal as consulted on in furtherance of Jersey's overriding policy objective of implementing FATF Recommendation 35 in full.

Question 3: Do you agree with the proposed definition of a senior management function? If not, please provide details and an alternative definition.

8. The Consultation Paper explained that in order to achieve compliance with FATF Recommendation 35, the JFSC needs to be able to impose civil financial penalties for AML/CFT contraventions on directors and senior management of financial institutions and DNFBPs.
9. The Amendments proposed to amend the FSC Law to include, key persons, and any person performing a "senior management function".
10. Regarding the definition of key persons, the Amendments proposed that key person has the meaning given to that expression by the law which governs the registered person in any given contravention whereas money laundering compliance officer and money laundering reporting officer refer to a person appointed under the MLO.
11. Regarding the definition of a senior management function in relation to a registered person, the Amendments proposed to mean a function designated as such by the JFSC by notice but only where
 - (a) the function that requires the individual performing it to be responsible for managing one or more aspects of the registered person's affairs, and
 - (b) those aspects involve, or might involve, a risk of serious consequences
 - (i) for the registered person, or
 - (ii) for business or other interests in Jersey,and in paragraph (a), the reference to managing one or more aspects of the registered person's affairs includes a reference to taking decisions, or participating in the taking of decisions, about how one or more aspects of those affairs should be carried on.
12. Whilst the responses which expressed a direct view were almost equally split between support and rejection of the proposed extension of the civil financial penalties regime to key persons and senior management of financial institutions and DNFBPs, the vast majority of responses requested further guidance regarding the definition of a senior management function.
13. Although the request for further guidance regarding the definition of senior management is understandable, it is important to differentiate between the legislative implementation and the supervisory implementation. Regarding the legislative implementation, it can be noted that the Amendments are similar to the legislative provisions in comparable jurisdictions, like

Guernsey, the Isle of Man, Gibraltar, Cayman Islands or Bermuda. These jurisdictions face the same challenge as Jersey, namely implementing the FATF requirement to apply the penalty regime to senior management whilst providing a legislative definition that is broad enough to cover the different management structures within global financial institutions as well as local DNFBPs. As regards to supervisory implementation, it should be noted that the definition of “senior management function” to be inserted by the Amendments into the FSC Law requires the JFSC to designate such functions by means of a notice published on its website. This will ensure that there is transparency over the senior managers that fall within the scope of the civil penalties regime. The JFSC has committed to publicly consulting on its proposed notice in due course.

14. From Government’s interpretation of the legislative provisions in the aforementioned comparable jurisdictions, money laundering reporting officers would be in scope for civil financial penalties in all the regimes, noting that in Guernsey there is already a case, where a reporting officer has been subject to a supervisory fine.¹ However, benchmarking the Amendments against provisions in said comparable jurisdictions, the proposed approach can be considered more conservative because the JFSC would be required to prove consent, connivance or neglect on behalf of the individual. In most other comparable jurisdictions, this is not an explicit requirement.
15. Some responses queried whether Key Persons should be included at all because they are not mentioned in the FATF Standards. However, this cannot be a criterion because “Key Person” is a Jersey-specific term which would not be used within the FATF standards. Hence, one needs to consider the overall objective the FATF wants to achieve with the inclusion of senior management in the penalties regime, which is to create an *effective* regime. From that perspective, one could argue that Key Persons should be included in the regime, otherwise it might be considered less effective, and some responses argued along those lines. Some other responses considered that, whilst money laundering reporting officers have certain discretion in decision making, for example regarding the externalisation of suspicious activity reports, the discretion in decision making is much more limited for compliance officers and money laundering compliance officers which would support their exclusion from the regime in principle, unless, for example, an individual would be captured by virtue of performing of a senior management function in addition to their compliance officer role.
16. From a supervisory perspective, the JFSC already alluded to their general approach during the above-mentioned panel event, outlining:

“... that primary responsibility for regulatory compliance lies with the Board of a regulated business, so where contraventions require investigation our primary focus will be on the actions of the Board as a collective and, in appropriate cases, on the actions of individual directors (as principal persons), rather than on compliance personnel.”
17. With regards to compliance officers, it could be argued both ways, but noting the requirement under FATF Recommendation 35, Government considers it appropriate to extend the civil penalties regime so that the revised regime would then include reporting officers and senior management of financial institutions and DNFBPs. This would be the reasonable expectation of any jurisdiction when compared against FATF Recommendation 35.

¹ [Safehaven International Limited, Mr Richard John Bach, Miss Tracey Jane Ozanne, Mr David Charles Housley Whitworth, Mr Michael John Good and Mr Stephen John Dickinson | GFSC](#)

Question 4: Do you agree with the proposed way to amend Article (1) of the FSC Law to give the Commission the power to impose civil financial penalties where persons ought to have been registered, but were not, for the codes they would have contravened, had they been registered? If not, please provide details.

18. The Consultation Paper explained that in order to improve the effectiveness and dissuasiveness of the civil financial penalties regime, where a person ought to have been registered, but was not, the JFSC needs to have the power to impose a civil financial penalty for the codes that would have been contravened, had that person been registered. This amendment looks to prevent a person from gaining the benefit of avoiding a civil penalty, by virtue of their own failure to register.
19. Almost all responses supported the proposed extension to include persons ought to be registered but which are not. Some responses requested further guidance how this might be applied in practice though. Government would expect the JFSC to provide further guidance where applicable.
20. Since almost all responses supported the proposed extension, Government considers it appropriate to continue with this proposal as consulted on in order to improve the effectiveness and dissuasiveness of the civil financial penalties regime.

Question 5: Please provide any further comments or suggestions you might have on how to increase the effectiveness, proportionality, and dissuasiveness of the civil financial penalties regime with respect to AML/CFT contraventions.

21. Given that Question 5 was an open question, responses included a whole range of different comments with regard to the Amendments. Most responses though were rather general in nature and mainly expressed fundamental considerations of the existing civil penalties regime and the Amendments.
22. One response suggested that any enforcement decisions should be taken away from the JFSC and be given to an independent Tribunal. This was considered to enable a fairer enforcement process and a better separation of powers. However, all enforcement decisions on contested cases are taken by the Board of Commissioners (or a committee thereof) which is sufficiently separated from the Enforcement Division and other members of the Executive at the JFSC. Especially considering that there is no financial incentive for the JFSC to impose a civil financial penalty because penalty proceeds are applied to the following year's industry fees and are not retained by the JFSC. Significant costs and operational issues like delays in processing decisions are other arguments against an independent Tribunal.
23. Several responses commented on the impact on recruitment and the job market for compliance roles. While Government acknowledges that there is a general issue in recruitment for certain parts of the compliance industry at the moment (which is the same for other comparable jurisdictions), the experience from other jurisdictions is that changes to the supervisory enforcement regime have very little direct impact on the job market. On the other hand, certain recruitment issues are upon closer inspection rather retention challenges. Where businesses struggle to retain the right members of staff, this could be for number of

different reasons, for example, a lack of support at board level or because the individual's risk appetite is different from the organisation's risk appetite. However, these retention challenges are neither exacerbated nor connected to the Amendments. On a national level, Government is aware of genuine recruitment challenges for some businesses, and has thus made the creation of a skilled local workforce for the future an important priority within the [Government Plan 2022-2025](#), as part of a sustainable and vibrant economy.

Question 6: Do you agree that the proposed removal of the existing caps for registered persons in the FP Order will increase the proportionality, dissuasiveness, and effectiveness of the civil financial penalties regime while making it fairer and more equitable for all registered persons? If not, please provide details.

24. The Consultation Paper explained that the existing caps prevent the JFSC from issuing civil financial penalties which meet the requirements of proportionality and dissuasiveness for Relevant Incomes above the respective thresholds for each Band of contravention.
25. Hence, the Consultation Paper proposed to remove the existing caps for registered persons in the FP Order across all Bands in order to achieve compliance with Recommendation 35, aligning the civil financial penalties regime with international best practices as well as making it fairer and more equitable for all registered persons irrespective of their particular level of turnover.
26. A large majority of responses supported the proposed removal of the caps for registered persons. One response did not support the removal of the caps on the basis that it considered the issuance of a public statement a more effective sanction compared to a financial penalty. The other responses requested further guidance regarding the practical impact of the removal.
27. Some responses queried the impact on natural persons and their assets, however, as outlined in the Consultation Paper, Government is not proposing to remove or alter the existing caps for natural persons.
28. Some responses pointed out that a civil penalty needs to be proportionate not only to the turnover of the entity but also to the contravention committed. Government agrees with this notion, and the egregiousness of the contravention is currently reflected in the existing four Bands and the respective fraction of hundredths. As outlined in the Consultation Paper, Government is not proposing to remove or alter the existing Bands and fraction of hundredths applied to determine a civil financial penalty amount as a function of the egregiousness.
29. Since a large majority of responses supported the proposed removal of the caps for registered persons, Government considers it appropriate to continue with this proposal as consulted on in order to improve the effectiveness and dissuasiveness of the civil financial penalties regime whilst making it fairer and more equitable for all registered persons irrespective of their particular level of turnover.

Question 7: Do you agree that the proposed removal of Relevant Income and the application of the fraction of hundredths to the aggregate turnover of a registered person and its associated persons instead, will increase the proportionality, dissuasiveness, and effectiveness of the civil financial penalties regime? If not, please provide details.

30. The Consultation Paper explained that the current base for applying the fraction of hundredths is the Relevant Income of the registered person which is defined as income derived from the business activities in respect of which the registered person is licensed for.
31. The Consultation Paper continued to outline some of the challenges this calculation method poses in terms of proportionality and dissuasiveness when considering the turnover of the registered person or the aggregate turnover of a group of entities.
32. The Consultation Paper thus proposed to remove the definition of Relevant Income in its entirety from the FP Order and instead provide for civil financial penalties based on the fraction of hundredths applied to the aggregate turnover derived from all the business activities of the registered person and its associated persons carried out in or from within Jersey.
33. More responses were in support of the Amendments than against them but there were a number of responses which requested further guidance on the application of the Amendments, especially on the definition of turnover.
34. Where responses did not support the Amendments, it was because some responses considered the issuance of a public statement as more effective than a civil financial penalty. However, it is also best practice internationally that serious and material contraventions have financial consequences in order to establish a certain level of dissuasiveness. The JFSC can already issue public statements and it will be for the JFSC to determine in which cases a public statement, a civil financial penalty, or a combination of both, is more appropriate and more effective.
35. Other responses considered it unfair to bring income into scope, which is generated through unregulated activities, especially for DNFBPs. However, given that only a very small proportion of income could be generated through regulated activity compared to unregulated activity, limiting the scope to regulated activities might prevent the JFSC from imposing proportionate and dissuasive civil financial penalties.
36. Some responses pointed out that a civil financial penalty needs to be proportional to the egregiousness of the contravention, not the turnover or income of the registered person. As outlined above, Government agrees with this notion, but the seriousness of the contravention is reflected in the four different Bands and the respective fraction of hundredths and Government is not proposing to remove or alter these Bands.
37. Finally, some responses pointed out that it might be disproportionate and detrimental to Jersey's competitiveness as an International Financial Centre if income or turnover from outside of Jersey is brought into scope for civil financial penalties. Government agrees with this notion, however, as outlined in the Consultation Paper, the Amendments would only ever bring turnover from business activities of the registered person and its associated persons

carried out in or from within Jersey into scope. The Consultation Paper did not propose to bring income or turnover from activities outside of Jersey into scope for civil financial penalties.

38. In order to achieve an effective, proportionate, and dissuasive civil financial penalties regime, especially for DNFBPs, Government considers it appropriate to remove Relevant Income from the FP Order and replace it with turnover. Turnover will be defined as the average turnover in the five accounting years of the entity prior to the issue of the Final Notice by the JFSC under Article 21C of the FSC Law.
39. However, in order to strike a balance between dissuasiveness, clear accountability within group structures whilst acknowledging the separate legal personalities of the different entities, Government considers it appropriate to limit the calculation of civil financial penalties to the turnover of the contravening entity. The turnover of Associated Persons will not be considered by the JFSC for the calculation of civil financial penalties. Regarding the requirement of proportionality, Government is of the opinion that the JFSC will be in a position to impose, due to the removal of the caps, proportionate civil financial penalties which consider both, the egregiousness of the contravention and the turnover of the entity, without having to consider the aggregated turnover of the registered person and its Associated Persons.
40. There is one exception to this policy position though due to the way the Trust Company Business (TCB) sector operates. For this sector, Government considers it appropriate to continue with the proposal as consulted on because, uniquely of regulated businesses, TCBs tend to conduct the various classes of trust company business through different legal entities. Hence, where the contravening entity is a TCB, the turnover taken into account will be derived from all members of the affiliation, as proposed in the Consultation Paper.

Question 8: Do you agree with the proposed definition of an Associated Person? If not, please provide details and an alternative definition.

41. The Consultation Paper explained that in order to enable the consideration of Aggregate Turnover of the registered person and its Associated Persons, Associated Persons need to be defined in the FP Order.
42. The Consultation Paper proposed to define Associated Persons as such persons which are reasonably believed by the JFSC to be associated to the registered person committing the contravention. When considering whether a person is associated to the registered person, the JFSC would then need to have regard to six different factors ranging from business support purposes to ultimate beneficial ownership and control.
43. A large majority of responses supported the proposed definition of Associated Persons. For the responses which did not support the proposed definition of Associated Persons, the main reason given was that the calculation of a civil financial penalty should be limited to the income of the contravening entity. Another reason given was that it would be disproportionate and detrimental to Jersey's competitiveness as an International Finance Centre to bring income from outside of Jersey into scope. However, as outlined in the

response to Question 7, the Consultation Paper did not propose to bring income or turnover from activities outside of Jersey into scope for civil financial penalties.

44. Given that Government has taken the policy position to limit the calculation of a civil financial penalty to the turnover of the contravening entity and not to consider the turnover of any Associated Persons, as outlined in the response to Question 7, a definition of an Associated Person in the FP Order is no longer required.

During the consultation, but separate to the Amendments, it was suggested to Government that the existing time limit of the lookback window in Article 21D (2A) FSC Law might impede the effectiveness of the civil financial penalties regime. Said article provides that the JFSC shall not issue a notice of intent under Article 21C (1) FSC Law more than three years after the contravention giving rise to the notice came to the attention of the JFSC, except where the Royal Court has granted an exception. Whilst most comparable jurisdictions mentioned above do not provide for any limitation of the lookback window at all, Government is of the opinion that it would be disproportionate to have no limitation with regards to individuals. Hence, Government will propose to amend the lookback window in Article 21D (2A) FSC Law, similar to the provisions in the United Kingdom, by removing the three-year time limit for entities whilst providing a six-year time limit for individuals.

Government will revise the Amendments where necessary, in line with the policy positions outlined herein, in order to lodge the revised Amendments in time for a debate by the States Assembly at the beginning of 2022.

Government would like to take this opportunity to thank all consultation respondents for their feedback. Furthermore, Government would like to thank the JFSC and Jersey Finance for their support and cooperation during the consultation process.