



Consultation Paper No. 11 2019

Consultation on the proceeds of Civil Financial Penalties

Financial Services Commission (Jersey) Law 1998

A consultation on proposals regarding the disbursement of money received as proceeds of Civil Financial Penalties.

Issued: December 2019

Consultation Paper

The Jersey Financial Services Commission (**JFSC**) invites comments on this consultation paper by **13 January 2020**. If you require any assistance, clarification or wish to discuss any aspect of the proposal prior to formulating a response, it is of course appropriate to contact the JFSC.

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Alternatively, Lisa Springate at Jersey Finance Limited (**JFL**) is coordinating an Industry response that will incorporate any matters raised by local businesses. Comments should be submitted to JFL by **10 January 2020**.

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It is the policy of the JFSC to make the content of responses available for inspection unless specifically requested otherwise.

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

Glossary of Terms

Defined terms are indicated throughout this document as follows:

AIF Code	Code of Practice for Alternative Investment Funds
AIFJR	Alternative Investment Funds (Jersey) Regulations 2012
Banking Code	Code of Practice for Deposit-taking Business
BBJL	Banking Business (Jersey) Law 1991
Codes of Practice (Codes, or individually, Code)	collectively, the <ul style="list-style-type: none"> › AIF Code; › Banking Code; › FSB Code; › GIMB Code; › IB Code; › Insurance Code; › MSB Code; and › TCB Code
Commission Law	Financial Services Commission (Jersey) Law 1998
CP	Consultation Paper
FRS 102	The Financial Reporting Standard applicable in the UK and Republic of Ireland (March 2018)
FSB Code	Code of Practice for Fund Services Business
FSB Order	Financial Services (Financial Services Business) (Jersey) Order 2009
FSJL	Financial Services (Jersey) Law 1998
GIMB Code	Code of Practice for General Insurance Mediation Business
IB Code	Code of Practice for Investment Business
IBJL	Insurance Business (Jersey) Law 1996
Insurance Code	Code of Practice for Insurance Business
JFSC	Jersey Financial Services Commission
MSB Code	Code of Practice for Money Service Business
Penalty/Penalties	Civil Financial Penalties imposed in accordance with Articles 21A – 21G of the Commission Law
Proceeds	Money received in respect of a Penalty in accordance with Article 21G of the Commission Law
registered person/persons	a person who is registered, or holds a permit or certificate, as applicable, under one or more of the regulatory laws or the plural thereof

Regulatory Laws	<p>Alternative Investment Funds (Jersey) Regulations 2012</p> <p>Banking Business (Jersey) Law 1991</p> <p>Financial Services (Jersey) Law 1998</p> <p>Insurance Business (Jersey) Law 1996</p> <p>Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008</p>
SBJL	Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008
TCB Code	Code of Practice for Trust Company Business

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1 Executive Summary

1.1 Overview

- 1.1.1 This consultation paper (**CP**) seeks feedback on proposals regarding the disbursement of money received by the Jersey Financial Services Commission (**JFSC**) as proceeds of Civil Financial Penalties (**Penalties**).
- 1.1.2 The Commission Law prescribes how the proceeds of Penalties (**Proceeds**) shall be treated by the JFSC.
- 1.1.3 This CP invites feedback on how the JFSC proposes to implement the requirements of the Commission Law.
- 1.1.4 This CP also invites comment on whether alternative mechanisms for the disbursement of money received by the JFSC might be appropriate.

1.2 What is proposed and why?

- 1.2.1 It is proposed that Proceeds shall be retained by the JFSC and applied to future fee periods as a reduction to the fees that would otherwise be paid by relevant registered persons.
- 1.2.2 It is proposed that the JFSC will report on the application of Proceeds within its Annual Report.

1.3 Who would be affected?

- 1.3.1 The proposals in this consultation paper have the potential to affect all registered persons.

2 Consultation

2.1 Basis for consultation

- 2.1.1 The JFSC has issued this CP in accordance with Article 8(3) of the Commission Law, as amended, under which the JFSC “may, in connection with the carrying out of its functions [...] consult and seek the advice of such persons or bodies whether inside or outside Jersey as it considers appropriate”.
- 2.1.2 The JFSC draws attention to Article 15(3) of the Commission Law which, requires that before the JFSC may introduce and publish any fee it “must first publish a report that must include:
 - (a) details of the duty or power for or in respect of which the fee is to be determined;
 - (b) details of the proposed fee;
 - (ba) details of the extent (if any) to which any penalties received have reduced the level of fee that would otherwise have been proposed;
 - (c) a request for comments on the level of the proposed fee; and
 - (d) a date, that is at least 28 days after the publication of the report, before which those comments may be made to the Commission”.
- 2.1.3 The JFSC considers that this consultation paper constitutes such a report.

- 2.1.4 While the JFSC is not invoking Article 15(3) in order to introduce a fee, the subject matter within this CP is relevant to future fees consultations.
- 2.1.5 The JFSC also highlights Article 21G of the Commission Law (**Proceeds of penalties**) which specifies the manner in which Penalties shall be treated: “
- (1) [The JFSC] may retain any sum of money it receives in respect of a penalty as part of its income.
 - (2) The money must be treated as if it were part of the fees due from registered persons of the same class [...] as the registered person –
 - (a) on whom the penalties were imposed; or
 - (b) in the case of a penalty imposed on a principal person, of which the person is a principal person,so as to reduce the level of fees that would otherwise have been charged to those registered persons.
 - (3) However, if the result of the application of paragraph (2) would be to reduce substantially the level of fees that the Commission would otherwise have charged, the Commission may pay the money, or a proportion of it, to the States.”

2.2 Responding to the consultation

- 2.2.1 The JFSC invites comments in writing from interested parties on the proposals included in this CP. Where comments are made by an industry body or association, that body or association should also provide a summary of the type of individuals and/or institutions that it represents.
- 2.2.2 Comments should be received by the JFSC no later than **10 January 2020**.

2.3 Next steps

- 2.3.1 Following this consultation, the JFSC will publish feedback to this CP in the first quarter of 2020.

3 The JFSC

3.1 Overview

- 3.1.1 The JFSC is a statutory body corporate established under the Commission Law. It is responsible for the supervision and development of financial services provided in or from within Jersey.
- 3.1.2 Penalties may be imposed by the JFSC if it is satisfied that a person has, to a significant and material extent, contravened a Code of Practice (**Code**).

4 Proposals

4.1 Retention as income

- 4.1.1 Article 21G of the Commission Law prescribes that the JFSC may retain Proceeds as part of its income. The retained Proceeds shall be treated as if they are part of the fees due from registered persons.

- 4.1.2 The JFSC intends to implement this requirement by allocating Proceeds as a reduction to future annual fees due from registered persons of the same class (see section 4.2).
- 4.1.3 The allocation of Proceeds to reduce fees to be levied on such registered persons will be detailed in fee consultations for relevant registered persons in accordance with Article 15(3)(ba) of the Commission Law.
- 4.1.4 Following the completion of a fee consultation the relevant fees will be levied by the JFSC net of the relevant reduction in respect of Proceeds.
- 4.1.5 The JFSC has considered whether a cash rebate to fees already paid might be an appropriate option and considers that this is not an appropriate approach for the following reasons:
 - 4.1.5.1 The JFSC considers the requirement to treat Proceeds as “part of the fees due” and the JFSC’s ability to “retain any sum of money” means that a cash rebate is not the intent of the Commission Law.
 - 4.1.5.2 There would be additional administrative overheads in coordinating a cash rebate for industry including coordinating payments and maintaining the confidential payment data for registered persons. This would have a converse effect on the reduction of future fees.
 - 4.1.5.3 The JFSC will have incurred supervisory and enforcement costs in concluding the Decision Making Process where a Penalty is imposed on a registered person. The negative impact on cash flow associated with a cash rebate would therefore be imprudent.
- 4.1.6 Section 4.2 details the JFSC’s proposals in relation to the requirements of Article 21G in respect of allocating the retained Proceeds to registered persons of the same class.
- 4.1.7 The JFSC considers this approach to be the most straightforward and robust approach.

4.1.8 **Question 1**

Do you agree with the JFSC’s proposed approach to the retention of Proceeds as income?

4.2 Registered persons of the same class

- 4.2.1 Article 21G of the Commission Law specifies that retained Proceeds (see 4.1) will be treated by the JFSC such that they reduce fees due from registered persons of the same class as the registered person on whom the Penalty was imposed.
- 4.2.2 In the case of Proceeds imposed on principal persons the reduction in fees will be in respect of registered persons of the same class of business “of which the person is a principal person”.
- 4.2.3 “Class of Business” is defined at Article 21G(2) of the Commission Law as “(with reference to the various meanings of ‘registered person’ set out in Article 1 and the various classes of financial service business in respect of which a person may be registered as mentioned in paragraph (c) of that definition)” with Article 1 making reference to the Financial Services (Financial Services Business) (Jersey) Order 2009 (**FSB Order**).
- 4.2.4 The FSB Order is issued in pursuance of Articles 8 and 42 of the Financial Services (Jersey) Law 1998 (**FSJL**). The FSB Order prescribes 39 classes of financial services business within six types of financial services business activity:

- 4.2.4.1 Alternative Investment Fund Services Business (1 class);
- 4.2.4.2 Fund Services Business (17 classes);
- 4.2.4.3 General Insurance Mediation Business (4 classes);
- 4.2.4.4 Investment Business (5 classes);
- 4.2.4.5 Money Service Business (1 class);
- 4.2.4.6 Trust Company Business (11 classes).
- 4.2.5 In addition to the FSJL, Penalties may be imposed for significant and material contraventions of Codes issued under the following legislation:
 - 4.2.5.1 Alternative Investment Funds (Jersey) Regulations 2012 (**AIFJR**);
 - 4.2.5.2 Banking Business (Jersey) Law 1991 (**BBJL**);
 - 4.2.5.3 Insurance Business (Jersey) Law 1996 (**IBJL**); and
 - 4.2.5.4 Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 (**SBJL**).
- 4.2.6 The IBJL prescribes 25 classes within two types of insurance business:
 - 4.2.6.1 Long term business (7 classes); and
 - 4.2.6.2 General business (18 classes).
- 4.2.7 Each of the AIFJR, BBJL and SBIL contemplates different classes of business, however, none are prescribed therefore there is only one class of business under each of these statutes.
- 4.2.8 It should be noted that certain of the classes of business (for example, Class R General Insurance Mediation Business) are excluded from the ambit of the Penalty regime.
- 4.2.9 While, strictly, registered persons holding licences under the FSJL and IBJL will have specific classes of business the prevailing approach is to refer to the type of business rather than the specific class. For example, a Trust Company Business rather than a class J, K, L and M licence holder.
- 4.2.10 The JFSC therefore proposes that for the purpose of allocating Proceeds to reduce the fees of registered persons the following classes will be used when allocating Proceeds to registered persons of the same class:
 - 4.2.10.1 Alternative Investment Fund Services Business;
 - 4.2.10.2 Banking Business (deposit-taking business);
 - 4.2.10.3 Fund Services Business;
 - 4.2.10.4 General Insurance Mediation Business;
 - 4.2.10.5 Insurance Business;
 - 4.2.10.6 Investment Business;
 - 4.2.10.7 Money Services Business;
 - 4.2.10.8 Trust Company Business; and
- 4.2.11 Where a registered person has contravened Codes that span more than one of the classes detailed at 4.2.10 the JFSC will allocate the reduction in future fees based on the proportion of the prior year fees from the relevant classes, as reported in the audited annual financial statements of the JFSC in the period immediately preceding that in which the proceeds are received. To illustrate this:

- 4.2.11.1 Trust Company and Investment Business B pays a £500,000 penalty in respect of a significant and material contravention of both the TCB Code and the IB Code.
- 4.2.11.2 The TCB fees reported in the period immediately preceding that in which the Proceeds are received are £4 million and the IB fees in that period are £3 million (57% and 43% respectively).
- 4.2.11.3 During subsequent fee periods, the Penalty paid by Business B will reduce the fees that would otherwise be paid by the Trust Company Business class by £286,000 and the Investment Business class by £214,000.

4.2.12 Question 2

Do you agree with the JFSC's proposal to treat "class of business" according to the classes detailed at 4.2.10?

4.2.13 Question 3

In the case of Penalties applied to more than one class of business, do you agree with the JFSC's proposal to allocate Proceeds to future fees based on the relative proportion of fees income from those classes?

4.3 Reduction in future fees

- 4.3.1 Until such a time as a Penalty has been imposed at the conclusion of the Decision Making Process it meets the definition of a contingent asset under FRS 102 (the JFSC's financial reporting standard).
- 4.3.2 A contingent asset shall not be recognised, however, when the flow of future economic benefits is virtually certain, recognition is appropriate.
- 4.3.3 The JFSC considers that the final conclusion of the Decision Making Process includes any period of appeal in respect of the Decision Making Process.
- 4.3.4 The JFSC will not reduce fees due from registered persons until the Proceeds of a relevant Penalty have been settled in full.
- 4.3.5 The allocation of Proceeds to reduce fees will generally apply to the next fee period after that in which the Proceeds are received, however, Proceeds may be allocated to reduce fees in later periods.
- 4.3.6 The JFSC will report on the application of Proceeds within its Annual Report.

4.3.7 Question 4

Do you agree with the JFSC's proposed approach in respect of reductions in future fees?

5 Summary of Questions

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8	Question 1: Do you agree with the JFSC's proposed approach to the retention of Proceeds as income?
10	Question 2: Do you agree with the JFSC's proposal to treat "class of business" according to the categories detailed at 4.2.10?
10	Question 3: In the case of Penalties applied to more than one class of business, do you agree with the JFSC's proposal to allocate Proceeds to future fees based on the relative proportion of prior period fees income from those classes?
11	Question 4: Do you agree with the JFSC's proposed approach in respect of reductions in future fees?