

## **Feedback on Consultation No. 3 2022**

### **Senior management functions**

Feedback relating to a consultation on who should be regarded as senior managers for the purposes of our civil financial penalties regime

Issued: January 2023

## Consultation feedback

This feedback reports on responses we received to Consultation No. 3 2022, which was published on 4 May 2022.

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## Glossary of terms

AML/CFT	anti-money laundering / countering the financing of terrorism
AML/CFT Code of Practice	a Code of Practice issued by the JFSC pursuant to Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008
Code of Practice or Code	a JFSC Code of Practice referred to in Article 21A of the Commission Law
Commission Law	<a href="#">Financial Services Commission (Jersey) Law 1998</a>
JFSC	Jersey Financial Services Commission
Jersey Finance	Jersey Finance Limited
Key Person	a compliance officer, money laundering compliance officer or MLRO
MLRO	money laundering reporting officer (i.e. a person appointed as “reporting officer” under the MLO)
MLO	<a href="#">Money Laundering (Jersey) Order 2008</a>
Notice	The JFSC’s notice designating senior management functions, issued pursuant to Article 1 of the Commission Law
Principal Person	has the meaning given in Article 1 of the Commission Law
Registered Person	has the meaning given in Article 1 of the Commission Law
Senior Manager	A person who performs or performed a senior management function as designated in our Notice

## Table of Contents

<b>Consultation feedback .....</b>	<b>2</b>
<b>1 Executive summary .....</b>	<b>5</b>
1.1 Overview .....	5
1.2 Feedback received.....	5
1.3 Next steps.....	6
<b>2 Consultation feedback .....</b>	<b>7</b>
2.1 Feedback received.....	7
2.2 Category 1: A person who manages any aspect of an AML/CFT compliance/risk function .....	7
2.3 Category 2 - A person whose management function may have an impact on the registered person's compliance with the MLO or an AML/CFT Code of Practice ...	8
2.4 Category 3 - A person who carries out a duty or responsibility that is required to be performed by senior management .....	9
2.5 Category 4 - A person appointed as the 'senior officer' of a bank.....	10
2.6 Impact of the proposals on recruitment and retention of Senior Managers.....	10
2.7 Resourcing of personal questionnaire (PQ) processing .....	11
2.8 Other comments .....	12
<b>Appendix A – List of respondents to the consultation .....</b>	<b>15</b>

# 1 Executive summary

## 1.1 Overview

- 1.1.1 On 4 May 2022, we published a [consultation paper](#), which sought views on a proposed Notice that would designate “senior management functions” for the purposes of determining which senior managers in a Registered Person fall within the scope of our civil financial penalties regime.
- 1.1.2 The purpose of this feedback paper is to provide comments on the responses received to the consultation.
- 1.1.3 In light of the feedback received, we made some changes to the proposed Notice. The changes are described in this paper.
- 1.1.4 The final form of [the Notice](#) has been published on our website and will come into effect on 13 March 2023.

## 1.2 Feedback received

- 1.2.1 Respondents provided comments either directly to us or indirectly via Jersey Finance.
- 1.2.2 Jersey Finance received twenty responses, which came from:
  - 1.2.2.1 a mix of firms who carry on banking, trust company business, fund services business, investment business, money service business, and general insurance mediation business
  - 1.2.2.2 two trade associations, two firms of regulatory consultants, one accountancy firm, one law firm, and a group of compliance officers.
- 1.2.3 Fourteen other respondents provided comments to us directly. A full list of respondents is given in Appendix A.
- 1.2.4 Section 2 of this paper presents a summary of the substantive comments received and our response to them.
- 1.2.5 We are grateful to respondents for taking the time to consider and comment on our proposals. Each respondent has been sent a copy of this paper.

## 1.3 Next steps

- 1.3.1 We have published the final form of [the Notice](#) on our website. It will come into effect on 13 March 2023.
- 1.3.2 As indicated in section 2.7 of this paper, Registered Persons should not, at this time, advise us who they consider their Senior Managers are. Nor should personal questionnaires (PQs) be submitted to us by Senior Managers.

# 2 Consultation feedback

## 2.1 Feedback received

- 2.1.1 This section summarises the substantive comments received in response to the consultation. Whilst not every comment received is individually listed, this section contains summaries of the most commonly made and pertinent comments received and, as appropriate, our response to those comments.
- 2.1.2 Our consultation asked two questions:

- 2.1.2.1 Do you have any issues or concerns with any of the proposed categories of 'senior management function'?
- 2.1.2.2 Do you consider that any other function should be included in the Notice as a 'senior management function'?
- 2.1.3 Because many respondents' comments straddled both questions, in order to facilitate the provision of coherent feedback on the comments we received they have been grouped into discrete topics and the remainder of this section is structured accordingly.

## 2.2 Category 1: A person who manages any aspect of an AML/CFT compliance/risk function

### Overview

- 2.2.1 The first category of senior management function proposed was, **"The function of managing any aspect of a registered person's local AML/CFT compliance/risk function where that function is carried out by a person who, in the organisational hierarchy of the registered person, sits below a board level role but above the level of a Key Person role"**.

### Respondents' comments

- 2.2.2 The vast majority of respondents were either content with proposed Category 1 or offered no comments on it.
- 2.2.3 A small number of respondents sought clarity on the position of non-residents in relation to Category 1.
- 2.2.4 Although not directly related to the proposed wording of Category 1, some respondents were unclear as to whether Key Persons were within the scope of the JFSC's civil financial penalties regime.

### Our response

- 2.2.5 Except for some minor presentational changes, Category 1 has been implemented in the form consulted on.
- 2.2.6 In response to the query concerning non-residents, we can confirm that a person's place of residence is not a material consideration. It is the person's function, rather than their location, which is the determining factor. If the person meets the criteria to be a Category 1 Senior Manager it makes no difference whether they are resident in Jersey or not. Guidance to this effect has been included in the final form of the Notice.
- 2.2.7 MLROs (and nominated deputies) were brought explicitly into the scope of the civil financial penalties regime in April 2022 by means of an amendment made to the Commission Law – see the [Financial Services Commission \(Amendment No.8\) \(Jersey\) Law 2022](#) (in particular, Article 21A and the definition of 'key person' in Article 1).
- 2.2.8 For that reason, MLROs/deputy MLROs do not need to be included in the Notice that designates senior management functions. Compliance officers and money laundering compliance officers will not be in scope of the civil financial penalties

regime unless they are also a Principal Person or perform a senior management function (as per our Notice).

## 2.3 Category 2 - A person whose management function may have an impact on the registered person's compliance with the MLO or an AML/CFT Code of Practice

### Overview

2.3.1 The second category of senior management function proposed was, **"the function of managing any aspect of a registered person's affairs (other than those referred to in Category 1 above) the performance of which may have an impact on the registered person's compliance, or otherwise, with the Money Laundering (Jersey) Order 2008, as amended, or an AML/CFT Code of Practice issued by us where the function is carried out by a person who:**

**2.3.1.1 in the organisational hierarchy of the registered person sits below a board level role**

**2.3.1.2 is directly accountable for the performance of the function to the board or to a Principal Person of the registered person."**

### Respondents' comments

2.3.2 Category 2 attracted significant comment from respondents.

2.3.3 Many of those who commented on Category 2 considered the definition to be insufficiently clear, too subjective and open to differing interpretations.

2.3.4 Concerns were also expressed that the wording of Category 2 might result in less than the most senior staff being brought into scope of our civil financial penalties regime.

2.3.5 Some respondents suggested that the definition of Category 2 should place the emphasis on bringing into scope only those senior managers who could make material decisions that affected a registered person's exposure to the risk of money laundering or terrorist financing.

2.3.6 A small number of respondents considered that Category 2 was completely unnecessary to meet FATF standards.

### Our response

2.3.7 FATF Recommendation 35 requires a jurisdiction to have a range of effective, proportionate and dissuasive criminal, civil or administrative penalties available to deal with natural or legal persons that fail to comply with AML/CFT requirements. Those penalties must be applicable to directors and the senior management of regulated entities.

2.3.8 A gap analysis conducted by us in conjunction with Government identified that, to comply with FATF Recommendation 35, our civil financial penalties regime – which already has directors in scope – needed to be extended to cover the senior management of registered persons.

2.3.9 The FATF does not define "senior management" for the purposes of Recommendation 35. However, assessments that have been carried out into the effectiveness of various jurisdictions' implementation of FATF standards indicate that,

to be considered effective, the scope of a jurisdiction's financial penalties regime should include individuals immediately below board level whose management function may have an impact on a regulated firm's compliance with its AML/CFT obligations. Category 2 is intended to cover that cohort.

- 2.3.10 We have reflected on the drafting of Category 2 in light of the concerns raised by respondents and, in particular, the criticism that the definition in the form consulted on was insufficiently clear and open to differing interpretations.
- 2.3.11 A number of respondents helpfully made suggestions as to how they thought the definition could be made clearer, whilst still meeting FATF requirements. The final form of the Category 2 definition that we have determined incorporates a number of those suggestions.
- 2.3.12 We would encourage readers of this paper to review the detail of the final form of the Category 2 definition shown in our [Notice](#) and the accompanying notes and guidance. But, in summary, to fall into Category 2 the person would be below board level but report directly to the board or a Principal Person, and:
  - 2.3.12.1 have responsibility for the application, by the aspect of the registered person's affairs that they manage, of one or more of the registered person's arrangements for meeting its statutory and regulatory obligations to counter money laundering and terrorist financing
  - 2.3.12.2 be able to "exercise significant influence" in the registered person (one indication of having such influence is that the person is of sufficient seniority to take decisions that materially affect the registered person's exposure to the risk of money laundering or terrorist financing).

## 2.4 Category 3 - A person who carries out a duty or responsibility that is required to be performed by senior management

### Overview

- 2.4.1 The third category of senior management function proposed was, **"the function of carrying out a duty or responsibility (alone or jointly with others) that the Money Laundering Order (Jersey) Order 2008, as amended, or an AML/CFT Code of Practice requires to be performed by senior management."**

### Respondents' comments

- 2.4.2 The majority of respondents were either content with proposed Category 3 or offered no comments on it.
- 2.4.3 A small number of respondents considered the proposed wording of Category 3 to be too subjective and open to interpretation.
- 2.4.4 The most common comments in this regard were how Category 3 should be considered to apply (or not) to a person outside Jersey and how Category 3 would apply where a committee exercises a duty or responsibility that the Money Laundering Order or an AML/CFT Code of Practice requires to be performed by senior management.

### Our response



- 2.4.1 Except for some minor presentational changes, Category 3 has been implemented in the form consulted on.
- 2.4.2 Guidance has been included in the final form of the [Notice](#) to make it clear that a non-resident can fall into Category 3: it is the person's function, rather than their location, which is the determining factor. So, for example, an individual at group (e.g. UK) level with responsibility (alone or jointly with others) for approving the establishment by the Registered Person of a relationship with a politically exposed person will fall into Category 3.
- 2.4.3 Guidance has also been included in the final form of the Notice to make it clear that where a committee exercises a duty or responsibility that the Money Laundering Order or an AML/CFT Code of Practice requires to be performed by senior management, each member of the committee should be considered to fall into Category 3.

## 2.5 Category 4 - A person appointed as the 'senior officer' of a bank

### Overview

- 2.5.1 The fourth, and final, category of senior management function proposed was, **"the function of performing the duties of a senior officer as referred to in Article 11(2)(a) of the Banking Business (General Provisions) (Jersey) Order 2002, as amended."**

### Respondents' comments

- 2.5.2 No substantive concerns were voiced by respondents about Category 4.

### Our response

- 2.5.3 Except for a minor presentational change, Category 4 has been implemented in the form consulted on.

## 2.6 Impact of the proposals on recruitment and retention of Senior Managers

- 2.6.1 Around a third of respondents expressed the view that the proposal to extend the scope of the civil financial penalties regime to Senior Managers (in particular, to those in Category 2) would exacerbate existing challenges faced by firms in Jersey to recruit and retain staff of the appropriate calibre.
- 2.6.2 Many of those respondents also expressed the view that the proposal would result in upward pressure on salaries, thus impacting Jersey's competitiveness.

### Our response

- 2.6.3 Before responding to the specific comments made, we would re-affirm our view that to be compliant with FATF requirements it is necessary to bring senior managers, as set out in the final form of our Notice, into the scope of our civil financial penalties regime. The final form of the Notice is considered to go no further than is necessary in that regard and will not put Jersey out of line with competitor jurisdictions.

- 2.6.4 We recognise that the market for quality professionals is challenging. We do not wish to downplay the challenges firms have, which are well-known, but we would make the following observations:
- 2.6.4.1 as the Government noted in its [response paper](#) to the Commission Law amendment that added the senior management function to our civil penalties regime, *“the experience from other jurisdictions is that changes to the supervisory enforcement regime have very little direct impact on the job market”*
  - 2.6.4.2 a major [evaluation exercise](#) conducted by the UK’s Prudential Regulation Authority in 2020, four years after the UK introduced greater individual accountability through the Senior Managers & Certification Regime (SMCR), observed that initial concerns about the SMCR discouraging senior managers from working in the financial services industry and creating challenges for recruitment had generally not come to pass
  - 2.6.4.3 as we have emphasised previously, primary responsibility for compliance with AML/CFT requirements lies with the Board so that is where our principal focus will be if enforcement action appears to be necessary
  - 2.6.4.4 being included in the civil financial penalty regime is an incremental, rather than a fundamental, change in individual accountability for Senior Managers: misconduct by Senior Managers can already be dealt with – and has been – through regulatory sanctions such as public statements and banning directions.
- 2.6.5 We acknowledge the possibility that there may be some upward adjustment in salaries but that is a normal market mechanism when individuals consider that their personal liability is increasing. That said, we think it likely that bringing Senior Managers into the civil financial penalties regime will have a marginal impact on remuneration levels and that the wider issues of an existing restricted pool of suitably qualified/experienced professionals and the present cost of living will feature more significantly.

## 2.7 Resourcing of personal questionnaire (PQ) processing

- 2.7.1 A number of respondents raised concerns about our ability to evaluate and process, on a timely basis, a large influx of PQs for Senior Managers.

### Our response

- 2.7.2 Some of these respondents had mistakenly concluded that we were planning to require PQs to be submitted for all Senior Managers as soon as our Notice comes into effect. That is not the case.
- 2.7.3 Whilst we indicated in our consultation paper that we intended “in due course” to seek Government support for a legislative amendment to bring Senior Managers into the statutory ‘no objection’ regime (at which point PQs would be required) no timetable for that has yet been determined.
- 2.7.4 No immediate notification (or PQ) obligations will be placed on either Registered Persons or Senior Managers.

- 2.7.5 That said, we consider that, as a matter of best practice, Registered Persons should, at this time (and on an ongoing basis), identify which of their employees they consider fall into one of the four categories of senior management function set out in our Notice and notify those employees accordingly.
- 2.7.6 To give a reasonable opportunity for that to be done, our statutory notice, although published on 12 January 2023 will not come into effect until 13 March 2023.
- 2.7.7 Registered Persons should not send us information about the employees they consider fall into one of the four categories of senior management function.
- 2.7.8 Similarly, Senior Managers should not submit PQs to us.
- 2.7.9 Whilst no timescale has yet been determined, we anticipate consulting in the future on an amendment to our Codes of Practice, which would place a regulatory obligation on Registered Persons to: (i) identify and record internally (i.e. without notification to us) which employees they consider are carrying out a senior management function (as per the designations in our Notice); and (ii) notify those employees of that fact.
- 2.7.10 Such a staged approach will ensure that, at an appropriate point in the future, we could request data from Registered Persons on Senior Managers so that the resourcing implications – for both Industry and the JFSC - of bringing Senior Managers into the ‘no objection’/PQ regime would be clear before any formal request to Government for an amendment to the regulatory laws was made. What transitional measures might be necessary would also be considered at that time.

## 2.8 Other comments

- 2.8.1 Two respondents (one of whom was a trade association) considered that a fifth category of “senior management function” should be added to our Notice.
- 2.8.2 It was suggested that this fifth category should include representatives of the owners (private equity owners, in particular, were mentioned) and other individuals at group level with influence over the local board.
- 2.8.3 The rationale given for the inclusion of this fifth category was that it would help to mitigate the risk that decisions could be taken by those individuals, or pressure otherwise applied by them on the local board, which could compromise the Jersey business’s ability to meet its statutory and regulatory obligations.

### Our response

- 2.8.4 We are unpersuaded that such a fifth category is necessary.
- 2.8.5 Primary responsibility for compliance with Jersey’s statutory and regulatory regime lies with the local board. We would therefore expect that if decisions are taken (or proposed) at group level or pressure is applied on the local board by owners to take actions that might compromise such compliance, the board would make appropriate representations to the persons concerned.
- 2.8.6 Where such representations fail to result in an appropriate response from the person(s) concerned, we would expect the board to consider whether notification should be made to us in accordance with Principle 6 of the Codes of Practice, and in particular, pursuant to the requirement therein for, “A Registered Person [to] advise

the JFSC in writing as soon as it becomes aware of any matter that might reasonably be expected to affect its registration or be in the interests of its customers/clients/investors to disclose. Wherever possible this notification must include details of the steps the Registered Person has taken, or intends to take, to mitigate the matter.”

2.8.7 The associated guidance in the Codes indicates that notification under that provision would be expected in respect of, amongst other things, any matter that:

2.8.7.1 is material to our ability to undertake our function of supervision of financial services provided in or from within Jersey;

2.8.7.2 the Registered Person considers is material to, or may make it impractical for it to comply with, one or more of:

- › the provisions of the relevant regulatory law or any Regulation or Order made under it
- › a registration condition
- › a direction issued by the JFSC
- › the relevant Code of Practice
- › the fitness and propriety [requirements for] its Principal Persons and Key Persons.

2.8.8 We would also note that Principal Persons are already within the scope of our civil financial penalties regime and such persons include those who, either alone, or with any associate(s):

2.8.8.1 directly or indirectly holds 10% or more of the share capital

2.8.8.2 is entitled to exercise or control the exercise of not less than 10% of the voting power

2.8.8.3 otherwise has a holding (directly or indirectly) which makes it possible to exercise significant influence.

2.8.9 A small number of respondents, noting that the focus of the consultation was on senior managers that might be culpable in AML/CFT failings by a Registered Person, queried whether senior managers with responsibility for conduct and/or prudential matters would also be brought into scope.

#### Our response

2.8.10 Our focus, at this time, is on meeting FATF standards in relation to which individuals in firms need to be within the scope of our civil financial penalties regime.

2.8.11 Consequently, we are not contemplating any immediate further widening of the scope to cover senior managers with responsibilities associated with conduct/prudential matters. We do, of course, have regulatory sanctions other than civil financial penalties (for example, banning directions, public statements) that can be used in relation to that cohort, where appropriate.

2.8.12 Many respondents from the banking sector indicated that they would prefer to see us implement a senior manager individual accountability model similar to that in the

United Kingdom, where there is a list of defined functions that are directly applied to individuals occupying certain senior positions within a regulated entity.

**Our response**

- 2.8.13 We are unpersuaded by the arguments put forward in favour of a regime similar to the UK's Senior Manager & Certification Regime (SMCR). We consider that implementing such a regime in Jersey would likely prove a disproportionately expensive and resource-intensive solution for meeting the objective of compliance with FATF standards.

## Appendix A – List of respondents to the consultation

Name of respondent	Type of business
Affinity Trust Limited & APW Investors Limited	Trust company business, fund services business, investment business
Anonymous	Fund services business
Barclays Bank plc, Jersey branch	Banking, fund services business, investment business, money service business, general insurance mediation business
BNP Paribas	Banking, fund services business, investment business, money service business, trust company business
FCM Limited	Trust company business
HSBC Bank plc, Jersey branch	Banking, fund services business, investment business, money service business, general insurance mediation business
Investec Bank (Channel Islands) Limited	Banking, money service business
Jersey Bankers' Association	Represents banks
Jersey Finance	<p>The 20 responses that Jersey Finance received came from a mix of firms who carry on: banking; trust company business; fund services business; investment business; money service business; and general insurance mediation business.</p> <p>Jersey Finance also received comments from: two trade associations; two firms of regulatory consultants; one accountancy firm; one law firm; and, a group of compliance officers.</p>
Lloyds Bank Corporate Markets plc	Banking, general insurance mediation business, money service business
PwC CI LLP	Accountancy / audit
Santander Financial Services plc, Jersey branch	Banking, money service business
Standard Bank	Banking, fund services business, investment business, money service business, trust company business
The Royal Bank of Scotland International Limited	Banking, fund services business, general insurance mediation business, investment business, money service business
Trident Trust Company Limited	Trust company business, fund services business