

The revised Codes of Practice for Jersey regulated businesses



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Introduction

Following a period of consultation, the Jersey Financial Services Commission (the Commission) has announced that on 1 June 2019, revised codes of practice will come into force (the Revised Codes). One of the key changes to the Revised Codes surrounds the penalties regime.

Changes to the Revised Codes

Whilst many of the updates to the Revised Codes represent 'routine maintenance' to ensure they remain in line with international regulatory standards, there have been some key changes concerning the penalties regime. The Commission has explained its rationale for this change is to ensure that regulated persons and principal persons cannot rely on an indemnity or insurance policy if the Commission imposes a fine on them.

In short, the Commission expects that regulated person or principal person to bear the burden of satisfying that fine personally.

The Penalties Regime - A Recap

The penalties regime was introduced in 2015. The stated intention of the penalties regime is to ensure that a financial disincentive exists to deter registered persons from contravening the codes of practice and to ensure such persons cannot profit from a contravention of the codes of practice.

On introduction in 2015 it only applied to "registered persons" i.e. those businesses which carry out any or all of the following services:

- Insurance business (except those holding a Category A permit issued under Article 7 of the Insurance Business (Jersey) Law 1996)

- Deposit taking business
- Investment business
- Trust company business
- Money service business
- General insurance mediation business (excluding incidental general insurance mediation business)
- Fund services business Alternative Investment Funds services business or otherwise providing certain services in relation to Alternative Investment Funds

The Commission was granted the power to impose a penalty if satisfied that a registered person has, to a significant and material extent, contravened a relevant code of practice. In considering whether to impose such a penalty, the Commission is required to take certain aggravating and mitigating matters into consideration (as provided for in the Financial Services Commission (Jersey) Law 1998).

The level of the penalty that can be imposed on a registered person depends on the nature of the contravention but may in the most serious of cases be up to 8% of its relevant income (subject to an overall cap of £4,000,000).

The penalties regime was subsequently extended to "principal persons" in 2018. To recap principal persons includes, directors, certain shareholders and other individuals who exert control or significant influence over the management of a registered person. The Commission may impose a penalty on a principal person, if having determined that a registered person has significantly and materially contravened the applicable code of practice, it is satisfied that such contravention was:

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committed with the consent or connivance of, or is attributable to neglect on the part of a principal person; or aided, abetted, counselled or procured by a principal person.

The maximum penalty that can be imposed on a principal person is £400,000.

Impact of Revised Codes

The changes contained in the Revised Codes are designed to ensure that the penalties regime cannot be undermined if the recipient can be indemnified or insured against such a penalty. This has been addressed by introducing the following prohibitions:

- A registered person must not pay a financial penalty imposed by the Commission on behalf of any other person; and
- A registered person must not enter into, arrange, claim on or make a payment under a contract of insurance that is intended to have, or has or would have, the effect of indemnifying any person against all or part of a financial penalty imposed by the Commission.

These prohibitions largely reflect similar prohibitions imposed on firms regulated by the UK Financial Conduct Authority. The Commission having noted that they consider it undesirable for a person to be able to indemnify themselves against the financial consequences of a contravention of the Revised Codes by way of some form of indemnity or insurance contract.

It is therefore very clear, that where a penalty is levied, that person ought to suffer the repercussions of that penalty. The Commission has also indicated, that if a registered person, or principal person were to take steps to subvert such prohibitions, the Commission may call into question their fitness and propriety for office which could ultimately lead to that registered person losing their licence and the principal person being prevented from working in the finance sector.

It must be stressed that the prohibitions included in the Revised Codes do not prohibit obtaining insurance and or an indemnity to cover the costs of defending an action brought by the Commission or arguing against the imposition of a financial penalty.

What steps can be taken now in preparation for the Revised Codes coming into force?

To the extent that registered persons and principal persons have not already done so they should fully familiarise themselves with the contents of the Revised Codes applicable to their business.

It is also important that registered persons carefully review their insurance policies to ensure that such policies are not in contravention of the prohibitions.

What if a material contravention of the Revised Codes is identified?

Appropriate steps should be taken to mitigate the risk of the Commission imposing a fine or at least the level of the fine which should include being fully co-operative with the Commission. It is important to note that when considering the level of fine to impose, the Commission will consider a number of aggravating and mitigating factors.

To the extent that registered persons or principal persons identify material contraventions of the Revised Codes in their business we are able to offer advice on their position and offer practical steps to address and mitigate the issue.

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice. If you would like legal advice or further information, please contact us using the details below.

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