

UPDATE

Latest developments in civil penalties regime

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The Jersey Financial Services Commission has confirmed that revised codes of practice will come into force from 1 June 2019 onwards and, amongst other things, will seek to ensure that the recipient of a civil penalty will personally bear the burden of a civil penalty. It will no longer be acceptable to claim indemnity protection or to insure for a civil penalty.

Background to the civil penalties regime

Registered persons

The Jersey Financial Services Commission (the "**Commission**") introduced a penalties regime in 2015 which applies to all registered persons in respect of 'significant and material contraventions' of the relevant code of practice. The penalties regime applies to "**registered persons**" as defined in the Financial Services Commission (Jersey) Law 1998, namely persons carrying on:

- deposit-taking business;
- insurance business (other than those holding a Category A permit);
- investment business;
- trust company business;
- general insurance mediation business (other than incidental general insurance mediation business);
- money service business;
- fund services business; or
- Alternative Investment Funds services business or otherwise providing certain services in relation to Alternative Investment Funds.

The Commission has power to issue a penalty against a registered person where there has been a 'significant and material contravention' of a code of practice - it is notable that no penalties have yet been issued since the regime was introduced three years ago. The amount of the penalty will depend on, amongst other things, the seriousness of the contravention and whether there are any aggravating or mitigating factors but the penalties are capped at 8% of the registered person's relevant income (subject to an overall cap in any case of £4,000,000).

Principal persons

In October 2018, the civil penalties regime was extended to principal persons of registered persons – a "principal person" broadly includes directors, certain shareholders and other people who otherwise exert control or significant influence over the management of the registered person.

In the event that the Commission determines there has been a significant and material contravention by a registered person, it may impose a penalty on a principal person where it is satisfied that the contravention was (i) committed with the consent or connivance of, or is attributable to neglect on the part of a principal

person, or (ii) aided, abetted, counselled or procured by a principal person. The amount of the penalty will depend on various factors but is capped at £400,000.

No more insurance / indemnity coverage

The proposed changes to the codes of practice have been driven by a concern that the intent of the civil penalties regime could be undermined if those who receive a civil penalty can be indemnified or insured against a financial penalty. These concerns have been addressed by the introduction of two high-level prohibitions, which broadly replicate wording in the UK Financial Conduct Authority's Handbook applying to regulated firms in the UK:

1. a registered person must not pay a financial penalty imposed by the Commission on any other person; and
2. 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.

The Commission has been clear of its intention that where a penalty is levied on a person, that person ought to suffer the financial penalty. Where a registered person, or a principal person, takes steps to subvert this intention, the Commission may call into question their fitness and propriety for office. The Commission has also promised to revisit the wording if it finds that a 'pattern of evasion' develops.

Importantly, there is no restriction on obtaining insurance and/or indemnity protection to cover the costs of defending an action brought by the Commission or arguing against the imposition of a financial penalty.

What should registered persons and principal persons do now?

The changes to the codes of practice will prohibit a registered person from entering into any contract of insurance that would cover a financial penalty imposed by the Commission. This is important to bear in mind for registered persons (e.g. administrators, trustees, managed entities) when updating or renewing their insurance contracts. Whilst most contracts of insurance will have a general provision carving out any matter which cannot be insured against under applicable law or regulation, registered persons should carefully check their policies to ensure they do not breach the new prohibition.

What if a material contravention of the codes of practice is identified?

There are steps that can be taken to reduce the likelihood of the Commission imposing a fine or at least reduce the amount of the fine. In considering each contravention in the context of the civil penalties regime, the Commission will consider a number of aggravating and mitigating factors.

We can advise on factors that will mitigate and aggravate a person's position in any particular case but, as a general starting point, it is advisable to take appropriate action at the appropriate times and to be co-operative (albeit with care to avoid self-incrimination).

An important note for certificate holders and principal persons subject to the Collective Investment Funds (Jersey) Law 1988 and the Code of Practice for Certified Funds (the CIF Code)

When introduced, the penalties regime was not extended to cover those registered under the Collective Investment Funds (Jersey) Law 1988. Accordingly the changes will not be introduced to the CIF Code (which sits outside the scope of the civil penalties regime) and will only apply to those regulated by the other Codes of Practice. It remains to be seen whether this will be revisited.

In practice, the exclusion of the Code of Practice for Certified Funds from the civil penalties regime will only apply to a small population of funds, being self-managed corporate investment funds that are not otherwise regulated under Code of Practice for Alternative Investment Funds and AIF Services Business (the **AIF Code**). For other funds (e.g. unit trusts and partnerships) which act through Jersey fund services businesses (**FSBs**) such as trustees, general partners and managed entities, those FSBs will be affected as the prohibitions against indemnity protection or to insurance will be introduced to FSB Code and the AIF Code.

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