

Snapshot: the JFSC's decision-making process and challenging JFSC decisions

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If a firm or individual finds itself the subject of JFSC action, it is important to understand the JFSC's decision-making process. This will help you to identify and make best use of the opportunities to put your case across to the JFSC, potentially influencing what (if any) action it takes.

This briefing considers key questions concerning challenges to JFSC decisions.

| JFSC decision-making

Where can I find the JFSC's decision-making process?

In February 2022 the JFSC issued its updated policy statement entitled "Decision-Making Process" (DMP) [1] that sets out the decision-making process (Process) the JFSC will follow when it takes administrative actions that could result in the imposition of a "regulatory sanction" under the Regulatory Laws. [2]

To what decisions does the Process apply?

These are listed in Part A of the DMP, and broadly comprise decisions that can result in "regulatory sanction" (for example, objecting to a principal person's continued appointment or imposing a civil penalty) but not urgent or supervisory decisions.

Decisions will be taken by the "Board DMP Committee", which typically comprises three Commissioners.

Is a sanction inevitable once the JFSC commences its Process?

No. As the JFSC makes clear in the DMP, "[a]t any stage, the decision-making process will be terminated if it is determined that no further action is required, or that the matter should be addressed through normal or heightened supervision, or the JFSC and the Subject have agreed a

course of action".

What is the JFSC's Process?

As the DMP notes, "[t]he JFSC is not a judicial body. Court rules and procedures do not apply to the decisions that it takes. The JFSC takes administrative decisions in accordance with powers vested in it that are set out in the legislation that it administers. In so doing, the JFSC will act as supervisor, investigator and decision-maker". However, the JFSC is ultimately subject to judicial oversight through the appeal rights discussed below.

In overview, the Process has four stages:

Stage 1 - investigation: the Executive will typically open an investigation, of which the subject will be notified. The JFSC will gather the information it requires and at an appropriate stage will produce a draft report.

Stage 2 - review of the case by the Executive: once the investigation has concluded, the Executive will review it and determine whether the case should be referred for consideration by the Committee.

Stage 3 - consideration of the case by the Committee: the Committee will consider the case, and if it reasonably believes a regulatory sanction could be imposed it will issue a "Notice of Intent" (NoI) to the subject. The NoI will explain what regulatory sanction is proposed and why.

Stage 4: determination of the case by the Committee: the subject will be given one month to make written representations on the NoI, to which the Executive will be entitled to respond (with the subject given a copy of that response)

The subject then has the opportunity to make oral representations to the Committee, and may be accompanied by their legal advisers (who may speak on their behalf). The Committee may ask questions.

The Committee will give the subject written notice of its decision as soon as reasonably practicable after the meeting. If the decision is to impose a regulatory sanction, the subject will receive the formal notice required by statute that includes the reasons for that decision.

At what stage in the Process can I put my case across?

The JFSC's Process builds in a number of opportunities for the subject to communicate their position before the JFSC takes its decision: during the course of the investigation or information-gathering stage (for example, during interview); when reviewing any draft investigation report; and by written and oral submissions to the Committee.

It is important that subjects make best use of each of these opportunities to present their case, to ensure that the JFSC properly understands the matter before reaching its final view.

Will the JFSC engage in settlement discussions and what is involved?

In its policy statement entitled "Regulatory Settlements", [3] the JFSC confirmed that it is willing to explore settlement of regulatory investigations (in effect where a disciplinary sanction is possible). However, the JFSC will only explore settlement once it has a sufficient understanding of the nature and gravity of the suspected misconduct.

The JFSC can be expected to focus on achieving the "right" regulatory outcome, as opposed to a "commercial" settlement. Nonetheless, the settlement process provides subjects with a valuable opportunity to influence the wording of public statements and to secure up to a 50% discount on any civil penalty (the level of discount depends on the stage at which the matter settles).

If the JFSC is willing to engage in settlement discussions, it will invite the subject to a without prejudice meeting. The subject's attendees must have authority to settle the matter at that meeting. If settlement is not achieved, the Process resumes.

Can I appeal a JFSC decision?

The Regulatory Laws provide that the subject of a notice issued at the end of stage 4 may appeal that decision to the Royal Court of Jersey (**Court**). From this point, the Court's rules for administrative appeals in Part 15 of the Royal Court Rules 2004 (**RCR**) will apply and must be complied with strictly.

The subject will need to demonstrate that (broadly speaking) the JFSC's decision was unreasonable, and if unsuccessful they face the risk that the Court orders them to contribute towards the JFSC's costs.

Challenging other decisions - judicial review

Given the breadth of its responsibilities, the JFSC takes a wide variety of decisions when discharging its regulatory functions. Many of those decisions do not involve the exercise of powers in the Regulatory Laws to which formal appeal rights apply.

A person affected by such a decision *might* be able to challenge it by way of an application to the Court for judicial review under RCR Part 16. If so, judicial review is only available as a remedy of last resort, and must be brought promptly and within three months of the decision complained of. The hurdle for succeeding on judicial review is a high one: the subject must show the JFSC's decision was unlawful, irrational or flawed by procedural impropriety.

[1] <https://www.jerseyfsc.org/media/5252/decision-making-process-policy-statement.pdf>

[2] These include the Banking Business (Jersey) Law 1991, the Collective Investment Funds (Jersey) Law 1988, the Insurance Business (Jersey) Law 1996 and the Financial Services (Jersey) Law 1998. The civil penalty power is contained in the Financial Services Commission (Jersey) Law 1998.

[3] <https://www.jerseyfsc.org/media/5251/settlement-policy-statement.pdf>

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