

STATES OF JERSEY



DRAFT FINANCIAL SERVICES OMBUDSMAN (CASE-FEE AND LEVY) (JERSEY) REGULATIONS 201-

**Lodged au Greffe on 9th December 2014
by the Minister for Economic Development**

STATES GREFFE



Jersey

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REPORT

These Draft Regulations were published as an adjunct to the consultation on the Economic Development Department's and Commerce and Employment Department's (States of Guernsey) proposed funding scheme for the Office of the Financial Services Ombudsman (OFSO). The consultation ran from 26th September 2014 until the 14th November 2014.

The Regulations provide for the OFSO to prescribe schemes for case-fees and levies to be paid by certain financial service providers in respect of the expenses of the OFSO.

Financial and manpower implications

There are no financial and manpower implications for the States arising from the adoption of these Draft Regulations.

Adoption of these Draft Regulations will allow the Office of the Financial Services Ombudsman (OFSO) to repay the loan to the States of Jersey, advanced so that funds were available for establishment and initial operating costs (with an equivalent contribution from the States of Guernsey).

Explanatory Note

These Regulations are made under the Financial Services Ombudsman (Jersey) Law 2014 (the “Law”). They provide for the Office of the Financial Services Ombudsman (the “OFSO”) to prescribe schemes for case-fees and levies to be paid by certain financial service providers in respect of the expenses of the OFSO.

Regulation 1 is the interpretation provision, directing readers to the definitions of “fee scheme” and “levy scheme”, as well as “registered provider” and “levy notice”.

Regulation 2 requires the OFSO to prescribe a scheme of case-fees (the “fee scheme”), and provides for its contents and its effects. The fee scheme, and any subsequent amendments, must be published. Under Article 1 of the Law, publication must be in a manner appearing to the OFSO to be likely to bring the scheme to the attention of those affected. The scheme or amendment must specify when it comes into effect. The scheme must provide for the calculation of fees, and the dates on which they are payable (which can be at more than one stage, and can be when a subsequent levy is paid). A respondent can be charged interest and sued for late payment. The scheme can provide for different fees on any basis, including whether the respondent is liable to pay a levy.

Regulation 3 provides for consultation on the fee scheme, and on subsequent amendments. For the first fee scheme, the OFSO must take account of any prior steps taken by the Minister to discuss a potential fee scheme with those affected. The OFSO may choose whether to rely on those steps and consult within 4 months after publishing the scheme, or to consult fully before publishing the scheme.

Regulation 4 provides for the prescription of a scheme of levies (the “levy scheme”), or an amendment, and for the publication of the levy scheme or amendment, in a similar fashion to that for the fee scheme.

Regulation 5 provides for consultation on the levy scheme, in a similar fashion to that for the fee scheme.

Regulation 6 provides for the calculation of the total amount to be raised by levies in a year in which the OFSO decides a levy is called for. The funding is initially to be split equally between Jersey and Guernsey. So the total of the levies under these Regulations is set at half of the amount required to make up the gap between the OFSO’s spending (and provision for reserves) in both islands and the income from case-fees and other sources in both islands. This split lasts until the end of 2016, after which the Jersey OFSO would be funded solely from Jersey sources in respect of its Jersey operations, unless these Regulations are amended to alter that. Such an amendment could take effect before or after the end of 2016, and could be the result of a review under *Regulation 9* (see below, and see also *Regulation 10*).

Regulation 7 provides for the imposition of the levy. If the OFSO decides to raise a levy for a particular year, and serves notice demanding payment of an amount of levy on a financial service provider (who is not zero-rated), that provider must pay the levy. “Financial service provider” is defined by Articles 1 and 9 of the Law, subject to exemptions provided by the Financial Services Ombudsman (Exempt Business) (Jersey) Order 2014. No levy can be charged unless the financial service provider is registered with, or holds a permit or certificate from, the Jersey Financial Services Commission under the regulatory Laws that it administers (or under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 in respect of relevant credit business). Furthermore the levy scheme must provide for zero-rating of providers appearing sufficiently unlikely to generate complaints in the particular year (such as those that

will not do business in or from within Jersey, or will not do business with eligible complainants), and it may zero-rate additional categories of provider. The scheme can apply zero-rating or special rates to providers that become registered or cease to be registered mid-year. The scheme can apply different rates of levy (or different methods of calculation) to providers carrying on different types of business, or to different classes of provider in proportion to numbers of complaints generated by each class, or in any other manner. The scheme can base calculations on data from a previous year, or on predictions as to a year that has not yet ended (in which case it may provide for adjustments).

Regulation 8 provides for levy notices and appeals. The scheme must prescribe how notice is to be given. The notice must specify the amount of levy payable and the date for payment, and how that amount was calculated under the scheme (and give information on the right to appeal). A person served with a notice can be charged interest and sued for late payment. But the person can appeal to the Royal Court on the ground that they should not have to pay any levy or that it has been miscalculated (and cannot be sued for payment pending the appeal). The Royal Court can reject the appeal, in which case any interest will run from the original due date (unless the person paid pending the appeal). Alternatively the Court can order that nothing is payable, order the OFSO to recalculate, or substitute its own calculation and its own requirements as to payment.

Regulation 9 requires the OFSO to review these Regulations. It must consult appropriate persons and give the Minister proposals for amendment of the Regulations, or reasons why it does not propose any amendment. It must publish its proposals or reasons. The OFSO must do this within a year of the coming into force of these Regulations, which would be before the end of the initial provision for sharing funding with Guernsey in *Regulations 6 and 10*.

Regulation 10 amends Schedule 2 to the Law, to give effect to arrangements made with Guernsey as to funding. The amendment provides that references to funding include the funding of the equivalent scheme in Guernsey. But the amendment only applies to the financial years 2014 to 2016 (before which OFSO will have reviewed these Regulations under *Regulation 9*).

Regulation 11 names these Regulations and would bring them into force as soon as they are made. However, despite the immediate commencement, no money can be demanded immediately as either case-fees or levy. No case-fees will be payable immediately because the provisions of the Law have not yet been brought into force to enable complaints to be referred to the OFSO. Nor can any levy be demanded immediately, as the OFSO would first have to prescribe a levy scheme, and can only do so once it has taken account of information provided by the Minister and decided whether to consult afresh on a proposed scheme. Once a levy scheme is in place, a levy can be raised before the OFSO starts taking complaints, and can cover costs dating back to the establishment of the OFSO on 25th July 2014 – see *Regulation 6(5)(b)*, Article 27(2) of the Law, paragraph 2(4)(a) of Schedule 2 to the Law, and the Financial Services Ombudsman (Jersey) Law 2014 (Appointed Day) Act 2014.



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Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES, in pursuance of Articles 6 and 26 of, and paragraphs 3 and 4 of Schedule 2 to, the Financial Services Ombudsman (Jersey) Law 2014¹, have made the following Regulations –

1 Interpretation

In these Regulations –

“budget” means the budget approved for a year under paragraph 2 of Schedule 2 to the Law;

“fee scheme” has the meaning given by Regulation 2(1);

“financial year” has the meaning given by paragraph 1 of Schedule 2 to the Law;

“Law” means the Financial Services Ombudsman (Jersey) Law 2014²;

“levy notice” has the meaning given by Regulation 8(3);

“levy scheme” has the meaning given by Regulation 4(1);

“registered provider” has the meaning given by Regulation 7(3).

2 Fee scheme: prescription, contents and effects

- (1) The OFSO must prescribe, and may amend, a scheme (the “fee scheme”) of case-fees payable to the OFSO by respondents in respect of complaints against them that are referred to the OFSO, in circumstances prescribed in the scheme.
- (2) The OFSO must publish the fee scheme or amendment.
- (3) The fee scheme or amendment does not take effect until a date specified in the fee scheme or amendment, being a date later than the date of its publication.
- (4) The fee scheme –

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- (a) must provide for the amount of the case-fee, or of each description of case-fee, or for the means of calculating that amount;
 - (b) may do so on any basis appearing to the OFSO to be appropriate;
 - (c) must provide for the determination of the date by which payment of a case-fee is due;
 - (d) may do so by requiring payment of one or more case-fees at or in respect of any stage of the handling of a complaint by the OFSO, or at a later date when a levy is payable by a respondent, or at a date determined by any other means;
 - (e) may set a rate of interest payable on any amount of a case-fee remaining outstanding after payment is due;
 - (f) may provide for the OFSO to waive a case-fee at the OFSO's discretion in circumstances specified in the scheme; and
 - (g) may, in relation to any or all of sub-paragraphs (a) to (f), make different provision for different descriptions of complaints, including (without limitation) descriptions related to whether the respondent in the complaint –
 - (i) is a registered provider,
 - (ii) is zero-rated under Regulation 7(4)(a) or (b) for the levy scheme, or
 - (iii) has any other characteristic.
- (5) A respondent to a complaint must, before the date by which payment of a case-fee is due under the fee scheme in relation to that complaint, pay to the OFSO that case-fee, determined under the fee scheme in respect of that complaint.
- (6) If the case-fee is not paid in full by that date, the OFSO may recover as a civil debt from the respondent –
- (a) any amount of the case-fee remaining unpaid on that date; and
 - (b) any interest accruing on that amount at a rate set by the fee scheme under paragraph (4)(e).

3 Fee scheme: consultation

- (1) Before the OFSO prescribes the first fee scheme the Minister must inform the OFSO of the outcome of any steps taken by the Minister, whether before or after the commencement of these Regulations, to discuss the potential provisions of that fee scheme with persons appearing to the Minister appropriate from among financial service providers and their representatives.
- (2) The OFSO must, subject to paragraph (4) –
 - (a) take that information into account in prescribing the first fee scheme;
 - (b) publish, with the first fee scheme, the OFSO's response to that information, particularly stating reasons for departure from any potential provisions discussed by the Minister;

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- (c) after the first fee scheme is published, consult the persons mentioned in paragraph (3) as to whether any amendment should be made to the first fee scheme; and
 - (d) if, in the period of 4 months following publication of the first fee scheme, the OFSO does not amend that fee scheme as a result of the consultation, publish its reasons for not doing so.
- (3) Before prescribing any subsequent fee scheme or varying a fee scheme, the OFSO must consult –
- (a) any body appearing to the OFSO to be representative of the interests of all or any of the descriptions of financial service provider who may be liable to pay case-fees under the fee scheme; and
 - (b) any other person appearing to OFSO to be appropriate.
- (4) Paragraphs (2)(b), (2)(c) and (2)(d) do not apply if the OFSO consults on the first fee scheme as if it was a subsequent fee scheme for the purpose of paragraph (3).

4 Levy scheme: prescription and publication

- (1) The OFSO must prescribe, and may amend, a scheme (the “levy scheme”) under which, in any financial year in respect of which the OFSO decides that a levy is payable –
 - (a) the liability for a levy is to be divided among those liable;
 - (b) the amounts of levy are to be calculated; and
 - (c) the persons liable are to be notified.
- (2) The OFSO must publish the levy scheme or amendment.
- (3) The levy scheme or amendment does not take effect until a date specified in the levy scheme or amendment, being a date later than the date of its publication.

5 Levy scheme: consultation

- (1) Before the OFSO prescribes the first levy scheme the Minister must inform the OFSO of the outcome of any steps taken by the Minister, whether before or after the commencement of these Regulations, to discuss the potential provisions of that scheme with persons appearing to the Minister appropriate from among financial service providers and their representatives.
- (2) The OFSO must –
 - (a) take that information into account in prescribing the first levy scheme;
 - (b) publish, with the first levy scheme, the OFSO’s response to that information, particularly stating reasons for departure from any potential provisions discussed by the Minister;

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- (c) after the first levy scheme is published, consult the persons mentioned in paragraph (6) as to whether any amendment should be made to the first scheme; and
 - (d) if, in the period of 4 months following of the first levy scheme, the OFSO does not amend that scheme as a result of the consultation, publish its reasons for not doing so.
- (3) Before prescribing any subsequent levy scheme or varying a levy scheme, the OFSO must consult –
- (a) any body appearing to the OFSO to be representative of the interests of all or any of the descriptions of financial service provider who may be liable to pay levies under the levy scheme; and
 - (b) any other person appearing to OFSO to be appropriate.
- (4) Paragraphs (2)(b), (2)(c) and (2)(d) do not apply if the OFSO consults on the first levy scheme as if it was a subsequent levy scheme for the purpose of paragraph (3).

6 Levy scheme: calculation of total amount required

- (1) The manner in which the total amount required by the OFSO in levies under these Regulations for a particular spending year (within the meaning of Regulation 7) is to be determined is by calculating, using the values obtained under paragraphs (2) and (3), the result of the formula $\frac{X-Y}{2}$.
- (2) For the purpose of paragraph (1) the value of “X” is to be obtained by calculating the total of the amounts that the OFSO estimates for that year, having regard to its budget, as –
- (a) the costs, appearing to the OFSO to relate to that year, that are to be incurred by the OFSO and by the equivalent body under the law of Guernsey (“the Guernsey body”);
 - (b) any amount by which it appears to the OFSO to be necessary that a reserve of the OFSO, or the Guernsey body or both, should be increased in that year; and
 - (c) any deficit from the previous year in the funds of the OFSO, or the Guernsey body or both, after allowing for accumulation of a reserve.
- (3) For the purpose of paragraph (1) the value of “Y” is to be obtained by calculating the total of the amounts that the OFSO estimates in relation to that year, having regard to its budget, as –
- (a) the income, by way of case-fees, of the OFSO and the Guernsey body; and
 - (b) any other income of the OFSO, or the Guernsey body or both, other than by way of levies; and
 - (c) any surplus from the previous year in the funds of the OFSO, or the Guernsey body or both, after allowing for accumulation of a reserve.

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- (4) For the purpose of this Regulation the OFSO may, in respect of any calculation –
 - (a) make its own estimates;
 - (b) rely on estimates made by the Guernsey body; or
 - (c) make estimates jointly with the Guernsey body.
 - (5) For the purpose of paragraph (2)(a) the costs to be incurred may, without limitation, include –
 - (a) the repayment of any loans and payment of interest on loans; and
 - (b) the costs of establishing the OFSO and the Guernsey body, as well as of their operation.
 - (6) For the purpose of paragraphs (2) and (3) “reserve” means, in respect of the OFSO, a reserve accumulated under paragraph 6 of Schedule 2 to the Law and taken into account in the OFSO’s budget under paragraph 2(5)(b) of that Schedule, and in respect of the Guernsey body any equivalent reserve of that body.
 - (7) In respect of a financial year after 2016, this Regulation applies –
 - (a) without any of the references to the Guernsey body; and
 - (b) with the substitution, for the formula in paragraph (1), of the formula “X – Y”.

7 Levy scheme: imposition of levy

- (1) For the purpose of this Regulation –
 - (a) the assessment year is the financial year by reference to which assessment is to be made as to whether a person is a financial service provider or will be entitled to zero-rating or other treatment under the scheme; and
 - (b) the spending year is the financial year by reference to which the needs of the OFSO are to be assessed.
- (2) A financial service provider must pay a levy if –
 - (a) it is a registered provider at any time during an assessment year;
 - (b) it is not zero-rated under the levy scheme in accordance with paragraph (4); and
 - (c) the OFSO serves a levy notice on it under Regulation 8.
- (3) A registered provider, for the purpose of these Regulations, is a financial service provider that falls within any one or more of the following descriptions, in relation to the relevant financial service business carried on by that provider –
 - (a) a registered person within the meaning of the Financial Services (Jersey) Law 1998³;
 - (b) a certificate holder within the meaning of the Alternative Investment Funds (Jersey) Regulations 2012⁴;
 - (c) a registered person within the meaning of the Banking Business (Jersey) Law 1991⁵;

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- (d) a holder of a permit, or a certificate holder, within the meaning of the Collective Investment Funds (Jersey) Law 1988⁶;
 - (e) a permit holder within the meaning of the Insurance Business (Jersey) Law 1996⁷;
 - (f) a registered person within the meaning of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008⁸, being so registered (or deemed registered) in respect of business falling within paragraph 7(1)(b) of Part B of Schedule 2 to the Proceeds of Crime (Jersey) Law 1999⁹.
- (4) The levy scheme –
- (a) must provide for zero-rating for descriptions of registered provider in respect of which it appears to the OFSO that any complaint, that could relate to an act in the assessment year by a registered provider of that description, could not be, or is for any reason sufficiently unlikely to be, eligible for referral to the OFSO by virtue of Article 7 of the Law;
 - (b) may provide for zero-rating for other descriptions of registered provider;
 - (c) may provide for different rates or methods of calculation of levy for different descriptions of registered provider to which zero-rating does not apply;
 - (d) may provide that zero-rating, or particular rates or methods of calculation of levy, do not apply to a registered provider unless that registered provider –
 - (i) certifies to the OFSO, in a manner (including as to timing) prescribed by the levy scheme, that it falls within a description provided for under sub-paragraph (a), (b) or (c), or
 - (ii) if the levy scheme so requires (whether in every case or on demand, or by any other criteria), so certifies to the OFSO and satisfies the OFSO, in a manner (including as to timing) prescribed by the levy scheme, that it falls within that description; and
 - (e) may set a rate of interest payable on any amount of levy remaining outstanding after the date specified in a notice under Regulation 8(3)(d) as the date by which that levy must be paid.
- (5) For the purpose of paragraph (4)(a) the OFSO must in particular consider, in relation to any description of registered provider, whether a provider of that description is unlikely in the assessment year –
- (a) to have any required relationships with any persons who could be eligible complainants; or
 - (b) to carry on any relevant financial services business at all, or to do so in or from within Jersey.
- (6) For the purposes of paragraphs (4)(b) and (4)(c), and without prejudice to the generality of those paragraphs, the descriptions of registered provider may include descriptions based on whether a person became or ceased to be a registered provider at any point in the assessment year.

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- (7) Without prejudice to the generality of paragraph (4)(c) and of Regulation 4(1)(a), the levy scheme may divide the liability for a levy among those liable on any basis –
 - (a) whether by specifying classes of registered provider according to types of business carried on by that class, or otherwise; and
 - (b) whether in proportion to numbers of complaints referred in relation to each such class, or otherwise.
 - (8) The levy scheme must specify whether the levy is calculated –
 - (a) on the basis that the year of assessment is the spending year; or
 - (b) on the basis that the year of assessment is the financial year preceding the spending year, or a specified previous year.
 - (9) If the levy scheme specifies that the basis that the year of assessment is the spending year, it must also provide for –
 - (a) how assessment is to be made as to whether a person will be a financial service provider at a future date, or will be entitled to zero-rating or other treatment under the scheme based on future activity; and
 - (b) whether and how amounts of levy are to be adjusted if such an assessment turns out not to have been accurate during or at the end of the spending year.

8 Levy scheme: notice and appeal

- (1) This Regulation applies in respect of a financial year if the OFSO's budget for that year provides, in accordance with paragraph 2(4) to (6) of Schedule 2 to the Law, for the income of the OFSO for that year to include the proceeds of a levy.
- (2) The OFSO must serve a levy notice on each person from whom, under the levy scheme, the OFSO is to demand an amount of levy in respect of that year.
- (3) A levy notice is a notice that –
 - (a) demands payment of an amount of levy in relation to that year by that person;
 - (b) is served under the levy scheme as prescribed under Regulation 4(1)(c);
 - (c) specifies the amount of levy payable, and how that amount was calculated under the scheme;
 - (d) specifies the date, being not less than 28 days after service of the notice, by which the amount must be paid; and
 - (e) notifies the recipient of the right of appeal under paragraph (5).
- (4) If the OFSO serves a levy notice on a person –
 - (a) that person must pay in full the amount demanded, by the date specified under paragraph (3)(d); and
 - (b) the OFSO may recover as a civil debt from that person –
 - (i) any amount remaining unpaid on that date, and

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- (ii) any interest accruing on that amount at a rate set by the levy scheme under Regulation 7(4)(e).
- (5) A person on whom a levy notice is served, may, before the date specified under paragraph (3)(d), appeal to the Royal Court against the service of the notice on the ground –
- (a) that the person is not a registered provider;
 - (b) that zero-rating applies to the person under the scheme; or
 - (c) that amount demanded has not been correctly calculated under the scheme.
- (6) If a person appeals under paragraph (5), paragraph (4)(b) does not apply pending the appeal.
- (7) The Royal Court determining an appeal may –
- (a) reject the appeal;
 - (b) order that no amount is to be paid;
 - (c) order the OFSO to recalculate the amount of levy; or
 - (d) substitute an amount of levy recalculated by the court, and make any order it sees fit as to payment.

9 Review of Regulations during first year

The OFSO must, after consulting persons appearing to OFSO to be appropriate and before the expiry of 12 months from the commencement of these Regulations, publish and provide to the Minister –

- (a) proposals as to amendment of these Regulations in relation to future financial years; or
- (b) reasons why the OFSO considers that no such amendment would be expedient.

10 Amendment of Schedule 2 to the Financial Services Ombudsman (Jersey) Law 2014

After paragraph 2(6) of Schedule 2 to the Law there is added the following sub-paragraph –

- “(7) For the purposes of sub-paragraphs (4)(a) and (5), in relation to the financial years 2014, 2015 and 2016, the references to financial service providers, fees, levy, resources, OFSO, income, functions and reserve are to be read as including references to the equivalents of those terms under any law of Guernsey that establishes an Ombudsman scheme in relation to financial services.”.

11 Citation and commencement

These Regulations may be cited as the Financial Services Ombudsman (Case-Fee and Levy) (Jersey) Regulations 201- and come into force on being made.

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- ¹ *L.14/2014*
 - ² *L.14/2014*
 - ³ *chapter 13.225*
 - ⁴ *chapter 17.245.51*
 - ⁵ *chapter 13.075*
 - ⁶ *chapter 13.100*
 - ⁷ *chapter 13.425*
 - ⁸ *chapter 08.785*
 - ⁹ *chapter 08.780*