

VIRGIN ISLANDS

REGULATORY (AMENDMENT) CODE, 2010

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VIRGIN ISLANDS

STATUTORY INSTRUMENT 2010 NO. 91

**FINANCIAL SERVICES COMMISSION ACT, 2001
(No. 12 of 2001)**

Regulatory (Amendment) Code, 2010

[Gazetted 20th December, 2010]

The Financial Services Commission, in exercise of the powers conferred by section 41 of the Financial Services Commission Act, 2001 (No. 12 of 2001) and after consultation with the Minister of Finance and with the approval of the Board, issues this Regulatory Code:

Citation and commencement.

1. This Code may be cited as the Regulatory (Amendment) Code, 2010 and comes into force,

No. 2 of 2010

(a) in respect of licensees, and public funds (where applicable), under the Securities and Investment Business Act, 2010, on the 31st day of March, 2011; and

No. 9 of 1990
No. 8 of 1990
No. 1 of 2008
No. 9 of 2009

(b) in respect of all other licensees under the Banks and Trust Companies Act, 1990, Company Management Act, 1990, Insurance Act, 2008 and Financing and Money Services Act, 2009, on the 31st day of December, 2010.

Section 2 amended.
S.I. No. 60 of 2009

2. Section 2 of the Regulatory Code, 2009 (hereinafter referred to as “the principal Code”) is amended

(a) in subsection (1)

(i) by inserting in their appropriate alphabetical order the following new definitions:

““BVI undertaking” means an undertaking that, in the case of

(a) a company, is a BVI business company;

(b) a limited partnership, is registered under Part VI of the Partnership Act, 1996;

(c) a partnership that is not a limited partnership, has its principal office in the Virgin Islands; and

(d) an unincorporated association, is an undertaking that has its principal office in the Virgin Islands;

“complaint”, in relation to a licensee, means any oral or written expression of dissatisfaction, whether justified or not, from or on behalf of a person about the provision of a service which constitutes licensed business and which

(a) alleges that the complainant has suffered, or may suffer, financial loss, material distress or material inconvenience; and

(b) relates to the provision of the service by or on behalf of the licensee;

““fund administration licence” means a category 6, sub- category B investment business licence;

“fund custodian’s licence” means a category 5, sub- category B investment business licence;

“fund investment advisor’s licence” means a category 4, sub- category B investment business licence;

“fund investment business licence” means

(a) a fund administration licence;

(b) a fund custodian’s licence;

(c) a fund investment advisor’s licence; or

(d) a fund management licence;

“fund management licence” means a category 3, sub- category B investment business licence;

“investment business licence” means a licence issued under section 6 of the Securities and Investment Business Act, 2010;

“licensed fund administrator” means a person having a fund administration licence;

“licensed fund manager” means a person having a fund management licence;

“non-fund investment business licence” means an investment business licence that is not a fund investment business licence;

“retention period” means the period specified in section 39(2) and (3);”;

- (ii) by adding at the end of paragraph (a) of the definition of “eligible insurer”, the words “or an equivalent financial strength rating assigned by an equivalent rating company”;
- (iii) by deleting the words “section 8 (2)” in the definition of “money service licence” and replacing them with the words “section 9 (2)”;
- (iv) by inserting after the word “means” in the definition of “recognised exchange”, the words “, subject to subsection (5),”;

(b) by inserting after subsection (4), the following new subsections:

“(5) An exchange that is a member of the World Federation of Exchanges shall not be regarded as a recognised exchange if the Commission publishes a notice to that effect in the *Gazette*.

(6) A notice under subsection (5) may provide that an exchange shall not be regarded as a recognised exchange for certain specified purposes.”.

Section 11 amended.

3. Section 11 of the principal Code is amended

- (a) in subsection (1) by deleting the words “subsection (2)” and replacing them with the words “subsections (2) and (2A)”;
- (b) by deleting subsection (2) and replacing it with the following subsection:

“(2) Unless the Commission, by written notice otherwise directs, applicants for the following licences are not required to submit a business plan with their application:

(a) a restricted Class II or a restricted Class III trust licence; and

(b) a fund management, a fund administration or a fund investment advisor’s licence.”;

- (c) by inserting after subsection (2), the following new subsection:
 “(2A) The Commission may, on the application of an applicant for investment business licence, exempt the applicant from the requirement to submit a business plan.”; and
- (d) in subsection (3) (b) by adding after the words “three years of operation”, the words “or such other period as the Commission may, on the application of the applicant or on the Commission’s own volition, otherwise direct.”.

Section 12 amended. 4. Section 12 of the principal Code is amended by deleting the words “as far applicable to the applicant” and replacing them with the words “as far as is applicable to the applicant”.

Section 14 amended. 5. Section 14 of the principal Code is amended

- (a) by deleting the word “and” at the end of paragraph (f);
- (b) by deleting the full stop at the end of paragraph (g) and replacing it with a semi-colon; and
- (c) by inserting after paragraph (g), the following new paragraphs:
 “(h) a financing business licence; and
 (i) an investment business licence, where the licensee is resident in the Virgin Islands.”.

Section 15 amended. 6. Section 15 of the principal Code is amended

- (a) by deleting the colon at the end of the opening paragraph and adding the words “set out in Schedule 1A.”;
- (b) by adding immediately below the marginal note the word “Schedule 1A”;
- (c) by deleting the word “and” at the end of paragraph (d);
- (d) by deleting the full-stop at the end of paragraph (e) and replacing it with a semi-colon, and adding after the semi-colon the word “and”; and
- (e) by adding after paragraph (e), the following new paragraph:
 “(f) where by virtue of the FSC Act or any financial services legislation any other independent officer (by whatever name called) is required to be approved by the Commission, that independent officer.”.

Section 16
amended.

7. Section 16 of the principal Code is amended in subsection (1) by deleting paragraph (b) and replacing it with the following paragraph:

“(b) where the licensee is required to appoint an auditor, actuary or other independent officer, the auditor, actuary or other independent officer appointed is fit and proper.”

The Explanatory Notes after section 16 of the principal Code are amended

(a) in paragraph (i), by adding the following after the last sentence:

“In addition, where in the FSC Act or any regulatory legislation the approval of the Commission is required in relation to an independent officer of a regulated person, the same fit and proper criteria would equally apply. It is therefore essential that in submitting applications with respect to any of the persons referred to in section 15, the fit and proper requirements outlined in Schedule 1A are fully observed.”;

(b) in paragraph (ii), by deleting the words “auditor and actuary” in the opening paragraph and “auditor or actuary” in sub-paragraph (a) and respectively replacing them with the words “auditor, actuary and independent officer” and “auditor, actuary or independent officer”;

(c) in paragraph (v), by deleting the words “or one of its directors, senior managers or significant owners” and replacing them with the words “or any of its functionaries (as referred to in section 15)”;

(d) in paragraph (vii), by deleting the last sentence and replacing it with the following sentence:

“In this context, it is essential that the persons referred to in section 15 are cognizant of and seek to fully satisfy the fit and proper criteria outlined in Schedule 1A.”; and

(e) by deleting paragraphs (viii) to (xxi).

Section 19
amended.

8. Section 19 of the principal Code is amended

(a) by inserting after subsection (2), the following new subsection:

“(2A) The Commission may, where it considers it necessary, require a licensee that is not specified in paragraphs (i) to (vi) of subsection (2) (b), to have at least one of its directors resident in the Virgin Islands.”; and

(b) by deleting subsection (6) and replacing it with the following subsection:

“(6) Subsection (5) does not apply to

(a) a subsidiary of the holder of a Class I or Class II trust licence that is listed on the licence under section 10(2) of the Banks and Trust Companies Act, 1990; or

(b) a licensed fund manager, a licensed fund administrator or a licensed fund investment advisor, provided that the licensed fund manager, fund administrator or fund investment advisor has at least one director who is an individual.”.

Section 34 amended.

9. Section 34 (3) of the principal Code is amended

(a) in paragraph (a), by deleting the word “and”;

(b) in paragraph (b), by deleting the full-stop and replacing it with “; and”; and

(c) by adding after paragraph (b), the following new paragraph:

“(c) a category 5 investment business licence.”.

Section 39 amended.

10. Section 39 of the principal Code is amended by adding after subsection (3), the following new subsection:

“(4) A licensee shall not, without the written consent of the Commission and whether before or after the expiration of the retention period, alter, destroy or erase any record which is, or may be, relevant to any

(a) enforcement action being taken by the Commission;

(b) matter which is being investigated by the Commission or any law enforcement authority in the Virgin Islands; or

(c) matter which is the subject of, or relates to, a request from a foreign regulatory authority or law enforcement authority.”.

Section 40 amended.

11. Section 40 of the principal Code is amended by deleting subsection (2) and replacing it with the following subsection:

“(2) This Division is subject to any exemption specified in an enactment made pursuant to section 40C (1) of the FSC Act or in a regulatory legislation with respect to compliance by a licensee or a compliance officer referred to in subsection (1).”.

The Explanatory Notes to section 40 are amended by deleting paragraph (v) and replacing it with the following paragraph:

“(v) *The FSC Act provides a mechanism for exempting certain licensees from specified obligations under the FSC Act or a regulatory legislation and the circumstances in which the Commission may grant exemptions to licensees. For example, the Financial Services (Exemptions) Regulations, 2007 and Financial Services (Miscellaneous Exemptions) Regulations, 2010 (Exemption Regulations) exempt certain licensees from the requirement to appoint compliance officers and the circumstances in which the Commission will grant specified exemptions. This Division applies to such licensees and with respect to compliance officers to the extent specified in any Exemption Regulations or other applicable legislation. Consequently, this Division must be read subject to any applicable exemptions contained in the Exemption Regulations or other applicable legislation.*”

Section 43
amended.

12. Section 43 of the principal Code is amended in subsection (1) by deleting the words “the Financial Services (Exemptions) Regulations, 2007” and replacing them with the words “an exemption provided under section 40C (1) of the FSC Act or a regulatory legislation”.

Section 44
amended.

13. Section 44 of the principal Code is amended

(a) by deleting subsection (2) and replacing it with the following sub-section:

“(2) A licensee is not required to appoint a person approved by the Commission during the temporary absence of the compliance officer where an exemption provided pursuant to section 40C (1) of the FSC Act or under a regulatory legislation is in effect.”; and

(b) by adding after subsection (2), the following new subsection:

“(3) Where the period of absence of a compliance officer is anticipated to be longer than five days, the licensee shall appoint a competent individual from within the licensee to perform the duties of the compliance officer during the latter’s temporary absence.”.

The Explanatory Notes that follow section 44 are amended

(a) in paragraph (iv) by deleting the last sentence;

(b) in paragraph (viii) by deleting the words “three years” and replacing them with the words “five years”;

(c) by deleting paragraph (xvii) and replacing it with the following paragraph:

“(xvii) Where the temporary absence is very short, it may not be necessary to identify another individual to undertake the compliance functions in the absence of the compliance officer. However, in order to avoid a situation where the length of the period of absence from office of the compliance officer would compromise the compliance functions, a licensee is required to identify and appoint another individual to perform the compliance functions during the period of temporary absence of the compliance officer. That other individual does not require any approval from the Commission in order to be appointed to perform the functions of the compliance officer. As provided in section 44 (3), the stipulated period that would trigger an appointment of this type is five days where the licensee contemplates that the temporary absence of the compliance officer from office would exceed that period. The Commission expects the licensee to know in advance whether or not the absence of the compliance officer from office would exceed the stipulated period and therefore make necessary arrangements for a suitable individual to perform the compliance functions. In circumstances where the absence of a compliance officer beyond the stipulated period is occasioned by ill-health or other un-contemplated or unavoidable cause, the licensee is nevertheless expected to appoint another competent individual to perform the compliance functions.”; and

(d) by deleting paragraph (xviii) and replacing it with the following paragraph:

“(xviii) Where an individual is appointed to perform the compliance function of a licensee, the Commission would consider him to be the licensee’s compliance officer within the meaning of the FSC Act. While the appointment itself does not require any approval of the Commission before it is effected (as already noted in paragraph (xvii) above), the individual is obligated to perform all the requisite compliance functions as if he were the approved compliance officer. It should be noted that paragraph 3 of Schedule 1 of the Financial Services (Miscellaneous Exemptions) Regulations, 2010 is instructive as regards the duration of temporary absence – the cumulative period not exceeding eight weeks (taken consecutively or otherwise) or fifteen per cent of the compliance officer’s time in a consecutive twelve month period – and accordingly reference must be made thereto.”.

Section 55 amended.

14. Section 55 of the principal Code is amended

- (a) by designating the existing provision as subsection (1); and
- (b) by inserting the following subsection after the existing provision:

“(2) For the purposes of section 67(1) of the Securities and Investment Business Act, 2010, “relevant licensee” means a licensee that

- (a) is a BVI undertaking; and
- (b) holds an investment business licence.”.

Section 56 amended.

15. Section 56 of the principal Code is amended

- (a) in subsection (5), by inserting at the beginning of paragraph (b), the words “subject to subsection (6),”; and
- (b) by adding after subsection (5), the following new subsections:

“(6) Subsection (5) (b) and section 75 (2) (c) of the Securities and Investment Business Act, 2010 do not apply to a licensed fund manager, a licensed fund administrator or a licensed fund investment advisor if

- (a) the licensed fund manager, licensed fund administrator or licensed fund investment advisor has provided the Commission with not less than 14 days written notice of its intention to appoint the person concerned as auditor; and
- (b) the Commission has not, prior to the person’s appointment as auditor, provided the licensed fund manager, licensed fund administrator or licensed fund investment advisor notice that it objects to the appointment.

(7) For the purposes of subsection (6) (a), the 14 day period shall be computed from the date of receipt by the Commission of the notice referred to in that subsection.

(8) Where, prior to the coming into force of this Code, an auditor had been approved by the Commission under a regulatory legislation or as part of the licensing of the licensee and the auditor is not a member of any of the professional bodies outlined in subsection (1) (a) to (f), the professional body of which the auditor is a member shall be deemed to be recognised by the Commission by virtue of subsection (1) (g) in respect of that auditor only.”.

The Explanatory Notes that follow section 56 are amended by inserting after paragraph (v), the following new paragraph:

“(vA) *Section 56 of the Code outlines the relevant professional bodies that are recognised for purposes of assessing the qualification of an auditor. It is noted that prior to the coming into effect of the Code, some auditors were considered and approved by the Commission either pursuant to a specific*

regulatory legislation or as part of the licensing process. Those that fall under section 56 (1) (a) – (f) meet the first test outlined in subsection (2) (a). There will be those whose professional bodies are not specifically listed in section 56 and would therefore fall to be considered under subsection (1) (g) and thus require specific recognition by the Commission on a case by case basis. By virtue of subsection (8), the Commission considers auditors whose professional bodies are not specifically listed in subsection (1) but who were approved by the Commission prior to the coming into force of the Code to continue to be approved and their respective professional bodies therefore recognised under subsection (1) (g). This recognition, however, is only in relation to such auditors and new auditors requiring approval will be treated as provided in section 56. The Commission does not therefore require the submission of any new applications for approval in respect of those auditors that were approved prior to the coming into force of the Code and this would include auditors that were so appointed by fund managers, fund administrators and fund investment advisors.”

Section 61
revoked.

16. Section 61 of the principal Code is revoked and replaced by the following section:

“Professional indemnity insurance. 61. (1) A licensee shall only engage an auditor that carries on business in the Virgin Islands if the auditor maintains at all times professional indemnity insurance with an eligible insurer that provides minimum a minimum cover of \$500,000 for any one claim and \$5,000,000 in aggregate.

(2) Where an auditor that carries on business in the Virgin Islands is part of a group that provides professional indemnity insurance for its members with an eligible insurer for a minimum cover equivalent to or exceeding the cover prescribed in subsection (1), the professional indemnity insurance of the group shall be accepted as satisfying the requirement of subsection (1).”

The Explanatory Notes that follow section 61 are amended

(a) by inserting after paragraph (i), the following new paragraph:

(iA) *“Sections 68 to 80 of the Securities and Investment Business Act, 2010 (the provisions governing financial statements and audit) only apply to “relevant licensees”. Section 67(1) of that Act requires the Code to designate licensees as “relevant licensees” for this purpose. Section 55(1) of the Code provides, in effect, that all investment business*

licensees that are BVI undertakings are relevant licensees, except for investment advisers.”;

(b) by inserting after paragraph (v), the following new paragraph:

“(vA) Section 67(2) of the Securities and Investment Business Act, 2010 provides that sections 68 to 80 of that Act apply to relevant licensees except to the extent that they may be disapplied or modified by the Regulatory Code with respect to particular categories, types or descriptions of licensee.

*Pursuant to this power, section 56(6) of the Code disapplies section 75(2)(c) of that Act to substitute a “no objection” procedure for the appointment of an auditor by a licensed fund manager or a licensed fund administrator for the usual approval process.”; **and***

(c) by inserting after paragraph (xii), the following new paragraph:

“(xiiA) However, in order not to place BVI auditors that belong to a group at a disadvantage, section 61 (2) introduces a necessary flexibility whereby BVI auditors can benefit from a group professional indemnity insurance. The only caveat is that the group professional indemnity insurance must not be in relation to a cover that goes below the minimum sums outlined in subsection (1); it would therefore be possible for a BVI auditor within an insured group to benefit from any higher insurance cover taken by the group, irrespective of the jurisdiction in which the insurance cover is placed.”.

Section 62
amended.

17. Section 62 (1) of the principal Code is amended in the definition of “customer money” by deleting the words “, subject to subsection (2),”.

Section 63
amended.

18. Section 63 of the principal Code is amended

- (a) by designating the existing provision as subsection (1);
- (b) by deleting paragraph (b) of the existing provision;
- (c) in paragraph (e) of the existing provision,
 - (i) by inserting before the word “asset”, the word “customer”;
and
 - (ii) by deleting the words “it shall be” and replacing them with the words “the asset is”; and
- (d) by adding after the existing provision, the following new subsections:

“(2) Where the holder of a Class I or Class II trust licence (“the licensee”) registers customer assets in the name of a subsidiary listed on its licence under section 10 (2) of the Banks and Trust Companies Act, 1990 as nominee, the licensee shall accept responsibility for the acts or omissions of the subsidiary.

(3) This section does not apply to a person who has an investment business licence in relation to customer assets that are investments within the meaning of Schedule 1 of the Securities and Investment Business Act, 2010.”.

Section 66 amended. 19. Section 66 of the principal Code is amended by deleting subsection (1) and replacing it with the following subsection:

“(1) A licensee shall ensure that

(a) customer money is not mixed with other money; and

(b) customer money held with respect to a customer is not used for another customer, without proper authority.”.

Sections 69A and 69B inserted. 20. The principal Code is amended by inserting after the Explanatory Notes that follow section 69, and immediately before the heading “*Relationship with, and Reporting to, the Commission*”, the following heading and sections:

“*Complaints*

Complaints policy and procedures.

69A. A licensee shall

(a) establish and maintain a complaints policy which provides for the effective consideration and proper handling of any complaints made to the licensee and for appropriate remedial action to be taken, where appropriate; and

(b) maintain a complaints register in which the licensee shall record any complaints received together with details of how the complaint has been, or is being, dealt with.

Significant complaints.

69B. (1) Subject to subsection (2), for the purposes of this section, “significant complaint” means a complaint that alleges

(a) a breach of a regulatory enactment;

- (b) bad faith, malpractice or impropriety on the part of the licensee or one of its directors, employees or agents;
- (c) the repetition or recurrence of a matter previously complained of (whether significant or otherwise); or
- (d) that the complainant has suffered, or may suffer, financial loss that is material in relation to his financial circumstances.

(2) A complaint shall not be treated as significant if it relates to a minor clerical error.

(3) A significant complaint shall be considered by a senior manager of the licensee who is independent of the circumstances that gave rise to the complaint or, if this is not practicable, by a director of the licensee.

(4) If a significant complaint remains unsettled for longer than three months, the licensee shall immediately inform the Commission of the complaint and shall also advise the complainant that he may inform the Commission directly of his complaint.

(5) Where a licensee has given a substantive response in relation to a significant complaint, unless and until the licensee has received an indication from the complainant that the response is unsatisfactory, the licensee is entitled to treat the complaint as settled after the expiry of four weeks from the date of delivery of its response or, if the response is delivered by post, from the date of postage.”.

Section 73 amended. 21. Section 73 of the principal Code is amended by inserting after the definition of “capital base”, the following new definition:

““capital resources”, in relation to a bank, means its tier 1 capital and tier 2 capital;”.

Section 138 amended. 22. Section 138 of the principal Code is amended by adding after the words “A. M. Best Company”, the words “or an equivalent financial strength rating assigned by an equivalent rating company”.

Section 151 amended. 23. Section 151 of the principal Code is revoked and replaced by the following section:

“Variation and exemption re insurance requirements. 151. (1) The Commission may, on the written application of a licensed insurance manager or licensed insurance intermediary, vary the requirements specified in section 150.

(2) A licensed insurance manager or a licensed insurance intermediary that is part of a group that provides professional indemnity insurance for its members is not required to comply with section 150 so long as the licensed insurance manager and licensed insurance intermediary is fully covered under the group professional indemnity insurance.”.

Section 153 amended. 24. Section 153 of the principal Code is amended by adding after subsection (2), the following new subsection:

“(3) For the purposes of this section, “capital resources”, in relation to a licensed trust company, means its unencumbered contributed capital.”.

Section 156 amended. 25. Section 156 of the principal Code is amended by adding after subsection (5), the following new subsections:

“(6) Where a specified trust company to which subsection (5) applies is liable to pay an additional regulatory deposit, the additional regulatory deposit shall be calculated as at 31st December, 2010 and paid to the Commission no later than 31st January, 2011.

(7) Nothing contained in this section shall be construed as requiring the Commission to effect a refund of all or any part of any regulatory deposit paid pursuant to the Banks and Trust Companies Act, 1990 or the Company Management Act, 1990.”

Section 162 amended. 26. Section 162 of the principal Code is revoked and replaced by the following section:

“Variation and exemption re insurance requirements. 162. (1) The Commission may, on the written application of a licensed trust company or a licensed company manager, vary the requirements specified in sections 160 and 161.

(2) A licensed trust company or a licensed company manager that is part of a group that provides professional indemnity insurance for its members is not required to comply with sections 160 and 161 so long as the licensed trust company or licensed company manager is fully covered under the group professional indemnity insurance.”.

Section 174 amended. 27. Section 174 of the principal Code is amended

- (a) by deleting “(1)” such that the section stands on its own without any subsection; and
- (b) by deleting the words “Subject to section (3)” and replacing them with the words “Subject to section 173”.

Part VII
inserted.

28. The principal Code is amended by inserting after Part VI, the following new Part:

“PART VII

INVESTMENT BUSINESS

Preliminary

Interpretation
for this Part.

178.

(1)

For the purposes of this Part,

“Act” means the Securities and Investment Business Act, 2010;

“BVI licensee” means a licensee that is a BVI undertaking;

“capital resources” means,

- (a) in relation to a licensee that is a BVI business company, its unencumbered contributed capital and such other capital resources as the Commission may specify in respect of that licensee; and
- (b) in relation to any other BVI licensee, such resources as the Commission shall specify in respect of that licensee;

“contributed capital” means, in the case of a licensee that is a BVI business company,

- (a) monies paid, and
- (b) the value of other consideration provided,

for ordinary shares that have been issued by the licensee;

“licence” means an investment business licence;

“licensee” means a person that has a licence;

“non-domiciled fund administrator” means, subject to subsection (2), a licensed fund administrator the principal office of which is situated outside the Virgin Islands;

“non-domiciled fund manager” means, subject to subsection (2), a licensed fund manager the principal office of which is situated outside the Virgin Islands;

“professional investor” means an individual who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of \$1,000,000 or its equivalent in any other currency and that he consents to being treated as a professional investor for the purposes of this Part; and

“retail customer” means an individual who is acting for purposes which are outside his trade, business or profession, but excludes a professional investor.

(2) In the circumstances specified in subsection (1), the Commission may, by notice issued to a fund administrator or fund manager, direct that, for the purposes of this Part, the fund administrator or fund manager shall not be regarded as being a non-domiciled fund administrator or fund manager, as the case may be.

(3) The Commission may issue a notice under subsection (2) where it considers that, by virtue of the nature or extent of the activities of the fund administration or fund management carried on in the Virgin Islands, the fund administrator or fund manager should be regarded as being domiciled in the Virgin Islands.

Scope of this Part.

179. (1) Subject to subsection (2), this Part applies to all licensees.

(2) This Part does not apply to a licensee that has a category 7 licence (operating an investment exchange).

Records. 180. Any matter required under this Part to be recorded shall be recorded in written form and the record shall be retained for the retention period.

EXPLANATORY NOTES

- (i) *This Part applies to all investment business licensees, except for a person holding a category 7 licence (operating an investment exchange). The business of operating an investment exchange is very different from all other forms of investment business and many of the provisions in this Part would not be appropriate. If an investment exchange was to be established in the BVI, it would be subject to its own legislation.*
- (ii) *Division 2 contains provisions that are applicable only to licensees who act as a functionary in relation to mutual funds.*
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DIVISION 1 – CAPITAL AND INSURANCE REQUIREMENTS

Over-riding capital resource requirement

- Over-riding capital resource requirement. 181. (1) A BVI licensee shall
- (a) ensure that, at all times, it maintains its capital resources at a level that is adequate to support its investment business, taking into account the nature, size, complexity, structure and diversity of that business and its risk profile; and
 - (b) maintain adequate systems and controls to monitor and assess its capital adequacy requirements on an ongoing basis.
- (2) The requirement in subsection (1) (a) applies in addition to any specific capital resource requirements specified
- (a) in this Part of the Code; or
 - (b) by the Commission under section 8 (2) (a) or (b) of the Act.
- (3) The board and senior management of a BVI licensee shall make their own determination of the capital

resources that are reasonably required to support the licensee's business, taking into account its risk profile, and shall ensure that the licensee's capital resources are increased beyond the minimum required by this Code where appropriate.

- (4) On at least an annual basis,
 - (a) senior management of a BVI licensee shall report to the board on the scope and performance of the systems and controls established to monitor and assess the licensee's capital adequacy requirements; and
 - (b) the board shall review those systems and controls taking into consideration the report by senior management.

Professional indemnity and other insurance

Insurance requirements. 182. (1) A BVI licensee shall, subject to subsection (2), ensure that, at all times, it maintains such professional indemnity, fidelity and other insurance as is appropriate taking into account the nature, size, complexity, structure and diversity of its licensed business.

(2) Where a BVI licensee determines that, having regard to the nature, size, complexity, structure and diversity of its licensed business, a professional indemnity insurance is not appropriate in its case, subsection (1) shall not apply, but the BVI licensee shall notify the Commission of that fact in writing stating its reasons.

EXPLANATORY NOTES

Introduction

- (i) *Section 8 of the Securities and Investment Business Act, 2010 enables the Code to specify capital resource requirements for licensees. Given that international standards concerning the capitalisation of investment intermediaries are not yet fully developed, the Commission has determined that it would be premature for generally applicable capital resource requirements to be prescribed at this time. In the circumstances, as permitted by section 8(2)(b) of the Act, the Commission will set capital resource requirements for BVI*

licensees on a case-by-case basis, taking into account the business of the licensee and the risks that it faces. The Commission will issue separate guidance with regard to this matter.

- (ii) *In determining the appropriate capital resource requirements for a licensee, the Commission will take into account the type of licence held. For example, where a licensee only holds a category 4 licence (investment advisor), the Commission is unlikely to impose anything more than a contributed capital requirement. However, other licensees may be subject to both a minimum contributed capital requirement and a minimum net asset requirement.*

Over-riding Capital Resources Requirement

- (iii) *Section 181 of the Code is intended to ensure that a BVI licensee has sufficient capital resources to support its business. For most BVI licensees, “capital resources” means unencumbered contributed capital, although the Commission may provide for other types of capital resources on a case-by-case basis; the Commission does not expect to prescribe capital resources that would be a fit-for-all. It should be noted that the minimum capital resources specified by the Commission may not provide a licensee with adequate capital resources to support its business. It is important therefore that the board and senior management of every BVI licensee make their own determination of the capital resources that are reasonably required to support the licensee’s business, taking into account its risk profile, and it is the responsibility of the board and senior management to ensure that the capital resources of the licensee are increased beyond the minimum requirements set out in the Code where appropriate.*
 - (iv) *The Commission may, as part of its on-site and off-site monitoring programme, review a licensee’s own assessment of its capital resource requirements.*
 - (v) *Failure to comply with section 181 of the Code may result in the Commission taking enforcement action against a licensee, even though the licensee may be in compliance with the specific capital resource requirements applicable to it.*
-

DIVISION 2 – CONDUCT OF BUSINESS

General Requirements

- General conduct of business standards. 183. A licensee shall, in carrying on its licensed business, act honestly, fairly and with due skill, care and diligence in fulfilling the responsibilities that it has undertaken.
- Fund functionaries. 184. A licensee, when acting as the functionary of a fund shall, subject to any agreement between the licensee acting as functionary and the fund,
- (a) act in the best interests of the fund;
 - (b) if it acts as functionary for more than one fund, ensure that all the funds for which it acts are, between each other, dealt with fairly and that no fund is given an unfair advantage;
 - (c) in its dealing with investors of the fund, ensure that all investors are treated fairly.
- Valuation and pricing of fund property. 185. (1) If a licensee, when acting as a fund functionary for a public fund, has responsibility for the valuation of the fund's fund property, subject to subsection (2), it shall, in carrying out those responsibilities, comply with the fund's valuation policy and procedures and the provisions of the Public Funds Code, 2010 relating to valuation and pricing.
- (2) Subsection (1) does not apply if the fund's valuation policy does not comply with the Public Funds Code, 2010.
- Client agreement: retail customer. 186. (1) Where a licensee provides services constituting investment business to a retail customer ("the services"), it shall do so under a written agreement signed by both the licensee and the customer.
- (2) An agreement entered into under subsection (1) shall set out in adequate detail the basis and terms on which the services are provided, including specifying
- (a) whether or not the services are to be provided on an execution only basis; or

- (b) if discretion is to be exercised by the licensee, the extent of the discretion to be exercised.

Client agreement: provides services constituting investment business to a customer who is not a retail customer (“the services”), whether on a discretionary basis or otherwise, it shall provide the customer with the terms on which the licensee is prepared to provide the services.

(2) If it is not practicable for a licensee to provide the information required by subsection (1) before commencing business with the customer, the licensee shall provide the information to the customer as soon as reasonably practicable.

Disclosure. 188. (1) Before providing services that constitute investment business to a customer, a licensee shall disclose to the customer in writing,

- (a) the basis or amount of the licensee’s charges for the provision of those services; and
- (b) in the case of a retail customer, details of the licensee’s professional experience in relation to the services to be provided.

(2) A licensee shall not provide advice to a retail customer concerning a transaction or investment strategy or act as a discretionary manager for a retail customer unless the licensee has taken reasonable steps to make the customer aware of the risks involved and of any conflicts of interest.

Suitability. 189. (1) This section and section 190 apply in relation to retail customers only.

(2) Where a licensee is responsible for providing advice to, or exercising discretion for, a customer, it shall obtain, record and maintain any information about the circumstances (both financial and otherwise) and the investment objectives of the customer that are relevant to the advice to be provided or the discretion to be exercised.

(3) If a customer declines to provide information concerning his circumstances and investment objectives, a licensee must not provide advice to, or exercise discretion on behalf of, the customer unless it has first disclosed to the customer that the lack

of such information may adversely affect the service that it can provide.

(4) A licensee shall take reasonable steps to ensure that it does not in the course of its licensed business provide any advice to a customer, or exercise a discretion for a customer, unless the advice, or exercise of discretion, is suitable for the customer having regard to

- (a) the facts disclosed by the customer, including facts disclosed in a fund prospectus or offering document (if any);
- (b) the terms of any agreement with the customer; and
- (c) any other relevant facts about the customer of which the licensee is, or should reasonably be, aware.

(5) A licensee shall take reasonable steps to ensure that the facts about a customer that it is required to take into account are recorded as soon as the licensee becomes aware of them.

Charges. 190. The fees and charges levied by a licensee for the provision of investment business services shall not be unreasonable in the circumstances.

Dealing and Managing

Customer 191. A licensee shall deal with customer and own account orders fairly and in due turn.

Timely execution. 192. (1) Once a licensee has agreed with a customer or decided in its discretion to effect or arrange a customer order, it shall effect or arrange the execution of the order as soon as reasonably practicable in the circumstances, unless postponement of the order is in the best interests of the customer.

(2) Where a licensee decides to postpone an order in the best interests of the customer, it shall record the decision together with reasons for the decision.

Allocation of orders. 193. (1) A licensee shall

- (a) ensure that a transaction it executes is

promptly allocated; and

- (b) record the intended basis of allocation when
 - (i) the licensee is dealing for one or more customers, either before or as soon as possible after the transaction is effected; or
 - (ii) the licensee is dealing for one or more customers and itself, before the transaction is effected.

(2) If a licensee discovers an error, either in the intended basis of allocation or in the actual allocation, it may recommence the allocation on a different and correct basis provided that a record of the reason for reallocation is made at the time of reallocation.

(3) Each allocation made by a licensee shall be made in accordance with standards and procedures which are uniform for all allocations made by the licensee.

Aggregation
of orders.

194. (1) A licensee shall not aggregate an order of a customer with the order of another customer or of the licensee unless

- (a) otherwise agreed between the licensee and the customer;
- (b) it is in the overall best interest of the customer concerned; or
- (c) any possible disadvantage has been disclosed to the customer concerned.

(2) When a licensee has aggregated an order for a customer transaction with an order of its own account transaction, or with another order for a customer transaction, then in the subsequent allocation

- (a) it must not give unfair preference to itself or to any of those for whom it dealt; and
- (b) if all orders cannot be satisfied, it must give priority to satisfying orders for customer

transactions unless it believes on reasonable grounds that, without its own participation, it would not have been able to effect those orders either on such favourable terms or at all.

Best execution. 195. (1) Where a licensee deals with or for a customer, it must seek to provide best execution, unless there is a specific instruction, in writing, from the customer.

(2) For the purposes of subsection (1), a licensee provides best execution for a customer if

- (a) it takes reasonable care to ascertain the price which is the best available for the customer in the relevant market at the time for transactions of the kind and size concerned; and
- (b) unless the circumstances require it to do otherwise in the interests of the customer, it deals at a price which is no less advantageous to the customer.

(3) A licensee may rely on another person who executes the transaction to provide best execution, but only if it believes on reasonable grounds that the other person will do so.

(4) In applying best execution, a licensee shall

- (a) have regard to the best price, the likelihood of execution and settlement at that price, the costs of execution and the nature of the order; and
- (b) leave out of account any charges disclosed to the client which it or its agent would make.

(5) A licensee shall establish and implement a best execution policy.

Churning and switching. 196. A licensee shall not, unless otherwise agreed with a customer,

- (a) advise the customer to deal or to switch within or between investments, or

- (b) in the exercise of the licensee's discretion, deal or arrange a deal or effect such a switch for the customer,

if the dealing or switching would reasonably be regarded as too frequent in the circumstances.

Front running. 197. (1) Subject to subsection (2), if a licensee or a person connected with the licensee intends to publish to customers a recommendation, or a piece of research or analysis, in relation to a particular investment, it shall not

- (a) deal in the investment, or any related investment, on its own account, or
- (b) deal in the investment, or any related investment on behalf of the connected person,

until the customers for whom the publication was principally intended have had, or are likely to have had, a reasonable opportunity to react to it.

(2) A licensee is deemed not to have contravened subsection (1) if

- (a) the publication could not reasonably be expected to materially affect the price of the investment concerned or any related investment;
- (b) the licensee is a market maker in the investment concerned and the deal was executed or arranged in good faith in the normal course of market making;
- (c) the licensee deals in order to fulfil an unsolicited customer order;
- (d) the licensee believes on reasonable grounds that it needs to deal to fulfil customers' orders which are likely to result from publication, and that its doing so will not cause the price of the investment which is the subject of the written recommendation, or piece of research or analysis, to move against customers' interests by a material amount; or

- (e) the licensee or the person connected with the licensee discloses in the publication that it or, the connected person, has effected, or may effect, an own account transaction in the investment concerned or any related investment.

(3) For the purposes of this section “connected person” has the same meaning as “connected party” in section 102 of this Code.

Conflicts of Interest

Requirements concerning conflicts of interest.

198. (1) A licensee shall
- (a) either avoid any conflict of interest arising or, where conflicts arise, should ensure fair treatment to all its customers by disclosure, internal rules of confidentiality, declining to act, or otherwise; and
 - (b) not unfairly place its interests above those of its customers.

(2) If a licensee has a material interest in a transaction to be entered into with or for a customer, or a relationship which gives rise to a conflict of interest relating to such a transaction, the licensee shall not knowingly either advise, or deal in the exercise of discretion, in relation to that transaction unless it takes reasonable steps to ensure fair treatment for the customer.

(3) Where the policies of a licensee to manage conflicts of interest made in accordance with section 197, are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the licensee shall clearly disclose the general nature and sources of conflicts of interest to the customer before undertaking business on its behalf.

(4) A licensee shall, in making disclosure under subsection (3), provide the customer with sufficient detail, taking into account the nature of the customer, to enable the customer to take an informed decision with respect to the investment business in the context of which the conflict of interest arises.

- Policies and procedures. 199. (1) Without limiting section 197, a licensee shall establish, maintain and implement a conflicts of interest policy which shall

- (a) identify, with reference to the licensed business carried on by the licensee, the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of its customers or any of them;
- (b) set out procedures for ensuring the fair treatment of its customers; and
- (c) if the licensee is a member of a group, take into account potential conflicts arising from its membership of the group.

(2) A licensee shall establish, and maintain systems and controls designed to ensure the effective implementation of its conflicts of interest policy.

(3) A licensee shall keep a record of any significant conflicts that arise in the conduct of its licensed business and the steps that it has taken to avoid or manage those conflicts of interest.

EXPLANATORY NOTES

Conflicts of Interest

- (i) *Section 198 (2) of the Code provides that, where a licensee has a material interest in a transaction, or a relationship, which gives rise to a conflict of interest, it shall not knowingly advise or deal in the exercise of discretion unless it takes reasonable steps to ensure fair treatment for the customer.*
- (ii) *In the case of a fund, the Commission considers that the “reasonable steps” to be undertaken by a licensee include satisfying itself that*
 - (a) *the transaction is not precluded by law, by the fund prospectus or offering document or the constituting documents; and*
 - (b) *the constitutional documents of the fund and its prospectus expressly permit the transactions to be effected despite the existence of a material interest or conflict or, either*
 - (A) *the licensee has fairly disclosed the potential interest or conflict in the prospectus or offering document, or in its*

most recent report to investors, not more than twelve months before the date of the transaction; or

- (B) *where such disclosure is impracticable, the licensee, in effecting the transaction, disregards the interest or conflict so that any disadvantage to the customer is avoided, or eliminates the interest or conflict.*
-

DIVISION 3 – CUSTOMER ASSETS

Scope of, and interpretation for, this Part.

200. (1) This Division applies to a licensee in relation to customer investments.

(2) In this Division,

“custodian” means a person providing custodial services with respect to investments within the meaning of paragraph 5 of Part A of Schedule 2 of the Act;

“customer investments”, in relation to a licensee, means customer assets that are investments within the meaning of Schedule 1 of the Act;

“licensed custodian” means a licensee that has a category 5 investment business licence;

“recognised country” means a country or jurisdiction recognised by the Commission pursuant to section 40 (4) of the Act;

“suitable custodian” means

- (a) a licensed bank or a bank that is licensed, as a bank, in a recognised country;
- (b) a licensed custodian; or
- (c) a person
 - (i) who is lawfully carrying on business as a custodian; and
 - (ii) whom the licensee is satisfied, both at the outset and on a continuing basis, is

a fit and proper person to act as a custodian.

Safekeeping of
customer
investments.

201.

(1) A licensee shall

- (a) keep safe, or arrange for the safekeeping by a suitable custodian of, documents of title or other ownership rights relating to customer investments;
- (b) take reasonable steps to ensure that any customer investments that are registrable, are properly registered either in the customer's name or, where agreed with the customer, in the name of a suitable custodian or a nominee that is
 - (i) chosen by the customer; or
 - (ii) a corporate nominee, the business of which is limited to the holding of investments and related activities.

(2) Where a licensee arranges for customer investments belonging to a customer to be registered in the same name as that in which the licensee's own investments, or the customer investments of another customer are registered, it shall ensure that

- (a) customer investments are separately identifiable from investments of the licensee; and
- (b) the customer investments of each customer are separately identifiable from each other.

(3) Where a licensee registers customer investments in the name of its subsidiary, the licensee shall accept responsibility for the acts and omissions of the subsidiary.

(4) Where a licensee holds documents of title to customer investments, title to which passes by delivery, the licensee shall ensure that the documents are stored in such manner as to minimise the risk of their loss due to theft, fire, flood or other physical damage.

(5) A licensee shall establish and maintain systems and controls designed to minimise the risk of the loss or diminution of

customer investments, through the misuse of the investments, fraud, inadequate administration or record keeping or negligence.

Use of customer 202. A licensee shall not investments.

- (a) use a customer's investments for its own account unless it has obtained that customer's prior written consent to do so; or
 - (b) lend, or arrange the lending of customers' investments to another person unless
 - (i) the customer to whom the investment belongs has consented, in writing, and the loan is subject to appropriate documented terms and conditions;
 - (ii) where customers' investments belonging to more than one customer are registered in the same name, each customer whose investments are so registered has consented, in writing, to the lending of customer investments registered in that name, and each customer's entitlement is clearly ascertained;
 - (iii) adequate collateral is obtained and maintained for the duration of the loan, in accordance with any written instructions given by the customer; and
 - (iv) the licensee arranges for all income, inclusive of dividends, fees or commissions, earned thereby (other than any fees payable to the licensee for arranging the loan) either to be paid to the customer directly or to be received by the licensee on the customer's account and treated as customer money, unless instructed otherwise by the customer."
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EXPLANATORY NOTES

- (i) *Although Division 3 of the Code applies to an investment business licensee in place of section 63 of the Code, the general provisions of the Code relating to client monies [sections 64 to 68] apply fully to such a licensee.*
 - (ii) *Section 201(2) will typically apply where title to investments is recorded electronically. Although the method by which this section is complied with is left to be determined by the licensee, the Commission considers that it will usually be appropriate for each customer's investments to be identified by an account designation that is unique to the customer and which is recorded as the account of that customer.*
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Schedule 1 amended.

29. Schedule 1 of the principal Code is amended by inserting after paragraph 7, the following new paragraph:

“8. An investment business licence issued under section 6 of the Securities and Investment Business Act, 2010.”.

Schedule 1A inserted.

30. The principal Code is amended by inserting after Schedule 1, the following new Schedule:

“SCHEDULE 1A

[Section 15]

BVI FINANCIAL SERVICES COMMISSION

GUIDANCE NOTES ON FIT AND PROPER TEST

[These Guidance Notes are a revision of the Guidance Notes on fit and proper test issued by the Commission in 1993]

INTRODUCTION

The BVI Financial Services Commission (“the Commission”) believes that the maintenance of a “fit and proper” environment is essential in ensuring that those who use financial services offered in the British Virgin Islands (Virgin Islands) are confident that business activities are conducted in accordance with high standards of market practice and integrity. Under the Financial Services Commission Act, 2001 (“the FSC Act”) and other financial services legislation, the Commission is responsible for ensuring that regulated persons and approved persons are equipped to conduct business activities in and from within the Virgin Islands.

The “fit and proper” assessment is both an initial test undertaken during consideration of an application for licensing, approval or authorisation and also a continuing and

cumulative test, which takes account of the ongoing conduct of both a regulated person and its senior managers (including other independent officers by virtue of the FSC Act or any regulatory legislation), and their history of compliance with all applicable Virgin Islands laws, regulations and Codes, and the nature of their relationships with the Commission.

The primary responsibility for ensuring that regulated persons are soundly and prudently directed rests with the regulated persons themselves. The Commission's expectations are that regulated persons will take the measures necessary to ensure that they, along with their senior managers and other independent officers, meet the Commission's "fit and proper" criteria both at the licensing or approval stage and on an ongoing basis.

The criteria on fit and proper test outlined in this Schedule are of an imperative nature and the Commission will use them in making its regulatory and supervisory assessments with respect to persons that are required to be licensed, approved or authorised by the Commission or, where applicable, to persons that in any way require the consent of the Commission for any activity or matter to be undertaken by them. Furthermore, where in the FSC Act or any financial services legislation provision is made which, in relation to a person, requires an assessment of fitness and propriety, these criteria on the fit and proper test will, unless otherwise excluded, be applied accordingly.

GENERAL

Interpretation

1. For the purposes of these Guidance Notes,

“adequate” means sufficient in terms of quantity, quality and availability;

“applicant” means a person who submits an application or in relation to whom an application is required to be submitted to the Commission for licensing, approval or authorisation;

“approved person” means a person required to be approved under the FSC Act or a financial services legislation;

“other independent officer” means any other person who by virtue of the FSC Act or a financial services legislation is required to be approved, licensed or authorised by the Commission;

“regulated person” means a person authorised, licensed, registered or recognised or required to be so authorised, licensed, registered or recognised under a financial services legislation;

“resources” includes all financial resources, non-financial resources and means of managing resources (for example, capital, provisions against liabilities, holdings of or access to cash and other liquid assets, human resources and effective means by which to manage risks);

“senior manager” has the meaning outlined in section 4 of the Regulatory Code, 2009; and

“significant owner”, with respect to an undertaking, means a person having a significant interest in the undertaking.

PART I KEY ELEMENTS OF THE FIT AND PROPER TEST

Fundamental principles in the fit and proper test

2. The Commission exercises judgment and discretion in assessing fitness and propriety in relation to an applicant or licensee, a director, senior manager, significant owner or other independent officer. This process takes into account all relevant matters, including the following:

- (a) **Honesty, Integrity and Reputation**
- (b) **Competence and Capability**
- (c) **Financial Soundness**

The Commission may consider criteria that fall outside the above categories. Some of the fit and proper criteria detailed in the subsequent paragraphs may be more relevant for a company and some for an individual, but most are relevant to both. Depending upon the person being assessed, greater emphasis may be placed on one or more of the above categories than the others. For example, in the case of a senior manager, significant emphasis would be placed on category (b), whereas this may not be relevant for a significant owner. However, categories (a) and (c) are likely to be extremely important for a significant owner.

Factors relevant in assessing fitness and propriety

3. In assessing honesty, integrity and reputation, the Commission will consider among other things, whether the regulated person or other person concerned

- (a) has been convicted, or is connected with a person who has been convicted, of any offence, particularly an offence involving dishonesty, fraud or other financial crime, or has been subject to any pending criminal proceedings that may lead to a conviction by any court in the Virgin Islands or elsewhere or civil proceedings which strongly bring into question its integrity or reputation;

- (b) has been the subject, or connected to the subject, of any existing or previous investigation or enforcement proceedings by the Commission, or any other regulatory authority, professional body or government body or agency within or outside the Virgin Islands;
- (c) has contravened, or is connected with a person who has contravened, any provision of any financial services legislation, or any code, directive, policy or guideline issued by the Commission or other relevant industry standards applicable in the Virgin Islands or elsewhere. The Commission will, however, take into account both the status of these instruments and relevant industry standards and the nature of the contravention;
- (d) has been refused or is connected to a person who has been refused, registration, authorisation, membership or licence to carry out a trade, business or profession or has had that registration, authorisation, membership or licence suspended, revoked, withdrawn or terminated, or has been expelled by a regulatory or government body; and
- (e) has been open and co-operative in all its dealings with the Commission and any other regulatory body and is committed to comply with all relevant legal, regulatory and professional obligations.

Additional factors in respect of senior officers

4. In addition, in relation to a director, senior manager or other independent officer, the Commission will, in assessing honesty, integrity and reputation, consider among other things, whether the director, senior manager or other independent officer

- (a) has been dismissed or asked to resign from employment, a position of trust or a fiduciary or similar appointment;
- (b) has been disqualified from acting as a director or in any managerial capacity, is the subject of any proceeding of a disciplinary or criminal nature, or has been notified of any potential proceedings or investigations which might lead to such proceedings; or
- (c) has been a director, partner, or concerned in the management of a business that has gone into insolvency, liquidation or administration while he has been connected with that business or within one year of the end of such connection.

The Commission will consider the above matters only so far as they are relevant to its assessment of whether a director, senior manager or other independent officer satisfies its honesty, integrity and reputation criteria. In the circumstances, whilst the Commission would consider the dismissal of a director on the grounds of his incompetence or misconduct to be highly relevant, it is unlikely that his redundancy would be relevant.

Similarly, with respect to paragraph 4 (c) above, the Commission would consider an insolvent liquidation to be relevant, but the liquidation of a company under a group restructuring scheme may not be relevant.

Competence and capability criterion

5. In order to satisfy the competence and capability criterion, a regulated person or applicant must be able to demonstrate to the Commission that its business is, or will be, soundly and prudently run. In making this assessment, the Commission will consider, among other things, whether

- (a) the regulated person or applicant has satisfactory experience or demonstrable expertise in operating a similar business and whether its existing regulated business in other jurisdictions is soundly and prudently operated;
- (b) the regulated person or applicant has, or will have, adequate human and technical resources with the appropriate range of skills and experience to understand, operate and manage the regulated person's or applicant's regulated activities;
- (c) the regulated person has, or will have, in place appropriate recruitment policies and adequate internal control systems and procedures which, among other things, are sufficient enough to ensure that all persons acting on its behalf or providing services to it meet the "fit and proper" criteria;
- (d) the regulated person or applicant has, or will have, established clear managerial reporting lines with regard to the operation of its business; and
- (e) the regulated person or applicant has a compliance history that can be properly and effectively assessed.

Application of competence and capability criterion to directors, senior managers, etc.

6. The competence and capability criterion outlined in paragraph 5 above also applies to directors, senior managers and other independent officers. In order for its directors, senior officers and other independent officers to meet this criterion, a regulated person or applicant must be able to demonstrate that they have the requisite qualifications, skills, capabilities and experience adequate to undertake the functions that they perform, or will perform, in relation to the regulated person or applicant. In addition, they must be assessed for proper conduct. Accordingly, in determining the competence and capability of a director, senior manager or other independent officer, the Commission will consider, among other things, whether

- (a) the director, senior manager or other independent officer has been dismissed or suspended from employment for drug or alcohol abuse or other abusive acts in the workplace;
- (b) the director, senior manager or other independent officer has the technical knowledge, skill, ability and experience necessary to perform the duties for which he is to be engaged. In this respect, recognised professional qualifications and membership of professional institutions will be particularly relevant and will be taken into account by the Commission; and
- (c) the director, senior manager or other independent officer has, or will have, sufficient time and commitment to properly discharge his duties upon being engaged.

Condition of licensing, approval and authorisation

7. It shall always be a condition of every licensing, approval or authorisation granted by the Commission that the person to whom the licensing, approval or authorisation relates must perform to the highest standards of market practice and act in a way that protects the best interests of consumers and investors, and the reputation of the Virgin Islands. The Commission will therefore expect every regulated person, director, senior manager and other independent officer to have a good knowledge and appreciation of the relevant standards of market practice.

Assessing financial soundness

8. In assessing the financial soundness of a regulated person or applicant, the Commission will assess whether the regulated person or applicant is solvent or can maintain solvency and has established or will establish prudent financial controls. A regulated person or an applicant must show that its business plan is viable and realistic and that it is in good standing to satisfy the financial soundness criterion and therefore has a good probability of continuance in the future.

Factors for determining financial soundness

9. In determining the financial soundness of a regulated person or applicant and its directors, senior managers and other independent officers, the Commission will consider matters such as, but not limited to, whether

- (a) there are any indications that the regulated person or applicant will not be able to meet its debts as they fall due;
- (b) relevant prudential requirements (including solvency margins) are met, or will be met, by the regulated person or applicant;

- (c) the regulated person or applicant or any of its directors, senior managers or other independent officers have been subject to any judgement debt or award that remains outstanding or has not been satisfied within a reasonable period;
- (d) the regulated person or applicant or any of its directors, senior managers or other independent officers have made an arrangement with creditors, filed for bankruptcy, or been adjudged bankrupt or had a receiver appointed over it; and
- (e) the regulated person or applicant or any of its directors, senior managers or other independent officers have been able to provide the Commission with financial references that are satisfactory to the Commission.

Application of financial soundness to directors, senior managers, etc.

10. Financial soundness is likely to be relevant with respect to significant owners and may be relevant to directors, senior managers and other independent officers. It will be of most significance where there is an expectation that a person having a significant interest in a regulated person or an applicant could be relied on to provide additional capital or other financial support to the regulated person or applicant, if required. Although directors, senior managers and other independent officers would not usually be expected by the Commission to have substantial financial resources, the Commission would consider insolvency and any unsatisfied judgments debts to be relevant. In any case, it should be noted that the criteria outlined in paragraph 9 above are relevant and will be taken into account in assessing the financial soundness of a significant owner, director, senior manager or other independent officer.

**PART II
OTHER MATTERS**

Relevance of functions to be performed

11. As indicated, the Commission carries out a fit and proper assessment on the basis of the functions that a director, senior manager or key functionary will undertake for the regulated person or applicant. The Commission will not consider a person to be fit and proper with respect to a particular function if that function materially conflicts with any other function that he undertakes, or will undertake. In determining the materiality of a conflict, the Commission will take into account whether any conflicts can be managed and, if so, whether satisfactory arrangements have been, or will be, put in place to manage them.

**PART III
PERSONS NO LONGER FIT AND PROPER**

Power of Commission to direct removal and replacement of senior officer, including revocation of appointment

12. Where the Commission is of the opinion that, in respect of a regulated person, a director, senior manager, other independent officer or other person undertaking a function specified in any financial services legislation does not satisfy the fit and proper criteria outlined in these Guidance Notes, section 40D of the FSC Act gives the Commission the power to require the regulated person to remove that person and to replace him with another person acceptable to the Commission. The regulatory enactments give the Commission the power to revoke the approval of a licensee’s auditor, and in the case of a licensed insurer its actuary, if it considers that the auditor or actuary has failed to fulfil his obligations or is otherwise not fit and proper. Similar powers, wherever granted in any financial services legislation, with respect to any specified person may also be exercised by the Commission.

Treatment of persons with significant interest in a regulated person

13. The Commission does not have the power to direct the removal of a person who has a significant interest in a regulated person. However, section 40B of the FSC Act enables the Commission to attach conditions to a licence at any time. If the Commission considers that a person having a significant interest in a licensee no longer meets its fit and proper criteria, it would impose a condition on the regulated person to the effect that the person concerned should not have a significant interest in the regulated person. In order to avoid enforcement action being taken against it, the regulated person would be obliged to ensure that the person concerned ceased to have a significant interest in it.”

Schedule 3
amended.

31. Schedule 3 of the principal Code is amended

(a) in paragraph 19, by inserting after the word “sale” in the definition of “transfer”, the word “acquisition,”; and

(b) by inserting after paragraph 19, the following new paragraph:

“19A. Any transfer of an interest in a licensee which does not require the approval of the Commission, where

(a) the person whose interest is transferred holds, or before the transfer held, an interest that is not a significant interest in the licensee; or

(b) as a result of the transfer, a person becomes the holder of an interest that is not a significant interest in the licensee.

In this paragraph “transfer” includes a sale, acquisition, charge or any disposal.”.

Schedule 6 amended. 32. Schedule 6 of the principal Code is amended in paragraph 2 by deleting from the third column of the part referenced “Part II, Division 5” in the first column, the words “31 March, 2010” and replacing them with the words “The date specified by the Commission by notice”.

Explanatory Notes amended. 33. The Explanatory Notes

- (a) following the section of the principal Code specified in Column 1 of the Schedule, and
- (b) specified in Column 2 of the Schedule,

are amended as specified in Column 3 of the Schedule.

SCHEDULE

[Section 33]

TABLE OF AMENDMENTS TO EXPLANATORY NOTES

COLUMN 1	COLUMN 2	COLUMN 3
<i>Section of principal Code</i>	<i>Explanatory Note amended/added</i>	<i>Amendment</i>

8	(ii) New (vi) and (vii)	<p>Delete “<i>Parts III to VI</i>” and substitute “<i>Parts III to VII</i>”.</p> <p>Add the following paragraphs after paragraph (v):</p> <p>“(vi) <i>Principle 3 requires a licensee to maintain adequate financial resources, including capital resources as appropriate, taking into account the nature, scale, complexity and diversity of its business and the risks it faces. Specific capital resource requirements are imposed on most licensees in the specific Part of the Code that applies to them. In addition, the specific Parts of the Code impose over-riding capital resource requirements on the licensees to which they are subject.</i></p> <p><i>Principle 3, by requiring the maintenance of adequate financial resources, imposes a broader obligation on licensees. Compliance with the specific capital resource requirements imposed by the Code does not necessarily mean that the licensee has sufficient financial resources as required by this Principle.</i></p> <p>(vii) <i>A licensee should, therefore, monitor its total financial resources, in addition to its capital resources, and take appropriate action to increase its financial resources if they are insufficient, given its particular circumstances.”.</i></p>
13	New (i) and (ii)	<p>Insert the following Explanatory Notes after section 13:</p> <p>(i) <i>The Commission understands that an applicant’s business plan will be dependent on the nature, size and complexity of the applicant’s business, or proposed business. An applicant with a small and uncomplicated business will probably not require a detailed business plan as contemplated under sections 11, 12 and 13 compared to an applicant with a larger business. It is in this context that it is considered essential that the Commission may on a case by case basis find it necessary and prudent to grant exemptions which may fall short of requiring a full business plan. Indeed, in</i></p>

		<p><i>appropriate cases the Commission may exempt an applicant from the requirement to submit any business plan.</i></p> <p><i>(ii) It should be noted further that section 11(4) provides that an applicant's business plan shall cover the matters listed in paragraphs (a) to (h) "as far as relevant to the applicant and the proposed business". Therefore the requirement to include the matters specified in those paragraphs must be viewed in the context of their relevance to the applicant and the applicant's business."</i></p>
24	(xvi)	<p>Insert the following paragraph after paragraph (xvi):</p> <p><i>"(xviA) The Commission notes that corporate directors who may be under the ultimate control of one individual may not provide an adequate span of control. For this reason, the Code provides that only an individual may be appointed as the director of a licensee. Provided that they have at least one individual director, the Code exempts investment business licensees and listed subsidiaries of the holder of a Class I or Class II trust licence from this requirement. However, this does not in any way lessen the need to have an adequate span of control. It is therefore essential that, where a corporate director is relied upon to provide adequate span of control, it is not controlled by the individual director."</i></p>

		<p><i>customer assets, and section 63 (1) (e) requires a licensee to ensure that a customer asset is properly registered, either in the customer's name or, where agreed with the customer, in the name of a nominee.</i></p> <p><i>(iii) Licensees should note that any person providing custodial services with respect to investments in or from within the BVI is required to be licensed under the Securities and Investment Business Act, 2010. Where arrangements are made for the proper safeguarding of assets by another person, or assets are registered in the name of a nominee in circumstances where the other person would be carrying on investment business within the meaning of that Act, the Commission would not consider section 63 (1) (c) or (e) to be complied with unless the person concerned has the appropriate licence.”.</i></p>
72	(x)	<p><i>In paragraph (b), delete “requires a licensed insurer” and substitute “and section 7(2) of the Securities and Investment Business Act, 2010 require a licensed insurer and a licensed investment business, respectively,”.</i></p>
73 - 75	(vi)	<p><i>Insert after paragraph (vi), the following new paragraph:</i></p> <p><i>(viA) “Section 12 (5) of the Banks and Trust Companies Act, 1990 provides that the definition of “capital resources” may be prescribed by the Code. Section 73 defines the “capital resources” of a bank as its tier 1 capital and tier 2 capital. This definition has effect for the purposes of the over-riding capital resources requirement in section 74.”.</i></p>

[Explanatory Note:

The Explanatory Notes outlined in this Schedule relate to those sections of the Code that have not been amended in this amendment Code. Where a section of the Code has been amended and the need arose to amend any Explanatory Note(s) relating to that amended section, the relevant

Explanatory Note relative to the amended section is amended immediately after the amended section. The Commission hopes to consolidate the Regulatory Code, 2009 in due course.]

Issued by the Financial Services Commission this 15th day of December, 2010.

(Sgd.)Robert Mathavious
Managing Director/CEO
Financial Services Commission