

# British Virgin Islands Financial Services Commission

## GUIDELINES AND OPERATING PROCEDURES OF THE ENFORCEMENT COMMITTEE

*Issued Pursuant to Section 17 (1) of the Financial Services Commission  
Act, 2001*

---



**Published** 8 April, 2008

Issued 7 April, 2008

FSC/G050

## CONTENTS

INTRODUCTION .....	6
--------------------	---

### CHAPTER ONE

#### ESTABLISHMENT, MEMBERSHIP AND FUNCTIONS OF THE ENFORCEMENT COMMITTEE AND RELATED MATTERS

<i>PRINCIPAL ENFORCEMENT FUNCTIONS OF THE FINANCIAL SERVICES COMMISSION</i> .....	8
<i>ESTABLISHMENT OF THE ENFORCEMENT COMMITTEE</i> .....	9
<i>MEMBERSHIP OF THE EC</i> .....	9
<i>Membership</i> .....	9
<i>Co-opting Officer into the EC</i> .....	9
<i>Chairmanship</i> .....	10
<i>FUNCTIONS OF THE EC</i> .....	10
<i>Functions</i> .....	10
<i>Delegating Authority</i> .....	11
<i>Form of Notice of Delegation</i> .....	12
<i>Notice of Extension Time in Respect of a Delegated Authority</i> .....	12
<i>APPOINTMENT AND DUTIES OF THE SECRETARY</i> .....	12
<i>MATTERS RELATED TO MEMBERSHIP AND FUNCTIONS OF THE EC</i> .....	13
<i>Meetings of the EC (General)</i> .....	13
<i>Meetings of the EC (Electronic Media)</i> .....	14
<i>Quorum of the EC</i> .....	14
<i>Voting in the EC</i> .....	14
<i>Tenure of Office</i> .....	15

### CHAPTER TWO

#### GUIDING PRINCIPLES TO BE OBSERVED BY THE ENFORCEMENT COMMITTEE

<i>ESSENTIAL GUIDING PRINCIPLES</i> .....	16
<i>Confidentiality</i> .....	16
<i>Consistency</i> .....	16
<i>Disclosure</i> .....	17
<i>Transparency</i> .....	17
<i>Professionalism</i> .....	17
<i>Due Process</i> .....	17
<i>Efficiency</i> .....	18
<i>Integrity</i> .....	18

<b>CONFLICT OF INTEREST</b> .....	<b>18</b>
<b>CODE OF CONDUCT</b> .....	<b>19</b>
<i>Use of Official Information</i> .....	19
<i>Exerting or Canvassing Influence</i> .....	20
<i>Accepting Gifts or Favours</i> .....	20
<i>Contact with the Media</i> .....	21
<i>Committing the EC or the Commission</i> .....	21
<i>Freedom to Debate</i> .....	22
<b>RULES OF NATURAL JUSTICE</b> .....	<b>22</b>
<b>RETROACTIVE Vs. RETROSPECTIVE APPLICATION OF LEGISLATION</b> .....	<b>25</b>

### **CHAPTER THREE**

#### **PRINCIPLES AND PROCEDURES TO BE OBSERVED IN THE ENFORCEMENT PROCESS**

<b>OBJECTIVES OF AND GENERAL APPROACH TO ENFORCEMENT</b> .....	<b>27</b>
<i>Objectives of Enforcement</i> .....	27
<i>General Approach to Enforcement</i> .....	28
<b>BREACHES AND OFFENCES</b> .....	<b>29</b>
<i>Breaches</i> .....	29
<i>Factors Relative to Breaches</i> .....	29
<i>Mitigating Factors in Relation to Breaches</i> .....	30
<i>Additional Factors to Consider</i> .....	31
<i>Offences</i> .....	31
<i>Factors to be Considered</i> .....	32
<i>Cooperation with the Prosecution</i> .....	32
<i>Compounding an Offence</i> .....	32
<i>Pre-requisites for Compounding an Offence</i> .....	33
<b>THE ROLE OF THE REGULATORY DIVISIONS</b> .....	<b>33</b>
<i>Procedure on Discovery of Breach</i> .....	33
<i>Procedure on Discovery of Offence</i> .....	35
<i>Referrals by the Licensing and Supervisory Committee</i> .....	35
<i>Unthreading the Conflict</i> .....	35
<i>Unthreading the Conflict Further</i> .....	36
<i>Referral from Other Sources</i> .....	37
<i>Dealing with Urgent Cases</i> .....	37
<i>Taking Decisions by Round Robin</i> .....	38

### **CHAPTER FOUR**

#### **ENFORCEMENT POWERS OF THE EC**

<b>THE AVAILABLE ENFORCEMENT POWERS</b> .....	<b>40</b>
---	-----------

<i>Enforcement Actions (the Ascending Ladder)</i> .....	40
<i>Related Enforcement Actions</i> .....	42
<i>Procedures and Conditions Relative to Public Statements</i>	
<i>Suspension and Revocation and Protection Order</i> .....	43
<i>Triggers for Enforcement Action</i> .....	44
<b>AIDS TO ENFORCEMENT</b> .....	<b>45</b>
<i>Initiating Investigations</i> .....	45
<i>Power to Appoint an Examiner</i> .....	47
<i>Obligations of an Examiner</i> .....	47
<i>Qualifications of an Examiner</i> .....	48
<i>Use of Compulsory Powers</i> .....	48
<i>Manner of Exercising Compulsory Powers</i>	
<i>(Issuing a Notice)</i> .....	48
<i>Manner of Exercising Compulsory Powers</i>	
<i>(Applying for a Search Warrant)</i> .....	50
<i>Form of Notice to provide Information or</i>	
<i>Produce Documents</i> .....	50
<b>CONSIDERATIONS IN EFFECTING ENFORCMENT</b>	
<b>ACTION</b> .....	<b>51</b>
<b>DELEGATING ENFORCEMENT ACTION</b> .....	<b>52</b>
<i>Delegating Functions and Powers</i> .....	52
<i>Conditions of Delegation</i> .....	52
<i>Form of Delegation</i> .....	52
<i>Conditions Applicable in Relation to Delegated</i>	
<i>Enforcement Actions</i> .....	53
<i>Duration of a Delegation</i> .....	54
<b>REMOVAL OF AUDITORS</b> .....	<b>55</b>
<b>REMOVAL OF DIRECTORS, SENIOR OFFICERS,</b>	
<b>COMPLIANCE OFFICERS, ETC.</b> .....	<b>55</b>
<b>RE-APPOINTMENT OF REMOVED AUDITOR, DIRECTOR,</b>	
<b>SENIOR OFFICER, COMPLIANCE OFFICER, ETC.</b> .....	<b>56</b>

## **CHAPTER FIVE**

### **ADMINISTRATIVE PENALTIES**

<b>PROCEDURE UNDER THE FINANCIAL SERVICES</b>	
<b>(ADMINISTRATIVE PENALTIES) REGULATIONS, 2006</b> .....	<b>57</b>
<i>Notice Requirement</i> .....	58
<i>Limitation Period</i> .....	59
<b>PROCEDURE UNDER THE ANTI-MONEY LAUNDERING</b>	
<b>AND TERRORIST FINANCING CODE OF PRACTICE, 2008</b> .....	<b>59</b>

**CHAPTER SIX**  
**MISCELLANEOUS MATTERS**

<b><i>DEALING WITH COMPLAINTS</i></b> .....	<b>60</b>
<i>Nature of Complaint</i> .....	60
<i>Identity of Complainant</i> .....	61
<i>Whistleblowers</i> .....	62
<i>Registers of Complaints and EC Decisions</i> .....	62
<b><i>MEDIATING DISPUTES</i></b> .....	<b>63</b>
<b><i>ABUSIVE TREATMENT</i></b> .....	<b>64</b>
<b><i>PUBLICATION OF EC DECISIONS</i></b> .....	<b>65</b>
<b><i>QUESTIONS AND ASSISTANCE</i></b> .....	<b>65</b>
<hr/>	
<b>SCHEDULE 1 (Delegation of Authority)</b> .....	<b>67</b>
<b>SCHEDULE 2 (Notices re Public Statement and Suspension or Revocation of Licence)</b> .....	<b>69</b>
<b>SCHEDULE 3 (Notice to provide Information and Documents)</b> .....	<b>71</b>
<b>SCHEDULE 4 (Administrative Penalties)</b> .....	<b>73</b>
<b>SCHEDULE 5 (Notice re Administrative Penalties)</b> .....	<b>82</b>
<b>SCHEDULE 6 (Registers of Complaints and EC Decisions)</b> .....	<b>86</b>

## INTRODUCTION

The nature, scope and reach of modern-day financial services business are so elaborate (and in some cases complex) that it has become an ever increasing imperative for regulators to put in place necessary measures to ensure a proper and effective policing of the financial services perimeter. The nature and scope of financial services business transcend national boundaries and both domestic and collaborative international efforts are required to ensure the sanity and stability of the financial system. As governments increasingly recognize the pivotal role of efficient and effective regulation, serious attention continues to be paid to adequate regulatory measures to achieve financial stability. It is an accepted fact that the world economies are inter-related, even if remotely in some cases, and it is therefore in the interest of all players in the financial services sector to be governed by well-thought out and effective laws and policies to stem any attempt at abusing the financial system. Of course, one can debate endlessly as to what constitutes a “well-thought out law and policy”, but suffice it to state that the essence of the principle is that each jurisdiction needs to develop necessary administrative and legislative mechanisms that are transparent, enforceable, of a deterrent nature and consistent in application.

Effective enforcement is an essential tool in any serious regulatory environment. It serves as a check to attain two fundamental objectives: to ensure compliance and to prohibit and punish contraventions. When a compliance measure is breached or a prohibition is contravened, there needs to be legal and administrative provisions that penalise the conduct of the perpetrator of the breach or contravention; the penal provisions must be dissuasive and proportionate. When such mechanisms are absent from a financial services regulatory environment, a loophole is created for unscrupulous elements to abuse the financial system and thus place the reputation of the jurisdiction at risk.

One of the fundamental pillars of the Financial Services Commission’s (Commission) regulatory mechanisms is its enforcement machinery. The Commission recognizes that, like any other financial services industry around the world, its systems and tools are liable to abuse by unscrupulous elements if not properly and effectively guarded by the relevant legislation, administrative mechanism and enforcement machinery. It believes that to ensure an effectively regulated financial services environment, its institutional, regulatory and enforcement structures must be adequately resourced and appropriate training afforded to key staff on a continual basis. In addition, the Commission has instituted a *Meet the Regulator Forum* and other fora that are designed to sensitize the financial services industry and the public generally on the work of the Commission and to emphasize the importance of compliance and thus reduce instances of enforcement.

The Financial Services Commission Act, 2001 (“FSCA”) provides the legislative framework for the establishment of an enforcement committee within the Commission. The functions of the committee and the relevant enforcement mechanisms are set out in the Act. These *Guidelines and Operating Procedures* are designed to chart a simple and user friendly process with respect to the workings of the committee. They map out the applicable laws in the enforcement process, how those laws and in what circumstances

they are to be applied, the principles of law that must be borne in mind in the enforcement process, the necessary principles and guidelines to aid the process of effective enforcement, the investigative and reporting process, administering the administrative penalty regimes and other related matters.

It is the aim of the Commission to continually review and update these *Guidelines and Operating Procedures* to keep them attuned to emerging developments in the enforcement process and to provide further clarifications with regard to matters of enforcement as they relate to the various financial services business operating in and from within the Virgin Islands. Accordingly, the processes and procedures outlined herein must be viewed as setting minimum standards and the Enforcement Committee is entitled to adopt such other measures as it considers appropriate in the circumstances of any particular case.



## CHAPTER ONE

### ESTABLISHMENT, MEMBERSHIP AND FUNCTIONS OF THE ENFORCEMENT COMMITTEE AND RELATED MATTERS

#### *1.1 PRINCIPAL ENFORCEMENT FUNCTIONS OF THE FINANCIAL SERVICES COMMISSION*

Before delving into the theme of this Chapter, it is appropriate to look into the principal objectives of the Commission as they relate to the functions of the Enforcement Committee (EC). Apart from the day-to-day regulation and supervision of licensed entities and the financial services industry generally and providing necessary international cooperation, the Commission performs functions that are germane to ensuring a vibrant and stable economy and to maintaining the reputation of the Virgin Islands as a jurisdiction in which to engage in legitimate business. Those functions relate to the enforcement of compliance measures and contraventions of prohibitions.

The Commission was established by the Financial Services Commission Act, 2001 (No. 12 of 2001). Amongst its principal functions and objectives are those that relate to monitoring and enforcement action. These may be stated as follows:

- (a) taking action against persons who engage in unauthorized financial services business in or from within the Virgin Islands;
- (b) monitoring compliance by persons who are licensed under the relevant Virgin Islands financial services legislation with the applicable laws, codes of practice, guidelines and directives relating to money laundering and the financing of terrorism;
- (c) issuing, in appropriate circumstances, advisories to investors, licensed persons and the general public;
- (d) monitoring, in the public interest, promotional activities which relate to financial services business and provide necessary advice with respect to accuracy, fairness and compliance with current laws and policies;
- (e) promoting a safe and sound financial services environment in the Virgin Islands; and
- (f) taking appropriate measures
  - (i) to protect the public within and without against financial loss that may arise out of dishonesty, incompetence,



malpractice or insolvency of persons who are engaged in financial services business in the Virgin Islands;

- (ii) to protect and enhance the reputation of the Virgin Islands as a financial services centre; and
- (iii) to reduce crime and other unlawful conduct with respect to financial services business.

The protection of the public includes investors as well as customers and potential customers of persons who are engaged in the provision of financial services business in or from within the Virgin Islands. The Commission takes on this responsibility seriously as the reputation and integrity of the Virgin Islands as a financial services centre hinges on it. That explains the rationale, need and relevance of the essential enforcement tools vested in the Commission and exercised on its behalf by the EC.

When the Commission performs its functions in pursuit of its statutory mandates, it is not liable for any loss or injury that a person may suffer as a result. This protection is essential to ensure the full and effective performance of the Commission's functions without let or hindrance. It is, however, tempered with the principle that in the execution of its duties and the exercise of its powers the Commission shall act in good faith.

## ***1.2 ESTABLISHMENT OF THE ENFORCEMENT COMMITTEE***

The EC is statutorily established under section 14 (1) of the Financial Services Commission Act, 2001. It is one of two committees that is so established under the Act, the other being the Licensing and Supervisory Committee.

## ***1.3 MEMBERSHIP OF THE EC***

### ***1.3.1 Membership***

The composition of the EC is outlined in section 15 (2) of the FSCA. As of March, 2008 its membership comprises the Managing Director as Chairman and the Deputy Managing Director (Regulation) as Deputy Chairman, Deputy Managing Director (Corporate Services), Director of Legal and Enforcement and Director of Policy Research and Statistics.

### ***1.3.2 Co-opting Officers into the EC***

By virtue of section 15 (5) of the FSCA, the Managing Director of the Commission (Chairman) has the power to co-opt into the EC any officer of the Commission as he may determine. The duty of such a co-opted officer shall be to assist the EC in discharging its functions. Accordingly, a co-opted officer is not

by virtue of such an appointment a member of the EC and has no voting rights; the officer simply attends the EC to render necessary assistance. Thus where a member of the EC considers the presence of another officer of the Commission in the meetings of the EC relevant, either to provide technical advice or to take part in its deliberations (whatever form that may take), he or she should notify the Managing Director in advance requesting for such officer to be appropriately co-opted. At least twenty-four hours notice must be given (to allow the officer adequate time to prepare where necessary), although the Managing Director may, at his discretion, dispense with such notice.

### ***1.3.3 Chairmanship***

The Chairman shall preside at every meeting of the EC. In his absence, the Deputy Chairman shall preside. In the absence of both the Chairman and the Deputy Chairman, such other member of the EC shall preside as the Chairman may designate.

## ***1.4 FUNCTIONS OF THE EC***

### ***1.4.1 Functions***

The EC performs specific general functions on behalf of the Commission. Essentially, these relate to

- (a) considering and determining the exercise by the Commission of its enforcement powers under Part V of the FSCA (compliance and enforcement) or pursuant to any financial services legislation;
- (b) submitting reports to the Board of the Commission in respect of all enforcement actions taken by the Commission;
- (c) submitting reports to the Board of the Commission on the performance of its functions at least once every quarter;
- (d) reviewing the enforcement powers of the Commission and making suggested amendments and/or revisions to the Board of the Commission; and
- (e) performing, on the authorization of the Board of the Commission, any other enforcement functions that are not inconsistent with the FSCA or any other financial services legislation.

### ***1.4.2 Delegating Authority***

It is recognized that in the performance of its functions the EC may find it necessary to delegate some of its functions or powers to specific persons, namely to a senior officer of the Commission or to a Commissioner. This is mandated by section 17 (2) of the FSCA. However, delegation must be founded on relevant specified parameters. Accordingly, the EC may, subject to paragraph 4.4.2, delegate the performance of its functions or the exercise of its powers only under any of the following circumstances and conditions:

- (a) the delegation shall be only to a named senior officer of the Commission who shall be of or above the rank of Deputy Director or Manager or to a named Commissioner;
- (b) the need and reason(s) for the delegation must be established and recorded;
- (c) the decision to delegate must be taken by the EC either at a meeting of the EC or by a formal round robin that sets out the need and reason(s) for the decision;
- (d) every delegation must be made by a formal written notice as provided in paragraph 1.4.3;
- (e) the delegation must outline
  - (i) the task(s) to be performed by the delegate;
  - (ii) the power(s) to be exercised by the delegate;
  - (iii) the duration of the delegation and, where necessary, the period within which any specific task(s) must be performed; and
  - (iv) the need or otherwise of reporting back to the EC on the performance of the task(s) delegated;
- (f) the delegate must perform the task(s) assigned or exercise the power(s) delegated in accordance with the instructions and directions of the EC;
- (g) it shall always be a condition of any delegation that the EC reserves the right to terminate without notice and without proffering any reason the task(s) or power(s) delegated.

A function or power that is delegated by the EC may be renewed by the EC.

### ***1.4.3 Form of Notice of Delegation***

Where the EC delegates the performance of any of its functions or the exercise of any of its powers, such delegation shall be made in accordance with the form set out in Part I of Schedule 1 or as near thereto as possible, depending on the nature and scope of the delegation.

### ***1.4.4 Notice of Extension of Time in Respect of a Delegated Authority***

In circumstances where it becomes necessary to extend the time provided under a Notice issued pursuant to paragraphs 1.4.2 and 1.4.3 for the preparation and submission of a report, the EC may issue an extension using the form set out in Part II of Schedule 1.

## ***1.5 APPOINTMENT AND DUTIES OF THE SECRETARY***

The Managing Director appoints an employee of the Commission to perform the role of Secretary to the EC. As mandated by section 15 (4) (b) of the Act, the duties of the Secretary are outlined as follows:

- (a) to prepare and maintain a full record of the proceedings of the EC;
- (b) to collate and disseminate all relevant papers for decision or consideration of the EC, including minutes of the previous meeting, to all members; as far as possible, such papers and minutes must be so collated and disseminated at least 48 hours prior to a scheduled meeting;
- (c) in collaboration with the Chairman of the EC, to prepare an agenda of the meetings of the EC which must be disseminated along with the papers referred to under sub-paragraph (b) above;
- (d) to maintain on such periodic basis as the EC determines from time to time a log of matters on which further action may be required and to follow through with the necessary action by liaising with the relevant Division or person and to report back to the EC;
- (e) to communicate the decisions of the EC to persons to whom they relate and to such other person as the EC may direct; where the Secretary is uncertain as to any communication or to whom such communication is to be directed, he or she shall liaise with the Chairman of the EC, depending on the exigency of the matter, and act accordingly;
- (f) where pursuant to sub-paragraph (e) the Secretary liaises with the Chairman on any communication, he or she shall notify the EC at

the next meeting of the nature of the communication and how it was dealt with following consultation with the Chairman;

- (g) to record and maintain a statistics of the enforcement actions advised by the EC in the year by outlining the specific areas to which they relate and providing the EC a record thereof within two months of the end of each year;
- (h) in consultation with the Chairman, to prepare and submit to the EC a draft report on the activities of the EC (including all enforcement actions taken) at the end of each quarter;
- (i) to bring to the attention of the EC any matter that requires further action on the part of the EC, such matter having been previously considered by the EC;
- (j) to bring to the attention of the EC any complaint received with respect to a regulated person or otherwise in relation to a financial services matter; and
- (k) to perform such other duties as the EC from time to time determines.

## ***1.6 MATTERS RELATED TO MEMBERSHIP AND FUNCTIONS OF THE EC***

### ***1.6.1 Meetings of the EC (General)***

The following general rules shall apply with respect to meetings of the EC:

- (a) the EC shall meet on the first and third Wednesdays of each month at such time as the Chairman may determine.;
- (b) the meeting shall be convened in the Board Room of the Commission or at such other place as the Chairman may determine; and
- (c) notwithstanding the time and place stipulated in this subparagraph, the EC may meet at such other time and place as the Chairman considers expedient, having regard to other meetings or exigencies of the Commission or the work of the EC or the urgency of any matter. In such cases the secretary shall notify the members of the EC of any change in time and venue of any meeting.

### ***1.6.2 Meetings of the EC (Electronic Media)***

As a general rule, the EC may convene a meeting of members through video link, telephone conference or other form of electronic media (collectively referred to as “technology”) considered suitable and which would enable full participation in the meeting by all those connected to such electronic media. Where the matters for discussion by the EC relate to enforcement actions, the use of such technology is permitted only where all the relevant information and documents are available to the members utilizing the technology for the purpose of participation in a meeting and there exists no factor that would hinder full participation.

The EC may in its discretion allow the use of technology in relation to its meetings by co-opted members, consultants, persons with EC delegated authority, witnesses, senior officers of regulated persons or such other persons as the EC may consider relevant in any of its deliberations.

However, the use of technology is not permitted where a person, other than a member, to whom it is intended to be extended is present in the Virgin Islands.

### ***1.6.3 Quorum of the EC***

The following rules and procedures shall apply in determining a quorum of the EC:

- (a) the quorum of the EC at every meeting shall be three members and shall include any member who joins a meeting through technology;
- (b) if during the course of a meeting of the EC the quorum falls below the required number, the meeting shall either be adjourned until the required quorum is met or be adjourned to another date; and
- (c) no meeting shall be convened or proceeded with in the absence of the required quorum.

### ***1.6.4 Voting in the EC***

The following procedures shall apply with respect to the taking of votes at an EC meeting:

- (a) only the members of the EC are entitled to vote on any decision of the EC and this includes any member who is present in a meeting via technology;
- (b) as far as possible the decisions of the EC shall be taken on the basis of consensus;

- (c) where it becomes necessary to take a vote on a matter, the decision shall be taken on a majority vote of the members present and entitled to vote;
- (d) in the event of an equality of votes, the Chairman shall have a casting vote; and
- (e) all decisions taken by the EC shall be guided by the principle of collective responsibility and are binding on all the members irrespective of how they voted or whether or not they were present at the time the decisions were taken.

#### ***1.6.5 Tenure of Office***

Save for the Managing Director and the Director of Legal and Enforcement (whose appointments on the EC are statutorily *ex officio*), all other members of the EC serve at the pleasure of the Board and in accordance with their terms of appointment.



## CHAPTER 2

### GUIDING PRINCIPLES TO BE OBSERVED BY THE ENFORCEMENT COMMITTEE

In the performance of its duties and exercise of its powers, the EC must be guided by certain fundamental principles of transparency and fairness; it must demonstrate the highest standards of probity and circumspection, engage in analytical evaluation and foster confidence through its decision making processes. Furthermore, there must be certainty and consistency in the manner in which it takes its decisions, especially with respect to matters with the same or similar set of facts or circumstances under the same or similar governing legal and regulatory regimes; its decisions must equally be certain and consistent (as may be applicable). It should be borne in mind that decisions of the EC (as adopted and applied by the Commission) may become subject to appeal pursuant to Part VI of the FSCA or through the process of judicial review. In either case, it is essential that procedural regularity is ensured, notwithstanding that a particular decision of the EC may be wrong or inconsistent.

#### **2.1 ESSENTIAL GUIDING PRINCIPLES**

##### **2.1.1 Confidentiality**

All members of the Commission (including the EC) subscribe to an oath of confidentiality upon assuming office (section 48 of the FSCA). That oath imposes a legal obligation to “*keep confidential all information concerning a regulated person, financial services business or other person in connection with or relative to a regulated person or financial services business*” which is acquired by virtue of one’s capacity within or relative to the Commission. What this means for a member of the EC (including the Secretary) is that all matters pertaining to the work, and transacted within the realm, of the EC must be maintained with the utmost confidence and any information in respect thereof must not be divulged except as lawfully authorized in accordance with law. Confidentiality is an essential tool of efficient and effective enforcement.

##### **2.1.2 Consistency**

Good administration demands (amongst other things) consistency in the decision making process. What this means for the EC is that the same rules must be brought to bear on the same set of cases, facts and circumstances. While prudence may dictate a varied approach in specific cases (for instance, in the imposition of penalties for first time and repeat violators of compliance requirements or prohibitions), this must be founded on good reason depending on the nature and circumstances of each case; otherwise the principle of precedence must as far as possible be adhered to if the EC is to be seen as fair and objective in the application of its enforcement mechanisms. However, nothing prohibits the EC

from departing from the *ratio* of an earlier decision where it forms the strong opinion that the law and circumstances warrant such a departure.

### **2.1.3 Disclosure**

Any matter referred to the EC for consideration and possible action must disclose all relevant information essential thereto. This is particularly the case where the possible action to be taken by the EC may involve serious penalties (such as revocation or suspension of a licence). Full disclosure, apart from being in the nature of good governance, will aid the process of objective decision-making. Where the EC forms the opinion that full disclosure of information may be better achieved by requesting additional information or inviting an officer to a meeting of the EC, then the Chairman should avail the EC of that opportunity before any decision is taken on a matter.

### **2.1.4 Transparency**

The processes, procedures and decisions of the EC must be transparently applied and taken within the EC's established parameters as outlined in these ***Rules of Procedure and Operating Guidelines***. Transparency requires both a broad approach and a non-discriminatory application of established rules; in circumstances where there are no established rules, every effort must be made to devise and apply, consistent with the law, a sound and objective policy to aid the decision-making process.

### **2.1.5 Professionalism**

Every conduct of the EC must be accentuated with the utmost professionalism. There must be no room for personal prejudices or arbitrary conduct. A past personal knowledge of a conduct of a person who is the subject of consideration before the EC must not be brought to bear on a decision regarding that person, unless such knowledge has relevance to the matter before the EC, is fully disclosed to the EC and the person given an opportunity to contradict views regarding the conduct or to provide an explanation in respect thereof. However, the EC may take notice of previous decisions, directives, etc. taken by it or issued by the courts or the Commission or any of its organs (the Board, Licensing and Supervisory Committee, EC, etc.) in relation to a person who is the subject of consideration by the EC.

### **2.1.6 Due Process**

Due process is a cornerstone of any enforcement regime. It requires compliance with established procedures, observance of all the rules of natural justice and giving due regard to the tenets of the law. This is particularly relevant where the EC considers a matter in relation to which an adverse decision may be arrived at.

### **2.1.7 Efficiency**

Efficiency requires the appropriate and expeditious handling of cases by the EC, the timely communication of decisions and the taking of action on any follow up issues. Matters referred to the EC must not take undue periods before deliberation commences thereon and once deliberation commences, this must be administered with reasonable despatch; matters that take too long to be deliberated upon invariably compromise and bring into disrepute the enforcement process and may inadvertently affect the business affairs of the person concerned.

### **2.1.8 Integrity**

Integrity caps all the guiding principles outlined above. The integrity of the enforcement process is dependent on the full observance of all the guiding principles (paragraphs 2.1.1 – 2.1.7). The processes and the work of the EC generally must not only be objective, professional and up to standard in application, but they must also be seen to so function.

## **2.2 CONFLICT OF INTEREST**

Section 47 of the FSCA requires every Commissioner with “*any direct or indirect personal, professional, business or pecuniary interest in any matter which falls to be considered by the Board*” to declare such interest; also such Commissioner is required not to participate in any meeting while the matter in which he or she has an interest is being considered and he or she must not express any view or take part in any vote in relation to the matter. In the conduct of its business, the EC is to be guided by these principles. Accordingly:

- (a) any member of the EC who has any direct or indirect personal, professional, business or pecuniary interest in any matter to be considered by the EC, shall, within a timely manner and in any case in advance of the meeting at which the matter is to be considered, declare that interest to the Chairman through the Secretary;
- (b) subsequent to the declaration, the member concerned shall withdraw from the meeting when the matter is considered by the EC;
- (c) where the Chairman has any interest as outlined in sub-paragraph (a), he shall, within a timely manner and in any case in advance of the meeting at which the matter is to be considered, declare that interest to the Secretary who shall notify the Deputy Chairman and other members accordingly; in such a case the Chairman shall withdraw as provided in sub-paragraph (b); and

- (d) where a member is for any exceptional reason unable to declare his or her interest as outlined in sub-paragraph (a) in advance of a meeting of the EC or becomes aware of the interest only during the meeting of the EC, he or she shall immediately declare that interest to the EC and withdraw from the meeting; thereafter anything he or she might have said or contributed on the matter in which interest has been declared shall be expunged from the record and shall have no bearing on the decision to be taken by the EC on or in relation to the matter.

## **2.3 CODE OF CONDUCT**

### **2.3.1 Use of Official Information**

Section 48 of the FSCA, read together with Schedule 3 thereof, make it imperative to keep confidential information acquired by virtue of one's capacity as a member of the Commission and such information may be divulged only as may be permissible under law. The extended dimension of this legal obligation is the duty not to use such information for one's private interest. Accordingly:

- (a) no member shall use any official information disclosed to or acquired by him or her in his or her capacity as a member of the EC for personal benefit or profit; and
- (b) during his or her tenure in office, a member of the EC shall not use official information disclosed to or acquired by him or her for a purpose other than in relation to his or her work as a member of the EC or generally enter into any activity or transaction whereby his or her private life may come into conflict with his or her official duties or bring the EC (and the Commission) into disrepute.

The prohibition against the use of official information is designed essentially to preserve the integrity of the EC and ensure confidence in the overall functioning of the EC. It is expected therefore that the obligations enshrined under this paragraph will follow a member of the EC beyond the period of his or her membership. Thus information acquired by virtue of one's membership of the EC must continue to be maintained on a confidential basis after a member demits office and must not be disclosed to a third party or used for any purpose other than as may be permissible under law. This obligation continues to apply even where a member ceases to be a member of the Commission. However, a member using knowledge acquired during his or her membership of the EC for a legitimate purpose which does not identify any person relating to it or compromise the principles enshrined in these *Guidelines and Operating Procedures* or the integrity of the EC or the Commission may not be subject to the restrictions outlined in this paragraph.

The restrictions outlined in this paragraph equally apply to any person who is co-opted into the EC and any other person who becomes privy to EC information or documentation by virtue of his or her association with the EC, whether as a consultant, examiner or by virtue of a delegated authority of the EC.

### ***2.3.2 Exerting or Canvassing Influence***

The following obligations and restrictions shall apply:

- (a) a member shall not put himself or herself or allow himself or herself to be placed in a position to exert influence (official or personal) in support of or against any measure before the EC or in furtherance of any matter in which the member has an interest;
- (b) where a person directly or indirectly canvasses (in whatever form) a member of the EC to adopt a position of influence in respect of any matter that is or that is likely to be brought before the EC, the member concerned shall, as soon as practicable, notify the EC of that fact; and
- (c) no member shall use his or her influence to advance, support, delay or prevent the consideration of a matter before the EC where in the circumstances it would be wrong to do so, having regard to the law, these ***Guidelines and Operating Procedures*** and the facts and circumstances of the matter.

### ***2.3.3 Accepting Gifts or Favours***

The following obligations and restrictions shall apply:

- (a) no member may accept any gift or favour from a person (legal or natural) who is or is likely to become a subject of consideration by the EC (this may be discerned either from matters that are notified by the EC or from discussions and decisions of the Board or the Licensing and Supervisory Committee or from any of the Commission's Divisions in relation to inspections carried out by them with respect to the person);
- (b) a member shall avoid engaging in business transactions with a person (legal or natural) who is regulated by the Commission;
- (c) where in any exceptional circumstance and within an official setting a member feels obliged to accept a tangible gift from a person (legal or natural) whose matter he or she is aware is already before or may be referred to the EC, he or she shall accept such a

gift only on behalf of the Commission and shall so state when accepting the gift; and

- (d) it is considered a serious breach of discipline for a member to accept or request from another person the provision of a gift or favour in return for exercising a vote, or to promote or support a view or position, in the EC in respect of that person or in relation to some other person.

Nothing prohibited or restricted under this paragraph includes a legitimate business relationship or transaction that a member enters into with a bank, insurance company, trust company, company management company or any other entity that is regulated by the Commission.

#### ***2.3.4 Contact with the Media***

The following obligations and restrictions shall apply:

- (a) a member may not make any comments or communicate with the media concerning the operations and decisions of the EC other than in his or her capacity as such member and with the prior authorization of the Chairman;
- (b) where a member is contacted by the media to comment on an official matter of the EC, he or she may refer the media to the Chairman or seek the authorization of the Chairman to communicate with the media; in the latter case, the member shall adhere to any conditions attached to his or her authorization to communicate with the media; and
- (c) notwithstanding sub-paragraph (b), all communications with the media shall, as far as possible, be facilitated through official correspondence and on the basis of officially approved minutes; verbal communications shall as far as possible be premised and conducted on the basis of officially approved minutes.

#### ***2.3.5 Committing the EC or the Commission***

The following obligations and restrictions shall apply:

- (a) a member shall not in his or her speech, whether in private or in public, or in his or her writing, commit the EC or the Commission to a general or specified course of action on a matter, save in accordance with decisions already made by the EC and recorded in its approved minutes; and

- (b) where a member inadvertently commits the EC or the Commission contrary to sub-paragraph (a), he or she shall as soon as practicable thereafter notify the Chairman and properly retract the commitment or provide an appropriate explanation that will be consistent with the decision of the EC as recorded in its approved minutes. A retraction notwithstanding, the Chairman may issue or direct to be issued a statement on behalf of the EC giving appropriate advice in relation to the commitment made by a member.

### **2.3.6 Freedom to Debate**

The following obligations and restrictions shall apply:

- (a) subject to paragraph 6.4, every matter discussed or debated in the EC shall be treated with the utmost confidence and shall so remain as between members, including the Secretary, save where the Chairman or the EC collectively decides that the matter is of specific or general public importance to be disclosed or shared with another person or persons (including the media); provided, however, that such disclosure or sharing of information shall not identify how individual members of the EC contributed or voted on the matter;
- (b) in debating issues before the EC, every member is free to fully participate and express his or her thoughts without any fear of personal opinions and comments being made public at any time by the EC or the Commission or being used against a member for any reason; and
- (c) no member shall disclose or discuss outside the EC how individual members of the EC voted on a subject or the individual views put forward on a matter before the EC.

## **2.4 RULES OF NATURAL JUSTICE**

Consistent with every decision of the EC is the need to observe the principles of natural justice. The principles of natural justice are all about fairness. They require the observance, on the part of an authority exercising powers that affect others, of established laws, rules, policies and procedures that ensure due process. In relation to the EC, these principles may be outlined as follows:

- (a) **Fair Hearing:** Where the EC considers a matter that may result in an adverse decision against a person, it should, where required and to the extent necessary, afford the person the opportunity of a fair hearing; this may be oral or written and may be embodied in



communication between a regulatory division (and not necessarily the EC) and a person against whom enforcement action is contemplated. The essential element here is that the person concerned must be made aware of a breach or contravention with respect to a legal requirement, whether embodied in a specified statute, directive, practice direction, guideline, etc., and be invited to respond thereto where it is reasonable to do so. The EC should be aware always that the extent of application of this principle very much depends on the circumstances of each particular case;

- (b) In making its decisions, the EC must
- (i) **apply an objective mind:** it must not allow any prejudice or other cause for bias to taint its decision or decision-making process. For instance, a member's knowledge of a previous incident concerning a person who is the subject of enforcement which had not been established factually or judicially must not be used by the EC to the detriment of that person;
  - (ii) **act in good faith:** the EC must ensure that its decisions and decision-making processes are not tainted by bad faith. Thus the EC must avoid taking a decision that is motivated by extraneous factors;
  - (iii) **avoid arbitrariness:** the EC is expected to act within the confines of the law, including any guidelines and policies established by the Commission; its actions must relate to matters for which it has proper and lawful jurisdiction. Simply put, it must not conduct its affairs or exercise its powers in an arbitrary manner;
  - (iv) **consider only relevant matters:** all factors relevant to an application that are required by law, and guidelines and policies consistent with the law, must be taken into account in making decisions and no irrelevant factors must be taken account of; thus factors that may relate to but are not relevant to an issue in a matter before the EC must not be imported into the decision-making process;
  - (v) **aim for reasonableness:** what is reasonable in any particular situation depends on the circumstances relative to the subject of decision; it is based on the thinking of an ordinary publican in a given circumstance. The EC must therefore ensure that its decisions are not fanciful or overbearing, but rather are made with appropriate

reasonableness, taking account of all the guiding principles outlined in this paragraph;

- (vi) **aim for consistency:** in the law enforcement arena, consistency of approach and application of the law is viewed in the nature of good government; like matters must be treated in the like manner. In essence, matters referred to the EC that have the same or similar set of facts (and circumstances in some cases) must be dealt with in accordance with the same or similar rules and policies, noting, however, that sometimes differences in circumstances (even if minute) may warrant a difference in treatment; where relevant precedents for the same or similar matters exist, these should be consulted to obviate inconsistent approaches and decisions. This does not mean, however, that the EC is bound to its precedents for good; where there is exceptional reason for departing from any precedent, that must be founded on good grounds and the matters to which the precedents relate distinguished appropriately; and
  - (vii) **ensure procedural compliance:** rules are made to be complied with and procedures are set out to be followed; the EC must ensure that its decision-making processes closely follow the procedures outlined in the law and any existing guidelines or policies, for failure to do so may give rise to an appeal to the Appeal Board or to an application for judicial review. Indeed failure to comply with the rules of natural justice generally is a recipe for an appeal or judicial review application that could otherwise have been avoided.
- (c) **Giving Reason(s):** The law may not require that in every situation or decision taken a reason or reasons must be given; it is, however, in the nature of good government to give reason(s) for a decision made that is (are) adverse to a person. This not only informs the affected person as to where he or she might have gone wrong, but also affords him or her the opportunity to exercise his or her constitutional rights of seeking further or alternative remedy or redress. The EC is engaged in the exercise of enforcement powers that invariably will affect persons against whom adverse decisions are made and as a rule of policy it should as far as practicable proffer reason(s) for its decisions. Sometimes policy may dictate against communicating reason(s) for a decision, but the EC should at least aim to have on record its reason(s) for the decision. Where

there is uncertainty in any particular case, guidance must be sought from the Legal and Enforcement Division.

- (d) **Approach:** In applying the principles enunciated above, the EC must, as a general rule, adopt and apply discretion and a commonsense approach that properly fits a matter before it, having regard to the facts and circumstances of each case.
- (e) **Manner of exercise of powers:** The EC must ensure that it exercises the enforcement powers of the Commission in a manner that is transparent, fair, proportionate and consistent with the law and with the publicly stated guidelines and policies of the Commission. Persons who are the subject of enforcement expect to be treated fairly and the EC can assure this in its pursuit of ensuring compliance with the law and established guidelines and policies of the Commission.

## ***2.5 RETROACTIVE Vs. RETROSPECTIVE APPLICATION OF LEGISLATION***

The terms “retroactive legislation” and “retrospective legislation” are often used interchangeably. However, the two terms are not synonymous; they are distinct in their application. It is easier to identify legislation that is retroactive; the picture is not always clear with respect to legislation that is retrospective. For the EC it is important to know the distinction, particularly in circumstances where legislation is enacted from time to time providing for new regulatory and/or disciplinary or penalty measures with respect to compliance matters.

A legislation is considered to be retroactive where it effects changes to the law from a specified date prior to the date on which the legislation is enacted. There is a specific provision within the body of the legislation stating that the legislation shall be deemed to have come into operation on a specified date prior to the enactment of the legislation. In the context of the Virgin Islands, this is often provided in the first section of an enactment with a language that may run as follows: “*This Act may be cited as the Mandarin Season Act, 2009 and shall be deemed to have come into force on the 1<sup>st</sup> day of January, 2009*”. The Act itself would have been enacted on 1<sup>st</sup> September, 2009. Thus the legislature’s intention here would be to give effect to the new legislation from a date (1<sup>st</sup> January, 2009) prior to the enacting date (1<sup>st</sup> September, 2009). Such legislation, in effect, becomes operative and is therefore applicable to transactions that fall within the specified commencement date of the legislation, bearing in mind the general principle that an enactment operates prospectively, unless otherwise specified.

On the other hand, a legislation is considered to be retrospective where the legislation itself attaches new consequences to an event that took place prior to the enactment of the legislation; the prior event forms the basis for the enactment

of the legislation. However, a legislation is not given a retrospective construction unless such a construction is clearly set out in the legislation or arises by necessary implication, having regard to the provisions of the legislation. Thus where an enactment provides that “*where a person who is or was an employee of a regulated person has been convicted of an offence involving dishonesty, an application may be made to the Commission for an order directing that no regulated person shall take or retain him in its employment*”, it affords the Commission the power to issue an order in respect of the employee. What had occurred in the past in respect of the employee is the cause or reason for the order of the Commission; the intention is to enable a retrospective application of the disability, notwithstanding that at the time of enacting the legislation the employee had no such disability. But the language of the legislation is very clear!

The presumption, however, is that retrospective legislation does not operate to take away a vested right or impose a penalty unless the legislation is specific in language to that effect. Thus where, for instance, Cabinet, acting pursuant to a delegated power under the Financial Services Commission Act, 2001, enacts the Administrative Penalties Regulations, 2006 in June of 2006 simply prescribing penalties applicable for breaches of regulatory legislation, then the penalties prescribed in the said Regulations can only apply to prospective breaches; they have no application to breaches that occurred prior to June, 2006. The same principle applies with respect to the imposition or levying of taxes and fees. The rule always is that if the legislature had intended otherwise, it would have clearly and specifically so indicated.

Accordingly, the EC must always note the distinction between retroactive and retrospective legislation in the context of the exercise of its powers with respect to any legislation (including amending legislation) and satisfy itself that the decisions it takes accord well with the intents of the applicable legislation in any particular case before it. This would not only ensure fairness in the treatment of enforcement matters, but also protect the EC from making any embarrassing decisions.

## CHAPTER THREE

### PRINCIPLES AND PROCEDURES TO BE OBSERVED IN THE ENFORCEMENT PROCESS

The FSCA vests the Commission with extensive powers to enable the Commission to efficiently and effectively address regulatory breaches and similar concerns. While these powers are used primarily to ensure that regulated persons comply with the requirements of the applicable laws, including any guidelines, practice directions or directives issued by the Commission, the broad objective of the FSCA is not to seek fault or embark on a punishment spree. Rather it is the objective of the Commission to assist with and ensure compliance with established laws, rules, processes and procedures. This necessarily requires the Commission to adopt a proactive approach to enforcement and ensure that the applicable standards of compliance are followed and, where they are not, to apply appropriate and proportionate sanctions. In appropriate cases, this would include the issuing of notices and warnings requiring remedial action to be taken before any specific enforcement action is pursued by the EC.

#### **3.1 OBJECTIVES OF AND GENERAL APPROACH TO ENFORCEMENT**

##### **3.1.1 Objectives of Enforcement**

In performing its functions, the EC must at all times be cognizant of the objectives of the FSCA in relation to ensuring an efficient, effective and workable enforcement regime. Those objectives may be outlined as follows:

- (a) the importance of ensuring that the enforcement regime is not for any reason compromised to accommodate any business; rather the aim should be to encourage only high quality and transparent financial institutions and other entities to establish and maintain businesses in the Virgin Islands;
- (b) the recognition of the obligation to protect the public, including investors, against financial loss arising from the dishonesty, incompetence, malpractice or insolvency of persons who are engaged in financial services business in or from within the Virgin Islands;
- (c) the need to maintain confidence in the financial services industry by adopting appropriate measures designed to deter those who might consider breaching the laws and other regulatory standards requirements;
- (d) the importance of ensuring that the Virgin Islands effectively plays its part in contributing to the reduction of financial crime and

improper behaviour in the global financial markets by preventing the unlawful use of its service vehicles; and

- (e) the need and importance of protecting, enhancing and maintaining the reputation of the Virgin Islands as a centre of excellence in the provision of legitimate financial services business and as a jurisdiction that recognizes and implements internationally established standards of regulation, compliance and enforcement.

### ***3.1.2 General Approach to Enforcement***

The EC's approach to engaging the enforcement process must at all times take into account the overall objectives of the FSCA (as already outlined in paragraph 3.1.1). This must necessarily take into account the obligations imposed on the Commission both at the domestic and international levels and adopting an appropriate formula for the effective discharge of those obligations. Therefore in dealing with enforcement matters, the EC should bear the following in mind:

- (a) the need to establish a clear and distinct record of cooperative relationships with foreign regulators, seeking information on the outlook or business activities of regulated persons and providing mutual legal assistance whenever requested;
- (b) the importance of adopting a transparent approach and providing clear guidance on the procedures and practices the EC follows, so that those who are the subject of investigation or enforcement action understand the process involved and the applicable sanctions;
- (c) the need to publish the results of enforcement matters where this helpfully provides guidance to the rest of the financial services industry regarding the EC's approach and the proper interpretation of the regulatory laws and any established policies, practices and guidelines;
- (d) the importance of adopting a proportionate approach which seeks to minimize costs and burdens on businesses that do not relate to activities giving rise to investigative initiatives or enforcement action;
- (e) the importance of adopting a risk-based approach to enforcement whereby decisions on investigations and the application of sanctions are balanced against the established objectives of the FSCA and enabling the timely application of appropriate enforcement measures;

- (f) the need to ensure that regulated persons against whom enforcement action is contemplated or taken are given the due process of the law by fully complying with the requirements of the rules of natural justice; and
- (g) the urgency that needs to be attached to certain fundamental breaches, for instance those affecting the public or investors, and thus adopting swift action to address such breaches in a timely manner.

## **3.2 BREACHES AND OFFENCES**

The FSCA outlines in Schedule 2 thereof the financial services legislation that fall under the purview of the Commission. Each of the financial services legislation provides its own regime of compliance and prohibition in relation to the obligations outlined therein; this applies also in relation to relevant subsidiary legislation made under the principal financial services legislation. However, it should be noted that the FSCA enables the Commission to provide for the imposition of administrative penalties (discussed in detail in Chapter Five) pursuant to the authority of any regulations made under the FSCA. The EC, in dealing with an enforcement matter, should identify the nature of the contravention or non-compliance before it proceeds to consider any particular case before it. This will enable it from the onset to make an appropriate determination as to its jurisdiction: whether the matter is one that the EC has power to determine or whether it is one to be referred to the Director of Public Prosecutions and whether there is any collateral dimension to the matter that warrants a referral to another authority, domestic or foreign.

### **3.2.1 Breaches**

A breach may relate to an issue of contravention or non-compliance and invariably attracts a lesser sanction. It is normally attributed to non-compliance with conditions attached to a licence, for example, or where, in the case of an enactment, it is specifically described as a breach within the enactment itself. Whatever the nature or form of breach, it should normally attract some sanction, although that does not mean that for every breach a sanction must be applied. The nature and gravity of the breach must be considered in order to arrive at an objective and rational decision.

### **3.2.2 Factors Relative to Breaches**

Some of the factors the EC should consider under this subject may be itemized as follows:

- (a) the duration of the breach;



- (b) whether the breach reveals serious or systemic weaknesses of the management systems or internal controls of a regulated person;
- (c) the impact of the breach – whether public confidence in the financial markets or the financial services industry generally has been shaken or damaged (and the extent thereof) or the reputation of the Virgin Islands has been harmed or may be brought into question;
- (d) whether, as a result of the breach, there has been any financial gain and by whom;
- (e) whether the breach has caused or facilitated the commission of an offence; and
- (f) whether there is any loss or risk of loss to shareholders, investors, policy holders, etc. as a result of the breach.

### ***3.2.3 Mitigating Factors in Relation to Breaches***

In terms of the mitigating factors in relation to a breach, the EC must bear the following in mind:

- (a) whether or not the breach was the first committed by the regulated person;
- (b) whether, when the breach was brought to its attention, the regulated person has provided a reasonable cause explanation for the breach; this should include an assessment as to whether the breach was deliberate, reckless or inadvertent (a mere statement to the effect that the regulated person relied on legal advice a copy of which has not been made available is not sufficient);
- (c) the measures the regulated person has taken after the breach was identified and communicated;
- (d) how quickly, effectively and completely the regulated person has brought the breach to the attention of the Commission;
- (e) the degree of responsiveness and cooperation the regulated person showed during the investigation of the breach;
- (f) the remedial steps (if any) the regulated person has taken since the breach was identified and communicated; such remedial steps may entail putting in place appropriate measures for an effective system

of internal controls and procedures to prevent the re-occurrence of a similar breach; and

- (g) how effective the remedial steps taken are likely to prevent future breaches by the regulated person and whether the steps taken indeed demonstrate a serious undertaking in that regard.

#### ***3.2.4 Additional Factors to Consider***

In addition to the factors outlined in sub-paragraphs 3.2.2 and 3.2.3, the EC should also consider whether there are any regulatory concerns relative to the regulated person with respect to any breach. Such concerns may generally relate to

- (a) the general compliance history of the regulated person (in terms of repeat breaches, respect for the law, compliance with directives, adherence to advice, etc.);
- (b) whether the Commission or any other regulator outside the Virgin Islands had previously instituted enforcement action against the regulated person, the nature of the breach and the enforcement action taken and when; and
- (c) whether there are a number of smaller issues relating to the regulated person which, taken individually, may not justify enforcement action, but which, taken collectively, may justify enforcement action.

#### ***3.2.5 Offences***

Where in any financial services legislation provision is made creating an offence for a contravention or non-compliance which is stated to be punishable on summary conviction or on indictment, then any proceedings relating thereto fall outside the jurisdiction of the EC (and the Commission). Any matter relating to such an offence is one for the Director of Public Prosecutions and/or the Police. While the DPP or the Police do not require any fiat from the Commission in order to institute or discontinue criminal proceedings under any financial services legislation, invariably offences committed under any financial services legislation come to the attention of the Commission first. Thus when a matter that has the appearance of a criminal nature comes before the EC, the EC must make a determination whether the matter is of the nature to be referred to the DPP and/or the Police. The decision may, without prejudice to the DPP's constitutional remit on criminal prosecution, hinge on one or more factors.

### ***3.2.6 Factors to be Considered***

The following factors may be considered with respect to any possible referral to the DPP and/or the Police:

- (a) the nature and gravity of the offence;
- (b) whether or not the offence involves an act of dishonesty, fraud or other financial crime by the regulated person or its agent;
- (c) whether or not there has been any loss or there is likely to be some loss by members of the public, including shareholders, investors, policy holders, etc. as a result of the commission of the offence;
- (d) where the offence involves a suspicious act of money laundering or terrorist financing;
- (e) where the offence, though muddled in transactions of a regulatory nature, needs to be extricated and separately dealt with by the appropriate authority; and
- (f) where the offence, even if considered not too serious, might have a negative impact on the reputation of the Virgin Islands.

It should always be borne in mind that it is not the function of the EC to position itself so as to make a final determination on whether or not an offending regulated person should be criminally investigated and prosecuted.

### ***3.2.7 Cooperation with the Prosecution***

Where the EC refers a matter to the DPP and/or the Police, it should as a matter of course provide full cooperation to the investigation by providing such information as are not restricted or as may be compelled by law or through a court order. Indeed such cooperation extends to the entire Commission which the Managing Director has responsibility for ensuring.

### ***3.2.8 Compounding an Offence***

Where an enactment empowers the Commission to compound an offence then, notwithstanding the matters stated in paragraph 3.2.5, the EC can make a determination on the offence by accepting not less than a specified percentage of the amount stipulated in the enactment as the applicable fine. For instance, the FSCA provides in section 56 that the Commission can compound an offence by accepting from the offender a sum of money that is not less than one half of the maximum prescribed for that offence.

### ***3.2.9 Pre-requisites for Compounding an Offence***

Before the EC can embark on the process of compounding an offence on behalf of the Commission (where such a power is available in respect of the offence), it must satisfy the conditions prescribed in the relevant provision granting the power to compound. Generally, such conditions would comprise the following:

- (a) the penalty prescribed for the offence must be of a monetary nature (a fine);
- (b) the person committing the offence must agree in writing for the offence to be compounded;
- (c) the fact of the compounding of the offence must be notified in writing under the signature of the offender and the Managing Director of the Commission to the court;
- (d) the compounding of an offence does not apply to a person who has had a previous offence compounded under the same enactment; and
- (e) any money received from the compounding of an offence must be turned over by the Commission to the Government.

### ***3.3 THE ROLE OF THE REGULATORY DIVISIONS***

The regulatory Divisions of the Commission have the primary responsibility of ensuring regulatory compliance by regulated persons. Invariably it is the Divisions, through their prudential inspections and other measures, that discover breaches (which include suspected breaches) of or offences committed under financial services legislation.

#### ***3.3.1 Procedure on Discovery of Breach***

**This sub-paragraph and sub-paragraph 3.3.2 (c) do not apply to a breach in respect of which enforcement action is delegated pursuant to sub-paragraph 4.4.**

Where a Division discovers a breach, it must adopt the following procedure:

- (a) document the breach, outlining the date of discovery of the breach, when the breach occurred, the parties involved (including the regulated person concerned) and any related information;

- (b) document the nature of the breach, specifying the provision(s) of the enactment, directive, guideline or similar instrument that is breached;
- (c) refer the matter of the breach (with all available information) to the Director of Legal and Enforcement (DLE) seeking legal advice on a way forward;
- (d) where the DLE forms the opinion that a reasonable cause explanation should be sought from the regulated person committing the breach, the Division concerned must act accordingly and revert to the DLE with the regulated person's response; in order to ensure timely responses and necessary action, the Division must require a response within a reasonable timeframe (which may be determined depending on the nature and gravity of the breach);
- (e) where remedial action is considered appropriate in the circumstances of any breach, the Division concerned (acting in accordance with the advice of the DLE) must communicate with the regulated person directing the appropriate remedial action to be taken and within what time frame;
- (f) the Division concerned must adopt follow up measures to establish whether or not the directive issued has been complied with and, if not, to refer the matter to the DLE who will then advice on a way forward and specifically whether the matter is fit for referral to the EC;
- (g) notwithstanding sub-paragraphs (e) and (f) but subject to any established statutory procedure, the DLE may direct an immediate referral of a breach to the EC where the opinion is formed that the breach is of a substantive nature, has a serious public policy implication (including compromising the reputation of the Virgin Islands), may damage or has the potential to damage the interests of investors, creditors, shareholders, etc. or merits a referral on some other specific basis;
- (h) when in doubt as to whether a particular conduct by a regulated person or a person connected to the regulated person constitutes a breach and therefore merits immediate referral to the EC, the Division concerned must seek immediate advice from the DLE and comply with that advice;
- (i) whenever in the opinion of a Division a regulated person is no longer fit and proper, an immediate referral must be made to the

EC through the DLE who provides the necessary legal advice and then transmits the referral accordingly.

### **3.3.2 Procedure on Discovery of Offence**

If a Division, in the conduct of its duties or at any time, discovers that a regulated person has committed an offence or has engaged in conduct which may relate to an offence, the Division must adopt the following procedure:

- (a) document the offence, outlining the date of discovery of the offence, when the offence occurred, the parties involved (including the regulated person concerned) and any related information;
- (b) document the nature of the offence, specifying the enactment to which the offence may relate;
- (c) refer the matter of the commission of the offence to the EC through the DLE who will provide the necessary legal advice and transmit the referral to the EC;
- (d) where a regulated person's conduct constitutes both a breach and an offence, then the Division shall adopt the procedure outlined under this paragraph as if the breach were also an offence.

### **3.3.3 Referrals by the Licensing and Supervisory Committee (LSC)**

It is the duty of the LSC to receive, review and determine applications for licences under the various regulatory legislation and to supervise licensees to ensure compliance with the fit and proper regime established by the Commission for the conduct of financial services in and from within the Virgin Islands. In that role, the LSC will necessarily find the need to make specific referrals to the EC for enforcement purposes; this will normally occur where, in dealing with an application for a renewal of a licence, approval, non-objection to a course of action, etc., the LSC forms the opinion that the regulated person to whom an application relates has committed a breach or an offence with respect to a financial services legislation.

### **3.3.4 Unthreading the Conflict**

The Commission functions as a single unit with multiple responsibilities. Decisions taken within the Commission must not be arrived at in isolation. Thus the situation must be avoided where approval is granted to a regulated person which might give the appearance of sanctioning a breach or offence committed by the regulated person prior to the granting of the approval; the Commission must not deliberately *estop* itself. It is recognized that certain breaches need not stop the LSC from granting approvals or generally taking certain decisions as the

nature of such breaches is not of a magnitude as would cause serious concern. It is a question of judgment on the part of the LSC whether in such cases a decision sought should be proceeded with or whether a referral must first be made to the EC for its decision before the matter is reverted to by the LSC. Accordingly, the following questions must be considered:

- (a) has there been a breach and, if so, is it so significant that granting the approval sought might give the appearance of compromising any decision the EC might take;
- (b) is the approval sought of an urgent nature and, if not, should the breach not be first referred for a decision of the EC before the LSC takes a decision on the approval sought; if it is urgent, what does prudence dictate;
- (c) where an offence has been committed, can the approval sought be treated without compromising the prosecution of the offence;
- (d) has the Division dealing with the approval sought made, where applicable, a referral to the EC as required under paragraph 3.3.1 and, if so, what has been the EC's decision; where the requisite referral has not been made, ought that requirement not be complied with first;
- (e) if the approval sought is of an urgent nature, should the EC be required to meet on an urgent basis to deal with the breach and the LSC's decision be deferred pending the taking of the EC's decision;
- (f) can the approval sought be dealt with and granted but stayed, pending a referral to and decision of the EC on the breach.

### ***3.3.5 Unthreading the Conflict Further***

The scenarios outlined in paragraph 3.3.4 can be avoided to a large degree if the Division from which an application for approval emanates complies with the requirements of paragraph 3.3.1. A Division should not wait for the LSC to take a decision on a referral for a breach which at the time, or subsequent to the receipt, of an application for approval was apparent to the Division; it should move with haste and make the referral to the EC as prescribed in paragraph 3.3.1 (and if need be, outline the urgency attached to the matter) before forwarding the matter to the LSC. This would enable the LSC to take a clear decision, being fully cognizant of the decision already made by the EC on the breach committed by the regulated person to whom an application relates.

### **3.3.6 Referral from Other Sources**

The EC's mandate is not limited to the receipt of referrals from the Divisions or the LSC. It may deal with complaints (see paragraph 6.1 et al) or reports concerning a regulated person which emanate from

- (a) members of the public concerning regulated persons;
- (b) regulated or unregulated persons;
- (c) public authorities within or outside the Virgin Islands; or
- (d) sources that the EC has become aware of and considers prudent, on its own motion, to initiate inquiries on for purposes of enforcement action.

### **3.3.7 Dealing with Urgent Cases**

Part of the EC's efficient and effective functioning is its ability to meet on an urgent basis to deal with urgent matters that have come to its attention. While generally what matter has an element of urgency attached to it is one of fact, the EC and indeed the referring Divisions and the DLE are expected to make a value judgment and provide the appropriate recommendation when referring a matter to the EC. However, an urgent matter would generally constitute that whose breach is so serious, having regard to its nature, circumstances and persons affected or the reputation of the Virgin Islands, that it requires urgent action. Some of the matters (by no means an exhaustive list) that would fall within this fold may be cited as follows:

- (a) where the breach brings into question the fitness and propriety of a regulated person;
- (b) where evidence reveals that a regulated person might have submitted to the Commission inaccurate or misleading information which brings into question whether the regulated person should continue to be licensed;
- (c) where evidence suggests serious management or internal problems which raise concerns regarding a regulated person's ability to meet the conditions of its licence or any regulatory requirements;
- (d) where the breach relates to a criminal activity a regulated person is connected with; this would include any allegation of fraud or other financial crime;



- (e) where criminal proceedings have been commenced or are contemplated against a regulated person and/or a senior officer of a regulated person, whether within or outside the Virgin Islands, and there may be questions as to whether the regulated person and/or senior officer contravened a financial services legislation;
- (f) where the breach is of a nature that might warrant the application for some injunctive relief from the courts to preserve assets and thus prevent their dissipation;
- (g) where the interests of investors, shareholders and other interest holders are being or are likely to be adversely affected by the known or suspected activities of a regulated person;
- (h) where, as a result of any previous or ongoing action, a regulated person is likely to compromise or destroy its books and records;
- (i) where the activity engaged in by the regulated person is affecting or is likely to affect the reputation of the Virgin Islands;
- (j) whether, having regard to the public interest, the matter ought to be treated in an expeditious manner to obviate any negative fallout.

Certain cases of extreme urgency will call for much more expeditious action on the part of the EC; this is a question of judgment, having regard to the facts available to the EC. However, where it becomes absolutely necessary in the public interest or in the interest of simply affording justice, the procedures outlined in these *Guidelines and Operating Procedures* may, subject to any statutory restrictions, be abridged in such manner as the EC considers fit in order to deal with the urgency at hand. The EC must at all times note and manage conflicts of interest which might otherwise taint the decision or the decision-making process.

### **3.3.8 Taking Decisions by Round Robin**

Considering the nature of its functions, it is generally unacceptable for the EC to consider and take decisions on any enforcement matter by round robin. Enforcement matters generally call for concerted consideration of issues and evidence relating to the conduct of regulated persons and the taking of decisions which may adversely affect such regulated persons. Those decisions must not be made by an individual or through a mechanism that does not sufficiently afford concerted and detailed consideration; this is particularly relevant where a decision relates to the application of a penalty in the nature of a fine, a cease and desist order or a suspension or revocation of a licence or the imposition of any other disability.

However, where the EC has already discussed an enforcement matter and arrived at a decision but some further action (such as verifying information) needs to be carried out as a precondition of the communication of the decision which is itself not very critical to the taking of the decision, then it should be possible to crystallize the decision by round robin. The expectation is that such an arrangement would already have been agreed upon at the EC meeting at which the actual enforcement decision was taken.

## CHAPTER FOUR

### ENFORCEMENT POWERS OF THE EC

The FSCA provides the powers and mechanisms of enforcement which the EC engages on behalf of the Commission. It is important that the EC is fully aware of the relevant provisions applicable in each particular case before it; account must at the same time be taken of the relevant regulatory legislation which might relate to the case. Where a penalty for any particular breach is prescribed in more than one enactment, the EC must determine under which enactment it wishes to proceed; it cannot proceed under more than one enactment for the same breach.

#### ***4.1 THE AVAILABLE ENFORCEMENT POWERS***

The Commission is vested with a range of powers under the FSCA which may be exercised on its behalf by the EC. It is for the EC to determine in any particular case which power it needs to exercise and whether or not more than one power should be exercised.

##### ***4.1.1 Enforcement Actions (the Descending Ladder)***

Where the Commission is entitled to take enforcement action, any one or more of the powers outlined in sub-paragraphs (a) to (j) below may be exercised; the exercise of the powers may be in descending order as provided below or in a combination of such orders or by simply acting pursuant to any established statutory procedure or requirement which does not mandate such an order. The procedure adopted will very much depend on the nature, gravity or urgency related to a breach, such as where loss or damage is caused or is likely to be caused to investors and other stakeholders, an offence is or is being committed, the reputation of the Virgin Islands is at stake or the public interest simply demands urgent action:

- (a) issue a letter to a regulated person notifying it of the breach committed or being committed by it (setting out the details thereof) and requiring it to effect such remedial action within such specified period as the EC may determine;
- (b) where the regulated person fails to comply or only partially complies with a required remedial action, the EC
  - (i) may issue the regulated person with a warning letter as to what course of action the EC intends to take if the required remedial action is not complied with within a period not exceeding 7 days from the date of the warning letter;

- (ii) shall record the issuing of the warning letter as an indication of non-cooperation by the regulated person;
  - (iii) shall place the regulated person on a watch list to be referred to as the “Regulatory Watch List”; this List shall be kept and maintained by the Secretary of the EC, the purpose of which shall be to closely monitor the activities of the regulated person and develop an appropriate compliance and cooperation history in respect of the regulated person;
  - (iv) may require the board of directors or such other officer or officers of the regulated person to issue to the Commission a signed letter acknowledging the required remedial action and proposing specific measures taken or intended to be taken to address the required remedial action; and
  - (v) may require the conduct of a more frequent on-site inspection of the regulated person by the relevant Division of the Commission.
- (c) require a regulated person to appoint a qualified person at the expense of the regulated person to advise the regulated person on the proper conduct of its business and affairs and provide the Commission with a report in respect thereof; in the case of a regulated person undertaking insurance business, the requirement may relate to the appointment of an actuary who must prepare and submit a report to the Commission;
  - (d) issue a directive prohibiting, restricting or limiting the financial business a regulated person may undertake;
  - (e) issue a directive requiring a regulated person to cease and desist in engaging in any class or type of business, including desisting from taking on any new financial business or entering into any contract for such business;
  - (f) issue a directive requiring a regulated person to take a specific course of action considered necessary to protect the property of, or in the custody, possession or control of, the regulated person, or to protect investors or creditors (including potential investors or creditors);
  - (g) initiate such investigation as may be considered necessary, including the appointment of an examiner to conduct such investigation;

- (h) apply to the court for injunctive relief, including the appointment of a liquidator pursuant to the Insolvency Act, 2003;
- (i) impose such administrative penalty as may be available in respect of any regulated person pursuant to the provisions of Chapter Five; and
- (j) issue a public statement, revoke or suspend a regulated person's licence or apply for a protection order as provided in paragraphs 4.1.2 and 4.1.3.

#### **4.1.2 Related Enforcement Actions**

It should be noted that where the Commission is entitled to take enforcement action against a regulated person, the EC may, in addition to the enforcement actions outlined in paragraph 4.1.1, take any of the following actions:

- (a) where it is considered in the public interest to do so, a public statement may be issued in relation to
  - (i) any person that is carrying on or intends to carry on or is likely to carry on unauthorized financial services business; the statement may include information regarding any action the Commission intends to take or has already taken;
  - (ii) any person who holds himself out as holding a licence when in fact no such licence is held or has been issued;
  - (iii) any matter relative to financial services where the issuing of such a statement is considered desirable in order to protect the public, investors, shareholders, etc., from financial loss arising from the dishonesty, incompetence, malpractice or insolvency of persons engaged in financial services business in the Virgin Islands, or to protect and enhance the reputation of the Virgin Islands, or to aid the process of reducing crime and other unlawful activities connected to financial services;
- (b) suspend or revoke a regulated person's licence if the regulated person fails to commence or ceased to carry on the financial services business for which the licence was issued, or applies for the revocation of its licence under the FSCA or any regulatory legislation;
- (c) make an application to the High Court for a protection order where a regulated person's licence is about to be revoked or where

enforcement action may be taken; such an application may also relate to a former regulated person or a person carrying on unauthorized financial services business.

The Commission is empowered, in the taking of any enforcement action against a regulated person, to require such regulated person to pay any costs and expenses associated with the enforcement action. The EC will determine in each case of an enforcement action whether any costs and expenses have been incurred by the Commission and whether it considers it appropriate that such costs and expenses should be recovered from the regulated person to which they relate.

#### ***4.1.3 Procedures and Conditions Relative to Public Statements, Suspension and Revocation and Protection Order***

Where the decision is taken for the institution of an enforcement action and the Commission intends to issue a public statement, the following must be observed:

- (a) the public statement may be issued in such form as the Commission considers fit;
- (b) the public statement must set out the reason(s) for the enforcement action and outline precisely what enforcement action has been taken or is contemplated;
- (c) where a public statement is to be issued, at least three days written notice must be given in the form set out in Part I of Schedule 2 outlining the intention to issue the public statement and the reason(s) therefor; and
- (d) where it is considered necessary to protect the public interest or the interest of customers, creditors or investors of a regulated person or former regulated person, a public statement may be issued without notice to the regulated person or former regulated person, or with such shorter notice period as may be considered appropriate.

Where the decision is taken to suspend or revoke a regulated person's licence, the following must be observed:

- (a) the period of suspension must not exceed 30 days (start counting one day after the date of suspension);
- (b) the Commission may, where it considers it in the public interest to do so, apply to the High Court for the period of suspension to be

extended for one or more further periods not exceeding 30 days each;

- (c) no suspension or revocation must be effected unless the regulated person is first given notice in writing in the form set out in Part II of Schedule 2
  - (a) stating the grounds upon which the Commission intends to exercise its power of suspension or revocation; and
  - (ii) advising that unless good reason is shown as to why the regulated person's licence should not be suspended or revoked the licence will be suspended or revoked on a date not less than 14 days after the date of issue of the notice; and
- (c) in the case of an application for a protection order, the application may be made *ex parte* or on such notice as the High Court may determine and before the notice of intention to revoke has been issued.

#### **4.1.4 Triggers for Enforcement Action**

There are certain factors that trigger the consideration and commencement of enforcement action against a regulated person. These may be cited as follows (by no means an exhaustive list):

- (a) where there is a contravention of the FSCA, a financial services legislation or any regulatory code or practice direction issued pursuant to the FSCA or other enactment;
- (b) where there is a contravention of an enactment relating to money laundering or terrorist financing and any regulations or code of practice made or issued pursuant to such enactment;
- (c) where a regulated person carries on or is likely to carry on business in a manner that poses a detriment to the public interest or to the interest of clients, creditors or investors;
- (d) where a regulated person is or is likely to become insolvent;
- (e) where a regulated person fails to comply with a directive of the Commission;
- (f) where a regulated person is in breach of a condition of the licence issued to it;

- (g) where evidence exists of any false, inaccurate or misleading information being made or submitted to the Commission by a regulated person, whether at the time of an application for a licence, approval, etc. or otherwise; this includes any false, inaccurate or misleading information contained in any brochure, prospectus or other document which a regulated person produces or has direct or indirect interest in and which is likely to mislead the public;
- (h) where a regulated person is dissolved or a liquidator is appointed in respect of the regulated person; it matters not whether the liquidator is appointed by directors, shareholders or the court;
- (i) where a receiver is appointed with respect to the financial services business carried on by a regulated person or any of its property has been taken possession of by or on behalf of the holder of a debenture secured by a registered charge;
- (j) if the Commission forms the opinion that a person who has a share or other interest (legal or equitable) in a regulated person or any director or senior officer thereof is not a fit and proper person to hold such interest or be concerned in the management of the regulated person;
- (k) if the Commission forms the opinion that a regulated person or other person relevant to the regulated person has refused or failed to cooperate in a compliance inspection conducted by the Commission; or
- (l) where a regulated person is liable to an administrative penalty, such penalty is not paid by the due date.

## **4.2 AIDS TO ENFORCEMENT**

In performing its duties, the Commission is empowered to utilise certain specific measures. These relate essentially to the institution of formal investigations, appointment of examiners and taking of evidence on oath.

### **4.2.1 Initiating Investigations**

The decision whether or not to open investigations in relation to any breach by a regulated person is a matter entirely for the EC; however, a regulatory Division may submit recommendations to the EC through the Secretary outlining why, in its opinion, investigations should be conducted into or regarding the business affairs of or contraventions by regulated persons or



other persons who are otherwise holding themselves out as regulated persons without the requisite licence. Investigations may include the following:

- (a) undertaking preliminary inquiries which may include a review of available records and documents, verifying information from known sources and requesting mutual legal assistance from other regulators;
- (b) appointing one or more competent persons as examiners to formally conduct investigations;
- (c) maintaining confidentiality on the investigation or investigative process where the Commission forms the view that the public interest is best served by such an action;
- (d) setting a time frame within which investigations must be conducted and concluded; this is particularly relevant in breaches that are of a grave nature and where a 'swift' decision on an appropriate course of action is essential to the integrity of the investigative process or where a delay may cause loss or damage to investors, customers, shareholders, creditors or other stakeholders;
- (e) during the course of an investigation and depending on the nature and gravity of the subject matter of investigation, the EC might require to be briefed orally from time to time in order to keep abreast of developments;
- (f) where a regulated person that is the subject of an investigation may also be of interest to another regulator or where the EC considers that another regulator ought to be made aware of the opening of an investigation in relation to the regulated person, the other regulator shall be informed accordingly;
- (g) requiring the taking of evidence by oath pursuant to the powers of the Commission under the FSCA; this must recognize the person's right to be represented by a legal practitioner of his or her choice; and
- (h) every formal investigation must conclude with a written report to the EC outlining the findings of the investigation and making any observations considered necessary to the EC's decision-making process.

#### **4.2.2      *Power to Appoint an Examiner***

The Commission has the power to appoint one or more persons as examiners to conduct investigations on its behalf. The EC must always be cognizant of this power where the decision is taken to initiate investigations, especially in complex matters. The power, however, is exercised where the view is formed on reasonable grounds that there are or may be grounds for taking enforcement against a regulated person; the power may also be exercised in circumstances where it appears on reasonable grounds that a person is engaging in or has engaged in unauthorized financial services business. Where an examiner is appointed, the matters to be investigated may include one or more of the following (by no means an exhaustive list):

- (a) the nature, conduct and/or state of the business of the person being investigated;
- (b) a specific aspect of the business of the person being investigated;
- (c) the ownership or control of the person being investigated;
- (d) whether or not there are grounds for taking enforcement action against a regulated person; and
- (e) whether the person that is the subject of the investigation is carrying on any unauthorized financial services business.

At the time of appointing an examiner to conduct an investigation the EC must outline clearly the scope and period for the conduct of the investigation and the manner of reporting back to the EC. Also a person appointed as an examiner functions in the capacity of an agent of the Commission and must therefore subscribe to the Oath of Confidentiality outlined in Schedule 3 of the FSCA prior to assuming office.

#### **4.2.3      *Obligations of an Examiner***

A person appointed as an examiner has the compulsory powers of the Commission. It is important that every examiner appointed is made aware that in addition to the investigative matters assigned to him or her, it is also his or her responsibility, where he or she considers it necessary for achieving a comprehensive investigation, to also investigate the affairs of a person who is or has been a member of the group of which the person being investigated is a part, or a partnership of which the person being investigated is a member. After completing an investigation, an examiner must prepare and submit a report of the investigation to the EC. The EC, after considering the report, is at liberty to call the examiner to explain or clarify the report or to address

specific aspects of it or to conduct further investigation into specific areas or matters considered relevant by the EC.

#### **4.2.4 *Qualifications of an Examiner***

Although the FSCA does not prescribe any qualifications for an examiner, the EC expects that persons selected to perform that role must meet certain minimum thresholds. Thus the EC must, before appointing a person as an examiner, satisfy itself that the person is an individual of integrity with

- (b) appropriate academic and technical qualifications (in areas such as forensic accounting, auditing, legal practice, insolvency practice, and financial services administration) ;
- (c) knowledge of financial services business, and sufficient experience in this area should be considered a requirement;
- (d) a good record of investigative skills and tools, including a sufficient cadre of qualified and skilled investigative human resource to provide necessary support to the individual performing the function of examiner; and
- (e) a reliable record of undertaking and completing investigations on time, including the preparation and submission of well-written reports.

Where the person appointed to be an examiner is a legal person, the EC must satisfy itself of the individual(s) it will put to the investigation and they must satisfy the criteria set out in sub-paragraphs (a) to (d) above.

#### **4.2.5 *Use of Compulsory Powers***

Sections 32, 33, 33A and 33B of the FSCA outline the compulsory powers exercisable by the Commission in the discharge of its functions. These powers essentially relate to the power to compel information and documents, apply for search warrants from a magistrate, apply for a person to be examined before a magistrate and require a person to be examined on oath by a Commissioner or an officer of the Commission. These powers may be exercised by an examiner when carrying out investigations.

#### **4.2.6 *Manner of Exercising Compulsory Powers (Issuing a Notice)***

It should be borne in mind that the rationale for the Commission exercising its compulsory powers relates to the discharging of its functions or ensuring compliance with the precepts of financial services legislation. Thus where it

desires to exercise such powers, the EC must ensure compliance with the following:

- (a) a notice must be issued to a specified person requiring the person to provide specified information or documents or information or documents of a specified nature;
- (b) a specified person may be any of the following:
  - (i) a regulated person;
  - (ii) a former regulated person;
  - (iii) a person reasonably believed to be carrying on or to have at any time carried on unauthorized financial services business;
  - (iv) a person who is connected in any way with a regulated person or former regulated person;
  - (v) a person who is reasonably believed to have the information or documents to which the notice relates;
- (c) the notice must specify the place where and the period within which the required information or documents must be provided or produced;
- (d) the notice is to specify that the information or documents required are to be supplied to the EC through the Secretary or such other person as the EC may determine and specify in the notice;
- (e) where considered necessary by the EC, the notice must indicate the form in which the required information must be provided;
- (f) where considered necessary by the EC, the notice must indicate the manner in which any information to be provided is to be verified or authenticated (this may relate to verification or authentication by a sworn affidavit or a declaration from a named third party with connection to the information attesting to the veracity or authenticity of the information supplied);
- (g) where the EC considers it helpful or for the purposes of the discharge of the Commission's functions or for record purposes, it may take copies or extracts of any document produced to it.

In circumstances where a person claims a lien on a document, it should be noted that the production of that document is without prejudice to the lien.

#### **4.2.7 Manner of Exercising Compulsory Powers (Applying for a Search Warrant)**

The issuing of a notice to compel information or documents may not be a desirable measure in every case of enforcement. There are those circumstances when it becomes necessary to utilize other measures in order to ensure the provision or production of information or documents. The FSCA specifically permits the Commission to apply to a Magistrate for a search warrant upon an oath sworn to on its behalf by an officer of the Commission. The circumstances in which a search warrant may be applied for are the following:

- (a) where a person fails to comply or only partly complies with a notice issued by the EC to provide information or produce documents;
- (b) where the opinion is formed that if a notice is issued it would not be complied with (such opinion may be formed on the basis of the compliance history of, exchange of correspondence with, level of cooperation of, etc., the person relative to an enforcement action);
- (c) where the opinion is formed that if a notice is issued the information or documents to which the notice relates may be removed, tampered with or destroyed;
- (d) where the opinion is formed that an offence under a financial services legislation has been, is being or may be committed unless fast action is taken to deal with, stop or prevent the commission of the offence; and
- (d) where the opinion is formed that there is information or some document on the premises of any of the persons referred to in paragraph 4.2.6 (b) (with ‘premises’ including a vehicle, a vessel or an aircraft).

The powers of a Magistrate upon an application for a search warrant are outlined in section 33 (2) of the FSCA, with the consequence flowing therefrom outlined in subsection (3) thereof.

#### **4.2.8 Form of Notice to Provide Information or Produce Documents**

Where the EC (or a person appointed as an examiner) takes the decision to issue a notice pursuant to section 32 of the FSCA, such notice shall be issued in accordance with the form set out in Schedule 3 or as near thereto as possible, depending on the nature and scope of the notice.

### **4.3            *CONSIDERATIONS IN EFFECTING ENFORCEMENT ACTION***

While the EC must as far as possible engage the enforcement actions and triggers for enforcement action respectively outlined in paragraphs 4.1.1, 4.1.2 and 4.1.4 where a breach of a financial services legislation occurs, the extent of such engagement will necessarily depend on a variety of factors. As previously noted, the EC's primary aim is not to punish (although that forms a relevant theme of its functions), but to seek and encourage compliance with the established regulatory regime. Thus when deciding what enforcement action is appropriate in any particular case, the EC must note the following considerations (by no means an exhaustive list):

- (a) the nature and gravity of the breach concerned;
- (b) the regulated person's current and past known compliance attitude, including willingness to cooperate with the Commission;
- (c) the regulated person's ability to resolve problems in a timely manner;
- (d) the level of resources available to the regulated person to effectively deal with regulatory concerns;
- (e) whether the regulated person has a history of committing breaches of the established regulatory regime;
- (f) whether or not there has been any loss to investors, creditors, shareholders, etc. or the potential for such loss is apparent or imminent;
- (g) whether the options available for effectively resolving problems are so limited as not likely to make much of a difference in the regulated person's conduct (the EC might want to consider suspension or revocation of licence);
- (h) the danger(s) posed by the regulated person operating as an ongoing concern;
- (i) whether or not the regulated person has indulged in providing the Commission with inaccurate or misleading information; and
- (j) the potential for compromising the reputation of the Virgin Islands.

The decision to suspend or revoke a regulated person's licence is a serious matter. The EC must satisfy itself of the gravity of the breach committed, the

loss or potential loss to investors, creditors, shareholders, etc. and all other relevant factors presented by any particular case.

#### **4.4            *DELEGATING ENFORCEMENT ACTION***

While it may be considered ideal for all enforcement action to be dealt with by the EC, such an approach may create unintended inefficiencies and unnecessary bureaucratic delays in the enforcement process. Minor regulatory breaches which are not likely to result in the imposition of penalties or the issuing of strong warnings and which by their nature are unlikely to have any significant impact may be enforced by specified officers of the Commission. As already outlined in paragraph 1.4.2, the FSCA empowers the EC to delegate the performance of its functions or the exercise of its powers to a senior officer of the Commission or to a Commissioner where its rules of procedure permit such an action. This power must be exercised through a notice in writing. In each case of delegation, it is for the EC to establish the specific matters it wishes to delegate; it is imperative for the delegate to act in accordance with the EC's directions. Where a delegate fails to act in accordance with the EC's directions, then the EC must seriously consider suspending or revoking the delegation concerned.

##### **4.4.1        *Delegating Functions and Powers***

In any case it considers it appropriate to do so, the EC may delegate one or more enforcement actions to a senior officer of the Commission not below the rank of Deputy Director or Manager or to a named Commissioner. The enforcement actions delegated may relate to one or more breaches of any financial services legislation and shall include the exercise of the EC's enforcement powers under the FSCA or any other power that the EC has a right or a discretion to exercise pursuant to any other enactment or authority.

##### **4.4.2        *Conditions of Delegation***

The conditions outlined in paragraphs 1.4.2 and 4.4.4 shall apply to every delegation of function or exercise of power in relation to the taking of enforcement action, save that the EC may, in appropriate cases, modify those conditions.

##### **4.4.3        *Form of Delegation***

The forms of delegation and extension of delegation outlined pursuant to paragraphs 1.4.3 and 1.4.4 (and respectively reflected in Part I and Part II of Schedule 1) shall be used by the EC in delegating any authority to undertake enforcement action.

#### **4.4.4 Conditions Applicable in Relation to Delegated Enforcement Actions**

Where the EC delegates a function and/or power in relation to enforcement action, the person to whom the delegation relates must comply with the following conditions, in addition to those applicable in his or her case under these *Guidelines and Operating Procedures* and the notice of delegation issued to him or her:

- (a) document the breach, outlining the date of discovery of the breach, when the breach occurred, the parties involved (including the regulated person concerned) and any related information;
- (b) document the nature of the breach, specifying the provision(s) of the enactment, directive, guideline or similar instrument that is breached;
- (c) where the breach relates partly to a function and/or power delegated and partly beyond such delegation, the matter shall be referred to the EC for guidance and the delegate shall act in accordance with any guidance provided;
- (d) seek legal advice from the DLE whenever such advice is necessary to the due execution of the function and/or power delegated;
- (e) any enforcement decisions taken must be consistent in relation to the same or similar facts and/or circumstances; where a radical departure is considered necessary on account of the specific facts and circumstances of any particular case, then advice must be sought from the DLE on a way forward and the advice given complied with accordingly;
- (f) where a breach is considered to be of a consistent nature by the same regulated person or other person connected with the regulated person, a referral must be made to the DLE for advice and the advice given complied with accordingly; a breach must be considered to be of a consistent nature in this context if it occurs three or more times;
- (g) where a directive is issued to undertake remedial action and such remedial action is not carried out within the time frame prescribed, the matter must be referred to the EC through the Secretary of the EC; for this purpose, a delegate must adopt follow up measures to establish whether or not a directive that has been issued has been complied with;



- (h) when in doubt as to whether a particular conduct by a regulated person or a person connected to the regulated person constitutes a breach, advice must be sought from the DLE and the advice given complied with;
- (i) where the opinion is formed that a regulated person is no longer fit and proper, an immediate referral must be made to the EC through the DLE;
- (j) where, considering the nature of a breach, the opinion is formed that a higher penalty ought to be applied than the delegate has power to exercise, the matter must be referred to the EC for action through the DLE stating the reason or reasons for the opinion;
- (k) any enforcement action taken pursuant to a delegation must be recorded and a report prepared thereon and submitted to the EC; where one or more enforcement actions are taken in relation to one or more breaches, these may be combined in a single report, but stating in each case the type of enforcement action taken;
- (l) where a delegation extends beyond 3 months but is less than six months, a report must be prepared and submitted to the EC for the first 3 months and at the end of the delegation; and
- (m) where a delegation extends to 6 or more months, a report must be prepared and submitted to the EC in respect of each quarter or part thereof of a year.

#### **4.4.5 Duration of a Delegation**

A delegation issued by the EC shall not extend beyond twelve calendar months, unless it is renewed in writing by the EC. This condition serves as a check to enable the EC to make a proper assessment of the function and/or power delegated, to establish the level and extent of compliance with the delegated authority and to make a determination whether there is merit in extending the delegation or whether the delegation should be given to another person. The factors that might assist in making this determination may include any of the following:

- (a) whether the delegate has been providing timely reports;
- (b) whether there has been consistency in the application of enforcement action and, where there has been departures, whether these have been dealt with as required under these *Guidelines and Operating Procedures*; and

- (c) whether there has been any breach of the conditions applicable with respect to a delegated authority.

#### **4.5            *REMOVAL OF AUDITORS***

Various financial services legislation require the appointment of auditors by regulated persons. Such appointments are made with the approval of the Commission on the basis of written applications made by the regulated persons. The preparation and timely submission of financial statements by regulated persons is considered a fundamental obligation, as it is through such statements (amongst other things) that the Commission can make a timely evaluation of the solvency of the regulated person and the level and extent of compliance with the relevant financial services legislation under which the regulated person operates. The auditor is integral to this process and must also function efficiently and effectively to aid the Commission's oversight function. Where an auditor fails to properly carry out his or her functions under any relevant financial services legislation (such as not immediately reporting the discovery of a criminal conduct or not submitting a report to the Commission where that is required or requested), consideration should be given to removing the auditor and requiring the regulated person to have another auditor appointed. The EC needs to be vigilant in this regard to satisfy itself that the auditing obligations applicable are being properly discharged and, if not, to ensure that appropriate action is taken.

#### **4.6            *REMOVAL OF DIRECTORS, SENIOR OFFICERS, COMPLIANCE OFFICERS, ETC.***

The Commission's power to require the removal of officers of regulated persons extends beyond auditors; it includes directors, senior officers and compliance officers of, and other persons who undertake functions in relation to, regulated persons. The functions relative to the latter category must be those that are so specified in regulations to fall within the scope of the Commission's power to require the removal of an officer of a regulated person.

This power of the Commission is outlined in section 40D of the FSCA. Thus the EC needs to be alert to the section and where it forms the opinion that a person – director, senior officer, compliance officer or other person whose functions are specified in regulations – does not satisfy his or her fit and proper criteria, it must consider whether the person ought to remain in the office he or she occupies. The EC must, in this regard, consider all the relevant prevailing circumstances relating to the fit and proper criteria not being met and apply an objective mind vis-à-vis the overall regulatory functions of the Commission. The EC may, as a result, require the regulated person to remove the person who no longer meets the requisite fit and proper criteria. Where the EC considers it appropriate, it may require the regulated

person to replace the person required to be removed from office with another person who is acceptable to the Commission.

**4.7 RE-APPOINTMENT OF REMOVED AUDITOR, DIRECTOR, SENIOR OFFICER, COMPLIANCE OFFICER, ETC.**

It is not unusual that a person who has been removed as auditor, director, senior officer, compliance officer or other officer becomes the subject of a new appointment by the same or another regulated person. The removal might have been on the initiative of a regulated person acting alone and in accordance with its own internal procedures or it might have been a consequence of a requirement for removal instructed by the Commission. In either case, it is always important to identify and record the reason(s) for the removal of the person concerned. The Commission pays particular attention to removals that are the result of incompetence (which includes non-compliance with legislative mandates or directives or policies of the Commission), probity and abusive treatment of employees. While it may be considered inappropriate in some cases to condemn a person removed from office for life without considering new and developing circumstances, the Commission adopts as a general rule the policy of not approving persons previously removed from positions of auditor, director, senior officer, compliance officer or other officer to the same or similar position within any regulated person. A person removed on account of probity may never be engaged or re-engaged by any regulated person; a person removed on account of incompetence may not be engaged or re-engaged without evidence of further training and enhanced ability to function competently; a person removed on account of abusive treatment of employees may not be engaged or re-engaged unless there is evidence of training (including anger management where applicable) and better aptitude towards and respect for co-workers of all ranks, including the demonstration of ability to treat employees equally.

While it is not for the EC to deal with the issue of whether or not to grant approval for the engagement or re-engagement of a person removed from office (that being a function performed on the Commission's behalf by the Licensing and Supervisory Committee), it is the duty of the EC to ensure that

- (a) a removal from office of any person is properly recorded, identifying in each case the date of removal, the name (including any aliases) and address of the person, the steps (if any) taken to have any breach remedied prior to the removal and the reason(s) for the removal; and
- (b) the Licensing and Supervisory Committee and the relevant Division of the Commission to which the removal should be of interest are informed of the removal in writing.

## CHAPTER FIVE

### ADMINISTRATIVE PENALTIES REGIME

Section 62 (1) of the FSCA empowers Cabinet to make regulations relative to the Act; that power extends to providing for the imposition by the Commission of administrative penalties on regulated persons that contravene that Act, any regulatory legislation, the Regulatory Code or any directive issued by the Commission. In a similar vein, the Proceeds of Criminal Conduct Act, 1997 empowers the Commission to issue a Code of Practice on AML/CFT matters which may create offences and impose penalties to be enforced by the Commission as administrative penalties. Thus the Commission has two regimes of administrative penalties created, namely under the Financial Services (Administrative Penalties) Regulations, 2006 and the Anti-money Laundering and Terrorist Financing Code of Practice, 2008. The penalties relative to both regimes are respectively set out in Part I and Part II of Schedule 4.

#### **5.1        *PROCEDURE UNDER THE FINANCIAL SERVICES (ADMINISTRATIVE PENALTIES) REGULATIONS, 2006***

The Financial Services (Administrative Penalties) Regulations, 2006 (“the Regulations”) provide specific procedures to be followed where the decision is taken or contemplated to impose an administrative penalty. These are substantive procedures which must be followed by the EC in relation to the application of administrative penalties for breaches committed by regulated persons. Thus where the decision is taken to impose an administrative penalty, the amount thereof must be fixed within the applicable range specified in the Schedule, after taking into account the following matters:

- (a) the nature and seriousness of the contravention concerned;
- (b) the regulated person’s compliance history with the FSCA or any regulatory legislation;
- (c) whether the contravention is a result of the regulated person’s negligence or deliberate or reckless conduct;
- (d) whether or not loss or damage has been sustained by any person as a result of the contravention;
- (e) the ability of the regulated person to pay the penalty, including any gain the regulated person might have received as a result of the contravention; and

- (f) such other matter as the EC may consider appropriate, having regard to the contravention.

### **5.1.1 Notice Requirement**

Where the decision is taken to impose an administrative penalty on a regulated person for a contravention, a notice of proposed penalty must be issued to the regulated person outlining the relevant contravention, the amount to be imposed and inviting the regulated person to make any representation it wishes; the regulated person has a period of 21 days from the date of the notice to make a representation as to why it should not pay the stated penalty or why a reduced amount should apply. After the 21 day period, a notice of imposed penalty may be issued imposing an administrative penalty on the regulated person. However, the EC must ensure that any penalty imposed after the notice period does not exceed the amount previously notified to the regulated person. The notice of proposed penalty and the notice of imposed penalty shall be in the forms provided respectively in Part I and Part II of Schedule 5 or as near thereto as possible.

The EC is entitled, however, prior to communicating a written penalty notice to a regulated person, to withdraw that notice and substitute it with a new one prescribing a different amount which does not exceed the amount previously notified. Any penalty that is imposed on a regulated person must be paid within 14 days of the receipt of the written penalty notice. The Commission may commence legal proceedings against a regulated person that fails to pay an administrative penalty imposed on it.

The above procedures essentially apply to non-payment or late payment of any fee or charge payable under the FSCA or a financial services legislation.

While a regulated person is entitled to appeal against the decision to impose an administrative penalty (which is within 14 days of the receipt of the written penalty notice), such appeal does not operate as a stay of the obligation to pay the imposed administrative penalty.

The imposition of an administrative penalty on a regulated person operates as a bar against the revocation of the licence of that regulated person; however, this restriction applies only in respect of the contravention to which the administrative penalty relates.

It is open to the EC to agree to an instalmental payment of an administrative penalty. This must be on the basis of a written application submitted by the regulated person on which an administrative penalty has been imposed. The application must contain a proposal for an intalmental payment arrangement which the EC will consider and take a decision upon. The EC is not obliged to accept any proposal for an instalmental payment arrangement, although it

must consider such proposal in making its own determination. Accordingly, it is for the EC to determine the instalmental payment arrangement acceptable to it and communicate it to the regulated person liable thereto and such person shall comply accordingly.

### **5.1.2      *Limitation Period***

In respect of a contravention under the FSCA or any financial services legislation, no action must be brought against a regulated person after a period of 2 years from the date that the Commission knew of the contravention. In relation to the non-payment or late payment of a fee or charge, the limitation period prescribed is 6 years after the date on which the fee, charge or penalty became due for payment.

## **5.2            *PROCEDURE UNDER THE ANTI-MONEY LAUNDERING AND TERRORIST FINANCING CODE OF PRACTICE, 2008***

The Anti-money Laundering and Terrorist Financing Code of Practice, 2008 (“the Code”), unlike the Regulations, does not prescribe a procedure to be followed when an administrative penalty is to be imposed. The reason is simple: a contravention under the Code constitutes an offence. However, the Commission must satisfy itself, on the basis of evidence before it, that a person has committed an offence under the Code. Where there is uncertainty regarding the commission of an offence or as to who may be involved in the commission of an offence, the EC must initiate the necessary investigations in order to enable it to arrive at an informed position before action is taken against a person with respect to the imposition of an administrative penalty.

It is also considered appropriate that the Commission, before imposing an administrative penalty for an offence under the Code, should make the fact of the commission of the offence known to the person concerned and invite the person to make such representation as may be deemed fit. In this regard therefore, the timelines provided under the Regulations for the imposition of penalties are to be applied by the EC in respect of penalties imposed pursuant to the Code.

## CHAPTER SIX

### MISCELLANEOUS MATTERS

There is a miscellany of matters which may fall to be considered by the EC as part of its function of discharging enforcement responsibilities on behalf of the Commission. As part of its overall objectives, the Commission aims to ensure a legitimate and well-regulated business environment in the Virgin Islands. In this vein, the Commission takes a strong stance against those whose business ethics and standards fall short of the established rules and standards established by statutes, and policies, rules and procedures of the Commission as well as those established by regional and international standard-setting institutions of which the Virgin Islands is a part or which or whose standards it recognizes.

#### **6.1**        *DEALING WITH COMPLAINTS*

Generally, it is not the policy of the Commission to enter the arena of disputes that is of a private nature. However, there is recognition that in the discharge of its functions the Commission will from time to time receive complaints from sources outside of the Commission. It is for the Commission to decide when it is appropriate to intervene in the handling of complaints and how such complaints should be treated. Complaints received by the Commission are to be referred to and dealt with by the EC in such manner as the EC considers appropriate.

##### **6.1.1**      *Nature of Complaint*

Where a complaint is referred to the EC, the EC must consider the nature of the complaint and decide whether or not the complaint is one the Commission should be involved in. The EC must be guided by the following considerations in deciding whether or not to get involved:

- (a) whether the complaint is one the Commission generally has an interest in; examples may relate to issues of the reputation of the Virgin Islands being at stake, the public being misled as a result of some representation being made, investors' interests being affected by the conduct of a regulated person, etc.;
- (b) whether the complaint raises questions concerning the financial health of a regulated person;
- (c) whether the complaint raises issues of competence, probity or prudent management of a regulated person;

- (d) whether, having regard to the nature of the complaint and the compliance history of the regulated person to which the complaint relates, the complaint warrants consideration; and
- (e) whether there is a failure by a regulated person to comply with the laws of the Virgin Islands or any directive, guideline or policy established by the Commission.

### **6.1.2 *Identity of Complainant***

Whenever possible, the EC must seek to establish the identity of the person making a complaint. This will aid the EC immensely in making a decision on the issue of the complaint and where it requires additional information, clarification, documentary evidence, identification and availability of witnesses, etc. Thus where a complaint is received, the following considerations and procedures must be put in motion:

- (a) the person making the complaint provides sufficient personal information regarding his or her identity, contact details (telephone and facsimile numbers and email address, where available) and his or her link or association, if any, with the regulated person against whom the complaint is made;
- (b) on the face of it, the complaint provides sufficient clarity and guidance to enable a proper decision to be made whether or not to proceed in dealing with the complaint;
- (c) where the complaint is made orally, the person making the complaint is willing to reduce the complaint in writing and/or assist the EC in the event it decides to institute appropriate investigations with a view to taking enforcement action;
- (d) the availability of witnesses and documentary evidence (where necessary);
- (e) the complaint relates to a possible regulatory breach by an identified regulated person;
- (f) the regulated person against whom a complaint is made is given an opportunity to respond to the complaint; in ideal circumstances, where the complaint is in written form, a copy may be made available to the regulated person and, in a case where the complainant requests anonymity, the personal details of the complainant are expunged from the copy of the written complaint forwarded to the regulated person;



- (g) where a decision is taken to deal with the complaint, an appropriate investigation is instituted;
- (h) the complainant is notified in writing of the findings of the investigation; this would not apply in the case of anonymous complaints; and
- (i) appropriate enforcement action is taken in accordance with the rules established by the FSCA and these *Guidelines and Operating Procedures*.

As a matter of general principle, the EC must be slow to give credence to and rely on a complaint that is given anonymously. The reputation of the regulated person against which such a complaint is received must be seriously considered and nothing must be done that would tend to unduly and unfairly operate against the regulated person in the absence of information that raises sufficient credible concerns. Where a person making a complaint requests anonymity for whatever reason, the EC must provide such anonymity; however, where the EC forms the opinion that the complaint can best be dealt with by having the name of the complainant revealed, it must seek the cooperation and agreement of the complainant before removing the cover of anonymity. However, nothing prevents the EC from using other legitimate means and sources in order to properly and effectively deal with a complaint.

### **6.1.3 Whistleblowers**

Whistleblowers must be treated as complainants and their complaints are to be dealt with as provided in paragraphs 6.1.1 and 6.1.2. However, because of their relationship with the regulated person against which the complaints are made, the EC must ensure that in dealing with their complaints nothing is done that would aggravate their conditions or relationship with the regulated person. This may require the EC to interface in writing or otherwise with the regulated person to ensure that the regulated person does not adopt any negative measures or actions that would directly or indirectly affect or militate against the whistleblower. Where a whistleblower submits a complaint and requests anonymity, then the requirements and procedures outlined in the penultimate paragraph of paragraph 6.1.2 must be followed.

### **6.1.4 Registers of Complaints and EC Decisions**

The Secretary of the EC shall maintain a register in which he or she shall make entries of all complaints received by the Commission in relation to a regulated person. The register shall be in the form prescribed in Part I of Schedule 6. Similarly the Secretary shall maintain a register in which he or she shall make entries of the enforcement matters dealt with by the EC in accordance with the form prescribed in Part II of Schedule 6. These forms

may be amended by the EC as it considers fit and in such form as may be necessary in any particular case.

## **6.2            *MEDIATING DISPUTES***

Where in a private dispute the Commission is invited by the disputing parties to mediate between them, it may, having regard to the nature, form and extent of the dispute, accept the invitation on the following conditions:

- (a) the subject matter of the dispute must relate to a matter of financial services for which the Commission has regulatory functions or responsibility and does not relate to the taking of enforcement action by the Commission;
- (b) the acceptance to mediate shall not render the Commission to any liability, civil or otherwise;
- (c) the Commission may establish its own rules of procedure with respect to the handling of disputes which the parties shall agree upon;
- (d) the parties must agree in writing that any costs incurred by the Commission in the process of mediating between the parties shall be borne by the parties in equal proportions or by such other proportion as the parties may agree in writing and to which the Commission agrees; the Commission may require payment of costs at such time as it considers fit;
- (e) the parties must separately indicate in writing that they voluntarily agree to mediate their dispute and similarly indicate their agreement for the dispute to be referred to the Commission to be mediated;
- (f) the objective of the mediation is to bring about a consensus of the minds of the parties and, where the parties request the Commission to take a decision on any matter, the parties will recognize and respect the decision;
- (g) the parties shall at all times act with decorum and in good faith and devote all necessary facilities and resources to aid the Commission to conduct a proper and effective mediation between the parties;
- (h) any role assumed by the Commission in mediating a dispute shall not be construed as a substitute for any dispute settlement process and/or procedure established by the courts of the Virgin Islands; and

- (i) a mediation by the Commission shall not operate as a bar to either party instituting or continuing any legal proceedings with respect to the matter(s) in dispute.

### **6.3 ABUSIVE TREATMENT**

It is not unknown that some regulated persons may engage in acts that tantamount to harassing or abusing some members of their staff for whatever reason. While it is not the role of the Commission to interfere in the internal administration of a regulated person, it cannot be oblivious to harassing or abusive conduct against employees which may raise questions regarding the fitness and propriety of a regulated person, the actual conduct of business by a regulated person or the extent and level of compliance with the laws of the Virgin Islands. The EC must therefore be alert to any complaints or reports of harassing and/or abusive conduct against an employee engaged in by a regulated person. This may be carried out by receiving complaints of harassing and abusive conduct orally or in writing from the person who is affected or can provide sufficient guidance to the EC in that regard; such complaints may be treated in accordance with paragraphs 6.1.1 and 6.1.2 where they relate to or embody some element of possible regulatory breach or dealt with in such manner as the EC considers fit, having regard to the nature of the alleged harassment or abuse.

What conduct on the part of a regulated person constitutes harassment or abuse is one of fact. The EC must apply an objective approach and an objective assessment with regard to such matter; it must seek to elicit all relevant information and, where necessary, documentary evidence (including witness evidence) with the cooperation of the regulated person concerned and the employee that is the subject of harassment or abuse.

As already noted, the Commission does not seek to interfere with the manner or form in which a regulated person is administered and recognizes and supports internal measures and actions designed to uphold the law and ensure efficiency and proper and effective conduct on the part of its employees at all levels. However, where it establishes any harassment or abusive conduct on the part of a regulated person, it may consider whether or not

- (a) the regulated person continues to be fit and proper;
- (b) the conduct of the regulated person has related or underlying breaches that warrant enforcement action;
- (c) new or further conditions need to be applied with respect to the regulated person's licence; and

- (d) the conduct of the regulated person should be referred to another authority that could better deal with the harassment or abuse in question.

#### **6.4 PUBLICATION OF EC DECISIONS**

As a matter of general principle, the EC will publish all decisions taken by it with respect to enforcement actions. Such publications may be posted on the Commission's website at [www.bvifsc.vg](http://www.bvifsc.vg) or on other websites (such as the Virgin Islands Government website) or in any domestic, regional or international media. The extent of publication will be determined on the basis of

- (a) the relevance of the decision, having regard to its nature and gravity;
- (b) the subject matter to which the decision relates; and
- (c) the extent of interest in the matter, having regard to the history surrounding it.

However, the EC may in any particular case and for any special reason decide not to publish its decision on an enforcement action (indeed it need not proffer any reason for a decision not to publish). This may be the case, for example, in enforcement actions that are considered to relate to breaches that may not bear significant impact or that are committed by a regulated person for the first time; the same may apply where the EC forms the opinion that the matter to which enforcement action has been taken relates to another ongoing matter (under investigation or for a decision) and publication may prejudice or give the appearance of prejudicing that other matter.

#### **6.5 QUESTIONS AND ASSISTANCE**

Any questions relating to the Commission's regulatory functions and enforcement powers may be obtained from the FSCA, the Regulatory Legislation outlined in Schedule 2 of the FSCA and these *Guidelines and Operating Procedures*. While generally, the EC is not into entertaining questions in order to provide answers to matters in respect of which enforcement action is ongoing or contemplated, its Secretariat will provide any necessary assistance to ensure compliance with any directive of the Commission, provide clarification on actions taken and provide information on matters of cooperation. Questions must be specific and clear and must not be conjectural or speculative and the person forwarding the question must be identifiable. Also the questions must, as far as possible, be in writing. It should be noted that the EC Secretariat staff perform a lot of duties and may

not be able to provide spontaneous responses to questions; they may need time to revert to questions.



**SCHEDULE 1**

[Paragraph 1.4.3]

***Part I***

***Notice of Delegation of Authority by the Enforcement Committee of the Financial Services Commission Pursuant to Section 17 (2) of the Financial Services Commission Act, 2001***

*The Enforcement Committee, in exercise of the powers conferred on it by section 17 (2) of the Financial Services Commission Act, 2001 (No. 12 of 2001), by this Notice hereby delegates to .....(name of delegate) of .....(address of delegate) to perform and/or exercise the following functions and/or powers (“delegated task(s)”) on behalf of the Enforcement Committee:*

- 1. ....
- 1. ....
- 2. ....
- 3. ....
- 4. ....

*In the course of performing the functions and/or exercising the powers referred to above, you shall at all times act in accordance with the directions of the Enforcement Committee. In addition, you are required to complete the delegated task(s) on or before the day of , 20xx with the preparation and submission of a written report to the Enforcement Committee.*

*If during the execution of the task(s) assigned to you herein any matter arises which requires consultation with or direction from the Enforcement Committee, you shall immediately bring the matter to the attention of the Secretary of the Enforcement Committee.*

*This delegation, unless extended in writing by a further Notice, will come to an end on the date above referred for the submission of the requisite report, so however that the Enforcement Committee reserves the right at all times to terminate this delegation without notice and without proffering any reason therefor.*

ISSUED this day of , 20xx .

.....  
*Secretary, Enforcement Committee  
Financial Services Commission*

**Part II**

[Paragraph 1.4.4]

***Notice of Extension of Time in Respect of a Delegated Authority***

*With reference to the Notice of Delegation of Authority dated the  
day of , 20xx issued to  
..... (name of delegate) of  
..... (address), this Notice serves as authority  
from the Enforcement Committee of the Financial Services Commission  
extending the period within which the said  
..... (name of delegate) of  
..... (address) shall prepare and submit  
the required report in relation to the task(s) assigned under the Notice of  
Delegation of Authority, from the day of , 20xx  
to the day of , 20xx .*

*ISSUED this day of , 20xx .*

.....  
*Secretary, Enforcement Committee  
Financial Services Commission*

**SCHEDULE 2**

[Paragraph 4.1.3]

**Part I**

**Notice of Intention to Issue a Public Statement Pursuant to Section 37A of the Financial Services Commission Act, 2001**

The Financial Services Commission (“the Commission”), acting in accordance with the requirements of section 37A (3) of the Financial Services Commission Act, 2001 (No. 12 of 2001), by this Notice hereby notifies .....(name of person) of .....(address) of the Commission’s intention to issue a public statement in relation to the said.....This Notice is issued with respect to an enforcement action that the Commission intends to take against the said .....(name of same person).

The reason(s) for the Commission’s intention to issue a public statement in relation to the said ..... are as follows:

.....  
.....  
.....  
.....

If you wish to make any representation(s) in relation to this Notice, you must do so in writing to reach the Commission on or before the day of , 20xx. The representation must be addressed to

The Secretary  
Enforcement Committee  
Financial Services Commission  
Pasea Estate  
Road Town, Tortola  
British Virgin Islands

ISSUED this day of , 20xx.

.....  
Secretary, Enforcement Committee  
Financial Services Commission



**Part II**

**Notice of Intention to Suspend or Revoke a Licence Pursuant to Section 38 of the Financial Services Commission Act, 2001**

The Financial Services Commission (“the Commission”), acting in accordance with the requirements of section 38 (4) of the Financial Services Commission Act, 2001 (No. 12 of 2001), by this Notice hereby notifies .....(name of person) of..... (address) of the Commission’s intention to suspend/voke\* the licence issued to the said .....(name of same person).

The ground(s) upon which the Commission intends to suspend/voke\* the licence of the said .....(name of same person) is/are\* as follows:

.....  
.....  
.....  
.....

Unless you, the said .....(name of same person), can show good reason why your licence should not be suspended/revoked\* by filing a written notice with the Commission, your licence will be suspended/revoked\* on or after the            day of            , 20xx.

Should you choose to file a written notice with the Commission, the notice must be addressed to:

The Secretary  
Enforcement Committee  
Financial Services Commission  
Pasea Estate  
Road Town, Tortola  
British Virgin Islands

ISSUED this            day of            , 20xx.

.....  
Secretary, Enforcement Committee  
Financial Services Commission

\* Delete as necessary

**SCHEDULE 3**

[Paragraph 4.2.8]

*Notice to Provide Information or Produce Documents Pursuant to  
Section 32 of the Financial Services Commission Act, 2001*

*The Financial Services Commission (“the Commission”), in exercise of  
the powers conferred by section 32 of the Financial Services  
Commission Act, 2001 (No.12 of 2001), by this Notice requires  
..... (name of person) of  
..... (address of person),*

- (a) to provide the following information:*
  - (i).....*
  - (ii).....*
  - (iii).....*
  - (iv).....*
  
- (b) to provide information known to you or in your  
possession relating to*
  - (i).....*
  - (ii).....*
  - (iii).....*
  - (iv).....*
  
- (c) to provide the following documents:*
  - (i).....*
  - (ii).....*
  - (iii).....*
  - (iv).....*
  
- (d) to provide any documents in your possession relating to*
  - (i).....*
  - (ii).....*
  - (iii).....*
  - (iv).....*

*The information required from you pursuant to this Notice must be  
provided in the form of a narrative (or such other form as the  
Commission may direct during or after the currency of this Notice) and  
shall be verified and authenticated by a notarized affidavit duly sworn by  
you or, as may be applicable, by any senior officer of your organization.*



## SCHEDULE 4

### Part I

[Chapter Five]

### *Financial Services (Administrative Penalties) Regulations, 2006*

#### SCHEDULE 1

[Regulation 3 (2)]

#### ADMINISTRATIVE PENALTIES

<i>Categories of contravention and description</i>	<i>Penalty range</i>
<p><b>1. Licensing contravention</b></p> <p><i>Licensee:</i></p> <ul style="list-style-type: none"><li><i>(a) carrying on financial services business not authorised by its licence; or</i></li><li><i>(b) carrying on business in breach of a condition of its licence or contrary to a directive issued by the Commission.</i></li></ul>	<p><i>\$2,000 to \$20,000</i></p>
<p><b>2. Contravention of financial resource requirement</b></p> <p><i>Licensee failing to comply with any financial resource requirement, including, where applicable to the licensee, any failure:</i></p> <ul style="list-style-type: none"><li><i>(a) to maintain the required level of capital;</i></li><li><i>(b) to maintain the required solvency margin;</i></li><li><i>(c) to comply with any reserving requirements;</i></li><li><i>(d) to maintain any deposit required to be maintained.</i></li></ul>	<p><i>\$2,000 to \$20,000</i></p>
<p><b>3. Late filing/notification</b></p> <p><i>Licensee filing any document required to be filed or notifying the Commission of any matter required to be notified after last date on which the document is to be filed or the matter is to be notified to the Commission:</i></p> <p><i>1 to 30 business days late</i></p>	<p><i>\$100 to \$500</i></p>

<p><i>31 to 60 business days late</i></p> <p><i>61 to 90 business days late</i></p> <p><i>91 to 120 business days late</i></p> <p><i>121 to 150 business days late</i></p> <p><i>151 or more business days late</i></p>	<p><i>\$500 to \$2,000</i></p> <p><i>\$750 to \$3,000</i></p> <p><i>\$1,000 to \$4,000</i></p> <p><i>\$2500 to \$6,000</i></p> <p><i>\$3,000 to \$10,000</i></p>
<p><b>4. Failure to obtain approval</b></p> <p><i>Licensee taking any action for which the approval of the Commission is required without having obtained the necessary approval.</i></p>	<p><i>\$1,000 to \$5,000</i></p>
<p><b>5. Record keeping contravention</b></p> <p><i>Licensee failing to maintain any records required to be maintained or failing to maintain records in the manner or at the place required.</i></p>	<p><i>\$500 to \$5,000</i></p>
<p><b>6. Compliance contravention</b></p> <p><i>Licensee failing to establish or maintain adequate systems and controls for ensuring compliance with the requirements of, and its obligations under, the Act, the regulatory legislation, the Regulatory Code or directives issued by the Commission as required by section 34 of the Act, including</i></p> <p><i>(a) failure to appoint a compliance officer;</i></p> <p><i>(b) failure to establish and maintain a compliance procedures manual;</i></p> <p><i>(c) failure to comply with any requirement of a regulatory code with respect to compliance.</i></p>	<p><i>\$2,000 to \$10,000</i></p>
<p><b>7. Late payment of fee or penalty</b></p> <p><i>Licensee</i></p> <p><i>(a) paying any fee or penalty required to be paid</i></p> <p><i>under any regulatory legislation or any penalty required to be paid under these Regulations more than 360 days after the date when fee or penalty is due; or</i></p> <p><i>(b) persistently paying fees or penalties</i></p>	<p><i>\$500 to \$5,000</i></p> <p><i>In addition to any penalty payable in accordance with Schedule 2</i></p>

<p><i>required to be paid under any regulatory legislation or any penalty required to be paid under these Regulations after the date when fee or penalty is due.</i></p>	
<p><b>8. Other contravention</b></p> <p><i>Licensee committing any other contravention not falling within a category specified above.</i></p>	<p><i>\$100 to \$5,000</i></p>

**SCHEDULE 2**

62/2007

*[Regulation 5A (1)]*

**LATE PAYMENT PENALTIES**

*The following penalties are payable for the late payment of any fee or penalty payable under any regulatory legislation or for the late payment of any penalty payable under these Regulations*

<b>Description of Fee/Penalty</b>	<b>Penalty payable</b>
<p><b>1. Penalties for late payment of fee or charge payable under any regulatory legislation</b></p> <p><i>For the late payment of a fee or charge payable under any regulatory legislation</i></p> <p><i>(a) Where the fee or charge is paid 1-30 days after due date</i></p> <p><i>(b) For each additional period of 30 days, or any part thereof, during which fee or charge remains unpaid</i></p>	<p><i>20% if fee or charge payable, subject to a minimum of \$80.00</i></p> <p><i>10% of fee or charge payable, subject to a minimum of \$20.00</i></p> <p><i>The maximum penalty payable under paragraphs (a) and (b) shall be 100% of the fee or charge payable</i></p>

<p><b>2. Penalty for late payment of administrative penalty , other than late payment penalty)</b></p> <p><i>For the late payment of an administrative penalty imposed under Schedule 1,</i></p> <p>(a) <i>Penalty paid 1-30 days after due date</i></p> <p>(b) <i>For each additional period of 30 days, or any part thereof, during which penalty remains unpaid</i></p>	<p><i>10% of penalty payable</i></p> <p><i>10% of penalty payable</i></p> <p><i>The maximum penalty payable under paragraphs (a) and (b) shall be 100% of the administrative penalty payable.</i></p>

**Part II**

[Chapter Five]

**Anti-Money Laundering and Terrorist Financing Code of Practice 2008**

**SCHEDULE 2**

[Section 57 (1)]

**OFFENCES AND ADMINISTRATIVE PENALTIES**

<b>COLUMN 1</b> <i>Section of the Code creating offence.</i>	<b>COLUMN 2</b> <i>General nature of offence.</i>	<b>COLUMN 3</b> <i>Penalty (Corporate body)</i>	<b>COLUMN 4</b> <i>Penalty (Individual)</i>
4 (3), (6) and (7)	<i>Failure to comply with requirements of subsection (1), or carry out customer due diligence and record keeping measures, or accepting donations linked to money laundering or terrorist financing</i>	\$3,000	\$2,000
12	<i>Failure to carry out money laundering and terrorist financing risk assessments</i>	\$3,000	\$2,000
14	<i>Failure to comply with the measures required under section 14 (2)</i>	\$3,000	\$2,000
15 (1)	<i>Failure by an employee to comply</i>		\$2,500



	<i>with internal control systems of an employer, or to disclose a suspicion</i>		
16 (3)	<i>Failure to comply with the prescribed obligations in relation to a Reporting Officer</i>	\$1,500	\$1,500
18 (1)	<i>Failure by an employee to report a suspicious activity or transaction</i>		\$3,000
19 (2), (4) and (5)	<i>Failure to engage in or undertake customer due diligence, or additional customer due diligence in the case of a trustee of a trust or a legal person</i>	\$3,500	\$2,500
20	<i>Failure to engage in enhanced customer due diligence</i>	\$3,500	\$2,500
21	<i>Failure to review and keep up-to-date customer due diligence information in the required manner</i>	\$2,500	\$1,500
29 (2) and (4)	<i>Failure to adopt relevant measures or additional measures or checks</i>	\$3,500	\$2,500

	<i>in non-face to face relationships</i>		
<i>30 (1) and (3)</i>	<i>Failure to ensure proper certification of document, or accepting certified document contrary to the section</i>	<i>\$3,000</i>	<i>\$2,000</i>
<i>30 (4)</i>	<i>Failure to verify existence of certifier of document</i>	<i>\$2,500</i>	<i>\$1,500</i>
<i>31 (2) and (5)</i>	<i>Failure to record an introduction of an applicant for business or a customer, or to ensure that an introducer reviews and maintains customer due diligence information as required</i>	<i>\$2,000</i>	<i>\$1,000</i>
<i>32</i>	<i>Failure to take post verification steps required under the section</i>	<i>\$1,500</i>	<i>\$1,000</i>
<i>36</i>	<i>Failure by a correspondent bank to satisfy itself regarding necessary customer due diligence measures required to be undertaken by a respondent bank</i>	<i>\$1,500</i>	<i>\$2,500</i>

39 (1) and (3)	<i>Failure to ensure transfer of funds accompanied by full originator information, or to verify full originator information</i>	\$2,500	\$2,500
39 (6)	<i>Failure to keep records of full originator information on payer</i>	\$3,500	\$3,500
41 (2) and (5)	<i>Failure to keep information received on payer with the transfer of funds, or to provide upon request within the specified time information on payer that the intermediary payment service provider has received</i>	\$2,500	\$2,500
41 (6)	<i>Failure to keep records of information on payer for the specified period</i>	\$3,500	\$3,500
42 (2)	<i>Failure to maintain records in the required form</i>	\$1,000	\$500
43 (1) and (2)	<i>Failure to ensure required contents of record, or to ensure that the manner of keeping records does not hinder monitoring of</i>	\$1,500	\$1,000

	<i>business relationships and transactions</i>		
44	<i>Failure to maintain transaction records</i>	\$3,500	\$2,500
46	<i>Entering into an outsourcing arrangement for the retention of records whereby access to such records is impeded by confidentiality or data protection restrictions</i>	\$3,500	\$2,500
47 (1)	<i>Failure to train employees</i>	\$2,500	\$1,500
48 (1) and (2)	<i>Failure to provide training at appropriate frequencies or to the desired level and standard</i>	\$2,500	\$1,500
54 (1) and (2)	<i>Failure to make or submit a report in the proper form</i>	\$500	\$200

**SCHEDULE 5**

[Paragraph 5.1.1]

**Part I**

***Notice of Proposed Penalty Pursuant to Regulation 4 (1) of the Financial Services (Administrative Penalties) Regulations, 2006***

*The Financial Services Commission, in exercise of the powers conferred by regulation 3 (1A) of the Financial Services (Administrative Penalties) Regulations, 2006 and pursuant to regulation 4 (1) of the said Regulations, by this Notice hereby notifies .....(name of person) of ..... (address) that you have committed the following contravention(s):*

- Licensing contravention
- Late filing/notification
- Record keeping contravention
- Late payment of fee/penalty
- Contravention of financial resource requirement
- Failure to obtain approval
- Compliance contravention
- Other contravention (specify)

***Description of Contravention:***

.....  
.....  
.....  
.....

*You are to further note that the amount of the proposed penalty is US\$.....*

*Please note that you may, within 21 days of the date of this Notice, make a representation to the Commission as to why you should not be required to*



**Part II**

***Notice of Imposed Penalty Pursuant to Regulation 4 (4) of the Financial Services (Administrative Penalties) Regulations, 2006***

*The Financial Services Commission, in exercise of the powers conferred by regulation 4 (4) and following the expiration of the Notice of Proposed Penalty dated the \_\_\_\_\_ day of \_\_\_\_\_, 20xx issued to .....(name of person) of ..... (address) and after consideration of the representation(s) received from the said .....(name of same person), by this Notice imposes on the said .....(name of same person) the administrative penalty of US\$..... for the following contravention(s):*

- Licensing contravention
- Late filing/notification
- record keeping contravention
- Late payment of fee/penalty
- Contravention of financial resource requirement
- Failure to obtain approval
- Compliance contravention
- Other contravention (specify)

***Description of Contravention:***

.....  
.....  
.....  
.....

*Please note that you are required to pay the said administrative penalty to the Commission within 14 days of the receipt of this Notice. Receipt of this Notice shall be assumed from the date the Commission delivers it to your registered address or, if sent by post, from the fifth day of the postage.*





**SCHEDULE 6**

[Paragraph 6.1.4]

**Part I**

*Register of Complaints*

<i>No.</i>	<i>Date Complaint Received</i>	<i>Person Filing Complaint</i>	<i>Nature of Complaint</i>	<i>Action Taken</i>	<i>Remarks</i>

**Part II**

*Register of EC Decisions*

<i>Enforcement Action No.</i>	<i>Nature of Breach</i>	<i>Form of Enforcement Action</i>	<i>Decision Taken by EC</i>	<i>Required Follow-up Action</i>	<i>Remarks</i>

ISSUED by the Financial Services Commission this            day of            , 2008.

Robert Mathavious  
Managing Director/CEO  
Financial Services Commission