

Questions Relevant to the Operation of the Regulatory Code, 2009

Cherno Jallow, QC

Director - Policy, Research and Statistics



Question 1

With the commencement of the RC on 1st February, 2010, have all the provisions of the Code become enforceable as of that date?



No. All the provisions are in force, except those outlined in Schedule 6 of the RC. Sections 19 (4) (requirement for at least 1 non-executive director), 25-28 (strategies, policies, systems and controls), 29-33 (internal controls), 34-35 (internal audit), 39 (1) (retention of records policy), Division 5 of Part II (outsourcing), 61 (requirement to maintain professional indemnity insurance for auditors), 69 (providing policies, systems and controls to prevent abuse of financial services) 134-137 (investment by licensed insurers), Division 2 of Part IV (corporate governance and policies, systems and controls by licensed insurers) and Part VI (money services business) become operational on 31st March, 2010.



Sections 19 (3) (requiring majority non-executive directors where BVI licensee required to have audit committee), 36 (a) (submission to Commission of list of internal audit reports – applicable to holders of general banking licence & holders of categories A and D insurer's licence), 36 (b) (submitting internal audit reports when requested by Commission) and 37 (appointment of audit committee) become operational on 30th June, 2010.

Section 57 (independence of auditor) is operational on first appointment or reappointment of auditor after 1st February, 2010.

There is no intention to amend Schedule 6 to enlarge the transitional periods provided.



Question 2

What is the status of the Explanatory Notes within the RC?



Section 5 of the RC addresses this question. The Explanatory Notes do not represent a legal interpretation of the provisions of the Code to which they relate; rather, they are provided as a guide to a better understanding of the relevant provisions of the Code. However, regulated persons are expected to pay very close attention to the Explanatory Notes as a court or the Commission may have regard to them in dealing with any matter under the Code.



Question 3

Do the current provisions of the RC extend to investment business? If not, are the provisions likely to be so extended and when might that be?



No. The RC does not currently extend to matters concerning investment business. However, the investment business component of the Code is being drafted, but will not be finalized until the Securities and Investment Business Bill (SIBA) is enacted by the House of Assembly. SIBA is currently with the Government for consideration and if and when it is enacted the relevant aspects relating to investment business as they concern the Code will be made available to the Focus Group on SIBA for its consideration; thereafter the subject will be made available on the Commission's website inviting comments from the industry.



The precise date as to when the provisions of the Code might be extended to investment business is unknown and very much depends on the timing relative to the enactment of SIBA. The Commission is unable to answer the question as to precisely when SIBA is likely to be enacted.



Question 4

With the definition of “senior officer” in the RC, how does that definition correlate with the definition of the same term in the Commission’s Guidelines for the Approved Persons Regime (issued in March, 2009)?



As already noted in the Guidelines for the Approved Persons Regime, following the enactment of the RC, necessary amendments (where required) will be effected to ensure appropriate synergy with the requirements of the Code. Accordingly, the Guidelines are being amended to cross reference the definition of “senior officer” in the RC and effect consequential amendments.



Question 5

The Commission's Guidance Notes on Compliance Regime (issued April, 2008) provides that the Guidance Notes are interim or provisional in nature in order to facilitate compliance with the administration of the FSCA and that its provisions would be transformed into imperative legislative provisions under the RC (to the extent possible). What therefore is the current status of the Guidance Notes, following the operation of the RC?



Most of the provisions of the Guidance Notes have already been incorporated in the RC. There are, however, a few areas that require further legislative action (see answer to question 9 below) or separate guidance. Once these areas are finalized, the Commission will issue a circular advising of the termination of the Guidelines. Furthermore and in the interim, all compliance matters are generally being dealt with in accordance with the provisions of the RC and, in any case, where any provision of the Guidelines continue to be in effect, it is being construed and applied with such modifications as would be consistent with the provisions of the RC.



Question 6

In view of the fact that the exemptions provided in sections 20 and 21 of the Provisional Guidance Notes on Compliance Regime have not been replicated in the RC, has there been a shift in policy in this regard on the part of the Commission? If not, would these exemptions still continue to apply and how would they relate to the specific exemption provided in section 40 (2) of the RC?



No, there is no shift in policy. The exemptions contained in sections 20 and 21 of the Guidelines are now required to be made under section 40C of the Financial Services Commission Act, 2001. As a consequence, section 40 (2) of the RC is being amended to specifically make reference to the exemptions to be effected pursuant to section 40C of the FSCA. The Commission would suggest that the amendment to the RC and enactment of the exemption regulations under the FSCA will be given retroactive effect to the date of commencement of the RC. In this respect, the Commission continues to allow the exemptions outlined in sections 20 and 21 of the Guidelines.



Question 7

Under Division 1 of Part II of the RC it is provided that every application for a licence has to be made in an approved form, yet no forms are provided in the RC. How is the Commission addressing this subject?



The Commission has already prepared relevant application and related forms in accordance with the powers conferred on it by section 41B of the Financial Services Commission Act, 2001. That includes forms relative to applications for licences under all the regulatory legislation. In tandem, the Commission has also prepared the Financial Services (Approved Forms Publication) Regulations which are required to be made by Cabinet before the approved forms can be finalized and published. The Commission is now awaiting Cabinet approval of the said Regulations and as soon as they are made the Commission will issue and publish the approved forms.



Question 8

In light of the fact that the number of years experience required for an approved person under the Guidelines for the Approved Persons Regime is five, is there justification in applying a lower level of experience in respect of a compliance officer (currently required to have only three years of relevant experience)? If not, how does the Commission intend to address this difference, especially in the context whereby under the FSCA a compliance officer whose appointment as such is approved by the Commission is deemed to be a senior officer?



No. The RC is being amended in the Explanatory Note (viii) following section 44 thereof to streamline the experience requirement to be at par with that which obtains under the Guidelines for the Approved Persons Regime.

