

No. 13 of 2009

VIRGIN ISLANDS

FINANCIAL SERVICES COMMISSION (AMENDMENT) ACT, 2009

ARRANGEMENT OF SECTIONS

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17. Section 56 substituted.
18. Section 56A inserted.

No. 13 of 2009

**Financial Services Commission
(Amendment) Act, 2009**

**Virgin
Islands**

I Assent

**(Sgd.) DAVID PEAREY,
Governor
31st August, 2009**

VIRGIN ISLANDS

No. 13 of 2009

An Act to amend the Financial Services Commission Act, 2001 (No. 12 of 2001).

[Gazetted 17th September, 2009]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title.

1. This Act may be cited as the Financial Services Commission (Amendment) Act, 2009.

General amendment.

2. The Financial Services Commission Act, 2001 (hereinafter referred to as “the Principal Act”) is amended

- (a) by replacing the word “Council” wherever it occurs in the principal Act, with the word “Cabinet”; and
- (b) by replacing the words “Legislative Council” wherever they occur in the principal Act, with the words “House of Assembly”.

Section 2 amended.
No. 12 of 2001

3. The principal Act is amended in section 2 (1) by deleting the term “Council” and the definition assigned to it and substituting it with the following:

“ “Cabinet” means the Cabinet of the Virgin Islands established under section 47 of the Virgin Islands Constitution Order 2007;” and

4. Section 9 of the principal Act is amended by inserting immediately after subsection (2), the following new subsection: Section 9 amended.

“(2A) Where the Cabinet removes a Commissioner from office pursuant to subsection (1), it shall provide in writing its reason for the removal.”

5. Section 10 of the principal Act is amended by inserting immediately after subsection (1), the following new subsection: Section 10 amended.

“(1A) The Board may remove the Managing Director from office pursuant to the terms and conditions of his appointment, and the Board shall provide in writing the reason for the removal.”

6. Section 13 of the principal Act is amended Section 13 amended.

(a) by renumbering the section as subsection (1); and

(b) by adding immediately after the renumbered subsection (1), the following new subsection:

“(2) Notwithstanding anything contained in this Act or any other enactment to the contrary, the Commission shall, in the exercise of its powers under this Act or any financial services legislation in making any decision, provide in writing the reason for the decision.”

7. Section 24 of the principal Act is amended by adding immediately after subsection (5), the following new subsections: Section 24 amended.

“(6) Where the estimates and work plan are laid before the House of Assembly and they are subsequently referred to a Select Committee of the House of Assembly, the Managing Director and other senior staff of the Commission may be required in writing by the Speaker to appear before the Select Committee of the House of Assembly to assist with and respond to any matter concerning the estimates and work plan.

(7) Where, following the approval of the estimates and work plan, the estimates and work plan are not laid in the House of Assembly within the time frame provided in subsection (5), the Commission may publish the estimates and work plan in a manner it considers fit.”

8. Section 27 of the principal Act is amended by adding immediately after subsection (2), the following new subsections: Section 27 amended.

“(3) Where the Commission’s audited accounts, report and audited financial statements are laid in the House of Assembly and they are subsequently referred to a Select Committee of the House of Assembly, the Managing Director and other senior staff of the Commission may be required in writing by the Speaker to appear before the Select Committee of the House of Assembly to assist with and respond to any matter concerning the audited accounts, report and audited financial statements.

(4) Where the Commission’s audited accounts, report and audited financial statements are not laid in the House of Assembly within the time frame provided in subsection (2), the Commission may publish the audited accounts, report and audited financial statements in a manner it considers fit.”

Section 34 amended.

9. Section 34 of the principal Act is amended

- (a) in subsection (3) by deleting the word “as” where it first occurs in paragraph (i) and replacing it with the word “and”; and
- (b) by inserting after subsection (4), the following new subsection:

“(4A) Where the Commission approves an individual as a licensee’s compliance officer, the individual shall, for the purposes of a relevant financial services legislation applicable to the licensee, be deemed to be a senior officer.”.

Section 36A amended.

10. Section 36A of the principal Act is amended in the opening paragraph of subsection (1) by inserting after “licensee”, where the word first occurs, the words “ or where it considers it reasonable for purposes of ensuring the proper and effective regulation and supervision of a licensee”.

Section 37 amended.

11. Section 37 of the principal Act is amended

- (a) by inserting immediately after subsection (1), the following new subsection:

“(1A) The Commission may take enforcement action against any person who

- (a) carries on unauthorised financial services business;
- (b) fails to comply with a directive given to him

by the Commission; or

- (c) fails to pay an administrative penalty imposed pursuant to regulations made under section 62 on or before the date on which the penalty is due to be paid.”;

(b) in subsection (2)

- (i) by inserting after “enforcement action” in the opening paragraph, the words “against a licensee”;
- (ii) by deleting “section 40” in paragraph (d) and replacing it with “section 40 (1) and (2)”;
- (iii) by deleting the word “or” at the end of paragraph (f);

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

“(2A) If the Commission is entitled to take enforcement action against any person under subsection (1A), it may

- (a) issue an order against the person to cease carrying on unauthorised financial services business;
- (b) issue a warning letter against the person;
- (c) appoint an examiner to conduct an investigation under section 36 as if the person were a licensee, or initiate and conduct such other investigation as the Commission thinks fit;
- (d) issue a directive under section 40 (3);
- (e) impose such administrative penalty on the person as may be provided for in regulations made under section 62;
- (f) require the person to pay for costs and expenses incurred by the Commission in the conduct of any investigation or the taking of

enforcement action against the person as the Commission thinks fit.”;

- (d) in subsection (3) by deleting “subsection (2)” and replacing it with “subsection (2) or (2A)”;
- (e) by adding immediately after subsection (3), the following new subsections:

“(4) The Commission’s power under subsection (2) (g) and (2A) (e) to require a licensee or any other person to pay costs and expenses incurred by the Commission shall be construed to include the power to require payment of costs and expenses associated with any investigation against or in relation to the licensee or other person, including the appointment of an examiner, irrespective of whether or not enforcement action has been taken against the licensee or other person.

(5) Where a person against whom an enforcement action is taken, pending or contemplated pursuant to this section, any subsequent issuing by the Commission of a licence to the person to carry on financial services business is without prejudice to the Commission’s exercise of its powers under this section in respect of the person.

(6) Where the Commission takes enforcement action against a licensee or any other person, the Commission may, notwithstanding anything to the contrary contained in this Act or any financial services legislation, publish the name of the licensee or other person in such manner as the Commission considers fit outlining the enforcement action taken and any sanction that the Commission may have imposed.”.

Section 38 amended.

12. Section 38 of the principal Act is amended in subsection (1)

- (a) by inserting before the word “revoke” in the opening paragraph, the word “cancel,”;
- (b) by deleting the word “revoked” in paragraph (c) and replacing it with the word “cancelled”.

Section 40D amended.

13. Section 40D of the principal Act is amended

- (a) by deleting subsection (1) and replacing it with the following new subsection:

“(1) Where the Commission forms the opinion that a person to which this section applies does not satisfy the Commission’s fit and proper criteria, it may

(a) require the licensee in writing to remove that person and, if the Commission considers it appropriate, to replace him with another person acceptable to the Commission; or

(b) on its own volition,

(i) suspend the person from performing any duty or function in or in relation to the licensee for a period determined by the Commission; or

(ii) withdraw its approval of the person, where the person has been the subject of an approval by the Commission under this Act or any financial services legislation.”; and

(b) by inserting after subsection (1), the following new subsections:

“(1A) Where a person is suspended by the Commission under subsection (1) (b) (i),

(a) the suspension shall not operate as a bar to any subsequent decision to remove him; and

(b) the Commission may extend the period of suspension from time to time as it considers fit, but the cumulative period of suspension shall not exceed nine months.

(1B) Where the Commission requires a licensee to remove a person or, on its own volition, suspends or withdraws an approval in respect of a person pursuant to subsection (1), the person shall immediately cease to perform any function in relation to the licensee concerned.

(1C) A licensee that is required by the Commission to remove a person shall ensure that the person does not perform any function in relation to the licensee.

(1D) A person who acts contrary to subsection (1B) or a licensee that acts contrary to subsection (1C) is liable to the imposition by the Commission of such administrative penalty as may be prescribed pursuant to Regulations made under section 62.”.

Section 41A amended.

14. Section 41A of the principal Act is amended in subsection (1) by deleting “financial institutions” and replacing it with “regulated persons”.

Section 50D amended.
Cap. 291
No. 16 of 2004

15. Section 50D of the principal Act is amended by deleting “under Part IIIA of the International Business Companies Ordinance” and replacing it with “under Division 5 of Part III of the BVI Business Companies Act, 2004”.

Section 54A inserted.

16. The principal Act is amended by inserting after section 54 the following new section:

“Duty to notify breach or offence. **54A.** (1) Where an authorised or a registered agent knows or has reasonable grounds to suspect that a licensee for which it acts as agent has committed a breach or an offence under this Act or a financial services legislation, or the authorised or registered agent commits an offence if it fails to notify the Commission in writing of the breach or offence within a reasonable period after it became known to or when the suspicion was held by the authorised or registered agent.

(2) An authorised or a registered agent who commits an offence under subsection (1) is liable to be fined by the Commission for an amount not exceeding seven thousand five hundred dollars.

(3) Where, on the basis of information available to it, the Commission is satisfied that a breach or offence committed by a licensee under this Act or any financial services legislation is due wholly or partly to the default of an authorised or a registered agent, the Commission may impose on the authorised or registered agent a fine not exceeding such amount as is prescribed for the breach or offence in respect of the licensee.

(4) Where the penalty prescribed for a breach or an offence committed by a licensee under this Act or any financial services legislation does not comprise a fine, the Commission may, for the purposes of subsection (3), impose a fine not exceeding twenty-five thousand dollars.

(5) The Commission shall not impose a fine under this section unless it notifies the authorised or registered agent in writing of the Commission's intention to impose such a penalty, and invites the authorised or registered agent to make such representation in writing as it considers necessary and within such period as the Commission prescribes, providing reasons why the Commission should not impose a fine.

(6) Where, after considering any representation made, or after the lapse of the period prescribed, under subsection (5), the Commission imposes a fine against an authorised or a registered agent under subsection (2), (3) or (4), it

- (a) shall notify the authorised or registered agent in writing of such decision and prescribe a period, not exceeding sixty days from the date of the decision, within which the fine shall be paid to the Commission; and
- (b) may, notwithstanding paragraph (a) and after receiving representation in writing from the authorised or registered agent within fourteen days from the date of the decision, require the fine to be paid in such instalments as the Commission may consider fit.

(7) Where an authorised or a registered agent fails to pay a penalty within the period prescribed by the Commission,

- (a) the fine shall attract interest at the rate of five per cent per annum from the date after it became due until the date the fine is paid; and
- (b) the Commission may recover the fine (including interest) by instituting civil proceedings against the authorised or registered agent before the Magistrate's Court.

(8) Any fine payable pursuant to this section shall be paid into the Commission’s bank account for use by the Commission.

(9) For the purposes of subsection (1), a “reasonable period” shall be construed to be a period not exceeding seven days after the breach or offence became known to or the suspicion for the commission of such breach or offence was held by the authorised or registered agent.

(10) The liability of an authorised or a registered agent under this section does not absolve a licensee from any liability for a breach or offence committed by the licensee.

(11) An authorised or a registered agent shall not be liable in any legal proceedings on account of the fact that it notified the Commission of a breach or an offence committed under this Act or a financial services legislation by a licensee for which it acts as agent.

(12) This section applies to an authorised representative, insurance manager or any other person who acts in the capacity of an agent with respect to a licensee, appointed under this Act or any financial services legislation, as if the reference in this section to “authorised or registered agent” were to such authorised representative, insurance manager or other person acting in the capacity of an agent.”.

Section 56 substituted.

17. Section 56 of the principal Act is substituted with the following new section:

“Power to impose a fine for an offence.

56. (1) Where under this Act or any financial services legislation the Commission is satisfied that an act or conduct by a person constitutes an offence, the Commission may, where

- (a) the offence carries a penalty of a fine, and
- (b) criminal proceedings have not been instituted against the person for the offence,

impose on the person a fine (not exceeding the prescribed fine) as the Commission may consider fit.

(2) Where a penalty of a fine under this Act or any financial services legislation is prescribed to be in addition to a penalty of imprisonment or other punishment, the Commission may nevertheless impose the penalty of a fine and the imposition of the fine only shall not be construed to be inconsistent with the penalty prescribed under the Act or any financial services legislation.

(3) The Commission shall not impose a fine against a person under subsection (1) unless it notifies the person in writing of

- (a) the offence the Commission considers the person has committed; and
- (b) the Commission's intention to impose a fine on the person,

and invite the person to make a representation in writing as it considers necessary and within a period the Commission prescribes, providing reasons why the Commission should not impose a fine.

(4) Where, after considering any representation made, or after the lapse of the period prescribed, under subsection (3), the Commission imposes a fine against a person under subsection (1), it

- (a) shall notify the person in writing of the decision and prescribe a period, not exceeding sixty days from the date of the decision, within which the fine shall be paid to the Commission; and
- (b) may, notwithstanding paragraph (a) and after receiving representation in writing from the person within fourteen days from the date of the decision, require the fine to be paid in installments as the Commission considers fit.

(5) Where a person fails to pay a penalty within the period prescribed by the Commission,

- (a) the fine shall attract interest at the rate of five per cent per annum from the date after it became due until the date the fine is paid; and
- (b) the Commission may recover the fine (including interest) by instituting civil proceedings against the person before the Magistrate's Court.

(6) For the purposes of this section and notwithstanding anything to the contrary contained in this or any other enactment, an offence under this Act or any financial services legislation in respect of which a fine is imposed by the Commission shall be treated as if it were a breach.

(7) Any fine payable pursuant to this section shall be paid into the Commission's bank account for use by the Commission.”.

Section 56A inserted.

18. The principal Act is amended by inserting after section 56, the following new section:

“Power to require returns.

56A. (1) The Commission may, by an Order published in the *Gazette*, require a regulated person to prepare and submit to the Commission a return of any matter concerning the business or affairs of the regulated person and his clients.

(2) Any return required by the Commission pursuant to subsection (1)

- (a) shall be in a form and contain such detail as may be prescribed by the Commission in the Order issued under subsection (1);
- (b) may be used for the purpose of analysing and developing relevant statistical data for use by the

Commission or for public dissemination;

- (c) may be used for the purpose of facilitating the supervisory functions of the Commission;
- (d) may be used in response to statistical inquiries by persons who are connected to or have interest in the work of the Commission or generally in the operation of financial services business in the Territory and which the Commission considers to be legitimate and appropriate;
- (e) may be used for the purpose of meeting any obligation or undertaking of the Commission by virtue of its membership or association of any institution or organisation or of implementing any domestic or internationally established standard or commitment;
- (f) may be applied for some other purpose consistent with the duties and functions of the Commission; and
- (g) shall be prepared and submitted for the period and within the time frame as may be prescribed in the Order.

(3) A regulated person shall ensure that information provided in any return is accurate and complete.

(4) Where a regulated person fails to comply with subsection (2) (a) or (f) or subsection (3) or contravenes any provision of the Order, he is liable to such administrative penalty as the Commission may prescribe in the Order, and section 62 (1B) shall apply accordingly as if the reference in that section to “regulations made in accordance with subsection (1)” were a reference to “the Order”.”.

Passed by the House of Assembly this 11th day of August, 2009.

(Sgd) ROY HARRIGAN,
Speaker.

(Sgd) PHYLLIS EVANS,
Clerk of the House of Assembly.