

British Virgin Islands Financial Services Commission

Guidelines and Operating Procedures of the Licensing and Supervisory Committee



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**GUIDELINES AND OPERATING
PROCEDURES
OF THE
LICENSING AND SUPERVISORY COMMITTEE
OF THE
BRITISH VIRGIN ISLANDS
FINANCIAL SERVICES COMMISSION**

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INTRODUCTION	

One of the primary functional roles of any financial services regulator is to properly regulate and supervise its licensees to ensure compliance with established laws, policies and international best practices and standards. This role, however, stems from the recognition of the existence of the regulated entities in the first place, following a mechanism for licensing. The scope of modern day financial services regulation entails a raft of regulatory issues ranging from the need for appropriate due diligence at the licensing stage to the monitoring and supervision of licensees and taking necessary enforcement action. It is therefore incumbent that all necessary legislative, regulatory and enforcement mechanisms are suitably framed and put in place to guide the regulator in ensuring proper compliance with the established rules governing the conduct of financial services business.

The conduct of modern day financial services business is global in character and not necessarily restricted to the domestic sphere. Indeed the world has globalised and so has the trade in goods and services. It is in this context that there have emerged in the last several years international institutions – Financial Action Task Force (FATF) and related regional task forces (FSRBs), Basel Committee on Banking Supervision (BCBS), International Organisation of Securities Commissions (IOSCO), Egmont, etc. – with responsibility for setting global standards of regulation in the field of financial services, law enforcement and international cooperation. We have also witnessed the establishment of regional and special interest organizations and associations, such as the Offshore Group of Banking Supervisors (OGBS), Caribbean Group of Banking Supervisors (CGBS), International Association of Insurance Supervisors (IAIS), (ASBA), **Financial Stability Board (FSB) and Global Forum of the OECD** which seek to ensure a harmonized approach to the regulation of specific financial services business among their members and thus collectively aim to play an active role in the establishment and promotion of international standards of regulation and supervision. The activity of standards development revolving around the regulation, monitoring and supervision of the vehicles of financial services is not to be expected to ease at any moment, for the financial services environment is an evolving and innovative one and with it must grow the necessary standards to ensure the legitimacy of the conduct of business, upholding of jurisdictional reputation and maintaining global financial stability. In fact, the recent global financial crises have demonstrated the extent to which world economies are interlinked and the importance for greater cooperation in harmonizing standards of regulation and supervision.

As a key player in the global financial services industry, the British Virgin Islands (hereafter referred to as “the Virgin Islands”) is obligated to abide by established standards of regulation and supervision in the functioning of its financial services industry. Adherence to those standards is essentially viewed as the minimum obligation in preserving the Territory’s financial services industry, strengthening its law enforcement machinery and promoting its international cooperation regime. While it is necessary to ensure an appropriate balance between promoting a sound and vibrant domestic business environment and adhering to established standards of regulation and supervision, every regulator must be reminded in this regard of the important link between global economies and the need therefore to ensure collective responsibility in maintaining the stability of the global financial system.

It has been the policy of successive Virgin Islands’ governments that the Territory must always give prominence to adherence with established international standards in the

licensing and supervision of financial services business, in addition to established domestic policies geared towards a better corporate governance regime and ensuring the continued good reputation of the Territory. The Financial Services Commission (“the Commission”), established in 2002 pursuant to section 3 (1) of the Financial Services Commission Act, 2001 (No. 12 of 2001), is charged with the responsibility of regulating and supervising financial services business in the Territory. In this regard, the Commission works with the Government in ensuring the adoption of sound legislative measures that provide the necessary balance between promoting domestic financial services business and adhering to established standards of regulation and supervision.

It is in this context that the Financial Services Commission Act, 2001 (“the FSCA”) provides the legislative framework for the establishment of the Licensing and Supervisory Committee (“the LSC”) as an important arm of the operations of the Commission. The functions of the LSC and the relevant licensing and supervisory processes 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 LSC. They map out the applicable laws in the licensing and supervisory 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 licensing and supervisory process, the necessary principles and guidelines to aid the process of effective licensing and supervision, the necessary inquiry process to aid the formulation and taking of decisions with respect to applications for licensing, approval, etc. 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 licensing and supervisory process and to provide further clarification with regard to matters of licensing as they relate to the various financial services businesses operating in and from within the Virgin Islands. Accordingly, the processes and procedures outlined herein must be viewed as setting minimum standards and the LSC is entitled to adopt such other measures as it considers appropriate in the circumstances of any particular case.

Furthermore, these ***Guidelines and Operating Procedures*** are designed for use by the LSC only and their publication merely provides information to others, the Commission’s licensees in particular, to learn about the workings and procedures of the LSC. They cannot therefore be relied upon to establish any liability against the LSC, its members or the Commission. Indeed by virtue of section 50 of the FSCA, no action can be maintained against the Commission or any member of the LSC or an employee or agent of the Commission for anything carried out in good faith in furtherance of any duty or in exercise of any power under the FSCA or a financial services legislation.

CHAPTER ONE

ESTABLISHMENT, MEMBERSHIP AND FUNCTIONS OF THE LICENSING AND SUPERVISORY COMMITTEE (LSC) AND RELATED MATTERS

1.1 PRINCIPAL LICENSING AND SUPERVISORY FUNCTIONS OF THE FINANCIAL SERVICES COMMISSION

The FSCA imposes certain duties and responsibilities on the Commission as the sole regulator of financial services business in the Virgin Islands. The Commission has the primary responsibility for ensuring the day-to-day regulation and supervision of the persons it licences (also referred to as “regulated persons”¹). This responsibility is carried out through appropriate monitoring and reporting mechanisms as well as by engaging the financial services providers in regular dialogue regarding the expectations of the Commission, compliance with new and emerging standards of regulation and supervision and fostering cooperation between the Commission and the financial services industry. These overarching functions are essential to the Territory’s observance of established international standards with respect to regulation and supervision, while in the same vein ensuring that the established structures for the conduct of business are not abused. At the same time, the efficient and effective observance of regulatory and supervisory requirements helps to promote legitimate business in and from within the Territory and thus preserve the good reputation of the Territory.

The FSCA outlines in broad terms the licensing and supervisory functions of the Commission as performed on its behalf by the LSC. These are provided in section 4 (1) of the FSCA as follows:

- (a) supervising and regulating licensees in accordance with the FSCA, the financial services legislation and Regulatory Code;²
- (b) receiving, reviewing and determining applications for licences from persons in the financial services industry;
- (c) monitoring the effectiveness of the relevant financial services legislation³ in providing for the supervision and regulation of financial services business in the BVI to established international standards;
- (d) monitoring and regulating, in accordance with the relevant financial services legislation, all financial services business that is carried on in or from within the Virgin Islands;
- (e) developing appropriate legal, regulatory and supervisory mechanisms for the efficient and effective administration of the Commission and the financial services legislation;

¹ A “regulated person” is defined in section 2 (1) of the Financial Services Commission Act, 2001 as a person who is “authorised, licensed, registered or recognised or required to be so authorised, licensed, registered or recognised under a financial services legislation”.

²The Regulatory Code was enacted in November, 2009 and is slated to come into force on 2nd January, 2010. The Code embodies regulatory matters pertaining to banking business, fiduciary services business, investment business, insurance business and money services business, including general corporate governance pertaining to the conduct of such businesses.

³ The financial services legislation comprise regulatory legislation and registry legislation as outlined in Schedule 2 of the Financial Services Commission Act, 2001.

- (f) maintaining contact and developing relations with persons who are engaged in financial services business in or from within the Virgin Islands with a view to
 - (i) encouraging the development of high professional standards within the Territory's financial services industry; and
 - (ii) initiating and promoting the adoption of relevant codes of conduct for licensees; and
- (g) promoting a safe and sound financial services environment in the Virgin Islands.

These broad regulatory and supervisory duties imposed on the Commission are performed by the LSC on behalf of the Commission. It is the LSC's responsibility to undertake appropriate oversight of regulated persons to ensure they are performing in accordance with the requirements of the FSCA and the various regulatory legislation. This responsibility conforms with the LSC's duty to properly safeguard the financial services environment of the Territory.

It should be noted that when the LSC (and indeed the Commission) performs its functions in pursuit of its statutory mandates, it is not liable for any loss or injury that ensues as a result so long as the functions are performed in accordance with the given mandates. This protection is essential to ensure the full and effective performance of the LSC's (and Commission's) functions without let or hindrance. It is, however, tempered with the principle that any duty performed or power exercised must be performed or exercised in good faith. It is therefore vital that members of the LSC know and are fully cognizant of their statutory duties and the powers reposed them in order to ensure their appropriate performance or exercise.

1.2 ESTABLISHMENT OF THE LSC

The LSC is established under section 14 (1) (a) of the FSCA. It is one of two committees (the other being the Enforcement Committee) established under the FSCA to carry out specific functions germane to the efficient licensing and supervision of regulated persons.⁴

1.3 MEMBERSHIP OF THE LSC AND RELATED MATTERS

1.3.1 Membership

By virtue of section 15 (1) of the FSCA, the LSC comprises the Managing Director of the Commission as Chairman, Deputy Managing Director (Regulation) as Deputy Chairman, directors of the regulatory and supervisory Divisions of the Commission and other senior officers of the Commission that the Managing Director designates with the approval of the Board of Commissioners. In this regard, the directors of the Legal and Enforcement

⁴ The Enforcement Committee has responsibility for dealing with enforcement matters pursuant to the powers granted to the Commission under the Financial Services Commission Act, 2001 and any regulatory legislation.

Division and Policy Research and Statistics Division are approved designated members of the LSC. The Deputy Managing Director (Corporate Services) is also an approved designated member and the appointed Secretary of the LSC pursuant to the power granted to the Managing Director under section 15 (3) of the FSCA (and as articulated in paragraph 1.6 below).

While deputy directors and other senior officers may, with the permission of the Managing Director, attend meetings of the LSC, they are not members of the LSC and are ordinarily not entitled to the powers and/or privileges of the members of the LSC. However, in the case of a deputy director, this restriction is subject to paragraph 1.7.5 below.

1.3.2 Co-opting Officers into the LSC

By virtue of section 15 (5) of the FSCA, the Managing Director of the Commission (as Chairman) has the power to co-opt into the LSC any officer of the Commission as he may determine. The duty of such a co-opted officer shall be to assist the LSC in discharging its functions. Accordingly, a co-opted officer is not by virtue of such an appointment a member of the LSC and, subject in the case of a deputy director as provided in paragraph 1.7.5 below, has no voting rights; the officer simply attends the LSC to render necessary assistance. Thus where a member of the LSC considers the presence of another officer of the Commission in the meetings of the LSC relevant, either to provide technical advice or to take part in its deliberations (whatever form that may take), the member should notify the Managing Director (or whoever would be acting as Chairman in the Managing Director's absence) in advance requesting for such officer to be appropriately co-opted. At least twenty-four hours notice must be given (to allow the Managing Director or other officer acting in his stead as Chairman sufficient time to consider the request and also afford the proposed co-opted officer adequate time to prepare where necessary); however, the Managing Director may, at his discretion, dispense with such notice.

If approval is given to co-opt an officer pursuant to a request, the Secretary of the LSC must be notified as soon as the approval is granted. This would enable the Secretary to make appropriate arrangements (such as seating and timing) for the attendance of the co-opted officer concerned.

1.3.3 Chairmanship

The Chairman shall preside at every meeting of the LSC. In his or her absence, the Deputy Chairman shall preside. In the absence of both the Chairman and the Deputy Chairman, such other member of the LSC shall preside as the Chairman may designate. Where for any reason the Chairman fails to designate a member of the LSC to preside as Chairman for any particular meeting, the Director of Legal and Enforcement or such other member as the members present may appoint (in that order) shall preside.

1.4 FUNCTIONS OF THE LSC

As already noted in paragraph 1.1 above, the LSC has responsibility for performing the licensing and supervisory tasks assigned to the Commission under the FSCA. Thus where in any financial services legislation reference is made to the Commission with respect to the granting of an authorization or approval or a licence, registration or recognition, the power to grant such an authorization or approval or a licence, registration or recognition is to be construed to vest in the LSC.

In addition to the functions outlined in paragraph 1.1 above, section 16 (1) of the FSCA outlines the following specific functions to be performed by the LSC:

- (a) to receive, review and determine applications for authorizations, licences, registration and recognition under the relevant financial services legislation⁵;
- (b) to supervise regulated persons to ensure that they continue to satisfy the fit and proper criteria for the conduct of financial services business; and
- (c) to publish the names of persons who have been granted licences.

Part of the duty that comes with the performance of the above functions and those outlined in paragraph 1.1 above, is the timely consideration of all applications received by the Commission. While the LSC has responsibility for taking decisions on relevant applications, it is the duty of the individual Divisions that have responsibility for processing the applications to do so with appropriate speed and forward the applications to the LSC through the LSC Secretariat for consideration and decision (see paragraphs 3.3 and 3.4 below for detailed requirements).

1.5 ESTABLISHMENT, COMPOSITION AND DUTIES OF THE LSC SECRETARIAT

1.5.1 Establishment of the LSC Secretariat

For the purposes of the effective functioning of the LSC, there is established within the Commission a Secretariat that is dedicated to matters relating to the work of the LSC. The Secretariat shall be the central body responsible for the receipt and processing of all matters concerning the work of the LSC.

1.5.2 Composition of the Secretariat

The LSC Secretariat shall comprise the Managing Director of the Commission and Secretary of the LSC. In addition, the Managing Director shall appoint a Recording Secretary and such other employees of the Commission as he considers fit to perform such duties of the LSC as may be prescribed in these ***Guidelines and Operating Procedures*** or as may be required by the Managing Director and/or Secretary for the efficient and effective functioning of the LSC. In particular, the Recording Secretary shall

⁵ All other matters applied for which fall under the registry legislation pursuant to Part II of Schedule 2 of the Financial Services Commission Act, 2001 are administered and dealt with by the Registrar of Corporate Affairs.

assist the Secretary in the performance of his or her duties and act in accordance with such instructions as the Secretary or the Managing Director may from time to time issue.

1.5.3 Duties of the Secretariat

As already noted in paragraph 1.5.1 above, the LSC Secretariat is charged with the responsibility of receiving and processing matters connected with the work of the LSC. In essence, the LSC, acting in accordance with the requirements of these ***Guidelines and Operating Procedures***, requires and obtains relevant papers from the various Divisions of the Commission that require LSC consideration and collates and disseminates those papers to the members of the LSC. The Secretariat also has the duty of maintaining the records of the LSC and disseminating or communicating LSC decisions to the parties concerned. Overall, the Secretariat facilitates the discharge of the duties reposed on the Secretary and such assignments as may be issued by the Managing Director or the LSC.

1.6 APPOINTMENT AND DUTIES OF THE SECRETARY OF THE LSC

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

- (a) to prepare and maintain a full record of the proceedings of the LSC;
- (b) to receive, collate and disseminate all relevant papers (including minutes of meetings) for decision or consideration of the LSC, to all members;
- (c) in consultation with the Chairman, to prepare an agenda of the meetings of the LSC which must be disseminated along with the papers referred to under sub-paragraph (b) above;
- (d) to maintain on such periodic basis as the LSC 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 LSC;
- (e) subject to paragraph 4.2.6 below, to communicate directly, on behalf of the LSC, with any person on such matter as may concern a decision or work of the LSC; 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, 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, the Secretary shall notify the LSC at the next meeting of the nature of the communication and how it was dealt with following consultation with the Chairman; this will, however, not be necessary where the Chairman considers the subject matter of the communication not to be sufficiently relevant to warrant a notification;

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

1.7 MATTERS CONCERNING MEETINGS, TENURE OF OFFICE AND RELATED MATTERS

1.7.1 Meetings of the LSC (General)

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

- (a) the LSC shall meet on a weekly basis on Wednesday, subject to sub-paragraph (d) below;
- (b) the meetings of the LSC shall normally be convened for 10:00am, unless the Chairman, for any reason, appoints a different time; any change in time shall be notified by the LSC Secretariat to all members within a reasonable period prior to the convening of the meeting concerned;
- (c) the meeting shall be convened in the Board Room of the Commission or at such other place as the Chairman may determine; a meeting convened at a place other than the Board Room shall be notified by the Secretariat to all members within a reasonable period prior to the convening of the meeting; and
- (d) notwithstanding the time and place stipulated in the above sub-paragraphs, the LSC 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 LSC or the urgency of any matter.

1.7.2 Convening Extra-ordinary Meetings of LSC

Where a licensing or supervisory matter arises which, because of its nature or the urgency attached to it could not reasonably be held back until the regular meeting of the LSC is

convened to consider it, the Chairman may at his or her sole discretion convene an extraordinary meeting of the LSC. Such a meeting shall be accordingly notified by the LSC Secretariat to all the members of the LSC. In this respect, any member may request the Chairman orally, or otherwise as may be required by the Chairman, to convene an extraordinary meeting of the LSC. The Chairman may direct the convening of an extraordinary meeting of LSC if satisfied of the requirements set out in paragraph 3.5.4 below.

The procedures applicable in relation to taking decisions at regular meetings of the LSC as outlined in Chapter Four shall apply to every extra-ordinary meeting.

No extra-ordinary meeting shall be convened on the basis of an Information-only Paper unless the Chairman specifically considers the matter of the Information-only Paper to be critical with respect to a licensing or supervisory function of the Commission.

1.7.3 Use of Electronic Media at Meetings of LSC

As far as possible, all meetings of the LSC shall be convened with the members physically present. However, where for any reason it becomes necessary to convene and conduct a meeting of members of the LSC through an electronic medium, such as video link or telephone conference, the Chairman may authorize that the meeting be so convened and conducted. The convening and conduct of such a meeting shall, with the authority of the Chairman, be arranged by the LSC Secretariat.

The Chairman may, in his or her discretion, allow the use of electronic media in relation to any particular meeting of the LSC with respect to co-opted members, consultants, persons with LSC-delegated authority, witnesses, directors and senior officers of regulated persons or proposed directors and/or senior officers of applicants for licences, solicitors, personal representatives or authorized agents of regulated persons or applicants for licences or such other person as the LSC may consider relevant in its deliberations.

1.7.4 Quorum of the LSC

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

- (a) the quorum of the LSC at every meeting shall be at least one half of the total membership (including the Chairman or other person presiding as such) and shall include any member who joins the meeting through an electronic medium; however, if a person is a member by virtue of more than one position he or she holds, he or she shall be counted only as one;
- (b) if during the course of a meeting of the LSC the quorum falls below the required number, the Chairman shall either adjourn the meeting until the required quorum is met or adjourn to another date; and
- (c) no meeting shall be convened or proceeded with in the absence of the required quorum.

1.7.5 Attendance of LSC Meetings by Deputy Directors and Others

In the absence of a director of a Division, the deputy director of the Division shall be entitled to attend and participate in the meetings of the LSC and shall, at such meetings, have full powers as if he or she were the director of the Division. Accordingly, such deputy director shall be counted as forming part of the quorum required under paragraph 1.7.4 (a) above and have a voting right.

In circumstances where the Chairman considers it necessary, both a director and a deputy director of a Division may attend meetings of the LSC. However, for the purposes of recording the quorum of, or taking a vote at, an LSC meeting at which both the director and deputy director of a Division are present, only the presence of the director shall be recorded as part of the quorum and only the director can exercise a voting right.

Where during any period a Division does not have a deputy director and the director of the Division is for any reason unable to attend a meeting of the LSC, the Chairman may allow the next most senior officer of the Division to attend the meeting. Such senior officer shall be counted as part of the quorum of the meeting at which he or she is present and have all the powers of the director of the Division, save the power to vote.

1.7.6 Voting in the LSC

The following procedures shall apply with respect to the taking of votes at LSC meetings:

- (a) subject to paragraph 1.7.5, only the members of the LSC are entitled to vote on any decision of the LSC and this includes any member who is present in a meeting through an electronic medium; however, if a person is a member by virtue of more than one position he or she holds, he or she shall be entitled to only one vote;
- (b) as far as possible, the decisions of the LSC shall be taken on the basis of a 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 LSC 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 agreed with the decision taken; however, where a member expresses strong views on a matter, it is open to such member to request that his or her views in relation to any decision be recorded in the minutes of the LSC.

1.7.7 Tenure of Office

Save for the Managing Director, Deputy Managing Director(s) and the heads of the regulatory and supervisory divisions (whose appointments on the LSC are statutorily *ex*

officio), all other members of the LSC serve at the pleasure of the Managing Director of the Commission (with the approval of the Board of Commissioners) and in accordance with their terms of appointment.

CHAPTER TWO

GUIDING PRINCIPLES TO BE OBSERVED BY THE LSC

In the performance of its duties and exercise of its powers, the LSC 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 far as possible and any deviation from consistency must be backed by good reason on the basis of facts, circumstances and the law (see paragraph 2.1.2 below). It should be borne in mind that decisions of the LSC (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 LSC may be wrong or inconsistent.

2.1 ESSENTIAL GUIDING PRINCIPLES

2.1.1 Confidentiality

All members of the Commission (which includes LSC members) 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 in relation to the Commission. What this means for a member of the LSC (including the staff of the LSC Secretariat) is that all matters pertaining to the work, and transacted within the realm, of the LSC 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 or as may be directed by the LSC or the Managing Director. Confidentiality is an essential tool of efficient and effective discharging of the Commission’s mandate under the FSCA and the various financial services legislation and every LSC member must uphold it.

2.1.2 Consistency

Good administration demands (amongst other things) consistency in the decision-making process. What this means for the LSC 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, having regard to an applicant’s compliance culture or nature and complexity of the applicant’s business), 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 LSC is to be seen as fair and objective in the application of its licensing and supervisory mechanisms. However, nothing prohibits the LSC from departing from the *ratio* of an earlier decision where it forms the strong opinion that the nature, law and circumstances warrant such a departure.

2.1.3 Disclosure

Any matter referred to the LSC for consideration and possible action must disclose all relevant information essential thereto. The various application forms approved by the Commission require relevant information to be provided by all applicants. This is designed to ensure that the LSC has all the required information when it comes to consider an application. Thus full disclosure, apart from being in the nature of good governance, will aid the process of objective decision-making. Where the LSC 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 LSC, then the Chairman should avail the LSC of that opportunity before any decision is taken on a matter. It is therefore essential that directors of the regulatory Divisions provide the LSC with full relevant information in relation to an application to the Commission or with respect to any supervisory matter.

2.1.4 Transparency

The processes, procedures and decisions of the LSC must be transparently applied and taken within the LSC's established parameters as outlined in these ***Guidelines and Operating Procedures***. 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 and fair play, a sound and objective policy to aid the decision-making process.

2.1.5 Professionalism

Every conduct of the LSC must be accentuated with the utmost professionalism. There must be no room for personal prejudices or arbitrary conduct. A personal knowledge of a conduct of a person who is the subject of consideration before the LSC must not be brought to bear on a decision regarding that person, unless such knowledge has relevance to the matter before the LSC (such as where it hinges on the person's fitness and propriety), is fully disclosed to the LSC and the person given an opportunity to contradict views regarding the conduct or to provide an explanation in respect thereof. However, the LSC 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, EC, etc.) in relation to a person who is the subject of consideration by the LSC.

2.1.6 Due Process

Due process is a fundamental aspect of a licensing and supervisory process, especially considering, for instance, that an applicant may be aggrieved by a denial of an application for a licence. It requires compliance with established procedures, observance of all the rules of natural justice (see paragraph 2.4 below) and giving due regard to the tenets of the law. This is particularly relevant where the LSC 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 licensing and supervisory matters by the LSC, the timely communication of decisions and the reason(s) therefor and

the taking of action on any follow up issues. Matters referred to the LSC must not take undue periods before deliberation commences thereon and once deliberation commences, this must be administered with reasonable dispatch; matters that take too long to be deliberated upon invariably compromise and bring into disrepute the licensing and supervisory process and may inadvertently affect the business affairs and arrangements of the person concerned.

2.1.8 Integrity

Integrity caps all the guiding principles outlined above. The integrity of the licensing and supervisory process is dependent on the full observance of all the guiding principles (paragraphs 2.1.1 – 2.1.7 above). The processes and the work of the LSC 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 LSC is to be guided by these same principles. Accordingly:

- (a) any member of the LSC who has any direct or indirect personal, professional, business or pecuniary interest in any matter to be considered by the LSC, 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 LSC;
- (c) where the Chairman has any interest as outlined in sub-paragraph (a) above, 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) above; and
- (d) where a member is for any exceptional reason unable to declare his or her interest as outlined in sub-paragraph (a) above, or paragraph (c) above in the case of the Chairman, in advance of a meeting of the LSC or becomes aware of the interest only during the meeting of the LSC, he or she shall immediately declare that interest to the LSC 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 LSC on or in relation to the matter.

In any particular case where an interest has been declared by a member warranting the withdrawal of the member from the meeting at which the case is considered and in respect of which the views and advice of the member's Division is considered essential, the Chairman may, at his or her discretion, and shall, at the request of the LSC, invite any member of the Division concerned to provide such views and advice in relation to the case.

2.3 CODE OF CONDUCT

The Licensing and Supervisory Committee is tasked with processing licensing matters and carrying out supervisory responsibilities. In this regard, it must ensure that all applicants and regulated persons whose matters are before the LSC for consideration are treated fairly and consistently. In addition, all information received by the LSC must be treated with the utmost confidence and in a professional manner. Members should note at all times that by virtue of their positions in the Commission and their membership of the LSC, they are and will always be held to higher standards of prudence and compliance and they must therefore comport themselves properly in all matters concerning the work of the Commission. Accordingly, all members of the LSC are required to adhere to the following established code of conduct:

2.3.1 Use of Official Information

Section 48 of the FSCA, read together with Schedule 3 thereof, makes 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, whether direct or indirect. Accordingly:

- (a) no member of the LSC shall use any official information disclosed to or acquired by him or her in his or her capacity as a member of the LSC (or the Commission generally) for personal benefit or profit; and
- (b) during his or her tenure in office, a member of the LSC 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 LSC 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 LSC (and the Commission) into disrepute.

The prohibition against the use of official information is designed essentially to preserve the integrity of the LSC and ensure confidence in the overall functioning of the LSC. It is expected therefore that the obligations enshrined in this paragraph will follow a member of the LSC beyond the period of his or her membership. Thus information acquired by virtue of one's membership of the LSC must continue to be maintained on a confidential basis after a member demits office and must not be 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 LSC for a legitimate purpose which does not identify any person relating to it or compromise the principles and codes of conduct enshrined in these ***Guidelines and Operating Procedures*** and any other applicable code of the Commission or the integrity of the LSC 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 LSC and any other person who becomes privy to LSC information or documentation by virtue of his or her association with the LSC, whether as a consultant, examiner, senior officer of a Division or by virtue of a delegated authority of the LSC.

2.3.2 Exerting or Canvassing Influence

The following obligations and restrictions shall apply to every member of the LSC:

- (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 LSC or in furtherance of any matter in which the member has a direct or indirect interest;
- (b) where a person directly or indirectly canvasses (in whatever form) a member of the LSC to adopt a position of influence in respect of any matter that is or that is likely to be brought before the LSC, the member concerned shall, as soon as practicable, notify the LSC 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 LSC 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 to every member of the LSC:

- (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 LSC (*this may be discerned either from matters that are notified by the LSC or from discussions and decisions of the Board or the EC or from any of the Commission's Divisions in relation to applications, or 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, save in cases of transactions specifically provided by the regulated person as a service to the public at large, whether on the basis of a fee, premium, commission or otherwise. Where a member utilizes the service of a regulated person, he or she shall ensure that the business relationship with the regulated person does not have any bearing with his or her duties and responsibilities as a member of the LSC;

- (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 LSC, he or she may 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, or to expedite or delay the processing of a matter, in the LSC in respect of that person or in relation to some other person.

By way of buttressing sub-paragraph (b) above, it should be noted that 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, financing or money services business company or any other entity that is regulated by the Commission. However, the obligation outlined in the last sentence of that sub-paragraph must always be borne in mind.

2.3.4 Contact with the Media

The following obligations and restrictions shall apply to every member of the LSC:

- (a) a member may not make any comments or communicate with the media concerning the operations and decisions of the LSC 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 LSC, he or she should refer the media to the Secretary and immediately advise the Secretary of that fact. The Secretary shall liaise with the Chairman and act accordingly, including (where deemed necessary) advising a member of the LSC that is considered best suited to do so to respond directly to the media inquiry. Any conditions attached to any advice in this regard shall be adhered to; 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 of the LSC; verbal communications shall be premised and conducted on the basis of officially approved minutes.

2.3.5 Committing the LSC or the Commission

The following obligations and restrictions shall apply to every member of the LSC:

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

- (b) where a member inadvertently commits the LSC or the Commission contrary to sub-paragraph (a), he or she shall as soon as practicable thereafter notify the Secretary and properly retract the commitment or provide an appropriate explanation that will be consistent with the decision of the LSC as recorded in its approved minutes. A retraction notwithstanding, the Chairman may issue or direct to be issued a statement on behalf of the LSC giving appropriate advice in relation to the commitment made by a member. The same would apply where the commitment made relates to a matter that is yet to be considered by the LSC or that has been deferred or withdrawn.

2.3.6 Freedom to Debate

In debating issues before the LSC, 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 LSC or the Commission or being used against a member for any reason. This freedom is considered essential in order to promote free and honest exchanges of views on matters before the LSC and to ensure a balanced and fair decision-making process.

In this regard every member (including any other person attending an LSC meeting) shall note and abide by the following:

- (a) every matter discussed or debated in the LSC shall be treated with the utmost confidence and shall so remain as between members, including the Recording Secretary and all other officers who attend any LSC meeting, save where the Chairman or the LSC 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 the members present at the LSC meeting concerned or how individual members of the LSC contributed or voted on the matter, and regard shall at all times be had to the provisions of sections 49 and 49A of the FSCA; and
- (b) no member shall disclose or discuss outside the LSC how individual members of the LSC voted on a subject or the individual views put forward on a matter before the LSC; however, this restriction does not apply in a case where a member of the EC who is also a member of the LSC wishes to make, at a meeting of the EC, reference to specific views expressed at the LSC in furtherance of a view, decision or other particular course of action before the EC with respect to the same matter.

2.4 RULES OF NATURAL JUSTICE

Consistent with every decision of the LSC 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 LSC, these principles may be outlined as follows:

- (a) **Fair Hearing:** Where the LSC 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 LSC) and a person against whom an adverse decision may be likely. However, this must not be interpreted to mean that for an application for licensing and/or approval before the LSC, the LSC cannot refuse such application on the basis of the documentation available unless it first communicates with the applicant to that effect. Every application is to be dealt with on its own merits and in accordance with the law and established procedures and practices. Therefore it is in order for the LSC to consider and refuse an application if it is so minded for good reason.

However, where an applicant submits an application and requests an audience with the LSC to orally advance a matter in relation to the application before or during its consideration, it may not be unreasonable for the LSC to grant such an audience. In the same breath the LSC is not bound to grant such an audience if it forms the considered view that the application can properly be considered on its merits without any oral hearing or representation; it may also decide to invite the applicant concerned to submit written representations instead of making a physical appearance before the LSC. The LSC should be aware always that the adoption of one mode as against what may be requested very much depends on the nature and circumstances of each particular case, whether or not the application is complete in itself or whether there is any need for clarification before taking any adverse decision. Furthermore, it should be noted that the LSC is guided at all times in its decision-making process by the applicable laws, policies, directives, practice directions, guidelines, forms, procedures, practices and processes which it is required to implement, adhere to or take into consideration. Central to the scheme of things in the work of the LSC is to ensure fairness and due process in its deliberations to consider licensing and supervisory matters.

- (b) **Decision-making:** In making its decisions, the LSC 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 current or previous incident concerning a person who is the subject of licensing, supervision or approval which had not been established factually or judicially must not be used by the LSC to the detriment of that person. In a situation, however, where the LSC forms the view that (notwithstanding the absence of any factual or judicial evidence) it would be inappropriate not to consider knowledge of a current or previous incident which if proven might have a significant bearing on its decision, it should invite either written or oral submissions

(or both, if considered necessary) from the party concerned before taking a decision on a matter to which such knowledge relates;

- (ii) **act in good faith:** the LSC must ensure that its decisions and decision-making processes are not tainted by bad faith. Thus the LSC must avoid taking a decision that is motivated by extraneous factors;
- (iii) **avoid arbitrariness:** the LSC 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 LSC 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 LSC 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:** consistency in the decision-making process is considered to be in the nature of good government; like matters must be treated in the like manner. This relates both to approach and application of the laws and established rules, procedures and processes. In essence, matters referred to the LSC 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 LSC 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 LSC 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 be avoided.

- (c) **Giving Reason(s):** Section 13 (2) of the FSCA⁶ makes it obligatory for the Commission, in the exercise of any of its powers under the FSCA or any regulatory legislation, to provide reasons for its decisions; those reasons must be reflected in writing. This legal obligation applies to all the organs of the Commission that exercise powers in the name or on behalf of the Commission. That necessarily includes the LSC when it exercises its licensing and supervisory powers.

It is generally the norm that where a favourable decision is granted in respect of an application (of whatever nature) reasons are not proffered for the decision, for there is not likely to be any appeal with respect to the decision. However, this must simply be treated as a general rule of exception, for an interested third party may in certain circumstances file an objection or bring an action to quash the decision concerned on account of some specified interest. For the purposes of the LSC, where favourable decisions are made in relation to a licensing or supervisory matter, the reasons for so doing are normally contained in the relevant papers seeking the decisions. Consequently, where approval is given, the reason for the approval need not be communicated to the person to whom it relates.

However, where the LSC makes an adverse decision (such as refusing an application for the grant of a licence or the approval of a director or senior officer), it must provide reasons in writing for the decision. In addition, the reasons arrived at in respect of the decision made must be communicated to the person to whom the decision relates. 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 legal and/or constitutional rights of seeking further or alternative remedy or redress. The LSC is engaged in the exercise of licensing and supervisory powers that invariably will affect persons against whom adverse decisions are made and as a matter of law and good governance it must proffer reason(s) for its decisions.

- (d) **Approach:** In applying the principles enunciated above, the LSC must, as a general rule, adopt and apply discretion and a commonsense approach that properly fits a matter before it, having regard to the fact and circumstances of each case.
- (e) **Manner of exercise of powers:** The LSC must ensure that it exercises the

⁶ The Financial Services Commission (Amendment) Act, 2009 (No. 13 of 2009) effected the amendment to section 13 of the FSCA making it mandatory for the Commission to provide reasons in writing for the exercise of any of its powers under the FSCA or any regulatory legislation.

licensing and supervisory 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 licensing and supervision expect to be treated fairly and the LSC can assure this in its pursuit of ensuring compliance with the law and established guidelines and policies of the Commission.

CHAPTER THREE

PROCESSES AND PROCEDURES TO BE OBSERVED IN LICENSING AND SUPERVISION

As already noted in Chapter One, the Commission is vested with specified duties and responsibilities under the FSCA and the regulatory legislation. Each of those duties and responsibilities is considered very essential to the efficient and effective functioning of the Commission. The work of the Commission is, in that regard, undertaken by different organs within the Commission which have the responsibility of not only carrying out the duties vested in the Commission, but also of preparing relevant reports on a periodic basis to submit to the Board for review. This affords the necessary checks and balances with respect to the Commission's adherence to its statutory obligations and compliance with international best practice standards. Accordingly, members of the LSC must always be alert to the fact that they carry a heavy responsibility in steering the Commission's work forward and maintaining the integrity of the Commission and its processes in the execution of their assignments.

3.1 OBJECTIVES OF LICENSING AND SUPERVISION

The objectives of the Commission with respect to licensing and supervisory matters may vary in many respects, but the guiding principles outlined in Chapter Two are considered essential in the efficient and due attainment of those objectives. The LSC should therefore bear in mind the following objectives:

- (a) it is important always to emphasize and uphold the importance of the integrity of the licensing and supervisory regime; in this regard, the LSC must not aim to cut corners in the interest of expediency and in the process sacrifice quality and objectivity in its decision-making process;
- (b) the LSC must ensure that the laws and established rules, procedures, processes, guidelines, practice directions and other related matters are upheld and duly adhered to in a transparent and fair manner;
- (c) the aim at all times is to encourage and promote high quality, transparent and law-abiding financial institutions and other regulated entities to establish and maintain legitimate businesses in the Virgin Islands;
- (d) it must be recognized that the Commission has an obligation to perform well within the remit of the law 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;
- (e) applications for licensing must be certain and compliant with the rules relative to the subject matter of application; in this regard and where considered necessary, the LSC must engage applicants as far as reasonable in order to ensure that all required information for licensing is available in order to achieve informed decisions in the licensing process;

- (f) the engagement by the EC of the enforcement process against licensees can be reduced considerably if careful attention is paid to applicants at the licensing stage; thus the need arises to adopt appropriate measures to deter potential breaches of the laws and regulatory standards requirements during the consideration of applications for licensing or approval;
- (g) as the sole regulator of financial services business in the Virgin Islands, the Commission has a responsibility in contributing in a meaningful way to a stable global economy; it does so by ensuring adherence to proper inquiries and investigations regarding the backgrounds of persons that are the subject of applications for licensing or approval;
- (h) the Commission must necessarily engage foreign regulators and domestic agencies in a cooperative relationship with the view to achieving the objective outlined in sub-paragraph (g) above;
- (i) applications made to the Commission come with the expectation that they will be dealt with expeditiously and it is the duty of the LSC to ensure that the expectation is fulfilled where all the required information for consideration has been provided;
- (j) where for any reason the LSC refuses, or defers for a considerable period, an application before it, it must provide written reason(s) for the refusal or communicate the fact of the deferral and the reason therefor; and
- (k) the LSC must recognize 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.

3.2 DEVELOPING AND SUBMITTING PAPERS TO LSC

3.2.1 Required Actions upon Receipt of Applications/Other Matters

While generally applications for licensing are received by the Commission, such applications are communicated to the relevant Divisions that have responsibility for the subject of the applications for initial consideration. In the same vein, supervisory matters relating to licensees are communicated to the relevant Divisions for initial consideration and advice, including vetting relevant information against the law and applicable rules, guidelines, practice directions, etc. In either case, it is the initial duty of the respective Divisions to engage the following process:

- (a) all applications and supervisory matters received in the Commission would ordinarily be directed to the relevant Division; upon receipt of such applications and supervisory matters, the relevant Division will log in the date of receipt and provide a letter to the person concerned acknowledging receipt;

- (b) unless a matter received by a Division is one that the Division has authority to deal with under the FSCA or a relevant regulatory legislation through a delegated authority of the LSC, the matter must be reviewed and appropriately processed for LSC consideration by the Division in a diligent manner, taking full account of the legal, policy and other established requirements in relation to the matter; if the matter is one that the Division has authority to deal with, it must also review and process it with the same degree of diligence, taking into account all relevant considerations;
- (c) where a Division, upon reviewing a matter, forms the opinion that additional information or some clarification is required from the person who submitted the matter to the Commission, it shall so advise the person concerned in writing providing a reasonable deadline for the submission of the additional information or clarification required; a comprehensive detail of the required information must be outlined so as to avoid the Division having to revert to the person again for more additional information after the person has provided the initial additional information requested. The Division shall log every communication with the person concerned, including the date when every such communication was made, and the log shall be kept in such form as the director of the Division may determine; the receipt of additional information or clarification need not necessarily be acknowledged, although it must be appropriately logged;
- (d) where additional information or clarification requested pursuant to subparagraph (c) above is not complied with by the prescribed deadline, a reminder may be sent to the person concerned seeking compliance with the required information or clarification, providing such further deadline as may be considered reasonable in all the circumstances; while a Division may send as many reminders as it feels necessary, no Division is under any obligation to send more than one reminder for the provision of additional information or clarification;
- (e) if within a period of three months after first requesting the provision of additional information or clarification from a person and after the required reminder, a Division does not receive the requisite response, it shall, unless the Managing Director permits otherwise, process the matter at hand without the additional information or clarification, setting out its recommendation(s) to the LSC and the failure of the person concerned to provide the requested additional information or clarification and the significance of such additional information and/or clarification; this is, however, without prejudice to the matter being sent afresh to the Commission for its consideration in the event that the original matter had been decided in the negative;
- (f) ordinarily, completed applications made to the Commission must be processed as quickly as possible after the date of receipt of the applications; where additional information or clarification is sought and provided, the application must be processed soon thereafter, especially

considering that the Division would already have been seized of the matter, save for the additional information or clarification sought;

- (g) consistent with the requirements of sub-paragraph (f) above, all completed applications and other matters to be dealt with by a Division for LSC consideration must be processed by the Division within the applicable time frame provided in the relevant Appendix of the Commission's Performance Accountability Policy and Supervisory Service Standards;
- (h) every completed application or other matter must be processed through the LSC in accordance with paragraphs 3.2.2 and 3.2.3 below.

3.2.2 Preparing Papers for LSC Consideration

Every matter for the consideration and decision of the LSC must be clearly outlined by a Division in a memorandum. The memorandum must be prepared on the authority of the director or, in his absence, the deputy director of the Division concerned or such other senior officer as the Managing Director may designate. For the purposes of ensuring appropriate consideration of a memorandum, each Division must ensure that the memorandum is clearly and concisely organized in the following manner:

- (a) it should be clearly marked for the attention of the LSC by providing the reference number and date of the memorandum and title/subject area to which the memorandum pertains;
- (b) it must clearly indicate, at the outset (after the title/subject area referred to in sub-paragraph (a) above), the purpose of the memorandum, which may be reflected in the decision sought;
- (c) it must clearly state relevant and adequate background information on the matter to facilitate reaching an informed decision; merely making reference to an issue or to a document without outlining the thrust of the issue or document in the memorandum and how relevant it might be to the subject matter of the decision sought from the LSC is not acceptable. It should be noted that while a Division may be familiar with a relevant issue or document or with a particular applicant, the same must not be assumed for the rest of the LSC membership;
- (d) if there are any special factors or events or unusual or unfavourable circumstances that are or might be relevant to the subject matter of a memorandum which may have a bearing on the LSC's decision and the LSC should therefore be made aware of, these must be clearly outlined under a specific heading marked "SPECIAL MENTION"; if a Division is not certain in any particular case as to the relevance of a circumstance, factor or event, it should outline it in the memorandum and express the Division's opinion thereon;
- (e) the background information must be outlined in paragraphs and sequentially numbered for ease of reference;

- (f) the conclusion of the memorandum must clearly state in a summarized form the actual decision(s) that is being sought from the LSC; and
- (g) when a memorandum is completed, it must be reviewed and signed off by the director of the Division concerned or, with his authority, by the deputy director, or, in the absence of both, the senior officer designated by the Managing Director, before it is submitted to the LSC; accordingly, every memorandum must bear the name and title of the director inscribed after the concluding paragraph and this must be the case even in the absence of the director (unless in any particular case the Managing Director instructs otherwise).

3.2.3 Matters Relevant to the Preparation of LSC Papers

Every Division must have regard to the following matters when preparing a memorandum for the consideration of the LSC:

- (a) if, in respect of a subject area for which LSC decision is sought, there are likely legal implications, Divisions must seek the legal advice/opinion of the Legal and Enforcement Division and incorporate that in the background information of the memorandum before submitting the memorandum. The legal advice/opinion given must be clearly outlined in the memorandum; it is unacceptable to merely indicate that the text of the legal advice/opinion is attached to the memorandum as an Appendix;
- (b) legal advice (as opposed to a legal opinion) given by the Legal and Enforcement Division on a matter referred to it by a Division is binding on the Division. However, in a situation where the Division holds a view that is contrary to or materially differs from the legal advice/opinion given, it may reflect its view in the background information of the memorandum to justify a particular position; it will be up to the LSC to make a determination on the legal advice/opinion and views given;
- (c) where a memorandum relies on a document or other tangible information in support of or in reference to a particular position or matter, it shall attach the document or other tangible information as an Appendix to the memorandum. Every Appendix must be properly and (if applicable) sequentially numbered; in addition, a list of the Appendix or Appendices, as the case may be, must be provided at the end of the memorandum for ease of reference;
- (d) where the subject matter of a memorandum straddles more than one Division and the issues are or may be connected, consideration must be given to having a joint memorandum between the Divisions concerned. Where such a joint memorandum is agreed, this fact must be reflected on the face of the memorandum before the title/subject area of the memorandum and the background information must reflect the common positions of the Divisions and those areas (if any) where there may be some divergent views or approaches;

- (e) with respect to a memorandum relative to an application (whether for a licence, approval or otherwise), the memorandum must clearly indicate in the background information the date of receipt of the application within the Commission; if there are any special circumstances why the processing of an application is delayed, those circumstances must also be outlined in the background information of the memorandum;
- (f) every memorandum must be prepared to be consistent with all the relevant laws and the policies, guidelines, guidance notes and practice directions of the Commission; if a Division considers it essential to deviate from any policy, guideline, etc. of the Commission in respect of any matter, it must specify its reason(s) for such a deviation and the implications thereof;
- (g) where a memorandum relates to a recommendation to refuse an application, the main factors leading to the recommendation should be concisely set out taking particular care to exclude extraneous matters, particularly those that might suggest that the recommendation was tainted by irrelevant adverse material. In addition, where it is felt necessary to mention in the memorandum potential concerns that arose but were not substantiated, it should be made clear that these are not to be a factor for the refusal of the application.; and
- (h) care should be taken in wording the decision(s) sought, bearing in mind that if the recommendation is adopted by the LSC, this wording may determine the way LSC's decision is framed and subsequently communicated to the applicant and, in the event of a challenge, it would have to be put before the Appeal Board or court.

For ease of reference and in order to ensure a uniform approach to the preparation of LSC memoranda, Divisions are required to comply with the form outlined in Part I of **Schedule 1**.

3.2.4 Status of Information-only Memoranda

Members of the LSC are encouraged to submit items to the LSC that may not require a decision but are for the sole purpose of informing the LSC of matters of importance which may relate to the work of the LSC. In such cases, a memorandum (referred to as "Information Paper") should be prepared and submitted to the Secretary in the form outlined in Part II of Schedule 1, taking care to be clear and concise. It is particularly essential to inform the LSC on matters that are germane to previous decisions of the LSC which establish significant patterns or new developments which may be of interest to the Commission or on or in relation to which future support of the LSC may become necessary. What may constitute relevant information and therefore considered essential for the LSC to be informed about is generally a matter of judgment for each Division.

However, it is essential that periodic reports prepared by Divisions for the Board's attention are first tabled before the LSC for its information before they are forwarded to the Board. This would allow the LSC to express views on issues of substance and the need for continual streamlining of reports which may benefit the quality of the report.

The LSC may on its own motion request a director and/or deputy director or, in their absence, a senior officer of a Division to provide the LSC with an Information Paper on any matter it considers relevant in order to better inform members of the matters concerned therewith and allow for necessary debate and exchange of views. It is open to the LSC, under such circumstances, to issue such directive as it considers appropriate in relation to the subject matter of the Information Paper, including requiring the preparation of a memorandum on a specified matter for the consideration of the LSC.

3.4. SUBMITTING MEMORANDA AND OTHER PAPERS TO LSC

3.4.1 Duty of Directors

Every memorandum or Information Paper for LSC consideration or information shall be submitted to the Secretary as follows:

- (a) the memorandum or Information Paper shall be contained in a Division's file relative to the subject matter of the memorandum or Information Paper;
- (b) the director or, in his absence, the deputy director or senior officer designated by the director (or the Managing Director in the alternative), shall minute the file to the Secretary requesting his or her consideration of the memorandum or Information Paper, as the case may be, and placement on the agenda of the LSC of such memorandum or Information Paper; the Secretary reserves the right not to accept or to return a memorandum or an Information Paper that is not contained in a file and properly minuted;
- (c) where a memorandum or Information Paper has an Appendix or Appendices, the Division concerned shall prepare the relevant number of copies of the Appendix or Appendices and transmit them to the Secretary along with the file; it is not the duty of the Secretary or the LSC Secretariat to prepare relevant attachments as Appendices; and
- (d) if there are any specific circumstances in relation to a memorandum or an Information Paper which a Division wishes the Secretary to consider, these must be brought to his or her attention at the time of submitting the file.

The above requirements are the responsibility of directors and it is their duty to put in place appropriate mechanisms to ensure compliance with the requirements. All files submitted to the Secretary shall remain with the LSC Secretariat for purposes of the LSC meeting to which they relate and shall be returned to the relevant Divisions after LSC's consideration or information and upon confirmation of the minutes with respect to the subject matter of the file. If for any reason a Division requires back a file in the possession of the LSC Secretariat before the matter in relation to it is considered by the LSC or thereafter but before a confirmation of the relevant minutes, it shall make necessary arrangements with the Secretariat to retrieve the file, provided always that the file shall be available during the LSC meeting to which it relates.

3.4.2 Period for Submission of Documents

A Division that wishes to have a matter considered for inclusion on the agenda must provide the relevant document to the Secretary no later than 4:30pm on the Thursday before the week at which the Division wishes to have the matter included on the agenda. The LSC normally meets on the Wednesday of each week, thus any document for its consideration must reach the Secretary at least by 4:30pm on the Thursday before.

A document that reaches the Secretary after the stipulated period cannot be guaranteed for inclusion on the agenda for the next meeting of the LSC.

The above stipulations do not apply to documents that are for consideration at extraordinary or special meetings of the LSC; the treatment of those documents is subject to the direction of the Chairman, acting in liaison with the Secretary. The stipulations do not also apply where paragraph 3.4.4 below applies.

3.4.3 Duty of Secretary Upon Receipt of Submissions

Upon the receipt of any matter for inclusion on the LSC agenda, the Secretary shall perform the following duties:

- (a) bring the matter to the attention of the Chairman for his or her consideration and approval and placement on the agenda;
- (b) arrange for the proper numbering of the documents (LSC reference numbers) and ensure that the other requirements of Part I or Part II of Schedule 1 (as applicable) are complied with;
- (c) ensure that, where a memorandum or Information Paper makes reference to any attachment, all the relevant and necessary attachments or Appendices have been received (see paragraph 3.4.1 (c) above);
- (d) ensure compliance with the requirements outlined in paragraph 3.4.1 (b) above;
- (e) return, if necessary, files that are incomplete and/or unclear in any material respect to the Division concerned with appropriate instructions for completion and/or clarification or simply act in accordance with the powers reposed in the LSC Secretariat by paragraph 4.4.1 below;
- (f) subject to paragraph 3.4.1 (c) above, arrange for the reproduction of the documents submitted for distribution to LSC members;
- (g) noting that the Chairman reserves the right to exclude a submission from the agenda, the Secretary shall, where the Chairman does so, advise the director of the Division concerned accordingly, giving reasons for the exclusion or providing such instructions as would have been agreed by the Chairman;

- (h) prepare the agenda and place the approved submissions thereon; the agenda shall be sequentially numbered in a way that allows submissions from a particular Division to be dealt with to completion before submissions from another Division are considered; in addition, matters that are related shall be so numbered on the agenda so that one follows the other or so as to enable the matters to be taken together if so requested by the person making a presentation on the submission; and
- (i) circulate the approved agenda, together with the relevant documents and any attachments thereto, to members of the LSC; save in the case of extraordinary or specially convened meetings or for late documents/walk-in papers (as outlined in paragraph 3.4.4 below), the agenda and all relevant LSC documents shall be completed and distributed to members of the LSC at least 48 hours before a scheduled meeting of the LSC.

In the performance of any of the above duties or exercise of any powers, the Secretary shall, as far as possible, act in accordance with materiality and interface with the Divisions as much as possible to avoid any unnecessary delays in the processing of documents intended for LSC consideration.

3.4.4 Treatment of Late Documents/Walk-in Papers

Where, for any special reason, a matter for the consideration of the LSC could not be submitted to the Secretary as provided in paragraph 3.4.2 above, but is considered to be of such an important and urgent nature that its consideration at a scheduled LSC meeting is necessary, the following process will apply:

- (a) the Division that wishes to have the matter considered shall first notify and seek the agreement of the Chairman, stating the reason(s) for the delay in submitting the document in accordance with the requirements of paragraph 3.4.2 above and the important and urgent nature of the matter;
- (b) if the Chairman accepts that the matter should be considered at the scheduled LSC meeting concerned, he or she shall advise the Secretary for the matter to be dealt with under the item of “Any Other Business” on the agenda; it should be noted that it is also the Chairman’s prerogative to reject a request for the consideration of a late document/walk-in paper if he or she forms the view that the matter is not of an important and urgent nature or that the reason(s) given for the delay in submitting the document is not sufficiently convincing to justify the matter concerned to be walked-in as a late document;
- (c) where the Chairman permits the matter to be considered by the LSC as a late document/walk-in paper, the Secretary shall process the matter in the usual way and make copies of the document available to LSC members before the matter is due to be considered at the LSC meeting concerned;
- (d) the matter shall be considered by the LSC in the usual way.

It is to be noted that, unless the Chairman otherwise permits, no Information Paper shall be treated or accepted as a late document/walk-in paper, unless the Information Paper is ancillary to a matter for the consideration and decision of the LSC and it is expedient to treat or accept it in that context.

3.4.5 Suspending these Guidelines and Operating Procedures

Notwithstanding anything contained in this Chapter or any other Chapter, the Chairman may, with the consent of at least one half of the members of the LSC, suspend the application of these ***Guidelines and Operating Procedures*** with respect to any matter that requires the urgent attention of the Commission. However, it is expected that this power would be sparingly used, must not be abused in any case and would be applied only in genuine cases where such a suspension becomes essential.

3.5 STREAMLINING THE WORK OF THE COMMISSION

3.5.1 Convening Joint Meetings of LSC and EC

The Commission performs its functions through the Board, relevant Divisions, committees, sub-committees and other organs. It is therefore important that the assignments of these organs are properly and effectively streamlined to avoid unnecessary conflicts or the appearance thereof in their decisions or decision-making processes. In particular, it is essential that two of the key organs – LSC and EC – ensure that their functions complement each other to the extent possible. Thus where a subject matter is of such a nature that it straddles the responsibilities of both the LSC and the EC, consideration should be given to arranging a joint meeting of the two committees. The decision for such a joint meeting may be taken either at the LSC or the EC. In either case, the Chairman at which such a decision is taken shall issue such directive as he considers appropriate to convene a joint meeting of the two committees.

In a joint meeting of the LSC and EC, the Secretaries and recording secretaries of both committees shall attend. However, only one recording secretary need record the proceedings of the joint meeting, but both Secretaries shall agree on the draft of the minutes of the joint meeting before they are dispatched for consideration and approval. Furthermore, the minutes of the joint meeting shall be confirmed by the LSC⁷ and a copy thereof transmitted to the EC for its records.

The procedure for conducting joint meetings of the LSC and EC shall be in accordance with these ***Guidelines and Operating Procedures***. However, the taking of decisions shall be carried out in accordance with the guidelines and operating procedures of either committee, depending on whether the decisions relate to licensing and/or supervisory matters or enforcement matters. In the unlikely event of any conflict or inconsistency with respect to a manner of taking any decisions that are of a related nature, both the LSC and EC shall seek to resolve the conflict or inconsistency in a way that would achieve the overall objectives of the Commission's functions under the FSCA or any financial services legislation.

⁷ The members of the Enforcement Committee, save for the Secretary of the Committee, are also members of the LSC.

3.5.2 Referrals by the LSC

It is the duty of the LSC to receive, review and determine applications for licences, authorizations, approvals, etc. 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 business in and from within the Virgin Islands. In that role, the LSC will necessarily find the need to make specific referrals to the EC which better accord with the duties and functions of the EC. This will normally occur where, for instance, in dealing with an application for a renewal of a licence, authorization, approval, 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. In such a case, the LSC is entitled to make a referral to the EC for the consideration of any matter before taking a decision on a licensing or supervisory issue or notwithstanding any decision the LSC may take.

3.5.3 Discovery of an Enforcement Issue on an Application (Pre-LSC)

Where a Division, upon receipt of an application or in processing an application, discovers that the applicant may have committed a breach or an offence, it must consider whether the nature and gravity of the breach or offence is of a magnitude to warrant a referral to the EC before it can properly be dealt with by the LSC. While this may be considered a judgment call on the part of a Division, the issue must be taken quite seriously in order to ensure the expeditious processing of the application concerned; a matter that should have been referred to the EC initially may result in delayed action if it is first taken to the LSC for a decision on the application, considering that under paragraph 3.5.2 above the LSC may decide on such a referral.

Consequently, if a Division discovers a breach or offence in relation to an application, it should first refer the matter to the Director of Legal and Enforcement for urgent advice on the way forward. The Director may conclude that the matter be proceeded with to LSC, be referred to the EC, be the subject of further inquiry or be the subject of some or no action. Whatever the case may be, the Division concerned should comply with the advice given by the Director, having full regard to the relevant processes and procedures established under the Guidelines and Operating Procedures of the Enforcement Committee in such matters.

In a similar vein, where a Division, in processing an application, discovers that the person to whom the application relates is the subject of an enforcement action before the EC, it must liaise with the Secretary of the EC to establish the nature of the enforcement action taken or pending for EC decision and, where enforcement action has been taken, whether or not any requirement of the enforcement action has been discharged. The director of the Division concerned or, in his or her absence, the deputy director, must consider whether the subject matter of the enforcement action taken or pending is so germane that prudence dictates that the processing of the application should be stayed. In any case, it is essential that in such cases reference is made to the Director of Legal and Enforcement for advice, setting out fully the nature and type of the application, the enforcement action taken or pending against a person in relation to the application and the views of the director of the Division on the matters. The advice of the Director of Legal and Enforcement shall be adhered to with respect to any further processing of the application. It is important that all

Divisions comply with this procedure in order to avoid the taking of any decision that compromises the position of the Commission with respect to the same or related matters.

However, where a matter is presented before the LSC which is established to be connected to an enforcement action and the procedure outlined in this paragraph has not been followed or, in the opinion of the LSC, a decision on the matter requires legal advice (or further legal advice) or should await the discharge of any enforcement action taken or the taking of an enforcement decision by the EC, the LSC may defer consideration of the matter and advise such course of action as it considers appropriate.

In relation to these matters, the LSC shall have particular regard to the processes outlined in paragraphs 3.3.3, 3.3.4 and 3.3.5 of the Guidelines and Operating Procedures of the Enforcement Committee.

3.5.4 Referring Urgent Matters

There are matters that may be of very urgent nature and therefore require very urgent attention on the part of the Commission. This is particularly the case where there are ongoing issues, for instance, with a licensee with respect to which official communication is active. This may also relate to a case where enforcement action is contemplated by the EC (or there is a potential for such action), where a directive has been issued by the EC with a stipulated period for compliance, where a request for further information has been made and received, where additional information has been requested in order to initiate or continue with a specified course of action or other similar matters. In such cases, the Division concerned must treat the matter with the utmost urgency and, in any case, immediately notify the Managing Director and Director of Legal and Enforcement of any communication received by it and, in the case of a document, make that document available to them forthwith. Where considered necessary, the Managing Director may instruct the preparation of relevant memoranda or other document for the expeditious consideration of the LSC or EC, as the case may be, to deal with the matter in accordance with the applicable guidelines and operating procedures.

In such matters, the Chairman may act in accordance with paragraph 1.7.2 above, subject to being satisfied that

- (a) the director or, in his or her absence, the deputy director, of the Division concerned has sufficient information to demonstrate the urgent nature of the matter concerned;
- (b) the matter concerned is indeed of a very urgent nature and thus requires the urgent attention of the LSC;
- (c) the matter cannot wait to be dealt with at a scheduled meeting of the LSC; and
- (d) the appropriate memorandum and accompanying documents in relation to the matter have been prepared or can be prepared in a timely manner for presentation to the LSC Secretariat for LSC purposes.

3.5.5 *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 person which might give the appearance of sanctioning a breach or offence committed by the 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 may not be 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 acted, where applicable, in accordance with paragraph 3.5.3 or 3.5.4 above and, if so, what has been the advice and/or 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 requested 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; this course of action may be ill-advised in instances where granting such a conditional approval would give the appearance of assuming or pre-empting the EC's decision and the LSC should therefore not adopt such an approach lightly.

Taking decisions at the LSC level that would effectively make a referral to the EC academic must be avoided (buttressing sub-paragraph (a) above). In the case of urgent matters before the LSC that require the EC's views and/or decision, consideration may be given to convening a joint meeting with the EC as provided in paragraph 3.5.1 above as a way of expediting the decision-making process.

3.5.6 Unthreading the Conflict Further

Compliance by Divisions with the requirements outlined in paragraphs 3.5.3 and 3.5.4 above will aid immensely the process of licensing by the LSC. A Division should not wait for the LSC to take a decision on a referral for a breach or offence 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 seek the necessary advice from the Director of Legal and Enforcement with a view to an early referral to the EC (if so advised) before forwarding the matter to the LSC for consideration. This would shorten the actions required of the Commission by enabling the LSC to take clear decisions, being fully cognizant of the decision(s) already made by the EC on the breach or offence committed by the person to whom an application relates.

CHAPTER FOUR

POWERS AND DUTIES OF THE LSC

The duties of the Commission and the specific functions to be performed by the LSC in relation thereto are clearly outlined in Chapter One. The mechanisms for licensing and supervision are laid down in the FSCA and other regulatory legislation. It is important that the LSC is fully aware of the relevant provisions applicable in each particular case before it; account must at the same time be taken of current Orders, directives, guidelines, guidance notes, practice directions and established policies which might have a bearing on the matters presented for LSC consideration. The requirements outlined in relevant forms concerning applications as well as approval and compliance regimes processes established by the Commission must be borne in mind and, wherever applicable, applied accordingly.

4.1 POWERS EXERCISABLE IN RELATION TO LSC FUNCTIONS

4.1.1 Powers of the LSC Secretariat

The LSC Secretariat performs a pivotal role in the efficient and effective functioning of the LSC; it is effectively the nerve centre of the LSC. It is the duty of the Secretariat to ensure that the work performed by the LSC on behalf of the Commission is properly streamlined and managed. Towards this end, the Secretariat shall have and, subject to paragraph (16) of Schedule 5, perform and/exercise the following duties and/or powers:

- (a) review all memoranda and Information Papers received by the Secretary to ensure compliance with the requirements of these **Guidelines and Operating Procedures**; this includes compliance with the FSCA, regulatory legislation and current Orders, directives, guidelines, guidance notes, practice directions and established policies of the Commission which have a bearing on such memoranda or Information Papers;
- (b) effect corrections that are obvious on the face of the record; thus where, for instance, an Information Paper is presented as requiring some specific or general action from the LSC, this may be converted into a memorandum for the decision of the LSC. Similarly, where a memorandum elicits information with no particular request for decisive action on the part of the LSC, this may be converted into an Information Paper. The power to effect corrections also includes clerical errors as well as names and references that are of an obvious nature;
- (c) where the decision sought, in the case of a memorandum, is not clear or is improperly worded as not to convey the actual decision required from the LSC, to re-word the decision sought appropriately to achieve the desired intent; however, where a re-wording would constitute a fundamental amendment, the Secretariat should act in accordance with sub-paragraph (d) (i) below;
- (d) refer back to the Division concerned any memorandum which, in the opinion of the Secretariat,

- (j) is not clear on the required action on the decision sought; the Secretariat is at liberty to suggest specific amendments, but is not obliged to do so. It shall, however, indicate to the Division in writing (preferably in the form of a minute on the accompanying file) the reason for referring the memorandum back to the Division;
 - (ii) contains facts that are or may be erroneous and request correction or clarification;
 - (iii) contains errors of law; this may relate to issues that are clearly in conflict or inconsistent with current law or legal principles or presented in a manner contrary to the legal advice rendered by the Legal and Enforcement Division without complying with the requirements set out in paragraph 3.2.3 (b) above;
 - (iv) requires a decision which is inconsistent with a previous decision of the LSC, without providing any distinguishing features or special circumstances for requiring the decision sought (special attention must be paid to the principle outlined in paragraph 2.1.2 above); or
 - (v) fails to conform to the format for the preparation of LSC memoranda or fails to provide information which is essential to better enable the LSC to make an informed decision on the subject of the memorandum;
- (e) defer placement of a memorandum on the agenda to a subsequent meeting of the LSC if doing so would better secure compliance with an obligation arising from any of the matters outlined in sub-paragraph (d) above.

In exercising any of the powers outlined above, the Secretariat (through the Secretary) shall liaise with and act in accordance with any advice or directive the Chairman may give (see, in particular, paragraph 3.4.3 (a) above). It should be noted that the above powers are to be exercised judiciously and with a view to ensuring quality management of the work of the LSC to better serve the Commission's licensees or potential licensees and maintaining the integrity and reputation of the Virgin Islands.

Where a Division has any issue with the Secretariat's exercise of any of its powers, the Division shall liaise with the Secretary with a view to resolving the issue amicably, failing which the matter may be referred to the Chairman whose decision on the matter shall be final and binding.

4.1.2 Record Keeping Obligations

All documents received by the LSC Secretariat and/or distributed to members on account of their membership of the LSC are the property of the Commission. The documents must not be further distributed, copied or circulated to persons not entitled to them. Documents that are distributed to members for LSC purposes and remain in their custody

and/or for which they continue to be responsible for become their individual responsibility and they must ensure their safe keeping and maintenance.

The LSC Secretariat shall maintain and keep in a safe place all LSC documents. It shall also keep a register of all matters received by it and/or considered by the LSC by outlining the date of receipt, when distributed to members, when considered by the LSC and the decisions taken, including any follow-up action where applicable.

4.1.3 Power to Recall Documents

The LSC Secretariat may either on its own motion or on the directive of the Chairman recall any document that has been distributed to a member. In addition, the LSC may direct the retrieval of distributed documents. The recall of a document may be founded on any of the following grounds:

- (a) the wrong document was distributed;
- (b) the document distributed has material errors which require correction;
- (c) the LSC has directed the document to be corrected or enhanced, notwithstanding that the LSC might have taken a decision in relation to the decision sought in the document;
- (d) the document has been withdrawn from the agenda of the LSC and therefore no longer forms a part of the record of the LSC meeting at which it was withdrawn;
- (e) following distribution of the document, the Secretariat advises that the Division that submitted the document no longer wishes to pursue the subject matter of the document; in such a case, the LSC Secretariat shall, if feasible, amend the agenda of the LSC at which the document was slated to be considered or presented to remove it therefrom; or
- (f) any other reason that the Chairman or LSC considers appropriate.

Where a member ceases to be a member of the LSC for whatever reason, the LSC Secretariat may recall all, or issue such directive in relation to, the documents that would have been distributed to, or assumed by, that person during his or her membership of the LSC. In this regard, where documents are presented by officers other than directors, the documents are deemed to be distributed to the directors and they shall be held accountable accordingly (save that where the position of director in any Division is vacant, this responsibility falls to the next most senior person that is at the material time performing the duties of the office of the director). It is therefore essential that all papers presented before the LSC by officers other than their directors are returned to the directors concerned for their record and safe keeping. Furthermore, every member shall forthwith comply with any recall of documents by the LSC Secretariat.

4.2 PROCEEDINGS OF THE LSC

4.2.1 Considering Matters on the Agenda

In order to promote the most efficient use of time and in accordance with the requirements of these *Guidelines and Operating Procedures*, LSC meetings will, subject to paragraph 3.4.4 above, be restricted to items on the day's agenda. The items on the agenda shall be taken seriatim, provided that the Chairman may, notwithstanding paragraph 3.4.3 (h) above, in his or her discretion decide otherwise.

The rationale for requiring the distribution of documents to LSC members at least 48 hours in advance of a scheduled meeting is to enable members to read through and review the subject matter of the documents in order to expedite the consideration of those matters at the meeting. Consequently, it would normally not be necessary for a director (or his representative) to read through a memorandum or document; it is sufficient to highlight the most pertinent issues outlining the reasons for justifying the decision(s) sought and specifically providing the decision(s) that the LSC is being requested to take. However, it is imperative that every matter of special mention be outlined succinctly and indication given as to whether and how it relates to or affects the decision sought from the LSC. Similarly if a memorandum or other document deviates from legal advice rendered by the Legal and Enforcement Division, the deviation must be specifically addressed during the presentation of the memorandum or other document taking into account the requirements outlined in paragraph 3.2.3 (b) above.

Every matter for the decision of the LSC must be dealt with in accordance with the principles outlined in Chapter Two of these *Guidelines and Operating Procedures*.

4.2.2 Presenting Documents at LSC and Permitting Observers

Memoranda and other documents before the LSC shall ordinarily be presented by the director of the Division that authored them or, in his or her absence, by the deputy director of the Division. However, the Chairman may permit any officer of a Division to present a memorandum or other document if the officer is responsible for the examination and evaluation of the subject matter of the memorandum or other document and prepared such memorandum or other document. This may be permitted notwithstanding that the director or deputy director of the Division is present at the meeting concerned, although the director or deputy director, as the case may be, may intervene in the presentation to make such contribution as may be necessary or answer such questions as may be raised.

Apart from providing a medium for improving the clarity of the subject matter of a memorandum or other document, this process also helps to aid the training of staff of the Commission. Accordingly, the Chairman may, at the request of the director of a Division, permit any officer of that Division to attend a meeting of the LSC to observe the proceedings thereof. Such permission shall be on the condition that the officer shall under no circumstances divulge any matter concerned with the proceedings of the LSC, including how matters are debated or decisions taken.

Every file in respect of a subject matter for consideration or the information of the LSC must be made available by the LSC Secretariat for reference purposes during the meeting at which the subject matter is being addressed.

4.2.3 Taking Decisions at LSC

The LSC shall take its decisions in accordance with the procedure outlined in paragraph 1.7.6 above. In any matter that a member considers to be so crucial as to warrant an indication of position thereon by every member of the LSC, he or she may propose a round table indication from every member of their position with regard to the matter. Such round table indication may be by word of mouth expressing a definitive position of the matter concerned or by a call of votes which may be by a show of hands or by secret ballot. If any proposal is made in this regard by a member, the Chairman shall oblige accordingly. In the case of a call of votes by secret ballot, the recording secretary shall issue and conduct the ballot as well as declare the count of the ballot.

Following the presentation of a memorandum or other document before the LSC, members shall adopt the following process in making their decision:

- (a) debate the matter (where considered necessary by any member), expressing their opinions thereon and raising such questions as they consider necessary to facilitate the decision-making process;
- (b) approve the decision sought without any amendment; it should be noted that an approval may relate to a recommendation to refuse an application and sub-paragraphs (c) and (d) below should also be read in that context;
- (c) approve the decision sought with such amendment as the LSC considers appropriate;
- (d) approve the decision sought subject to specified conditions;
- (e) decline (refuse) to approve the decision sought;
- (f) defer approval of the decision sought, pending consideration of another or related matter;
- (g) defer approval and direct a referral of the memorandum or document to the Legal and Enforcement Division for legal advice/opinion; where a referral had already been made but no response had been received, approval may be deferred to await the legal advice/opinion sought from the Legal and Enforcement Division;
- (h) defer approval and direct that Divisional or other consultation be had on the subject matter of the decision sought or other matter in the background information of the memorandum;
- (i) in the absence of the Managing Director, defer approval where, in the opinion of the LSC, the subject matter of the memorandum or other

document is of such a nature that prudence dictates that its consideration should await the presence of the Managing Director;

- (j) defer approval of the decision sought, subject to the Division that is requesting the decision
 - (i) inquiring into and providing additional information;
 - (ii) rewriting the memorandum or other document to enable a proper decision to be taken by the LSC; or
 - (iii) undertaking such measures as may be required by the LSC;
- (k) withdrawal of the memorandum or other document by the Division presenting it; however, any member may request that the memorandum or other document be withdrawn, but if the Division concerned declines to do so, the LSC shall proceed in accordance with the provisions outlined in sub-paragraphs (a) to (j) above; or
- (l) take such other decision as the LSC considers appropriate and has power to make, having regard to the nature, complexity or circumstances of the decision sought or any person or persons that may be associated therewith.

As already noted in paragraph 2.4 (c) above, every decision taken by the LSC must provide reason(s) for the decision. This is particularly the case where a decision sought has not been approved.

In circumstances where a memorandum or other document is presented by a deputy director or other officer in the presence of the director of the Division concerned, the LSC shall not take its decision on the subject matter of the memorandum or other document until after the deputy director or other officer has made his or her presentation and left the meeting. In other words, LSC decisions shall be taken in the absence of the deputy director or other officer where the director is present at the meeting at which the presentation has been made. Where such deputy director or other officer has more than one memorandum or other document to present, the Chairman may allow all presentations to be made first before directing decisions to be taken, or adopt such other measure as may be necessary under the circumstances; provided, however, that no such decision shall be taken in the presence of the deputy director or other officer where the director is present.

4.2.4 Taking Decisions by Round Robin

Generally, all LSC decisions must be taken at a meeting of the LSC in accordance with the requirements outlined in these Guidelines and Operating Procedures. However, where a matter falls to be treated as an urgent matter in accordance with the provisions of paragraph 3.5.4 above and its consideration cannot await a formally convened meeting of the LSC, the Chairman may, notwithstanding anything contained in these Guidelines and Operating Procedures, allow the matter to be considered by LSC members and a decision taken by way of round robin. However, this power shall be exercised only in circumstances where the Chairman determines that the subject matter concerned is non-

controversial, does not raise any specific concerns from a regulatory or enforcement standpoint and fully complies with the matters set out in paragraph 3.5.4 above of which the Chairman has to be satisfied.

In such a case, the Chairman shall advise the Secretary accordingly who shall liaise with the Division concerned to have the matter dealt with by round robin.

4.2.5 Refusing Approval of Decisions Sought/Applications

Particular care is required in the process whereby the LSC reaches a decision to refuse an application and the manner in which the applicant is informed of this decision. The LSC must be mindful at all times that refusing an application before it constitutes an adverse decision and must therefore not be taken lightly. It should be borne in mind that such decisions are more susceptible than others to be challenged. Every effort must therefore be made to ensure that the decision-making process is at every stage fair and is substantively sound and can therefore withstand scrutiny. It is therefore essential that the principles and procedures outlined in these ***Guidelines and Operating Procedures*** are followed to ensure a fair process.

4.2.6 Noting Information Papers

In the case of Information Papers presented before the LSC, the LSC may (if it considers it necessary) debate the matters contained in the Paper with a view to having a better understanding of the issues concerned therewith. In this vein, it is open to the LSC to determine that the subject matter of the Information Paper should be reflected in a properly prepared memorandum and presented for a decision of the LSC on any specific subject therewith. Furthermore, the LSC may simply provide comments and suggestions on specific issues of the Information Paper with any direction to the Division dealing with the subject matter or for the LSC Secretariat to communicate any such direction. Otherwise the LSC must note the contents on Information Papers presented before it.

4.2.7 Confirmation of LSC Minutes

The proceedings of the LSC shall be recorded in minutes which shall be made available to members for consideration and correction. The minutes will detail the essence of the discussions (as may be necessary) and decisions at meetings of the LSC and shall be subject to confirmation by members at the next meeting of the LSC following the one to which they relate. Ordinarily, this would be the week that follows. However, the Chairman may defer confirmation of minutes to another period if he or she considers that to be an appropriate course of action or if for any reason the Secretary has not been able to complete preparing the minutes in time for the relevant scheduled meeting.

4.2.8 Communicating LSC Decisions

Upon confirmation of minutes of the LSC, the LSC Secretariat shall communicate the LSC's decision on a subject matter to the Division to which it relates. This may be done by simply providing the relevant extract of the minutes or providing such extract along with any special instructions that may be required by the LSC or that might be necessary in clearly communicating the decision taken by the LSC. It is then the responsibility of the Division concerned to take the required action and communicate with the applicant.

However, in a non-contentious matter on which a decision has been taken, the LSC Secretariat may communicate LSC's decision to the Division concerned by minuting such decision in the relevant file to which the subject matter of the decision relates. This may be done notwithstanding that the minutes of the LSC meeting to which the decision relates have not been confirmed.

Where a decision relates to a refusal of an application, it is advisable that the Division concerned, upon preparing the letter or other document to be communicated to an applicant, refers it to the Legal and Enforcement Division for vetting before it is communicated. While this may not be necessary in straight-forward matters (and some matters may be less straight-forward than they seem), Divisions should be mindful of what is stated in paragraph 4.2.5 above and the need therefore to communicate properly and effectively on matters in which adverse decisions have been taken.

It is also important that, in preparing the letter or other document communicating the refusal of an application, the Division concerned should have regard to precedents developed over time in similar matters to ensure, as far as possible, a consistent approach and use of language. In unusual cases, such as where no precedent has been settled for the particular type of decision or where there is a material difference in the circumstances of the current matter or the matter may otherwise be considered legally problematic, the draft letter or other document communicating the LSC decision should be submitted to the Legal and Enforcement Division for vetting before it is issued. In cases of reasonable doubt, Divisions should err on the side of caution and seek legal advice.

4.2.9 Expediting Communication of LSC Decisions

Divisions should bear in mind that the general right of appeal under the FSCA allows an aggrieved person 14 days to appeal from the *date of the questioned decision*. While this time is likely to be treated by a court as running from the *date of actual notice to the applicant*, letters (or other documents) of refusal in particular, should be issued expeditiously in keeping with the spirit of this Chapter.

4.3 DEALING WITH QUERIES ON LSC DECISIONS

4.3.1 Receipt of Queries

It is not unusual that some unsuccessful applicants will revert to the Commission with queries regarding the refusal of their applications. All such queries, when received by a Division, must be notified to the Secretary immediately. The Secretary must then liaise with the Chairman, Director of Legal and Enforcement and director of the Division concerned regarding the manner of handling the query. It is essential that during that period of consultation the Division concerned makes no attempt to provide a response to the aggrieved person. Between the Chairman, Director of Legal and Enforcement and Secretary, the following steps shall be taken:

- (a) the query should be thoroughly considered to determine whether there is merit to it to warrant a revisit by the LSC of its decision on the matter;
- (b) if it is decided that the LSC's decision should be reconsidered (this may normally be the case where the applicant has made a formal representation

or requested an audience with the LSC), the director of the Division concerned shall prepare a memorandum on the subject to forward to the Secretary for the LSC's attention at its next convenient meeting;

- (c) the Division concerned will acknowledge receipt of the query and advise the aggrieved person that submitted the query that the query is being referred to the LSC for further consideration; thereafter the processes for taking decisions under these *Guidelines and Operating Procedures* shall apply accordingly;
- (d) where it is agreed that there is no merit to the query, the director of the Division concerned shall communicate the Commission's response to the aggrieved person;
- (e) in acting pursuant to sub-paragraph (d) above, it is advisable that the director of the Division concerned seeks the views and advice of the Director of Legal and Enforcement on a draft of the response before actually communicating the response; this will be particularly the case where the subject matter of the query received has legal implications;
- (f) where action is taken pursuant to sub-paragraph (d) above, the director of the Division concerned shall prepare an Information Paper on the subject to inform LSC members of the nature of the query and the decision arrived at, including a copy of the written response that was sent to the aggrieved person.

4.3.2 Matters Related to Treatment of Queries

While some queries may be fairly routine, such as those that seek clarification from the Commission, care must be taken in dealing with applicants whose applications have been refused. As far as possible, any response to clarifications sought must stick to the letter and spirit of the decision taken by the LSC and there must under no circumstances be any deviation that would give the appearance of abridging or contradicting the LSC's decision. In particular, care must be taken not to provide oral clarifications or any further views on the Commission's refusal of an application; any such clarifications or further views sought must be received in writing before any attempt is made to provide a response. Depending on the nature of the clarification or further view sought, the Division should always consider the need to liaise with and/or seek advice from the Director of Legal and Enforcement and/or the Secretary before communicating a response. In fairly routine matters, it is acceptable for the Division to respond in such appropriate manner as it considers fit. However, the Division concerned must always bear in mind the prudence of liaising with and seeking the advice of the Legal and Enforcement Division before communicating a response.

It should be noted that nothing provided in this paragraph derogates from the provisions of paragraph 4.3.1 above. Thus every query to a decision taken by the LSC must adhere to the process outlined in paragraph 4.3.1 above.

4.4 EFFECTING RECTIFICATIONS TO LSC DECISIONS

Rectifications to LSC decisions is permissible, but only in relation to obvious clerical errors which do not go to substance. For instance, if the decision is taken to grant approval to “JOHN BITTER” (which was the name reflected in the memorandum seeking LSC approval), but the Division concerned realizes subsequently that the name should in fact have been “JOHN BETTER” and that is in fact the name on the application, then it should not be necessary for the Division concerned to write another memorandum seeking LSC approval on the correction of the error. The Division must in such a case simply notify the Secretary in writing outlining the fact that, in its opinion, the error is clerical in nature and the original application provides the correct name. It could then, with the concurrence of the Secretary, proceed to effect the rectification of the name and issue the correct licence or certificate in accordance with the provisions of these *Guidelines and Operating Procedures*.

Generally what may or may not be a clerical error can best be deduced from the nature and type of the correction sought. It is for every Division seeking a rectification to make clear to the Secretary precisely the nature and type of correction sought and how the error might have been committed. If the error is that of the Commission, this may (depending on the subject matter) be easily rectified at the Divisional level after obtaining the concurrence of the Secretary if doing so would not amount to a substantial amendment of the LSC’s decision. If it is the error of the applicant, then written documentation to that effect must be presented to the Division and the matter discussed with the Secretary to determine whether it is of substance to warrant LSC approval.

However, if the Secretary forms the view that what appears or is presented as a clerical error is of a nature that warrants LSC approval then, notwithstanding the immediately preceding stipulations, the Division to which the subject relates will prepare the necessary memorandum for LSC consideration and approval.

In every case of rectification at the Divisional level, the Secretary shall notify the LSC of the rectification made. This shall be done at the next LSC meeting following the date on which the decision to rectify at the Divisional level took place.

4.5 RENDERING LEGAL ADVICE/OPINION

In the performance of its functions, the Commission neither has the mandate nor the duty to render legal advice/opinion to its licensees or potential licensees. It is therefore essential that directors and their staff refrain from doing anything or communicating on any matter that could be interpreted as proffering legal advice/opinion. If one is unsure whether or not a proposed communication on a specific or general matter might constitute legal advice/opinion, advice must be sought from the Legal and Enforcement Division before the communication is dispatched.

4.6 PROVIDING REGULATORY OPINION

Part of the Commission’s regulatory and supervisory functions is to ensure compliance with the FSCA and regulatory legislation. In so doing, the Commission views its primary role as that of assisting its licensees to properly and effectively function within the confines of the laws. It is precisely for this reason that rigorous and thorough measures

are adopted at the licensing stage to ensure that rules governing fitness and propriety are satisfied. Thus where a proposed licensee seeks clarification or raises a question with a view to seeking assistance on an application (such as filling an application form), the Division to which the matter is directed should do its best to provide such assistance as is appropriate in the circumstances, taking care not to contravene paragraph 4.4 above.

On the other hand where, in the performance of its supervisory functions or in the course of performing some other function, a Division observes or discovers a breach or contravention by a licensee or potential licensee of the FSCA or a financial services legislation which may be actionable by the Commission, it must document the breach or contravention and act in accordance with the provisions of the Guidelines and Operating Procedures of the Enforcement Committee.⁸ It is wrong and against the Commission's role as the regulator of financial services business in the Virgin Islands for any member of its staff to advise or render opinion to a licensee or potential licensee on how such licensee might avoid a provision of the FSCA or a regulatory legislation. It should be noted that any such advice or opinion from a staff of the Commission may be used against the Commission, which is likely to put the Commission in an insidious position.

⁸ The Commission's Guidelines and Operating Procedures of the Enforcement Committee were published on 8th April, 2008 and came into force on 10th April, 2009; they are available on the Commission's website.

CHAPTER FIVE

DELEGATION AND SUPERVISION

While it may be considered ideal for all licensing and supervisory matters to be dealt with by the LSC, such an approach may create unintended inefficiencies and unnecessary bureaucratic delays in the licensing and supervisory process. Certain aspects of regulation and supervision are of such a nature that efficiency dictates that they are delegated to be dealt with at the Divisional level, subject to such checks and balances as may be essential in ensuring due and appropriate execution. As outlined in sub-paragraph 5.1.1 below, the FSCA empowers the LSC 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 LSC to establish the specific matters it wishes to delegate; it is imperative for the delegate to act in accordance with the LSC's directions. Where a delegate fails to act in accordance with the LSC's directions, then the LSC must seriously consider suspending or revoking the delegation concerned or transferring such delegation to another functionary of the Commission.

5.1 DELEGATING AUTHORITY

5.1.1 The Statutory Remit

Paragraph 3 of Schedule 1 of the FSCA provides a general delegating authority. It provides that

“Anything permitted or required to be done by the Commission may be done by a Board member or employee of the Commission who is authorized for that purpose by the Commission either generally or specifically.”

Also relevant is section 6(1)(a) of the FSCA which recognizes the Board as the governing body of the FSC and expressly confers on it, inter alia, the functions of establishing the policy of the FSC and monitoring and overseeing its implementation by the FSC. Under section 6(3), the Board also has the authority, in the performance of its functions, to delegate such duties as it considers necessary to the Managing Director.

Furthermore, the LSC may, in the performance of its functions, 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 which provides that

“A committee may, by notice in writing, delegate the performance of any of its functions or the exercise of any of its powers to a senior officer of the Commission or to a Commissioner where authorized to do so

(a) in its rules of procedure; or

(b) by the Board.”

Thus to the extent that the FSCA expressly authorizes the LSC (as one of the committees established under section 14 (1) thereof) to perform specific functions under section 16A, the Board's authorization is not strictly required. In addition, these ***Guidelines and Operating Procedures*** provide relevant delegating functions and consequently such a delegating authority fully complies with the remit outlined in section 17 (2) (a) of the FSCA.

5.1.2 Parameters for Delegation

Delegation of authority to perform specified functions must be founded on relevant specified parameters. Accordingly, the LSC may delegate the performance of its functions or the exercise of its powers under 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 in the minutes of the meeting at which or in relation to which the decision to delegate is taken;
- (c) the decision to delegate must be taken by the LSC either at a meeting of the LSC 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 required by section 17 (2) of the FSCA;
- (e) the delegation must outline
 - (i) the task(s) to be performed by the delegate, provided that in the case of this sub-sub-paragraph and sub-sub-paragraph (ii) below) a delegation of tasks and/or exercise of powers by reference to a specified provision or provisions of the FSCA or financial services legislation will suffice;
 - (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 for reporting back to the LSC 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 LSC; and

- (g) it shall always be a condition of any delegation that the LSC reserves the right to terminate without notice and without proffering any reason the task(s) or power(s) delegated.

5.1.3 Conditions Applicable in Relation to Delegated Authority

Where the LSC delegates a function and/or power in relation to a licensing, approval, authorization, certification or supervisory matter, 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) comply with the terms and conditions of the delegated authority; where, for any reason and in any particular case, there is an inability or there is likely to be an inability to keep to the terms of the delegated authority, the LSC shall be notified immediately through the Secretary, outlining the nature of the matter concerned and the reason(s) for the disability or likely disability;
- (b) where in performing or exercising the function or power delegated, an issue arises in relation to enforcement, the relevant provisions of these *Guidelines and Operating Procedures* and/or the Guidelines and Operating Procedures of the Enforcement Committee shall be complied with or advice sought from the Director of Legal and Enforcement; the advice given shall be complied with or, in the alternative, a referral made to the LSC for a decision on the way forward;
- (c) seek legal advice from the Legal and Enforcement Division whenever such advice is necessary to the due execution of the function and/or power delegated;
- (d) any regulated or supervisory decision taken must be consistent across the board in relation to the same or similar facts and/or circumstances; where a departure is considered necessary on account of the nature, specific facts or circumstances of any particular case, then advice must be sought from the Director of Legal and Enforcement on a way forward and the advice complied with accordingly;
- (e) where, in the course of discharging a delegated authority, the opinion is formed that a particular or general conduct or breach on the part of a regulated person or other person connected to the regulated person is of a nature as to raise legitimate questions regarding fitness and propriety, a referral must be made to the Director of Legal and Enforcement for advice and the advice complied with;
- (f) when in doubt as to whether a particular conduct by a regulated person or a person connected to the regulated person raises questions of fitness and

propriety, advice must be sought from the Director of Legal and Enforcement and the advice complied with; and

- (g) where a delegated authority does not specify a requirement for preparing and submitting a report on the discharge of the delegated authority and within a specified period, the delegate shall prepare and submit to the LSC a report for every quarter in respect of which the delegated authority has been discharged; if the delegation is for a period of less than six months, the delegate shall prepare and submit to the LSC a report for the first quarter (if applicable) and at the end of the period of the delegation. The report shall be prepared in a manner that shows how the delegated authority has been discharged and in relation to what matters, including any ancillary matters.

5.1.4 Duration of Delegation

The LSC may delegate the performance of functions or exercise of powers for a defined period or without specifying any period. However, a function or power that is delegated by the LSC for a specified period may be renewed by the LSC. Where a function or power is delegated without any restriction as to the period of delegation, the function or power may be performed or exercised indefinitely, but without prejudice to the LSC's power to terminate or reduce the scope of the delegation at any time or within a specified period as the LSC may see fit to impose.

5.1.5 Delegation not a bar Against the LSC

No form of delegation by the LSC shall be construed as prohibiting the LSC from doing anything in relation to the matter delegated, including performing the task associated or powers connected with the matter delegated, as it sees fit.

5.1.6 Referral of Delegated Authority

Where a delegated matter is of such a nature that the person to whom it is delegated considers it appropriate that the matter should be referred to the LSC for an opinion or a decision, the person may refer the matter to the LSC by providing a memorandum setting out his or her reason(s) for the referral and outlining the matter(s) for decision. At that stage it would be up to the LSC to make a determination as to whether or not

- (a) the matter has been properly referred for its opinion or decision; and
- (b) the LSC should render an opinion or decision and thus proceed to do so; or
- (c) the matter should be remitted to the person making the referral to act on the delegated authority; however, where the LSC under sub-paragraph (b) above merely renders an opinion, then it shall remit the matter for action in accordance with this sub-paragraph.

5.1.7 Form of Notice of Delegation

Without prejudice to paragraph 5.1.2 above, where the LSC 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 1 of Schedule 2** or as near thereto as possible, depending on the nature and scope of the delegation.

5.1.8 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 5.1.2 and 5.1.7 for the preparation and submission of a report or performance of a function, the LSC may issue an extension using the form set out in **Part II of Schedule 2**. While the LSC has the power to grant such further extensions as it deems appropriate, it must always bear in mind that extensions are to be granted for good reason and for the proper purpose. Where the LSC finds that a request from a director or other senior officer for extension of time is frequent or unreasonable having regard to the Commission's ability to efficiently and effectively discharge its functions, it may consider whether it is not appropriate that the delegated authority should be terminated, re-assigned, transferred or the scope of it reduced.

5.1.9 Terminating a Delegated Authority

The LSC can terminate at any time and without notice any authority it has delegated. Thus the authority delegated under **Schedule 3** may be terminated accordingly. The termination of a delegated authority shall be in the form provided in **Part III of Schedule 2**, but the failure to terminate in accordance with that form shall not invalidate any performance by the LSC or some other person so authorized by the LSC of the matter(s) that had been delegated.

The LSC shall make a proper and periodic 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 terminated, suspended, transferred or its scope reduced. 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 the applicable regulatory and supervisory regimes and, where there has been departures, whether these have been dealt with as required under these ***Guidelines and Operating Procedures***;
- (c) whether there has been any breach of the conditions applicable with respect to a delegated authority.

5.2 SCHEME OF AUTHORISED DECISION-MAKING

5.2.1 General Delegated Authority

The powers and duties outlined in **Schedule 3** (by reference to relevant provisions of specified in relevant regulatory legislation) in relation to the LSC's functions and powers are delegated to the directors of Division as prescribed in the Tables of that Schedule. This delegation shall therefore be construed as a written notice by the LSC delegating to the specified directors of Division the performance of its functions or the exercise of its powers with respect to the regulatory matters specified in Schedule 3. It shall also be deemed to have taken account of the delegating parameters outlined in paragraph 5.1.2 above. This delegation is, however, without prejudice to the LSC's authority to

- (a) act in accordance with paragraph 5.1.7 above in providing any new or further delegation to any director or other senior officer of the Commission in accordance with paragraph 5.1.2 above; or
- (b) terminate a delegated authority pursuant to paragraph 5.1.9 above.

5.2.2 Specific Delegated Authority:

(a) to the Managing Director

The functions relating to compliance matters, as an aspect of supervision, fall within the statutory responsibilities of the LSC. In this regard, the power to approve a compliance officer in respect of a regulated person is delegated to the Managing Director, acting after consultation with the Compliance Officer Approval Committee⁹ established in accordance with paragraph 6 of Schedule 1 of the FSCA. This function to approve compliance officers is to be carried out in accordance with the requirements of section 34 of the FSCA and pursuant to any related requirement under the Regulatory Code, 2009. [Unless otherwise required by the Managing Director, the LSC Secretariat shall be responsible for handling all communications relating to applications for compliance officer certificates (rescission or revocation of approval of compliance officers falls to the remit of the EC).]

In this context, it would be appropriate for the Divisions to exercise aspects of these functions in the specific instance, indicated in the Tables set out in Schedule 3, of initiating compliance visits where required on a case by case basis and not as part of a general exercise mandated by the LSC.

In addition, the Managing Director is empowered to perform the duties specifically delegated to him or her under Schedule 3; where expedience dictates, a Division may seek the advice and obtain the instruction of the Managing Director in any matter that has been delegated to the director of the Division, provided that any advice or instruction

⁹ The Compliance Officer Approval Committee is established pursuant to paragraph 6 of Schedule 1 of the FSCA and generally comprises senior staff at the level of deputy director. For Divisions that do not at any material time have a deputy director, the next most senior person below the deputy director position represents the Division concerned. The Committee is chaired by the Deputy Managing Director, Corporate Services and has a unit within the Commission specially dedicated to receiving and processing applications for the approval of compliance officers and/or granting relevant exemptions that may be applicable.

given shall be notified by the director of the Division to the LSC as soon thereafter. Furthermore, any matter specifically delegated to the Managing Director may be referred to the LSC in accordance with the referral provisions of these Guidelines and Operating procedures.

(b) to the Board

Matters specifically delegated to the Board shall not be performed by any functionary of the Commission, but shall be referred to the Board for its consideration, advice or decision. In any particular delegated matter to the Managing Director or a director of a Division which the Managing Director considers to be of such importance that it should be notified or referred to the Board for its consideration and action, the delegated matter shall be so notified or referred notwithstanding the delegated authority.

(c) to the Director of Legal and Enforcement

Any matter in the FSCA or a financial services legislation which requires an application to be made to, or which involves legal proceedings before, a court or the Appeal Board, is delegated to the Director of Legal and Enforcement. In such a matter the Director shall take such action as he or she considers fit, including engaging the assistance of other counsel with the approval of the Managing Director, in order to best represent the interests of the Commission.

(d) to a director of a Division

Where an authority is delegated to a director of a Division and the delegated authority therewith does not specifically provide for a deputy director to perform the function of the delegated authority in the absence of the director, the deputy director may perform such a function with the consent of the Managing Director as if the authority concerned were delegated to him or her to perform. In circumstances where a Division has more than one deputy director, the delegated authority concerned shall, in the absence of the director of the Division and subject to the Managing Director's consent, be performed by the deputy director whose duties closely relate to the delegated authority.

(e) to the Managing Director and a director of a Division

Where an authority is delegated both to the Managing Director and a director of a Division, either of them may perform the delegated authority after consulting each other and agreeing on a common approach and/or decision. If only one of them is present at the time of the required consultation and it is not expedient to wait for the presence of the other before performing the delegated authority, the one available may perform the delegated authority and subsequently notify the other of the action performed. In the event that consultation takes place, but the Managing Director and the director of the Division concerned could not reach a common position on the subject matter of the delegated authority, the position adopted by the Managing Director shall prevail.

(f) to the Managing Director and the Board

If a delegated authority is both to the Board and the Managing Director, the authority shall be performed by the Board. However, if it is not expedient to await the Board's

action on the delegated authority, then the Managing Director may perform the delegated authority after consultation with, and agreement of, the Chairman of the Board (or the Deputy Chairman, in the absence of the Chairman). In the event that the Chairman of the Board and the Managing Director could not agree on a common position on the subject matter of the delegated authority, the position adopted by the Chairman of the Board shall prevail and be acted upon accordingly. In any case, the Board shall always be notified of the action taken on the delegated authority, including the reason(s) why it was considered expedient for the Chairman of the Board and the Managing Director to act on the delegated authority.

5.2.3 Principles Governing Delegated Authority

The regulatory legislations clearly provide that regulatory functions are to be performed by the Commission and empower the LSC with specific duties and responsibilities in that regard. In some instances the level at which specified functions are to be performed are not specifically delineated, but are placed on the Commission generally. It is in this regard that account must be taken of the various levels of the power of delegated authority and it is instructive that these ***Guidelines and Operating Procedures*** are consulted as a guide.

The Tables set out in **Schedule 3** outline a comprehensive list of statutory powers exercisable by the Commission under the relevant financial services legislation; this also includes a list of the functions to be performed by the Commission. The relevant legislations are listed as follows:

- Banks and Trusts Companies Act, 1990 and related subsidiary legislation (BTCA);
- Company Management Act, 1990 (CMA) and related subsidiary legislation;
- Insurance Act, 1994 (IA) and related subsidiary legislation (applicable only for a transitional period);
- Insurance Act, 2008 (IA) and related subsidiary legislation (expected to be brought into force in January, 2010);
- Mutual Funds Act, 1996 (MFA) and related subsidiary legislation (applicable only for a transitional period);
- Securities and Investment Business Act (SIBA) and related subsidiary legislation (expected to be enacted in December, 2009 or in the first quarter of 2010);
- Insolvency Act, 2003 (INSOL) and related subsidiary legislation;
- Financing and Money Services Act, 2009 and related subsidiary legislation (expected to be brought into force in March, 2010); and

- Financial Services Commission Act, 2001 (FSCA) and related subsidiary legislation.

Any reference to these legislations must always have regard to amendments relative to them.

The general scheme of distribution of decision-making levels set out in the Tables in **Schedule 3** is premised on the following broad principles:

- (a) the enactment of the FSCA represents a policy decision to streamline the functioning of the Commission with a view to ensuring the highest standards of efficiency and effectiveness. In this regard, a clear and comprehensive scheme of decision-making within the Commission is conducive to efficient and speedy decision-making;
- (b) the Commission's Board has general oversight of the work of the Commission and is essentially responsible for setting the policy framework for the Commission and ensuring the implementation of the policy. Subject to the general and special directions of the Board, the Managing Director is responsible for the administration and operation of the Commission and the supervision of the Commission's staff and is accountable to the Board for the implementation of the Board's policies and the overall functioning of the Commission;
- (c) the operational functions of authorising and supervising financial services business are vested in the LSC. The LSC takes all authorization decisions, including the major supervisory decisions, and otherwise performs its day-to-day functions through the LSC Secretariat and staff of the relevant Divisions which act under its general and specific authority. Routine regulatory and supervisory tasks, such as receiving and processing applications for authorization and undertaking routine supervisory functions like approving authorised agents or regulated persons' name changes, or undertaking general daily supervision and monitoring, are to be carried out as far as possible at the level of the relevant Division;
- (d) the director of each Division to whom authority is delegated is accountable to the LSC for the work of the Division and must keep the LSC duly informed of all significant matters relevant to the proper discharge by the LSC of its functions;
- (e) in the scheme of the FSCA, the LSC's function of supervising regulated persons necessarily includes making decisions whether to take enforcement action and what specific action to take, including the action to revoke the person's authorisation. Where, pursuant to the performance of any delegated function or exercise of a delegated power, a Division comes across an issue of enforcement, it must act in accordance with the requirements set out in these ***Guidelines and Operating Procedures*** and/or the Guidelines and Operating Procedures of the Enforcement Committee;

- (f) as part of the checks and balances envisaged in the efficient and effective functioning of the Commission, the Board is to be kept informed on an ongoing basis of the work of the LSC. For this purpose, the Board is entitled to receive the LSC's minutes and, whenever it so requests, will receive such further information as it requires; it is precisely for this reason that section 17 (1) (c) of the FSCA requires at least a quarterly reporting to the Board by the LSC with respect to the performance of its functions;
- (g) as a matter of sound policy and good governance and within the letter and spirit of the FSCA, the LSC is required to promptly bring to the specific attention of the Board any authorization or supervision matter which
 - (i) raises fundamental issues regarding a policy of the Commission;
 - (ii) is or is likely to be of a high profile in the community and/or to raise or likely to raise serious reputational issues for the Commission and/or the Virgin Islands; or
 - (iii) presents or is likely to present serious public interest issues, such as one which may draw negative or unnecessary media attention or create or likely to create instability within the financial services industry;
- (h) where a matter relative to a delegated function is of such importance as to warrant the immediate attention of the LSC or to require urgent notification to the Board, the Division concerned therewith must be mindful of the importance of acting with speed and following the necessary processes and procedures outlined in these *Guidelines and Operating Procedures*;
- (i) the levels of decision-making indicated in the Tables set out in **Schedule 3** by ticks in the relevant column reflect the level at which the decision would usually be taken and the minimum level at which it must be taken. This is without prejudice to the indicated decision-maker referring the matter upwards for consideration where the particular circumstances warrant this. This would normally be the case whereby a director, for example, refers a serious matter that he or she is authorised to handle to the LSC or the LSC to the Board. Consistent with the procedures outlined in Chapters Three and Four, the preparatory work for the taking of decisions by the LSC (or the Board) would be undertaken at the Divisional level; and
- (j) as part of the Commission's risk-based approach to decision-making, the various functionaries of the Commission should be mindful, in performing their functions, of the desirability of ensuring that the greater the risk posed in relation to an applicant, the more the need for greater caution, inquiry and diligence in any approval process; accordingly, no decision should be taken lightly and, by the same token, no decision which carries

an element of risk should, as a rule, be made at the level of only one individual, irrespective of any delegated authority.

5.3 NOTES ON SPECIFIC ITEMS IN SCHEDULE 3

5.3.1 Authorisation matters

As already noted, all matters for the consideration of the LSC are to be processed by the relevant Divisions through the LSC. Even in matters of delegated authority, care must be taken to ensure that, where appropriate, reference is made to the LSC and/or Legal and Enforcement Division for guidance and/or decisions on issues that have broad policy or legal implications for the Commission. With respect to authorizations generally (which includes approvals, certification, etc.), the following must be borne in mind and complied with accordingly:

- (a) subject to sub-paragraph (b) below, the decision to grant or refuse an initial authorization is to be made by the LSC; thereafter decisions to grant annual renewal of an authorization should be taken at the level of the director of the Division concerned. However, a proposed refusal to renew an authorization should be referred to the LSC for a decision;
- (b) in the interests of speed, efficiency and commercial necessity, routine applications for recognition of private and professional mutual funds as well as for limited partnerships may be determined at the level of the director of the Division concerned, provided that the applicants meet the criteria for authorization required under the applicable laws and subject to any applicable policies, guidelines, guidance notes, practice direction or directive of the Commission;
- (c) in relation to sub-paragraph (b) above, the director of the Division concerned will prepare and present for the information of the LSC a monthly Information Paper; however, any applications or other delegated matter the director of the Division considers to be non-routine or as falling within the ambit of paragraph 5.2.3 (d), (e), (g), (h), (i) or (j) above must be referred to the LSC for determination;
- (d) the issuing of the authorization documents (licences, certificates, etc.) after signing is to be handled at the Divisional level. The Commission's seal is to be affixed to all authorization documents and paragraph 1 of Schedule 1 of the FSCA requires the application of the seal to be authenticated by the signature of an authorised person. For this purpose and unless otherwise indicated, the relevant director of Division or, in his or her absence, the deputy director, is authorised to sign; where this is not practicable (for example, for reasons of urgency and/or absence of the director and deputy director), the Managing Director, Deputy Managing Director or another director of a Division, in that order of priority, may sign; and

- (e) the Divisional staff will, on behalf of the LSC, arrange, through the Secretary, the publication (where required) of the names of persons granted authorization by the Commission.

5.3.2 Supervision Matters

With respect to supervisory matters, the following must be borne in mind and complied with accordingly:

- (a) Generally, the processing of applications (including vetting) for approval under the relevant regulatory legislation is carried out by the Approved Persons Unit of the Commission. These applications relate essentially to the approval of directors, senior officers, auditors, actuaries and other senior persons identified in regulatory legislation. Where a regulatory legislation does not prescribe approval by the Commission of a specific functionary of a regulated person but the functionary concerned is considered to be material to the overall assessment of the regulated person's fitness and propriety, the director of a Division should vet the functionary to satisfy himself or herself that the requisite fitness and propriety standards of the Commission have been met. In particular, the director must bear in mind the Commission's power under section 4 (2) of the FSCA to take into account any matter that is considered appropriate in performing the functions of the Commission, having regard to the need to protect the public against financial loss, reduction of crime in relation to the conduct of financial services business and protection and enhancement of the reputation of the Virgin Islands as a financial services centre;
- (b) the approval (which includes a no objection) of changes of ownership of up to 25% of the shareholding of a regulated entity are to be carried out at the level of the director of Division, with an Information Paper prepared and submitted to the LSC on a quarterly basis. However, changes of ownership of more than 25% of the shareholding are to be referred to the LSC for approval (or an indication of no objection). It is always important to inquire into the reason(s) for the change in shareholding and the persons to whom the change relates;
- (c) generally, where regulatory issues arise, supervisory investigations/inquiries should be initiated at the Divisional level without the prior approval of the LSC by the exercise of the relevant statutory powers to require information or access to documents. Where the scope of the available power of investigation/inquiry is uncertain, the Division concerned must seek advice from the Director of Legal and Enforcement. If the Division forms the view that the regulatory issues concerned relate to or border on enforcement matters, then action should be initiated and pursued in accordance with the provisions of the Guidelines and Operational Procedures of the Enforcement Committee;
- (d) where, in any case, a regulatory issue appears to be mixed with an enforcement issue as to blur the distinction between the two in the context of the authority delegated, the director to whom the authority is delegated

should seek the views and advice of the Director of Legal and Enforcement and proceed according to the Director's advice; account must, however, be taken of the requirements outlined in paragraph 3.5.3 above, where applicable;

- (e) with respect to matters concerning international cooperation, every Division shall, whenever requested from within the Commission (orally or in writing) provide relevant regulatory or other information that may be in its possession; this includes enabling access to the Division's books. Any requests addressed to a Division must relate to a specified function of the Commission under the FSCA or a financial services legislation;
- (f) the function of advising the Cabinet to make principal or subsidiary legislation in relation to regulatory, supervisory or compliance matters or other matters concerning the efficient functioning of the Commission is reserved to the Board as an instance of general policy-making. However, the process leading to the policy decision being taken resides in the Commission and Divisions are therefore free to suggest or develop proposals for legislative reform, especially with respect to improvements that may be effected to the Commission's regulatory and supervisory functions as they affect the Divisions' sphere of operation;
- (g) the power to grant exemptions under regulatory legislation may be exercised, in the case of minor matters, at the Divisional level, or in other cases at the level of the LSC which will decide whether in any particular case the matter needs to be referred to the Board for a decision. The exercise of this power may not relate to statutory exemptions required to be made under the FSCA; and
- (h) the function of approving or recognizing jurisdictions is a policy matter reserved for the Board, although proposals for approving or recognizing jurisdictions may emanate from Divisions, subject to the initial consideration and approval of the LSC.

CHAPTER SIX

MISCELLANEOUS MATTERS

There is a miscellany of matters which may fall to be considered by the LSC as part of its function of discharging licensing and supervisory 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 the policies, rules and procedures of the Commission as well as best practices established by regional and international standard-setting institutions of which the Virgin Islands is a part or whose standards it recognizes.

In this context, particular reference must be made to section 4 (2) of the FSCA which provides the following:

“In performing its functions the Commission may take into account any matter which it considers appropriate including international initiatives, geared towards establishing legal, business and regulatory standards relating to financial services business or to other businesses or activities subject to financial services legislation but shall, in particular, have regard to

- (a) the protection of the public, whether within or outside the Territory, against financial loss arising out of the dishonesty, incompetence, malpractice or insolvency of persons engaged in financial services business in the Territory;*
- (b) the protection and enhancement of the reputation of the Territory as a financial services centre; and*
- (c) the reduction of crime and other unlawful activities relating to financial services business.”*

By virtue of this provision, the Commission is expected to take account of several factors in the administration of its licensing and supervisory regimes in order to ensure the integrity and reputation of the Virgin Islands and protect the public against dishonest and incompetent persons whose activities may be or may become inimical to their financial interests thereby causing them losses. These ***Guidelines and Operating Procedures*** are designed to guide the efficient and effective functioning of the LSC, but are by no means exhaustive. It is therefore incumbent on members of the LSC, both individually and collectively, to be mindful of other matters contained in the FSCA and regulatory legislation which are considered relevant in the overall discharge of the Commission’s functions and exercise of its powers. In particular, attention must be paid to current and emerging standards of regulation and supervision, including international best practices, all of which should be considered in the context of section 4 (2) of the FSCA and other similar provisions in the FSCA and financial services legislation. The paragraphs that follow are therefore to be considered in that context as well and applied accordingly.

6.1 APPEALS

Decisions of the LSC are liable to be appealed against by persons who are aggrieved by such decisions.¹⁰ The FSCA establishes in Part VI the Financial Services Appeal Board (“the Appeal Board”) which has the responsibility of hearing an appeal against a decision of the Board, Commission or committee of the Commission in relation to any matter in respect of the FSCA or any financial services legislation. Such appeals are required to be filed within a period of fourteen days following the making of the decision to which the appeal relates.

In the hearing of an appeal, the Appeal Board is required, amongst other things, to have regard to the written decision issued and any other document that may form a part of the record of appeal. Thus every supporting document appended in support of a memorandum in respect of which an LSC decision is taken must reflect accurate information and be fairly framed and presented.

In effect, this buttresses the importance therefore of ensuring that all documentation relating to the decisions of the LSC are properly considered, appropriately written, fully compliant with the established principles and procedures set out in these *Guidelines and Operating Procedures* and effectively communicated. The ultimate responsibility for ensuring the accuracy and proper presentation of documents for LSC consideration is that of directors of Division; the ultimate responsibility of ensuring the taking of accurate and appropriate decisions is that of the LSC; the ultimate responsibility for ensuring the accurate communication of LSC decisions to Divisions is that of the Secretary; and the ultimate responsibility for properly and effectively communicating LSC’s decisions to applicants is that of the Division to which the decisions relate. All of these responsibilities reside in the directors of Division in the case of delegated authority (save where the delegated authority is itself exercised or performed by the LSC).

Where an appeal is filed against a decision of the Commission (including a decision of the Board or a committee of the Commission), the Division to which the subject matter of the appeal relates and the LSC Secretariat shall cooperate fully with the Legal and Enforcement Division to provide such necessary assistance as may be required in order to ensure the Commission’s proper representation at the hearing before the Appeal Board, including the filing of relevant documentation.

6.2 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. Indeed some complaints may relate to the Commission’s own conduct or the conduct of its licensees, employees or other related matters. It is for the Commission to establish the nature of the complaints, decide whether it is appropriate to intervene in the handling of the complaints and how such complaints should be treated. Complaints received by the Commission that are of a regulatory or supervisory nature are to be

¹⁰ By virtue of section 44 (1) of the FSCA, no appeal lies under section 16 (3) thereof on a refusal by the Commission to grant a licence or, a decision made pursuant to the Securities and Investment Business Act, 2009 (which is expected to replace the Mutual Funds Act, 1996) to refuse the grant of a licence, registration or recognition to a person that does not qualify as an existing entity under the Act.

referred to and dealt with by the LSC in such manner as the LSC considers appropriate, using the processes and procedures established in these ***Guidelines and Operating Procedures***. Complaints that relate to the conduct of the Commission or any of its organs or members of staff are to be received and dealt with by the Complaints Steering Committee in accordance with the Commission's Policy Regarding the Handling of Complaints (issued in December, 2009).

6.2.1 Nature of Complaint

Where a complaint is referred to the LSC, the LSC must consider the nature of the complaint and decide whether or not the complaint is one the Commission should be involved in; in particular, consideration should be given as to whether or not the complaint relates to a regulatory or supervisory matter. The LSC must be guided by the following considerations in deciding whether or not the Commission should get involved (noting at all times that it is not the Commission's function to seek to settle private disputes):

- (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 or the financial services industry 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 serious issues of policy relating to the Commission's exercise of its powers and/or performance of its functions with respect to a regulatory or supervisory matter;
- (d) whether the complaint raises issues of competence, probity or prudent management of a regulated person;
- (e) 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;
- (f) whether the complaint raises issues of enforcement and should therefore be appropriately referred to the EC;
- (g) 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, the implications thereof and the need or otherwise for a referral to the EC.

All complaints received by the Commission in relation to regulatory or supervisory matters shall be referred to the LSC Secretariat which shall process them for LSC consideration.

6.2.2

Identity of Complainant

Whenever possible, the LSC must seek to establish the identity of the person making a complaint. This will aid the LSC 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 or in relation to 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 LSC in the event it decides to institute appropriate investigations/inquiries;
- (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) whether the complaint relates to the commission of an offence and should therefore be referred to the Financial Investigation Agency, Police Force or Director of Public Prosecutions or to all of them;
- (g) 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 redacted from the copy of the written complaint forwarded to the regulated person;
- (h) where a decision is taken to deal with the complaint, an appropriate investigation/inquiry is instituted or commenced;
- (i) the complainant is notified in writing of the findings of the investigation/inquiry; this would not apply in the case of anonymous complaints;
- (j) where the complaint is against or relates to the Commission or an organ or employee of the Commission, refer the matter to be dealt with in accordance with the Commission's Policy Regarding the Handling of Complaints; and

- (k) where the complaint relates to a general or specific policy of the Commission that is of a regulatory or supervisory nature, establish the nature of the complaint and what suggestions for remedy have been proposed.

As a matter of general principle, the LSC must be slow to give credence to and rely on a complaint that is given anonymously. If an anonymous complaint is made against a regulated person, the reputation of the regulated person against whom 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 LSC must provide such anonymity; however, where the LSC 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 LSC from using other legitimate means and sources in order to properly and effectively deal with a complaint.

6.2.3 Whistleblowers

Whistleblowers must be treated as complainants and their complaints are to be dealt with as provided in paragraphs 6.2.1 and 6.2.2 above. However, because of their relationship with the regulated person against whom the complaints are made, the LSC 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 LSC 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 6.2.2 above must be followed.

In a situation where a regulated person, being aware that its employee has reported to the Commission a matter against or in relation to the regulated person, adopts any measure which adversely affects the employee and which, having regard to all the circumstances of the report and measure, points towards a direct or indirect penalizing of the employee, the LSC may direct the taking of the following actions:

- (a) conduct an inquiry into the action taken against the employee to establish its nexus with the report made by the employee to the Commission; this action may be undertaken by a Division assigned by the LSC and more than one Division may be assigned;
- (b) write to the regulated person concerned outlining the measure taken against the employee and requesting an explanation for the measure;
- (c) require the employee to provide such additional information or clarification as the LSC may consider appropriate in order to properly consider the complaint made;

- (d) after carrying out an inquiry pursuant to sub-paragraph (a) above, consider whether any measure against or other treatment of the employee raises any issue of the fitness and propriety of the regulated person; and
- (e) where pursuant to sub-paragraph (d) above, the LSC determines that the measure against or other treatment of the employee raises an issue of the fitness and propriety of the regulated person, consider the need or otherwise of making a referral to the EC for enforcement action against the regulated person and thus act accordingly.

The LSC must always tread with caution in order not to be viewed as deliberately interfering in what may appear to be a private dispute between a regulated person and its employee. The LSC's remit in this regard must be restricted to the issue of whether or not a complaint raises concerns of a regulated person's fitness and propriety pursuant to the FSCA and the Commission's guidelines on fitness and propriety.

In addition, the LSC should recognize at all times that compliance officers approved by the Commission for appointment pursuant to section 34 of the FSCA carry out a vital function for the regulated person and the Commission, but are also in an unenviable position of having to report to the Commission the regulated person's non-compliance with the applicable laws, established policies, directives, guidelines, practice directions and other measures of the Commission and the regulated person's own internal guidelines, policies and manuals for the conduct of business. This puts them in the path of suffering from deliberately intended adverse measures taken against them by the regulated person. The LSC must therefore treat the cases of such compliance officers in the same manner as it would with respect to a whistleblower as outlined in this paragraph. If the Commission is to properly rely on compliance officers to effectively function, then the Commission must provide such necessary support as may be appropriate, especially in adverse situations.

6.2.4 Register of Complaints and LSC Decisions

The Secretary shall maintain a register in which he or she shall make entries of all complaints and/or reports received by the Commission in relation to a regulated person. The register shall be in the form prescribed in **Part I of Schedule 4**. Similarly the Secretary shall maintain a register in the form prescribed in **Part II of Schedule 4** in which he or she shall make entries of LSC decisions pursuant to the requirements established in paragraph 4.1.2 above. These forms may be amended by the LSC as it considers fit and in such form as may be necessary in any particular case.

6.3 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 before, and similarly indicate their agreement for the dispute to be referred to, the Commission;
- (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.

This specific role is also one that the EC can perform under its Guidelines and Operating Procedures. Thus, in accordance with the one-Commission policy, where a matter is first referred to the EC for resolution, the LSC shall not deal with the matter unless the EC considers that it is best dealt with by the LSC and makes a referral to that effect. Similarly, where a matter is first referred to the LSC for resolution, it shall be treated in the same manner.

6.4 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 harassment 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 LSC must therefore be alert to any complaints or reports of harassment and/or abusive conduct against an employee engaged in by a regulated

person. This may be carried out by receiving complaints of harassment and abusive conduct orally or in writing from the person who is affected or can provide sufficient guidance to the LSC in that regard; such complaints may be treated in accordance with paragraphs 6.2.1 and 6.2.2 where they relate to or embody some element of possible regulatory breach or dealt with in such manner as the LSC 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 LSC 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, having regard to the facts and circumstances of the matter as known by the Commission,

- (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 and accordingly make appropriate reference to the EC;
- (c) new or further conditions need to be applied with respect to the regulated person's licence; or
- (d) the conduct of the regulated person should be referred to another authority that could better deal with the harassment or abuse in question.

The LSC's mandate under this paragraph is essentially shared with the EC which also has the same responsibility. However, both the LSC and the EC must ensure that there is no duplication in the discharge of the responsibility outlined in this paragraph. Thus where a matter is already being dealt with by either committee, the committee that first has charge of the matter shall have jurisdiction to deal with the matter to its conclusion, unless it considers that, having regard to the nature of the issues involved, a referral should be made to the other committee or some other authority within or outside the Commission.

6.5 PUBLIC INTEREST

The work of the Commission is also designed to preserve the public interest with respect to the stability of the Virgin Islands' financial services industry. In this context, where, for instance, the LSC considers that an applicant meets all the regulatory requirements for licensing but determines that, having regard to the Virgin Islands' international obligations in relation to a specific subject, it would not be in the best interest of the Virgin Islands to grant the licence applied for, it may decline the application. Indeed such

matters may well fall within the ambit of fitness and propriety and therefore appropriately dealt with in that context. However, it is always advisable that legal advice be first sought in such matters bordering on public interest issues before a decision is taken in that regard. It may be necessary in some instances for the Legal and Enforcement Division to liaise with and obtain the advice of the Attorney General as the “guardian of the public interest”.

6.6 PUBLICATION OF NAMES OF LICENSEES

One of the licensing duties of the LSC under section 16 (1) of the FSCA is to publish the names of persons that have been granted licences. This responsibility is primarily to be carried out by the regulatory Divisions working together with the LSC Secretariat. Accordingly, in all cases of authorization by a director of a Division, the details of the authorization, including the names of the persons granted such authorization must be made available to the Secretary as soon as the authorization is granted. The Secretary will arrange for the publication on the Commission’s website and/or Gazette of all persons granted licences and authorization.

6.7 ESTABLISHING A REGULATORY WATCH LIST

The scenario may exist that, in considering an application, the LSC forms the opinion that while it does not wish to delay or prevent the granting of approval for a specified matter applied for, it is desirable that specified persons relative to the application should be monitored in terms of their performance or on the basis of their compliance history, enforcement actions taken against them or for other relevant regulatory- or supervisory-related matter. What may make it desirable for such persons to be monitored is not capable of exhaustive listing and has to be dealt with by the LSC on a case by case basis and on the basis of cogent evidence or information which makes such monitoring essential in the context of the Commission’s statutory obligations. In such situations the LSC may require the establishment of a Regulatory Watch List of Persons (“Watch List”) which shall comprise the names of persons that the LSC requires to be monitored for their performance and compliance with any conditions attached to their applications or the applications to which they relate.

A Watch List may be established and kept by each Division for monitoring purposes and for reference with respect to future applications which might concern or relate to them. The Watch List is not to be published and no reference may be made to it publicly in relation to any person, unless the public interest makes such a reference essential to preserve the integrity of the Virgin Islands’ financial services industry and/or the reputation of the jurisdiction. The objective of establishing and keeping a Watch List is to facilitate the Commission in the discharge of its licensing and supervisory responsibilities.

It should be noted that only the LSC may authorize the placing of a person on a Watch List and such a placement must be for a specified period, subject to a renewal of the period if considered necessary. Where a person is placed on a Watch List, it would be essential that the Division concerned prepares and submits a report to the LSC in relation

to the person at the end of the specified period. The report must indicate any specified action that may be required, including removing the person from the Watch List.

6.8 QUESTIONS AND ASSISTANCE

Any questions relating to the Commission's regulatory and supervisory functions may be obtained from the FSCA, the regulatory legislation and these *Guidelines and Operating Procedures*. While generally, the LSC is not into entertaining questions in order to provide answers to matters in respect of which regulatory or supervisory action is ongoing, the Divisions will provide any necessary assistance to ensure compliance with the requirements of any application form and guidelines relating thereto and provide necessary clarifications. 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 and directors must alert their staff to this requirement. It should be noted that the Divisions are regularly engaged in the processing of applications and may not be able to provide spontaneous responses to questions; they may need time to revert to questions and it is therefore essential that they do not engage in activities that will unduly burden their duties.

6.9 GLOSSARY OF TERMS AND REFERENCES

As a guide to a better understanding of the terms used in these *Guidelines and Operating Procedures*, **Schedule 5** provides a glossary of terms and specific aids to interpretation. These are designed to facilitate the contextual understanding of the terms and the applicable rules and must not be treated as a substitute of the interpretations or definitions applicable in their case under the FSCA or the financial services legislation. Where, for instance, a term used is not defined and assistance is required in that regard, reference must be made either to the relevant applicable enactment or to the Legal and Enforcement Division or the Policy Research and Statistics Division for guidance.

SCHEDULE 1

[Paragraphs 3.2.3, 3.2.4 & 3.4.3]

PART I

FORM OF MEMORANDUM FOR LSC PURPOSES

“RESTRICTED”

**THIS DOCUMENT IS THE PROPERTY OF THE BRITISH VIRGIN ISLANDS
FINANCIAL SERVICES COMMISSION**

B.C.:

REF.:

DATE:

DECISION PAPER

**This Decision Paper is a Joint Memorandum between ABC Division and XYZ
Division**

[This applies only in the case of joint papers between two or more Divisions and the names of the Divisions must be specified; otherwise this heading should be omitted.]

[Insert here as a heading the subject matter of the memorandum.]

Decision Sought

[State concisely the actual decision(s) to be sought from the LSC. If it is considered necessary for the decision(s) sought to be preceded by relevant information, this could be in the form of inviting the LSC to note the specified information and then followed by the decision(s) sought]

Background Information

[Provide the detail of the background information supporting the decision(s) being sought from the LSC. The paragraphs must be sequentially numbered, although the first paragraph need not be numbered, such that the numbering begins from paragraph 2.]

Special Mention

[Outline here any specific matter that may have a bearing on the decision being sought from the LSC. This requirement may not necessarily apply in all cases.]

Conclusion

[Outline in summary the action required of the LSC.]

Director

[Specify the director of the Division that has responsibility for the subject matter of the memorandum.]

Appendix/Appendices

[If there are any attachments to the memorandum, please list them here (titles only) in the order in which they are appended to the memorandum. This part may be dispensed with if there is no attachment to be appended to the memorandum.]

RESTRICTED

NB: Please note that the word “RESTRICTED” must be provided at the top and bottom of every page of the memorandum.

PART II

FORM OF INFORMATION PAPER

“RESTRICTED

**THIS DOCUMENT IS THE PROPERTY OF THE BRITISH VIRGIN ISLANDS
FINANCIAL SERVICES COMMISSION**

B.C.:

REF.:

DATE:

INFORMATION PAPER

[Insert here as a heading the subject matter of the Information Paper]

Information

[Provide the details of the information to be notified to the LSC. The paragraphs should be numbered seriatim.]

Conclusion

[Summarise the thrust of the information outlined in the Information Paper.]

Director

[Specify the director of the Division that has responsibility for the subject matter of the Information Paper.]

Appendix/Appendices

[If there are any attachments to the Information Paper, please list them here (titles only) in the order in which they are appended to the Information Paper. This part may be dispensed with if there is no attachment to be appended to the Information Paper.]

RESTRICTED

NB: Please note that the word “RESTRICTED” must be provided at the top and bottom of every page of the Information Paper.

SCHEDULE 2

[Paragraphs 5.1.7, 5.1.8 & 5.1.9]

PART I

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

The Licensing and Supervisory 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 Licensing and Supervisory Committee:

- 1.
- 2.
- 3.
- 4.
- 5.

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 Licensing and Supervisory 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 Licensing and Supervisory Committee.

If during the execution of the task(s) assigned to you herein any matter arises which requires consultation with or direction from the Licensing and Supervisory Committee, you shall immediately bring the matter to the attention of the Secretary of the Licensing and Supervisory 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 Licensing and Supervisory Committee reserves the right at all times to terminate this delegation without notice.

ISSUED this day of , 20xx .

.....
SECRETARY
Licensing and Supervisory Committee
Financial Services Commission

PART II

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 Licensing and Supervisory 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
*Licensing and Supervisory Committee
Financial Services Commission*

PART III

Notice of Termination of 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 to terminate the authority delegated to you, the said(name of delegate) of(address), by the Licensing and Supervisory Committee. The termination takes effect from the _____ day of _____, 20xx and in this regard you are required to transmit to the Secretary of the Licensing and Supervisory Committee, no later than the date of termination of the authority delegated to you, every outstanding material in your possession which may relate to work you have undertaken thus far pursuant to the authority delegated to you prior to its termination. If you do not have any outstanding material in relation to the authority delegated to you, this fact must be notified in writing to the Secretary of the Licensing and Supervisory Committee no later than the date when the termination of the authority delegated to you takes effect.

ISSUED this _____ day of _____, 20xx.

.....
SECRETARY
*Licensing and Supervisory Committee
Financial Services Commission*

SCHEDULE 3

[Paragraphs 5.2.1, 5.2.3 & 5.3.1]

DELEGATED AUTHORITIES

*Notice of Delegated Authority under the Relevant Financial Services Legislation
and Related Activities by the Licensing and Supervisory Committee*

Table of Authorised Levels of Decision-Making on Behalf of the Financial Services Commission Under the Financial Services Legislation						
PART I (a): Banking and Fiduciary Services Division						
Authority Delegated	Banks & Trust Companies Act – (Section)	Company Management Act – (Section)	Decision Maker			Other (in the absence of primary decision maker)
			Director of Division	Managing Director	Board	
Signing of Licences			√	√		Deputy Director, Dep. M.D. or Director of Other Division
Signing of Non-negotiable certificates re banks/trust companies		n/a		√		Financial Controller as second signatory
Publishing notice of grant of a licence	4(6)	4(5)	√			
Renewal of licences	5	6	√			
Certain prescribed approvals (e.g. subsidiaries operating outside the Virgin Islands)	18	n/a	√			
Noting change of auditors/solicitors	8;17(3)	9	√			
Approving authorised agents	9(1)(b)	n/a	√			
Approving change of authorised agent	9(3)(b)	n/a	√			
Noting change of name of licence holder	18	9	√			
Noting change of financial year-end (audited accounts)	8	9	√			
Approving change in ownership (1-25)%	14	13(1)	√			
Approving use of restricted word by a non- licensee	16(1)(a)&(2)	15(1)(a)	√			
Approving use of restricted representation	16(1)(b)	15(1)(b)	√			
Requiring change of name by licensee	n/a	15(2)	√			Legal
Supervising audits of licensee	17 H (2)	17 H (2)	√			
Discussing audit/ requiring further information	17 I (3)	17 I (3)	√			
Requiring licensee to effect insurance	23	19	√			
Advising Cabinet to make regulations	28	26(a)			√	

PART I (b): Banking and Fiduciary Services Division (Applicable upon the coming into force of the Financing and Money Services Act, 2009)

Delegated Authority	Financing and Money Services Act, 2009 (Section)	Decision Maker			
		Director of Division	Managing Director	Board	Other (in the absence of primary decision maker)
Issuing guidelines for approval of director/senior officer	2 (6)			✓	
Approving change in ownership (1-25)%	14 (1) & (3)	✓			
Approving change of location of principal office	15 (2)	✓			
Extending time for submitting financial statements	25 (1)	✓			
Issuing notice to licensee to amend document or submit replacement document	26 (1) & 34 (2)	✓			
Rejecting document where licensee fails to comply with notice under section 26 (1)	26 (2)	✓			
Approving an auditor	27 (2) (c)	✓			
Requiring auditor to discuss audit	29 (3)	✓			
Appointing a new auditor in accordance with section 27	30 (3)	✓	✓		
Requiring submission of group accounts	31 (1)	✓			
Requiring group accounts to be audited by licensee's auditor or by alternate auditor	31 (2)	✓			
Approving change of licensee's name	37 (1)	✓			
Requiring an applicant to provide additional documents and information and/or verify same in respect of an application	41 (2)	✓			
Maintaining Register of Licences and other licences	42 (1)	✓			
Form for keeping registers and information connected therewith	42 (2)	✓			
Advising Cabinet to make regulations	49 (1)			✓	

PART II (a): Insurance Division (Applicable until the Insurance Act, 2008 comes into force.)

Authority Delegated	Decision Maker				
	Insurance Act, 1994 (Section)	Director of Division	Managing Director	Board	Other (in the absence of primary decision maker)
Renewing a licence	17(d)	✓			
Renewing a certificate of authority	59(2)(c)	✓			
Signing of licences	n/a	✓	✓		Deputy Director, Deputy M. D. or Director of Other Division
Signing of certificate of Authority	n/a	✓	✓		
Issuing certificate confirming licensed/recognized status	8	✓			
Recognising qualified actuaries/auditors	2(1)	✓			

Summoning witnesses, documentation etc.	4(1)(d)	√			
Taking statutory declarations, affidavits etc.	4(2)	√			
Requiring access to books/info from licensee	5(1)(2)	√			
Keeping of registers	7(1),(2),(3)	√			
Approving overseas reinsurers	20	√			
Requiring increase in insurer's capital	14(2)	√			
Approving financial institutions	14(3)	√			
Extending time for submitting financial statements	22(1)(b)	√			
Approving change of ownership/shareholding (1-25%)	25(1)(b)	√			
Approving an actuary	21(1); 42(1)	√			
Approving an auditor	22(1)(a)	√			
Approving notation reinsurance contracts	25(1)(c)(ii)	√			
Approving charge or pledge of assets (captives)	25(1)(c)(iii)	√			
Approving change of licensee's name	25(1)(c)(iv)	√			
Approving change of business/class	25(1)(c)(v)	√			
Approving alternation to M&A	25(1)(c)(vi)	√			
Notifying of intention to cancel licence	27(1)	√			
Approval of trust deed	33(2)	√			
Requiring special actuarial reports	42(2)	√			
Deciding if use of words restricted	73(a)	√			
Granting of Exemptions from certain provisions	74&78(4)	Minor	√	√	
Approving jurisdictions	74(1)(a)			√	
Advising Cabinet to make regulations	77(1)			√	
Regulating exemptions from licensing for named insurer	77(2)			√	
Approving to continue in another country	78(3)(d)	√			
	Insurance Regulations				
Approving financial institutions, governments and investments	Reg.8(2)&(13)	√			
Approving accounting principles & practices	Regs.9&10	√			
Deciding records/registers to be kept	Reg.11(2)(h)	√			

PART II (b): Insurance Division (Applicable upon the coming into force of the Insurance Act, 2008.)					
		Decision Maker			
Authority Delegated	Insurance Act, 2008 (Section)	Director of Division	Managing Director	Board	Other (in the absence of primary decision maker)
Regulation and Supervision of Insurance Business					
Authorising investment or trade in a derivative	17 (1)	√			
Approving change of ownership/shareholding (1-25%)	21 (1)	√			
Approving appointment of an actuary	27 (2)	√			
Regulation and Supervision of Insurance Managers, Intermediaries & Loss Adjusters					

Approving change of ownership/shareholding (1-25%)	45 (1)	✓			
Approving removal of licensed insurer from licence of insurance agent	46 (2)	✓			
Ancillary Provisions Applicable in Relation to Licensees					
Extending time for submission of financial statements and short period financial statements and report	59 (1)	✓			
Requiring amendment of financial statements	60 (1)	✓			
Approving appointment of auditor	61 (2) (c)	✓			
Requiring auditor to discuss audit	63 (3)	✓			
Appointing a new auditor in accordance with section 61 (2) (c)	64 (1)	✓	✓		
Appointing a qualified person to act as auditor in the event of failure to do so by a licensed insurer	64 (3)	✓	✓		
Requiring submission of group accounts	65 (1)	✓			
Requiring group accounts to be audited by alternate auditor	65 (2)	✓			
Requiring a licensee to amend document or submit replacement document	69 (2)	✓			
Approving change of licensee's name	72 (1)	✓			
Approving use of restricted name	75 (1)	✓	✓		
Requiring an applicant to provide additional documents and information and verify same in respect of an application	77 (2) (a) & (b)	✓			

PART III (a): Investment Business Division (Applicable until the Securities and Investment Business Act is enacted and brought into force)

Authority Delegated	Decision Maker				
	Mutual Funds Act, 1996 (Section)	Director of Division	Managing Director	Board	Other (in the absence of primary decision maker)
Receipt of Applications					
Processing applications for registration of a public fund	9(1)	✓			
Processing applications for consent to be registered as a public fund	10(1)	✓			
Renewing consent to registration	10(4)	✓			
Processing applications to be recognized as a private or professional fund	19	✓			
Processing applications to be licensed as a manager/administrator or both	23(1)	✓			
Granting of Licences & Certificates					
Notifying of refusal to grant recognition to existing entity	20(4)	✓			

Notifying of refusal to grant registration/recognition/licence & reasons for refusal	32	√			
Issue of Certificate/Licences					
Issuing a certificate of compliance	3(3)	√			
Issuing registration certificate to professional funds, including signing	12(1)(b), (3)	√			Deputy Director, Deputy M. D. and Director of Other Division
Issuing licences to licensees, including signing	25(b)	√			
Issuing recognition certificates to private and professional funds, including signing	21(b)	√			
Registers					
Supervising mutual funds, managers & administrators	6(1)	√			
Determining the form of registers kept	6(3)	√			
Registering public funds in the register	12(1)(a)	√			
Registering private or professional funds in the register	21(a)	√			
Registering licensees in the register		√			
Supervision & Enforcement					
Supervising mutual funds, managers & administrators	3(2)(a)	√			
Issuing policy guidelines	3(2)(d)			√	
Approving auditors of public funds	13(2)(a)	√			
Examining public funds' accounting records	13(1)(b)	√			
Determining accounting records to be kept locally	13(1)(b)(ii)	√			
Requiring translation & verification of a prospectus filed by a public fund	14	√			
Publishing notice of the grant of certificate/licence	34	√			
Approving the use of restricted words	35(A)(a)	√			
Approving the use of restricted representations	35(A)(b)	√			
Directing submission of information/access to records, etc.	36	√			
General					
Advising Cabinet to alter Schedules to the Act	41			√	
Advising Cabinet to make regulations	42			√	
Appointing Mutual Funds Advisory Committee members	7(1)			√	
Designating the Chairman of the Committee	7(2)			√	
Prescribing a Code of Practice for licensees	25(A)			√	
Submitting annual reports to Cabinet	5(1)			√	
Recognising countries/jurisdictions	2(3)			√	
Accepting notice of recognized manager	Dirs. 1998, No.8	√			

PART III (b): Investment Business Division (Applicable upon the enactment and coming into force of the Securities and Investment Business Act)

Authority Delegated	Securities and Investment Business Act, 2009 (Section)	Director of Division	Managing Director	Board	Other (in the absence of primary decision maker)
Investment Business					
Receiving and processing an application for an investment business licence	6 (1)	✓			
Approving change of ownership/shareholding (1-25%)	11 (1)	✓			
Approving change of licensee's name	14 (2)	✓			

Directing a licensee to change its name	15	✓	✓		
Advising Cabinet to make Investment Business Regulations	21(1)			✓	
Public Issues of Securities					
Receiving and processing an application for registration of prospectus (including a supplementary prospectus under section 29 (1))	27 & 28 (1)	✓			
Registering a prospectus	28 (2)	✓			
Providing applicant with written confirmation, or notice of refusal, of registration of prospectus	28 (4) (a) & (b)	✓			
Registering a supplementary prospectus	29 (3)	✓			
Providing applicant with written confirmation, or notice of refusal, of registration of supplementary prospectus	29 (3)	✓			
Issuing a Public Issuers Code	39 (1)		✓	✓	
Mutual Funds					
Recognising jurisdictions	40 (4)			✓	
Registering public fund in the Register of Public Funds and issuing certificate of registration	45 (3) (a) & (b)	✓			
Receiving and processing an application for registration of prospectus (including a supplementary prospectus under section 51 (1))	48 (1) or 49 (1)	✓			
Requiring English translation of prospectus to be provided	49 (2)	✓			
Registering a prospectus	49 (3)	✓			
Providing applicant with certificate, or written notice of refusal, of registration of prospectus	49 (5) (a) & (b)	✓			
Registering a supplementary prospectus	51 (3)	✓			
Providing applicant with certificate, or written notice of refusal, of registration of supplementary prospectus	51 (3)	✓			
Recognising a mutual fund as a private or professional fund	55(2)	✓			
Registering private fund or professional fund respectively in the Register of Private Funds and Register of professional Funds and issuing certificate of recognition	55 (5)	✓			
Advising Cabinet to make Mutual Fund Regulations				✓	
Provisions of General Application					
Extending time for submission of financial statements and short period financial statements and report	73 (1)	✓			
Requiring amendment of financial statements and other documents	74 (1)	✓			
Approving appointment of auditor in respect of a relevant licensee and a public fund	75 (2) (c) & (3) (a) and (b)	✓			
Directing a licensee or public fund to provide report prepared by auditor or other person nominated by the Commission	76 (3)	✓			
Requiring auditor to discuss audit	77 (3)	✓			
Appointing a new auditor in accordance with section 75 (2) (c) & (3)	78 (1)	✓			
Appointing a qualified person to act as auditor in the event of failure to do so by a licensee or public fund	78 (3)	✓	✓		
Requiring submission of group financial statements	79 (1)	✓			
Requiring group financial statements to be audited by licensee's auditor or other person approved by the Commission	79 (2)	✓			
Requiring the provision of additional documents and information and/or verify same in respect of an application	81 (2)	✓			

Market Abuse					
Advising Cabinet to make Market Abuse Regulations	94 (1)			✓	
Miscellaneous Matters					
Approving use of restricted name or certain representation	95 (1)	✓	✓		
Requiring an applicant to provide additional documents and information and/or verify same in respect of an application	98 (2)	✓			
Maintaining registers of Investment Business Licensees, Public Funds, Private Funds, Professional Funds and Certified Authorised Representatives	99 (1)	✓			
Form for keeping registers and information connected therewith	99 (2)	✓			
Refusal to take action pending settlement of fees, penalties and charges	102 (2)	✓			
Establishing, and appointing members of, the Securities, Investment Business and Mutual Funds Advisory Committee (with approval of the Board)	104 (1)		✓		
Appointing Chairman of the Committee established under section 104 (1)	104 (3)				
Advising Cabinet to amend Schedules to the Act	108(1)			✓	

PART III (c): Segregated Portfolio Companies Regulations, 2005

Approving the incorporation or registration of an SPC that is a private or professional fund	6(1) (b)	✓			
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Part IV (a): Insolvency Division

Delegated Authority	Insolvency Act, 2003 (Section)	Decision Maker			
		Director	Managing Director	Board	Other (in the absence of primary decision maker)
Accepting a shorter period of notice for appointment of a liquidator under section 159 (2)	159 (5)	✓	✓		
Advising Cabinet to make regulations on liquidation of insurance companies	238 (3)			✓	
Requiring additional documentation and information to determine an application	475 (3)	✓			
Requiring a licensee to produce records, accounts and reports in respect of insolvency proceedings	478 (1)	✓			
Causing records and accounts to be audited	478 (2)	✓	✓		
Requiring a licensee to give further information, explanations and assistance in relation to records, accounts and reports	478 (3)	✓			
Recommending to Cabinet the making				✓	

Requesting auditor or proposed auditor to provide information or documentation regarding his or her experience, skills and resources	58 (1)	✓			
Specifying certification or confirmation required from auditor of licensee	59 (2) (c)	✓			
Recognising jurisdiction for purposes of establishing an approved bank	62 (1)			✓	
Banking					
Determining acceptable foreign currency for tier 1 capital requirement	76 (2)	✓			
Approving other capital items with respect to a bank under section 82	77 (2) (f)	✓			
Requiring other deductions from tier 1 capital of a bank	77 (3) (d)	✓			
Approving value of other consideration as contributed capital	78 (1) (b)	✓			
Approving value of other consideration in relation to a bank's perpetual non-cumulative preference shares	79 (2) (b)	✓			
Refusal to approve other capital items for inclusion in tier 1 capital	82 (2)	✓			
Specifying deductions with respect to exposures to connected counterparties	84 (2) (c)	✓			
Specifying other deductions with respect to a bank	84 (2) (e)	✓			
Requiring deductions with respect to a bank for determining tier 2 capital of the bank	85 (1) (b)	✓			
Approving other capital items with respect to a bank under section 89	85 (2) (e)	✓			
Requiring BVI bank to provide information with respect to its branches and subsidiaries	127 (4)	✓			
Insurance					
Approval of appointment of a person as actuary of licensee	144 (4) (b)	✓			
Requesting actuary or proposed actuary to provide information or documentation regarding his or her experience, skills and resources	145 (1)	✓			
Approving other recognized international actuarial standards	147 (1) (b)			✓	
Trust Companies and Company Management Companies					
Approving value of other consideration in determining contributed capital of licensed trust company	154 (1) (b)	✓			
Determining acceptable foreign currency equivalent for satisfying minimum capital resource requirement	155	✓			
Approving interest in real property as a suitable and adequate capital resource	158 (1) (b) (ii)	✓	✓		
Determining whether encumbrance on leased property will not adversely affect adequacy of property as a minimum capital resource	158 (2) (a) (iii)	✓	✓		
Disapplying section 158 (2) (a) (ii)	158 (3)	✓	✓		

Determining whether encumbrance on freehold property will not adversely affect adequacy of property as a minimum capital resource	158 (4)	✓			
Money Services Business					
Approving interest in real property as a suitable and adequate capital resource	169 (1) (b) (ii)	✓			
Determining whether encumbrance on leased property will not adversely affect adequacy of property as a minimum capital resource	169 (2) (a) (iii)	✓			
Disapplying section 169 (2) (a) (ii)	169 (3)	✓			
Determining whether encumbrance on freehold property will not adversely affect adequacy of property as a minimum capital resource	169 (4)	✓			

PART VI: Financial Services Commission Act, 2001 (Applicable to all Divisions)					
Delegated Authority	Financial Services Commission Act (Section)	Decision Maker			
		Director of Division	Managing Director	Board	Other (in the absence of primary decision maker)
Deciding if regulatory function relates to company/financial services	2		✓		
Entering into contracts/disposing of property	3(2)		✓	✓	
Residual power to appoint officers, employees, agents	11(1)&(2)		✓	✓	
Establishing & maintaining pension & benefits schemes	11(3)		✓	✓	
Employing advisers & consultants	13		✓	✓	
Charging fee for duties performed	18(2)		✓	✓	
Maintaining Govt Trust a/c & agreeing funding with Cabinet	19&20		✓	✓	
Aministrating monies held in respect of regulated persons	21		✓		
Borrowing monies, obtaining credit & giving security	22		✓	✓	
Other financial duties	24-27		✓	✓	
Requiring persons to provide info/documents	32	✓			
Approving compliance officers	34(1)		✓		
Approving AMLCOP Compliance Officers as FSCA C. Officers	34(4)		✓		
Conducting compliance inspections	35(2)&(3)	✓			
Allowing foreign regulated authorities on compliance visits	35(4)&(5)		✓		

Issuing & amending Regulatory Code (after consultation with Minister)	41			√	
Advising Cabinet to impose/amend fees under fin services legn	57(1)			√	
Charging fees for manual/documentation prepared	57(3)		√		
Managing employment matters re. transferred staff	58		√	√	

SCHEDULE 4

[Paragraph 6.2.4]

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 Licensing and Supervisory Committee Decisions

<i>No.</i>	<i>Application and Date Received</i>	<i>When Distributed to LSC Members</i>	<i>Date Considered by the LSC</i>	<i>Decision Taken</i>	<i>Follow-up Action</i>	<i>Remarks</i>

SCHEDULE 5

[Paragraph 6.9]

GLOSSARY OF TERMS AND REFERENCES IN THESE GUIDELINES AND OPERATING PROCEDURES

The following terms bear the meanings assigned to them and they must be read in the context in which they appear in these *Guidelines and Operating Procedures*. Thus a term herein defined applies, unless the context in which it appears indicates a different meaning. Furthermore, the terms defined herein are not designed to replace the meanings (as applicable) assigned to them in the FSCA or any financial services legislation. Accordingly, users are advised to adhere closely to the meanings established in the FSCA and financial services legislation as the primary aids in ensuring a better understanding of the terms used. Where feasible, reference is made to the relevant enactments in which the same terms are defined.

In addition, any term not defined herein shall be construed in accordance with the relevant provisions of the FSCA or any applicable financial services legislation, failing which it shall be construed in accordance with such advice as the Legal and Enforcement Division may provide.

- (1) “AML/CFT” means Anti-money Laundering and Countering the Financing of Terrorism;
- (2) “Board” refers to the Board of Commissioners of the Commission established under section 5 of the FSCA;
- (3) “Commission” refers to the Financial Services Commission established under section 3 of the FSCA;
- (4) “document” bears the meaning assigned to it under section 2 (1) of the FSCA;
- (5) “financial services business” bears the meaning assigned to it under section 2 (1) of the FSCA;
- (6) “FSCA” means the Financial Services Commission Act, 2001;
- (7) “licence” and “licensee” have the meanings assigned to them under section 2 (1) of the FSCA;
- (8) “Managing Director”, when used without qualification, means the Managing Director of the Commission;
- (9) “regulated person” bears the meaning assigned to it under section 2 (1) of the FSCA.

In addition, the following aids to interpretation should be noted:

- (10) Wherever reference is made to licence or licensing or authorization, this shall be construed to include, as the context permits, approval, recognition, non-objection, certificate or certification, etc., so long as the action to which the term relates requires some form of agreement or positive action of the Commission in order to be effected.
- (11) Where a requirement is provided in relation to a memorandum for LSC purposes, the requirement shall be construed, as the context permits, to apply to an Information Paper.
- (12) Any reference to the doing of an act without any indication as to the procedure applicable in achieving such an act or bringing it to the attention of the LSC, the relevant provisions of these ***Guidelines and Operating Procedures*** shall apply with such modifications as the Chairman may, in his or her sole discretion, determine.
- (13) Any reference to a Division refers, unless the context otherwise permits, to a regulatory Division and “relevant Division” shall be construed accordingly.
- (14) A reference to a Division shall not be construed as conferring any specified power on any staff of the Division in relation to matters under these ***Guidelines and Operating Procedures*** without the oversight and direction of the director of the Division or, in his or her absence, the deputy director of the Division.
- (15) A reference to an officer or senior officer of a Division includes a regulator of the Division of any rank.
- (16) Any duty imposed on or power reposed in the LSC Secretariat shall, unless a contrary intention appears, be construed to be a duty or power to be performed or exercised in accordance with such directions as the Managing Director and/or Secretary may from time to time give.
- (17) Any authority delegated to the Board shall be construed as a delegation to all the individual Commissioners of the Board, unless the delegation is specific to a specific number of them.
- (18) In the performance of their duties, the Recording Secretary and other staff of the LSC Secretariat shall be deemed, unless the contrary is shown, to be acting in accordance with the instructions of the Secretary and/or Managing Director.
- (19) A statutory function that is established under the FSCA or any financial services legislation to be acted upon by the Commission which has not been specifically delegated under these ***Guidelines and Operating Procedures*** or in accordance with paragraph 5.1.7 above shall be deemed not to have been delegated and remains to be acted upon by the LSC on behalf of the Commission so long as the statutory function relates to a licensing and/or supervisory matter.

- (20) Where under the FSCA or any financial services legislation an authority is delegated to a specified functionary, any other provision in the enactment that relates to the discharging of the authority, but which is not specifically outlined in the delegated authority, applies as if it were also specifically delegated to the specified functionary.
- (21) Where under the FSCA or any financial services legislation a person is required to provide notification to the Commission on a specified matter, the notification shall be deemed to be so made if it is made to and/or received by a Division to which the subject matter of the notification relates.
- (22) For the purposes of these *Guidelines and Operating Procedures*, the reference to financial services legislation or regulatory legislation shall be construed to include the Regulatory Code notwithstanding that the Code is not listed in Schedule 2 of the FSCA as such.
- (23) Where under the FSCA or any financial services legislation a matter is required to be published by the Commission in the Gazette, the matter may, in addition to such publication, be published on the Commission's website. The Division to which the matter relates shall make the necessary arrangements in relation to the matter and transmit it to the Secretary who shall authorize the requisite publication.

ISSUED by the Financial Services Commission this 18th day of December, 2009.

Signed:
Robert Mathavious
Managing Director/CEO
Financial Services Commission