APPLEBY

Guide to the BVI Regulatory Code

TABLE OF CONTENTS

PREFACE 4

1. Principles for Business 5

2. Provisions of General Application 6

2.1 Licensing 6

2.2 Fit and Proper Criteria 7

2.3 Business Plan 8

2.4 Management and Control 8

2.4.1 Directors 8

2.4.2 Board of Directors 9

2.4.3 Span of Control 9

2.4.4 Internal Audit 9

2.4.5 Audit Committee 10

2.4.6 Retention of Records 10

2.5 Compliance 11

2.5.1 Compliance Officer 11

2.5.2 Exemptions 12

2.5.3 Compliance Officer as Money Laundering Reporting Officer (“MLRO”) 12

2.6 Outsourcing 12

2.7 Financial Statements, Auditors and Audits 13

2.8 Customer Assets 14

2.9 Other obligations and restrictions 14

3. Banking 15

3.1 General Banking Licence 15

3.2 Parallel and Shell Banks 16

3.3 Capital Adequacy Requirements 16

3.4 Tier 1 Capital Requirement 17

3.5 Tier 2 Capital Requirement 18

3.6 Minimum risk weighted capital adequacy ratio 18

3.7 Regulatory Deposit 18

3.8 Maximum Exposure Limits 18

3.9 Counterparty 19

3.10 Risk Management Strategies 19

3.11 Granting of Credit to Connected Persons 19

3.12 Loan Loss Provisioning 20

3.13 Audit Committee 20

3.14 Licensed Foreign Banks 20

4.Insurance 20

4.1 BVI Insurer/Foreign Insurer 21

4.2 General insurance/long-term insurance 21

4.3 Financial Resource Requirements for BVI Insurers 21

4.3.1 Contributed capital 21

4.3.2 Minimum Solvency Margin 21

4.3.3 Capital Resources Requirement 21

4.4 Financial Resource Requirements for Foreign Insurers 22

4.5 Reinsurance 22

4.6 Actuaries 22

4.7 Insurance Managers and Intermediaries 23

4.8 Captive Insurers 23

5.Trust and Company Management Companies 23

5.1 Capital Resource Requirements – Licensed Trust Companies 24

5.2 Regulatory Deposit Requirements 24

5.3 Capital Resource Requirements – Licensed Company Managers 25

5.4 Professional Indemnity and Other Insurance 25

5.5 Managed Trust Companies 25

5.6 Outsourcing 26

6.Money Services Business 26

6.1 Financing Business 26

6.2 Money Services Business 27

6.3 Capital Resource Requirements 27

6.4 Corporate Governance 28

6.5 Foreign Money Services Business 28

6.6 Aspects of Regulatory Code not applicable to Money Services Licensees 29

7.Enforcement 29

8.Financial Resource Requirements 29

9.Prevention of Money Laundering and Terrorist Financing 29

10.Mutual Funds 29

PREFACE

One of the key measures designed to drive home the BVI's commitment to responsible and global best practice regulation is the Regulatory Code 2009 (the "Regulatory Code"). Following over a year of public and professional consultation, the Regulatory Code took effect on 1 February 2010 (with certain transitional provisions coming into effect between 31 March 2010 and 30 June 2010 to provide existing licensees with additional time to comply with the requirements imposed by the Regulatory Code).

The Regulatory Code is intended to supplement, rather than to depart from, the requirements set out in existing primary legislation. As such, it contains detailed requirements for licensees across a range of sectors within the BVI financial services industry including banking, insurance, trust/company management companies and money services businesses.

The Regulatory Code along with the Financial Services Commission Act 2001 (the "FSC Act") and a host of other commercial legislation governing regulated entities in the BVI (such as banks, trust companies and insurance companies to name a few) establish the general legal framework for the regulation and supervision of financial services business carried on in and from within the BVI by the BVI's Financial Services Commission ("FSC").

This guide is not intended to be exhaustive but rather is intended only to provide a general overview of the Regulatory Code.

Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of BVI law should be obtained.

Appleby
Road Town, Tortola
British Virgin Islands
June 2010

Scope of Regulatory Code

The Regulatory Code applies to "licensees" which includes:

- all trust companies and company managers (including registered agents);
- all banks;
- all insurance companies and intermediaries; and
- money services providers (ie. foreign exchange providers).

The Regulatory Code does not apply to:

- financiers;
- investment business firms such as fund administrators (however this may change with the introduction of the Securities and Investment Business Act 2010 ("SIBA");
- insolvency practitioners;
- law firms; and
- accountants.

The Regulatory Code does not address the following:

- anti money-laundering and combating the financing of terrorism ("AML/CFT");
- licensing forms;
- application fees; and
- exemptions.

1. Principles for Business

Part I of the Regulatory Code sets out a number of principles of conduct by which all licensees are required to abide.

These principles include:

a) Integrity
- Licensees are expected to conduct their business with integrity.

b) Management and Control
- Licensees are required to take reasonable care to organize and control their affairs effectively and have adequate risk management systems in place.

c) Financial Resources
- Licensees are expected to maintain adequate financial resources taking into account the nature, scale, complexity and diversity of their business and the risks they face.

d) Customers' Interests
- Licensees are expected to have due regard to the interests of their customers and to make adequate arrangements to protect their customers' assets.

e) Transparency

- Licensees are expected to be transparent in their business arrangements.

f) Relationship with the FSC

- Licensees are expected to deal with the FSC in an open and cooperative manner.

2. Provisions of General Application

Part II of the Regulatory Code sets out requirements that apply to every licensee which it governs, regardless of the type of licence held. This section also includes general licensing criteria for applicants for certain types and categories of licence.

2.1 Licensing

While the FSC has a general discretion as to whether or not to grant a licence, an applicant will have to satisfy the FSC that:

- its directors, its senior management (both individually and collectively) and significant owners (and auditors/actuaries if required to be appointed) satisfy the FSC's fit and proper criteria (in determining whether a person is a "significant owner", the FSC is required to look behind legal ownership to ultimate beneficial ownership);

- its ownership structure will not impede the FSC's effective supervision of the applicant if it is granted a licence (thus, where the applicant is part of a group, the FSC will consider the ownership structure of the group and its members in addition to the ownership structure of the applicant);

- it has (or before the grant of the licence it will have) sufficient financial resources, including capital resources, to support the licensed business that it will carry on, taking into account the nature, scale, complexity and diversity of the business and the risks to which the applicant is likely to be exposed (where the applicant is part of a group, the FSC will consider the ownership structure of the group and its members in addition to the ownership structure of the applicant);

- its management and operational structure is adequate for the licensed business that it proposes to carry on (where the applicant is part of a group, the FSC may also consider the management and operational structure of the group (as part of its assessment of compliance with this criterion, the FSC will consider the internal controls and compliance procedures that the applicant has in place, or proposes to put in place before the licence is granted, and in particular that it has, or will have, appropriate risk management policies, systems and controls);

- it has a sufficient nexus to the BVI as the FSC cannot adequately supervise a licensee that has no, or an insufficient, nexus to the BVI (for this purpose, one of the key indicators of nexus is jurisdiction of incorporation; where a company is incorporated in the BVI, the FSC will be better able to supervise the company, to take enforcement action against it and, if necessary, to take proceedings against the company in court, including the appointment of a liquidator); and

- it has complied with its regulatory and AML/CFT obligations (where the applicant is subject to the supervision of a financial services regulator in another jurisdiction, the FSC will also need to be satisfied that it is in compliance with its regulatory and other relevant obligations and the FSC will usually require the directors to make a declaration to this effect).

2.2 Fit and Proper Criteria

The following persons are required to satisfy the FSC's fit and proper criteria:

(a) an applicant for a licence;
(b) a licensee, on an on-going basis;
(c) the directors, senior managers and significant owners of an applicant or licensee, as the case may be;
(d) an auditor (where a licensee is required to appoint one); and
(e) an actuary (where a licensed insurer is required to appoint one).

For the purposes of the Regulatory Code, a senior manager is defined as an individual employed under a contract of service who is appointed to undertake, or have responsibility for, one or more of the following supervisory or managerial functions:

(a) the compliance function;
(b) the money laundering compliance function;
(c) the internal audit function; or
(d) a senior management function.

In making an assessment as to whether an applicant, licensee, director, senior manager or significant owner satisfies their fit and proper criteria, the FSC will take the following factors into account:

(a) honesty, integrity and reputation;
(b) competence and capability; and
(c) financial soundness.

Depending upon the person being assessed, greater emphasis may be placed on one or more of the above categories ie. in the case of a senior manager, significant emphasis would be placed on category (b), whereas this may not be relevant for a significant owner. However, categories (a) and (c) are likely to be extremely important for a significant owner.

The primary responsibility for ensuring that a licensee is soundly and prudently managed rests with the licensee itself. Accordingly, a licensee is expected to satisfy itself that its directors, senior managers and, if appropriate, auditor and actuary, are fit and proper. Therefore, all licensees are expected to:

- carry out reasonable due diligence before applying to the FSC for approval to appoint a director, senior manager, auditor or actuary; and
- monitor the person's fitness on an ongoing basis subsequent to their appointment.

Where the FSC is of the opinion that a director or senior manager does not satisfy its fit and proper criteria, it has the authority under the FSC Act to require the licensee to remove that person and replace them with someone acceptable to the FSC. While the FSC does not have the power to direct the removal of a person who has a significant interest in the licensee, they may attach conditions to a licence at any time. Accordingly, if the FSC held the view that a person having a significant interest in a licensee no longer met its fit and proper criteria, it could potentially impose a condition on that licensee to the effect that the person concerned should not have a significant interest in the licensee. In order to avoid enforcement action being taken by the FSC, the licensee would then be obligated to ensure that the person concerned no longer held a significant interest in it.

In light of this, licensees should therefore be guided by the FSC's fit and proper criteria in determining the criteria that they use to make their own fit and proper assessment.

2.3 Business Plan

Applicants for licences (with the exception of an application for certain classes of trust licences) are required to submit a detailed business plan to the FSC. The business plan is required to cover the first five years of operation in the case of an application for an insurer's licence and the first three years of operation in any other case. A detailed description of the requirements of the business plan is outlined in section 11 of the Regulatory Code.

2.4 Management and Control

In accordance with the second general principle of business related to management and control, licensees are expected to operate in accordance with sound principles of corporate governance.

This entails:

- taking reasonable care to maintain a clear and appropriate apportionment of significant responsibilities among its directors, senior managers and key functionaries;
- ensuring that its systems and controls are regularly reviewed and updated as required;
- ensuring that records are retained for a particular period of time;
- having an adequate number of directors;
- ensuring that it has a span of control that is adequate for the nature, size, complexity, structure and diversity of its business;
- appointing a BVI resident manager (in the case of a foreign licensee);
- establishing and maintaining effective risk management systems and controls; and
- establishing a business continuity policy and putting business continuity arrangements in place.

2.4.1 Directors

Licensees are required to have at least two directors at all times. At least one of the licensee's directors is required to be resident in the BVI if it holds one of the following licences:

(i) a banking licence;
(ii) a category A or a category D insurer's licence;

(iii) an insurance manager's licence;
(iv) an insurance intermediary's licence;
(v) a Class I or a Class III trust licence, including a restricted Class III trust licence; or
(vi) a company management licence.

The Regulatory Code does not seek to prevent a person serving as the director of more than one licensee or specify a maximum number of licensees for which a person may serve as a director. Instead, the Regulatory Code imposes a requirement that the directors of a BVI licensee must have "sufficient time and commitment to undertake their duties diligently". Where a licensee ceases to have two directors, they are obligated to notify the FSC immediately and to remedy the situation within 21 days.

2.4.2 Board of Directors

The board of directors of a BVI licensee is ultimately responsible for all aspects of the business, organisation, policies, systems/controls and financial soundness of the licensee. The board also has responsibility for risk management, internal controls, compliance and outsourcing.

2.4.3 Span of Control

A BVI licensee is required to ensure that it has an adequate span of control. This entails ensuring that its management:

- is undertaken by at least two directors or senior managers (see 2.2 above for a definition of senior manager);
- is actively involved in day-to-day management and able to exercise executive powers; and
- is adequate for the nature, size, complexity, structure and diversity of the licensee's business.

2.4.4 Internal Audit

A licensee holding a general banking licence or a category A or D insurer's licence is required to appoint one or more persons who will be responsible for the licensee's internal audit function. Such persons are required to be independent from the day-to-day functioning of the licensee (including the day-to-day operation of its internal controls) and to have access to all activities conducted by the licensee, including at its branches and subsidiaries. The scope of an internal audit will usually need to include the following:

a) a review of the management and financial information systems, including the licensee's electronic systems;

b) a review of the accuracy and reliability of the accounting records and financial reports;

c) a review of the means whereby assets are safeguarded;

d) where appropriate, for example in the case of a bank, the system of assessing the licensee's capital in relation to its estimate of risk;

e) an appraisal of the economy and efficiency of the licensee's operations;

f) a method for testing transactions and the functioning of specific internal control procedures;

g) a review of the systems established to ensure compliance with the licensee's regulatory obligations; and

h) a method for testing the reliability and timeliness of the regulatory reporting.

Licensees who are required to undertake an internal audit function are required to provide the FSC with a list of reports within ten days of the last day of each calendar quarter. Copies of internal audit reports must also be submitted to the FSC at its request. Internal audit activities may be undertaken on an in-house basis or may be outsourced.

2.4.5 Audit Committee

A licensee holding a general banking license or such other licensee as is directed by the FSC is required to have an audit committee at all times. This committee acts as the primary contact point for the licensee's external auditor and is also responsible for monitoring the external audit.

The FSC would normally expect to see a document approved by the board of directors that specifies the composition of the audit committee, its authorities and duties and how and when it must report to the board. The Regulatory Code requires that the audit committee of a licensee be comprised solely of directors, the majority of whom must be non-executive directors. This ensures that the audit committee acts independently of the senior management of the licensee.

2.4.6 Retention of Records

Licensees are required to keep adequate and orderly records that will enable the FSC to monitor their compliance with their regulatory and AML/CFT obligations for a minimum of five years. The BVI Business Companies Act 2004 includes certain requirements with respect to records, which are not repeated in the Regulatory Code with respect to BVI companies (see for example sections 96 to 102 of the BVI Business Companies Act which outlines the documents to be kept at the office of the registered agent including the memorandum and articles of the company and registers of directors/members). The requirements of the Regulatory Code with respect to record keeping are in addition to those requirements.

Section 38(4) of the Regulatory Code provides that a licensee should not keep records that it is required to maintain outside the BVI if access to those records will or is likely to be impeded by confidentiality or data protection restrictions. This applies to records kept outside the BVI whether kept at an overseas office of the licensee or its parent or whether kept outside the BVI by a service provider pursuant to an outsourcing agreement

2.5 Compliance

The FSC Act imposes a number of obligations on licensees with respect to compliance. The principal obligations of a licensee are to:

a) establish and maintain adequate compliance systems and controls;
b) establish and maintain a compliance procedures manual; and
c) appoint an individual approved by the FSC as its compliance officer.

Although the FSC Act outlines the basic requirements with respect to compliance, it delegates the establishment of a compliance regime to the Regulatory Code.

Compliance is the responsibility of the licensee and, notwithstanding the requirement to appoint a compliance officer, ultimate responsibility for compliance lies with the board of directors. The board of directors is required to approve the licensee's compliance policy and review the effectiveness of the compliance policy and systems and controls in managing the licensee's compliance risk on an annual basis. Although licensees may use external sources to, for example, undertake a regulatory risk assessment or assist in the development of a compliance manual, compliance remains the sole responsibility of the licensee and cannot be contracted out.

2.5.1 Compliance Officer

The FSC Act requires every licensee to appoint an individual approved by the FSC as its compliance officer, although, as stated above, the Exemption Regulations (discussed in more detail below) permit certain exemptions to this requirement. The approvals process for a compliance officer is covered generally in Division 2 of Part II of the Regulatory Code.

The FSC Act also provides that the FSC shall not approve an individual as a licensee's compliance officer unless it is satisfied that he/she satisfies the FSC's fit and proper criteria. The Regulatory Code goes further by requiring the licensee to be satisfied as to the fitness and propriety of the individual to be appointed. The FSC will therefore expect a licensee to be able to demonstrate that it has carried out a fit and proper assessment of its proposed compliance officer and that the results of this assessment have been recorded.

The compliance officer of a licensee is required to be an employee of the licensee except as otherwise permitted by the Exemption Regulations. In the event of the temporary absence of its compliance officer, a licensee is also required to ensure that arrangements are made for some other person approved by the FSC to undertake the compliance function (unless an exemption has been granted under the Exemption Regulations or the period of absence of the compliance officer is anticipated to be short and the licensee is satisfied that their temporary absence will not compromise the compliance function).

The FSC Act enables the FSC to direct a licensee to remove its compliance officer where the FSC considers that he/she no longer satisfies the FSC's fit and proper criteria. Where the FSC exercises this power, it is the responsibility of the licensee to identify another suitable individual for appointment and to submit an application for approval to the FSC.

The compliance officer is required to submit an annual compliance report to the FSC on behalf of the licensee. However, the FSC may determine that a particular licensee must submit a compliance report on a more frequent basis.

2.5.2 Exemptions

The Financial Services (Exemption) Regulations 2007 (the "Exemption Regulations") exempt certain licensees from the obligation to appoint a compliance officer and also exempt other licensees from some of the requirements of the FSC Act and the Regulatory Code. The up-to-date policy can be found in the Provisional Guidance Notes on Compliance Regime, 2008 which are available on the FSC's website at www.bvifsc.vg. The Regulatory Code applies to such licensees to the extent specified in the Exemption Regulations. The FSC has an Approved Persons unit in place that processes applications for exemptions and approvals of compliance officers.

2.5.3 Compliance Officer as Money Laundering Reporting Officer ("MLRO")

Every licensee is required to appoint an MLRO who has responsibility for the compliance function relating to AML/CFT obligations (ie. reporting suspicious transactions to the BVI Financial Investigation Agency).

Provided that the size and nature of the business carried on by a licensee do not make it impractical for one individual to fulfil both roles, there is no reason, in principle, why the compliance officer of the licensee cannot also act as its MLRO. However, the FSC's approval is required if the same person is to act as both the licensee's compliance officer and its MLRO and it should be borne in mind that the roles of both functions are distinct and separate.

2.6 Outsourcing

BVI licensees are increasingly outsourcing both regulated and unregulated activities and the Regulatory Code makes provision for the outsourcing of certain functions. An outsourcing arrangement is defined in the Regulatory Code as an arrangement between a licensee and a service provider whereby the service provider, or another person acting for the service provider, undertakes an activity on a continuing basis that would normally be undertaken by the licensee.

A service provider, in relation to an outsourcing arrangement, is defined as any person other than a director of the licensee acting in his capacity as a director or an employee of the licensee acting in his capacity as an employee. An activity is considered to be outsourced whether the service provider is an independent third party, another company in the same group as the licensee or any person otherwise connected to the licensee.

As activities are outsourced only if they are activities that the licensee would normally have undertaken itself, the purchase of goods (for example stationery and office equipment), services (such as telephone or water services and, in some cases, professional services) and facilities (such as the rent of an office), do not fall within the definition of an outsourcing arrangement. It is not possible to define, with respect to types

of activity, which activities would be considered to be "normally" undertaken by a licensee. However, an arrangement is unlikely to fall within the definition of an outsourcing arrangement if it does not involve the transfer of the licensee's non-public proprietary information concerning its customers or otherwise connected with its business.

A licensee that outsources any activities is required to:

- establish and maintain appropriate and adequate systems and controls to manage its outsourcing risk;
- provide for the monitoring and controlling of the licensee's outsourcing arrangements;
- undertake appropriate due diligence with respect to the service provider to whom the activities will be outsourced to enable it to assess the service provider's capacity and ability to undertake the outsourced activities and the risks associated with outsourcing the proposed activities to the service provider;
- enter into a written contract with the service provider that clearly specifies all material aspects of the outsourcing arrangement; and
- establish and maintain a contingency plan for each outsourcing agreement that it enters into.

Licensees are prohibited from outsourcing the following activities:

a) the compliance function or a core management function; or
b) an activity if the outsourcing of that activity would

    (i) impair the FSC's ability to supervise the licensee (ie. the licensee outsources an activity that the FSC would wish to inspect on an on-site inspection to an overseas provider and the performance of the activity cannot be fully assessed by the FSC); or
    (ii) affect the rights of a customer against the licensee, including the right to obtain legal redress.

At this time, FSC approval is not required for outsourcing arrangements. However, it is considered best practice by the FSC to provide them with advanced notice of any proposed outsourcing arrangement, in order to comply with the Principles of Business in Part 1.

2.7 Financial Statements, Auditors and Audits

If a licensee is required to appoint an auditor, the following three conditions must be satisfied before a person can be appointed to act in this capacity:

a) the individual is qualified to act as the auditor of a licensee under the Regulatory Code;
b) the person concerned has consented to act as the auditor of the licensee; and
c) the FSC has given its prior written approval to the appointment of the auditor.

The auditor is also required to satisfy the FSC's fit and proper criteria. Approval is given with respect to an individual licensee on a case-by-case basis.

Auditors are not regulated by the FSC and the FSC therefore has no power to take enforcement action

against an auditor who contravenes a requirement of a regulatory enactment or the Regulatory Code. However, each of the regulatory enactments creates a number of offences that may be committed by an auditor if he breaches certain provisions of the enactment. Furthermore, the FSC will take any contraventions of a regulatory enactment or the Regulatory Code into account when determining whether an auditor is fit and proper to audit, not just the licensee concerned, but other licensees. The regulatory enactments also give the FSC the power to revoke the approval of an auditor if it determines that he is no longer fit and proper.

Auditors that carry on business in the BVI are required to maintain professional indemnity insurance. The fact that an auditor based outside the BVI visits the BVI for the purposes of carrying out an audit would not, on its own, constitute "carrying on business in the BVI".

2.8 Customer Assets

Licensees are required to ensure that:

a) customer assets are identified, or identifiable, and are appropriately segregated and accounted for;

b) customer money is not mixed with other money;

c) it makes arrangements for the safekeeping and proper protection of customer assets and any documents of title relating to customer assets;

d) the location of a customer's assets and documents of title relating to a customer's assets are recorded in the customer's records; and

e) where any asset is required to be registered, it is properly registered either in the customer's name or, where agreed with the customer, in the name of a nominee.

In relation to customer accounts, licensees are required to ensure that they are:

a) held with an approved bank;
b) separate from any of the licensee's own bank accounts;
c) clearly designated as a customer account; and
d) under at least dual signatory control.

2.9 Other obligations and restrictions

The Regulatory Code along with various regulatory enactments contain specific requirements for notifying events and changes to the FSC, usually in writing. For example,

a) the Banks and Trust Companies Act 1990 (the "BTCA") requires a licensee to inform the FSC within fourteen days of any change in the particulars of a licensee as set out in the application for the licence;

b) the Insurance Act 2008 (the "Insurance Act") requires a licensed insurer to notify the FSC if it

forms the opinion that the insurer does not comply with the requirement to maintain its business in a financially sound condition; and

c) the Regulatory Code requires a licensee to notify the FSC if, at any time, it forms the opinion that its auditor is not independent of its licensee.

In many cases, failure to comply with a notification requirement in a regulatory enactment is an offence.

Furthermore, where a regulatory enactment provides that the FSC's prior written approval is required before a licensee can take some action that is a notifiable event, the Regulatory Code cannot remove, reduce or in any way affect that requirement. For example, a number of regulatory enactments require licensees to obtain the prior written approval of the FSC for a change of name. The requirement of section 72(3) of the Regulatory Code for a licensee to provide prior written notification to the FSC of any name change, does not affect any requirement for prior written approval. Obviously, where the approval of the FSC is obtained, the application for approval would be regarded as prior written notice of the change and a separate notice would not be required.

Where a notification requirement under a regulatory enactment and the Regulatory Code are substantively the same, the licensee would not be required to submit two separate notices to the FSC.

3. Banking

Part III of the Regulatory Code sets out the requirements applicable to bank licensees. These provisions are intended to give effect to the International Convergence of Capital Measurement and Capital Standards known as the Basel Capital Accord.

In the BVI, banks are regulated under the BTCA and supervised by the Banking and Fiduciary Division of the FSC.

3.1 General Banking Licence

A restricted Class I or Class II banking licence will only be granted to:

(a) a branch or subsidiary of a bank with a well established and proven track record which is subject to effective consolidated supervision by its home supervisory authority;
(b) a bank which, although not a subsidiary, is closely associated with an overseas bank, and which, by agreement, will be included within the consolidated supervision exercised by the overseas bank's home supervisory authority; or
(c) a wholly-owned subsidiary of a non-bank corporation whose shares are quoted on a recognised exchange, where the objective of the subsidiary is to undertake in-house treasury operations only, and where the operations are fully consolidated within the published financial statements of the parent company.

A licence will only be granted to a bank if its place of incorporation and mind and management are within the same jurisdiction, or, in the case of a subsidiary, if the mind and management are located in the jurisdiction in which consolidated supervision is being exercised.

The FSC will expect an applicant to demonstrate that its management has proven experience in a relevant field of banking.

A banking licence will not be granted unless direct confirmation has been received from the supervisory authority in the jurisdiction in which the applicant or its parent is incorporated, that the authority:

(a) consents to the establishment of the subsidiary or branch in the BVI;
(b) will exercise consolidated supervision over the applicant's business, including within the BVI; and
(c) will cooperate in the sharing of regulatory information with the FSC

and that the authority confirms that the applicant, or its parent, is in full compliance with its regulatory and other relevant obligations.

The bank must be subject to the consolidated supervision of either the FSC or its home supervisory authority.

A general banking licence will only be granted to a branch or subsidiary of an international bank with a well established and proven track record which is subject to effective consolidated supervision by its home supervisory authority.

3.2 Parallel and Shell Banks

The FSC will not grant a banking licence to a parallel bank. A parallel bank (that is, a bank licensed in a jurisdiction other than the BVI that, while not being part of the same financial group for regulatory consolidation purposes, has the same beneficial owner(s)) presents a significantly higher supervisory risk to the BVI.

For the same reasons, the FSC will not under any circumstances grant a banking licence to a shell bank, that is, a bank incorporated in the BVI that:

(a) has no meaningful mind and management in the BVI; and
(b) is not affiliated to a financial services group that is subject to consolidated supervision in another jurisdiction.

3.3 Capital Adequacy Requirements

Banking licensee are required to ensure that, at all times, they maintain their capital resources at a level that is adequate to support their banking business (taking into account the nature, size, complexity, structure and diversity of that business and the bank's risk profile) and to maintain adequate systems and controls to monitor and assess their capital adequacy requirements on an ongoing basis.

The BTCA specifies the capital resource requirements applicable to banks. All BVI banks are required to ensure that they have sufficient capital resources to support their business. Although the Regulatory Code specifies minimum capital resource requirements applicable to all BVI banks, it recognizes that the minimum requirements may not provide all banks with adequate capital resources to support their

businesses. The Regulatory Code therefore requires the directors and senior management of a bank to make their own determination of the capital resources that are reasonably required to support the bank's business (taking into account its risk profile) and it is the responsibility of the board and senior management to ensure that the bank's capital resources are increased beyond the minimum requirements set out in the Regulatory Code where appropriate. It follows that compliance with the specific minimum capital resource requirements of the Regulatory Code is not, in itself, sufficient to demonstrate compliance with the over-riding capital resource requirement.

While the Regulatory Code does not require a BVI bank to calculate the precise amount of its capital resources and its capital adequacy requirement on a daily basis, a bank may be required to demonstrate the adequacy of its capital resources at any particular time, if required to do so by the FSC. When undertaking on-site compliance inspections, the FSC will expect to see evidence that determinations of a BVI bank's capital resource requirements and capital resources are made at appropriate intervals.

3.4 Tier 1 Capital Requirement

A BVI bank is required to ensure that at all times its tier 1 capital is maintained in an amount equal to or greater than

a) $2,000,000 (where it holds a general banking licence); or
b) $1,000,000 (where it holds a restricted Class I or Class II banking licence).

The following capital items are specified in the Regulatory Code as constituents of tier 1 capital:

(a) contributed capital;
(b) perpetual non-cumulative issued and fully paid up preference shares;
(c) disclosed reserves;
(d) published and unpublished interim retained profit, if verified by the bank's auditors;
(e) minority interests; and
(f) such other capital items as the FSC may approve with respect to the bank.

The following items are specified as items to be deducted from the tier 1 capital of a bank:

(a) treasury shares held by the bank;
(b) goodwill and other intangible assets;
(c) the current year's loss, if any; and
(d) such other deductions as the FSC may require with respect to the bank.

Subject to certain restrictions set out in the Regulatory Code, the sum of a bank's tier 1 (core capital) and tier 2 capital (supplementary capital) constitute its capital base. The tier 1 capital of a BVI bank must be maintained at an amount equal to or greater than $2,000,000 (where it holds a general banking licence), or $1,000,000 where it holds a restricted Class I or restricted Class II banking licence.

The minimum tier 1 capital requirement of the Regulatory Code is an absolute minimum requirement applicable to BVI banks irrespective of the nature and extent of their banking business. It applies to a newly licensed bank that has not yet commenced business as well as an established bank. However, in

most cases a BVI bank will have to maintain a higher amount of tier 1 capital in order to ensure that it meets its over-riding capital resource requirement specified in the Regulatory Code and to enable it to meet the minimum risk weighted capital adequacy ratio.

Furthermore, the BTCA provides that the FSC may, in the case of a particular bank, require it to maintain capital resources greater than the minimum capital resource requirement specified in the Regulatory Code. Where the FSC imposes such a requirement on a BVI bank, the bank must maintain its tier 1 capital in an amount equal to or greater than such amount as specified by the FSC.

3.5 Tier 2 Capital Requirement

Tier 2 capital, also known as supplementary capital, includes forms of capital that do not fully meet the requirements for tier 1 capital on the grounds that the capital is not permanent or is subject to binding obligations. Although tier 2 capital is of a lower quality than tier 1 capital, it comprises capital items that contribute to the overall strength of the bank as a going concern. Tier 2 capital is only eligible for the purposes of determining a bank's capital base only to the extent that it does not exceed the bank's tier 1 capital. It therefore follows that at least 50% of the capital base of a BVI bank must be comprised of tier 1 capital.

There is no specified minimum requirement with respect to tier 2 capital, but it is used to calculate the bank's risk weighted capital adequacy ratio, which must never fall below 12%.

3.6 Minimum risk weighted capital adequacy ratio

A BVI bank is required to maintain a minimum risk weighted capital adequacy ratio of 12% at all times.

3.7 Regulatory Deposit

The required regulatory deposit for a BVI bank is $500,000. The regulatory deposit made by a BVI bank may be used by the FSC to satisfy outstanding fees or penalties payable by the bank to the FSC or to satisfy the costs of any enforcement action taken by the FSC against the bank and the running off and winding up of the licensed business of the bank. The FSC would not look to the regulatory deposit unless the BVI bank was unwilling or unable to pay the fees, penalties or costs concerned.

3.8 Maximum Exposure Limits

A BVI bank is prohibited from incurring an aggregate exposure to a counterparty, or a group of related counterparties, that exceeds 25% of its capital base or large exposures that, in aggregate, exceed 800% of the bank's capital base without the FSC's prior written approval. The maximum exposure limits specified in the Regulatory Code are intended to be regarded as absolute maximums but the FSC expects BVI banks to establish significantly lower limits unless there are exceptional reasons to the contrary.

3.9 Counterparty

The Regulatory Code provides that a counterparty includes any person, body or association with whom the bank has an exposure. Given the wide definition of "exposure", the range of the potential

counterparties of a bank is large. It would include a borrower, a person whose obligations the bank is guaranteeing, another bank with which funds are being placed, the issuer of a security held by the bank and the party with whom a derivatives contract is made.

3.10 Risk Management Strategies

A licensed bank is required to put credit, country and transfer, liquidity, interest rate and operational risk management procedures in place that are appropriate for the nature, size, complexity, structure and diversity of the bank's business and for the risks to which it is exposed.

Credit risk is the risk that a borrower or other counterparty will fail to meet its obligations to a bank in accordance with the agreed terms. A BVI bank's credit risk strategy includes the granting of loans, the making of investments, the evaluation of the quality of loans and investments and the ongoing management of the bank's loan and investment portfolios.

Country risk arises when a bank is engaged in international lending and investment activities and is the risk that borrowers or counterparties of the bank in a particular country may be unwilling or unable to fulfil their external obligations for reasons beyond the usual risks which arise in relation to all lending.

Transfer risk is the risk that private borrowers and counterparties will not be able to fulfil their obligations due to government actions, for example the imposition of foreign exchange controls.

Liquidity risk is the risk that a bank is not able to fund increases in assets and meet obligations as they come due.

Interest rate risk is the exposure of a bank's financial condition to adverse movements in interest rates.

Operational risk is deliberately not defined in the Regulatory Code but rather requires a bank's operational risk strategy or policies to include a definition of operational risk that will apply throughout the bank. Operational risks include, but are not limited to, internal and external fraud, employment practices and workplace safety, fiduciary breaches, misuse of confidential customer information, improper trading activities on the bank's account, money laundering, the sale of unauthorised products, damage to physical assets, business disruption and system failures, data entry errors, collateral management failures, incomplete legal documentation, unapproved access to customer accounts and non-customer counterparty misperformance and vendor disputes.

3.11 Granting of Credit to Connected Persons

Banks are required to take particular care in the granting, or renewing, of credit to persons connected to the bank. To this end, the Regulatory Code requires that all such decisions are made on an "arms length" basis. This means that where credit is granted, it should not be granted on more favourable terms (ie. as to credit assessment, interest rates etc.) than credit would be granted to non-connected persons in the same circumstances. However, a BVI bank may grant credit to its employees on favourable terms (for example as to interest rate) where this is part of the employee's overall remuneration package.

3.12 Loan Loss Provisioning

The Regulatory Code requires that the loan-loss provisions of a BVI bank shall be adequate to absorb estimated credit losses in the loan portfolio. Although not mandated as an international standard, the FSC considers International Accounting Standards (IAS 39) as setting out best international practice for loan-loss provisioning. Accordingly, although it is not currently required that loan-loss provisioning be determined using IAS 39, the FSC will expect the principles of IAS 39 to be applied when preparing financial statements.

3.13 Audit Committee

A licensee holding a general banking license is required to have an audit committee at all times. This committee is a committee of the board and shall be comprised solely of directors, the majority of whom shall be non-executive directors.

3.14 Licensed Foreign Banks

Establishing the capital requirements for a foreign bank licensed in the BVI is primarily the responsibility of the bank's home supervisor. Accordingly, the capital resource requirements that apply to BVI banks are not applicable to licensed foreign banks.

Rather, in the case of a licensed foreign bank, the country and transfer risk management policies, systems and controls will usually be established by the head office of the bank and will be compliant with the requirements of the bank's home supervisor. However, as with all matters that are subject to home country supervision, the FSC will assess their adequacy with respect to business undertaken in the BVI.

4. Insurance

Insurance law in the BVI is derived from English common law as supplemented by the Insurance Act, the Insurance Regulations 2009 (the "Insurance Regulations") and the Regulatory Code.

There is a general prohibition against carrying on "insurance business" of any kind in or from within the BVI unless the requisite licence is obtained or an exemption applies. "Insurance business" is defined by the Act to mean the business of undertaking liability under a contract of insurance to indemnify or compensate a person in respect of loss or damage, including the liability to pay damages or compensation contingent on the happening of a specified event, and includes life insurance business and reinsurance business.

An entity is deemed to be carrying on insurance business in the BVI if it:

- occupies premises in the BVI to conduct business as an insurer;
- markets services to residents of the BVI; or
- is a BVI business company that carries on insurance business outside the BVI.

4.1 BVI Insurer/Foreign Insurer

The Insurance Act distinguishes between a BVI insurer (a business company incorporated in the BVI,

which must hold a Category A, Category C or Category D insurance licence) and a foreign insurer (a foreign company, which must hold a Category B insurance licence).

4.2 General insurance/long-term insurance

The Insurance Act also makes a distinction between long-term insurance business and general insurance business. General insurance business consists of motor, property, liability, financial loss, marine and aviation, goods in transit, and accident and health insurance. Long-term business consists of life, annuity or health insurance.

4.3 Financial Resource Requirements for BVI Insurers

4.3.1 Contributed capital

A BVI insurer is required to maintain its contributed capital in an amount equal to or greater than the minimum prescribed in the Regulatory Code. The minimum contributed capital applicable to a BVI insurer is $200,000 where the insurer is authorized to carry on any class of long-term business or $100,000 in any other case.

Contributed capital is defined in the Insurance Act as the total of monies paid, and the value of other consideration provided, for shares issued by the insurance company.

4.3.2 Minimum Solvency Margin

A BVI insurer is required to ensure that it maintains a minimum solvency margin in accordance with the Regulatory Code. In the case of a general insurer, the prescribed minimum solvency margin is as follows:

(i) if the insurer's annual net written premium is less than $500,000, the prescribed minimum solvency margin is $100,000;
(ii) if the insurer's annual net written premium is greater than $500,000, but less than $5,000,000, the prescribed minimum solvency margin is 20% of the net annual written premium;
(iii) if the insurer's annual net written premium is greater than $5,000,000, the prescribed minimum solvency margin is $1,000,000 plus 10% of the difference between the annual net written premium and $5,000,000.

The prescribed minimum solvency margin of a long-term insurer is $250,000.

4.3.3 Capital Resources Requirement

A BVI insurer is required to ensure that, at all times, it maintains its capital resources at a level that is adequate to support its insurance business, taking into account the nature, size, complexity, structure and diversity of that business and its risk profile.

Although the Regulatory Code specifies minimum contributed capital and solvency margin

requirements applicable to all BVI insurers, the minimum requirements may not provide all insurers with adequate capital resources to support their businesses. The Regulatory Code therefore requires the directors and senior management of a BVI insurer to make their own determination of the capital resources that are reasonably required to support the insurer's business (taking into account its risk profile) and it is the responsibility of the board and senior management to ensure that the insurer's capital resources are increased beyond the minimum requirements set out in the Regulatory Code where appropriate. It follows that compliance with the specific contributed capital and solvency margin requirements of the Regulatory Code is not, in itself, sufficient to demonstrate compliance with the over-riding capital resource requirement.

4.4 Financial Resource Requirements for Foreign Insurers

The capital resource, contributed capital and solvency margin requirements that apply to BVI insurers do not apply to licensed foreign insurers as responsibility for the prudential regulation and supervision of a licensed foreign insurer is seen to lie with its home supervisor.

The Regulatory Code requires the FSC to consider additional criteria before issuing a Category B licence to a foreign insurance company. In addition to the statutory requirements laid out in the Insurance Act, the FSC will also need to be satisfied that an applicant for a category B licence is solvent, meets all applicable regulatory requirements in its home jurisdiction and its home supervisor does not object to the insurer carrying on business in the BVI. The FSC will seek the necessary confirmations from the insurer's home supervisor so these do not need to be provided by the applicant.

A foreign insurer holding a Category B licence that does not establish a branch is required to appoint a licensed insurance agent.

4.5 Reinsurance

For the purposes of the Insurance Act, the prescribed criteria for an approved reinsurer are that the insurer has a financial strength rating of A++, A+, A or A- assigned to it by the A. M. Best Company.

A BVI insurer holding a category A licence shall submit to the FSC on an annual basis a summary of its reinsurance arrangements together with copies of all reinsurance treaties entered into.

A foreign insurer holding a category B licence shall submit to the FSC on an annual basis a summary of its reinsurance arrangements with respect to insurance business carried on in the BVI, together with copies of all reinsurance treaties entered into relating to that business. The summary and reinsurance treaties required to be submitted shall be submitted together with its audited financial statements.

4.6 Actuaries

Only BVI insurers that are long-term insurers are required to appoint and at all times have an actuary. However, under the Insurance Act, the FSC may direct a licensed insurer, whether long-term or general, to cause an actuary to investigate such aspects of the insurer's financial condition as the FSC may specify. The prior written approval of the FSC is required in order to appoint an actuary and will not be granted unless the actuary satisfies the fit and proper criteria.

Actuaries are not regulated by the FSC and the FSC therefore has no power to take enforcement action against an actuary who contravenes a requirement of the Insurance Act or the Regulatory Code. However, the Insurance Act does create certain offences that may be committed by an actuary. Furthermore, the FSC will take any contraventions of the Insurance Act or the Regulatory Code into account when determining whether an actuary is fit and proper to act as the actuary, not just of the insurer concerned, but also other insurers. The Insurance Act also gives the FSC the power to revoke the approval of an actuary if it determines that he/she is no longer fit and proper.

4.7 Insurance Managers and Intermediaries

Licensed insurance mangers and licensed insurance intermediaries are required to ensure that they maintain a minimum contributed capital of $25,000. They are also required to maintain professional indemnity and other insurance as is appropriate.

4.8 Captive Insurers

The corporate governance requirements laid out in Part II above (Provisions of General Application) apply to captive insurers. In addition to those requirements, all captive insurers are required to appoint an insurance manager.

The Regulatory Code specifically indicates that the FSC does not expect all captive insurers to establish a corporate framework that is equivalent to the corporate governance framework required to be established by a category A licensed insurer. Rather, the directors of a captive insurer are required to establish a corporate governance framework that is appropriate for the business undertaken by the insurer and the risks that it takes. In particular, provision is made in the Regulatory Code for many more of the functions of a captive insurer to be outsourced, either to the insurance manager or other specialists (eg. claims administrators).

Captive insurers are not expected to have the same policies, systems and controls as a full service insurer and accordingly, if the circumstances justify it, there may be no need for systems and controls in certain areas. Where it is decided by the board that particular types of policies, systems and controls are not required, the decision must be recorded in writing together with the reasons. The FSC, when undertaking an on-site inspection, will expect to see evidence that the board has considered appropriate policies, systems and controls relating to all areas of its business.

5. Trust and Company Management Companies

Companies offering trust services must be licensed under the BTCA, and supervised by the Banking and Fiduciary Division of the FSC.

The BTCA requires a licensed trust company holding a Class I or a Class II trust licence to maintain adequate financial resources to support its business of not less than the minimum prescribed by the Regulatory Code or such greater capital resources as the FSC may require. The Company Management Act 1990 imposes an identical requirement on a licensed company manager.

5.1 Capital Resource Requirements – Licensed Trust Companies

The Regulatory Code specifies an unencumbered minimum capital resource requirement of US$250,000 (or its equivalent in a foreign currency which is acceptable to the FSC) with respect to licensed trust companies. However, as this may not necessarily provide every licensee with adequate financial resources to support its business, every licensee must make their own determination of the level of capital resources that are reasonably required to support its business, taking into account the nature, size, complexity, structure, diversity and risk profile of its business. If appropriate, the licensee must increase the level of its capital resources beyond the basic minimum financial requirement stipulated in the Regulatory Code.

A licensee must continually review and monitor whether it is satisfying its overriding capital resource requirement responsibilities. Where the FSC find a licensee to be in breach of its ongoing responsibilities it may take enforcement action against the licensee, regardless of it having met the minimum prescribed financial requirement.

5.2 Regulatory Deposit Requirements

The BTCA also requires a licensed trust company holding a Class I or a Class II trust licence to hold such sum of money as may be prescribed and in such manner as may be prescribed by the Regulatory Code.

The Regulatory Code requires a trust company to ensure that, at all times, it has paid monies to the FSC equal to the required deposit. In practice, the FSC will expect an applicant for a trust licence to pay the FSC the deposit at the time of the application and before the licence is granted. In the case of a licensed trust company, the sum will usually be an estimate based on the applicant's business plan. As the business of a licensed trust company develops and grows, the deposit would be likely to increase. As with the capital resource requirement, the licensee is under an ongoing duty to monitor the level of the deposit and needs to ensure that it is increased as necessary and such increase is paid to the FSC.

The minimum required deposit for a Class I or a Class III trust licensee generally ranges from US$30,000 to US$80,000 depending upon the number of BVI business companies for which it provides registered agent services. For a Class II trust licensee, the minimum deposit is US$20,000. The FSC may however require a licensee to make an additional sum available as the FSC considers appropriate.

The reason why a licensee is required to maintain a deposit are for the purposes of using it to satisfy fees and penalties owing to the FSC, to pay for any enforcement action taken and to cover the costs of winding up the business of the licensee. The FSC would only look to the deposit for making good the outstanding fees and penalties where the trust company was unwilling or unable to meet them. This deposit, however, is not intended to cover the costs of any liquidation proceedings under the Insolvency Act 2003, except to the extent that these cover the winding up of the business.

5.3 Capital Resource Requirements – Licensed Company Managers

The Regulatory Code specifies a minimum capital resource requirement for licensed company managers of US$25,000. This is intended to cover the costs of the licensed company where it ceases to carry on business and the business needs to be wound up. The FSC does not require the entire capital resource requirement to be met only by cash. Provided at least US$10,000 of the capital resource requirement is

satisfied with cash in hand or on deposit, the balance may be made up of either a standby letter of credit or some other guarantee, or by an interest in real property located in the BVI. In both cases, the FSC must approve this non-cash element of the capital resource.

5.4 Professional Indemnity and Other Insurance

A licensed trust company and a licensed company manager must ensure at all times that they maintain sufficient professional indemnity and other insurance as is appropriate and necessary taking into account such factors as the nature, size, complexity, structure and diversity of their business.

Such indemnity and insurance should be sufficient, except where the FSC otherwise permits, to cover events or occurrences of negligence, or errors and omissions, of the trust company or company manager, the dishonesty of its employees, the loss and theft of documents and the costs of replacement or reinstatement of data.

The licensed trust company or licensed company manager shall notify the FSC in writing of any limitations to its cover which may apply to its business and generally it must also maintain systems and controls to ensure that it is complying with the terms and conditions of any policy of insurance.

The minimum level of cover for any one claim is the greater of:

(a) three times the relevant fees and commissions;

(b) thirty times the relevant fees and commissions from the single largest customer of the licensed trust company or company manager, including all related customers; or

(c) $5,000,000 in the case of a licensed trust company and $1,000,000 in the case of a licensed company manager.

Notwithstanding these minimum levels of cover, a licensed trust company is not required to maintain a level of insurance cover exceeding $10,000,000 and a licensed company manager is not required to maintain a level of insurance cover exceeding $2,000,000.

5.5 Managed Trust Companies

A managed trust company is defined as a licensed trust company whose trust licence is subject to the condition that its business is carried on and managed by a BVI trust company approved by the FSC. A managed trust company may apply for a Class I, a Class II or a Class III trust licence.

Generally, trust companies must establish a physical presence in the BVI, with an office and complement of staff, before they are permitted to conduct authorized financial business. However, by way of exception and where justified, the FSC is prepared to licence trust companies as managed trust companies which would not be required to establish a physical presence in the BVI. This is conditional upon the licensed business of a managed trust company being conducted by a trust company holding a Class I trust licence approved by the FSC for that purpose.

Except as provided by the Regulatory Code, a managed trust company is fully subject to the requirements of the Regulatory Code including the financial resources requirements referred to above. However, exemptions may be made available to a managed trust company where the FSC accepts that it should be subject to the supervision of a foreign regulatory authority. This is intended to ensure that the managed trust company is not subject to a dual regulatory regime.

Subject to having a board of directors, a managed trust company can rely on its managing trust company to provide management, resources and the other human and infrastructural resources required for it to function as a licensed business. However, the FSC would expect that its licensed business will be conducted in the BVI to a similar extent as any other trust company, albeit that the work is undertaken by the managing trust company. Whilst the FSC accepts that client-facing work will usually be undertaken outside the BVI, the FSC would not permit a managed trust company to continue to hold its licence if it became apparent that its licensed business was being carried on largely outside the BVI.

The Regulatory Code provides that the managed trust company shall enter into a written management agreement with the managing trust company and that the managed trust company shall not commence business until such time as the agreement is in force. The Regulatory Code highlights in some detail the key elements which must be outlined, and agreed to, in the management agreement.

5.6 Outsourcing

As outlined in section 2.5, the compliance function and a core management function cannot be outsourced. However, a managed trust company is permitted to outsource its compliance function to its managing trust company. The compliance function cannot be outsourced to any service provider other than the managing trust company. A managed trust company is still required to apply to the FSC for the approval of its compliance officer. The FSC may, if it considers it appropriate, require a managed trust company to appoint its own compliance officer.

6. Money Services Business

Part VI of the Regulatory Code regulates those holding a licence to conduct "money services business" in or from within the BVI pursuant to the recently-enacted Financing and Money Services Act 2009 (the "FMSA").

6.1 Financing Business

The FMSA introduced a prohibition on carrying on or holding oneself out as carrying on, in or from within the BVI, "financing" business or "money services" business, unless one is the holder of a licence. Under the FMSA, a person is considered to carry on "financing business" if:

a) s/he carries on, in the BVI, the business of providing credit under financing agreements to borrowers resident in the BVI;
b) in the course of any business carried on by the person in the BVI, s/he provides credit under a financing agreement, in an amount or to a value exceeding US$50,000 to a borrower in the BVI;
c) s/he carries on, in the BVI, the business of leasing property to a person resident in the BVI under a financing lease; or
d) s/he carries on such other business or activity as may be specified in the regulations as financing business.

6.2 Money Services Business

The FMSA also prohibits a person from carrying on, or holding themselves out as carrying on, money services business. A person is considered to carry on "money services business" if the person carries on the business of any one or more of the following services:

a) money transmission services;
b) cheque cashing services;
c) currency exchange services;
d) the issuance, sale or redemption of money orders or traveller's cheques;
e) such other services as may be specified in regulations; or
f) operating as an agent or franchise holder of a person carrying on one of the businesses specified above.

Part VI of the Regulatory Code supplements the FMSA in setting out the obligations of, and the requirements relating to, licensed money services businesses and their supervision by the FSC. It also lays out the capital resource and corporate governance requirements of money services licensees.

6.3 Capital Resource Requirements

The Regulatory Code specifies both:

a) an over-riding capital resource requirement (a money services business must ensure that, at all times, it maintains capital resources at a level that is adequate to support its licensed business, taking into account the nature, size, complexity, structure and diversity of that business and its risk profile, and maintain adequate systems and controls to monitor and assess its capital adequacy requirements on an ongoing basis); and
b) a minimum capital resource requirement (being cash in hand or cash on deposit of US$10,000 with a licensed bank approved by the FSC, or cash in hand or cash on deposit of US$5,000 with a licensed bank approved by the FSC along with security held or issued in the amount of US$5,000 made up of either a standby letter of credit or other form of guarantee which satisfies the criteria set out in the Regulatory Code, or an interest in real property in the BVI which the FSC approves as being a suitable and adequate capital resource).

The above capital resource requirements apply only to a "domestic money services business" (that is, a licensed money services business which is a BVI company). A "foreign money services business" (a licensed money services business that is a foreign undertaking rather than a BVI company which is conducting business in the BVI) is subject to an alternative "regulatory deposit" requirement. This is because it is considered too difficult for the FSC to enforce the capital resource requirements against a foreign company. A regulatory deposit of US$10,000 must be made to and retained by the FSC.

6.4 Corporate Governance

The corporate governance rules in Part VI of the Regulatory Code require a licensed money services business to take reasonable care to establish a corporate governance framework appropriate for the nature, size, complexity, structure and diversity of its business. A licensed money services business must ensure, for example, that:

- the systems and controls it has implemented pursuant to the FMSA are regularly reviewed and updated as required;
- it has adequate risk management systems in place; and
- it has a "span of control" which is adequate for the nature, size, complexity, structure and diversity of its business.

In order to demonstrate this "span of control", a licensee is required to ensure that its management is undertaken by at least two individuals at all times, who must each be "fit and proper" for the purpose. Furthermore, the corporate governance framework of the licensee must be such as to ensure that the directors or senior managers undertaking the management of the licensee can exercise independent judgment and that none of them are able to exercise duress or undue influence over the other(s).

The Regulatory Code also requires that a licensed money services business keep adequate and orderly records (including records of its financial affairs, all transactions undertaken by the business whether on its own account or for clients, its policies systems and controls, and minutes of all board meetings), along with establishing and maintaining an adequate and effective system of internal controls appropriate for the nature, size, complexity, structure and diversity of its business.

6.5 Foreign Money Services Business

In addition to the requirements outlined above, a foreign money services business is required to appoint a manager resident in the BVI to manage its business and affairs in the BVI, and to designate a senior manager in the licensee's home jurisdiction to which the BVI manager is to be responsible.

The corporate governance requirements apply only to a foreign money services business with respect to its business in the BVI.

6.6 Aspects of Regulatory Code not applicable to Money Services Licensees

Part I of the Regulatory Code outlined above (General Principles for Business) and aspects of Part II of the Regulatory Code dealing with licensing, fit and proper criteria for directors and senior managers, and requirements relating to financial statements, auditors and audits and customer assets) also apply to money services licensees.

However, it is expressly stated in the Regulatory Code that the provisions of Part II dealing with the general corporate governance requirements of licensees (Part II, Division III), outsourcing of licensed services (Part II, Division V) and customer assets (Division 7), do not apply to money services licensees.
It is important to note that the Regulatory Code applies only to money services licensees and not financing business licensees under the Act.

7. Enforcement

The FSC has the power to take enforcement action against a licensee for non-compliance with the Regulatory Code. The Regulatory Code contains a range of enforcement powers available to the FSC, including issuing directives or imposing administrative penalties. The FSC will be able to take into account any contravention of the Regulatory Code when assessing whether a licensee is "fit and proper" to hold a financial services licence,

and whether directors/senior managers of the licensee are "fit and proper" to be concerned with the management of the licensee.

8. Financial Resource Requirements

The financial resource requirements applicable to licensees are contained in the sector specific parts of the Regulatory Code (ie. the financial resource requirements applicable to banks are contained in Part III-Banking).

9. Prevention of Money Laundering and Terrorist Financing

The Regulatory Code does not set out a licensee's AML/CFT obligations. Such obligations are covered separately in the BVI Anti-Money Laundering Regulations and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008.

10. Mutual Funds

The Regulatory Code is not intended to apply to mutual funds but will apply to persons carrying on investment business under the new SIBA, which came into effect on 17 May 2010. For further information on mutual funds, please see our "Guide to Mutual Funds in the BVI" as well as our "Guide to Investment Business in the BVI".

For more specific advice relating to the Regulatory Code, we invite you to contact one of the following:

British Virgin Islands Office

Michael Burns
Managing Partner – BVI
+1 284 852 5318
mburns@applebyglobal.com

Sally Cox
Partner – BVI
+1 284 852 5301
scox@applebyglobal.com

Valerie Georges-Thomas
Partner – BVI
+1 284 852 5306
vthomas@applebyglobal.com

Heidi Maharaj
Associate - BVI
+1 284 852 5332
hmaharaj@applebyglobal.com

Appleby is the leading provider of offshore legal, fiduciary and administration services. With an unparalleled presence in the key offshore jurisdictions of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Isle of Man, Jersey, Mauritius and the Seychelles, the group offers advice on offshore law. We also have offices in the international financial centres of London, Hong Kong, Zurich and Bahrain.

Over 800 lawyers and professional specialists deliver sophisticated, specialised services, primarily in the areas of Corporate and Commercial; Litigation and Insolvency; Private Client and Trusts; and Property. We advise global public and private companies, financial institutions, and high net worth individuals, working with them and their advisers to achieve practical solutions, whether in a single location or across multiple jurisdictions.

This publication is intended only to provide a summary of the subject mattered covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.

If this guide has been sent to you, and you would like to update your details or be removed from our marketing database, please contact the marketing department at Appleby or e-mail info@applebyglobal.com

Bahrain
Bermuda
British Virgin Islands
Cayman Islands
Guernsey
Hong Kong
Isle of Man
Jersey
London
Mauritius
Seychelles
Zurich

applebyglobal.com