

No. of 2010

**VIRGIN ISLANDS**

**SECURITIES AND INVESTMENT BUSINESS ACT, 2010**

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No. of 2010 Securities and Investment Virgin Islands  
Business Act 2010

I Assent

Governor  
, 2010

VIRGIN ISLANDS

NO. of 2010

A Bill for

An Act to provide for the licensing, regulation and supervision of investment business, the registration of public mutual funds, the recognition of professional and private mutual funds and the control of offers of securities to the public in the Virgin Islands, to create offences relating to insider trading and market abuse and to provide for connected and consequential matters.

[Gazetted , 2010]

ENACTED by the Legislature of the Virgin Islands as follows:

**PRELIMINARY PROVISIONS**

Short title and commencement.

**1.** (1) This Act may be cited as the Securities and Investment Business Act, 2010.

(2) The provisions of this Act come into force on such date or dates as may be appointed by the Governor by proclamation published in the *Gazette* and different dates may be appointed for different provisions and different purposes.

Interpretation.

**2.** (1) In this Act, unless the context otherwise requires,

“affiliate”, with respect to an undertaking, means another undertaking that is in the same group as that undertaking;

“allot”, in relation to a security, includes issuing, selling, transferring or assigning the security;

“approved form” means a form approved by the Commission under the Financial Services Commission Act, 2001;

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“auditor” means a person qualified under the Regulatory Code to act as an auditor;

“buy” includes to acquire;

“BVI business company” means a company that is on the Register of Companies maintained under the BVI Business Companies Act, 2004;

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“capital resources”, with respect to a licensee, means the licensee’s capital resources calculated in accordance with the Regulatory Code;

“category” and “sub-category”, in relation to an investment business licence, mean a category or sub-category of investment business as specified in Schedule 3;

Schedule 3

“client”, in relation to a licensee, means a person, whether resident in or outside the Virgin Islands, to whom the licensee provides, agrees to provide or has provided a service that constitutes investment business, and includes a mutual fund;

“client assets” means investments and other assets that, in the course of its licensed business, a licensee holds, has custody or control of or is otherwise responsible for that

- (a) belong to a client or potential client of the licensee; or
- (b) are held by the licensee on behalf of a client or potential client;

“commencement date” means the date when this Act comes into force;

“Commission” means the Financial Services Commission established under section 3 of the Financial Services Commission Act, 2001;

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“company” means a body corporate, wherever incorporated, registered or formed, and includes a BVI business company;

“corporate licensee” means a licensee that is a company;

“country” includes a territory;

“Court” means the High Court;

“director”, in relation to an undertaking, means a person appointed to direct the affairs of the undertaking and includes

- (a) a person who is a member of the governing body of the undertaking; and
- (b) a person who, in relation to the undertaking, occupies the position of director, by whatever name called;

“document” means a document in any form and includes

- (a) any writing or printing on any material,
- (b) any record of information or data, however compiled, and whether stored in paper, electronic, magnetic or any non-paper based form and any storage medium or device, including discs and tapes,
- (c) books and drawings, and
- (d) a photograph, film, tape, negative, facsimile or other medium in which one or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced,

and, without limiting the generality of the foregoing, includes any court application, order and other legal process and any notice;

“dollar” or “\$” means the lawful currency of the United States of America;

“financial statements” has the meaning specified in section **69**;

“financial year”, in relation to financial statements, has the meaning specified in section **68**;

“foreign company” means a company that is incorporated, formed or registered outside the Virgin Islands, but excludes a BVI business company;

“foreign undertaking” means

- (a) a foreign company; or
- (b) an undertaking other than a foreign company that has its principal office outside the Virgin Islands;

“fund interest” means the rights or interests, however described, of the investors in a mutual fund with regard to the assets of the fund, but does not include a debt;

“group”, in relation to an undertaking (the “first undertaking”), means the first undertaking and any other undertaking that is

- (a) a parent of the first undertaking;
- (b) a subsidiary of the first undertaking;
- (c) a subsidiary of a parent of the first undertaking;
- (d) a parent of a subsidiary of the first undertaking;
- (e) an undertaking in which the first undertaking, or an undertaking specified in paragraphs (a) to (d), has a significant interest;

“instrument” includes any record, whether or not in the form of a document;

“investment” means an asset, right or interest specified in Schedule 1; Schedule 1

“investment activity” has the meaning specified in section 3;

“investment business” has the meaning specified in section 3;

“Investment Business Regulations” means the Investment Business Regulations made under section 21;

“investor”, in relation to a mutual fund, means a person who owns or holds fund interests issued by a mutual fund;

“joint enterprise” means an enterprise into which two or more persons enter for a commercial purpose related to a business carried on by those persons, other than an investment business, and, where one of the participants is an undertaking, each undertaking in the same group as the first undertaking is regarded as a participant in the joint enterprise;

“licence” means an investment business licence issued under section **6**;

“licensed fund administrator” means a licensee holding a category 6, sub-category B licence;

“licensed fund manager” means a licensee holding a category 3, sub-category B licence;

“licensee” means a person holding a licence;

“listing rules” has the meaning specified in the Public Issuers Code;

“Market Abuse Regulations” means the Market Abuse Regulations made under section **94**;

“market operator” has the meaning specified in the Public Issuers Code;

“mutual fund” or “fund” has the meaning specified in section **40**;

“Mutual Fund Regulations” means the Mutual Fund Regulations made under section **62**;

“parent”, in relation to an undertaking (the “first undertaking”), means another undertaking that

- (a) is a member of the first undertaking and whether alone, or under an agreement with other members, is entitled to exercise a majority of the voting rights in the first undertaking;
- (b) is a member of the first undertaking and has the right to appoint or remove the majority of the directors of the first undertaking;
- (c) has the right to exercise a dominant influence over the management and control of the first undertaking pursuant to a provision in the constitutional documents of the first undertaking;
- (d) is a parent of a parent of the first undertaking; or
- (e) is an undertaking that the Commission, by written notice, has directed shall be regarded as a parent of the first undertaking;

“participant”, in relation to a joint enterprise, means a person who has entered into the joint enterprise;

“partnership” includes

- (a) a limited partnership, wherever situated; and
- (b) a partnership constituted or formed under the law of a country outside the Virgin Islands;

“person” means an individual or an undertaking and includes a mutual fund, however constituted;

“prescribed” means prescribed in the Regulatory Code, or the Public Issuers Code, as the case may be;

“private fund” has the meaning specified in section **40**;

“professional fund” has the meaning specified in section **40**;

“prospectus” has the meaning specified,

- (a) in relation to a public fund, in section **40**; or
- (b) in relation to an issuer that is not a mutual fund, in section **24**;

“public fund” has the meaning specified in section **40**;

“Public Issuers Code” means the Code issued by the Commission with respect to public issuers under section **39**;

“recognised exchange” means an investment exchange that is prescribed as a recognised exchange in the Regulatory Code;

“recognised foreign fund” has the meaning specified in section **40**;

“registers” means the registers required to be maintained by the Commission under section **99**;

“Registrar of Corporate Affairs” means the Registrar of Corporate Affairs appointed under section 229 (1) of the BVI Business Companies Act, 2004; No. 16 of 2004

“Regulatory Code” means the Regulatory Code issued by the Commission under the Financial Services Commission Act, 2001; No. 12 of 2001

“security”,

- (a) for the purposes of Part V, has the meaning specified in Schedule 5; and
- (b) for the purposes of any other provision of this Act, means
  - (i) a share of any kind,
  - (ii) a debt obligation of any kind,
  - (iii) an option, warrant or right to acquire a share or debt obligation, or
  - (iv) an interest or right specified in the Public Issuers Code as a security,

but excludes an interest or right that the Public Issuers Code specifies is deemed not to be a security;

“segregated portfolio company” means a company incorporated or registered as a segregated portfolio company under Part VII of the BVI Business Companies Act, 2004;

“sell” includes to dispose of;

“senior officer” has the meaning prescribed in the Regulatory Code;

“significant interest”, in respect of an undertaking, means a holding or interest in the undertaking or in any parent of the undertaking held or owned by a person, either alone or with any other person and whether legally or equitably, that entitles or enables the person, directly or indirectly,

- (a) to control ten per cent or more of the voting rights of the undertaking;
- (b) to a ten per cent or more share in any distribution of the surplus assets of the undertaking; or
- (c) to appoint or remove one or more directors of the undertaking;

“subsidiary”, in relation to an undertaking (the “first undertaking”), means an undertaking of which the first undertaking is a parent;

“trustee”, in relation to a unit trust, means the person holding the property of the fund on trust for the investors;

“undertaking” means

- (a) a company;
- (b) a partnership; or
- (c) an unincorporated association;

“unit trust” means a mutual fund under which the property of the fund is held on trust for the investors.

(2) Where the Commission is permitted or required by this Act to consider the “public interest”, the “public” includes

- (a) the public inside and outside the Virgin Islands; and
- (b) any persons who have a legitimate interest in the decision to be made by the Commission including, in the case of a mutual fund, its investors or potential investors.

(3) For the purposes of this Act, one person (the first person) has a close connection with another person (the second person) if the first person is,

- (a) where the second person is an undertaking,
  - (i) a director or employee of the second person;
  - (ii) an affiliate of the second person;
  - (iii) a relative of an individual who is, or was, a director or employee of the second person;
- (b) where the second person is an individual, a relative of the second person;
- (c) such other person as may be specified, in relation to issuers, in the Public Issuers Code or, in relation to mutual funds, in the Mutual Fund Regulations.

(4) An individual’s relatives are his parents, spouse, siblings, children (including step-children) and their descendants.

(5) Unless the context otherwise requires, any reference to this Act includes a reference to any regulations made under this Act.

Meaning of “investment activity” and “investment business”.

Schedule 2

**3.** A person carries on investment business if, by way of business, he engages in an activity that

- (a) is of a kind specified as an investment activity in Schedule 2, Part A; and
- (b) is not excluded by Schedule 2, Part B.

*Unauthorised investment business*

Prohibition on unauthorised investment business.

**4.** (1) Subject to subsections (2) and (3), no person shall carry on, or hold himself out as carrying on, investment business of any kind in or from within the Virgin Islands unless he holds a licence authorising him to carry on that kind of investment business.

(2) For the purposes of, but without limiting, subsection (1),

- (a) a person carries on investment business in the Virgin Islands if
  - (i) he occupies premises in the Virgin Islands for the purposes of carrying on investment business; or
  - (ii) he solicits a person in the Virgin Islands for the purpose of offering to provide a service that constitutes investment business; and
- (b) a BVI business company that carries on, or holds itself out as carrying on, investment business outside the Virgin Islands is deemed to carry on, or hold itself out as carrying on, investment business from within the Virgin Islands.

Schedule 2

(3) Subsection (1) does not apply to any person excluded under Schedule 2, Part C in such circumstances and to such extent as may be specified.

*Licensing*

Categories of, and restrictions on, investment business licence.

Schedule 3

**5.** An investment business licence

- (a) shall be issued in one or more of the categories specified in Schedule 3 and shall state the categories and sub-categories of investment business that the licensee is authorised to carry on;

- (b) is subject to such conditions as may be imposed by the Commission under section 40B of the Financial Services Commission Act; and
- (c) does not authorise the holder to carry on any category or sub-category of investment business that is not specified on the licence.

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6. (1) A person may make an application to the Commission for an investment business licence.

Application for, and issuance of, licence.

(2) Subject to subsections (3) and (4), the Commission may issue a licence to an applicant if it is satisfied that

- (a) the applicant intends, if issued with a licence, to carry on the relevant investment business;
- (b) the applicant satisfies the requirements of this Act and the Regulatory Code with respect to the application;
- (c) the applicant will, on the issuance of the licence,
  - (i) have capital resources at least equal to the amount that it is required to maintain under section 8(1); and
  - (ii) otherwise be in compliance with this Act, the Regulatory Code and any practice directions applicable to it;
- (d) the applicant, its directors and senior officers and any persons having a significant interest in the applicant satisfy the Commission's fit and proper criteria;
- (e) the organisation, management and financial resources of the applicant are, or on the issuance of the licence will be, adequate for the carrying on of the relevant investment business; and
- (f) issuing the licence is not against the public interest.

(3) Without limiting the discretion given to the Commission under subsection (2), the Commission may refuse to issue a licence to an applicant if it is of the opinion that any person having a share or other interest in the applicant, whether legal or equitable, does not satisfy the Commission's fit and proper criteria.

(4) For the purposes of subsection (2), "relevant investment business" means the category and sub-category of investment business that the applicant will be authorised to carry on if a licence is issued to it.

(5) A licence issued under subsection (2) shall be in writing and in the approved form and shall comply with section 5.

*Financial Resource Requirements*

Maintenance of financially sound condition.

**7.** (1) A licensee shall, at all times, maintain its business in a financially sound condition by

- (a) having assets,
- (b) providing for its liabilities, and
- (c) generally conducting its business,

so as to be in a position to meet its liabilities as they fall due.

(2) If a licensee forms the opinion that it does not comply with subsection (1), it shall forthwith notify the Commission in writing.

Maintenance of capital resources.

**8.** (1) Without limiting section 7 and subject to subsection (4), where the Regulatory Code prescribes a minimum capital resource requirement with respect to a category or sub-category of licence, a licensee holding a licence in such category or sub-category shall ensure that at all times its capital resources are maintained in an amount not less than the prescribed minimum.

(2) If the Commission considers it appropriate, having regard to the nature and extent of the investment business carried on, or proposed to be carried on, by a licensee, the Commission may direct the licensee,

- (a) in the case of a licensee to whom subsection (1) applies, to increase its capital resources to an amount higher than the prescribed minimum applicable to the licensee; or
- (b) in the case of a licensee to whom subsection (1) does not apply, to maintain its capital resources in an amount not less than the amount specified in the direction.

(3) A direction issued under subsection (2) shall specify a reasonable period for compliance with the direction.

(4) Notwithstanding subsection (1), where the Commission issues a direction under subsection (2) to a licensee, the licensee shall ensure that at all times its capital resources are maintained in an amount not less than the amount specified in the direction.

(5) If the capital resources of a licensee fall below the amount that it is required to maintain under subsection (1) or (4), it shall forthwith notify the Commission in writing.

**9.** (1) Subject to subsection (2), every share in a corporate licensee issued after the commencement date shall be fully paid for in cash on issue. Shares.

(2) A share in a corporate licensee may be issued for a consideration other than cash

(a) where permitted by the Regulatory Code; or

(b) where authorised by the Commission in writing, on the application of the licensee.

*Obligations of, and restrictions on, licensees*

**10.** (1) A licensee shall not appoint a director or senior officer without the prior written approval of the Commission. Appointment of directors and senior officers.

(2) The Commission shall not grant approval under subsection (1) unless it is satisfied that the person concerned

(a) satisfies the Commission's fit and proper criteria; and

(b) complies with the requirements of any guidelines issued by the Commission relating to the approval of directors and senior officers.

**11.** (1) A person owning or holding a significant interest in a licensee shall not sell, transfer, charge or otherwise dispose of his interest in the licensee, or any part of his interest, unless the prior written approval of the Commission has been obtained. Disposing of, or acquiring significant interest in, licensee.

(2) A person shall not, whether directly or indirectly, acquire a significant interest in a licensee unless the prior written approval of the Commission has been obtained.

(3) A licensee shall not, unless the prior written approval of the Commission has been obtained,

(a) cause, permit or acquiesce in a sale, transfer, charge or other disposition referred to in subsection (1);

(b) issue or allot any shares or cause, permit or acquiesce in any other

reorganisation of its share capital that results in

- (i) a person acquiring a significant interest in the licensee; or
- (ii) a person who already owns or holds a significant interest in the licensee, increasing or decreasing the size of his interest.

(4) An application to the Commission for approval under subsection (1), (2) or (3) shall be made by the licensee.

(5) The Commission shall not grant approval under subsection (1), (2) or (3) unless it is satisfied that, following the acquisition or disposal, any person who will acquire a significant interest in the licensee satisfies the Commission's fit and proper criteria.

Authorisation required with respect to offices and subsidiaries.

**12.** A licensee shall not, without the prior written approval of the Commission,

- (a) open, maintain or carry on business through a branch or a representative or contact office outside the Virgin Islands; or
- (b) incorporate, form or acquire a subsidiary.

Professional indemnity and other insurance.

**13.** A licensee shall at all times maintain such professional indemnity and other insurance as may be prescribed.

Change of name.

**14.** (1) A licensed fund manager and a licensed fund administrator shall notify the Commission within twenty-one days of any change in its corporate name or the name under which it carries on business.

(2) A licensee, other than one to which subsection (1) applies, shall not, without the prior written approval of the Commission having been obtained, change its corporate name or the name under which it carries on business.

Commission may require licensee to change name under which it carries on business.

**15.** The Commission may, by written notice, direct a licensee to change the name under which it carries on business if the Commission is of the opinion that the name is

- (a) identical to that of any other person, whether within or outside the Virgin Islands, or which so nearly resembles that name as to be likely to deceive; or
- (b) otherwise misleading or undesirable.

Bearer shares.

**16.** (1) A licensee shall not issue any bearer shares.

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(2) For the purposes of subsection (1), "bearer share" means

- (a) in the case of a corporate licensee, a share represented by a certificate which states that the bearer of the certificate is the owner of the share, and includes a share warrant to bearer; and
- (b) in the case of any other licensee, a certificate of ownership interest in the licensee that is issued in bearer form.

*Corporate Governance*

- 17.** (1) A licensee shall keep records that are sufficient
- (a) to show and explain its transactions;
  - (b) at any time, to enable its financial position to be determined with reasonable accuracy;
  - (c) to enable it to prepare such financial statements and make such returns as it is required to prepare and make under this Act and the Regulatory Code; and
  - (d) to enable, if applicable, its financial statements to be audited in accordance with this Act.
- (2) The Regulatory Code may prescribe
- (a) the form, manner and place in which the records specified in subsection (1) are to be maintained;
  - (b) other records required to be maintained by a licensee and the form, manner and place in which such records are to be maintained.
- (3) A licensee shall retain the records required to be maintained under this section for a period of at least five years after the completion of the transaction to which the records relate.
- (4) Subsection (3) applies to a licensee after the cancellation or revocation of its licence as if its licence had not been cancelled or revoked.

Maintenance of records by licensee.

- 18.** (1) A licensee shall
- (a) ensure that client assets are identified, or identifiable, and appropriately segregated and accounted for; and
  - (b) make arrangements for the proper protection of client assets.

Client assets.

(2) Without limiting subsection (1), the Regulatory Code may provide for the holding, control, and handling of, and the accounting for, client assets by a licensee and, in particular, it may provide for

- (a) the manner in which client assets are to be identified, or made identifiable, segregated, accounted for and protected;
- (b) the opening and maintenance of client accounts and the payment of monies into client accounts;
- (c) the audit of client accounts and records keeping requirements concerning client assets;
- (d) how interest and other monies earned with respect to client assets is to be dealt with;
- (e) circumstances in which client assets held by a licensee are deemed to be held on trust for the client; and
- (f) such other matters relating to the custody and control of client assets by a licensee as the Commission considers appropriate.

*Control of advertisements and conduct of business*

Misleading advertisements, statements, etc.

**19.** (1) A licensee shall not, in relation to any activity that constitutes investment business, whether or not carried on by him and whether or not the activity is one that he is authorised to carry on, or in relation to any investment,

- (a) issue, or cause or permit to be issued, an advertisement, brochure or similar document or make, or cause or permit to be made, a statement, promise or forecast, which he knows, in a material particular
  - (i) is false or misleading; or
  - (ii) contains an incorrect statement of fact;
- (b) issue, or cause or permit to be issued, an advertisement, brochure or similar document or make, or cause or permit to be made, a statement, promise or forecast, where he is reckless as to whether the advertisement, brochure, document, statement, promise or forecast, in a material particular
  - (i) is false or misleading; or

- (ii) contains an incorrect statement of fact;
- (c) dishonestly conceal a material fact, whether in connection with an advertisement, brochure or similar document, statement, promise or forecast, or otherwise.

(2) If the Commission is of the opinion that an advertisement, brochure or other similar document issued, or to be issued, or a statement, promise or forecast made, or to be made, by or on behalf of a licensee contravenes subsection (1) or is contrary to the public interest, it may

- (a) direct the licensee in writing not to issue the document, or not to make the statement, promise or forecast, or to withdraw it; or
- (b) grant written approval to the licensee to issue the document, or make the statement, promise or forecast, with such changes as the Commission may specify.

(3) Subsection (2) does not limit the powers of the Commission to take enforcement action under Part V of the Financial Services Commission Act, 2001.

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**20.** The Regulatory Code may

Regulatory Code may provide for advertising, etc.

- (a) prohibit the issue of advertisements, brochures or similar documents relating to investment activities of a particular type or description, whether as to the contents of the advertisement, brochure or other document or the persons for whom they are intended; and
- (b) provide for
  - (i) the issue, form and content of advertisements, brochures or similar documents, and
  - (ii) the making of statements, promises and forecasts,relating to investment business.

*Administration*

**21.** (1) The Cabinet may, on the advice of the Commission, make Investment Business Regulations generally for giving effect to this Part and for the administration of this Act by the Commission as it relates to investment business.

(2) The Investment Business Regulations may,

- (a) be made for the purposes of this Act or for specified provisions of this Act;
- (b) make different provision in relation to different persons, circumstances or cases; and
- (c) subject to subsection (3), provide for offences and penalties for any contravention of or failure to comply with specified requirements of the Regulations.

(3) A penalty provided for an offence under the Investment Business Regulations may not exceed,

- (a) in the case of a fine, the sum of twenty thousand dollars; and
- (b) in the case of a period of imprisonment, the term of three years.

**22.** (1) Without limiting the powers of the Commission under this Act or the Financial Services Commission Act 2001, the Regulatory Code may specify or provide for

- (a) systems and controls, including internal controls, to be maintained by licensees;
- (b) policies and procedures to be maintained by licensees with respect to the assessment and management of risk;
- (c) principles and rules of corporate governance to be adhered to by licensees;
- (d) the duties and responsibilities of the directors of a licensee;
- (e) prudential requirements not inconsistent with this Act applicable to licensees;
- (f) business conduct rules to be followed by licensees; and
- (g) circumstances in which an individual is required to be approved by the Commission for appointment by a licensee, whether as an employee, as an agent or in such other capacity as may be

specified.

- (2) The Regulatory Code may
  - (a) make provision in relation to different persons or class of persons, circumstances or cases;
  - (b) contain such incidental, supplemental and transitional provisions as the Commission considers necessary or expedient.

## **PART II**

### **PUBLIC ISSUES OF SECURITIES**

#### *Scope and interpretation*

- 23.** This Part does not apply with respect to a security Scope of this Part.
  - (a) issued, to be issued, or guaranteed by the Government of the Virgin Islands;
  - (b) issued, or to be issued, by a person
    - (i) registered, or required to be registered, under Part III as a public fund; or
    - (ii) recognised, or required to be recognised, under Part III as a private fund or a professional fund; or
  - (c) issued, or to be issued, by such persons as may be specified in the Public Issuers Code.
  
- 24.** (1) For the purposes of this Part, unless the context otherwise requires, Interpretation for this Part.
  - “advertisement” means any form of communication that
    - (a) relates to a specific offer to the public to subscribe for securities; and
    - (b) is intended to specifically promote the potential subscription of securities;
  
  - “foreign listed issuer” means a foreign company, any securities of which are approved for listing on a recognised exchange;

“issuer”, in relation to a security, means the person by whom the security is, or is to be, issued;

“listed”, in relation to a security, means that the security is listed on a recognised exchange;

“listed issuer” means a BVI business company, any securities of which are approved for listing on a recognised exchange;

“offer” includes

- (a) an invitation and any proposal or invitation to make an offer;
- (b) an offer made through a licensee or any other person;
- (c) an offer however communicated or made;

“promoter”, in relation to an offer of securities to the public, means a person other than the issuer who, whether acting alone or in conjunction with others, is instrumental in organising the offer of the securities to the public;

“prospectus” means a document that contains an invitation or offer of securities to the public for purchase or subscription and, where appropriate, includes a supplementary prospectus;

“public issuer” means an issuer, with respect to which, a prospectus has been registered under section **28**;

“public offer” is to be construed in accordance with section **25**;

“qualified investor” means a person specified as a qualified investor in Schedule 4;

“registered prospectus” means a prospectus that has been registered by the Commission under section **28**, the registration of which has not been cancelled and, where appropriate, includes a supplementary prospectus that has been registered by the Commission under section **29**; and

“supplementary prospectus” means a document containing details of amendments to a registered prospectus.

(2) A reference in this Part to an offer of securities to the public shall be construed as including a reference to distributing an advertisement, a prospectus, a registered prospectus or an application form for the subscription of securities.

*Control of public offers*

**25.** (1) Subject to subsection (3), no security shall be offered to the public in the Virgin Islands for purchase or subscription by or on behalf of an issuer, unless

Prohibition on public offer of securities.

- (a) the offer is contained in a registered prospectus; and
- (b) the offer complies with such requirements as may be specified in the Public Issuers Code.

(2) For the purposes of subsection (1),

- (a) an offer of securities to any person in the Virgin Islands is an offer of the securities to the public in the Virgin Islands;
- (b) a security is offered to a person in the Virgin Islands if the offer is received by the person in the Virgin Islands; and
- (c) no regard shall be had to
  - (i) the place where the allotment arising out of the offer occurs; or
  - (ii) where the issuer is incorporated, formed or registered or where it carries on business.

(3) Subsection (1) does not apply to an offer that

- (a) is deemed not to be a public offer under section **26**(1); or
- (b) is exempted by the Public Issuers Code in accordance with section **26**(4).

**26.** (1) An offer of securities to a person is deemed not to constitute an offer of securities to the public if

Circumstances in which offer not public offer.

- (a) the offer is made to, or directed exclusively at, one or more of the following:
  - (i) a qualified investor;
  - (ii) a person having a close connection with the issuer;
  - (iii) the Government of the Virgin Islands;

- (b) the minimum aggregate purchase price payable by a person for securities acquired by him pursuant to the offer
  - (i) must be paid before the securities are issued; and
  - (ii) equals or exceeds the minimum specified in the Public Issuers Code, or the equivalent in another currency; or
- (c) the offer is made
  - (i) to such persons,
  - (ii) with respect to securities issued, or to be issued, by such persons, or
  - (iii) in such circumstances,as may be specified in the Public Issuers Code.

(2) In determining the purchase price paid, or to be paid, for the purposes of subsection (1)(b), any amount paid, or payable, for the securities shall be disregarded to the extent that it is paid or to be paid out of money loaned by the issuer or by a person associated with the issuer.

(3) For the purposes of subsection (2), a person is associated with an issuer if the person is

- (a) an affiliate of the issuer;
- (b) a director of the issuer; or
- (c) holds a significant interest in the issuer.

(4) Without limiting subsection (1)(c), the Public Issuers Code may provide for section **25** to be modified or disapplied where

- (a) the issuer is a listed company or a foreign listed company; and
- (b) the offer complies with the requirements specified for public offers made by listed companies or foreign listed companies, as the case may be, in the Public Issuers Code.

*Prospectuses*

**27.** (1) A prospectus intended to be submitted to the Commission for registration shall

Form and content of prospectus.

- (a) be in writing and be dated;
- (b) provide full and accurate disclosure of all such information as investors would reasonably require and expect to find for the purpose of making an informed investment decision;
- (c) contain a summary statement of investors' rights as provided in the Public Issuers Code;
- (d) be in the form, contain the information, statements, certificates and other matters specified in the Public Issuers Code; and
- (e) have attached to it such documents as may be specified in the Public Issuers Code.

(2) The date of a prospectus shall be no later than the date of the application to the Commission for registration of the prospectus.

(3) Any documents attached to a prospectus referred to in subsection (1) shall comply with the requirements contained in the Public Issuers Code.

**28.** (1) Application may be made to the Commission for the registration of a prospectus by

Registration of prospectus.

- (a) the issuer; or
- (b) a person authorised by the issuer to make the application on the issuer's behalf.

(2) Subject to subsection (3), the Commission may register a prospectus if it is satisfied that the prospectus complies with this Act and the Public Issuers Code.

(3) The Commission shall not register a prospectus if it is of the opinion that, although complying with this Act and the Public Issuers Code,

- (a) the prospectus contains a material error or misdescription or a statement that is misleading, omits a material fact or particular or is unclear;
- (b) the prospectus does not provide full and accurate disclosure of all such information as investors would reasonably require and expect to find for the purpose of making an informed investment decision; or

- (c) approving the prospectus would be contrary to the public interest.
- (4) The Commission shall,
  - (a) if it registers the prospectus, provide the applicant with written confirmation of its approval; or
  - (b) if it refuses to register the prospectus, provide the applicant with a written notice of its decision.

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(5) For the avoidance of doubt, section 40B of the Financial Services Commission Act, 2001 applies to an application under this section.

Registration of supplementary prospectus.

**29.** (1) An application to the Commission to register a supplementary prospectus setting out amendments to a registered prospectus

- (a) may be made by or on behalf of an issuer at any time during the relevant period; and
- (b) shall be made by the issuer or the person who applied for the registration of the prospectus on the issuer's behalf if, during the relevant period, the issuer, or the person who applied for registration of the prospectus, becomes aware that the registered prospectus
  - (i) contains a material inaccuracy; or
  - (ii) omits a material fact or particular.
- (2) For the purposes of subsection (1),
  - (a) the "relevant period" is the period commencing with the registration of a prospectus and ending with the closure of the offer to which the prospectus relates; and
  - (b) subsection (1)(b) applies whether the inaccuracy or omission is due to the fact that the prospectus contained an error on issue, a change in circumstances or some other reason.

(3) Section 27 applies to the supplementary prospectus and section 28 applies to the registration of the supplementary prospectus as if, in each case, the supplementary prospectus was the original prospectus.

(4) Where a supplementary prospectus is registered under this section, the issuer shall ensure that a copy is made available to every person who has received a copy of the original prospectus.

**30.** (1) A registered prospectus shall not be distributed by, or on behalf of, an issuer

Distribution of prospectus.

- (a) if the person distributing it knows, or ought reasonably to know, that the prospectus contains a material error, is materially misleading or omits a material fact or particular; or
- (b) where a supplementary prospectus has been registered, unless the registered prospectus incorporates all the amendments in the supplementary prospectus.

(2) For the purposes of subsection (1)(a), it is immaterial whether or not the prospectus became misleading or false by reason of a change in circumstances subsequent to the registration of the prospectus.

(3) A registered prospectus shall not be distributed unless it is accompanied by the documents, if any, required by the Public Issuers Code.

**31.** If a prospectus is distributed with respect to an offer of securities in the Virgin Islands in circumstances where section 25 does not apply, the prospectus shall comply with section 27(1), except to the extent that the Public Issuers Code otherwise provides.

Prospectus issued, other cases.

**32.** The Public Issuers Code may make provision for

Public Issuers Code may provide for prospectuses.

- (a) the form of, and information, statements, certificates and other matters to be contained in, a prospectus;
- (b) the documents to be attached to a prospectus;
- (c) the manner in which a prospectus may be communicated or distributed or otherwise made available to members of the public;
- (d) the circumstances in which prospectuses prepared in accordance with the laws or requirements of a country outside the Virgin Islands may be registered by the Commission; and
- (e) such other requirements with respect to prospectuses and their registration as are reasonably required to give effect to this Part.

*Compensation orders*

Compensation  
false or misleading  
advertisement or  
prospectus.

**33.** (1) Subject to section **34**, where a prospectus, whether registered or not, is distributed, the Court may, on the application of a subscriber, make a compensation order against one or more persons specified in subsection (2) if the subscriber

- (a) acquired securities in reliance on the prospectus; and
- (b) suffered loss or damage by reason of
  - (i) any untrue or misleading statement in the prospectus; or
  - (ii) the omission from the prospectus of any matter required to be included in it by virtue of this Act or the Public Issuers Code.

(2) Subject to subsection (3), a compensation order may be made against,

- (a) the issuer of the securities referred to in the prospectus, unless the issuer proves that it did not make or authorise the offer in relation to which the prospectus was issued;
- (b) where the issuer is an undertaking, a person who
  - (i) has signed the prospectus as a director;
  - (ii) is a director of the issuer at the time that the prospectus was distributed; or
  - (iii) has authorised himself to be named, and is named, in the prospectus as a director or as having agreed to become a director of the company either immediately or at a future time;
- (c) if there is a guarantor for the issue, the guarantor in relation to information in the prospectus that relates to the guarantor and the guarantee;
- (d) a person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus;
- (e) a person who is a promoter of the offer and, where the promoter is a company, a person who is a director of the promoter when the prospectus is distributed; and
- (f) a person not falling within paragraphs (a) to (e) who has

authorised the contents of the prospectus.

(3) The Court shall not make a compensation order against a person who is a director of the issuer if that person proves that

- (a) the prospectus was distributed without his knowledge or consent; and
- (b) on becoming aware of the distribution of the prospectus, he gives reasonable public notice that it was distributed without his knowledge or consent.

(4) The Court may, on the application of a subscriber, make a compensation order against a person who fails to comply with section 29(1)(b) if the subscriber

- (a) acquired securities in reliance on the prospectus in question; and
- (b) suffered loss or damage in respect of the securities by reason of the failure.

(5) This section does not affect any liability which may be incurred apart from this section.

**34.** The Court shall not require a person to compensate a subscriber under section 33 for loss or damage caused with respect to a statement or omission referred to in section 33(1)(b)(i) or (ii) if the person proves, to the satisfaction of the Court, that

Circumstances in which no compensation to be awarded.

- (a) at the time that the prospectus was distributed, he reasonably believed, having made such enquires as were reasonable, that the statement was true and not misleading, or the matter whose omission from the prospectus caused the loss was properly omitted and that one or more of the following applies:
  - (i) he continued in this belief until the time when the securities in question were acquired;
  - (ii) the securities were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them;
  - (iii) before the securities were acquired, he had taken all such steps as were reasonable for him to have taken to secure that a correction was brought to the attention of those persons;
- (b) before the securities in question were acquired, a correction had been published in a manner calculated to bring it to the attention of

persons likely to acquire the securities or that he took all such steps as were reasonable for him to take to secure publication and reasonably believed that publication had taken place before the securities were acquired; or

- (c) the person suffering the loss acquired the securities in question knowing, as the case may be,
  - (i) that the statement was false or misleading;
  - (ii) of the matter that had been omitted; or
  - (iii) of the change or new matter.

### *Enforcement*

Cancellation or suspension of registration.

**35.** (1) The Commission may suspend or cancel the registration of a prospectus if it is of the opinion that

- (a) the prospectus
  - (i) contains a material error or is materially misleading;
  - (ii) omits a material fact or particular; or
  - (iii) does not comply with this Act or the Public Issuers Code; or
- (b) the continued registration of the prospectus is not in the public interest.

(2) The period of suspension of the registration of a prospectus under subsection (1) shall not exceed thirty days.

(3) Before cancelling the registration of a prospectus, the Commission shall give written notice to the issuer stating

- (a) the grounds upon which it intends to cancel the registration; and
- (b) that unless the issuer, by written notice submitted to the Commission, shows good reason why the registration of the prospectus should not be cancelled, the registration will be cancelled on a date no earlier than fourteen days after the date of the notice and no later than the date that the suspension notice expires.

(4) Where the Commission suspends the registration of a prospectus, it shall immediately notify the issuer in writing of the suspension and the reasons for the suspension.

(5) If it is satisfied that the suspension of the registration of a prospectus should not continue, the Commission may withdraw the suspension.

(6) While the registration of a registered prospectus is suspended, no allotment may be made of any securities subscribed for but not allotted, whether the securities were subscribed for before or after the suspension.

(7) The suspension of the registration of a prospectus shall be kept confidential by the Commission, unless the registration is subsequently cancelled.

**36.** (1) Where a person makes an offer of securities to which this Part applies and the Commission has reasonable grounds for suspecting that a provision of this Part or the Public Issuers Code has been, or will be, contravened, the Commission may direct that the offer is suspended for a period not exceeding fourteen days.

Suspension or prohibition of public offer.

(2) Where the Commission issues a direction under subsection (1), it may also direct that the offer should not be advertised and that any existing advertisement is suspended in accordance with the Commission's direction.

(3) If the Commission forms the opinion that a provision of this Part or the Public Issuers Code has been contravened, it may direct that the offer be withdrawn.

(4) A direction under subsection (3) may be made

(a) after a direction has been made under subsection (1); or

(b) even though no direction has been issued under subsection (1).

*Other provisions applying to public issuers*

**37.** The BVI Business Companies Act is disapplied and modified with respect to public issuers that are BVI business companies to the extent provided for in Schedule 6.

Modification of Companies Act, public issuers.

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Schedule 6

*Offers made outside the Virgin Islands*

Offer made outside the Virgin Islands, BVI company.

**38.** (1) An offer for securities issued, or to be issued, by a BVI business company that is made outside the Virgin Islands, shall be made in accordance with the laws or rules of the country in which the offer is made.

(2) For the purposes of subsection (1), “laws” includes any subordinate legislation and “rules” includes any applicable listing rules or any rules issued by a market operator to which the BVI business company is subject.

*Administration*

Public Issuers Code.

**39.** (1) The Commission may issue a Public Issuers Code

- (a) providing for
  - (i) the public issues of securities and the duties and obligations of public issuers;
  - (ii) the preparation of financial statements by public issuers and their audit and for the powers and duties of auditors of public issuers; and
  - (iii) meetings of members, including the notice to be given to members; and
- (b) giving effect to this Part and for the administration of this Part by the Commission; and
- (c) in respect of anything permitted by this Part to be contained in the Public Issuers Code.

(2) The Public Issuers Code may

- (a) make provision in relation to different persons or class of persons, circumstances or cases; and
- (b) contain such incidental, supplemental and transitional provisions as the Commission considers necessary or expedient.

**PART III**  
**MUTUAL FUNDS**

*Interpretation*

**40.** (1) In this Part, unless the context otherwise requires,

Interpretation for  
this Part.

“authorised representative” means a person appointed in accordance with section **64**;

“constitutional documents” means,

- (a) in the case of a company, the memorandum and articles of association, the company’s constitution or such other equivalent constituting instrument;
- (b) in the case of a partnership, the agreement or other instrument by which the partnership is formed and governed;
- (c) in the case of a unit trust, the trust deed or other equivalent instrument by which the unit trust is organised or governed;
- (d) in the case of a mutual fund that does not fall within paragraph (a), (b) or (c), the principal instrument by which the mutual fund is constituted, formed or organised and governed;

“custodian” means a person to whom the fund property is entrusted for safe keeping;

“experienced investor” means

- (a) a person who holds
  - (i) a licence issued under section **6**;
  - (ii) a licence issued under the Banks and Trust Companies Act, 1990; or No. 9 of 1990
  - (iii) an insurer’s licence issued under section 8 of the Insurance Act, 2008; No. 1 of 2008
- (b) a person licensed in a jurisdiction outside the Virgin Islands to carry on an activity equivalent to an activity for which a

license specified in paragraph (a) is required, provided that the person is regulated and supervised in the carrying on of that business; or

- (c) a public, private or professional fund;

“foreign fund” means a mutual fund that is incorporated, constituted, formed or organised under the laws of a country outside the Virgin Islands;

“functionary”, in relation to a mutual fund, means

- (a) the manager, administrator, investment advisor or custodian of the fund;
- (b) in the case of a fund that is a unit trust, the trustee;
- (c) a prime broker acting for, or in relation to, a fund; or
- (d) a person undertaking such other function with respect to the fund as may be specified in the Mutual Fund Regulations;

“fund administrator” means a person who, by way of business, provides a mutual fund with fund administration services;

“fund manager” means a person who, by way of business, provides a fund with fund management services;

“mutual fund” or “fund” means a company or any other body, a partnership or a unit trust that is incorporated, formed or organised, whether under the laws of the Virgin Islands or the laws of any other country, which

- (a) collects and pools investor funds for the purpose of collective investment, and
- (b) issues fund interests that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company or other body, partnership or unit trust, as the case may be, and includes
  - (i) an umbrella fund whose fund interests are split into a number of different class funds or sub-funds, and

- (ii) a fund which has a single investor which is a mutual fund not registered or recognised under this Act,

but excludes any company or other body, partnership or unit trust which is of a type or description designated by the Mutual Fund Regulations as not being a mutual fund;

“private fund” means a fund that is recognised under section **55** as a private fund;

“professional fund” means a fund that is recognised under section **55** as a professional fund

“professional investor” means a person

- (a) whose ordinary business involves, whether for that person’s own account or the account of others, the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, of the fund; or
- (b) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of such sum as shall be specified in the Mutual Fund Regulations or its equivalent in any other currency and that he consents to being treated as a professional investor;

“promoter” means a person who, whether acting alone or in conjunction with others, directly or indirectly takes the initiative in forming or organising a mutual fund, but does not include an underwriter who receives underwriting commission without taking any part in the forming or organising of the mutual fund;

“prospectus”, in relation to a public fund, means a document that contains an invitation or offer to investors or potential investors to purchase or subscribe for fund interests, and includes an amended prospectus;

“public fund” means a fund that is registered under section **45** as a public fund;

“recognised country” means a country recognised by the Commission under subsection (4);

“recognised foreign fund” means a foreign fund that is recognised by the Commission under section **57**;

“underwriter” means a person who,

- (a) as principal, agrees to purchase fund interests issued by mutual funds with a view to offering them to the public; or
- (b) as agent for a mutual fund, offers for sale or sells to the public fund interests issued by the mutual fund.

(2) For the purposes of the definitions of “fund administrator” and “fund manager”, “fund administration services” and “fund management services”

- (a) include such specific activities, and
- (b) exclude such specific activities,

as may be prescribed in the Mutual Funds Regulations.

(3) Regulations made in accordance with subsection (2) do not limit the generality of “fund administration services” or “fund management services”.

(4) The Commission may, by notice published in the *Gazette*, recognise a country for the purposes of this Act.

### *Prohibitions*

Prohibitions with respect to business of unregistered or unrecognised funds.

- 41.** (1) Subject to sections **43** and **44**,
- (a) a company shall not carry on business or hold itself out as carrying on business as a mutual fund in or from within the Virgin Islands,
  - (b) the partners of a partnership that is a mutual fund shall not carry on or hold themselves out as carrying on the business of the fund in or from within the Virgin Islands,
  - (c) the trustee of a unit trust that is a mutual fund shall not carry on or hold itself out as carrying on the business of the unit trust in or from within the Virgin Islands, and
  - (d) a mutual fund that does not fall within paragraph (a), (b) or (c) shall not carry on or hold itself out as carrying on business as a mutual fund in or from within the Virgin Islands,

unless, the mutual fund concerned is a public fund, a professional fund, a private fund or a recognised foreign fund.

(2) A person shall not act as the functionary, or otherwise be concerned with the management or administration, of a mutual fund that carries on business in or from within the Virgin Islands, unless the mutual fund concerned is a public fund, a professional fund, a private fund or a recognised foreign fund.

(3) For the purposes of this section, but without limiting the section,

- (a) a mutual fund, whether incorporated, formed or organised within or outside the Virgin Islands, is deemed to carry on business in the Virgin Islands, if
  - (i) it operates from a place of business in the Virgin Islands; or
  - (ii) it solicits an individual within the Virgin Islands to subscribe for, or purchase, any of its fund interests; and
- (b) a mutual fund that carries on business outside the Virgin Islands, is deemed to carry on business from within the Virgin Islands if it is
  - (i) a BVI business company;
  - (ii) a partnership formed under the laws of the Virgin Islands; or
  - (iii) a unit trust governed by the trust laws of the Virgin Islands and managed from within the Virgin Islands.

(4) For the avoidance of doubt, a foreign fund does not carry on business in the Virgin Islands as a mutual fund solely by reason of the fact that it appoints a licensee as its fund administrator, fund manager, investment advisor or custodian.

**42.** (1) A person, including the mutual fund itself, shall not, whether in or from within the Virgin Islands, promote a mutual fund unless

Prohibition against promotion of mutual funds.

- (a) the fund is
  - (i) a public fund,
  - (ii) a professional or private fund, or
  - (iii) a recognised foreign fund, andthe fund is promoted as permitted by this Act; or
- (b) the communication or advice is exempted by the Mutual Fund Regulations made in accordance with subsection (3).

(2) Without limiting subsection (1), a person promotes a mutual fund if he communicates, or causes to be communicated, an invitation or inducement to any other person, or advises or procures any other person, to become an investor, or to offer to become an investor, in a mutual fund.

(3) The Mutual Fund Regulations may provide that subsection (1) does not apply in relation to communications or advice

(a) of a specified category or description; or

(b) made or given in specified circumstances.

General  
exemptions to  
prohibition.

**43.** (1) A mutual fund incorporated, formed or organised outside the Virgin Islands does not solicit an individual within the Virgin Islands to subscribe for, or purchase, any of its fund interests in circumstances where the subscription or purchase is a result of an approach made by the individual to the fund without any solicitation being made by or on behalf of the fund.

(2) The Mutual Fund Regulations may specify circumstances in which section 41(1) or (2) does not apply with respect to certain specified categories or descriptions of mutual fund or person.

Exemptions: fund  
to be recognised as  
professional fund.

**44.** (1) A mutual fund may carry on business in or from within the Virgin Islands, as if a professional fund, for a continuous period not exceeding twenty-one days, if the fund

(a) satisfies the criteria for a professional fund specified in section 55(2)(a), (c) and (d); and

(b) complies with, and is managed and administered in accordance with, the requirements of this Act and the Mutual Fund Regulations relating to professional funds, other than with respect to recognition.

(2) A mutual fund that commences business in reliance on subsection (1) shall submit an application with the Commission for recognition as a professional fund within fourteen days after the commencement of its business.

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(3) For the purposes of the Financial Services Commission Act, a fund that commences business in reliance on subsection (1) is deemed to have been recognised as a professional fund for the period in which it carries on business in reliance on subsection (1).

(4) During the period in which a mutual fund carries on business in accordance with subsection (1),

- (a) the fund, a partner of the fund or, where the fund is a unit trust, the trustee, does not commit an offence under section 41(1);
- (b) a person does not commit an offence under section 41(2) by acting as the functionary of or being concerned with management or administration of the fund; and
- (c) a person does not commit an offence under section 42(1) by promoting the fund.

*Public funds*

**45.** (1) Application may be made to the Commission for the registration of a mutual fund as a public fund by,

Registration of fund as public fund.

- (a) in the case of a mutual fund that is a BVI business company, the company itself; or
- (b) in the case of a unit trust, by the trustee.

(2) The Commission may grant an application for registration under subsection (1), if it is satisfied that

- (a) the fund is
  - (i) a BVI business company; or
  - (ii) a unit trust that is governed by the trust laws of the Virgin Islands and has a trustee that is based in the Virgin Islands;
- (b) the fund satisfies the requirements of this Act with respect to the application;
- (c) the fund will, on registration, be in compliance with this Act and any practice directions applicable to the fund;
- (d) the fund's functionaries satisfy the Commission's fit and proper criteria;
- (e) the fund has, or on registration will have, an independent custodian;
- (f) the fund's name is not undesirable or misleading; and
- (g) registering the fund is not against the public interest.

(3) Where the Commission grants an application for registration under subsection (1), it shall

- (a) register the public fund in the Register of Public Funds; and
- (b) issue the fund with a certificate of its registration in the approved form.

(4) The registration of a public fund is subject to such conditions as may be imposed by the Commission under section 40B of the Financial Services Commission Act.

No 12 of 2001

Prohibition on public offer of fund interests by public fund.

**46.** (1) A public fund shall not, whether in or outside the Virgin Islands, make an invitation to the public to subscribe for or purchase its fund interests, unless the offer

- (a) is contained in a registered prospectus; and
- (b) complies with such requirements as may be specified in the Mutual Fund Regulations.

(2) For the purposes of subsection (1), an offer of fund interests to any person, whether in or outside the Virgin Islands, is an offer of the fund interests to the public.

(3) Subsection (1) does not apply to an offer that is deemed not to be a public offer under section 47.

Circumstances in which offer not public offer.

**47.** An offer of fund interests to a person is deemed not to constitute an offer of fund interests to the public if

- (a) the offer is made to, or directed exclusively at, one or more of the following:
  - (i) an experienced investor;
  - (ii) a person having a close connection with the issuer; or
  - (iii) the Government of the Virgin Islands;
- (b) the minimum aggregate purchase price payable by a person for the fund interests acquired by him pursuant to the offer
  - (i) must be paid before the fund interests are issued; and

- (ii) equals or exceeds the minimum specified in the Mutual Fund Regulations, or the equivalent in another currency; or
- (c) the offer is made
  - (i) to such persons,
  - (ii) with respect to fund interests issued, or to be issued, by such persons, or
  - (iii) in such circumstances,
 as may be specified in the Mutual Fund Regulations.

**48.** (1) A prospectus intended to be submitted to the Commission for registration shall

Form and content of prospectus.

- (a) be in writing, be dated and be signed by or on behalf of,
  - (i) in the case of a BVI business company, the board of the company; or
  - (ii) in the case of a BVI unit trust, the fund manager or the trustee of the trust;
- (b) provide full and accurate disclosure of all such information as investors would reasonably require and expect to find for the purpose of making an informed investment decision;
- (c) contain a summary statement of investors' rights as provided in section 52;
- (d) be in the form, contain the information, statements, certifications and other matters specified in the Mutual Fund Regulations; and
- (e) have attached to it such documents as may be specified in the Mutual Fund Regulations.

(2) The date of a prospectus shall be no later than the date of the application to the Commission for registration of the prospectus.

(3) Any documents attached to a prospectus referred to in subsection (1) shall comply with the requirements contained in the Mutual Fund Regulations.

**49.** (1) An application may be made to the Commission for the registration of a prospectus by the directors of a public fund that is a company or the trustee of a public fund that is a unit trust.

(2) If all or any part of the prospectus is not in the English language, the Commission may require that an English translation of the prospectus or that part of the prospectus, verified in a manner satisfactory to the Commission, be provided along with the prospectus.

(3) Subject to subsection (4), the Commission may register a prospectus if it is satisfied that it complies with this Act.

(4) The Commission shall not register a prospectus if it is of the opinion that, although complying with this Act,

- (a) the prospectus contains a material error or misdescription or a statement that is misleading, omits a material fact or particular or is unclear;
- (b) the prospectus does not provide full and accurate disclosure of all such information as investors would reasonably require and expect to find for the purpose of making an informed investment decision; or
- (c) approving the prospectus would be contrary to the public interest.

(5) The Commission shall,

- (a) if it registers the prospectus, provide the applicant with a certificate of registration; or
- (b) if it refuses to register the prospectus, provide the applicant with a written notice of its decision.

(6) For the avoidance of doubt, section 40B of the Financial Services Commission Act applies to an application under this section.

**50.** (1) A public fund shall make its prospectus available to each of its investors and provide a copy upon request.

(2) Where any of the disclosures required under section 48(1)(b) cease to be accurate in a material particular, the public fund concerned shall, within fourteen days of the change occurring, apply to the Commission under section 51 to register an amended prospectus giving accurate disclosures and, when registered, provide a copy of the amended prospectus to each of its investors.

(3) Any advertisement issued or published, in whatever form or through whatever medium, by or on behalf of a public fund, the purpose of which is to make an invitation to the public or any section thereof to subscribe for or purchase fund interests issued by a public fund shall contain information as to where, at what times and at what cost, if any, a copy of the prospectus can be obtained and a copy of the advertisement shall be provided to the Commission within fourteen days of its publication.

- 51.** (1) An application to the Commission to register an amended prospectus
- (a) may be made by the directors of a public fund that is a BVI business company or the trustee of a public fund that is a unit trust at any time during the relevant period; and
  - (b) shall be made by the directors of a public fund that is a BVI business company or the trustee of a public fund that is a unit trust if, during the relevant period, the directors become, or the trustee becomes, aware that the registered prospectus
    - (i) contains a material error; or
    - (ii) omits a material fact or particular.

Amendment of prospectus.

(2) For the purposes of subsection (1), the “relevant period” is the period commencing with the registration of the prospectus and ending with the closure of the offer of fund interests to which the prospectus relates.

(3) Section **48** applies to an amended prospectus and section **49** applies to the registration of an amended prospectus as if, in each case, the amended prospectus was the original prospectus.

**52.** (1) If a public fund issues a prospectus that contains any misrepresentation relating to any of the disclosures required under section **48**(1)(b), a person who purchased any fund interests on the basis of the prospectus is deemed to have relied upon the misrepresentation and shall have the rights provided in subsection (2).

Investors' rights.

- (2) A person referred to in subsection (1) may elect to exercise a right of action
- (a) for the rescission of the purchase; or
  - (b) for damages, jointly and severally against the fund, and every director of the fund, or in the case of a unit trust, every member of the equivalent governing body who, while aware of the misrepresentation, or would have been aware of the misrepresentation had he made reasonable investigations

consistent with his duties, authorised the signing of, or approved, the prospectus and consented to its issue.

- (3) For the purposes of this section, “misrepresentation” means
- (a) an untrue or misleading statement with respect to any of the disclosures required under section **48(1)(b)**; or
  - (b) an omission to disclose any of the disclosures required.

(4) No person is liable under this section if he proves that the purchaser purchased the fund interests offered by the prospectus with knowledge of the misrepresentation.

(5) The right of action for rescission or for damages conferred by subsection (2) is in addition to and without derogation from any other right the purchaser may have at law.

Limitation of action and amount recoverable.

**53.** (1) Notwithstanding any provision of any other enactment to the contrary, any action under section **52(2)** shall not be commenced after the earlier of

- (a) one hundred and eighty days from the day that the investor first had knowledge of the misrepresentation; or
- (b) two years from the date of the purchase transaction that gave rise to the cause of action.

(2) In any action under section **52(2)**, the amount recoverable shall not exceed the amount for which the fund interests were purchased or subscribed, including any fees or other charges paid by the investor.

Appointment and termination of directors, functionaries and others.

**54.** (1) No person shall be appointed as a director or functionary of a public fund without the prior written approval of the Commission.

(2) The Commission shall not grant an approval under subsection (1) unless it is satisfied that the person concerned satisfies its fit and proper criteria and, where applicable, complies with the requirements of any guidelines issued by the Commission for the approval of such a person.

- (3) Written notice shall be given to the Commission within
- (a) seven days after
    - (i) a director ceases to hold office with a public fund; or
    - (ii) a functionary ceases to act for a public fund; or

(b) such longer period as the Commission may specify.

(4) The notice provided under subsection (3) shall include a statement of the reasons and any other matters required under any guidelines issued by the Commission for the director ceasing to hold office with, or the functionary ceasing to act for, the public fund and a written notice shall be deemed not to be provided under that subsection if it does not include such a statement.

*Private and professional funds*

**55.** (1) An application may be made to the Commission for the recognition of a mutual fund as a private fund or as a professional fund by,

Recognition of private and professional funds.

- (a) in the case of a mutual fund that is a company, the fund itself;
- (b) in the case of a unit trust, by the trustee;
- (c) in the case of a mutual fund that is a partnership, by a partner;
- (d) in any other case by the manager, or proposed manager, of the fund.

(2) The Commission may recognise a mutual fund as a private fund or a professional fund if it is satisfied that,

- (a) the fund is lawfully incorporated, constituted, formed or organised under the laws of the Virgin Islands or under the laws of a country outside the Virgin Islands;
- (b) in the case of a private fund, the constitutional documents of the fund specify that
  - (i) the fund is not authorised to have more than fifty investors; and
  - (ii) an invitation to subscribe for, or purchase, fund interests issued by the fund shall be made on a private basis only;
- (c) in the case of a professional fund, the constitutional documents of the fund specify that
  - (i) the fund interests of the fund shall be issued only to professional investors; and

- (ii) the initial investment of each investor in the fund, other than exempted investors, shall be not less than such sum as may be prescribed in the Mutual Fund Regulations;
  - (d) the fund satisfies such other criteria as may be specified for recognition of a private or professional fund, as the case may be, in the Mutual Fund Regulations;
  - (e) the fund satisfies the requirements of this Act with respect to the application;
  - (f) the fund will, on being recognised, be in compliance with this Act and any practice directions applicable to the fund;
  - (g) recognising the fund as a private or professional fund is not against the public interest.
- (3) For the purposes of subsection (2)(b)(ii), an invitation to subscribe for, or purchase, fund interests issued by a mutual fund on a private basis includes an invitation which is made
- (a) to specified persons (however described) and is not calculated to result in fund interests becoming available to other persons or to a large number of persons; or
  - (b) by reason of a private or business connection between the person making the invitation and the investor.
- (4) For the purposes of subsection (2)(c), the minimum investment limit referred to does not apply in respect of an investment made by a person specified in the Mutual Funds Regulations as an exempted investor.
- (5) Where the Commission grants an application for recognition under subsection (1), it shall
- (a) register the fund in the Register of Private Funds or the Register of Professional Funds, as appropriate; and
  - (b) issue the fund with a certificate of recognition in the approved form.
- (6) The recognition of a private or professional fund is subject to such conditions as may be imposed by the Commission under section 40B of the Financial Services Commission Act.

**56.** (1) No private or professional fund shall make any offer or invitation of its fund interests, issue any fund interests or carry on business in any manner that would result in the fund,

Obligation to act in accordance with constitutional documents.

- (a) in the case of a private fund,
  - (i) having more than fifty investors; or
  - (ii) making any invitation to subscribe for, or purchase, its fund interests otherwise than on a private basis; or
- (b) in the case of a professional fund, issuing fund interests
  - (i) to any person who is not a professional investor; or
  - (ii) where the initial investment, in respect of a professional investor who is not an exempted investor, is less than the sum prescribed in the Mutual Fund Regulations.

(2) Without limiting subsection (1), no person shall be accepted as an investor in a private or professional fund unless that person has provided,

- (a) in the case of a professional fund, written confirmation that he is a professional investor within the meaning specified in section 40(1); and
- (b) in the case of a private or professional fund, a written acknowledgment that he has received, understood and accepted the prescribed investment warning.

#### *Recognised foreign funds*

**57.** (1) An application may be made to the Commission by a foreign fund or by its manager for the fund to be a recognised foreign fund.

Recognition of a foreign fund.

(2) The Commission may grant an application for the recognition of a foreign fund if the Commission is satisfied that

- (a) the fund complies with the requirements of this Act in respect of the application and will, upon being recognised, be in compliance with the requirements of this Act with respect to recognised foreign funds;
- (b) the fund is subject to an authorisation and supervisory regime in the jurisdiction in which it is constituted that, in the opinion of the

Commission, provides to investors in the Virgin Islands protection at least equivalent to the protection provided under this Act for investors of public funds;

- (c) adequate arrangements exist, or will exist, for co-operation between the authorities of the country responsible for the authorisation and supervision of the fund and the Commission; and
- (d) the fund is being operated and managed in compliance with the authorisation and supervisory regime to which it is subject.

Mutual Fund Regulations may provide for recognised foreign funds.

**58.** The Mutual Fund Regulations may make provision with respect to recognised foreign funds, including as to

- (a) the submission to the Commission and the publication of such particulars as regards recognised foreign funds as may be prescribed;
- (b) the notifications to be provided to the Commission with respect to recognised foreign funds, including as to the amendment of the constituting instruments of a recognised foreign fund and changes of the functionaries of a recognised foreign fund;
- (c) the maintenance in the Virgin Islands of deposits and property by and with respect to recognised foreign funds.

*Provisions applicable generally to registered and recognised funds*

Maintenance of financial records.

**59.** (1) A mutual fund that is a public fund, a private fund or a professional fund shall maintain records that are sufficient

- (a) to show and explain its transactions;
- (b) at any time, to enable its financial position to be determined with reasonable accuracy;
- (c) to enable it to prepare such financial statements and make such returns as it is required to prepare and make under this Act and the Mutual Funds Regulations; and
- (d) if applicable, to enable its financial statements to be audited in accordance with this Act.

(2) The Mutual Fund Regulations may specify

- (a) the form and manner in which the records specified in subsection (1) are to be maintained;
- (b) the place where the records required to be maintained under subsection (1) and under the Mutual Fund Regulations are required to be kept; and
- (c) other records required to be maintained by a mutual fund to which this section applies, and the form, manner and place in which such records are to be maintained.

(3) A mutual fund to which this section applies shall retain the records required to be maintained under this section for a period of at least five years after the completion of the transaction to which they relate.

(4) Subsection (3) applies to a mutual fund after the cancellation or revocation of its registration or recognition as if the registration or recognition had not been cancelled or revoked.

**60.** (1) In addition to the grounds specified in section 37(1) of the Financial Services Commission Act, 2001, the Commission may take enforcement action under that section against a public, private or professional fund or a recognised foreign fund if

Modification of Financial Services Commission Act, 2001 with respect to mutual funds.

No. 12 of 2001

- (a) a functionary of the fund does not, in the Commission’s opinion, satisfy its fit and proper criteria; or
- (b) the fund no longer satisfies the criteria specified in this Act for its registration or recognition.

(2) Without limiting the powers of the Commission under section 40 of the Financial Services Commission Act, where the Commission is entitled to take enforcement action against a public, private or professional fund, it may issue a directive that the fund suspends the issuance or redemption, or both, of fund interests in the fund.

(3) Section 40D(1) of the Financial Services Commission Act, 2001 also applies to a functionary of a public, private or professional fund.

**61.** (1) This section applies to a public fund, a private fund, a professional fund and a recognised foreign fund and references in this section to a “fund” are to a fund to which this section applies.

Exemptions from certain enactments.

(2) Subject to subsection (4), a person to whom this subsection applies is exempt from the payment of income tax under the Income Tax Ordinance and stamp duty under the Stamp Act.

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- (3) Subsection (2) applies to
- (a) a fund; and
  - (b) an investor in a fund
    - (i) where the investor is not ordinarily resident or domiciled in the Virgin Islands; and
    - (ii) with respect to any fund interest that he holds.
- (4) Subsection (2) does not apply to an instrument relating to
- (a) the transfer to or by a fund of an interest in land situate in the Virgin Islands; or
  - (b) transactions in respect of fund interests of a fund, the assets of which include an interest in any land in the Virgin Islands.
- (5) For the purposes of subsection (4), a fund has an interest in land in the Virgin Islands if
- (a) any fund with which it is connected has an interest in land in the Virgin Islands; or
  - (b) the fund, or any fund with which it is connected, has an interest in a land owning company.
- (6) For the purposes of subsection (5), “land owning company” has the meaning specified in section 242(5) of the BVI Business Companies Act, 2004.
- (7) Notwithstanding any provision of the Registration and Records Act, all deeds and other instruments relating to
- (a) transfers of property to or by a fund,
  - (b) transactions in respect of the fund interests in a fund, and
  - (c) other transactions relating to the business of a fund,
- are exempt from the provisions of that Act.

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Cap. 67

*General and administration*

**62.** (1) The Cabinet may, on the advice of the Commission, make Mutual Fund Regulations

Mutual Fund Regulations.

- (a) providing for the establishment, operation and supervision of mutual funds;
  - (b) generally for giving effect to this Part and for the administration of this Part by the Commission; and
  - (c) in respect of anything permitted by this Act to be contained in the Regulations.
- (2) Without limiting subsection (1), the Mutual Fund Regulations may
- (a) provide for
    - (i) applications for the registration or recognition of mutual funds;
    - (ii) the designation of classes and sub-classes of mutual funds;
    - (iii) the management, control and administration of mutual funds, including the functionaries required to be appointed by, or with respect to a mutual fund, the persons who may be appointed as the functionary of a mutual fund and the duties of functionaries;
    - (iv) the custodial arrangements to be put in place with respect to mutual funds;
    - (v) the circumstances in which an offer document is required to be issued and distributed by a private or professional fund, the form and content of offer documents and other requirements relating to offer documents;
    - (vi) the reporting of information and the submission of documents to the Commission, including periodic returns, and the verification of the information or documents, and returns to be submitted to the Commission by and in respect of funds;
    - (vii) the issue and redemption of fund interests;
    - (viii) the rights of investors;

- (ix) title to, and the transfer of, fund assets;
  - (x) the income of a mutual fund;
  - (xi) meetings of investors;
  - (xii) names that may, or shall not, be used by a mutual fund;
  - (xiii) the retention of records by funds and fund functionaries; and
  - (xiv) the preparation and audit of the financial statements of a mutual fund; and
- (b) specify requirements and restrictions with respect to
- (i) the constitutional documents of a mutual fund;
  - (ii) investments and borrowing;
  - (iii) pricing and dealing;
  - (iv) the suspension and termination by a mutual fund of its operation or business;
  - (v) the valuation of assets and liabilities; and
  - (vi) payments made, and benefits provided, to the functionaries of a mutual fund.
- (3) The Mutual Fund Regulations may
- (a) specify matters relating to the establishment and operation of public funds, including any matters specified in subsection (2), that may be provided for in the Public Funds Code;
  - (b) make different provision in relation to different persons, circumstances or cases;
  - (c) provide for offences and penalties for any prohibition or contravention or failure to comply with a requirement specified in the Regulations; and
  - (d) include such transitional provisions as may be considered necessary or appropriate.

**63.** (1) The Commission may, with the approval of the Board, issue a Public Funds Code providing for

Public Funds Code.

- (a) the establishment and operation of public funds; and
- (b) anything permitted by the Mutual Funds Regulations to be contained in the Public Funds Code.

(2) The Commission may, with the approval of the Board, amend the Public Funds Code in such manner and to such extent as it may determine.

(3) The Public Funds Code may

- (a) make different provision in relation to different persons, circumstances or cases; and
- (b) include such transitional provisions as the Commission considers necessary or appropriate.

(4) The Public Funds Code, and any amendment thereto, shall be published in the Gazette.

## **PART IV**

### **PROVISIONS OF GENERAL APPLICATION**

#### *Authorised representatives*

**64.** (1) An application may be made to the Commission for certification as an authorised representative by

Application for certification as authorised representative.

- (a) a BVI business company;
- (b) a partnership formed under the laws of the Virgin Islands; or
- (c) an individual who is ordinarily or habitually resident in the Virgin Islands.

(2) The Commission may grant an application for certification under subsection (1), if it is satisfied that

- (a) the applicant satisfies the requirements of this Act and the Mutual Fund Regulations with respect to the application;
- (b) the applicant satisfies the Commission's fit and proper criteria;

- (c) where the applicant is a BVI business company, its directors and senior officers and any persons having a significant interest in the applicant satisfy the Commission's fit and proper criteria;
- (d) where the applicant is a partnership, the partners satisfy the Commission's fit and proper criteria;
- (e) certifying the applicant is not against the public interest.

(3) Without limiting the discretion given to the Commission under subsection (2), the Commission may refuse to certify an applicant if it is of the opinion that any person having a share or other interest in the applicant, whether legal or equitable, does not satisfy the Commission's fit and proper criteria.

(4) A certification issued under subsection (2) shall be in writing and in the approved form.

(5) A person who is certified as an authorised representative is not required to be licensed under the Business, Professions and Trade Licences Act to act in that capacity.

Cap. 200

Licensees and funds to have authorised representative.

**65.** (1) Subject to subsection (2), a licensee, and a public, private, professional or recognised foreign fund shall appoint and at all times have an authorised representative who shall be a person certified by the Commission under section **64**.

(2) Subsection (1) and section **66** do not apply to a licensee that has a significant management presence in the Virgin Islands.

(3) Criteria for determining whether a licensee has a significant management presence in the Virgin Islands shall be specified in the Regulatory Code.

(4) Where an authorised representative resigns or his appointment is terminated or becomes vacant for any reason, a licensee or a public, private or professional fund does not commit an offence, if it appoints another authorised representative within twenty-one days of the date of the previous authorised representative ceasing to so act.

(5) No person shall accept appointment, or act, as the authorised representative of a licensee or a public, private or professional fund unless the person has the benefit of a certification issued under section **64**.

Functions of authorised representative.

**66.** (1) The functions of an authorised representative are

- (a) to act as the main intermediary between the licensee or mutual fund that he represents, and the Commission;

- (b) to accept service of notices and other documents on behalf of the licensee or mutual fund that he represents;
- (c) to keep in the authorised representative’s office in the Virgin Islands such records, or copies of such records, as may be prescribed
  - (i) where he acts as authorised representative for a licensee, in the Regulatory Code; or
  - (ii) where he acts as authorised representative of a mutual fund, in the Mutual Fund Regulations.

(2) Except to the extent provided in the Regulatory Code or the Mutual Funds Regulations, as the case may be,

- (a) all documents to be submitted by a licensee or a mutual fund to the Commission shall be submitted by its authorised representative; and
- (b) all fees to be paid by a licensee or a mutual fund shall be paid by its authorised representative on behalf of the licensee or mutual fund.

*Financial statements and audit*

**67.** (1) For the purposes of sections **68** to **80**,

Application of sections **68** to **80**.

“prescribed” means, in the case of a relevant licensee, prescribed in the Regulatory Code and, in the case of a public fund, specified in the Mutual Fund Regulations; and

“relevant licensee” means a licensee designated in the Regulatory Code as a relevant licensee.

(2) Sections **68** to **80** apply to

- (a) a relevant licensee, except to the extent that they may be disappplied or modified by the Regulatory Code with respect to particular categories, types or descriptions of licensee; and
- (b) a public fund, except to the extent that they are disappplied or modified by this Act or by the Mutual Fund Regulations.

Meaning of  
“financial year”.

- 68.** (1) The financial year end of a relevant licensee or a public fund is
- (a) the date specified in its application for a licence or registration; or
  - (b) such other date as may be notified to the Commission following its licensing or registration, provided that the financial year end shall not be less than nine months, or more than fifteen months, after the date of the previous financial year end.
- (2) Subject to subsection (3), for the purposes of this Act, the financial year of a relevant licensee or a public fund is,
- (a) in the case of its first financial year, the period from the date of its incorporation to the last day of the month specified in the application for a licence or registration provided to the Commission under subsection (1); and
  - (b) in the case of subsequent financial years, the period of one year commencing on the day immediately after the day of its previous financial year.
- (3) Subsection (1) applies whether or not financial statements have actually been prepared for the financial year in question.
- (4) The Commission may, on the application of a relevant licensee or public fund, in respect of any financial year, direct that the financial year shall be a period not exceeding eighteen months that is different to that determined in accordance with subsection (1).

Meaning of  
“financial  
statements”.

- 69.** In this Act, the Regulatory Code and the Mutual Fund Regulations, “financial statements”, in relation to a relevant licensee or a public fund, and to a financial year, means
- (a) a statement of the financial position of the licensee or public fund as at the last date of the financial year,
  - (b) a statement of the financial performance of the licensee or public fund in relation to the financial year,
  - (c) a statement of cash flows for the licensee or public fund in relation to the financial year,
  - (d) in the case of a relevant licensee, such statement relating to the prospects for the business of the licensee as may be prescribed or specified in the Mutual Fund Regulations, or as may be required by the accounting standards in accordance with which the financial

statements are prepared, and

- (e) such other statements as may be prescribed or specified in the Mutual Fund Regulations,

together with any notes or other documents giving information relating to the matters specified in paragraphs (a), (b), (c), (d) or (e).

**70.** (1) A relevant licensee and a public fund shall prepare for each financial year financial statements that comply with such accounting standards as may be prescribed.

Preparation of financial statements.

(2) If, in complying with the accounting standards in accordance with which they are prepared, the financial statements do not give a true and fair view of the matters to which they relate, the notes to the financial statements shall contain such information and explanations as will give a true and fair view of those matters.

(3) The financial statements prepared under subsection (1) shall

- (a) be approved by the directors of the relevant licensee or public fund or, where the public fund is a unit trust, by the trustee; and
- (b) be signed by, in the case of a public fund that is a unit trust, by the trustee, and in any other case by at least one director on behalf of all the directors, following approval under paragraph (a).

(4) The director, or trustee, signing the financial statements shall state the date when the financial statements were approved by the directors or trustee and the date when he signs the financial statements.

**71.** (1) The financial statements of a relevant licensee, or public fund, signed by a director, or the trustee of a unit trust, in accordance with section 70 shall be submitted to the Commission within six months of the end of the financial year to which they relate, accompanied by

Submission of financial statements to the Commission.

- (a) a directors' certificate, or a trustee's certificate, in the approved form;
- (b) an auditor's report;
- (c) a report on the affairs of the licensee or public fund made in respect of the relevant financial year to
  - (i) the members of the licensee; or
  - (ii) the investors of the public fund; and

(d) such other documents as may be prescribed.

(2) Unless accompanied by the certificates, reports and documents specified in subsection (1), the financial statements referred to in subsection (1) are deemed not to have been submitted to the Commission.

Submission of short period financial statements and report.

**72.** (1) A relevant licensee and a public fund shall, in respect of, and within, such periods as may be prescribed, submit to the Commission

(a) short period financial statements, that may be unaudited;

(b) a return in the approved form;

(c) such other information and documentation as may be prescribed.

(2) In this section,

“financial statements” has the meaning specified in section **70** with the substitution of the period covered by the financial statements for “financial year”; and

“short period” means such period or periods shorter than a financial year in respect of which financial statements are required by the Regulatory Code to be submitted to the Commission.

Extension of time.

**73.** (1) The Commission may, on the application of a relevant licensee or public fund, extend the time for compliance with section **71** or **72** for a period of, or where it grants more than one extension for an aggregate period not exceeding, six months.

(2) An extension under subsection (1) may be granted subject to such conditions as the Commission considers appropriate.

Amendment of financial statements.

**74.** (1) If the Commission considers that any document submitted by a relevant licensee or a public fund under section **71** or **72** is inaccurate or incomplete or is not prepared in accordance with this Act or the Regulatory Code, it may by written notice require the licensee or public fund to amend the document or to submit a replacement document.

(2) If a relevant licensee or public fund fails to comply with a notice under subsection (1), the Commission may reject the document.

Relevant licensee and public fund to appoint auditor.

**75.** (1) A relevant licensee and a public fund shall appoint and at all times have an auditor for the purposes of auditing its financial statements.

(2) An auditor shall not be appointed under subsection (1) unless

- (a) he is qualified under the Regulatory Code to act as the auditor of a relevant licensee or a public fund;
  - (b) he has consented to act as auditor; and
  - (c) the auditor is an approved auditor within the meaning of subsection (3).
- (3) For the purposes of subsection (2)(c), “approved auditor” means,
- (a) in the case of a relevant licensee, an auditor whose appointment the Commission has approved in writing prior to his appointment; and
  - (b) in the case of a public fund, an auditor who is approved by the Commission to act as the auditor of public funds.
- (4) The Commission shall not approve the appointment of an auditor under subsection (3)(a) unless it is satisfied that he has sufficient experience and is competent to audit the financial statements of the relevant licensee.
- (5) For the purposes of
- (a) subsection (3), the Commission may rely on such guidelines as it may issue in relation to the approval of an auditor;
  - (b) subsection (3)(a), the approval of the Commission is not required where
    - (i) the auditor appointed in respect of a financial year acted as the auditor of the relevant licensee in the previous financial year; and
    - (ii) the Commission has not revoked its approval of the auditor under section 78.
- (6) A relevant licensee or public fund shall, within 14 days of the appointment of its auditor, submit a notice of appointment to the Commission.
- (7) A relevant licensee and a public fund shall make such arrangements as are necessary to enable its auditor to audit its financial statements in accordance with this Act, the Regulatory Code and the Mutual Fund Regulations, including
- (a) by giving the auditor a right of access at all reasonable times to its financial records and to all other documents and records, and

(b) by providing the auditor with such information and explanations,

as the auditor reasonably requires for the purposes of the audit.

(8) Where, for whatever reason, a person ceases to be the auditor of a relevant licensee or public fund, the licensee or public fund does not commit an offence by failing to comply with subsection (1) if it appoints another auditor in accordance with this section within two months of the date that the person who was previously appointed auditor ceases to hold that appointment.

Audit and audit report.

**76.** (1) An auditor shall carry out sufficient investigation to enable him to form an opinion on the financial statements, and prepare an audit report, in compliance with the Regulatory Code or the Mutual Fund Regulations, as the case may be.

(2) Upon completion of his audit of the financial statements of a relevant licensee or public fund, the auditor shall provide an audit report to the licensee or public fund complying with the Regulatory Code or the Mutual Fund Regulations, as the case may be.

(3) The Commission may at any time, by notice in writing, direct a licensee or public fund to supply the Commission with a report, prepared by its auditor or such other person as may be nominated by the Commission, on such matters as the Commission may determine, which may include an opinion on the adequacy of the accounting systems and controls of the licensee or public fund.

(4) A report prepared under subsection (3) shall be at the cost of the licensee or public fund.

Obligations of auditors.

**77.** (1) Notwithstanding anything to the contrary in any other enactment, the auditor of a relevant licensee or a public fund shall report immediately to the Commission any information relating to the affairs of the licensee that he has obtained in the course of acting as its auditor that, in his opinion, suggests that

(a) the licensee or fund is insolvent or is likely to become insolvent or is likely to be unable to meet its obligations as they fall due;

(b) in the case of a licensee,

(i) the licensee is in breach of section 7 or 8;

(ii) the licensee has significant weaknesses in its internal controls which render it vulnerable to significant risks or exposures that have the potential to jeopardise the licensee's financial viability;

(c) a criminal offence has been or is being committed by the licensee

or fund or in connection with the business of the licensee or fund;  
or

- (d) serious breaches of this Act or the Regulatory Code or such enactments, Guidelines or Codes relating to money laundering or the financing of terrorism as may be issued or prescribed have occurred in respect of the licensee or fund or in connection with the business of the licensee or fund.

(2) Where the appointment of an auditor of a relevant licensee or public fund is terminated, or an auditor resigns before the expiration of his term of office, the auditor whose appointment has been terminated or who has resigned shall

- (a) forthwith inform the Commission of the termination of his appointment, or his resignation, and disclose to the Commission the circumstances that gave rise to such termination or resignation; and
- (b) if, but for the termination of his appointment, he would have reported information to the Commission under subsection (1), he shall report the information concerned to the Commission, as if his appointment had not been terminated.

(3) The Commission may require an auditor of a relevant licensee or public fund to discuss any audit he has conducted or commenced with, or provide additional information regarding the audit to, the Commission.

(4) Where, in good faith, an auditor or former auditor provides any information to the Commission under subsection (1), (2) or (3), he is deemed not to be in contravention of any enactment, rule of law, agreement or professional code of conduct to which he is subject and no civil, criminal or disciplinary proceedings shall lie against him in respect thereof.

(5) The failure, in good faith, of an auditor or former auditor to provide a report or any information to the Commission under subsection (1), (2) or (3) does not confer upon any other person a right of action against the auditor which, but for that failure, he would not have had.

**78.** (1) Where the Commission is satisfied that the auditor of a relevant licensee or public fund has failed to fulfil his obligations under this Act or is otherwise not a fit and proper person to act as the auditor of a licensee or public fund, it may, by written notice to the licensee or public fund, revoke the approval of the appointment of the auditor and the licensee or public fund shall appoint a new auditor in accordance with section **75**.

Powers of  
Commission re  
appointment of  
auditor.

- (2) A notice revoking the appointment of an auditor under subsection (1)

shall be given to the auditor.

(3) If a licensee or public fund fails to appoint an auditor, the Commission may appoint an auditor for the licensee or public fund, as the case may be.

(4) An auditor appointed under subsection (3) is deemed for the purposes of this Act to have been appointed by the licensee or public fund.

Group financial statements.

**79.** (1) Where a relevant licensee is a member of a group of companies, the Commission may require the licensee to submit to it group financial statements.

(2) The Commission may require that the group financial statements are audited by the auditor of the licensee or by another auditor approved by the Commission.

(3) The Regulatory Code may provide for the form and content of group financial statements to be submitted under this section.

Commission may require other licensee to have financial statements audited.

**80.** (1) The Commission may, by written notice, require a licensee that is not a relevant licensee, to appoint an auditor and to submit audited financial statements to the Commission.

(2) The Commission shall in a written notice issued under subsection (1) specify the extent to which sections **68** to **79** apply to the licensee and its auditor.

### *General*

Reporting of information to Commission.

**81.** (1) A licensee, a public fund, a private fund, a professional fund and a recognised foreign fund shall report to the Commission such information as may be prescribed within such time and verified in such manner as may be prescribed.

(2) If the Commission considers that any information reported by a licensee, public fund, private fund, professional fund or recognised foreign fund under subsection (1) is inaccurate or incomplete or is not verified in such manner as may be prescribed, it may by written notice and within such time as it may specify, require the licensee or fund to report amended or additional information to the Commission or to verify the information in such manner as may be specified in the notice.

**PART V**  
**MARKET ABUSE**

*Interpretation*

**82.** (1) For the purposes of this Part,

Interpretation for  
this Part.

“acquiring”, in relation to a security, includes

- (a) agreeing to acquire the security; or
- (b) entering into a contract which creates the security;

“dealing”, in relation to a security, means acquiring or disposing of the security, whether as principal or agent, or directly or indirectly procuring the acquisition of the security by any other person;

“disposing”, in relation to a security, includes

- (a) agreeing to dispose of the security; or
- (b) bringing to an end a contract which created the security;

“inside information” has the meaning specified in section **83**;

“market information” means information consisting of one or more of the following facts:

- (a) that securities of a particular kind have been or are to be acquired or disposed of, or that their acquisition or disposal is under consideration or the subject of negotiation;
- (b) that securities of a particular kind have not been or are not to be acquired or disposed of;
- (c) the number of securities acquired or disposed of or to be acquired or disposed of or whose acquisition or disposal is under consideration or the subject of negotiation;
- (d) the price (or range of prices) at which securities have been or are to be acquired or disposed of or the price (or range of prices) at which securities whose acquisition or disposal is under consideration or the subject of negotiation may be acquired or disposed of;

- (e) the identity of the persons involved or likely to be involved in any capacity in an acquisition or disposal;

“market maker” means a person who

- (a) holds himself out, at all normal times in compliance with the rules of a securities market, as willing to acquire or dispose of securities; and
- (b) is recognised as doing so under those rules;

“market rules”, in relation to a securities market, means the rules that regulate the securities market in relation to the use and dissemination of information, provided that the rules are

- (a) specified under a law or regulations of the country in which the securities market is located; or
- (b) made by the securities market, where the securities market is authorised to make such rules by a law or regulations of the country in which the securities market is located;

“professional intermediary” has the meaning specified in section 87;

“profit” includes the avoidance of a loss;

“public sector body” means

- (a) the Government of the Virgin Islands or the government, or local government, of any country outside the Virgin Islands;
- (b) an international organisation specified in the Market Abuse Regulations; and
- (c) the central bank of any country or group of countries;

“regulated market” means a market specified by the Commission by a notice published in the *Gazette* as a regulated market;

“securities market” means a securities market that is established by or under, or is regulated by or under, a law or regulations of a country in which the securities market is located; and

“security” has the meaning specified in Schedule 5.

(2) For the purposes of the definition of “dealing” in subsection (1), but without limiting it, a person procures an acquisition or disposal of a security if the security is acquired or disposed of by another person who is

- (a) his agent;
- (b) his nominee; or
- (c) acting at his direction in relation to the acquisition or disposal.

**83.** “Inside information” means information which

Meaning of “inside information”.

- (a) relates to one or more particular securities or one or more particular issuers and not to securities generally or to issuers generally;
- (b) is specific or precise in nature;
- (c) has not been made public; and
- (d) if it were made public, would be likely to have a significant effect on the price of any securities.

**84.** (1) A person has information as an insider if

Meaning of having information as “insider”.

- (a) the information is inside information, and he knows that it is inside information; and
- (b) he has the information, and knows that he has the information, from an inside source.

(2) For the purposes of subsection (1), a person has information from an inside source if

- (a) he has the information through
  - (i) being a director, employee or shareholder of an issuer; or
  - (ii) having access to the information by virtue of his employment, office or profession; or
- (b) the direct or indirect source of the information is a person within paragraph (a).

**85.** (1) Without limiting the expression, information is “made public” if

Meaning of “made public”.

- (a) it is published in accordance with the rules of a securities market for the purpose of informing investors and their professional advisers;
  - (b) it is contained in records which, by virtue of any laws or regulations of the country in which the securities market is located, are open to inspection by the public;
  - (c) it can be readily acquired by those likely to deal in any securities
    - (i) to which the information relates; or
    - (ii) of an issuer to which the information relates; or
  - (d) it is derived from information which has been made public.
- (3) Information may be treated as made public even though
- (a) it can be acquired only by persons exercising diligence or expertise;
  - (b) it is communicated to a section of the public and not to the public at large;
  - (c) it can be acquired only by observation;
  - (d) it is communicated only on payment of a fee; or
  - (e) it is published only outside the country, or the part of the country, in which the securities market to which the information relates.

Meaning of “price-affected securities”.

**86.** Securities are “price-affected securities” in relation to inside information, and inside information is “price-sensitive information” in relation to securities, if the information would, if made public, be likely to have a significant effect on the price of the securities and for this purpose, “price” includes value.

Meaning of “professional intermediary”.

**87.** (1) Subject to subsection (2), a “professional intermediary” is a person who

- (a) carries on, and who holds himself out to the public, or any section of the public including a section of the public constituted by persons such as himself, as willing to carry on, the business of
  - (i) acquiring or disposing of securities, whether as principal or agent; or

- (ii) acting as an intermediary between persons taking part in any dealing in securities; or
  - (b) is employed by a person who carries on business in accordance with paragraph (a) to carry out such an activity.
- (2) A person is not to be treated as a professional intermediary if
  - (a) undertaking an activity specified in subsection (1)(a)(i) or (ii) is incidental to the carrying on of another business not specified in that subsection; or
  - (b) he undertakes an activity specified in subsection (1)(a)(i) or (ii) on an occasional basis only.
- (3) A person dealing in securities relies on a professional intermediary if a person who is acting as a professional intermediary carries on an activity specified in subsection (1)(a).

*Insider dealing*

**88.** (1) Subject to sections **89** and **90**, an individual who has information as an insider commits an offence if

Offence of insider dealing.

- (a) he deals in securities that are price-affected securities in relation to the information where
    - (i) the acquisition or disposal that constitutes the dealing takes place on a securities market; or
    - (ii) the person dealing relies on a professional intermediary or is himself acting as a professional intermediary;
  - (b) he encourages another person to deal in securities that are, whether or not that other person knows it, price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances specified in paragraph (a); or
  - (c) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.
- (2) An individual who commits an offence under this section is liable

- (a) on summary conviction, to a fine not exceeding forty thousand dollars or imprisonment for a term not exceeding three years, or both; or
- (b) on conviction on indictment, to a fine not exceeding one hundred thousand dollars or imprisonment for a term not exceeding five years, or both.

**89.** (1) A person does not commit an offence under section **88**(1)(a) by virtue of dealing in securities if he proves that

- (a) he did not, at the time, expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities;
- (b) at the time, he believed on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or
- (c) he would have done what he did even if he had not had the information.

(2) A person does not commit an offence under section **88**(1)(b) by virtue of encouraging another person to deal in securities if he proves that

- (a) he did not, at the time, expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities;
- (b) at the time, he believed on reasonable grounds that the information had been or would be disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or
- (c) that he would have done what he did even if he had not had the information.

(3) A person does not commit an offence under section **88**(1)(c) by virtue of a disclosure of information if he proves that

- (a) he did not at the time expect any person, because of the disclosure, to deal in securities in the circumstances mentioned in section **88**(1)(a); or
- (b) although he had such an expectation at the time, he did not expect

the dealing to result in a profit attributable to the fact that the information was price-sensitive information in relation to the securities.

(4) A person does not commit an offence under section **88** by virtue of dealing in securities or encouraging another person to deal in securities if he proves that

- (a) he acted in good faith in the course of
  - (i) his business as a market maker; or
  - (ii) his employment in the business of a market maker; or
- (b) the information which he had as an insider was market information and it was reasonable for an individual in his position to have acted as he did despite having that information as an insider at the time.

(5) In determining for the purposes of subsection (4)(b) whether it is reasonable for a person to do any act despite having market information at the time, the following shall be taken into account:

- (a) the content of the information;
- (b) the circumstances in which he first had the information and in what capacity; and
- (c) the capacity in which he now acts when the determination is made.

(6) A person does not commit an offence under section **88** by virtue of dealing in securities in a securities market or encouraging another person to deal in securities in a securities market if he proves that he acted in compliance with the market rules applicable to the securities market concerned.

(7) A person does not commit an offence under section **88** by virtue of dealing in securities or encouraging another person to deal if he proves

- (a) that he acted
  - (i) in connection with an acquisition or disposal which was under consideration or the subject of negotiation, or in the course of a series of such acquisitions or disposals; and

(ii) with a view to facilitating the accomplishment of the acquisition or disposal or the series of acquisitions or disposals; and

(b) that the information which he had as an insider was market information arising directly out of his involvement in the acquisition or disposal or series of acquisitions or disposals.

Territorial scope:  
insider dealing.

**90.** (1) An individual does not commit an offence under section **88**(1)(a) unless

(a) he was within the Virgin Islands at the time when he is alleged to have done any act constituting or forming part of the alleged dealing; or

(b) the professional intermediary referred to in section **88**(1)(a) was within the Virgin Islands at the time when he is alleged to have done anything by means of which the offence is alleged to have been committed.

(2) An individual does not commit an offence under section **88**(1)(b) or (c) unless

(a) he was within the Virgin Islands at the time when he is alleged to have disclosed the information or encouraged the dealing; or

(b) the alleged recipient of the information or encouragement was within the Virgin Islands at the time when he is alleged to have received the information or encouragement.

*Misleading information and market manipulation*

Misleading  
statements and  
market  
manipulation.

**91.** (1) A person commits an offence if, for the purpose specified in subsection (2), he

(a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive;

(b) dishonestly conceals any material facts; or

(c) recklessly makes, whether dishonestly or otherwise, a statement, promise or forecast which is misleading, false or deceptive.

(2) The purpose referred to in subsection (1) is the purpose of inducing another person, whether or not that other person is the person to whom the statement, promise or forecast is made or from whom the facts are concealed,

- (a) to enter, or offer to enter into, or refrain from entering into, an agreement or arrangement the making of which or performing of which constitutes investment business; or
- (b) to exercise, or refrain from exercising, any rights conferred by an investment.

(3) Subsection (2) applies whether the person intended to induce the other person or was reckless as to whether it would induce that other person, in the manner specified in that subsection.

(4) A person commits an offence if he does any act or engages in any course of conduct and

- (a) the act or course of conduct concerned creates a false or misleading impression as to the market, price or value of an investment;
- (b) the person does the act or engages in the course of conduct concerned for the purpose of creating the impression and thereby inducing another person
  - (i) to deal in the investment; or
  - (ii) refrain from doing so or to exercise, or refrain from exercising, any rights conferred by that investment.

(5) A person commits an offence under this section only if

- (a) the statement, promise or forecast is made in, or from, the Virgin Islands;
- (b) the facts are concealed in, or from, the Virgin Islands; or
- (c) the arrangement referred to in subsection (2)(a) are made in, or from, the Virgin Islands.

(6) A person who commits an offence under this section is liable

- (a) on summary conviction, to a fine not exceeding forty thousand dollars or imprisonment for a term not exceeding three years, or both; or
- (b) on conviction on indictment, to a fine not exceeding one hundred thousand dollars or imprisonment for a term not exceeding five years, or both.

Defences.

**92.** (1) A person does not commit an offence under section **91** in relation to a statement, promise or forecast if

- (a) the statement, promise or forecast was made in respect of a securities market; and
- (b) he proves that he acted in compliance with the market rules applicable to the securities market concerned.

(2) A person does not commit an offence under section **91** in relation to an act or a course of conduct if he undertook the act, or engaged in the course of conduct, in respect of a securities market and he proves that

- (a) he reasonably believed that the act or conduct would not create an impression that was false or misleading as to the matters contained in section **91**(4); or
- (b) he acted in compliance with the market rules applicable to the securities market concerned.

*General exclusion*

Monetary policy exclusion.

**93.** Sections **88** and **91** do not apply to anything done by a person acting on behalf of a public sector body in pursuit of

- (a) monetary policies;
- (b) policies with respect to exchange rates; or
- (c) policies with respect to the management of public debt or foreign exchange reserves.

*Regulations*

Market Abuse Regulations.

**94.** (1) The Cabinet may, on the advice of the Commission, make Market Abuse Regulations generally for giving effect to this Part and for the administration of this Act by the Commission as it relates to market abuse.

(2) The Market Abuse Regulations may

- (a) be made for the purposes of this Act or for specified provisions of this Act;
- (b) make different provision in relation to different persons,

circumstances or cases; and

- (c) subject to subsection (3), provide for offences and penalties for any contravention of or failure to comply with specified requirements of the Regulations.

(3) A penalty provided for an offence under the Market Abuse Regulations may not exceed

- (a) in the case of a fine, the sum of thirty thousand dollars; and
- (b) in the case of a period of imprisonment, the term of five years.

## **PART VI**

### **MISCELLANEOUS PROVISIONS**

**95.** (1) Subject to subsections (2) and (3), no person shall, except with the prior written approval of the Commission or unless authorised by or under another enactment,

Restrictions on use of certain names and terms.

- (a) use, whether in the name under which he is registered or in the description or title under which he carries on business in or from the Virgin Islands,
  - (i) the words or terms “fund” or “mutual fund” or any combination or derivative thereof or any word or phrase specified in the Mutual Funds Regulations as a word or phrase that suggests a person is operating as a mutual fund; or
  - (ii) any word or phrase prescribed in the Investment Business Regulations as a word or phrase that suggests investment business; or
- (b) make any representation, whether in a document or in any other manner, that is likely to suggest that he
  - (i) is carrying on, or that he is licensed or otherwise entitled to carry on, investment business; or
  - (ii) is operating as, or that he is registered as a public fund, recognised as a private or professional fund or otherwise entitled to operate as a mutual fund.

(2) Subsection (1) does not apply to a person holding an investment business licence, a public fund or a private or professional fund, provided that the name under which it is registered or the name which it uses does not suggest that,

- (a) in the case of a person holding an investment business licence, he carries on any business required to be licensed under this Act other than the business that he is authorised by its licence to carry on; or
- (b) in the case of a mutual fund, that the fund is of a different type than that for which it is registered or recognised.

Incorporation and  
change of name of  
companies.

**96.** The Registrar of Corporate Affairs shall not register a company under, or register a change of name of a BVI business company to, a name that includes

- (a) the word or term “fund” or “mutual fund” or any combination or derivative thereof, or
- (b) any other word or phrase specified or prescribed pursuant to section **95**(1)(a),

unless the Registrar is satisfied that the company is authorised under this Act or another enactment to use the name or that the Commission has approved the use of the name by the company.

Exemption from  
certain enactments.  
No. 16 of 2004

**97.** (1) A foreign company which carries on business in the Virgin Islands within the meaning of section 185 of the BVI Business Companies Act is exempt from Part XI of that Act if the business it carries on in the Virgin Islands is limited to operating in the Virgin Islands as a public fund, a private fund or a professional fund.

Cap. 200

(2) A licensee is exempt from the need to obtain a licence under the Business, Professions and Trade Licences Act to carry on any class of investment business in respect of which he is licensed.

No. 9 of 2009

(3) Subject to subsection (5), a licensee is exempt from the need to obtain a licence under the Financing and Money Services Act, 2009 to carry on the business of providing currency exchange services if it has, not less than fourteen days prior to commencing that business, or such shorter period as the Commission may allow, submitted a written notice to the Commission

- (a) advising the Commission of its intention to carry on the business of providing currency exchange services; and
- (b) specifying the nature and extent of that business.

(4) If there is any significant change in the nature and extent of the currency exchange services business of a licensee that has the benefit of an exemption under subsection (3), the licensee shall provide written notification of the change to the Commission.

(5) The Commission may, whether on receipt of a notice under subsection (3) or (4), or at any time subsequent thereto, disapply subsection (3) to a licensee where it is of the opinion that the nature and extent of the currency exchange services business carried on by the licensee is such that it should be licensed under the Financing and Money Services Act, 2009.

### *Administration*

- 98.** (1) Every application made under this Act shall Applications.
- (a) be in writing and, where a form has been approved under the Financial Services Commission Act, 2001, shall be in the approved form; and No. 12 of 2001
- (b) have included with it such documents or information as may be specified by this Act and the Mutual Fund Regulations or the Regulatory Code, as the case may be.
- (2) The Commission may require an applicant to
- (a) provide it with such documents and information, in addition to those specified in subsection (1)(b), as it reasonably requires to determine the application and any such information shall be in such form as the Commission may require; and
- (b) verify any document and information provided in support of an application in such manner as the Commission may specify.
- (3) If, before the determination by the Commission of an application,
- (a) there is a material change in any information or documentation provided by or on behalf of the applicant to the Commission in connection with the application, or
- (b) the applicant discovers that any such information or documentation is incomplete, inaccurate or misleading,

the applicant shall forthwith give the Commission written particulars of the change or of the incomplete, inaccurate or misleading information or documentation.

Registers.

- 99.** (1) The Commission shall maintain
- (a) a Register of Investment Business Licensees;
  - (b) a Register of Public Funds;
  - (c) a Register of Private Funds;
  - (d) a Register of Professional Funds; and
  - (e) a Register of Certified Authorised Representatives.

(2) The registers and the information contained in any document submitted to the Commission may be kept in any form the Commission considers fit including, either wholly or partly, by means of a device or facility that

- (a) records or stores information in magnetic or electronic form; and
- (b) permits the information to be inspected and reproduced in legible and useable form.

Inspection of registers and information held by Commission.

- 100.** (1) Subject to subsection (2), a person may, during normal business hours,
- (a) inspect the registers and any records kept by the Commission that are specified as public records in the Investment Business Regulations or the Mutual Fund Regulations, upon payment of the prescribed fee; and
  - (b) require the Commission to provide him with a copy or certified copy of, or extract from, any document that he would be entitled to inspect under paragraph (a) upon the payment of such fee as the Commission determines.

(2) In respect of documents submitted or kept in electronic form, the rights granted under subsection (1) extend only to reproductions of those documents in useable written form produced in such manner as the Commission considers appropriate.

(3) A copy or reproduction of, or extract from, any document or record that is kept by the Commission and certified as such by it is admissible in evidence in all legal proceedings to the same extent as the original document.

Electronic filing of documents.

- 101.** (1) In this section, a document in electronic form is a document in a computer processable message format that is capable of being transmitted electronically.

(2) The Investment Business Regulations and the Mutual Fund Regulations may provide for a system enabling documents required or permitted to be submitted to the Commission under this Act to be submitted to the Commission in electronic form.

- (3) A system for the filing of documents in electronic form shall provide for
- (a) the criteria for authorising persons to submit documents in electronic form; and
  - (b) the security and authentication of the documents submitted.

**102.** (1) The fees and penalties specified in regulations made under this Act are payable to the Commission.

Fees, penalties and charges payable to Commission.

(2) The Commission may refuse to take any action required of it with respect to a licensee under this Act for which a fee is payable until the fee and any other fees, penalties and charges payable by, or in respect of, the licensee have been paid.

No. 12 of 2001

(3) Any fee, charge or contribution which is owed to the Commission under this Act may be recovered as a debt due to the Commission.

**103.** (1) Without limiting the powers of the Commission under the Financial Services Commission Act, the Regulatory Code may, in addition to matters specifically provided for in this Act, specify or provide for

Regulatory Code.  
No. 12 of 2001

- (a) the financial resources to be maintained by licensees;
- (b) the policies, procedures, systems and controls, including internal controls, to be established and maintained by licensees, including with respect to the assessment and management of risk;
- (c) principles and rules of corporate governance to be adhered to by licensees;
- (d) record keeping;
- (e) internal reporting;
- (f) staff training;
- (g) the solicitation of business and in particular unsolicited calls;
- (h) the preparation by a licensee of a business plan and the information to be included in, and the form of, the business plan.

Securities and  
Investment  
Business Advisory  
Committee.

- 104.** (1) The Commission, with the approval of its board, may
- (a) establish a committee to be known as the “Securities, Investment Business and Mutual Funds Advisory Committee”; and
  - (b) appoint as members of the Committee persons having such knowledge and experience as the Commission considers appropriate.
- (2) The functions of the Securities, Investment Business and Mutual Funds Advisory Committee shall be
- (a) to keep this Act, and such other enactments relevant to securities, investment business and mutual funds as may be specified by the Commission, under review;
  - (b) to make such recommendations as it considers appropriate to the Commission for changes to this Act and to any other enactments specified by the Commission under paragraph (a); and
  - (c) to make such recommendations as it considers appropriate to the Commission for the development and reform of the law relating to securities, investment business and mutual funds.
- (3) The Chairman of the Committee shall be appointed by the Commission.
- (4) The Committee
- (a) may appoint such subcommittees as it considers appropriate; and
  - (b) shall determine its own rules of procedure.

*Offence Provisions*

False or misleading  
representations,  
statements, reports  
or returns.

- 105.** (1) No person shall make or assist in making a representation, statement, report or return, whether oral or written,
- (a) that is required or permitted by this Act to be made to or, in the case of a document, submitted to the Commission; and
  - (b) that
    - (i) contains a false statement of a material fact; or

- (ii) omits to state a material fact required to be provided to the Commission or necessary to avoid the statement or document being materially misleading.

(2) A person does not contravene subsection (1) if he did not know and, with the exercise of reasonable diligence, could not have known that the representation or statement contained a false statement or omitted a material fact.

**106.** (1) A person who contravenes a provision of this Act specified in Column 1 of Schedule 7 and described in Column 2 of that Schedule commits an offence and is liable on conviction up to the maximum of the penalty provided

Schedule of offences.  
Schedule 7

- (a) in Column 4 of that Schedule, in the case of a company; or
- (b) in Column 5 of that Schedule, in the case of an individual.

(2) Where an offence is committed by a company, a director and every senior officer of that company who knowingly authorised, permitted or acquiesced in the commission of the offence also commits an offence and is liable on conviction to the same penalty prescribed for the company.

(3) Schedule 7 does not apply to an offence committed under Part V.

**107.** Where a person is convicted of an offence under this Act or any regulations, the court having jurisdiction to try the offence may, in addition to any punishment it may impose, order that person to comply with the provision of this Act or of the regulations for the contravention of which he has been convicted.

Order to comply.

### *Final Provisions*

**108.** (1) The Cabinet may by Order, on the advice of the Commission, amend any Schedule to this Act in such manner as it considers necessary.

Amendment of Schedules.

(2) An Order made under subsection (1) shall

- (a) be published in the Gazette; and
- (b) be subject to a negative resolution of the House of Assembly.

**109.** The transitional provisions specified in Schedule 8 shall have effect.

Transitional provisions.  
Schedule 8

Repeals and  
amendments.

No. 6 of 1996

No. 12 of 2001

**110.** (1) The Mutual Funds Act, 1996 is repealed.

(2) Schedule 2 to the Financial Services Commission Act, 2001 is amended by deleting the reference to “Mutual Funds Act, 1996” in item 4 under Part 1 (Regulatory Legislation) and replacing it with “Securities and Investment Business Act, 2009”.

## **SCHEDULE 1**

**[Section 2]**

### **INVESTMENTS**

#### **Shares, interests in a partnership or fund interests, etc.**

1. Any of the following:
  - (a) shares in, and stock in the share capital of, a company;
  - (b) interests in a partnership;
  - (c) a fund interest in a mutual fund that does not fall within paragraph (a) or (b).

#### **Debentures, etc.**

2. Debentures, debenture stock, loan stock, bonds, certificates of deposit and any other instruments creating or acknowledging indebtedness, other than
  - (a) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services;
  - (b) a cheque or other bill of exchange, a bankers draft or a letter of credit;
  - (c) a banknote or a statement showing a balance in a current, deposit or savings account;
  - (d) by reason of any financial obligation contained in it,
    - (i) a lease or other disposition of property;
    - (ii) a mortgage or any other charge; or
    - (iii) an insurance policy.

#### **Instruments giving entitlement to shares, interests or debentures**

3. (1) Subject to sub-paragraph (2), warrants or other instruments entitling the holder to subscribe for investments falling within paragraph 1 or 2.
  - (2) For the purposes of sub-paragraph (1),

- (a) it is immaterial whether the investments are for the time being in existence or identifiable; and
- (b) an investment falling within sub-paragraph (1) shall not be regarded as falling within paragraph 5, 6 or 7.

### **Certificates representing investments**

- 4. Certificates or other instruments which confer contractual or property rights
  - (a) in respect of any investment falling within paragraph 1, 2 or 3, being an investment held by a person other than the person on whom the rights are conferred by the certificate or instrument; and
  - (b) the transfer of which may be effected without the consent of that person.

### **Options**

- 5. Options to acquire or dispose of
  - (a) an investment falling within any other paragraph of this Schedule;
  - (b) any currency;
  - (c) palladium, platinum, gold or silver; or
  - (d) an option to acquire or dispose of an investment falling within sub-paragraph (a), (b) or (c) of this paragraph.

### **Futures**

- 6. (1) Rights under a contract for the sale of a commodity or property of any other description under which delivery is to be made at a future date and at a price agreed upon when the contract is made, other than a contract made for commercial and not investment purposes.
- (2) A contract shall be regarded as made for investment purposes if it is made or traded on an investment exchange, or made otherwise than on such an exchange but expressed to be as traded on such an exchange or on the same terms as those on which an equivalent contract would be made on such an exchange.

- (3) A contract not falling within subparagraph (2) shall be regarded as made for commercial purposes if, under the terms of the contract, delivery is to be made within seven days.

### **Contracts for differences**

7. (1) Rights under
  - (a) a contract for differences; or
  - (b) any other contract the purpose or intended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in
    - (i) the value or price of property of any description, or
    - (ii) an index or other factor designated for that purpose in the contract,other than a contract where the parties intend that the profit is to be obtained or the loss avoided by taking delivery of any property to which the contract relates.
- (2) This paragraph does not apply to rights under a contract under which money is received by way of deposit on terms that any interest or other return to be paid on the sum deposited will be calculated by reference to fluctuations in an index or other factor.

### **Long-term insurance contracts**

8. (1) Rights under a contract the effecting and carrying out of which constitutes Class 1 or Class 2 long-term business within the meaning of the Insurance Act, 2008.
- (2) This paragraph does not apply to rights under a reinsurance contract.
- (3) Rights falling within this paragraph shall not be regarded as falling within paragraph 7.

### **Rights and interests in investments**

9. Rights to and interests in any investment falling within any of the preceding paragraphs of this Schedule.

### **Specified investment**

10. Anything specified as an investment in the Investment Business Regulations.

## SCHEDULE 2

[Sections 3 and 4]

### INVESTMENT ACTIVITIES

#### PRELIMINARY

#### Interpretation for this Schedule

For the purposes of this Schedule, “member of the public”, in relation to a person soliciting him (the first person), means any other person except

- (a) a company in the same group as the first person;
- (b) a person who is a participant with the first person in a joint enterprise;
- (c) a person holding
  - (i) a licence issued under section 6 of this Act;
  - (ii) a licence issued under the Banks and Trust Companies Act, 1990;
  - (iii) a licence issued under the Company Management Act, 1990; or
  - (iv) an insurer’s licence issued under the Insurance Act, 2008;
- (d) a person licensed in a jurisdiction outside the Virgin Islands to carry on an activity equivalent to an activity for which a licence specified in paragraph (c) is required, provided that the person is regulated and supervised in the carrying on of that business.

No. 9 of 1990

No. 8 of 1990

No. 1 of 2008

#### PART A - INCLUDED ACTIVITIES

##### 1. Dealing in Investments

- (a) Buying, selling, subscribing for or underwriting investments as an agent.
- (b) Buying, selling, subscribing for or underwriting investments as principal where the person
  - (i) holds himself out as willing, as principal, to enter into transactions of that kind at prices determined by him generally and continuously rather than in respect of each particular transaction;

- (ii) holds himself out as engaging in the business of underwriting investments of the kind to which the transaction relates;
- (iii) holds himself out as engaging in the business of buying investments of the kind to which the transaction relates with a view to selling them; or
- (iv) regularly solicits members of the public for the purpose of inducing them, whether as principals or agents, to buy, sell, subscribe for or underwrite investments and the transaction is, or is to be entered into, as a result of the person having solicited members of the public in that manner.

For the purposes of this paragraph, one investment is of the same kind as another investment if they both fall within the same paragraph of Schedule 1.

## **2. Arranging Deals in Investments**

Making arrangements with a view to

- (a) another person (whether as a principal or an agent) buying, selling, subscribing for or underwriting a particular investment, being arrangements which bring about, or would bring about, the transaction in question; or
- (b) a person who participates in the arrangements buying, selling, subscribing for or underwriting investments.

## **3. Managing Investments**

- (a) Managing investments belonging to another person in circumstances involving the exercise of discretion (other than as manager of a mutual fund).
- (b) Acting as manager of a mutual fund.

## **4. Providing Investment Advice**

- (a) Advising a person on investments (other than as the investment adviser of a mutual fund) where the advice
  - (i) is given to the person in his capacity as an investor, or a potential investor, or in his capacity as agent for an investor or potential investor; and

- (ii) concerns the merits of the investor, or a potential investor, doing any of the following (whether as principal or agent):
  - (A) buying, selling, subscribing for or underwriting a particular investment; or
  - (B) exercising any right conferred by an investment to acquire, sell, subscribe for, underwrite or convert an investment.
- (b) Acting as the investment adviser of a mutual fund.

## **5. Providing Custodial Services With Respect to Investments**

- (a) Acting as custodian or depository of assets belonging to another person, other than as custodian of a mutual fund or trustee of unit trust, where
  - (i) those assets include investments falling within paragraphs 1 to 6 of Schedule 1; or
  - (ii) the custodial (or depository) arrangements are such that those assets may consist of or include investments specified in subparagraph (a) (i) and the arrangements have at any time been held out as being arrangements under which investments would be safeguarded.
- (b) Acting as custodian of a mutual fund.
- (c) Acting as the trustee of a unit trust.

## **6. Providing Administration Services With Respect to Investments**

- (a) Administering or arranging for the administration of assets belonging to another person (other than as administrator of a mutual fund) where
  - (i) those assets include investments falling within paragraphs 1 to 6 of Schedule 1; or
  - (ii) the administration arrangements are such that those assets may consist of or include investments and the arrangements have at any time been held out as being arrangements under which investments would be administered.
- (b) Acting as administrator of a mutual fund.

## 7. **Operating an Investment Exchange**

Providing a facility, whether by electronic means or otherwise, for the orderly trading of investments or for the listing of investments for the purposes of trading, by members of the investment exchange.

### **PART B - EXCLUDED ACTIVITIES**

#### 1. **Dealing in Investments**

Where they would otherwise constitute dealing in investments, the following activities or transactions are deemed not to constitute dealing in investments for the purposes of paragraph 2 of Part A in the circumstances and to the extent specified:

(1) ***Investments evidencing indebtedness***

A person, whether as principal or agent, accepting, transferring or becoming a party to (otherwise than as a debtor or surety) an instrument creating or acknowledging indebtedness in respect of any loan, credit, guarantee or other similar financial accommodation or assurance which he, or his principal, has made, granted or provided.

(2) ***Issuance, redemption or re-purchase of own investments***

- (a) The issuing, redeeming or re-purchasing by a company of its own
  - (i) shares;
  - (ii) debentures; or
  - (iii) instruments giving entitlement to shares in, or debentures issued by, the company.

For the purposes of this paragraph, “debenture” includes any other instrument falling within paragraph 2 of Schedule 1.

- (b) The issuing, redeeming or re-purchasing by a unit trust of its own fund interests; or
- (c) The issuing, redeeming or re-purchasing by a partnership of its own partnership interests.

(3) ***Sale of Goods and Supply of Services***

- (a) A transaction entered into by a supplier of goods or services with a customer where the supplier is acting as principal and the transaction is, or is to be, entered into by the supplier with the customer for the purposes of, or in connection with, the sale of goods or the supply of services by the supplier to the customer or a related sale or supply.
- (b) A transaction entered into by a supplier of goods or services with a customer where the supplier is acting as agent for the customer, and
  - (i) the transaction is, or is to be, entered into by the supplier with the customer for the purposes of, or in connection with, the sale of goods or the supply of services by the supplier to the customer or a related sale or supply;
  - (ii) the investment falls within paragraph 1(a), 2 or 3 of Schedule 1 or , as far as is relevant to those paragraphs, paragraph 9 of Schedule 1; and
  - (iii) the supplier does not
    - (A) hold himself out generally as engaging in the business of buying investments with a view to selling them; or
    - (B) regularly solicit members of the public to buy, sell, subscribe for or underwrite investments.

(4) ***Risk Management***

- (a) A transaction where
  - (i) the transaction relates to one or more investments falling within paragraph 5, 6(1) or 7(1) of Schedule 1;
  - (ii) none of the parties to the transaction are individuals;
  - (iii) the sole or main purpose for which the person concerned enters into the transaction (either by itself or in combination with other such transactions) is to limit the extent to which a business specified as a “relevant business” in subparagraph (b) will be affected by an identifiable risk arising otherwise than as a result of the carrying on of any of the activities in Part A which are not excluded by this Part.

- (b) A business is specified as a “relevant business” for the purposes of subparagraph (a) if it is not relevant investment business and it is carried on by
  - (i) the person entering the transaction;
  - (ii) a company that is in the same group as the person entering the transaction; or
  - (iii) a person who is, or is proposing, to participate in a joint enterprise with the person entering the transaction.

(5) ***Dealing as agent by professionals and non-investment businesses***

Dealing in investments as agent if

- (a) the dealing consists of making arrangements with a view to another person buying, selling, subscribing for or underwriting investments;
- (b) the arrangements are made in the course of carrying on any business or profession which does not otherwise constitute investment business;
- (c) the agent does not receive any commission or other remuneration on account of, or with respect to, the dealing; and
- (d) the agent does not hold himself out generally as providing a service of dealing in investments.

(6) ***Employee share schemes***

- (a) Dealing by a company (“the first company”), with a company in the same group as the first company or a relevant trustee in shares in, or debentures of, the first company, for the benefit of, or holding the shares or debentures for the benefit of,
  - (i) the employees or former employees of the first company or a company in the same group as the first company; or
  - (ii) the spouses, widows, widowers or children, or step-children, under the age of eighteen years of the persons referred to in subparagraph (i).
- (b) For the purposes of subparagraph (a),

- (i) a “relevant trustee” is a person holding shares in, or debentures of, the first company as trustee for the purposes of the scheme specified in subparagraph (a); and
- (ii) “share” and “debenture” includes any other instrument falling within paragraph 1 or 2 of Schedule 1, as the case may be, or, where relating to the share or debenture concerned, paragraph 3, 4 or 9.

(7) ***Dealing as bare trustee***

Dealing in investments which are, or are to be held, by a person as bare trustee for another person on the other person’s instructions where

- (a) the dealing takes place in the course of a business that does not otherwise constitute investment business;
- (b) the person concerned does not receive any remuneration, whether directly or indirectly, for the transaction that constitutes dealing in investments and, for the purposes of this subparagraph,
  - (i) remuneration includes commission; and
  - (ii) no account shall be taken of any remuneration that the person receives separately for acting as bare trustee; and
- (c) the person does not otherwise provide, or hold himself out as providing, a service of dealing in investments.

**2. Arranging Deals in Investments**

The following activities are deemed not to constitute arranging deals in investments for the purposes of paragraph 3 of Part A in the circumstances and to the extent specified:

(1) ***Sale of Goods and Supply of Services***

- (a) A transaction entered into by a supplier of goods or services with a customer where the supplier is acting as principal and the transaction is, or is to be, entered into by the supplier with the customer for the purposes of, or in connection with, the sale of goods or the supply of services by the supplier to the customer or a related sale or supply.

- (b) A transaction entered into by a supplier of goods or services with a customer where the supplier is acting as agent for the customer, and
  - (i) the transaction is, or is to be, entered into by the supplier with the customer for the purposes of, or in connection with, the sale of goods or the supply of services by the supplier to the customer or a related sale or supply;
  - (ii) the investment falls within paragraph 1(a), 2 or 3 of Schedule 1 or , as far as is relevant to those paragraphs, paragraph 9 of Schedule 1; and
  - (iii) the supplier does not
    - (A) hold himself out generally as engaging in the business of buying investments with a view to selling them; or
    - (B) regularly solicit members of the public to buy, sell, subscribe for or underwrite investments.

***(2) Arrangements in connection with instruments creating or acknowledging indebtedness***

A person making arrangements in respect of a transaction specified in paragraph 1(1).

**3. Managing Investments**

The management of investments by a supplier of goods or services where the securities are, or are to be, managed for the purposes of, or in connection with, the sale of goods or the supply of services by the supplier to a customer or a related sale or supply is deemed not to constitute managing investments for the purposes of paragraph 4 of Part A in the circumstances and to the extent specified.

**4. Providing Investment Advice**

The following activities are deemed not to constitute providing investment advice for the purposes of paragraph 5 of Part A in the circumstances and to the extent specified:

**(1) *Newspapers, broadcasting and information services***

The giving of investment advice in

- (a) a newspaper, journal, magazine or other periodical publication,
- (b) a television or sound broadcast, or
- (c) any electronic information service,

if the principal purpose of the publication, broadcast or information service, taken as a whole and including any advertisements contained in it, is not to induce persons to buy, sell, subscribe for or underwrite a particular investment.

(2) ***Providing investment advice in the course of a non-investment business***

The giving of investment advice in the course of a business that does not constitute investment business where the person does not receive any remuneration for the advice and the advice is not, or does not include

- (a) a recommendation to a person to buy, sell, subscribe for or underwrite a particular investment or to exercise or refrain from exercising rights conferred by a particular investment;
- (b) advice on the suitability of a particular investment for the person to whom, or in relation to whom, the advice is given; or
- (c) advice on the characteristics or performance of a particular investment.

(3) ***Providing investment advice in the course of a profession***

The giving of legal or accounting advice with respect to an investment by a person in the course of carrying on business as a legal practitioner or an accountant.

(4) ***Trustee providing investment advice***

The giving of investment advice by a person as trustee to

- (a) a co-trustee for the purposes of the trust, or
- (b) a beneficiary under the trust concerning the beneficiary's interest under the trust,

if the person does not otherwise carry on, or hold itself out as carrying on, the business of providing investment advice or managing investments.

(5) ***Director providing investment advice***

The giving of investment advice by a director of a company to another director of the company for the purposes of the company, provided that the director does not otherwise carry on, or hold itself out as carrying on, the business of providing investment advice or managing investments.

**5. Providing Custodial Services With Respect to Investments**

No excluded activities.

**6. Providing Administration Services With Respect to Investments**

No excluded activities.

**7. Operating an Investment Exchange**

No excluded activities.

**PART C - EXCLUDED PERSONS**

1. A person (the first person) does not carry on investment business solely by

(a) soliciting

(i) a person who is not a member of the public for the purpose of offering to provide that person with a service that constitutes investment business; or

(ii) a licensee for the purpose of offering to provide a client of the licensee with a service that constitutes investment business;

(b) making an offer to a person who is not a member of the public to provide that person with a service that constitutes investment business;

(c) making an offer to a person (the second person) to provide a service that constitutes investment business where

(i) the offer is made to the second person through a licensee holding a category 4 licence of which the second person is a client;

(ii) the first person does not have a place of business in the Virgin Islands; and

(iii) the service is to be performed outside the Virgin Islands;

- (d) providing information or documentation to the professional services provider of a BVI business company concerning an offer to provide, or the provision of, a service that constitutes investment business where
  - (i) the first person does not have a place of business in the Virgin Islands; and
  - (ii) the service is to be performed outside the Virgin Islands.
- 2. For the purposes of section 4(3), the persons specified in paragraphs 3 to 8 of this Part are excluded persons in the circumstances and to the extent specified provided that, in each case, the person concerned
  - (a) does not otherwise carry on, or hold himself out as carrying on, investment business; and
  - (b) does not receive any remuneration, whether directly or indirectly, for the activity that constitutes investment business, and for the purposes of this subparagraph,
    - (i) remuneration includes commission; but
    - (ii) no account shall be taken of any remuneration that the person receives separately for acting in the capacity specified in the relevant paragraph.
- 3. A company is an excluded person where it undertakes an activity that constitutes investment business exclusively with, or for, a company within the same group.
- 4. A person who is a participant in a joint enterprise is an excluded person where he undertakes an activity that constitutes investment business
  - (a) with, or for, another participant in the same joint enterprise; and
  - (b) for the purposes of, or in connection with, the joint enterprise.
- 5. A person who is a partner in a partnership is an excluded person where he undertakes an activity that constitutes investment business
  - (a) with or for another partner in the same partnership; and
  - (b) for the purposes of, or in connection with, the partnership.
- 6. A director of a company is an excluded person where he undertakes an activity that constitutes investment activity

- (a) with, or for,
    - (i) the company of which he is a director; or
    - (ii) a company in the same group as the company of which he is director; and
  - (b) for the purposes of, or in connection with, the company concerned.
7. A trustee of a trust is an excluded person where he undertakes an activity that constitutes investment activity for the purposes of, or in connection with, the trust.
8. A person is an excluded person where he undertakes an activity that constitutes investment business in his capacity as
- (a) an executor or administrator of an estate;
  - (b) a receiver of an estate or of the assets of a company;
  - (c) the administrator or liquidator of a company; or
  - (d) a trustee in bankruptcy.
9. A public fund, a private or professional fund or a recognised foreign fund is an excluded person where the fund undertakes an activity that constitutes carrying on business as a mutual fund in or from within the Virgin Islands.

## SCHEDULE 3

[Section 5]

### CATEGORIES AND SUB-CATEGORIES OF INVESTMENT BUSINESS LICENCE

#### **Category 1**

Dealing in Investments

- Sub-category A: Dealing as Agent
- Sub-category B: Dealing as Principal

#### **Category 2**

Arranging Deals in Investments

#### **Category 3**

Investment Management

- Sub-category A: Managing Segregated Portfolios
- Sub-category B: Managing Mutual Funds
- Sub-category C: Managing Pension Schemes
- Sub-category D: Managing Insurance Products
- Sub-category E: Managing Other Types of Investment

#### **Category 4**

Investment Advice

- Sub-category A: Investment Advice (Excluding Mutual Funds)
- Sub-category B: Investment Advice (Mutual Funds)

#### **Category 5**

Custody of Investments

- Sub-category A: Custody of Investments (Excluding Mutual Funds)
- Sub-category B: Custody of Investments (Mutual Funds)

**Category 6**

Administration of Investments

Sub-category A: Administration of Investments (Excluding Mutual Funds)

Sub-category B: Administration of Investments (Mutual Funds)

**Category 7**

Operating an Investment Exchange

## SCHEDULE 4

[Section 24(1)]

### Qualified Investors

The following are qualified investors for the purposes of section 24(1):

1. A person who holds
  - (a) an investment business licence issued under section 6 of this Act;
  - (b) a licence issued under the Banks and Trust Companies Act, 1990; or No. 9 of 1990
  - (c) an insurer's licence issued under section 8 of the Insurance Act, 2008. No. 1 of 2008
2. A company, any securities of which are listed on a recognised exchange.
3. A public fund, a private fund or a professional fund.
4. A professional investor within the meaning of section 40(1) of this Act.

## SCHEDULE 5

[Section 82]

### Securities for Purposes of Part V

For the purposes of Part V, “securities” means any of the following:

#### Shares

1. Shares and stock in the share capital of a company (“shares”).

#### Debt securities

2. Any instrument creating or acknowledging indebtedness which is issued by a company or public sector body including, in particular, debentures, debenture stock, loan stock, bonds and certificates of deposit (“debt securities”).

#### Warrants

3. Any right, (whether conferred by warrant or otherwise) to subscribe for shares or debt securities.

#### Depository receipts

4. (1) The rights under any depository receipt.  
(2) For the purpose of sub-paragraph (1) a “depository receipt” means a certificate or other record (whether or not in the form of a document)
  - (a) which is issued by or on behalf of a person who holds any relevant securities of a particular issuer; and
  - (b) which acknowledges that another person is entitled to rights in relation to the relevant securities or relevant securities of the same kind.  
(3) In sub-paragraph (2) “relevant securities” means shares, debt securities and warrants.

#### Options

5. Any option to acquire or dispose of any security falling within any other paragraph of this Schedule.

## **Futures**

6. (1) Rights under a contract for the acquisition or disposal of relevant securities under which delivery is to be made at a future date and at a price agreed when the contract is made.
- (2) In sub-paragraph (1)
  - (a) the references to a future date and to a price agreed when the contract is made include references to a date and a price determined in accordance with terms of the contract; and
  - (b) “relevant securities” means any security within the meaning of any other paragraph of this Schedule.

## **Contracts for differences**

7. (1) Rights under a contract which does not provide for the delivery of securities but whose purpose or intended purpose is to secure a profit or avoid a loss by reference to fluctuations in
  - (a) a share index or other similar factor connected with relevant securities;
  - (b) the price of particular relevant securities; or
  - (c) the interest rate offered on money placed on deposit.
- (2) In sub-paragraph (1) “relevant securities” means any security falling within any paragraph of this Schedule.

## SCHEDULE 6

[Section 37]

### DISAPPLICATION AND MODIFICATION OF BVI BUSINESS

#### COMPANIES ACT WITH RESPECT TO PUBLIC ISSUERS

The BVI Business Companies Act, 2004 is modified with respect to public issuers that are BVI business companies (referred to in this Schedule as BVI public issuers) as follows: No. 16 of 2004

##### **Section 9**

1. Section 9 is modified with respect to a BVI public issuer as follows:
  - (a) The memorandum of a BVI public issuer shall state that the company is limited by shares and section 9(1)(b)(ii), (iii), (iv) and (v) are disappplied with respect to BVI public issuers.
  - (b) The memorandum of a BVI public issuer shall state that the company is not authorised to issue bearer shares.
  - (c) In addition to the other matters required by section 9 to be stated in the memorandum of a company, the memorandum of a BVI public issuer shall state the the company is a public issuer within the meaning of this Act.

##### **Section 12**

2. Section 12(4) and (5) (amendment of memorandum and articles by resolution of directors) do not apply to a BVI public issuer.

##### **Section 28**

3. (a) Subsection (2)(d) applies to a BVI public issuer as if the words “and, at the discretion of the directors, for any person having a direct or indirect interest in the company” were omitted.
- (b) Subsections (3) and (4) do not apply to a BVI public issuer.

##### **Part III**

4. (a) Cabinet may make regulations providing for title to shares to be evidenced and transferred by means of a computer system, without a written instrument.

- (b) Without limiting subparagraph (a), regulations made by Cabinet under this paragraph may provide for
  - (i) the approval or recognition and control of persons who operate such computer systems;
  - (ii) the duties of public issuers with respect to the keeping of registers, the registration of transfers and other matters; and
  - (iii) the circumstances in which transfers of shares transactions made in accordance with the regulations are considered to be effective.
- (c) The regulations made under this paragraph
  - (i) may provide for such amendments to the BVI Business Companies Act as Cabinet considers necessary to give effect to the purpose of the Regulations as specified in paragraph (a);
  - (ii) shall be published in the Gazette; and
  - (iii) shall be subject to a negative resolution of the House of Assembly.

**Section 46**

- 5. Subsections (2) to (4) apply to a BVI public issuer and subsections (1) and (5) do not apply to a BVI public issuer.

**Section 47**

- 6. Every share in a public issuer shall be issued for money, except to the extent that the Public Issuers Code provides otherwise.

**Section 59**

- 7. (a) Where a BVI public issuer purchases, redeems or otherwise acquires its own shares, it must do so in accordance with sections 60, 61 and 62.
- (b) Subsections (2) and (3) do not apply to a BVI public issuer.

**Section 81**

- 8. Subsection (1)(b) does not not apply to BVI public issuer.

**Section 82**

- 9. Subsection (4) does not not apply to BVI public issuer.

**Section 83**

10. Subsection (1) as effect to as BVI public iccuer as if “twenty-one days” was substituted for “seven days”.

**Section 85**

11. Subsections (1) and (2) do not apply to a BVI public issuer.

**Section 88**

12. Section 88 does not apply to a BVI public issuer.

**Section 113**

13. Subsection (2) applies to a BVI public issuer as if
- (a) paragraphs (a) and (b) were deleted; and
  - (b) the words “may be appointed” were deleted and the words “shall be appointed by the members” were substituted.

**Section 114**

14. (a) Subsection (1) applies to a BVI public issuer as if the words “Subject to the memorandum or articles of a company” were deleted.
- (b) Subsection (2) applies to a BVI public issuer as if paragraph (b) was deleted.
- (c) Subsections (4) and (5) do not apply to a BVI public issuer.

**Section 119**

15. The Public Issuers Code may disapply section 119 to a BVI public issuer and make alternative provision for the fixing of the emoluments of directors.

**Part VII**

16. Part VII has no application with respect to a BVI public issuer.

**Section 184**

17. A BVI public issuer shall not continue as a company incorporated under the laws of a juruisdiction outside the Virgin Islands unless the Commission has given its prior written consent to the company so continuing.

## **Part XII**

18. (a) Section 199(1)(a) and section 199(2) do not apply to a BVI public issuer.
- (b) For the purposes of section 199(3)(b), “eligible individual” with respect to the voluntary liquidator of a BVI public issuer means an individual holding a licence to act as an insolvency practitioner issued under section 476 of the Insolvency Act, 2003.
- (c) Section 213(1) applies to a BVI public issuer as if after the words “the Registrar may” were inserted the words “, with the prior written approval of the Commission,”.
- (d) Section 219(1) applies to a BVI public issuer as if the words “the Registrar” were deleted and the words “the Commission” were substituted.

## **Section 231**

19. (a) Section 231 does not apply to a BVI public issuer.
- (b) The Public Issuers Code may require a BVI public issuer to file details of its members and directors with the the Registrar of Corporate Affairs.

**SCHEDULE 7**

**[Section 106]**

**OFFENCES UNDER THIS ACT**

<u>Column 1</u>	<u>Column 2</u>	<u>Column 3</u>	<u>Column 4</u>	<u>Column 5</u>
Section contravened	Description of offence	Method of trial	Penalty (company)	Penalty (individual)
<b>4(1)</b>	Person carries on, or holds himself out as carrying on, investment business of any kind in or from within the Virgin Islands without holding a licence authorising him to carry on that kind of investment business	Summary	\$40,000	\$20,000
		Indictment	\$75,000	\$40,000
<b>7(2)</b>	Licensee fails to forthwith notify the Commission in writing that it has formed the opinion that it does not comply with section <b>7</b> (1) (requirement to maintain its business in a financially sound condition)	Summary	\$25,000	\$15,000
<b>8(4)</b>	Licensee fails to forthwith notify the Commission in writing that its capital resources have fallen below the amount that it is required to maintain under section <b>8(1)</b> .	Summary	\$25,000	\$15,000
<b>10(1)</b>	Licensee appoints a director or senior officer without the prior written approval of the Commission	Summary	\$10,000	\$5,000

<b>13</b>	Licensee fails to maintain such professional indemnity and other insurance as is prescribed	Summary	\$30,000	\$20,000
<b>15</b>	Licensee fails to comply with direction of Commission to change the name under which it carries on business	Summary	\$25,000	\$15,000
<b>16</b>	Licensee issues a bearer share	Summary	\$25,000	\$20,000
<b>18(1)</b>	Licensee fails to ensure that  (a) client assets are identified, or identifiable, and appropriately segregated and accounted for; or  (b) he makes arrangements for their proper protection	Summary  Indictment	\$50,000  \$75,000	\$25,000  \$40,000
<b>19(1)</b>	Licensee, in relation to an activity that constitutes investment business, whether or not carried on by him and whether or not the activity is one that he is authorised to carry on, or in relation to any investment, contravenes paragraph (a), (b) or (c)	Summary	\$40,000	\$25,000
<b>19(2)</b>	Licensee issues or causes or permits to be issued an advertisement, brochure or other similar document or makes a statement, promise or forecast contrary to a direction or approval of	Summary	\$40,000	\$25,000

	the Commission			
<b>20 (2)</b>	Licensee issues, or causes or permits to be issued, whether in the Virgin Islands or elsewhere, an advertisement, brochure or similar document or makes a statement, promise or forecast the issue of which is prohibited by the Regulatory Code.	Summary	\$40,000	\$25,000
<b>25(1)</b>	Subject to section <b>25(3)</b> , issuer offers security to the public in the Virgin Islands for purchase or subscription where  (a) the offer is not contained in a registered prospectus; or  (b) the offer does not comply with such requirements as may be specified in the Public Issuers Code	Summary	\$25,000	\$15,000
		Indictment	\$40,000	\$25,000
<b>25(1)</b>	Subject to section <b>25(3)</b> , person offers security to the public in the Virgin Islands for purchase or subscription on behalf of an issuer where  (a) the offer is not contained in a registered prospectus; or  (b) the offer does not comply with such requirements as may be specified in the Public Issuers Code	Summary	\$25,000	\$15,000
		Indictment	\$40,000	\$25,000

<b>29(1)</b>	Issuer or person who applied for the registration of the prospectus on the issuer's behalf becomes aware during relevant period that the registered prospectus contains a material inaccuracy or omits a material fact and fails to apply to Commission to register supplementary prospectus.	Summary	\$25,000	\$20,000
<b>30(1)</b>	Issuer, or person acting on issuer's behalf distributes registered prospectus when issuer or other person knows, or ought reasonably to know, that the prospectus contains a material error, is materially misleading or omits a material fact or particular	Summary Indictment	\$25,000 \$40,000	\$15,000 \$25,000
<b>30(1)</b>	Issuer, or person acting on issuer's behalf, distributes registered prospectus that does not incorporate all the amendments in a registered supplementary prospectus	Summary	\$25,000	\$15,000
<b>31</b>	Issuer or other person causing or permitting prospectus to be distributed in circumstances where section <b>25</b> does not apply and where the prospectus does not comply with section <b>27(1)</b> (save as otherwise provided by the Public Issuers Code).	Summary	\$25,000	\$15,000
<b>41(1)(a)</b>	A company or other body, not being a public,	Summary	\$40,000	\$25,000

	private, professional or recognised foreign fund, carries on, or holds itself out as carrying on, business as a mutual fund in or from within the Virgin Islands	Indictment	\$75,000	40,000
<b>41(1)(b)</b>	The partners of a partnership that is a mutual fund carry on, or hold themselves out as carrying on, the business of the fund, the partnership not being a public, private, professional or recognised foreign fund, in or from within the Virgin Islands	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000
<b>41(1)(c)</b>	The trustee of a unit trust carries on, or holds itself out as carrying on, the business of the unit trust, the unit trust not being a public, private, professional or recognised foreign fund, in or from within the Virgin Islands	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000
<b>41(1)(d)</b>	A mutual fund not falling under section <b>41(1)(a)</b> , (b) or (c) carries on, or holds itself out as carrying on, the business of a mutual fund, the mutual fund not being a public, private, professional or recognised foreign fund, in or from within the Virgin Islands	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000
<b>41(2)</b>	A person acts as the functionary of, or is otherwise concerned with the management or administration of, a	Summary	\$40,000	\$40,000
		Indictment	\$75,000	\$75,000

	mutual fund that carries on business in or from within the Virgin Islands where the mutual fund concerned is not a public, private, professional or recognised foreign fund			
<b>42(1)</b>	Person promotes a mutual fund in contravention of section <b>42(1)</b>	Summary	\$40,000	\$25,000
		Indictment	\$50,000	\$30,000
<b>46(1)</b>	A public fund, whether in or outside the Virgin Islands, makes an invitation to the public to subscribe for or purchase its fund interests, where  (a) the offer is not contained in a registered prospectus; or  (b) the offer does not comply with such requirements as may be specified in the Mutual Fund Regulations	Summary	\$25,000	\$15,000
		Indictment	\$40,000	\$25,000
<b>50(1)</b>	A public fund fails to make its prospectus available to its investors or to provide a copy upon request	Summary	\$25,000	\$15,000
<b>50(2)</b>	A public fund fails to apply to the Commission, within 14 days of a disclosure required under section 48 (1) (b) ceasing to be accurate in a material particular, to register an amended prospectus, or provide a copy of the amended prospectus to its investors	Summary	\$25,000	\$15,000
		Indictment	\$40,000	\$25,000

<b>51</b>	Manager of a public fund becomes aware during relevant period that the prospectus contains a material error or omits a material fact or particular and fails to make application to Commission to register amended prospectus	Summary	\$25,000	\$15,000
		Indictment	\$40,000	\$25,000
<b>59(1)</b>	Public, private or professional fund fails to maintain records in compliance with section <b>59(1)</b>	Summary	\$20,000	\$15,000
<b>65(1)</b>	Relevant licensee or a public, private, professional or recognised foreign fund fails to appoint or have an authorised agent certified by the Commission under section <b>64</b>	Summary	\$15,000	\$10,000
<b>65(5)</b>	Person accepts appointment or acts as the authorised representative of a licensee or a public, private or professional fund without a certification issued under section <b>64</b>	Summary	\$20,000	\$15,000
		Indictment	\$40,000	\$25,000
<b>71(1)</b>	Relevant licensee or public fund fails to submit to Commission financial statements complying with section <b>71(1)</b> and accompanied by documents specified in paragraphs (a) to (d) within six months of the end of the financial year to which they relate	Summary	\$20,000	\$15,000
<b>75(1)</b>	Relevant licensee or	Summary	\$15,000	\$10,000

	public fund does not have an auditor who is eligible for appointment as specified in section <b>72(2)</b> .			
<b>77(1)</b>	Auditor fails to make report to Commission in accordance with section <b>77(1)</b> .	Summary	\$20,000	\$15,000
<b>77(2)</b>	Auditor whose appointment has been terminated or who has resigned fails to comply with section <b>77(2)(a)</b> or (b)	Summary	\$20,000	\$15,000
<b>95(1)</b>	Person uses word, term or phrase in name contrary to section <b>95(1)(a)</b>	Summary	\$20,000	\$15,000
<b>95(1)</b>	Person makes representation contrary to section <b>95(1)(b)</b>	Summary	\$20,000	\$15,000
<b>97(4)</b>	Licensee fails to provide notice to Commission of significant change in the nature and extent of its currency exchange services business	Summary	\$20,000	\$15,000
<b>98(3)</b>	Applicant failing to forthwith give the Commission written particulars of a change or of incomplete, inaccurate or misleading information or documentation provided to Commission	Summary	\$20,000	\$15,000
<b>105 (1)</b>	Person making or assisting in making representation, statement, report or return to the	Summary	\$25,000	\$20,000

	Commission that contains a false statement of a material fact or omits to state a material fact			
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## SCHEDULE 8

[Section 109]

### TRANSITIONAL PROVISIONS

1. In this Schedule, “relevant period” means the period starting on the commencement date and ending on a date six months after the commencement date.
2. A person who, immediately before the commencement date, was carrying on any kind of investment business shall not be guilty of an offence under section 4 and shall be deemed not to be carrying on unauthorised financial services business within the meaning of the Financial Services Commission Act by virtue of his carrying on that business
  - (a) during the relevant period; or
  - (b) if the person applies for a licence during the relevant period, on or from the commencement date until the date that the application is determined, including as a result of any appeal to the Appeal Board of the Commission, or is withdrawn.
4. A mutual fund that, immediately before the commencement date, is a registered public fund under the Mutual Funds Act, 1996 is deemed to be registered as a public fund under section 45 with effect from the commencement date.
5. A mutual fund that that, immediately before the commencement date, is a recognised private or professional fund under the Mutual Funds Act, 1996 is deemed to be recognised as a private or professional fund, as the case may be, under section section 55 with effect from the commencement date.
6. A fund manager or fund administrator that, immediately before the commencement date, is licensed as a fund manager, a fund administrator or a fund manager and administrator under the Mutual Funds Act, 1996 is deemed to be licensed as a fund manager or fund administrator (as the case may be) under clause 6 with effect from the commencement date.
7. A person who, immediately before the commencement date, is exempt, as a recognised manager, from the requirement to hold a licence under section 22 of the Mutual Funds Act 1996 by virtue of paragraph 2 of the Mutual Funds (Recognised Managers and Family Trusts) (Exemption) Directions, 1997
  - (a) is exempt from section 4(1) of this Act; but

(b) is deemed to be a licensee for the purposes of the Financial Services Commission Act, 2001.

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8. Paragraphs 3, 4(2) and 5 of the Mutual Funds (Recognised Managers and Family Trusts) (Exemption) Directions, 1997 apply to a person specified in paragraph 7, notwithstanding their revocation.
9. Section 25 shall not take effect until the first day of the fifth month after the commencement date.
10. Section 46 shall not take effect until the first day of the fifth month after the commencement date with respect to any fund that, immediately before the commencement date, is a registered public fund under the Mutual Funds Act, 1996.
11. Section 65 shall not take effect until the first day of the seventh month after the commencement date.

Passed by the House of Assembly this                      day of                      , 2010.

Speaker

Clerk of the House of Assembly

## OBJECTS AND REASONS

This Bill is designed to modernize the Territory's mutual funds and investment business regimes and introduce appropriate legislative provisions in relation to securities business. This process takes into full account current and emerging international standards of regulation as they relate to the regulation and administration of hedge funds and securities business.

The recent activities in the securities industries worldwide have culminated into calls by the G20, IMF and IOSCO for all regulators to improve their regulatory laws, rules and practices. Among key areas of the securities industry, the hedge fund industry is targeted for change; consequently, the Territory's regime for mutual funds (hedge funds) must also necessarily adapt in order to keep attuned to the established standards of regulation and supervision. This approach is consistent with the Government's policy of strengthening and safeguarding the Territory's financial services sector, while at the same time buttressing its international cooperation regime. Furthermore, as a member of the International Organisation of Securities Commissions (IOSCO), the Territory in effect subscribes to the international standards established for the regulation of securities, including the need to adopt appropriate measures to guard against market abuse and insider trading.

One of the fundamental policy issues in relation to the Bill is the provision of an appropriate legal framework under which securities and investment business ventures will be regulated and administered in or from within the Territory, with the details thereof being embodied in relevant subsidiary legislation.

This approach has been adopted in order to provide sufficient flexibility for the regulatory framework to be adapted as the market in the Territory develops and as international standards change. When fully in place, the Bill and its relevant subsidiary legislation are intended to ensure that the Territory is compliant with the Objectives and Principles of Securities Regulation issued by IOSCO (as relevant and appropriate to the BVI); as well as other internationally accepted standards and best practices. Moreover, the framework is intended to ensure that the regulatory regime for securities and investment business is comprehensive, and at the same time appropriate for the existing business environment in the Territory.

The Bill is divided into six Parts, each of which addresses a specific aspect of securities and/or investment business.

Part I deals with investment business and details the categories of licenses and the requirements for being granted a licence by the Commission. Financial resource requirements, including the maintenance of capital resources, are also outlined. Obligations of, and restrictions on, licensees including the appointment and termination of directors and senior officers, the need to maintain professional indemnity and other insurance, and the disposing or acquiring of significant interest

in a licensee are also explained. Other areas covered within this Part include corporate governance requirements, such as the obligation of the licensee to maintain records explaining its transactions and allowing for the determination of its financial position; identification, protection and proper segregation of client assets; and the control of advertisements and conduct of business as provided for in the Regulatory Code.

Part II addresses the public issuance of securities. It outlines the requirements for the registration, issuance and distribution of a prospectus; circumstances under which a court may issue a compensation order based on false or misleading advertisement of a prospectus, as well as those circumstances in which no compensation may be awarded. Clauses 34 and 35 address enforcement matters surrounding the cancellation or suspension of the registration or prohibition of a public offer. This Part further addresses the offer for securities issued by a BVI company outside of the Virgin Islands and gives the Commission the authority to issue a Public Issuers Code providing for the duties and obligations of public issuers, and the preparation of financial statements as well as the powers and duties of auditors of public issuers. It also allows for the making of Investment Business Regulations which may provide for offenses and penalties for any contravention of, or failure to comply with, specified requirements of those Regulations.

Part III covers Mutual Funds and will replace the existing mutual fund provisions in the Mutual Funds Act of 1996 (which is being repealed) and related subsidiary legislation, and addresses various prohibitions with respect to unregistered or unrecognized funds and the promotion of mutual funds. It speaks to the registration of public funds and the recognition of private, professional and foreign funds, investors' rights, the appointment and termination of directors, functionaries and others, and maintenance of financial records and the making of the Mutual Funds Regulations. In developing the framework as it relates to mutual funds, care has been taken not to materially change the existing well functioning and established industry and product. Therefore, as far as possible, the status quo has been maintained but transformed, enhanced and modernized through the appropriate medium of issuing Regulations.

Part IV outlines the provisions of general application including the requirement of licensees and funds to have an authorized representative and the process of applying for certification as an authorized representative. The requirements for preparation and submission of financial statements to the Commission, appointment of auditors and their obligations, as well as the powers of the Commission to revoke the appointment of auditors who have failed to fulfill their obligations under the Act are also outlined.

Part V addresses market abuse and defines certain key terms used in the section. It outlines the offences related to insider dealing, the making of misleading statements and the act of market manipulation and possible defences for such actions, and provides for the creation of Market Abuse Regulations. This addresses several of the

FATF Recommendations which call for the criminalisation of market manipulation and insider trading.

Miscellaneous provisions are addressed in Part VI which essentially includes the maintenance of registers by the Commission and inspection of such registers, the fees, penalties and charges payable to the Commission, the application of the Regulatory Code in respect of the Bill and the establishment of a Securities and Investment Business Advisory Committee. This Part also outlines the various offence provisions of the Bill.

The Bill provides six Schedules, with Schedule 1 dealing with definitions for the various investment vehicles, while Schedule 2 details the types of investment activities persons are permitted to engage in as well as those activities which are deemed not to constitute dealing in investments. Schedule 2 also outlines the categories of excluded persons who are not recognised as carrying on investment business. Schedule 3 defines the categories and sub-categories of investment business licences, while Schedule 4 provides a list of qualified investors. Schedule 5 defines the various types of securities for the purposes of Part V of the Bill. Schedule 6 deals with the modification of the various sections of the BVI Business Companies Act, 2004 with respect to public issuers that are BVI business companies. Schedule 7 provides a detailed list of offences found under the Bill, while Schedule 8 addresses the transitional provisions of the Bill.

The enactment of the Bill will demonstrate the Territory's ongoing commitment to continually reviewing and reforming its financial services legislation and to strengthening its current regimes to facilitate the conduct of business and make the Territory more competitive. It will also demonstrate the Territory's continued commitment to comply with established and emerging international standards of regulation and supervision thus helping to maintain the Territory's reputation. The Bill is accordingly commended to the House of Assembly for consideration and enactment.

Minister of Finance