

The Turks and Caicos Islands Financial Services Commission ('the Commission')

The 'Fit and Proper' Test

Guidelines issued under Section 43 of the Financial Services Commission Ordinance 2007 (the "FSC Ordinance")

Introduction

1 The Commission has responsibility under various regulatory Ordinances dealing with financial services business to form judgments and be satisfied that individuals connected with an applicant for licencing (an "applicant") and individuals connected with a person who has been granted a licence (a "licenceholder") are "fit and proper" persons.

2. The purpose of these Guidelines, which are issued under Section 43 of the FSC Ordinance, is to set down the key elements of the Commission's "fit and proper" standard in order that an applicant and a licenceholder has a clear understanding of the initial and ongoing standard that must be achieved and maintained in order to be the holder of a licence to carry on financial services business in or from the Territory.

3. It should be made clear that the onus is on the applicant or the licenceholder to demonstrate to the satisfaction of the Commission that the "fit and proper" standard is met. The Commission expects individuals looking to take on positions in relation to applicants and licenceholders to provide full and relevant information to enable it to reach a proper judgment. It will conduct such checks and inquiries in relation to this information as it views necessary.

4. The "fit and proper" standard is also applied by the Commission, as appropriate, to individuals who are **beneficial owners and controllers, directors, senior officers, key employees (including compliance officers), auditors and actuaries** of an applicant and a licenceholder. The standard takes into account operational matters concerning a licenceholder's conduct of business. It embraces an assessment of an individual's role in contributing to the standard of management and operational control in evidence in the course of a licenceholder conducting its business. The Commission must also be satisfied as to the financial soundness, business plans and the appropriateness and acceptability of an applicant and a licenceholder's proposed sources of business, products and services. All these matters are collectively taken into account when assessing whether an applicant and a licenceholder meets or continues to meet the Commission's "fit and proper" standard.

5. The Commission is empowered by relevant law to take enforcement action against a licenceholder. It may take such enforcement action if, among

other things, the licenceholder, a director, officer or key employee of the licenceholder, or a person who is an owner or controller of the licenceholder, fails to satisfy the Commission's 'fit and proper' standard.

6. It should also be made clear that an assessment of compliance with the "fit and proper" standard is both an **initial test** undertaken upon an application for a licence and is a **continuing test** that is applied by the Commission in relation to the ongoing conduct of a licenceholder's business. It is inferred by the granting of a licence that the "fit and proper" standard has been satisfied. It is a licenceholder's responsibility to ensure it demonstrates during the course of its ensuing business that individuals concerned continue to maintain the standard and any additional requirements that may from time to time be applied to the standard by the Commission. For example, failure by a licenceholder to conduct its affairs with integrity and competence, whether arising from individual actions or from an individual's failure to act appropriately, may affect the Commission's assessment of an individual's status and hence may also affect the status of the licence.

'Fit and Proper' Test: Directors, Officers and Key Employees

7. The 'fitness' standard required of individuals in this respect will vary considerably, since a very wide range of specific roles will be involved. The Commission will assess whether the standard is met in the specific context of the position that is proposed. Clearly, the expectation will be particularly high in the case of those persons having key operational responsibilities for the direct conduct of the affairs of a licenceholder (a "key employee"), or those persons in a directing or controlling position.

8. In considering whether an individual is deemed to be a "fit and proper" person to hold a particular position, the Commission will take into account all relevant considerations that relate to a person's **competence and ability**. Factors to be considered include, but are not limited to, whether the person has the relevant **work experience, track record, appropriate knowledge, qualifications and skills** in the context of the specific duties and responsibilities of the position in question and has demonstrated a soundness of judgment that is appropriate of someone who is in a position of trust. The Commission will form a view of the **diligence** with which the person is likely to fulfill his or her relevant duties and will take account of, for example, whether sufficient time and attention can be expected to be devoted by someone who has multiple, related or unrelated duties. The Commission's assessment will take into account any demonstrable evidence of the **effectiveness** with which similar responsibilities have previously been fulfilled, including the degree of **maturity** demonstrated in the person's previous conduct and decision-taking.

9. The second part of the test relates to **character** and includes key elements such as the **probity, honesty, integrity and reputation** of the

individual concerned. Evidence of appropriate character is critical given that a licenceholder is in a significant position of trust with regard to the assets of its clients and these circumstances dictate that an individual must be able to demonstrate that he or she meets the highest standard. In considering character and reputation, matters such as a previous criminal record and convictions for fraud or other convictions involving dishonesty, whether in the Territory or overseas, are clearly very relevant. In addition, the Commission will have regard for other contraventions of relevant legislation, notably of provisions designed to protect members of the public against financial loss due to dishonesty, incompetence or malpractice.

10. The Commission will take into account a person's past **record of compliance** with relevant laws, rules, regulations, Codes or Guidelines, whether in the Territory or overseas, that relate to protecting the interests of clients. It will also take account of whether a person has been censured or disqualified by a professional or regulatory body.

11. The Commission will have regard to a person's previous business connections and practices. Character may be called into question where, for example, there has been involvement with a business that has become insolvent or where past business history may reflect discredit on the person's standards and methods.

12. Further examples of the types of matters that the Commission will take into consideration in assessing whether a person may be judged 'fit and proper' are set out in **Appendix 1** to these Guidelines.

13. While any evidence of past misconduct will be taken into consideration, the Commission will also take into account any significant lapse of time and a person's subsequent conduct in assessing whether a person has demonstrated that he or she meets the standard for a particular position.

'Fit and Proper' Test: Owners and Controllers

14. The Commission will also, as appropriate, apply the "fit and proper" criteria set down in this Guidance to any person who is in a position of ownership or in a position to control the activities of a licenceholder, whether by virtue of a direct or indirect shareholding or otherwise. However, it is recognized that an ownership and control position in respect of an applicant or a licenceholder may vary widely and therefore the application of the "fit and proper" criteria will take this into account.

15. The key consideration for the Commission is **the likely or actual influence or control** that may be or has been exerted by an individual on the conduct of business of a licenceholder. Generally, the greater the degree of influence or control the higher the expectation will be in regard to the "fit and

proper” criteria set down in this Guidance. Thus, for example, other things being equal, a controller owning 40% of the shares of a licenceholder (whether directly or indirectly) may expect to be subject to stricter requirements than a 10% shareholder. However, this is not to say that a 10% shareholder might not also be deemed to be in a position of significant control and therefore attract the highest “fit and proper” standard. A major consideration is the influence that is exercised on the conduct of the licenceholder. If the controller is likely to exercise close operational control over a business, the Commission will look for evidence of **the competence and ability** as well as **probity** of the individual concerned, in accordance with the criteria set down in this Guidance. On the other hand, where an owner does not intend to directly influence the operations or actions of the directors or management of a licenceholder it may not be necessary to demonstrate the same level of compliance with the criteria set down in this Guidance.

16. The Commission must be satisfied as to the financial position of a licenceholder or the projected financial position of an applicant. It will, therefore, take account of whether the financial position of any particular shareholder or controller may adversely affect the **financial stability** of the licenceholder and whether this may give rise to a ‘contagion’. If, for example, a holding company or major shareholder of a licenceholder encounters severe financial problems, the stability of the licenceholder may also be affected, to the potential detriment of its clients. Generally, the higher the shareholding, the greater the potential risk of ‘contagion’.

17. At the same time, other factors beyond financial weakness may need to be considered as potential sources of **contagion risk** for a licenceholder. For example, the poor reputation of the controller or allegations of illegal, improper or unethical conduct, whether in the Territory or overseas, may similarly have a bearing on the Commission’s assessment.

Fit and Proper Test: Board of Directors

18. In its assessment of whether an applicant is competent to carry on the business proposed, the Commission will take into account the range and relevance of experience represented by individuals appointed to the Board of directors of the applicant and the licenceholder. Consequently, a subsequent proposal to change the composition of a licenceholder’s Board will also be assessed against the “fit and proper” standard in the context of the individual or individuals concerned.

Fit and Proper Test: Additional General Criteria

19. In general, owners and controllers, directors and other employees of licenceholders are expected to act with **openness and transparency** in their dealings with the Commission and with other authorities, whether regulatory or

otherwise, in the Territory or overseas. A failure to deal openly and transparently with the Commission is likely to give rise to questions over the “fit and proper” status of the individual concerned.

20. The Commission expects all licenceholders to remain alert to “fit and proper” issues. It expects owners, controllers, Directors and other employees **to report** to the Commission as soon as is practicable any circumstances which may be relevant to the Commission’s assessment of the “fit and proper” standard of an individual. Hence, a failure to report such circumstances may give rise to questions over the “fit and proper” status of the individual concerned.

***Financial Services Commission
August 2009***

Appendix 1

The Commission will take into account all relevant considerations when assessing whether an individual is a “fit and proper” person’. Relevant factors include but are not limited to, the following -

Fitness

Whether a person has –

- the technical knowledge and ability to perform the intended role;
- relevant recognized professional qualifications and memberships of appropriate professional bodies;
- demonstrated by experience through a record of past employment likely ability to perform the intended role;
- the appropriate training necessary to assist in fulfilling the intended role.

Probity

Whether a person has –

- been convicted of any criminal offence – in particular any offences of dishonesty, fraud, financial crime or other offences under specific financial services regulatory legislation;
- been the subject of any investigatory or disciplinary proceedings by the Commission or by other regulatory bodies, professional bodies or government bodies or agencies;
- contravened any regulatory requirements, rules, regulations, statements of principles or codes of practice issued by regulatory, professional or government bodies;
- been the subject of complaints that have been upheld with regard to regulated activities in any jurisdiction;
- been involved with a company, partnership or other business that has been refused registration, authorization, membership or licensing to carry out a trade, business or profession, or has had such registration, authorization, membership or licence revoked, withdrawn or suspended, or has been expelled by a regulatory, professional or government body;
- been a director, partner or senior manager of a business that has become insolvent, been liquidated or gone into administration while that person was connected with it or within 12 months after the termination of such a connection;
- been dismissed, or asked to resign and subsequently resigned, from employment in a position of trust;
- ever been disqualified from acting as a director or from exercising any managerial capacity in any jurisdiction;
- not been candid or truthful in past dealings with any regulatory body or otherwise demonstrates that he or she may be unwilling to comply with regulatory requirements and with other legal obligations as well as with professional and ethical standards.