LICENSING GUIDELINES FOR OFFSHORE BANKING

1. Legislative background and power of the Commission to issue policy/guidelines

The Financial Services Commission Act, R.S.A. c. F28 ("FSC Act") Section 3(1) as at 15 December 2008 provides for the principal functions of the Commission, including:

"(a) to supervise licensees in accordance with this Act, the financial services enactments and the Regulatory Codes;
(b) to consider and determine applications for licences; and
(c) to administer the financial services enactments."

The current Financial Services Enactments Regulations issued under the FSC Act indicate that the Trust Companies and Offshore Banking Act, R.S.A. c. T60 ("TCOB Act") is included within the definition of *"financial services enactments"*.

Section 3(2) of the FSC Act stipulates that: *"In discharging its functions, the Commission may take into account any matter which it considers to be appropriate but shall, in particular, have regard to –*

(a) the protection of the public, whether within or outside Anguilla, against financial loss arising out of the dishonesty, incompetence, malpractice or insolvency of persons engaged in financial services business in Anguilla;
(b) the protection and enhancement of the reputation of Anguilla as a financial services centre; and
(c) the deterrence of financial crime."

Section 49(1) of the FSC Act permits the Commission to issue Guidelines with respect to the procedures to be followed and the conduct expected of licensees in the operation of their licensed business as follows:

"(2) The Guidelines may make different provision in relation to different persons, circumstances or cases.
(3) The Commission must publish the Guidelines and any amendments thereto in the Gazette.
(4) Failure to follow Guidelines issued under this section shall not, of itself, render a person liable to proceedings of any kind but such failure may be taken into account by the Court or the Commission, as the case may be, in determining whether there has been a contravention of this Act, a financial services enactment or a Regulatory Code.
(5) Without limiting subsection (1), the Governor may make regulations prescribing matters that shall be, or may be, provided for in Guidelines."

The TCOB Act (Section 6) states that a licence may be issued provided:

"(a) that an applicant is –
(i) a fit and proper person, and
(ii) is qualified,

to carry on offshore banking business;

(b) that the persons having any share or other interest, whether legal or equitable, in the applicant and its directors and officers are fit and proper persons to have an interest in or be concerned with the management of a licensee, as the case may be;

(c) that the applicant intends, if issued with a licence, to commence offshore banking business;

(d) that the applicant satisfies the requirements of this Act in respect of the application and will, upon issuance of the licence, be in compliance with this Act in respect of licensing; and

(e) that issuing the licence is not against the public interest..."

In making its assessments, the Commission will have reference to generally accepted international prudential standards for banks as set out in the publications of the Basel Committee on Banking Supervision and, specifically, to those standards applied to domestic banks in Anguilla under the Banking Act and developed by the Eastern Caribbean Central Bank.

2. Objectives of Commission in setting out Licensing Guidelines

The Commission recognises that the licensing of an institution is the most important stage in the regulatory process, as it represents the primary means to restrict entry into the financial system to persons and entities of acceptable integrity and competence. To facilitate consideration by the Commission, applicants should submit the application form at Schedule 1 of the TCOB Regulations with supporting documents as outlined in the Commission's Guideline on Licensing Process (dated 24 July 2008 and applicable to all regulated businesses) whilst giving due regard to the guidance provided in these Licensing Guidelines.

The provision of a licence to operate in Anguilla is based on the Commission's determination that an applicant meets the requirements set out in the TCOB Act and does not pose a threat to the Commission's statutory objectives under the FSC Act. The Commission believes therefore that it is appropriate to publish, by way of Guidelines issued in accordance with its powers under Section 49 of the FSC Act, the factors which will be taken into account in reaching this judgement on the "fitness and propriety" of applicants.

Although this policy statement is set out within the context of an application (new licence) it should also be taken that the terms of these guidelines are an ongoing obligation on all licence holders and failure to meet any of the conditions, after the grant of a licence, may form the basis, or part thereof, of a Commission decision to impose directions on an offshore bank or initiate proceedings for the suspension or revocation of a licence in accordance with sections 29 and 32 of the FSC Act.

3. The Commission's Fitness and Propriety Test

The Commission will apply its test of "fitness and propriety" to the applicant and those persons employed by or associated with it. This "fit and proper" determination is both an initial and ongoing assessment in relation to the suitability of all parties. This means that the criteria set out below will apply to an existing registered person where there is a material change in its circumstances, for example an anticipated change of ownership.

The Commission considers the term "associated with the applicant" to include both natural persons and bodies corporate that might affect the fitness and propriety of the applicant and may encompass the following:

- ultimate and intermediate parent companies and/or beneficial owners and/or controllers;
- relevant management personnel;
- those that will perform functions on behalf of the applicant under an outsourcing or service level agreement;
- companies that share common ownership with the applicant;
- companies in which the applicant has 20% or more of the voting rights; and
- parties that have close business links with the applicant, but no legal structural interaction, (e.g. one which acts as a business introducer).

In January 2010, the Commission issued Guidelines on its "Fit and Proper" Test (see Appendix A) in relation to its judgements on the suitability of individuals connected with an applicant for licensing and individuals connected with a licence holder. These Guidelines defined *"beneficial owners and controllers, directors, senior officers, key employees (including compliance officers), auditors and actuaries"* as the classes of individual to whom the test would be applied.

These guidelines on licencing of offshore banks extend the requirements of the "Fit and Proper" Test, as appropriate, to corporate entities associated with applicants for an offshore banking licence and provide additional clarification on some aspects of the "Fit and Proper" Test where necessary.

3.1 General provisions

In considering an application, the Commission will take into account all requirements of these guidelines but may look to explore any other matters that it may deem relevant to an application. Where an applicant is (or is to be) a newly incorporated company and has no track record or audit history, then the Commission will:

- take into account the track record and audit history of the applicant's parent group and the background of each individual who is to be a director, controller (which includes the chief executive) or manager of the applicant; and
- seek to satisfy itself that the applicant will be able to meet on an ongoing basis the criteria that are set out in these guidelines.

When determining an application, it is the Commission's policy to consider the risk profile of the applicant, including the nature of the activities that are to be conducted and the intended customer base, having regard to its statutory duty to protect and enhance the reputation of Anguilla (FSC Act Section 3). The Commission will require the applicant's business plan to set out its procedures for countering money laundering and terrorist financing with detail of the intended source of deposits and, in particular, the jurisdictions with which it will seek to do business.

The Commission will expect an applicant to be able to demonstrate (either itself or via its parent group, where applicable) that it meets all the following criteria:

- minimum five years relevant and satisfactory track record as a banking business, supervised by a relevant supervisory authority;
- a satisfactory and up to date audit history, as demonstrated by the audit reports provided on its financial statements, or those of its ultimate and intermediate parents;
- a management team with the necessary developed capability in respect of corporate governance and conduct of business matters relevant to the proposed regulated activities and risk profile of the applicant;
- it conducts its business with integrity;
- it has due regard for the interests of its customers; and
- it provides appropriate supervision and training to its employees.

In assessing the integrity of an applicant and, as well those persons employed by or associated with it, the Commission will consider whether any of their past actions or conduct impact on their ability to meet expected standards.

The Commission considers the provision of information that is both complete and accurate to be an indication that an applicant is acting with integrity. Failure of an applicant to complete any form comprehensively or supply any information required in an honest manner, or intentional omission of any relevant material, will be taken into account by the Commission in assessment of an application.

Licencing may be refused if it appears to the Commission that the applicant is not "fit and proper" to be registered by reason of any director, controller or manager having been convicted for acting fraudulently or dishonestly, or by reason of any other circumstances whatsoever which are either likely to lead to improper conduct of business by the applicant, or reflect discredit on its methods of conducting business.

3.2 Stature of applicant, its parent bank and letter of comfort

In general, the Commission will accept applications from incorporated entities in respect of:

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

However, the Commission expects that most applications for offshore banking licences will involve the incorporation of a subsidiary of a domestic bank (including banks from other Eastern

Caribbean Currency Union jurisdictions) or a financial institution of significant international stature and reputation. The Commission will give due consideration to any credit rating given by an internationally recognised credit rating agency.

Any group to which the applicant belongs must be able to show, from up to date published financial statements and any other relevant information, that it has adequate financial strength to provide support to its operation in Anguilla and a risk profile that is acceptable to the Commission.

Applicants must be able to provide, prior to licencing, a letter of comfort from the ultimate parent bank, or intermediate owner if that party is an appropriately supervised financial institution. In certain circumstances, the Commission may require a parent bank to issue a formal guarantee to support its subsidiary.

The applicant is required to demonstrate the viability of its proposed operations by the submission of a three year business plan acceptable to the Commission, including financial projections and estimates of the physical, systems and human resources required.

3.3 Ownership, control and group structure

In the Banking Act, R.S.A.c.B11, "control" is defined as:

> *"the ability of a person to secure, through voting rights or power in a licensed financial institution or other company or by an agreement or other powers conferred by the bylaws, articles of association or other document regulating the operations of a licensed financial institution or other company, that the business and affairs of the licensed financial institution or other company are conducted in accordance with the wishes of that person".*

A "significant shareholder" is defined as:

> *"a person who, either alone or with an affiliate or related or connected person, is entitled to exercise or control 20% or more of the voting rights at any general meeting of the licensed financial institution or another company of which the licensed financial institution is a subsidiary".*

These definitions are based on a formal concept of "control". However, the Commission's Guidelines on its "Fit and Proper" Test take a much broader view of the definition of control as:

> *"any person who is in a position of ownership or in a position to control the activities of a licence holder, whether by virtue of a direct or indirect shareholding or otherwise"*

and state clearly that:

> *"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 licence holder".*

In particular, the Commission will take note of any person in accordance with whose directions or instructions the directors of an institution or any of its holding companies or controllers, including shareholder controllers, are accustomed to act. The applicant must satisfy the

Commission that all controllers (both natural persons and corporate bodies) are "fit and proper" in relation to the duties and extent of control they will undertake.

Any applicant must notify the Commission of: -

- the identity of its owners (including ultimate beneficial ownership) and controllers (defined as controlling 20% or more of the voting power of the company);
- the percentage of shares each controller holds;
- the percentage of voting power which each is entitled to exercise or control; and
- any other shareholders exercising voting power of 3% or more but less than 20%.

The Commission must be able to look through the ownership structure to identify all intermediate and significant ultimate owners and, if unduly complex or lacking transparency, the applicant will be expected to explain and justify the rationale for having such a structure. The Commission will expect the applicant to provide three years' audited financial statements for all intermediate parent companies as well as for the ultimate parent in a group. The Commission may determine to refuse an application for a licence on the basis that the corporate structure is too complex and non-transparent.

The Basel Committee on Banking Supervision (in BCBS 94 of 2003) defines parallel banks as:

> *"banks licensed in different jurisdictions that, while not being part of the same financial group for regulatory consolidation purposes, have the same beneficial owner(s), and consequently, often share common management and interlinked businesses. The owner(s) may be an individual or a family, a group of private shareholders, or a holding company or other entity that is not subject to banking supervision".*

The Commission will not licence any bank where such parallel banking structures, involving common shareholdings or control, exist or appear to exist.

Each applicant must appoint approved auditors who will perform audit work according to Internationally Accepted Auditing Standards and present accounts to International Financial Reporting Standards.

The Commission considers each application on the basis of the existing or planned ownership structure. Any subsequent changes may alter the Commission's assessment of the bank as a "fit and proper" person. Consequently, potential amendments to structure or ownership must be advised to the Commission sufficiently in advance for it to properly consider the proposals and determine whether to object.

Each beneficial owner and controller, director, senior officer, key employee (including compliance officers) that is a natural person will be required to complete the Commission's standard personal questionnaire (set out in the Addendum to Schedule 1 of the Trust Company and Offshore Banking Regulations) for assessment of "fitness and propriety".

3.4 Mind and management

Section 20 of the TCOB Act requires that a licensee must have a principal office in Anguilla and at least two authorised agents resident in Anguilla approved by the Inspector. Section 25 of the TCOB Act also provides that non-domestic banks must have not less than two directors approved by the Inspector. In addition, section 27 of the FSC Act requires licensees to appoint a "fit and proper" individual as its Compliance Officer.

In practice, the Commission will want to be assured that any offshore bank has adequate mind and management available in Anguilla and a suitable physical presence. In addition, where there is a corporate parent resident outside Anguilla, the Commission will require the applicant to identify a senior executive with line responsibility for the Anguilla off-shore bank who will be responsible to the Commission for all supervisory matters that may arise in connection with Anguilla business, including the administration of the letter of comfort. The Commission expects that this executive should normally be an individual with responsibility for the parent's relationship with the home supervisor exercising consolidated supervision.

Shell banks will not be licensed. Consequently, banks will only be granted licences if their place of incorporation, mind and management are within the same jurisdiction, or, in the case of a subsidiary, if the mind and management is located in the jurisdiction in which consolidated supervision is being exercised.

3.5 Competence

The Commission will need to be satisfied that the management of both any parent group and the off-shore banking business have proven experience in a relevant field of banking and will provide competent ongoing management, such that the institution will conduct its business in a prudent fashion. The Commission is particularly interested in the collective competence and experience of the team which will manage the entity.

Competence, with respect to those employed by or associated with an applicant, may be evidenced by the attainment of relevant qualifications or by having sufficient relevant experience for the functions they are charged with performing.

An applicant must be able to demonstrate that it is, and will have procedures that will assist it to remain, competent to undertake off-shore banking business, including the ability to comply with the Commission's regulatory requirements.

An applicant must be able to demonstrate that it will be able to undertake appropriate management and training of its staff.

4. Consolidated supervision, home jurisdiction and equivalence

Where the applicant is incorporated in a jurisdiction outside Anguilla or is the subsidiary (direct or indirect) of an institution so incorporated, the Commission will seek to establish contact with the supervisory bodies in all relevant jurisdictions. The Commission will assess whether the jurisdiction(s) may be considered:

- to be "equivalent" in terms of the measures applied to counter money laundering and the financing of terrorism.
- to operate an adequate regime of financial supervision.

In assessing equivalence in respect of countering money laundering and the financing of terrorism, the Commission will determine whether or not the requirements for measures to be taken in a country or territory are consistent with the FATF Recommendations, having regard for the following:

- whether or not the country or territory is a member of the FATF or a member of a FATF Style Regional Body; and
- the extent to which a country or territory is compliant or largely compliant with the Core FATF Recommendations.

The Commission may use the following sources to determine whether a country or territory is compliant or largely compliant:

- the laws and instruments in place;
- recent independent assessments of the framework to combat money laundering and the financing of terrorism, such as those conducted by the FATF, FATF Style Regional Bodies, the International Monetary Fund (the "IMF") and the World Bank (and published remediation plans); and
- other publicly available information concerning the effectiveness of a jurisdiction's framework.

In assessing the regime of financial supervision, the Commission will take account of any reports issued by relevant international bodies such as the IMF, as well as responses to its own enquiries in respect of the home supervisor's adherence to the Basel Committee's Core Principles for Effective Banking Supervision. In particular, the Commission will require that the relevant supervisors have legal protection and powers sufficient to allow them to provide supervisory information to the Commission.

The Commission will seek to verify with other supervisors all relevant information provided by the applicant.

Further, the Commission requires that the supervisory authority in the country in which the applicant or its proposed parent is incorporated, provides direct confirmation:

- that the authority consents to the establishment of the applicant in Anguilla;
- that it will exercise consolidated supervision over the applicant's overall activities, including within the host territory, and
- that it will cooperate fully in the sharing of regulatory information with the Commission and provide all the information that the Commission needs to perform its functions.

The Commission has already signed Memoranda of Understanding in connection with the supervision of off-shore banks with the Eastern Caribbean Central Bank and intends to formalise relations with other relevant supervisors in the same manner.

4.1 Sensitive jurisdictions

The Commission has identified that certain jurisdictions pose above average risk. These jurisdictions are characterised by the following features:

- common use of complex structures to conceal true ownership;
- informal corporate control structures;
- importance of political patronage links to secure corporate ownership or valuable franchises;
- endemic corruption, evidenced by poor ratings in Transparency International's Corruption Perception Index or other appropriate third party assessments;
- emphasis on form over substance in the legal, accounting and regulatory environments;
- limited depth of the financial system; and
- significant physical risk in business conflict resolution.

In this context, the Commission will have due regard for the information provided by the Financial Action Task Force and any of its current, or future, updates.

Where the Commission determines that an applicant is ultimately owned or controlled by persons connected with a sensitive jurisdiction, an applicant's ownership structure will be subject to heightened scrutiny. In addition, the applicant will be expected to demonstrate a longer relevant and satisfactory track record and mature relationship with the relevant supervisory authority.

If an applicant intends to provide services to customers who are themselves connected with such a sensitive jurisdiction, it must be able to demonstrate that it has the scale and depth of resources pertinent to the customer base together with sufficiently developed systems and controls which can adequately deal with the enhanced risk profile of such customers.

5. Adequate resources

The Commission requires that applicants demonstrate an appropriate and sustainable business plan and that adequate capital and other resources will be provided in relation to that plan.

5.1 Minimum capital requirement and risk asset ratio

Section 8 of the TCOB Act requires a licensee to ensure that its paid-up share capital is maintained at not less than USD 250,000 or the equivalent in another currency, or such greater sum as may be ordered by the Governor, on the recommendation of the Inspector or the Commission, having regard for the nature of the offshore banking business being, or sought to be, undertaken. In practice, the Commission will require off-shore banks to hold sufficient capital to maintain an acceptable ratio of capital and reserves to risk weighted assets, calculated

in accordance with the reporting instructions for off-shore banking issued by the ECCB. The Commission will assess the need for capital in relation to the risk profile of each off-shore bank, but will require a minimum capital to risk weighted assets ratio of at least 10%.

5.2 Up-streaming deposits to affiliates and independent liquidity

Where the offshore banking subsidiary is, or is planning, to upstream deposits to an ultimate, or intermediate parent or affiliate, the Commission reserves the right to apply the ECCB's normal large exposure requirements and will require appropriate due diligence on the financial condition of the recipient institution and seek to impose appropriate monitoring and control procedures. This will include regular submission of financial reporting by the recipient institution and close liaison with the relevant home supervisors, including receipt of all on-site examination reports. Off-shore banks should establish appropriate limits for all exposures with affiliates, including correspondent accounts, to reflect likely activity.

Where the Commission judges that up-streaming of deposits to a parent or affiliate poses a potential threat to the liquidity of an offshore bank, it reserves the right to impose directions on the offshore bank in respect of its deposit taking activities and restrict the placing of funds with the parent or affiliate.

Offshore banks may be required to establish independent liquidity management. In any event, offshore banks should not permit their assets to be pledged to support the borrowings of a parent or affiliate.

5.3 Organisation and Systems

The Commission considers that the organisation and systems of an applicant are essential elements of an applicant's ability to satisfy the Commission's "fit and proper" test.

The governance of a registered person is of particular interest to the Commission. In the case of off-shore banks which are subsidiaries of institutions incorporated (and supervised) outside Anguilla, the Commission requires that the Anguillian resident directors are actively involved in the governance of the business and that at least one board member of the Anguillian entity should be an individual who holds a senior position with any relevant regulated parent.

An applicant must be structured and organised in such a way that will enable the Commission to fulfill its oversight function.

The Commission's policy is to require at least two natural persons to act in the capacity of director of a licensee.

An applicant must be able to demonstrate to the satisfaction of the Commission that it will have, and will be able to maintain:

- sufficient management oversight and control of its activities;

- comprehensive operational records relating to all activities, which must be readily accessible in Anguilla;
- comprehensive financial information readily accessible in Anguilla;
- qualified, competent and experienced staff to deliver competently the services it offers, this to include third party service providers or relevant entities within the same group; and
- systems and controls appropriate to its risk profile and designed to manage its affairs effectively for the proper performance of all activities, including those that evidence transparency in its business arrangements.

The Commission recognises that applicants may wish to utilise group resources provided from a domestic bank parent or from outside Anguilla or outsource certain functions to external third parties able to offer particular expertise. The Commission requires that, even where functions have been outsourced, the licensed off-shore bank remains directly accountable to the Commission for all regulatory matters.

Where elements of the applicant's systems, controls or functions are to be outsourced, the Commission will consider whether such arrangements are appropriate. The Commission will assess whether such outsourcing would adversely affect the Commission's ability effectively to supervise the off-shore bank or the off-shore bank's capacity to meet regulatory requirements.

Approved by the Board
Anguilla Financial Services Commission

17 September 2012