



COMMISSION POLICY ON DECISION MAKING

(Issued under Section 49 of the Financial Services Commission Act, R.S.A. c. F28 as amended (the “FSC Act”))

1. Introduction

1.1 The FSC Act and the financial services enactments provide the Commission with a number of statutory powers. This policy document is a guideline for licensing applications and exercise of statutory powers including enforcement actions and is written to assist the Executive in decision making in the following circumstances:-

- Licensing Application Refusals (non-routine);
- Exercise of statutory powers (sanction); and
- Revocations/Suspensions (non-routine).¹

1.2 The Commission reserves the right in certain circumstances to modify its policy on decision making and this policy document is not binding on the Commission.

2. Decision Making Approach

2.1 The Commission may adopt the following approach in its considerations of the above noted circumstances, which will be evidenced in writing.

2.2 The Commission will ensure that there will be at least two levels of consideration in the process of decision-making.

(a) All actions will be subject to information gathering and an initial assessment within line management of the supervision departments. Allocated Regulators will gather information following an application or the Commission becoming aware of any circumstance which might require exercise of statutory powers. Information gathering can be an ongoing process during consideration of any issue. The purpose of information gathering is to lead to an assessment as to whether or not licensees, and potential licensees, are complying with the regulatory regime. In this assessment the Commission will have regard to laws and regulations as well as its own published policies and guidelines.

(b) Where Regulators are satisfied that the practitioner’s conduct, or proposal, falls within the rules, approval of applications or appropriate decisions can be given by the

¹ Notices of revocation or suspension are usually in cases where a licensee fails to file audited accounts, fails to pay annual fees or fails to commence or ceases to carry on the financial services business for which it was licensed. Referrals to the Board will only be in cases where the licensee makes a written submission showing good reason as to why its licence should not be revoked or suspended and the Executive does not find the reasons to be compelling.

Executive. It is expected that the majority of day-to-day dealings with applicants and licence holders will be approved at this stage. Formal approval will be given by the Director, or the Deputy Director in his/her absence. All consideration and assessments will be evidenced by documentation received from practitioners, notes of meetings and telephone calls in addition to a formal paper recommending the decision to the Director.

- (c) Where Regulators assess that a matter falls outside the necessary standards, it will be discussed with the Deputy Director. The Deputy Director will identify what additional steps may need to be taken to achieve a full or more balanced overview of the matter. For example, a meeting may be called between Regulators and a practitioner to explain concerns and provide an opportunity for additional representations by the licensee, or proposed licensee. Alternatively, missing information may be sought. However, the Deputy Director may be satisfied that all necessary enquiries have been made and nothing further remains to be elucidated.
- (d) Where the Deputy Director is satisfied that it is necessary to:
 - Refuse a licensing application;
 - Exercise a statutory sanction; or
 - Revoke/suspend a licence;the case should be passed to the Head of Enforcement.

2.3 The Commission recognizes that it is important to follow principles of natural justice. This implies that those who initially gather and assess information should not be responsible for its final evaluation.

The Head of Enforcement (if appropriate, in consultation with the Director) will review the information collected, which may be used as evidence in Court, and evaluate it to determine if:

- (a) The initial assessment that required standards are not being met is:-
 - Reasonable and fair;
 - Made impartially; and
 - Fully evidenced.
- (b) In this context, the information collected as “evidence” does not mean “proof”. The Commission is not required to prove that a licensee has breached a requirement or that an application, or applicant, is unsatisfactory. The burden of proof lies with the licensee or proposed licensee. However, the Commission has to demonstrate that it has sought to be reasonable in forming its conclusion that an application is not satisfactory or that a statutory requirement has been breached. Accordingly, the Commission must have an appropriate level of detailed information that may be used as evidence.
- (c) When the Head of Enforcement and the Director are content that the bulleted conditions set out in sub-section (a) have been met, a paper will be prepared for the

Board setting out the full position in accordance with the requirements of Section 3. The Board is the ultimate decision-maker.

3. “Maxwellisation” and the Commission’s decision

3.1 This process is important in fulfilling principles of natural justice and also ensures that the Commission has taken all appropriate steps should a decision be appealed. The Commission is committed to ensuring that:-

- (a) Licensees and proposed licensees know with what they are “charged”;
- (b) Have a right to reply; and
- (c) Have a reasonable expectation that decision makers come to any decision with “clean hands”.

3.2 “Maxwellisation” supports these two important steps because it avoids the Commission making a decision based on a paper which would have been corrected if the applicant had seen it. It also avoids the Board having to review the decision on two separate occasions: on the second occasion with less opportunity to be impartial.

Stage One

3.3 Before the paper goes to the Board, the Executive must consider the evidence and ensure objectively that it properly maps into the law, regulations and published policy/ guidelines. In this process, the Head of Enforcement (and the Director) may meet with the licensee or proposed licensee, or other parties with relevant information, to clarify issues or obtain missing information. Care will be taken to ensure that this stage is concentrated on investigating and elucidating matters which are not entirely clear. It is not intended to repeat the information gathering process.

3.4 Once the Head of Enforcement is satisfied that the case is made, the Executive will send a formal letter to the licensee, or proposed licensee, explaining that the Executive is not satisfied that the applicant/licensee meets the required standards and accordingly is minded to recommend to the Board that the licence be refused or revoked/suspended or that the practitioner be disciplined, as appropriate.

- (a) The letter should set out a clear chronology of the history of any application or conduct and state clearly why the Executive is not satisfied that appropriate standards have been met.

- (b) The letter should ask the recipient to: (i) correct any errors of fact; and (ii) state any reasons the Executive should take into account before finally deciding upon its recommendation to the Board set out Stage 2 of the process, below.

3.5 If appropriate, the letter may offer the licensee, or proposed licensee, the opportunity to consider withdrawing an application or surrendering to voluntary revocation if they do not wish to amend facts or offer additional circumstances for the Executive to take into

account. In any event, the licensee, or proposed licensee, always has the opportunity to seek independent legal advice.

- 3.6 The Executive will carefully consider any corrections of fact or additional circumstances which may be offered. It will then decide if a licensee or proposed licensee has met the required standards. If it is so satisfied, the Executive will issue appropriate approval or non-objection, with or without conditions attached. However, if the Executive is not satisfied, it will proceed to refer the case to the Board.

Stage Two

- 3.7 Should the Executive decide to refer the case to the Board, the licensee or proposed licensee will be advised of this decision and a copy of any submission it may have made will accompany the Executive's written presentation to the Board.
- 3.8 The licensee, or proposed licensee, will be advised of the decision of the Board, and its reasons, in writing and, should the decision be not to grant the approval, the right of appeal on a question of law.

4. Public statements

- 4.1 Section 24(4) of the FSC Act restricts disclosure by the Commission (among others) of "protected information" (as defined). Pursuant to section 25(a)(ii) of the FSC Act, the restriction does not apply where the disclosure is required or permitted under the FSC Act.
- 4.2 Under section 34(1) of the FSC Act, the Commission has statutory authority to issue a public statement in such manner as it considers fit setting out:
- enforcement action that the Commission intends to take against a licensee, or
 - enforcement action that the Commission has taken against a licensee or former licensee.
- 4.3 The public statement may include such information as the Commission considers appropriate, including the reasons for, and nature of, the enforcement action. Under section 34(3)(b) of the FSC Act, the Commission also has statutory authority to issue a public statement in such manner as it considers fit with respect to any matter relating to financial services business where the Commission considers that the statement is desirable for:
- 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,
 - the protection and enhancement of the reputation of Anguilla as a financial services centre, or
 - the deterrence of financial crime and other unlawful activities relating to financial services business.

The Commission, as a matter of best international practice, normally will issue a public statement where it takes enforcement action against a licensee or former licensee. Public statements may also be issued with respect to unlicensed activities.

In some cases, the Commission will consider it fit to include in the public statement the names of current or former directors or officers or other persons with current or former responsibility for, or involvement in, the conduct of the business of the licensee or former licensee. Where the Commission intends to include in the public statement the name of an individual, the Commission will ensure that the appropriate Maxwellisation steps are followed in respect of that person.

Approved by the Board
Anguilla Financial Services Commission
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