

**THIRD SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

**No. 3521 of 9th March, 2006**

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**B. 04/06**

**BILL**

**FOR**

**AN ORDINANCE** to amend the Financial Services Ordinance 1989 and the Financial Services Ordinance 1998.

**ENACTED** by the Legislature of Gibraltar.

**Part I  
General**

**Title and Commencement.**

1. This Ordinance may be cited as the Financial Services (Miscellaneous Provisions) Ordinance 2006.

**Part II  
Amendments to Financial Services Ordinance 1989**

**Amendments to the Financial Services Ordinance 1989.**

2. The Financial Services Ordinance 1989 is amended in accordance with the provisions of this Part.

**Amendment to section 2.**

3. In section 2(1),–

(a) in the definition of “relevant supervisory authority” for “Banking Ordinance 1992” substitute “Financial Services Ordinance 1998”; and

(b) after the definition of “member state” insert–

“Minister means the Minister with responsibility for financial services;”.

**Amendments to section 3.**

4. In–

(a) section 3(2)(b) after “to this Ordinance” insert “and are not excluded by Schedule 2A”; and

(b) after section 3(2) insert–

“(2A) Schedule 2B shall have effect for the construction of Schedules 1, 2 and 2A.”.

**Amendment to section 6.**

5. After section 6(1) insert–

“(1A) The Authority shall not consider an application under subsection (1) from a European authorised institution to carry on items 7 to 12 business.”.

**Amendments to section 8.**

6. In section 8–

(a) for subsection (3) substitute–

“(3) Where an applicant could be a European subsidiary institution in respect of any relevant investment business, the Authority shall not consider an application under section 6(1)

in respect of that business, unless the relevant supervisory authority has consented to the applicant carrying on that business other than as a European subsidiary institution.”; and

- (b) delete subsection (4).

**New section 11B.**

7. After section 11A insert–

**“Modification or waiver of regulations**

11B.(1) The Authority may, with the consent of the Minister, on the application or with the consent of an authorised firm or licensee, direct that all or any of the regulations made under section 53 (except for regulations made under section 56)–

- (a) are not to apply to the authorised firm or licensee; or
  - (b) are to apply to him with such modifications as may be specified in the direction.
- (2) An application may be made in such manner as the Authority may direct.
  - (3) The Authority may not give a direction unless it is satisfied that–
    - (a) compliance by the authorised firm or licensee with the regulations, or with the regulations as unmodified, would be unduly burdensome, or would not achieve the purpose for which the regulations were made; and
    - (b) the direction would not result in undue risk to persons whose interests the regulations are intended to protect.
  - (4) A direction may be given subject to conditions.
  - (5) Unless it is satisfied that it is inappropriate or unnecessary to do so, a direction must be published by the Authority in such a way as it thinks most suitable for bringing the direction to the attention of–

- (a) those likely to be affected by it; and
  - (b) others who may be likely to make an application for a similar direction.
- (6) The Authority may–
- (a) revoke a direction; or
  - (b) vary it with the consent of the Minister on the application, or with the consent, of the authorised firm or licensee to whom it relates.”

**Amendments to section 14.**

8. In section 14–

- (a) in subsection (1) after “controlled activity”, delete “by or on behalf of licensees,”;
- (b) in subsection 2(b) after “of investment”, insert “, or investment business,”; and
- (c) in subsection 2(c) after “of investment” insert “, or investment business,”.

**New section 33A.**

9. After section 33 insert–

**“Skilled Person’s Report.**

33A.(1) The Authority may, by notice in writing given to a relevant person, require him to provide the Authority, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with a report on any aspect of, or any matter about which, the Authority may reasonably require for the performance of its functions under this or any other Ordinance for which it exercises its regulatory powers.

- (2) The Authority may require the report to be in such form as may be specified in the notice.
- (3) The person appointed to make a report required under subsection (1) must be a person—
  - (a) nominated or approved by the Authority; and
  - (b) appearing to the Authority to have the professional skills necessary to make a report on the matter concerned.”.
- (4) The Costs of producing a report under subsection (1) shall be borne by the relevant person required to provide the report.

**Amendment to section 34.**

10. For section 34(b) substitute—

- “(b) any person who appears to the Authority to be carrying on, or holding himself out as carrying on, any investment business or a controlled activity in or from within Gibraltar.”.

**Amendment to section 35.**

11. After section 35(1) insert—

- “(1A) If it appears to the Authority that a person is not fit and proper to carry out any function in relation to investment business or a controlled activity carried on by a person licensed under this Ordinance or authorised under the 1998 Ordinance, the Authority may direct that the person is under an obligation not to perform a specified function, any function falling within a specified description, or any function as stated in the direction.”.

**Amendment to section 42.**

12. In section 42(4) for “contravened” substitute “information related to any contravention of”.

**Amendment to section 44.**

13. After section 44(1)(e) insert—

“(ee) under section 35, to issue a direction; or”.

**Amendment to section 46.**

14. In section 46(b) for “24” substitute “35”.

**Amendment to section 53.**

15. (1) In section 53 for all references to “Governor” substitute “Minister”.

(2) For section 53(2) substitute–

“(2) The Minister may make regulations empowering the Authority to prescribe by rules anything for which provision may be made under this Ordinance or the 1998 Ordinance.”.

**Amendments to section 56.**

16. In section 56(1)–

(a) for “Authority” substitute “Financial Services Commission”;

(b) for paragraph (c) substitute–

“(c) from time to time, in respect of licensees, authorised Gibraltar investment firms, authorised European investment firms or collective investment schemes.”; and

(c) delete paragraph (d).

**New section 57A.**

17. After section 57 insert–

**“Guidance.**

57A(1) The Authority may issue guidance consisting of such information and advice as it considers appropriate–

- (a) with respect to matters within its competence relating to the operation of this Ordinance or the 1998 Ordinance;
- (b) with respect to any matters relating to the discharge by the Authority of its functions under this or any other Ordinance;
- (c) with respect to any other matters within the statutory competence of the Authority about which it appears to the Authority to be desirable to give information or advice.”.

**Amendments to schedule 2.**

18. In Schedule 2–

- (a) after paragraph 1 insert–

**“Notes.**

- (1) This paragraph does not apply to a person by reason of his accepting, or offering or agreeing to accept, whether as principal or agent, 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 offered or agreed to make, grant or provide.
- (2) The references in Note (1) to a person accepting, or offering or agreeing to accept, an instrument include references to a person becoming or offering or agreeing to become, a party to an instrument otherwise than as a debtor or as surety.”;

- (b) for the Notes to paragraph 2 substitute–

**“Notes.**

- (1) The arrangements in subparagraph (a) are arrangements which bring about or would bring about the transaction in question; but arrangements do not fall within subparagraph (b) by reason

of their having as their purpose the provision of finance to enable a person to buy, sell, subscribe for or underwrite investments.

- (2) This paragraph does not apply to a person by reason of his making, or offering or agreeing to make, arrangements to which he will himself be a party as principal or which will be entered into by him as agent for one of the parties.
- (3) This paragraph does not apply to a person (the relevant person) who is either a money-lender, within the meaning of the Money-Lending Ordinance or a person whose ordinary business includes the making of loans or the giving of guarantees in connection with loans by reason of the relevant person making, or offering or agreeing to make, arrangements with a view to a regulated firm selling an investment which falls within paragraph 10 of Schedule 1 or, so far as relevant to that paragraph, paragraph 11 of that Schedule, if the arrangements are either—
  - (a) that the regulated firm or a person on its behalf will introduce persons to whom the regulated firm has sold or proposes to sell an investment of the kind described above, or will advise such persons to approach the relevant person with a view to the relevant person lending money on the security of that investment; or
  - (b) that the regulated firm gives an assurance to the relevant person as to the amount which will or may be received by the relevant person, should he lend money to a person to whom the regulated firm has sold or proposes to sell an investment of the kind described above, on the surrender or maturity of that investment if it is taken as security for the loan.
- (4) This paragraph does not apply to a person by reason of his making, or offering or agreeing to make, arrangements with a view to a person accepting, whether as principal or agent, 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 or which he or his principal has

offered or agreed to make, grant or provide; and the reference in this note to a person accepting an instrument includes a reference to a person becoming a party to an instrument otherwise than as a debtor or a surety.

- (5) This paragraph does not apply to arrangements for the introduction of persons to another person if—
- (a) the person to whom the introduction is made is a regulated firm or an exempted person or is a person whose ordinary business involves him in engaging in activities which fall within this Schedule, or would do so apart from the provisions of Schedule 2A, and who is not unlawfully carrying on investment business in Gibraltar; and
  - (b) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion either—
    - (i) in relation to investments generally; or
    - (ii) in relation to any class of investments if the transaction or advice is or is to be with respect to an investment within that class.”;
  - (c) after paragraph 2 insert—

**“Custody of investments.**

- 2A.(1) Safeguarding and administering or arranging for the safeguarding and administration of assets belonging to another where—
- (a) those assets consist of or include investments; or
  - (b) the arrangements for their safeguarding and administration 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 safeguarded and administered.

- (2) Offering or agreeing to safeguard and administer, or to arrange for the safeguarding and administration of, assets belonging to another where the circumstances fall within sub-paragraph (a) or sub-paragraph (b) of paragraph (1).

**Notes.**

- (1) This paragraph does not apply to a person by reason of his safeguarding and administering assets, or offering or agreeing to do so under arrangements—
  - (a) under which another person ("the primary custodian"), who is permitted to provide a service falling within this paragraph, undertakes to the person to whom the assets belong a responsibility in respect of the assets which is no less onerous than the responsibility which the primary custodian would undertake to that person if the primary custodian were safeguarding and administering the assets himself; and
  - (b) which are operated by the primary custodian in the course of carrying on, in or from within Gibraltar, investment business falling within this paragraph.
- (2) None of the following activities constitutes the administration of assets—
  - (a) providing information as to the number of units or the value of any assets safeguarded;
  - (b) converting currency; and
  - (c) receiving documents relating to an investment solely for the purpose of onward transmission to, from or at the discretion of the person to whom the investment belongs.
- (3) For the purposes of this paragraph it is immaterial that the assets safeguarded and administered—

- (a) constitute units of a security title to which is recorded on the relevant register of securities as being held in uncertificated form; or
  - (b) may be transferred to another person, subject to a commitment by the person safeguarding and administering them, or arranging for their safeguarding and administering, that they will be replaced by equivalent assets at some future date or when so requested by the person to whom they belong.
- (4) This paragraph does not apply to arrangements for the introduction of persons to another person if–
- (a) the person to whom the introduction is made is permitted to provide a service falling within this paragraph, and
  - (b) the introduction is made with a view to the provision in or from within Gibraltar of a service falling within this paragraph or the making of arrangements operated in or from within Gibraltar for the provision of a service falling within this paragraph by a person who is not connected with the person by whom the introduction is made, and, for the purposes of this Note, the person making the introduction shall be regarded as connected with the other person if he is either a body corporate in the same group as that other person or remunerated by that other person.
- (5) For the purposes of Notes (1) to (4), a person is permitted to provide a service falling within this paragraph if –
- (a) he is a regulated firm who may provide that service without contravening any such regulations as are referred to in section 12; or
  - (b) he is an exempted person as respects any investment business which consists of or includes that service; or

(c) he is entitled to carry on investment business in Gibraltar which consists of or includes that service pursuant to section 4(2) of the 1998 Ordinance.”; and

(d) after paragraph 5 insert–

**“Sending dematerialised instructions etc.**

6.(1) Sending on behalf of another person dematerialised instructions relating to an investment by means of a computer based system–

(a) through the medium of which securities may be transferred or allotted without the need for an instrument in writing, and

(b) which is operated by a person authorised by a relevant supervisory authority in an EEA state or by a prescribed authority in another territory,

or offering or agreeing to do so, or causing on behalf of another person such instructions to be sent by such means or offering or agreeing to do so.

(2) In subparagraph (1) "prescribed" means prescribed by rules made by the Authority.

**Notes.**

(1) This paragraph does not apply to a person by reason of his sending, or causing the sending of, instructions by means of a computer based system on behalf of–

(a) a participating issuer or settlement bank acting in its capacity as such; or

(b) an offeror making a takeover offer,

or by reason of his offering or agreeing to do so.

(2) This paragraph does not apply to a person by reason of any activity in which he engages, or in which he offers or agrees to engage, at a time when he is accredited by the Authority as a

provider of a network for the purposes of a computer based system and which is a necessary part of the provision of such a network.

- (3) For the purposes of this paragraph a person shall be taken to cause, or to offer or agree to cause, the sending of a dematerialised instruction only if he is a person who, under an agreement with the Authority, is responsible for the operation of, and the maintenance of security over, a gateway.

- (4) In this paragraph—

"dematerialised instruction", in relation to a computer based system, means an instruction sent by means of a gateway;

"gateway", in relation to a computer based system, means computer hardware and software by means of which instructions are authenticated and encrypted for processing by the system; and

"settlement bank", in relation to a computer based system, means a person who has agreed to make payments in connection with the discharge of debts or liabilities arising from the transfer or allotment of securities made through the medium of the system.”.

**New schedules 2A and 2B.**

19. After Schedule 2 insert—

**“SCHEDULE 2A**

Section 3(2)(b).

**EXCLUDED ACTIVITIES**

**Dealing as principal.**

1.(1) Paragraph 1 of Schedule 2 applies to a transaction which is or is to be entered into by a person as principal only if—

- (a) he holds himself out as willing to enter into transactions of that kind at prices determined by him generally and continuously rather than in respect of each particular transaction; or

- (b) he holds himself out as engaging in the business of buying investments with a view to selling them and those investments are or include investments of the kind to which the transaction relates; or
  - (c) he regularly solicits members of the public for the purpose of inducing them to enter as principals or agents into transactions to which that paragraph applies and the transaction is or is to be entered into as a result of his having solicited members of the public in that manner.
- (2) In subparagraph (1) "buying" and "selling" means buying and selling by transactions to which paragraph 1 of Schedule 2 applies and "members of the public", in relation to the person soliciting them ("the relevant person"), means any other persons except—
- (a) regulated firms or exempted persons;
  - (b) members of the same group as the relevant person;
  - (c) persons who are, or propose to become, participators with the relevant person in a joint enterprise;
  - (d) any person who is solicited by the relevant person—
    - (i) with a view to the acquisition by the relevant person of 20 per cent. or more of the voting shares in a body corporate (that is to say, shares carrying not less than that percentage of the voting rights attributable to share capital which are exercisable in all circumstances at any general meeting of the body); or
    - (ii) if the relevant person (either alone or with other members of the same group as himself) holds 20 per cent. or more of the voting shares in a body corporate, with a view to the acquisition by him of further shares in the body or the disposal by him of shares in that body to the person solicited

- or to a member of the same group as that person;  
or
  - (iii) if the person solicited (either alone or with other members of the same group as himself) holds 20 per cent. or more of the voting shares in a body corporate, with a view to the disposal by the relevant person of further shares in that body to the person solicited or to a member of the same group as that person; and
  - (e) any person whose head office is outside Gibraltar, who is solicited by an approach made or directed to him at a place outside Gibraltar and whose ordinary business involves him in engaging in activities which fall within Schedule 2 or would do so apart from this Schedule.
- (3) Subparagraph (1) applies only–
- (a) if the investment to which the transaction relates or will relate falls within any of paragraphs 1 to 6 of Schedule 1 or, so far as relevant to those paragraphs, paragraph 11 of that Schedule; or
  - (b) if the transaction is the assignment of an investment falling within paragraph 10 of Schedule 1 or is the assignment of an investment falling within paragraph 11 of that Schedule which confers rights to or interests in an investment falling within paragraph 10 of that Schedule.
- (4) Paragraph 1 of Schedule 2 does not apply to any transaction which relates or is to relate to an investment which falls within any of paragraphs 7 to 10 of Schedule 1 or, so far as relates to any of those paragraphs, paragraph 11 of that Schedule, being a transaction which is or is to be entered into by a person as principal if he is not a regulated firm and the transaction is to be entered into by him–
- (a) with or through a regulated firm or exempted person;  
or

- (b) through an office outside Gibraltar, maintained by a party to the transaction, and with or through a person whose head office is situated outside Gibraltar and whose ordinary business is such as is mentioned in subparagraph (2)(e).

**Groups and joint enterprises.**

2.(1) Paragraph 1 of Schedule 2 does not apply to a transaction which is or is to be entered into by a person as principal with another person if –

- (a) they are bodies corporate in the same group; or
- (b) they are, or propose to become, participators in a joint enterprise and the transaction is or is to be entered into for the purposes of, or in connection with, that enterprise.

(2) Paragraph 1 of Schedule 2 does not apply to a transaction which is or is to be entered into by any person as agent for another person in the circumstances mentioned in paragraph (a) or paragraph (b) of subparagraph (1) if –

- (a) where the investment falls within any of paragraphs 1 to 6 of Schedule 1 or, so far as relevant to any of those paragraphs, paragraph 11 of that Schedule, the agent does not–
  - (i) hold himself out (otherwise than to other bodies corporate in the same group or persons who are or propose to become participants with him in a joint enterprise) as engaging in the business of buying investments with a view to selling them and those investments are or include investments of the kind to which the transaction relates; or
  - (ii) regularly solicit members of the public for the purpose of inducing them to enter as principals or agents into transactions to which paragraph 1 of Schedule 2 applies; and the transaction is not or is not to be entered into as a result of his

- having solicited members of the public in that manner;
- (b) where the investment is not as mentioned in paragraph (a)–
    - (i) the agent enters into the transaction with or through a regulated firm or exempted person; or
    - (ii) the transaction is effected through an office outside Gibraltar, maintained by a party to the transaction, and with or through a person whose head office is situated outside Gibraltar and whose ordinary business involves him in engaging in activities which fall within Schedule 2 or would do so apart from this Schedule;
- (3) Paragraph 2 of Schedule 2 does not apply to arrangements which a person makes or offers or agrees to make if–
- (a) that person is a body corporate and the arrangements are made with a view to another body corporate in the same group entering into a transaction of the kind mentioned in that paragraph; or
  - (b) that person is or proposes to become a participator in a joint enterprise and the arrangements are with a view to another person who is or proposes to become a participator in the enterprise entering into such a transaction for the purposes of or in connection with that enterprise.
- (4) Paragraph 2A of Schedule 2 does not apply to a service which a person provides or offers or agrees to provide or to arrangements which a person makes or offers or agrees to make for the provision of a service if–
- (a) that person is a body corporate and the service is to be provided to another body corporate in the same group and relates or will relate to assets which belong to that other body corporate; or

- (b) that person is or proposes to become a participator in a joint enterprise and the assets to which the service relates or will relate are or are to be held on behalf of another person who is or proposes to become a participator in the enterprise and are or are to be held for the purposes of or in connection with that enterprise.
- (5) Paragraph 3 of Schedule 2 does not apply to a person by reason of his managing or offering or agreeing to manage investments of another person if—
  - (a) they are bodies corporate in the same group; or
  - (b) they are, or propose to become, participators in a joint enterprise and the investments are to be managed for the purposes of or in connection with that enterprise.
- (6) Paragraph 4 of Schedule 2 does not apply to advice given by a person to another person if—
  - (a) they are bodies corporate in the same group; or
  - (b) they are, or propose to become, participators in a joint enterprise and the advice is given for the purposes of or in connection with that enterprise.
- (7) Paragraph 6 of Schedule 2 does not apply to a body corporate by reason of its sending, or causing the sending of, dematerialised instructions relating to an investment or offering or agreeing to do so if—
  - (a) the person on whose behalf the instructions are, or are to be, sent or caused to be sent is a body corporate in the same group; and
  - (b) the investment to which the instructions relate, or will relate, is one in respect of which a body corporate in the same group is registered as the holder on an appropriate register of securities, or will be so registered as a result of the instructions.

- (8) The definitions in paragraph 1(2) apply also for the purposes of subparagraph (2)(a) except that the relevant person referred to in paragraph 1(2)(d) shall be the person for whom the agent is acting.

**Employees' share schemes.**

- 3.(1) Paragraphs 1, 2 and 2A of Schedule 2 do not apply to anything done by a body corporate ("the principal body corporate"), a body corporate connected with it or a relevant trustee for the purpose of enabling or facilitating transactions in shares or debentures of the principal body corporate between or for the benefit of any of the persons mentioned in sub-paragraph (2) or the holding of such shares or debentures by or for the benefit of any such persons.

- (2) The persons referred to in subparagraph (1) are—

- (a) the bona fide employees or former employees of the principal body corporate or of another body corporate in the same group; or
- (b) the wives, husbands, widows, widowers, children or step-children under the age of eighteen of such employees or former employees.

- (3) In this paragraph "a relevant trustee" means a person holding shares or debentures of the principal body corporate as trustee in pursuance of arrangements made for the purpose mentioned in subparagraph (1) by, or by a body corporate connected with, the principal body corporate.

- (4) In this paragraph "shares" and "debentures" include—

- (a) any investment falling within paragraph 1 or paragraph 2 of Schedule 1;
- (b) any investment falling within paragraph 4 or paragraph 5 of Schedule 1 so far as relating to paragraph 1 or paragraph 2 thereof; and

- (c) any investment falling within paragraph 11 of Schedule 1 so far as relating to any of paragraphs 1, 2, 4 and 5 thereof.

(5) For the purposes of this paragraph, a body corporate is connected with another body corporate if—

- (a) they are members of the same group; or
- (b) one of them is entitled, either alone or together with any other body corporate in the same group, to exercise or control the exercise of a majority of the voting rights attributable to the share capital which are exercisable in all circumstances at any general meeting of the other body corporate or of its holding company.

**Sale of body corporate.**

4.(1) Paragraphs 1 and 2 of Schedule 2 do not apply to the acquisition or disposal of, or to anything done for the purposes of the acquisition or disposal of, shares in a body corporate other than an open-ended investment company, and paragraph 4 of that Schedule does not apply to advice given in connection with the acquisition or disposal of such shares, if—

- (a) the shares consist of or include shares carrying 75 per cent or more of the voting rights attributable to share capital which are exercisable in all circumstances at any general meeting of the body corporate, or
- (b) the shares, together with any already held by the person acquiring them, carry not less than that percentage of those voting rights,

and, in either case, the acquisition and disposal is, or is to be, between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals.

(2) For the purposes of subparagraph (1), a "group of connected individuals", in relation to a person disposing of shares, means persons each of whom is, or is a close relative of, a director or

manager of the body corporate and, in relation to the person acquiring the shares, means persons each of whom is, or is a close relative of, a person who is to be a director or manager of the body corporate.

- (3) For the purposes of this paragraph the "close relatives" of a person are his spouse, his children and step-children, his parents and step-parents, his brothers and sisters and his step-brothers and step-sisters.

**Trustees and personal representatives.**

- 5.(1) Paragraph 1 of Schedule 2 does not apply to a person by reason of his buying, selling or subscribing for an investment or offering or agreeing to do so if—

- (a) the investment is, or is to be, held by him as bare trustee for another person;
- (b) he is acting on that person's instructions; and
- (c) he does not hold himself out as providing a service of buying and selling investments; and this subparagraph has effect to the exclusion of paragraph 1 as respects any transaction in respect of which the conditions in paragraphs (a) and (b) of this subparagraph are satisfied.

- (2) Paragraph 2 of Schedule 2 does not apply to anything done by a person as trustee or personal representative with a view to—

- (a) a fellow trustee or personal representative and himself engaging in their capacity as such in any activity falling within paragraph 1 of that Schedule; or
- (b) a beneficiary under the trust, will or intestacy engaging in any such activity, unless that person is remunerated for what he does in addition to any remuneration he receives for discharging his duties as trustee or personal representative.

- (3) Paragraph 2A of Schedule 2 does not apply to anything done by a person as trustee or personal representative unless—

- (a) he holds himself out as providing a service falling within that paragraph; or
  - (b) he is remunerated for providing such a service in addition to any remuneration he receives for discharging his duties as trustee or personal representative.
- (4) Paragraph 3 of Schedule 2 does not apply to anything done by a person as trustee or personal representative unless he holds himself out as offering investment management services or is remunerated for providing such services in addition to any remuneration he receives for discharging his duties as trustee or personal representative.
- (5) Paragraph 4 of Schedule 2 does not apply to advice given by a person as trustee or personal representative to—
- (a) a fellow trustee or personal representative for the purposes of the trust or estate, or
  - (b) a beneficiary under the trust, will or intestacy concerning his interest in the trust fund or estate, unless the person is remunerated for doing so in addition to any remuneration he receives for discharging his duties as trustee or personal representative.
- (6) Paragraph 6 of Schedule 2 does not apply to a person by reason of his sending, or causing the sending of, dematerialised instructions relating to an investment held by him as trustee or as personal representative, or by reason of his offering or agreeing to do so.

**Arrangements made and advice given in course of profession or non-investment business.**

- 6.(1) Paragraph 2 of Schedule 2 does not apply to arrangements—
- (a) which are made in the course of the carrying on of any profession or of a business not otherwise constituting investment business; and

- (b) the making of which is a necessary part of other services provided in the course of carrying on that profession or business.
- (2) Paragraph 2A of Schedule 2 does not apply to the provision of a service or to arrangements made in the provision of a service where–
  - (a) the service is provided or the arrangements are made in the course of the carrying on of any profession or of a business not otherwise constituting investment business; and
  - (b) the provision of the service or the making of the arrangements is a necessary part of other services provided in the course of carrying on that profession or business.
- (3) Paragraph 4 of Schedule 2 does not apply to advice–
  - (a) which is given in the course of the carrying on of any profession or of a business not otherwise constituting investment business; and
  - (b) the giving of which is a necessary part of other advice or services given in the course of carrying on that profession or business.
- (4) In construing the preceding provisions of this paragraph–
  - (a) the making of arrangements shall not be regarded as falling within subparagraph (1)(b);
  - (b) the provision of a service or the arranging for such a provision shall not be regarded as falling within subparagraph (2)(b); and
  - (c) advice shall not be regarded as falling within subparagraph (3)(b), if the making of the arrangements, the provision, or the arranging for the provision, of the service or the giving of the advice is

remunerated separately from the other services or advice.

**Custody of group pension funds by certain insurance companies.**

- 7.(1) Paragraph 2A of Schedule 2 does not apply to anything done by a relevant insurance company in relation to investments of any pension fund which is established solely for the benefit of officers or employees and their dependants of that company or of any other body corporate in the same group as that company.
- (2) In subparagraph (1) "relevant insurance company" means a licensed insurer, as defined in the Insurance Companies Ordinance 1987 who is not an exempted person in relation to the management of the pension fund in question.

**Newspapers.**

8. Paragraph 4 of Schedule 2 does not apply to advice given in a newspaper, journal, magazine or other periodical publication if the principal purpose of the publication, taken as a whole and including any advertisements contained in it, is not to lead persons to invest in any particular investment.

**Advice given in television, sound or teletext services.**

- 9.(1) Paragraph 4 of Schedule 2 does not apply to any advice given in any programme included, or made for inclusion, in—
- (a) any television broadcasting service;
  - (b) any sound broadcasting service; or
  - (c) any teletext service.
- (2) Any reference in subparagraph (1) to a "service" includes a programme, an advertisement and any other item included in that service.

**SCHEDULE 2B**

Section 3(2A)

**INTERPRETATION OF SCHEDULES 1, 2 AND 2A**

1. In this Schedule "the relevant Schedules" means Schedules 1, 2 and 2A.
2. (1) In the relevant Schedules–
  - (a) "property" includes currency of Gibraltar or any country or territory;
  - (b) "regulated firm" has the same meaning as in section 2(7)(b);
  - (c) references to an instrument include references to any record whether or not in the form of a document;
  - (d) references to an offer include references to an invitation to treat;
  - (e) references to buying and selling include references to any acquisition or disposal for valuable consideration;
  - (f) "group", subject to paragraph 4, shall be construed in accordance with paragraph 15 of Schedule 1 to the Financial Institutions (Prudential Supervision) Ordinance 1997 as if the relevant Schedules formed part of that Schedule.
- (2) In subparagraph (1)(d) "disposal" includes–
  - (a) in the case of an investment consisting of rights under a contract or other arrangements, assuming the corresponding liabilities under the contract or arrangements;
  - (b) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists;
  - (c) in the case of an investment consisting of rights under a contract, surrendering, assigning or converting those rights.

- (3) A company shall not by reason of issuing its own shares or share warrants, and a person shall not be reason of issuing his own debentures or debenture warrants, be regarded for the purposes of the relevant Schedules as disposing of them or, by reason of anything done for the purpose of issuing them, be regarded as making arrangements with a view to a person subscribing for or otherwise acquiring them or underwriting them.
- (4) In subparagraph (3)–
  - (a) "company" has the same meaning as in paragraph 1 of Schedule 1;
  - (b) "shares" and "debentures" include any investments falling within paragraph 1 or paragraph 2 of Schedule 1;
  - (c) "share warrants" and "debenture warrants" mean any investment which falls within paragraph 4 of Schedule 1 and relates to shares in the company concerned or as the case may be, to debentures issued by the person concerned.
3. For the purposes of the relevant Schedules a transaction is entered into through a person if he enters into it as agent or arranges for it to be entered into by another person as principal or agent.
- 4.(1) For the purposes of the relevant Schedules a group shall be treated as including any body corporate in which a member of the group holds a qualifying capital interest, as defined below.
  - (2) A "qualifying capital interest" means an interest in relevant shares of the body corporate which the member holds on a long term basis for the purpose of securing a contribution to its own activities by the exercise of control or influence arising from that interest.
  - (3) In subparagraph (2) "relevant shares" means shares comprised in the share capital of the body corporate of a class carrying

rights to vote in all circumstances at general meetings of the body.

- (4) A holding of 20 per cent. or more of the nominal value of the relevant shares of a body corporate shall be presumed to be a qualifying interest unless the contrary is shown.
5. In the relevant Schedules a "joint enterprise" means an enterprise into which two or more persons ("the participators") enter for commercial reasons related to a business or businesses (other than investment business) carried on by them; and, where a participator is a body corporate and a member of a group, each other member of the group shall also be regarded as a participator in the enterprise.
6. Where a person is an exempted person as respects part of the investment business carried on by him, anything done by him in carrying on that part shall be disregarded in determining whether any paragraph of Schedule 2A applies to anything done by him in the course of business in respect of which he is not exempt.
7. In determining for the purposes of the relevant Schedules whether anything constitutes an investment or the carrying on of investment business, any provision of the law relating to the enforceability of a contract by way of gaming or wagering shall be disregarded.
8. For the purposes of the relevant Schedules the following are not collective investment schemes—
  - (a) arrangements where the entire contribution is a deposit within the meaning of the Banking Ordinance 1992 or a sum of a kind described in any of paragraphs (d) to (f) of subsection (2) of section 4 of that Ordinance;
  - (b) arrangements under which the rights or interests of the participants are represented by the following—
    - (i) investments falling within paragraph 2 of Schedule 1 which are issued by a single body corporate which is not an open-ended

- investment company or which are issued by a single issuer which is not a body corporate and are guaranteed by the Government, or the government of any other country or territory; or
- (ii) investments falling within subparagraph (i) which are convertible into or exchangeable for investments falling within paragraph 1 of Schedule 1 provided that those later investments are issued by the same person as issued the investments falling within subparagraph (i) or issued by a single other issuer; or
  - (iii) investments falling within paragraph 3 of Schedule 1 issued by the same government, local or public authority; or
  - (iv) investments falling within paragraph 4 of Schedule 1 which are issued otherwise than by an open ended investment company and which confer rights in respect of investments, issued by the same issuer, falling within paragraph 1 of that Schedule or within any of subparagraphs (i) to (iii);
- (c) arrangements which would fall within paragraph (b) were it not for the fact that the rights or interests of a participant ("the counterparty") whose ordinary business involves him in engaging in activities which fall within Schedule 2 or would do so apart from Schedule 2A are or include rights or interests under a swap arrangement, that is to say, an arrangement the purpose of which is to facilitate the making of payments to participants whether in a particular amount or currency or at a particular time or rate or interest or all or any combination of those things, being an arrangement under which—
- (i) the counterparty is entitled to receive amounts (whether representing principal or interest) payable in respect of property subject to the scheme or sums determined by reference to such amounts; and

- (ii) the counterparty makes payments (whether or not of the same amount and whether or not in the same currency as those referred to in subparagraph (i)) which are calculated in accordance with an agreed formula by reference to the amounts or sums referred to in subparagraph (i);
  - (d) arrangements under which the rights or interests of the participants are rights to or interests in money held in a common account in circumstances in which the money is so held on the understanding that an amount representing the contribution of each participant is to be applied either in making payments to him or in satisfaction of sums owed by him or in the acquisition or property or the provision of services for him.
- 9.(1) For the purposes of the relevant Schedules, arrangements are not a collective investment scheme if they are operated by a body corporate ("the primary body corporate"), a body corporate connected with it or a relevant trustee, for the purpose of enabling or facilitating transactions in shares or debentures of the primary body corporate between or for the benefit of any of the persons mentioned in subparagraph (2) or the holding of such shares or debentures by or for the benefit of any such persons.
- (2) The persons referred to in subparagraph (1) are—
- (a) the bona fide employees or former employees of the primary body corporate or of another body corporate in the same group; and
  - (b) the wives, husbands, widows, widowers, or children or stepchildren under the age of eighteen of such employees or former employees.
- (3) In this paragraph a "relevant trustee" means a person holding shares or debentures of the primary body corporate as trustee in pursuance of arrangements mentioned in subparagraph (1) which were made by, or by a body corporate connected with, the primary body corporate.

- (4) In this paragraph "shares" and "debentures" include—
- (a) any investment falling within paragraph 1 or paragraph 2 of Schedule 1;
  - (b) any investment falling within paragraph 4 or paragraph 5 of Schedule 1 so far as relating to paragraph 1 or paragraph 2 thereof; and
  - (c) any investment falling within paragraph 11 of Schedule 1 so far as relating to any of paragraphs 1,2,4 and 5 thereof.
- (5) For the purposes of this paragraph a body corporate is connected with another body corporate if—
- (a) they are members of the same group; or
  - (b) one is entitled, either alone or together with any other body corporate in the same group, to exercise or control the exercise of a majority of the voting rights attributable to the share capital which are exercisable in all circumstances at any general meeting of the other body corporate or its holding company.”.

**Amendment to schedule 3.**

20. In Schedule 3 paragraph 1(2) after “of a person” insert “(whether as principal or as the servant or agent of a licensed management company)”.

**Amendment to schedule 4.**

21. In Schedule 4, Part I–

(a) after paragraph (b) insert–

“(bb) a licensed insurer, as defined in section 2(2) of the Insurance Companies Ordinance, in respect of any insurance business that it is authorised to carry on pursuant to a licence issued to it under that Ordinance and an EEA insurer as defined in section 2(2) of the Insurance Companies Ordinance which is lawfully carrying on insurance business, or providing insurance, in Gibraltar;” and

(b) after paragraph (h) insert–

“ Provided that, if the principal is a licensed management company, the exemption conferred by this sub-paragraph does not apply to a person who, as servant or agent of his principal, is a director of another company in circumstances falling within paragraph 1 of Schedule 3.”.

**Part III**

**Amendments to Financial Services Ordinance 1998**

**Amendments to the Financial Services Ordinance 1998.**

22. The Financial Services Ordinance 1998 is amended in accordance with the provisions of this Part.

**Amendment to section 2.**

23. In section 2(1) substitute for the definition of “Minister”–

““Minister” means the Minister with responsibility for financial services;”.

**Amendment to section 18.**

24. In section 18(1) delete paragraph (b).

**New section 27A.**

25. After section 27 insert–

**“Requirements for carrying on investment services in the United Kingdom.**

27A. The Minister may, by regulations, make specific provisions requiring authorised Gibraltar investment firms–

- (a) which provide investment services into the United Kingdom on a passporting, cross-border basis, to make, in all their written and visual advertisements and client agreements (for the United Kingdom), such statements as the Minister may prescribe;
- (b) which provide investment services (listed in schedule 1) in the United Kingdom through a branch established in the United Kingdom, to participate in any investor compensation scheme established in the United Kingdom, on such terms as the Minister may prescribe.

### EXPLANATORY MEMORANDUM

This Bill amends the Financial Services Ordinances 1989 and 1998 in order to enable Gibraltar investment services to be passported into the United Kingdom.

(1) Clause 3 amends the definition of “relevant supervisory authority” to ensure it refers to the Financial Services Ordinance 1998 rather than, as presently, the Banking Ordinance 1992.

(2) Clause 4 amends section 3(2) of the FSO 89 by–

- specifically excluding from the definition of carrying on investment business those activities excluded by the new schedule 2A; and
- referring to new schedule 2B (interpretation schedule).

(3) Clause 5 amends section 6 to limit the types of applications for licences from European authorised institutions in respect of items 7 to 12 business.

(4) Clause 6 deals with applicants which “could be a European subsidiary institution”; it amends section 8 and substitutes a new subsection (3) for existing subsections (3) and (4).

(5) Clause 7 inserts a new section 11B which allows the Authority to direct that certain regulations shall not apply to authorised firms or licensees.

(6) Clause 8 inserts a reference to “investment business” into section 14(1)(b) and (c).

(7) Clause 9 introduces a new section 33A which allows the Authority to request skilled person’s reports.

(8) Clause 10 amends section 34 to allow the Authority to request information and production of documents from an additional category of persons – ie persons holding themselves out as carrying on any investment business or controlled activity.

(9) Clause 11 amends section 35 by inserting a new subsection (1A) which allows the Authority to direct persons who it considers “not fit and proper” to not carry out particular functions.

(10) Clause 12 amends section 42 to extend the categories of persons whom the Supreme Court may order to furnish information to cover “persons appearing to have information related to any contravention” (previously this power existed only in relation to persons who appeared to have contravened provisions of sections 3 or 10).

(11) Clause 13 amends section 44 by inserting new subsection (ee); thus the requirements of sections 44 and 45 are extended to cover directions by the Authority under section 35.

(12) Clause 14 amends section 46(b) (discretionary notices in the Gazette) to refer to section 35 (directions of the authority regarding cancellation or suspension of licences and directions that a person is not “fit and proper”) instead of section 24 (schemes constituted in Member states).

(13) Clause 15 amends section 53(2) to provide that regulations are to be made by the Minister with responsibility for financial services rather than by the Governor.

(14) Clause 16 amends section 56(1) (fees regulations) to provide that fees shall be paid to the Financial Services Commission (as opposed to the Authority – ie the Commissioner); it amends section 56(1)(c) to provide that fees may also be prescribed for authorised Gibraltar and European investment firms and deletes section 56(1)(d) (which dealt with European firms).

(15) Clause 17 inserts a new section 57A allowing the Authority to issue guidance with respect to the Financial Services Ordinance 1989, Financial Services Ordinance 1998, the functions of the Authority or other matters about which it seems to the Authority desirable to give information or advice.

(16) Clause 18 amends schedule 2 (activities constituting investment business) and, in particular, inserts new provisions dealing with custody of investments and the sending of dematerialised instructions.

(17) Clause 19 inserts two new schedules – schedules 2A and 2B. Schedule 2A sets out excluded activities and schedule 2B is an interpretation schedule.

(18) Clause 20 amends schedule 3, paragraph 1(2) to clarify that the activities of a person as servant or agent of a licensed management company

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may be taken into account as well as the activities of a person as principal of such a company.

(19) Clause 21 amends schedule 4 (exempted persons) to include, at new subparagraph (bb) licensed insurers, and to limit the application of subparagraph (h) in respect of persons who are directors of other companies in certain circumstances.

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