

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,766 of 15th February, 2010

B. 09/10

BILL

FOR

AN ACT to make provision for and in connection with the appointment of an Authorised Administrator to control the affairs of a company upon the happening of a Relevant Event; to provide for the functions and powers of the Authorised Administrator; and for connected purposes.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Financial Services (Temporary Administration of Companies) Act 2010 and comes into operation on day of publication.

Interpretation.

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

“Associated Company” means any company or other legal entity which is wholly or partially owned or controlled by a Company or by any of the shareholders of or persons that ultimately own or control or appear to the Minister or the Authority to own or control the Company or its Relevant Affairs, or any company whose affairs are or appear to be controlled or directed by, or to the order of, the Company or its directors or shadow directors;

“Authorised Administrator” means a person appointed under section 4;

“Authority” means the Chief Executive appointed under the Financial Services Commission Act 2007;

“Client” means any person, company, trust or other legal entity to which the Company, or any of its employees or Associated Companies, provides services for which a licence is required under the Principal Act or any other statute;

“Client Service” means the doing of any act or thing or the holding of any post or office, or the discharge of any function or power, in, in relation to, or for the benefit of any Client, for which a licence is required under the Principal Act or any other statute;

“Company” means a person, company or other entity whose licence under the Principal Act has been suspended or cancelled under section 11 of that Act, whether or not an appeal has been lodged under section 45 of that Act or any other legal challenge has been brought against the decision to suspend or revoke the licence;

“fit and proper person” means a person who in the Authority’s opinion has the knowledge and expertise to carry out the functions of the Authorised Administrator;

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

“Principal Act” means the Financial Services (Investment and Fiduciary Services) Act;

“Relevant Affairs” means all the business and affairs of a Company comprising or relating to Client Services;

“Relevant Event” means the suspension or cancellation by the Authority of a licence pursuant to section 11 of the Principal Act, the imposition of conditions on a licence by the Authority pursuant to section 10 of the Principal Act, or any other statutory provision whether or not an appeal has been lodged under section 45 of the Principal Act or any other legal challenge has been brought against the decision to suspend or cancel the licence;

“Relevant Period” means any period of time during which this Act applies in accordance with section 3; and

“a suspended or cancelled licence” means a licence issued by the Authority under the Principal Act, or any other statute and which has been suspended or cancelled under section 11 of the Principal Act, whether or not an appeal has been lodged under section 45 of the Principal Act or any other legal challenge has been brought against the decision to suspend or cancel the licence.

Application.

3. This Act shall apply upon the happening of a Relevant Event and or during any period of time that a Relevant Event subsists.

Appointment of Authorised Administrator.

4. Upon the happening of a Relevant Event in relation to a Company, and for the duration of a Relevant Period the Authority may, and upon the Direction of the Minister shall, appoint a fit and proper person to be the Authorised Administrator of the Relevant Affairs of that Company.

Authorised Administrator to control the Company’s Relevant Affairs.

5. While the appointment of an Authorised Administrator under this Act remains effective—

- (a) no director, officer or other employee of the Company shall take any action or do anything in relation to its Relevant Affairs or the affairs of any Client of the Company or in connection with any Client Service without the consent of the Authorised Administrator;
- (b) every director, officer and other employee of the Company or Associated Company shall do all such acts and things in relation to its Relevant Affairs as may be directed by the Authorised Administrator.

Functions of the Authorised Administrator.

6. The functions of the Authorised Administrator shall be—

- (a) to enquire into and safeguard the Relevant Affairs of the Company and of its Clients;

- (b) to obtain custody of and safeguard the records and assets of the Company and of its Clients;
- (c) to communicate with Clients of the Company for the purposes of—
 - (i) informing them of the circumstances and facts affecting the Company, its Clients, that Client and Client Services;
 - (ii) obtaining and receiving instructions from Clients relating to their affairs;
- (d) to assist the Commission, any law enforcement authority or any other person exercising statutory authority in the execution of their duties and functions, including any enquiry or investigation.

Powers of the Authorised Administrator.

7.(1) The Authorised Administrator shall have the following powers—

- (a) to take all actions and do all things necessary or desirable for the conduct of the Relevant Affairs of the Company;
- (b) to take all actions and do all things necessary to carry out and implement the instructions of any Client, including but not limited to instructions to transfer the business and affairs of a Client to any other company or other entity duly licensed under the Principal Act;
- (c) to take all actions and do all things (including but not limited to the exercise of the functions and duties of directors, officers, trustees or other office) in relation to the affairs of any Client of the Company or of any Associated Company or their Client Services, which functions or duties were performed by the Company or any director or employee thereof or any Associated Company pursuant to a suspended or cancelled licence;

- (d) to sign all documents, papers, authorities, directions, instructions, mandates, cheques and where necessary, affix the common seal of the Company or of any Associated Company or other thing whatsoever necessary, or in the Authorised Administrator's opinion desirable, to give effect to any of his functions or powers, including (but not limited to) conducting Client Services and implement Client instructions;
- (e) to take all actions and do all things necessary to carry out the functions described in section 6(d) above, including (but without prejudice to the generality of the foregoing) delivering any equipment, records, papers, documents and information of any kind, or copies thereof, appertaining to a Company or any Client.

(2) Any power conferred on a Company or an Associated Company or its officers, whether by the Companies Act or by the memorandum and articles of association of the Company or the Associated Company, which could be exercised in such a way as to interfere with the exercise by the Authorised Administrator of his powers hereunder, is not exercisable except with such consent of the Authority.

Liability of Directors Officers and Managers.

8. Without prejudice to section 13 any director, officer or manager of a Company or of an Associated Company that fails or omits to do any act or thing directed by the Authorised Administrator or does any act or thing without the consent of the Authorised Administrator contrary to section 5, shall be personally liable to the Company and to the Client for all the financial consequences of his said acts or omissions.

Authorised Administrators and others not deemed to be in breach of the Principal Act.

9.(1) None of the persons specified in sub-section (2) below shall be deemed to be in breach of the Principal Act, in the circumstances also specified in sub-section (2) below by virtue only of the fact that the licence of the Company or an Associated Company under the Principal Act has been suspended or cancelled.

(2) The persons and circumstances referred to in sub-section (1) above are the following—

- (a) the Authorised Administrator, in the lawful discharge of his powers and functions under this Act;
- (b) any employee or agent of the Authorised Administrator duly authorised by the Authorised Administrator in the lawful discharge of his powers and functions under this Act;
- (c) any director, officer, manager or employee of the Company or Associated Company acting at the specific request or instruction or with the specific written authority of the Authorised Administrator.

Immunity.

10.(1) Neither the Authorised Administrator nor his officers, staff or agents, shall be liable in damages for anything done or omitted in the discharge or purported discharge of any powers or functions conferred on the Authorised Administrator by this Act or any other statute unless the act or omission is shown to have been in bad faith.

(2) The Commission shall (unless bad faith is definitively found to have existed) indemnify the Authorised Administrator, his officers, staff and agents for the costs of defending any action brought by a third party in respect of anything they are alleged to have done or omitted in the discharge or purported discharge of any powers or functions conferred on the Authorised Administrator by this Act.

(3) For all the purposes of the Principal Act, the Authorised Administrator and his officers, staff and agents shall be deemed to be officers, staff and agents of the Commission.

Funding.

11.(1) All the fees and costs of the Authorised Administrator in the carrying out of his powers and functions under this Act shall be defrayed out of the monies and assets of the Company.

(2) If the Company shall not have sufficient monies for the purposes described at sub-section (1) above, the said fees and costs shall be borne by the Authority.

(3) The Authority may, with the consent of the Minister, levy a special fee upon all the holders of licences under the Principal Act, on such terms as to division between them as it shall consider equitable, to recover any costs incurred by it under this Act.

(4) The raising of a levy under sub-section (3) above shall not prejudice the existence of a debt by the Company to the Authority for all such fees and costs, which shall rank in priority upon a winding up to any debt due by the Company to any director or shareholder of the Company or to any Associated Company or director or shareholder thereof.

Termination of Appointment.

12.(1) Subject to sub-section (2) the appointment of an Authorised Administrator under this Act shall terminate upon the happening of one of the following events, namely–

- (a) the Minister revokes the appointment;
- (b) the Authority revokes the appointment;
- (c) the Supreme Court of Gibraltar appoints a liquidator of the Company pursuant to a petition to wind up the Company.

(2) The Authority shall not, without the Minister's consent, revoke any appointment which it made at the direction of the Minister.

Offences and Penalties.

13.(1) Any person who interferes with or obstructs an Authorised Administrator in the exercise of his functions or powers under this Act shall commit an offence.

(2) Any person who is a director, officer, manager or employee of a Company who fails to carry out the directions of the Authorised Administrator under section 5(b) at the time and within the timescale directed by the Authorised Administrator, or who takes any action or does

anything in relation to the Relevant Affairs of a Company or the affairs of any Client of the Company or any Client Service without the consent or authority of the Authorised Administrator contrary to section 5(a) shall commit an offence.

- (3) Any person guilty of an offence under this Act shall be liable—
- (a) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level five on the standard scale or to both; or
 - (b) on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both.

Revocation and Savings.

14.(1) The Financial Services (Investment and Fiduciary Services) (Temporary Administration of Companies) Regulations 2010 are hereby revoked.

(2) Notwithstanding the revocation of the Financial Services (Investment and Fiduciary Services) (Temporary Administration of Companies) Regulations 2010, any appointment made under those Regulations prior to the coming into force of this Act shall be deemed to have been duly made under this Act.

EXPLANATORY MEMORANDUM

This Bill makes provision for the appointment of an Authorised Administrator to control the business and affairs of a Company comprising or relating to Client Services, upon the happening of a Relevant Event.

The Bill also makes provision for the functions and powers of the Authorised Administrator which are set out in clauses 6 and 7 respectively.

Clause 9 provides that the Authorised Administrator and others shall be deemed not to be in breach of the Financial Services (Investment and Fiduciary Services) Act by virtue of the fact that the licence of the Company or an Associated Company under that Act has been suspended or cancelled.

Clause 11 sets out how the Authorised Administrator will be funded for carrying out his functions and powers under the Bill.

Clause 12 deals with the termination of the appointment of the Authorised Administrator.

Clause 13 provides for offences and penalties.

Financial Services (Temporary Administration of Companies) Act 2010
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