

**SECOND SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

No. 3883 of 13 October, 2011

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LEGAL NOTICE NO. 191 OF 2011.

**INTERPRETATION AND GENERAL CLAUSES ACT**

**FINANCIAL SERVICES (COLLECTIVE INVESTMENT SCHEMES  
ACT) (AMENDMENT) REGULATIONS 2011**

In exercise of the powers conferred on it by section 23(g)(ii) of the Interpretation and General Clauses Act, and in order to transpose in part into the law of Gibraltar Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), the Government has made the following Regulations—

**Title and commencement.**

1. These Regulations may be cited as the Financial Services (Collective Investment Schemes Act) (Amendment) Regulations 2011 and come into effect on the day of publication.

**Amendment of the Financial Services (Collective Investment Schemes) Act 2005.**

2.(1) The Financial Services (Collective Investment Schemes) Act 2005 is amended in accordance with the provisions of this Regulation.

(2) For the Long Title, there shall be substituted the following Long Title—

“AN ACT to regulate the promotion, establishment and operation of collective investment schemes and to transpose in part into the law of Gibraltar Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in

transferable securities (UCITS), as amended from time to time.”.

- (3) Section 1(1) is amended by substituting for “2005”, “2011”.
- (4) For section 2, there is substituted the following section–

**“Interpretation.**

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

“approved form” means a form approved by the Authority in accordance with section 56;

“authorised open-ended investment company” means an authorised scheme that is an open-ended investment company;

“authorised person” means a person authorised under section 27, an authorised open-ended investment company or a person deemed under a provision of this Act or the CIS Regulations to be an authorised person;

“authorised scheme” means a common fund or an open-ended investment company in respect of which an authorisation issued under section 13 is in force;

“authorised UCITS scheme” means an authorised scheme that is a UCITS scheme;

“authorised common fund” means an authorised scheme that is a common fund;

“Authority” means such person or persons or body as the Minister may, by Order, appoint to exercise the powers, discretions and functions conferred on the Authority under this Act\*;

“CIS Regulations” means the Financial Services (Collective Investment Schemes) Regulations 2011 made under section 53;

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\* *The Commissioner, as defined in the Financial Services Commission Ordinance 1989, is appointed as the Authority see LN. 2005/183.*

“collective investment scheme” has the meaning specified in section 3;

“common fund” shall be interpreted in accordance with section 3A(2);

“common fund” means a collective investment scheme under which the property subject to the scheme is held on trust for the participants;

“depository” shall be interpreted in accordance with regulation 2 of the CIS Regulations;

“EEA” means the territories to which the EEA Agreement applies;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2<sup>nd</sup> May 1992 as it has effect for the time being;

“EEA State” means a State which is a contracting party to the EEA Agreement and any reference to EEA State shall, except where otherwise specified, be construed as including Gibraltar;

“EEA UCITS management company” shall be interpreted in accordance with regulation 13 of the CIS Regulations;

“EIF Regulations” means the Experienced Investor Fund Regulations made under section 52;

“experienced investor fund” and “experienced investor” have the meanings specified in the EIF Regulations;

“Gibraltar UCITS management company” means an authorised person that is authorised to be the operator of a UCITS scheme, whether or not it is also authorised to be the operator of one or more non-UCITS collective investment schemes;

“management agreement” means an agreement for the management of funds constituting the whole or part of a collective investment scheme;

“management company” means a company, the regular business of which is the management of UCITS in the form of common funds or of investment companies (collective portfolio management of UCITS);

“manager” has the meaning specified in the CIS Regulations;

“Minister” means the Minister responsible for financial services;

“Non-UCITS” means a collective investment scheme which is not a UCITS;

“open-ended investment company” has the meaning specified in section 4;

“operator”–

- (a) in relation to a common fund with a separate trustee, means the manager of the scheme;
- (b) in relation to an open-ended investment company which is a UCITS scheme, the person appointed to manage the scheme; and
- (e) in relation to any other open-ended investment company, the company itself;

“participant” means a person who participates in a collective investment scheme, and includes a shareholder in a collective investment scheme that is constituted as a corporate body;

“public interest” means the public interest of Gibraltar as determined by the Minister;

“prescribed” means prescribed by the CIS Regulations or, in relation to an expert investor fund, by the EIF Regulations;

“private scheme” means a collective investment scheme having the characteristics of a private scheme prescribed by the CIS Regulations;

“recognised foreign scheme” means a collective investment scheme recognised under section 40;

“recognised scheme” means a recognised foreign scheme or a recognised UCITS scheme;

“recognised UCITS scheme” means a UCITS scheme recognised under section 35;

“restricted activity” has the meaning specified in section 7;

“transferable securities” means–

- (a) shares in companies and other securities equivalent to shares in companies (shares);
- (b) bonds and other forms of securitised debt (debt securities);
- (c) any other negotiable securities which carry the right to acquire any such transferable securities by subscription or exchange;

“trustee”, in relation to a common fund, means the person holding the property subject to the scheme on behalf of the participants;

“UCITS” means a collective investment scheme to which this Act applies pursuant to section 3A;

“UCITS Directive” and “Directive” means Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time;

“UCITS scheme” means a scheme which, in accordance with the UCITS Directive, is an undertaking for collective investment in transferable securities subject to that Directive;

“unitholder” means–

- (a) in relation to a unit which is represented by a bearer certificate, the person who holds that certificate; or
- (b) in any other case, the person whose name is entered on the register of the scheme as the holder of that unit;

“units” means the rights or interests, however described, of the participants in a collective investment scheme.

- (2) For the purposes of the interpretation of “management company” in subsection (1), the regular business of a “management company” includes the functions referred to in Schedule 3 of the CIS Regulations.
- (3) For the purposes of the interpretation of “transferable securities” in subsection (1), “transferable securities” excludes the techniques and instruments referred to in regulation 48 of the CIS Regulations.”.
- (5) After section 3, there is inserted the following section–

**“Meaning of “UCITS” for purposes of Act.**

3A.(1) A UCITS is a collective investment scheme–

- (a) with the sole object of the collective investment of capital raised from the public in transferable securities or other liquid financial assets referred to in regulation 47(1) of the CIS Regulations and operating on the principle of risk-spreading; and
- (b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings’ assets,

and for these purposes–

- (i) UCITS may consist of several investment compartments with the Authority's written consent; and
    - (ii) action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value is deemed equivalent to a repurchase or redemption for the purposes of paragraph (b).
  - (2) Undertakings falling within the provisions of subsection (1) may be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies), and for these purposes–
    - (a) “common funds” include unit trusts; and
    - (b) “units” of UCITS include shares of UCITS.
  - (3) Open-ended investment companies–
    - (a) the assets of which are invested through the intermediary of subsidiary companies; and
    - (b) mainly other than in transferable securities,
- do not fall within the provisions of this section.
- (4) A UCITS may not transform itself into a collective investment undertaking of a type not covered by this section.
  - (5) Where a UCITS established in another EEA State or units issued by such UCITS are marketed in Gibraltar–
    - (a) the Authority may not apply any other legislative or regulatory provisions thereto in respect of any matter covered by this Act; and
    - (b) the provisions of regulations 106 and 107 and 123(2)(b) of the CIS Regulations apply.

- (6) For the purposes of this Act, a UCITS is deemed to be established in the EEA State in which it is authorised.”.
- (6) Section 5 is deleted.
- (7) The following section is inserted prior to section 6–

**“Authorisation of UCITS: General Provisions.**

5.(1) It is an offence for a UCITS to carry out any activity to which this Act applies, unless it has been authorised under this Act or in an EEA State, as the case may be.

(2) The Authority–

- (a) shall authorise a common fund only where it has approved the application of the management company to manage that common fund, the fund rules and the choice of depositary;
- (b) shall authorise an open-ended investment company only where it has approved both its instruments of incorporation and the choice of depositary, and, where relevant, the application of the designated management company to manage that open-ended investment company.

(3) Without prejudice to subsection (2)–

- (a) where Gibraltar is not the home State of a management company but is the UCITS’ home State, the management company shall apply to the Authority for an authorisation to manage the UCITS pursuant to regulation 17 of the CIS Regulations;
- (b) an authorisation to manage a UCITS under paragraph (a) shall not be subject to a requirement that the management company have its registered office in Gibraltar, that the management company pursue any activities in Gibraltar or that it delegate any responsibility to undertakings established in Gibraltar.



- (4) The following provisions apply–
- (a) the Authority shall not authorise a UCITS under this Act where–
    - (i) it has reason to believe that the open-ended investment company does not comply with the preconditions laid down in Part IV of the CIS Regulations; or
    - (ii) the management company designated to manage the UCITS is not authorised for the management of UCITS in its home EEA State;
  - (b) without prejudice to regulation 26(2) of the CIS Regulations, a management company or, where applicable, an open-ended investment company, shall be informed, within two months of the submission of a complete application, whether or not an authorisation of the UCITS has been granted;
  - (c) the Authority shall not authorise a UCITS where the directors of the depositary designated in relation to that UCITS are not of sufficiently good repute or are not sufficiently experienced in relation to the type of UCITS to be managed. To that end, the names of the directors of the depositary and of every person succeeding them in office shall be communicated forthwith to the Authority,

and for these purposes, a “director” means a person who, under the law or the instruments of incorporation, represents the depositary, or who effectively determines the policy of the depositary.

- (5) The Authority shall not grant an authorisation to a UCITS applying to be authorised under this Act where the UCITS is legally prevented (for example, through a provision in the fund rules or instruments of incorporation) from marketing its units in Gibraltar.

- (6) It is an offence for the management company or the depository of a UCITS authorised under this Act to be replaced, or the fund rules or instruments of incorporation of the open-ended investment company to be amended, without the prior approval of the Authority.
- (7) The Authority shall ensure that—
- (a) complete information on the laws, regulations and administrative provisions which relate to the constitution and functioning of UCITS are easily accessible at a distance or by electronic means;
  - (b) such information is available in the English language and is provided in a clear and unambiguous manner, and is kept up to date.”.
- (8) Sections 2(1), 7(1), 12(1)(a), 12(2)(a), 13(1)(b), 15(4)(a), 16(1)(a), 18(2), 18(4), 18(5), 18(6) are 22(1)(a), are amended by substituting for “unit trust scheme”, “common fund”.
- (9) Section 6 is amended as follows—
- (a) subsection (3) is amended as by substituting for “Subsection (1) does not apply -”, “Section 5 and subsection (1) do not apply -”;
  - (b) subsection (4) is amended by substituting for “The CIS Regulations may provide that subsection (1) does not apply”, “The CIS Regulations may provide that section 5 and subsection (1) does not apply”.
- (10) Section 11 is amended as follows—
- (a) the existing provision is numbered “(1)”; and
  - (b) the following is inserted after subsection (1)—
    - “(2) The provisions of this Part do not apply for the purposes of subsection (1)(a) to the extent that CIS Regulations make conflicting provision.”.

- (11) The following is inserted after section 15(4)–
- “(5) No condition may be imposed pursuant to this section where it conflicts with a provision of the Directive.”.
- (12) Section 16(1)(a) is amended by inserting after “a trust deed”, “or binding agreement, as the case may be.”.
- (13) Section 16(2)(a) is amended by inserting the words “or the Directive” after the words “this Act”.
- (14) For section 18(1)(b) there is substituted the following paragraph–
- “(b) subject to the provisions of the CIS Regulations, an EEA UCITS management company that has a place of business in Gibraltar.”.
- (15) Section 18(4)(b) is amended by inserting after “(b)”, “save where the CIS Regulations otherwise provide,”.
- (16) For section 28 there is substituted the following section–
- “Authorisation of Gibraltar UCITS management company.**
28. A person shall not be authorised as a Gibraltar UCITS management company unless that person complies with the relevant provisions of the CIS Regulations.”.
- (17) Section 30 is amended by inserting after subsection (2), the following subsection–
- “(3) No condition contrary to the provisions of the Directive may be imposed under this section.”.
- (18) Section 33(1)(a)(i) is amended by substituting for “1989 Act”, “Financial Services (Investment and Fiduciary Services) Act”.
- (19) For sections 35 and 36 there is substituted the following after section 34–

**“Recognition of EEA UCITS Schemes.**

35. For the purposes of this section, a collective investment scheme is constituted in an EEA State if it is a UCITS Scheme which complies with the requirements of the CIS Regulations for the recognition of such schemes in Gibraltar.”.

(20) Section 38 is amended by inserting after the reference “38.”, “Subject to the provisions of the CIS Regulations,”.

(21) Section 43(1)(g) is amended by substituting for “1989 Act”, “Financial Services (Investment and Fiduciary Services) Act”.

(22) Section 50(1) is amended by substituting for “A person aggrieved–”, “Subject to the provisions of the CIS Regulations, a person aggrieved–”.

(23) Section 53(1) is amended by inserting after “to be prescribed by this Act”, “and for giving effect to European Union legislation in any matter relating to collective investment schemes”.

(24) Section 54 is amended by substituting for “1989 Act”, “Financial Services (Investment and Fiduciary Services) Act,”.

(25) Section 57 is amended by substituting for “1989 Act”, “Financial Services (Investment and Fiduciary Services) Act” and for “1998 Act”, “Financial Services (Markets in Financial Instruments) Act 2006”.

(26) Schedule 1 is amended in Part 1 by deleting paragraphs (b) and (h).

Dated 13th October, 2011.

P R CARUANA,  
Chief Minister,  
For the Government.

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#### EXPLANATORY MEMORANDUM

These Regulations amend the Financial Services (Collective Investment Schemes) Act 2005 in order to transpose in part into the law of Gibraltar Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative

provisions relating to undertakings for collective investment in transferable securities (UCITS) as amended by Directive 2010/78/EC of the Parliament and of the Council of 24 November 2010.

In addition, the Regulations amend the Act in order to remove conflicts and inconsistencies with the Directive.

