

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3969 of 13 December, 2012

LEGAL NOTICE NO. 221 OF 2012.

INTERPRETATION AND GENERAL CLAUSES ACT

**FINANCIAL SERVICES (COLLECTIVE INVESTMENT SCHEMES)
ACT 2011 (AMENDMENT) REGULATIONS 2012**

In exercise of the powers conferred upon it by section 23(g)(ii) of the Interpretation and General Clauses Act and for the purpose of transposing into the law of Gibraltar Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as replaced by Directive 2009/65/EC, the Government has made the following Regulations—

Title and commencement.

1. These Regulations may be cited as the Financial Services (Collective Investment Schemes) Act 2011 (Amendment) Regulations 2012 and come into operation on the day of publication.

Amendment to the Financial Services (Collective Investment Schemes) Act 2011.

2. The Financial Services (Collective Investment Schemes) Act 2011 is amended by inserting the following sections after section 2—

“Meaning of “transferable securities”.

2A.(1) The reference to transferable securities in section 2(1) shall be understood as a reference to financial instruments which fulfill the following criteria—

- (a) the potential loss which the UCITS may incur with respect to holding those instruments is limited to the amount paid for them;
- (b) their liquidity does not compromise the ability of the UCITS to comply with regulation 99 of the Financial

Services (Collective Investment Schemes)
Regulations 2011;

- (c) reliable valuation is available for the financial instrument as follows—
 - (i) in the form of accurate, reliable and regular prices which are either market prices or prices made available by valuation systems independent from issuers, in the case of securities admitted to or dealt in on a regulated market as referred to in regulation 47(1)(a) to (d) of the Financial Services (Collective Investment Schemes) Regulations 2011;
 - (ii) in the form of a valuation on a periodic basis which is derived from information from the issuer of the security or from competent investment research, in the case of other securities as referred to in regulation 47(2) and (3) of the Financial Services (Collective Investment Schemes) Regulations 2011;
- (d) appropriate information is available for the financial instrument as follows—
 - (i) in the form of regular, accurate and comprehensive information to the market on the security or, where relevant, on the portfolio of the security, in the case of securities admitted to or traded on a regulated market as referred to in regulation 47(1)(a) to (d) of the Financial Services (Collective Investment Schemes) Regulations 2011;
 - (ii) in the form of regular and accurate information to the UCITS on the security or, where relevant, on the portfolio of the security, in the case of other securities as referred to in regulation 47(2) and (3) of the Financial Services (Collective Investment Schemes) Regulations 2011;
- (e) the financial instruments are negotiable;

- (f) the acquisition of the financial instruments is consistent with the investment objectives or the investment policy, or both, of the UCITS pursuant to the Financial Services (Collective Investment Schemes) Act 2011 and the Financial Services (Collective Investment Schemes) Regulations 2011; and
- (g) the risks associated with the financial instruments are adequately captured by the risk management process of the UCITS.

(2) For the purposes of paragraphs (b) and (e) of subsection (1), and unless there is information available to the UCITS that would lead to a different determination, financial instruments which are admitted or traded on a regulated market in accordance with regulation 47(1)(a), (b) or (c) of the Financial Services (Collective Investment Schemes) Regulations 2011 shall be presumed not to compromise the ability of the UCITS to comply with regulation 99 of the Financial Services (Collective Investment Schemes) Regulations 2011 and shall also be presumed to be negotiable.

(3) The reference to transferable securities in section 2(1) shall be taken to include the following—

- (a) units in closed end funds constituted as investment companies or as unit trusts and fulfilling the following criteria—
 - (i) they fulfil the criteria set out in subsections (1) and (2);
 - (ii) they are subject to corporate governance mechanisms applied to companies;
 - (iii) where asset management activity is carried out by another entity on behalf of the closed end fund, that entity is itself regulated for the purpose of investor protection;
- (b) units in closed end funds constituted under the law of contract which fulfil the following criteria—

- (i) the closed end funds fulfil the criteria set out in subsections (1) and (2);
 - (ii) the closed end funds are subject to corporate governance mechanisms equivalent to those applied to bodies corporate under the Companies Act;
 - (iii) the closed end funds are managed by an entity which is subject to regulation under Gibraltar law for the purpose of investor protection;
- (c) financial instruments which fulfil the following criteria—
- (i) the financial instruments fulfil the criteria set out in subsections (1) and (2);
 - (ii) the financial instruments are backed by, or linked to the performance of, other assets, which may differ from those referred to in regulation 47(1) of the Financial Services (Collective Investment Schemes) Regulations 2011.

(4) Where a financial instrument covered by subsection (3)(c) contains an embedded derivative component, the requirements of regulation 48 of the Financial Services (Collective Investment Schemes) Regulations 2011, shall apply to that component.

Liquid financial assets with respect to financial derivative Instruments.

2B.(1) The reference in section 3A to liquid financial assets shall be understood, with respect to financial derivative instruments, as a reference to financial derivative instruments which fulfil the following criteria—

- (a) their underlyings consist of one or more of the following—
 - (i) assets as listed in regulation 47(1) of the Financial Services (Collective Investment Schemes) Regulations 2011 including financial instruments having one or several characteristics of those assets;
 - (ii) interest rates;
 - (iii) foreign exchange rates or currencies;

(iv) financial indices;

(b) in the case of OTC derivatives, they comply with the conditions set out in regulation 47(1)(g)(ii) and (iii) of the Financial Services (Collective Investment Schemes) Regulations 2011.

(2) Financial derivative instruments as referred to in regulation 47(1)(g) of the Financial Services (Collective Investment Schemes) Regulations 2011 shall be taken to include instruments which fulfil the following criteria—

(a) they allow the transfer of the credit risk of an asset as referred to in subsection (1)(a) of this section independently from the other risks associated with that asset;

(b) they do not result in the delivery or in the transfer, including in the form of cash, of assets other than those referred to in regulation 47(1) and (2) of the Financial Services (Collective Investment Schemes) Regulations 2011;

(c) they comply with the criteria for OTC-derivatives laid down in regulation 47(1)(g)(ii) and (iii) of the Financial Services (Collective Investment Schemes) Regulations 2011 and in subsections (3) and (4) of this section;

(d) their risks are adequately captured by the risk management process of the UCITS, and by its internal control mechanisms in the case of risks of asymmetry of information between the UCITS and the counterparty to the credit derivative resulting from potential access of the counterparty to non-public information on firms the assets of which are used as underlyings by credit derivatives.

(3) For the purposes of regulation 47(1)(g)(iii) of the Financial Services (Collective Investment Schemes) Regulations 2011, the reference to fair value shall be understood as a reference to the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction.

(4) For the purposes of regulation 47(1)(g)(iii) of the Financial Services (Collective Investment Schemes) Regulations 2011, the reference to reliable and verifiable valuation shall be understood as a reference to a valuation, by

the UCITS, corresponding to the fair value as referred to in subsection (3) of this section, which does not rely only on market quotations by the counterparty and which fulfils the following criteria—

- (a) the basis for the valuation is either a reliable up-to-date market value of the instrument, or, if such a value is not available, a pricing model using an adequate recognised methodology;
- (b) verification of the valuation is carried out by one of the following—
 - (i) an appropriate third party which is independent from the counterparty of the OTC-derivative, at an adequate frequency and in such a way that the UCITS is able to check it;
 - (ii) a unit within the UCITS which is independent from the department in charge of managing the assets and which is adequately equipped for such purpose.

(5) The reference in section 3A and regulation 47(1)(g) of the Financial Services (Collective Investment Schemes) Regulations 2011 to liquid financial assets shall be understood as excluding derivatives on commodities.”.

Dated 13th December, 2012.

G H LICUDI QC,
Minister with responsibility for financial services.

EXPLANATORY MEMORANDUM

These Regulations amend the Financial Services (Collective Investment Schemes) Act 20011 in order to transpose into the law of Gibraltar Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as replaced by Directive 2009/65/EC