SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4247 of 17 March, 2016

LEGAL NOTICE NO. 52 OF 2016.

FINANCIAL SERVICES (COLLECTIVE INVESTMENT SCHEMES) ACT 2011

FINANCIAL SERVICES (COLLECTIVE INVESTMENT SCHEMES) (AMENDMENT) REGULATIONS 2016

In exercise of the powers conferred upon the Minister by section 53 of the Financial Services (Collective Investment Schemes) Act 2011, and of all other enabling powers, and in order to transpose Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, the Minister has made the following Regulations–

Title and commencement.

1.(1) These Regulations may be cited as the Financial Services (Collective Investment Schemes) (Amendment) Regulations 2016.

(2) These Regulations come into operation on 18 March 2016.

Amendment of Financial Services (Collective Investment Schemes) Regulations 2011.

2.(1) The Financial Services (Collective Investment Schemes) Regulations 2011 are amended as follows.

(2) In regulation 2, in sub-regulation (1)–

(a) after the definition of "dilution" insert–

> ""the 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) (recast), as it may be amended from time to time;";

(b) for the definition of "enforcement action" substitute—

""enforcement action" means–

(a) the suspension or cancellation of an authorisation;

(b) the imposition of a fine by the Authority and recoverable as a civil debt; or

(c) the imposition by the Authority of any sanction provided for in regulations 126B to 126F in respect of a contravention;";

(c) after the definition of "ESMA" insert–

""financial instrument" means a financial instrument specified in Section C of Annex I to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast);";

(d) after the definition of "key information document", insert–

""management body" means the body in a management company, open-ended investment company or depositary with ultimate decision-making authority comprising–

(a) the supervisory and the managerial functions; or

(b) if those functions are separated, only the managerial function;".

(3) In regulation 2, after sub-regulation (3) insert–

"(3A) For the purposes of the interpretation of "management body" in sub-regulation (1), where, by law, a management

company, open-ended investment company or depositary has in place different bodies with specific functions, the requirements of these Regulations directed at the management body or at the management body in its supervisory function shall also, or shall instead, apply to the members of those bodies of the management company, open-ended investment company or depositary to whom the applicable law assigns the respective responsibility.".

(4) After regulation 11, insert–

"**Management companies' remuneration policies.**

11A.(1) Management companies shall establish and apply remuneration policies and practices that–

(a) are consistent with and promote sound and effective risk management; and

(b) do not–

(i) encourage risk taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS that they manage; or

(ii) impair compliance with the management company's duty to act in the best interest of the UCITS.

(2) The remuneration policies and practices shall include fixed and variable components of salaries and discretionary pension benefits.

(3) The remuneration policies and practices shall apply to those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that falls within the remuneration bracket of senior management and risk takers, whose professional activities have a material impact on the risk profiles of the management companies or of the UCITS that they manage.

Remuneration policy principles.

11B.(1) When establishing and applying the remuneration policies referred to in regulation 11A, management companies shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities–

(a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS that the management company manages;

(b) the remuneration policy is in line with the business strategy, objectives, values and interests of the management company and the UCITS that it manages and of the investors in such UCITS, and includes measures to avoid conflicts of interest;

(c) subject to sub-regulation (3), the remuneration policy is adopted by the management body of the management company in its supervisory function, and that body adopts, and reviews at least annually, the general principles of the remuneration policy and is responsible for, and oversees, their implementation;

(d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;

(e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independently of the performance of the business areas that they control;

(f) the remuneration of the senior officers in the risk management and compliance functions is overseen directly by the remuneration committee, where such a committee exists;

(g) where remuneration is performance-related, the total amount of remuneration is based on a combination of the assessment as to the performance of the individual and of the business unit or UCITS concerned and as to their risks and of the overall results of the management company when assessing individual performance, taking into account financial and non-financial criteria;

(h) the assessment of performance is set in a multi-year framework appropriate to the holding period recommended to the investors of the UCITS managed by the management company in order to ensure that the assessment process is based on the longer-term performance of the UCITS and its investment risks and that the actual payment of performance-based components of remuneration is spread over the same period;

(i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year of engagement;

(j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;

(k) payments relating to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;

(l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;

(m) subject to the legal structure of the UCITS and its fund rules or instruments of incorporation, in respect of any variable remuneration component–

(i) a substantial portion must consist of units of the UCITS concerned, equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments with equally effective incentives as any of the instruments referred to in this paragraph (and for this purpose a substantial portion means at least 50% unless the management of the UCITS accounts for less than 50% of the total portfolio managed by the management company); and

(ii) the instruments which comprise that component must be subject to an appropriate retention policy designed to align incentives with the interests of the management company and the UCITS that it manages and the investors of such UCITS;

(n) a substantial portion of the variable remuneration component is–

(i) deferred over a period (of not less than three years) which is appropriate in view of the holding period recommended to the investors of the UCITS concerned; and

(ii) correctly aligned with the nature of the risks of the UCITS in question;

and the remuneration payable under deferral arrangements vests no faster than on a pro-rata basis (and for this purpose a substantial portion means at least 40% or, in the case of a variable remuneration component of a particularly high amount, at least 60%);

(o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the

management company as a whole, and justified according to the performance of the business unit, the UCITS and the individual concerned;

(p) the total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the management company or of the UCITS concerned occurs, taking into account both current compensation and reductions in pay-outs of amounts previously earned, including through malus or clawback arrangements;

(q) the pension policy is in line with the business strategy, objectives, values and long-term interests of the management company and the UCITS that it manages and–

(i) if an employee leaves the management company before retirement, discretionary pension benefits shall be held by the management company for a period of five years in the form of instruments referred to in paragraph (m); or

(ii) if an employee reaches retirement, discretionary pension benefits shall be paid to the employee in the form of such instruments but subject to a five-year retention period;

(r) staff are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;

(s) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements laid down in these Regulations.

(2) The principles set out in sub-regulation (1) shall apply to any benefit of any type paid by the management company, to any amount paid directly by the UCITS itself, including performance fees, and to any transfer of units or shares of the UCITS, made for the benefit of those categories of staff, including senior management, risk takers, control functions

and any employee receiving total remuneration that falls into the remuneration bracket of senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profile of the UCITS that they manage.

(3) The adoption of a remuneration policy under sub-regulation (1)(c) must be undertaken only by those members of the management body who–

(a) do not perform any executive functions in the management company concerned; and

(b) have expertise in risk management and remuneration.

Remuneration committees.

11C.(1) Management companies that are significant in terms of their size or of the size of the UCITS that they manage, their internal organisation and the nature, scope and complexity of their activities shall establish a remuneration committee.

(2) A remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

(3) A remuneration committee that is set up in accordance with guidelines adopted by ESMA under Article 14a(4) of the Directive shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the management company or the UCITS concerned and which are to be taken by the management body in its supervisory function.

(4) A remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the management company concerned.

(5) The members of a remuneration committee shall be members of the management body who do not perform any executive functions in the management company concerned.

(6) If employee representation on the management body is provided for by law, the remuneration committee shall include one or more employee representatives.

(7) When preparing its decisions, a remuneration committee shall take into account the long-term interest of investors and other stakeholders and the public interest.".

(5) In regulation 17, in sub-regulation (1), for paragraph (a) substitute–

"(a) the written contract with the depositary referred to in regulation 19(2);".

(6) For regulation 19 substitute–

"Depositaries: general provisions.

19.(1) An open-ended investment company and, for each of the common funds that it manages, a management company shall ensure that a single depositary is appointed in accordance with these Regulations.

(2) The appointment of the depositary shall be evidenced by a written contract which shall, among other things, regulate the flow of information deemed to be necessary to allow the depositary to perform its functions for the UCITS for which it has been appointed as depositary, as laid down in these Regulations and in other relevant laws, regulations and administrative provisions.

(3) The depositary shall–

(a) ensure that the sale, issue, repurchase, redemption and cancellation of units of the UCITS are carried out in accordance with these Regulations, the Companies Act and the fund's rules or instruments of incorporation;

(b) ensure that the value of the units of the UCITS is calculated in accordance with these Regulations, the Companies Act and the fund's rules or instruments of incorporation;

(c) carry out the instructions of the management company or an open-ended investment company, unless they conflict with these Regulations, the Companies Act or the fund's rules or instruments of incorporation;

(d) ensure that in transactions involving the assets of the UCITS any consideration is remitted to the UCITS within the usual time limits;

(e) ensure that the income of the UCITS is applied in accordance with these Regulations, the Companies Act and the fund's rules or instruments of incorporation.

(4) The depositary shall ensure that the cash flows of the UCITS are properly monitored, and, in particular, that all payments made by, or on behalf of, investors upon the subscription of units of the UCITS have been received, and that all cash of the UCITS has been booked in cash accounts that are–

(a) opened in the name of the UCITS, of the management company acting on behalf of the UCITS, or of the depositary acting on behalf of the UCITS;

(b) opened at an entity referred to in points (a), (b) and (c) of Article 18(1) of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive; and

(c) maintained in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

(5) Where the cash accounts are opened in the name of the depositary acting on behalf of the UCITS, no cash of the entity referred to in sub-regulation (4)(b) and none of the own cash of the depositary shall be booked on such accounts.

(6) The assets of the UCITS shall be entrusted to the depositary for safekeeping as follows–

(a) for financial instruments that may be held in custody, the depositary shall–

(i) hold in custody all financial instruments that may be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;

(ii) ensure that all financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the UCITS or the management company acting on behalf of the UCITS, so that they can be clearly identified as belonging to the UCITS in accordance with the applicable law at all times;

(b) for other assets, the depositary shall–

(i) verify the ownership by the UCITS, or by the management company acting on behalf of the UCITS, of such assets by assessing whether the UCITS or the management company acting on behalf of the UCITS holds the ownership based on information or documents provided by the UCITS or by the management company and, where available, on external evidence;

(ii) maintain a record of those assets for which it is satisfied that the UCITS or the management company acting on behalf of the UCITS holds the ownership and keep that record up to date.

(7) The depositary shall provide the management company or the open-ended investment company, on a regular basis, with a comprehensive inventory of all of the assets of the UCITS.

(8) The assets held in custody by the depositary shall not be re-used by the depositary, or by any third party to which the custody function has been delegated, for their own account and, for this purpose, re-use comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending.

(9) The assets held in custody by the depositary are allowed to be reused only where-

(a) the re-use of the assets is executed for the account of the UCITS;

(b) the depositary is carrying out the instructions of the management company on behalf of the UCITS;

(c) the re-use is for the benefit of the UCITS and in the interest of the unit holders; and

(d) the transaction is covered by high-quality and liquid collateral received by the UCITS under a title transfer arrangement.

(10) The market value of the collateral shall, at all times, amount to at least the market value of the re-used assets plus a premium.

(11) In the event of the insolvency of a depositary or any third party located within the EEA to which custody of UCITS assets has been delegated, the assets of a UCITS held in custody shall be unavailable for distribution among, or realisation for the benefit of, creditors of such a depositary or third party.

Depositaries: delegation.

19A.(1) The depositary shall not delegate to third parties the functions referred to in regulations 19(3) and (4).

(2) The depositary may delegate to third parties the functions referred to in regulation 19(6) only where–

(a) the tasks are not delegated with the intention of avoiding the requirements laid down in these Regulations;

(b) the depositary can demonstrate that there is an objective reason for the delegation;

(c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it intends to delegate parts of its tasks, and continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to which it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it.

(3) The functions referred to in regulation 19(6) may be delegated by the depositary to a third party only where that third party at all times during the performance of the tasks delegated to it–

(a) has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS or the management company acting on behalf of the UCITS which have been entrusted to it;

(b) for custody tasks referred to in regulation 19(6)(a), is subject to–

(i) effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned;

(ii) an external periodic audit to ensure that the financial instruments are in its possession;

(c) segregates the assets of the clients of the depositary from its own assets and from the assets of the depositary in such a way that they can, at any time, be clearly identified as belonging to clients of a particular depositary;

(d) takes all necessary steps to ensure that in the event of insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among, or realisation for the benefit of, creditors of the third party; and

(e) complies with the general obligations and prohibitions laid down in regulations 19(2), (6) and (8) and 22.

(4) Despite sub-regulation (3)(b)(i), where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in that sub-regulation, the depositary may delegate its functions to such a local entity

(a) only to the extent required by the law of that third country,

(b) only for as long as there are no local entities that satisfy the delegation requirements, and

(c) only where–

(i) the investors of the relevant UCITS are duly informed, prior to their investment, of the fact that such a delegation is required due to legal constraints in the law of the third country, of the circumstances justifying the delegation and of the risks involved in such a delegation;

(ii) the open-ended investment company, or the management company on behalf of the UCITS, has instructed the depositary to delegate the custody of such financial instruments to such a local entity.

(5) The third party may, in turn, sub-delegate those functions, subject to the same requirements and, in such a case, regulation 21(4)(a) shall apply to the relevant parties with any necessary modification.

(6) For the purposes of this regulation, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third-country securities settlement systems shall not be considered to be a delegation of custody functions.".

(7) In regulation 20–

(a) for sub-regulations (1) to (4) substitute–

"20.(1) A depositary may only offer services in Gibraltar to a UCITS where–

(a) if the UCITS is authorised under these Regulations, the depositary has a registered office or is established in Gibraltar; or

(b) if the UCITS is authorised in another EEA State, the depositary has a registered office or is established in that State.

(2) The depositary shall be–

(a) a national central bank (if such a bank is established in Gibraltar);

(b) a credit institution authorised in accordance with Directive 2013/36/EU; or

(c) another legal person, authorised by the Authority to carry out depositary activities under these Regulations, which is subject to capital adequacy requirements not less than the requirements calculated depending on the selected approach in accordance with Article 315 or 317 of Regulation (EU) No 575/2013 of the European Parliament and of the Council and which has own funds not less than the amount of initial capital under Article 28(2) of Directive 2013/36/EU.

(3) A legal person within sub-regulation (2)(c) shall be subject to prudential regulation and ongoing supervision by the Authority and shall satisfy the following minimum requirements–

(a) it shall have the infrastructure necessary to keep in custody financial instruments that can be registered in a financial instruments account opened in the depositary's books;

(b) it shall establish adequate policies and procedures sufficient to ensure compliance of the entity, including its managers and employees, with its obligations under these Regulations;

(c) it shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment and effective control and safeguard arrangements for information processing systems;

(d) it shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest;

(e) it shall arrange for records to be kept of all services, activities and transactions that it undertakes, which shall be sufficient to enable the Authority to fulfil its supervisory tasks and to perform the enforcement actions provided for in these Regulations;

(f) it shall take reasonable steps to ensure continuity and regularity in the performance of its depositary functions by employing appropriate and proportionate systems, resources and procedures, including to perform its depositary activities;

(g) all members of its management body and senior management, shall, at all times–

(i) be of sufficiently good repute; and

(ii) possess sufficient knowledge, skills and experience;

(h) its management body shall possess adequate collective knowledge, skills and experience to be able to understand the depositary's activities, including the main risks;

(i) each member of its management body and senior management shall act with honesty and integrity.

(4) Open-ended investment companies or management companies acting on behalf of the UCITS that they manage, which, before 18 March 2016, appointed as a depositary an institution that does not meet the requirements laid down in sub-regulation (2), shall appoint a depositary that meets those requirements before 18 March 2018.";

(b) omit sub-regulation (5).

(8) For regulation 21 substitute–

"**Liability of depositaries.**

21.(1) A depositary is liable to the UCITS and to the unit-holders of the UCITS for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with regulation 19(6)(a) has been delegated.

(2) In the case of a loss of a financial instrument held in custody, the depositary shall return a financial instrument of an identical type or the corresponding amount to the UCITS or the management company acting on behalf of the UCITS without undue delay, but the depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of

which would have been unavoidable despite all reasonable efforts to the contrary.

(3) A depositary is also liable to the UCITS, and to the investors of the UCITS, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations under these Regulations.

(4) The liability of the depositary under sub-regulations (1) to (3)–

(a) shall not be affected by any delegation under regulation 19A; and

(b) may not be excluded or limited by agreement and any agreement that purports to do so shall be void.

(5) Unit-holders in the UCITS may invoke the liability of the depositary directly or indirectly through the management company or the open-ended investment company provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders.".

(9) For regulation 22 substitute–

"**Depositaries: duty of independence.**

21.(1) No company shall act as–

(a) both management company and depositary; or

(b) both open-ended investment company and depositary.

(2) In carrying out their respective functions–

(a) the management company and the depositary shall act–

(i) honestly;

(ii) fairly;

(iii) professionally;

(iv) independently; and

(v) solely in the interest of the UCITS and the investors of the UCITS;

(b) the open-ended investment company and the depositary shall act–

(i) honestly;

(ii) fairly;

(iii) professionally;

(iv) independently; and

(v) solely in the interest of the investors of the UCITS.

(3) A depositary shall not carry out activities with regard to the UCITS or the management company on behalf of the UCITS that may create conflicts of interest between the UCITS, the investors in the UCITS, the management company and itself, unless–

(a) the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks; and

(b) the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the UCITS.".

(10) For regulation 23 substitute–

"**Replacement of counterparties.**

23.(1) The fund's rules shall lay down the conditions for the replacement of the management company and of the depositary and ensure the protection of unit-holders in the event of such a replacement.

(2) The constituting instrument of the open-ended investment company shall lay down the conditions for the replacement of the management company and of the depositary and rules to ensure the protection of unit-holders in the event of such a replacement.

Disclosure to EEA Authorities.

23A.(1) The depositary shall make available to the Authority and any other EEA Authority which is its competent authority, on request, all information which it has obtained while performing its duties and that may be necessary for the Authority or, if different, its EEA Authorities or those of the UCITS or the management company.

(2) If the EEA Authorities of the UCITS or the management company are different from those of the depositary, the Authority shall without delay share the information received with those EEA Authorities.".

(11) For regulation 27 substitute–

"**Application of regulations 10 to 11B.**

27.(1) Regulations 10 to 11B apply to open-ended investment companies that have not designated a management company.

(2) For the purpose of sub-regulation (1), "management company" in regulations 10 to 11B shall be understood as "open-ended investment company".

(3) Open-ended investment companies shall manage only assets of their own portfolio and shall not, under any circumstances, receive any mandate to manage assets on behalf of a third party.".

(12) Omit regulations 29 to 33.

(13) In regulation 84–

(a) in sub-regulation (1), for paragraph (b) substitute–

"(b) a clear and easily understandable explanation of the fund's risk profile, independent of the instruments invested in; and

(c) either–

(i) the details of the up-to-date remuneration policy, including, but not limited to, a description of how remuneration and benefits are calculated, the identities of persons responsible for awarding the remuneration and benefits including the composition of the remuneration committee, where such a committee exists; or

(ii) a summary of the remuneration policy and a statement to the effect that the details of the up-to-date remuneration policy, including, but not limited to, a description of how remuneration and benefits are calculated, the identity of persons responsible for awarding the remuneration and benefits, including the composition of the remuneration committee where such a committee exists, are available by means of a website – including a reference to that website – and that a paper copy will be made available free of charge upon request.";

(b) after sub-regulation (3) insert–

"(3A) The annual report shall also include–

(a) the total amount of remuneration for the financial year, split into fixed and variable remuneration paid by the management company and by the open-ended investment company to its staff, and the number of beneficiaries, and where relevant, any amount paid directly by the UCITS itself, including any performance fee;

(b) the aggregate amount of remuneration broken down by categories of employees or other members of staff as referred to in regulation 11A(3);

(c) a description of how the remuneration and the benefits have been calculated;

(d) the outcome of the reviews referred to in regulations 11B(1)(c) and (d) including any irregularities that have occurred;

(e) material changes to the adopted remuneration policy.".

(14) In regulation 93–

(a) in sub-regulation (3), for paragraph (a) substitute–

"(a) identification of the UCITS and of the EEA Authority of the UCITS;";

(b) after sub-regulation (4) insert–

"(4A) Key investor information shall also include a statement to the effect that the details of the up-to-date remuneration policy, including, but not limited to, a description of how remuneration and benefits are calculated, the identity of persons responsible for awarding the remuneration and benefits including the composition of the remuneration committee, where such a committee exists, are available by means of a website – including a reference to that website – and that a paper copy will be made available free of charge upon request.".

(15) In regulation 113, in sub-regulation (2), for paragraph (d) substitute–

"(d) require–

(i) in so far as permitted by the laws of Gibraltar, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of a contravention and where such records may be relevant to an investigation into contraventions of these Regulations;

(ii) existing recordings of telephone conversations or electronic communications or other data traffic records held by UCITS, management companies,

open-ended investment companies, depositaries or any other entities regulated under these Regulations;".

(16) After regulation 126 insert–

"**Contraventions.**

126A.(1) The Authority may take any of the actions specified in regulations 126B to 126F if it is satisfied that a contravention has occurred.

(2) This regulation and regulations 126B to 126F apply without limiting–

(a) section 33 of the Act or restricting the Authority to the enforcement action specified in that section;

(b) any other regulatory or enforcement power conferred upon the Authority by or under the Act or these Regulations; or

(c) the liability of any person for any offence under the Act or these Regulations, including any act or omission which constitutes an offence within the meaning of regulation 114(1) and also constitutes a contravention within the meaning of this regulation.

(3) For the purposes of these Regulations a "contravention" means a breach of an obligation under these Regulations (other than one imposed by regulations 55 to 72) by any person and, in the case of a UCITS, management company, open-ended investment company or depositary which is a legal person, includes any natural person who is a member of the management body of that legal person or otherwise responsible for the contravention.

(4) Without limiting sub-regulation (3), each of the following constitutes a contravention–

(a) pursuing the activities of UCITS without obtaining authorisation, contrary to section 5(1) of the Act;

(b) carrying on the business of a management company without obtaining prior authorisation, contrary to regulation 4(2);

(c) carrying on the business of an open-ended investment company without obtaining prior authorisation, contrary to regulation 24;

(d) failing to notify the Authority (or a relevant EEA Authority) in writing, contrary to regulation 8(1), when a qualifying holding in a management company is–

(i) acquired, directly or indirectly; or

(ii) increased so that–

(aa) the proportion of the voting rights or capital held would reach or exceed 20%, 30% or 50%; or

(bb) the management company would become the acquirer's subsidiary;

(e) failing to notify the Authority (or a relevant EEA Authority) in writing, contrary to regulation 8(1), when a qualifying holding in a management company is–

(i) disposed of, directly or indirectly, or

(ii) reduced so that–

(aa) the proportion of the voting rights or capital held would fall below 20%, 30% or 50%; or

(bb) the management company would cease to be the disposer's subsidiary;

(f) a management company obtaining authorisation through false statements or other irregular means, as provided for in regulation 5(5);

(g) an open-ended investment company obtaining authorisation through false statements or other irregular means, as provided for in regulation 26(4)(b);

(h) a management company, on becoming aware of an acquisition or disposal of holdings in its capital that causes holdings to exceed or fall below one of the thresholds in Article 11(1) of Directive 2014/65/EU, failing to inform the Authority (or a relevant EEA Authority) of that acquisition or disposal, contrary to regulation 8(1);

(i) a management company failing to inform the Authority, at least once a year, of the names of shareholders and members possessing qualifying holdings and the size of each such holding, contrary to regulation 8(1);

(j) a management company failing to comply with any rules or other requirements imposed upon it for the purpose of ensuring that it complies with the requirements of regulation 9(2)(a) or (b);

(k) an open-ended investment company failing to comply with any procedures and arrangements imposed upon it in accordance with regulation 28;

(l) a management company or open-ended investment company failing to comply with–

(i) requirements related to delegation of its functions to third parties imposed in accordance with regulations 10 and 27;

(ii) business conduct requirements imposed under the Act which give effect to the obligations in regulations 11 and 27;

(m) a depositary failing to perform its tasks in accordance with regulations 19(3) to (10);

(n) an open-ended investment company or, for each of the common funds that it manages, a management company, failing repeatedly to comply with obligations concerning–

(i) the investment policies of UCITS, as provided for in Part VI;

(ii) the information to be provided to investors, as provided for in Part IX;

(o) a management company or open-ended investment company failing to employ a risk-management process or a process for accurate and independent assessment of the value of OTC derivatives, contrary to regulation 48(1);

(p) a management company or open-ended investment company marketing units of UCITS that it manages in an EEA State other than Gibraltar failing to comply with the notification requirement in regulation 108(1).

Contraventions: public statement.

126B.(1) The Authority may publish a statement specifying–

(a) the nature of any contravention, and

(b) the identity of the person who has committed it.

(2) Publication under this regulation may take any form, or combination of forms, that the Authority thinks appropriate.

Contraventions: cease and desist order.

126C. The Authority may order a person–

(a) to cease any conduct which constitutes a contravention, and

(b) to desist from any repetition of that conduct.

Contraventions: prohibition order.

126D.(1) The Authority may by order ("a prohibition order") prohibit a specified person from carrying out specified functions in relation to a management company or open-ended investment company.

(2) A prohibition order shall specify a period during which it has effect and an indefinite period may be specified in respect of repeated and serious contraventions.

Contraventions: regulatory action.

126E.(1) The Authority may by order suspend or revoke the authorisation of a UCITS or management company.

(2) A suspension under sub-regulation (1) shall specify a period during which it has effect.

Contraventions: civil penalties.

126F.(1) The Authority may by order impose a penalty for a contravention of an amount not exceeding whichever is the higher of the following–

(a) where the amount of the benefit derived from the contravention can be determined, twice the amount of that benefit;

(b) in the case of a legal person–

(i) EUR 5,000,000 (or the Sterling equivalent based upon the exchange rate as at 17 September 2014); or

(ii) 10% of the total annual turnover according to the last available annual accounts approved by its management body;

(c) in the case of a natural person, EUR 5,000,000 (or the Sterling equivalent based upon the exchange rate as at 17 September 2014).

(2) Where a legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts pursuant to Directive 2013/34/EU, the relevant total turnover for the purpose of sub-regulation (1)(b)(ii) is the total annual turnover (or the corresponding type of income) according to the last available consolidated annual accounts approved by the management body of the ultimate parent undertaking.

(3) A penalty imposed under this regulation may be enforced in the same manner as if it were a debt owed to the Authority.

Contraventions: exercise of powers.

126G.(1) The Authority must ensure that the type and level of any penalty or sanction for a contravention is effective, proportionate and dissuasive, taking account of all relevant circumstances, including where appropriate–

(a) the gravity and the duration of the contravention;

(b) the degree of responsibility of the natural or legal person concerned;

(c) the financial strength of the natural or legal person responsible, for example as indicated by the legal person's total turnover or the natural person's annual income;

(d) in so far as they can be determined–

(i) the importance of the profits gained or losses avoided by the natural or legal person responsible;

(ii) the losses sustained by others as a result of the contravention; and

(iii) where applicable, the damage to the functioning of markets or the wider economy;

(e) the level of cooperation with the Authority by the natural or legal person responsible;

(f) previous contraventions by the natural or legal person;

(g) measures taken after the contravention by the natural or legal person concerned to prevent its repetition.

Contraventions: warning notices.

126H.(1) Before taking action under these Regulations in respect of a contravention the Authority must give the person concerned a warning notice, stating the action proposed and the reasons for it.

(2) Sub-regulation (1) does not apply if the Authority is satisfied that a warning notice–

(a) cannot be given because of urgency;

(b) should not be given because of the risk that steps would be taken to undermine the effectiveness of the action to be taken; or

(c) is superfluous having regard to the need to give notice of legal proceedings or for some other reason.

(3) A warning notice–

(a) must give the recipient not less than 14 days to make representations; and

(b) must specify a period within which the recipient may decide whether to make oral representations.

(4) The period for making representations may be extended by the Authority.

Contraventions: decision notices.

126I.(1) This regulation applies where the Authority has–

(a) issued a warning notice, or

(b) dispensed with the requirement to give a warning notice in accordance with regulation 126H(2).

(2) After considering any representations made in accordance with regulation 126H the Authority must issue–

(a) a decision notice stating that the Authority will take the action specified in the warning notice;

(b) a discontinuance notice stating that the Authority does not propose to take that action; or

(c) a combined notice consisting of a decision notice stating that the Authority will take certain action specified in the warning notice and a discontinuance notice in respect of the remaining action.

(3) A decision notice takes effect, and the specified action may be taken–

(a) at the end of the period for bringing an appeal if no appeal is brought, or

(b) when any appeal is finally determined or withdrawn.

Contraventions: appeals.

126J.(1) The person on whom a decision notice is served may appeal to the Supreme Court.

(2) An appeal must be brought within 28 days of the date of the decision notice.

Contraventions: interim orders.

126K. The Authority may apply to the Supreme Court for permission to take action under these Regulations where a decision notice has been given and has not yet taken effect (whether or not a warning notice has been given).

Contraventions: publication of action.

126L.(1) Subject to sub-regulation (3), the Authority must publish on its website details of any decision taken under these Regulations in respect of a contravention, without undue delay after the person concerned is informed of the decision.

(2) The information published under sub-regulation (1) must include at least–

(a) the type and nature of the contravention; and

(b) the identity of the natural or legal person responsible for it.

(3) The Authority must take one of the steps in sub-regulation (4) where–

(a) following an obligatory prior assessment, it considers that it would be disproportionate to publish in accordance with sub-regulation (1)–

(i) the identity of the legal person involved; or

(ii) the personal data of the natural person involved; or

(b) it considers that publication in accordance with that sub-regulation would jeopardise the stability of financial markets or an ongoing investigation.

(4) Those steps are–

(a) to defer publication until the reasons for non-publication cease to exist;

(b) to publish the decision on an anonymous basis if doing so ensures effective protection of the personal data concerned; or

(c) not to publish the decision if the steps in paragraphs (a) and (b) are considered to be insufficient to ensure–

(i) that the stability of the financial markets would not be put in jeopardy; or

(ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

(5) In the case of a decision to publish on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is envisaged that within that period the reasons for anonymous publication shall cease to exist.

(6) Sub-regulation (1) does not apply while an appeal could be brought or is pending.

(7) Despite sub-regulation (6), the Authority may apply to the Supreme Court for permission to publish a decision which is or may be subject to an appeal and, if permission is granted, the Authority shall without undue delay–

(a) publish the decision together with a statement which–

(i) states that the decision may be the subject of an appeal and the time in which any appeal must be made; and

(ii) confirms whether it is the subject of an appeal;

(b) amend the information published under paragraph (a)–

(i) if an appeal is submitted after its initial publication; or

(ii) to reflect the outcome of any appeal.

(8) Any decision published under this regulation shall remain on the Authority's website for at least five years but any personal data within a decision shall only remain on the website for so long as the Authority considers necessary, having regard to the Data Protection Act 2004.

(9) The Authority shall–

(a) when it discloses any sanction or penalty to the public, at the same time report that sanction or penalty to ESMA;

(b) inform ESMA of–

(i) any decision to impose a sanction or measure which, in accordance with sub-regulation (4)(c), has not been published (including any appeal in respect of such a sanction or measure and the outcome of that appeal); and

(ii) the final judgement in relation to any criminal sanction imposed for an offence which constitutes a contravention under these Regulations;

(c) provide ESMA annually with aggregated information regarding any sanctions or penalties imposed in respect of contraventions under these Regulations.

Cooperation in respect of contraventions.

126M.(1) In the exercise of its powers under regulations 126A to 126F, the Authority shall–

(a) cooperate closely with other EEA Authorities, to ensure that its supervisory, investigative and enforcement powers are used effectively; and

(b) coordinate its actions with those of other EEA Authorities, to avoid duplication and overlap when applying supervisory, investigative and enforcement powers in cross-border cases in accordance with regulation 116.

(2) The Authority may also cooperate with other EEA Authorities with respect to facilitating the recovery of pecuniary sanctions for infringements of these Regulations or the Directive.

(3) Without limiting regulation 116(11), the Authority may refuse to act on a request for information or cooperation where–

(a) it has been informed that communication of relevant information might adversely affect the security of Gibraltar, particularly in respect of terrorism and other serious crimes;

(b) compliance with the request is likely to affect adversely a criminal investigation or the Authority's investigation or enforcement activities;

(c) judicial proceedings have already been initiated in Gibraltar in respect of the same actions and against the same persons; or

(d) a final judgment has already been delivered in Gibraltar in relation to the same persons and for the same actions.

Reporting of contraventions.

126N.(1) Management companies, open-ended investment companies and depositaries shall establish appropriate procedures for their employees to report contraventions (including potential contraventions) internally through a specific, independent and autonomous channel.

(2) The Authority must establish appropriate arrangements for the reporting of contraventions (including potential contraventions) by any person to the Authority.

(3) The arrangements established under sub-regulation (2) shall include–

(a) secure communication channels for the reporting of contraventions;

(b) specific procedures for the receipt and investigation of reported contraventions; and

(c) arrangements for the protection of the personal data of the person who reports a contravention and any

natural person who is allegedly responsible for a contravention which accord with the Data Protection Act 2004.

(4) The Authority shall treat information about the identity of a person who reports a contravention as confidential except where its disclosure is necessary for the purpose of any further investigations or subsequent judicial proceedings.

(5) An employee of a management company, open-ended investment company or depositary who reports a contravention in accordance with sub-regulation (1) or arrangements established under sub-regulation (2)–

(a) shall not be considered to be in breach of any restriction on disclosure of information imposed by contract or by any law and any provision in an agreement is void in so far as it purports to preclude an employee from reporting a contravention; and

(b) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that the employee has reported a contravention.

(6) An employee who has been subjected to a detriment contrary to sub-regulation (5)(b) may present a complaint to the Industrial Tribunal as if the reporting of a contravention was a protected disclosure within the meaning of Part IVA of the Employment Act.".

(17) In Part A of Schedule 1, for paragraph 2 substitute–

"**2. Information concerning the depositary.**

2.1 the identity of the depositary of the UCITS and a description of its duties and of conflicts of interest that may arise;

2.2 a description of any safekeeping functions delegated by the depositary, the list of delegates and sub-delegates and any conflicts of interest that may arise from such a delegation;

2.3 a statement to the effect that up-to-date information regarding points 2.1 and 2.2 will be made available to investors on request.".

Dated 17th March 2016.

A J ISOLA,
Minister with responsibility for financial services.

EXPLANATORY MEMORANDUM

These Regulation amend the Financial Services (Collective Investment Schemes) Regulations 2011, in order to transpose Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

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