SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 3757 of 15 January, 2010

LEGAL NOTICE NO. 7 OF 2010.

INTERPRETATION AND GENERAL CLAUSES ACT

FINANCIAL SERVICES (MARKETS IN FINANCIAL INSTRUMENTS) AMENDMENT REGULATIONS 2010

In exercise of the powers conferred on it by section 23(g)(ii) of the Interpretation and General Clauses Act and in order to amend the Financial Services (Markets in Financial Instruments) Act 2006 so as to transpose into the law of Gibraltar Article 3 of Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, the Government has made the following Regulations–

Title and commencement.

1. These Regulations may be cited as the Financial Services (Markets in Financial Instruments) (Amendment) Regulations 2010 and come into operation on the day of publication.

Amendment of the Financial Services (Markets in Financial Instruments) Act 2006.

2.(1) The Financial Services (Markets in Financial Instruments) Act 2006 is amended in accordance with the provisions of this regulation.

(2) Section 2(1) is amended as follows-

(a) by substituting for the definition of "qualifying holding", the following definition–

""qualifying holding" means any direct or indirect holding in an investment firm which represents 10 % or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive

2004/109/EC[1], taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;" ;

(b) by inserting after subsection (2) the following subsection–

"(3) This Act applies to EEA States as it applies to Member States.".

(3) For section 10(5) to (9), there is substituted the following subsections–

"(5) Any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the investment firm would become its subsidiary (hereinafter referred to as the proposed acquisition), shall first notify in writing the competent authority of their intention and the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and other relevant information, as referred to in section 10B(4).

(6) Any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an investment firm shall first notify in writing the competent authority, indicating the size of the intended holding. Such a person shall likewise notify the competent authority if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20%, 30% or 50% or so that the investment firm would cease to be his subsidiary.

[1] Directive 2004/19/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (OJ L 390, 31.12.2004, p. 38).

(7) The competent authority need not apply the 30% threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, it applies a threshold of one-third.

(8) In determining whether the criteria for a qualifying holding referred to in this section are fulfilled, the competent authority shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Schedule 1, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

(9) The competent authority shall work in full consultation with any appropriate home State regulator when carrying out the assessment provided for in section 10B(1) (hereinafter referred to as the assessment) if the proposed acquirer is one of the following–

(a) a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed;

(b) the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed; or

(c) a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed.

(9A) The competent authority shall, without undue delay, provide any appropriate home State regulator with any information which is essential or relevant for the assessment. In this regard, the competent authority shall communicate with any appropriate home State regulator upon request all relevant information and shall communicate on its own initiative all essential information. A decision by the competent authority assessing the notification shall indicate any views or reservations expressed by the home State regulator of the proposed acquirer."

(4) The following is inserted after section 10–

"Assessment period.

10A.(1) The competent authority–

(a) shall, promptly and in any event within two working days following receipt of the notification required under section 10(5), as well as following the possible subsequent receipt of the information referred to in subsection (2) below, acknowledge receipt thereof in writing to the proposed acquirer;

(b) shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required to be attached to the notification on the basis of the list referred to in section 10B(4) (hereinafter referred to as the assessment period), to carry out the assessment;

(c) shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

(2) The following provisions apply–

(a) the competent authority may, during the assessment period, if necessary, and no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the

assessment. Such request shall be made in writing and shall specify the additional information needed; and

(b) for the period between the date of request for information by the competent authority and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the competent authority for completion or clarification of the information shall be at its discretion but may not result in an interruption of the assessment period.

(3) The competent authority may extend the interruption referred to in subsection (2) (b) up to 30 working days if the proposed acquirer is–

(a) situated or regulated outside the EEA; or

(b) a natural or legal person not subject to prudential supervision.

(4) Where the competent authority, upon completion of the assessment, decides to oppose the proposed acquisition, it shall, within two working days, and not exceeding the assessment period, serve on the proposed acquirer a written notice of objection which shall include the reasons for that decision. Subject to the laws of Gibraltar, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent the Minister from allowing the competent authority to make such disclosure in the absence of a request by the proposed acquirer.

(5) Where the competent authority does not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

(6) The competent authority may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

Assessment.

10B.(1) In assessing the notification provided for in section 10(5), and the information referred to in section 10A(2), the competent authority shall, in order to ensure the sound and prudent management of the investment firm in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment firm, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria−

(a) the reputation of the proposed acquirer;

(b) the reputation and experience of any person who will direct the business of the investment firm as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the investment firm in which the acquisition is proposed;

(d) whether the investment firm will be able to comply and continue to comply with the prudential requirements based on this Act and, where applicable, other financial services legislation, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

(2) The competent authority may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis

of the criteria set out in subsection (1) or if the information provided by the proposed acquirer is incomplete.

(3) The competent authority shall neither impose any prior conditions in respect of the level of holding that must be acquired nor examine the proposed acquisition in terms of the economic needs of the market.

(4) The competent authority shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to it at the time of notification referred to in section 10(5). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. The competent authority shall not require information that is not relevant for a prudential assessment.

(5) Where two or more proposals to acquire or increase qualifying holdings in the same investment firm have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.".

Dated 15th January, 2010.

P R CARUANA QC,
Chief Minister.

EXPLANATORY MEMORANDUM

These Regulations amend the Financial Services (Markets in Financial Instruments) Act 2006 in order to transpose article 3 of Directive 2007/44/EC.

The current system of prudential supervision in the EU is based on the principle of responsibility for the competent authorities of the home Member States. There is also an underlying requirement for the competent authorities of home and host Member States to collaborate closely in order to supervise the activities of institutions operating in Member States other than that in which their head offices are located.

In cases of acquisition, the existing legal framework has been designed to regulate cases where an acquirer wishes either to acquire a holding or increase a holding in a financial institution or investment firm. The competent national authorities - in our case the Financial Services Commission- are able to oppose an acquisition if, in view of the need to ensure sound and prudent management of the institutions, the authority is not satisfied as to the suitability of the acquirer. The current legal framework though does not provide specific criteria for assessing the suitability of the acquirer and has thus afforded considerable latitude to the relevant authorities in accepting, discouraging or rejecting a proposed acquisition. Furthermore, the current legislation does not set out in detail the procedure by which acquisitions are assessed.

To address these concerns, these Regulations, in accordance with the requirements set out in Directive 2007/44/EC, modifiy the existing regulatory framework with regard to the procedure as well as the criteria to be examined by the competent authorities when assessing the suitability of a proposed acquirer. The new approach curtails, significantly, authorities' discretion to make a prudential assessment. In addition deadlines have been reduced and any "stopping of the clock" by the authorities is limited to one occasion and subject to clear conditions, and are expected to apply a set of prudential criteria for supervisory assessments. For example: the reputation of the proposed acquirer; the reputation and experience of any person that may run the resulting institution or company; the financial soundness of the proposed acquirer; on-going compliance with relevant Directives; and the level of risk as regards money laundering and terrorist financing.