

# SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4651 GIBRALTAR Wednesday 15th January 2020

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LEGAL NOTICE NO. 5 OF 2020.

## FINANCIAL SERVICES ACT 2019

### INTERPRETATION AND GENERAL CLAUSES ACT

#### FINANCIAL SERVICES ACT 2019 (AMENDMENT) REGULATIONS 2020

In exercise of the powers conferred on the Minister by sections 33(2), 620 and 627 of the Financial Services Act 2019, as read with section 23(g)(i) of the Interpretation and General Clauses Act, and on the Government by section 23(g)(ii) of that Act and of all other enabling powers, the Minister and the Government have made these Regulations.

#### **Title.**

1. These Regulations may be cited as the Financial Services Act 2019 (Amendment) Regulations 2020.

#### **Commencement.**

2. These Regulations come into operation on the day of publication.

#### **Overview.**

3. These Regulations amend the Financial Services Act 2019 (“the 2019 Act”) as follows—

- (a) regulations 4 to 6 amend Chapter 3 of Part 19 of, and Schedule 8 to, the 2019 Act and add a new Schedule 24A to that Act, to give effect in Gibraltar to the EU Prospectus Regulation; and
- (b) regulation 7 makes miscellaneous amendments to sections 24, 25, and 382 of, and Schedules 2, 21, 28 and 29 to, that Act.

#### **Amendment of Chapter 3 of Part 19.**

4.(1) Chapter 3 of Part 19 of the Financial Services Act 2019 is amended as follows.

(2) In section 344—

(a) in subsection (1)–

(i) in the definition of “offeror”, omit “and”; and

(ii) after that definition insert–

““relevant financial intermediary” means a financial intermediary commissioned by a relevant person to carry out an offer of securities to the public or seek admission to trading on a regulated market;

“relevant person” means the relevant issuer, offeror or person seeking admission to trading on a regulated market; and”;

(b) in subsection (2)–

(i) for “Prospectus Regulations” substitute “EU Prospectus Regulation”; and

(ii) for “those Regulations” substitute “that Regulation”; and

(c) after subsection (2) insert–

“(3) In this Chapter a monetary amount expressed in euro may be treated as a reference to the corresponding value in Sterling on 20th July 2017.”.

(3) In section 345(2) for “must” substitute “may, in particular,”.

(4) For section 346 (including the cross-heading before it) substitute–

*“Delegation by competent authority*

**Delegation of electronic publication.**

346.(1) The GFSC may, in accordance with Article 31.2 of the EU Prospectus Regulation, delegate the electronic publication of approved prospectuses and related documents.

(2) The GFSC’s immunity under section 38 applies to the discharge of its functions under the EU Prospectus Regulation and, in particular, no civil liability attaches to the GFSC in respect of any decision by a competent authority in another EEA State in relation to the approval of a prospectus where responsibility for that approval has been transferred to that competent authority by the GFSC in accordance with Article 20.8 the EU Prospectus Regulation.

*Prospectuses*

**Obligation to publish prospectus.**

346A.(1) An offer of securities to the public made by an issuer whose home State is Gibraltar is exempt from the obligation to publish a prospectus under Article 3 of the EU Prospectus Regulation if–

- (a) the total consideration of the offer in the European Union is not more than €8,000,000 calculated, over a period of 12 months; and
- (b) the offer is not subject to notification in accordance with Article 25 of that Regulation.

(2) Subsection (1) applies without affecting the right of an issuer, offeror or person seeking admission to trading on a regulated market to draw up a prospectus voluntarily in accordance with Article 4 of the EU Prospectus Regulation.

(3) The Minister may by regulations made under section 345–

- (a) amend subsection (1)(a) so as to reduce the monetary amount specified in that subsection; or
- (b) impose proportionate disclosure requirements in respect of offers of securities to the public to which the exemption provided by Article 1.3 of the EU Prospectus Regulation applies (offers where the total consideration in the European Union is less than €1,000,000, calculated over a period of 12 months).

#### **Responsibility for prospectus.**

346B.(1) Each of the following persons are responsible for the information provided in a prospectus–

- (a) the issuer or its administrative, management or supervisory body;
- (b) the offeror;
- (c) the person seeking the admission to trading on a regulated market; or
- (d) the guarantor.

(2) The persons responsible must be clearly identified in a prospectus, which must include–

- (a) their names and functions or, in the case of legal persons, their names and registered offices; and
- (b) declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

(3) Section 346E provides for the person responsible for a prospectus to be liable to pay compensation to a person who has suffered loss as a consequence of false or misleading particulars in the prospectus.

(4) In this section, section 346E and Schedule 24A “prospectus” includes a supplement to a prospectus.

(5) A person has no civil liability solely on the basis of the summary of a prospectus or the specific summary of an EU Growth prospectus (within the meaning of Articles 7 and 15 of the EU Prospectus Regulations respectively), including any translation of such a summary, unless when read together with the other parts of the prospectus—

(a) it is misleading, inaccurate or inconsistent; or

(b) it does not provide key information in order to aid investors when considering whether to invest in the securities.

(6) The persons specified in subsection (1) are only responsible for the information provided in a registration document or universal registration document where the document is in use as a constituent part of an approved prospectus.

(7) Subsection (6) applies without limiting Articles 4 and 5 of the Transparency Directive where the information required under those Articles is included in a universal registration document.

**Language.**

346C.(1) Where an offer of securities to the public is made or admission to trading on a regulated market is sought only in Gibraltar, the prospectus must be drawn up in English.

(2) Where an offer to the public is made or admission to trading on a regulated market is sought in an EEA State other than Gibraltar and the prospectus has been approved in a language other than English, the GFSC may, in its discretion, require that the summary of the prospectus be translated into English.

**Approval of prospectus.**

346D.(1) An application for approval of a prospectus must be made to the GFSC in the form and manner it may direct.

(2) The GFSC may, after receiving an application for the approval of a prospectus—

(a) require the relevant person to include in the prospectus supplementary information, where necessary for investor protection;

- (b) require the relevant person or any person that controls or is controlled by the relevant person to provide to the GFSC any information and documents that it may reasonably require; or
- (c) require auditors and managers of the relevant person or a relevant financial intermediary to provide to the GFSC any information that it may reasonably require.

(3) The GFSC may—

- (a) suspend the scrutiny of a prospectus submitted for approval; or
- (b) suspend or restrict an offer of securities to the public or admission to trading on a regulated market,

where it has imposed a prohibition or restriction under Article 42 of MiFIR in respect of the same securities or a related financial instrument, structured deposit or financial activity or practice.

(4) A suspension or restriction imposed under subsection (3) applies until the relevant prohibition or restriction under MiFIR has ceased to apply.

(5) The GFSC may, for a period of not more than five years, refuse to approve any prospectus drawn up by a person who has repeatedly and severely infringed the EU Prospectus Regulation.

**Compensation for false or misleading particulars.**

346E.(1) The person responsible for a prospectus is liable to pay compensation to a person who has—

- (a) acquired securities to which the prospectus applies; and
- (b) suffered loss in respect of them as a result of—
  - (i) any untrue or misleading statement in the prospectus; or
  - (ii) the omission from the prospectus of any matter required to be included by this Act or the EU Prospectus Regulation.

(2) Subsection (1) is subject to section 346B(5) and the exemptions in Schedule 24A.

(3) If a prospectus is required to include information about the absence of a particular matter, the omission of that information from the prospectus is to be treated as a statement in the prospectus that there is no such matter.

(4) A person (“P”), by reason of being a promoter of a company or otherwise, does not incur any liability for failing to disclose in a prospectus in respect of a company's securities information–

- (a) which P would not be required to disclose if P was responsible for those particulars; or
- (b) if P is responsible for them, which P is entitled to omit by virtue of any provision made by or under this Act or the EU Prospectus Regulation.

(5) In subsection (4) the reference to P incurring liability includes a reference to any other person being entitled as against P to be granted any civil remedy or to rescind or repudiate an agreement.”.

(5) For section 347 (including the cross-heading before it) substitute–

*“Investigations and intervention powers*

**Investigations.**

347.(1) Where it appears to the GFSC that there are reasonable grounds for suspecting that this Chapter or the EU Prospectus Regulation has been or is being infringed, it may conduct an investigation or appoint one or more competent persons to do so on its behalf.

(2) Without limiting subsection (1), the GFSC may also–

- (a) disclose or require an issuer to disclose all material information which may affect the assessment of the securities admitted to trading, in order to ensure investor protection or the smooth operation of the market;
- (b) suspend or require a regulated market, MTF or OTF to suspend securities from trading where the GFSC considers that the issuer's situation is such that trading would be detrimental to investors’ interests; or
- (c) carry out on-site inspections or investigations of any premises (other than a dwelling) under a warrant issued by a magistrate in accordance with section 349.”.

(6) For section 348 substitute–

**“Intervention powers.**

348.(1) For the purpose of regulating offers of securities to the public or admissions to trading on a regulated market in accordance with the EU Prospectus Regulation, the GFSC may–

- (a) suspend a public offer or admission to trading, for not more than 10 consecutive working days on any single occasion, where the GFSC reasonably suspects that the EU Prospectus Regulation has been infringed;
- (b) prohibit or suspend advertisements or require the relevant person or a relevant financial intermediary to cease or suspend advertisements, for not more than 10 consecutive working days on any single occasion, where the GFSC reasonably believes that the EU Prospectus Regulation has been infringed;
- (c) prohibit an offer of securities to the public or admission to trading on a regulated market where the GFSC finds that the EU Prospectus Regulation has been infringed or reasonably suspects that it would be infringed;
- (d) suspend or require a regulated market, MTF or OTF to suspend trading on a regulated market, for not more than 10 consecutive working days on any single occasion, where the GFSC reasonably believes that the EU Prospectus Regulation has been infringed;
- (e) prohibit trading on a regulated market, MTF or OTF where the GFSC is satisfied that the EU Prospectus Regulation has been infringed; or
- (f) disclose or require the disclosure to the public that a relevant person is failing to comply with its obligations under the EU Prospectus Regulation.

*Infringements*

**Reporting of infringements.**

348A.(1) The GFSC must establish appropriate arrangements which enable any person to report an infringement or potential infringement of the EU Prospectus Regulation to the GFSC.

(2) The arrangements established under subsection (1) must include—

- (a) secure communication channels for the reporting of infringements;
- (b) specific procedures for the receipt and investigation of reported infringements; and
- (c) arrangements which accord with the Data Protection Act 2004 for the protection of the personal data of an individual who reports an infringement and any individual who is allegedly responsible for an infringement.

- (3) The GFSC must treat information about the identity of a person who reports an infringement as confidential, except where its disclosure is necessary for the purpose of any further investigations or subsequent judicial proceedings.
- (4) Employers who conduct regulated financial services activities (“financial services firms”) must establish appropriate internal procedures for their employees to report infringements through a specific, independent and autonomous channel.
- (5) An employee of a financial services firm who reports an infringement in accordance with arrangements established under subsection (1) or (4)–
- (a) is not to 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 an infringement; 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 an infringement.
- (6) An employee who has been subjected to a detriment contrary to subsection (5)(b) may present a complaint to the Employment Tribunal as if the reporting of an infringement was a protected disclosure within the meaning of Part IVA of the Employment Act.”.
- (7) In section 349–
- (a) in subsection (2)(a), for “Prospectus Regulations” substitute “EU Prospectus Regulation”;
  - (b) in subsection (3)–
    - (i) in paragraph (a), for “Prospectus Regulations” substitute “EU Prospectus Regulation”; and
    - (ii) in paragraph (c), for “Prospectus Regulations” substitute “EU Prospectus Regulation”;
  - (c) in subsection (7), in the definition of “relevant proceedings”–
    - (i) in paragraph (a), for “Prospectus Regulations” substitute “EU Prospectus Regulation”; and
    - (ii) in paragraph (b), for “Prospectus Regulations” substitute “EU Prospectus Regulation”.
- (8) In section 350(1), for “Prospectus Regulations” substitute “EU Prospectus Regulation”.

(9) For section 351 substitute—

“351.(1) Sections 158 to 161 apply to the exercise of any power under section 350 but as if, in section 158, the applicable criteria included the impact of the infringement on retail investors’ interests.

(2) Where the GFSC has taken any sanctioning action under section 350, the following provisions of this section apply instead of sections 616 to 618.

(3) The GFSC must publish on its website only details of any sanctioning action taken in respect of a person without undue delay after that person is informed of that action.

(4) The information published must be limited to—

- (a) the identity of the person against whom the action has been taken;
- (b) the type and nature of the contravention; and
- (c) the details of the sanctioning action taken.

(5) The GFSC must take one of the steps in subsection (6) where—

- (a) following an obligatory prior assessment, it considers that it would be disproportionate to publish in accordance with subsection (3)—
  - (i) the identity of the legal person involved; or
  - (ii) the personal data of the individual involved; or
- (b) it considers that publication would jeopardise the stability of financial markets or an ongoing investigation.

(6) 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.

(7) 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 will cease to exist.

(8) Where a decision to which this section applies is subject to an appeal, the GFSC must publish information to that effect on its website and, without undue delay, revise that information to reflect the status and outcome of any appeal or any decision annulling a previous decision to impose a sanction.

(9) The GFSC must ensure that any publication in accordance with this section is of proportionate duration and remains on its website for a minimum of five years, but that personal data is only retained on the website for so long as is necessary, in accordance with the data protection legislation.

(10) The GFSC must–

- (a) inform ESMA of any sanctioning action taken but not published in accordance with subsection (6)(c), including any related appeal and its outcome;
- (b) if it has disclosed a sanctioning action or criminal sanction to the public, report that fact at the same time to ESMA; and
- (c) provide ESMA annually with aggregated information regarding all sanctioning actions and measures taken in accordance with this section.

### *Appeals*

#### **Appeals.**

351A.(1) A person may appeal to the Supreme Court against–

- (a) a decision taken by the GFSC under this Chapter or the EU Prospectus Regulation; or
- (b) failure by the GFSC to–
  - (i) reach a decision in respect of the approval of a prospectus; or
  - (ii) request changes to, or supplementary information in respect of, a prospectus,

within the time limits specified in Articles 20.2, 20.3 or 20.6 of the EU Prospectus Regulation.

(2) An appeal must be brought within 28 days of–

- (a) in the case of an appeal under subsection (1)(a), the date of the notice of the decision; or
- (b) in the case of an appeal under subsection (1)(b), the date on which the GFSC should have reached a decision.”.

**Amendment of Schedule 8.**

5. In Schedule 8 of the 2019 Act–

- (a) after “EUMAR;” insert “EU Prospectus Regulation;”; and
- (b) omit “the Prospectus Directive;”.

**New Schedule 24A.**

6 After Schedule 24 to the 2019 Act, insert the following Schedule–

**“SCHEDULE 24A**

Section 346E

**PROSPECTUSES: COMPENSATION EXEMPTIONS**

**Statements believed to be true.**

1.(1) A person (“P”) is not liable under section 346E for loss caused by a statement if P satisfies the court–

- (a) that, at the time when the prospectus was submitted to the GFSC, P reasonably believed (having made such enquiries, if any, as were reasonable) that–
  - (i) the statement was true and not misleading; or
  - (ii) the matter whose omission caused the loss was properly omitted; and
- (b) that one or more of the conditions in sub-paragraph (2) are satisfied.

(2) The conditions are that–

- (a) P continued in that belief until the time when the securities in question were acquired;
- (b) the securities were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them;
- (c) before the securities were acquired, P had taken all reasonable steps to secure that a correction was brought to the attention of those persons; or

- (d) P continued in that belief until after the commencement of dealings in the securities following their admission to trading and they were acquired after such a lapse of time that P ought in the circumstances to be reasonably excused.

(3) In this paragraph “statement” means–

- (a) any untrue or misleading statement in a prospectus; or
- (b) the omission from a prospectus of any matter required to be included by or under this Act or the EU Prospectus Regulation.

**Statements by experts.**

2.(1) A person (“P”) is not liable under section 346E for loss in respect of any securities caused by an expert statement if P satisfies the court–

- (a) that, at the time when the prospectus was submitted to the GFSC, P reasonably believed that the other person–
  - (i) was competent to make or authorise the expert statement; or
  - (ii) had consented to its inclusion in the form and context in which it was included; and
- (b) that one or more of the conditions in sub-paragraph (2) are satisfied.

(2) The conditions are that–

- (a) P continued in that belief until the time when the securities were acquired;
- (b) the securities were acquired before it was reasonably practicable to bring the fact that the expert was not competent, or had not consented, to the attention of persons likely to acquire the securities in question;
- (c) before the securities were acquired P had taken all reasonable steps to secure that that fact was brought to the attention of those persons; or
- (d) P continued in that belief until after the commencement of dealings in the securities following their admission to trading and they were acquired after such a lapse of time that P ought in the circumstances to be reasonably excused.

(3) In this paragraph “expert statement” means a statement included in a prospectus which–

- (a) purports to be made by, or on the authority of, another person as an expert; and
- (b) is stated to be included in the prospectus with that other person's consent.

(4) In this schedule, "expert" includes any engineer, valuer, accountant or other person whose profession, qualifications or experience give authority to a statement made by that person.

**Correction of statements.**

3.(1) A person ("P") is not liable under section 346E for loss caused by a statement if P satisfies the court—

- (a) that before the securities in question were acquired, a correction had been published in a manner calculated to bring it to the attention of persons likely to acquire the securities; or
- (b) that P took all reasonable steps to secure such publication and reasonably believed that it had taken place before the securities were acquired.

(2) This paragraph applies without affecting paragraph 1.

(3) In this paragraph "statement" has the same meaning as in paragraph 1.

**Correction of statements by experts.**

4.(1) A person ("P") is not liable under section 346E for loss caused by an expert statement if P satisfies the court—

- (a) that before the securities in question were acquired, the fact that the expert was not competent or had not consented had been published in a manner calculated to bring it to the attention of persons likely to acquire the securities; or
- (b) that P took all reasonable steps to secure such publication and reasonably believed that it had taken place before the securities were acquired.

(2) This paragraph applies without affecting paragraph 2.

(3) In this paragraph "expert statement" has the same meaning as in paragraph 2.

**Official statements.**

5. A person ("P") is not liable under section 346E for loss resulting from—

- (a) a statement made by an official person which is included in the prospectus; or

- (b) a statement contained in a public official document which is included in the prospectus,

if P satisfies the court that the statement is accurately and fairly reproduced.

**False or misleading information known about.**

6. A person (“P”) is not liable under section 346E if P satisfies the court that the person suffering the loss acquired the securities in question with knowledge (as the case may be)–

- (a) that the statement was false or misleading;
- (b) of the omitted matter; or
- (c) of the change or new matter.

**Belief that supplementary prospectus not called for.**

7. A person (“P”) is not liable under section 346E if P satisfies the court that P reasonably believed that the change or new matter in question was not such as to call for supplementary prospectus.”.

**Miscellaneous amendments.**

7.(1) The 2019 Act is amended as follows.

- (2) In section 24(3)(g) for “612(4)” substitute “612(5)”.
- (3) In section 25(2)(a), for “not more than six members” substitute “not less than four members”.
- (4) For section 382 substitute–
  - “382.(1) Sections 158 to 161 apply to the exercise of any power under section 381.
  - (2) Where the GFSC has taken any sanctioning action under section 381, the following provisions of this section apply instead of sections 616 to 618.
  - (3) The GFSC must publish on its website only details of any sanctioning action taken in respect of a person without undue delay after that person is informed of that action.
  - (4) The information published must be limited to–
    - (a) the identity of the person against whom the action has been taken;

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

(c) the details of the sanctioning action taken.

(5) The GFSC must take one of the steps in subsection (6) where–

(a) following an obligatory prior assessment, it considers that it would be disproportionate to publish in accordance with subsection (3)–

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

(ii) the personal data of the individual involved; or

(b) it considers that publication would jeopardise the stability of the financial system or an ongoing investigation.

(6) Those steps are–

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

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

(7) 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 will cease to exist.

(8) Where a decision to which this section applies is subject to an appeal, the GFSC must publish information to that effect on its website and, without undue delay, revise that information to reflect the status and outcome of any appeal or any decision annulling a previous decision to impose a sanction.

(9) The GFSC must ensure that any publication is of proportionate duration and remains on its website for not more than two years or, if longer, the period during which any sanction imposed applies (and, for the purposes of publication, a sanction which is imposed without a specific duration is to be regarded as having a duration of three years).

(10) The GFSC must ensure that personal data is only retained on the website for so long as is necessary, in accordance with the data protection legislation.”.

(5) In Schedule 2–

(a) in paragraph 10(3)–

(i) for “the Financial Services (Electronic Money) Regulations 2019” substitute “the Financial Services (Electronic Money) Regulations 2020”; and

(ii) for “the Financial Services (Payment Services) Regulations 2019” substitute “the Financial Services (Payment Services) Regulations 2020”; and

(b) in paragraph 18(o)(ii), for “the Financial Services (Payment Services) Regulations 2019” substitute “the Financial Services (Payment Services) Regulations 2020”.

(6) In Schedule 21, after paragraph 4 insert–

**“Confidentiality.**

4A.(1) Members, their alternates, the Secretary and other persons employed by or acting on behalf of the Board must keep confidential any information obtained by them in the course of performing functions under this Act, and must not disclose any such information, or permit another person to do so, except as permitted by law or in compliance with the directions of the Supreme Court.

(6) A person who contravenes sub-paragraph (2) commits an offence and is liable–

(a) on summary conviction, to a fine at level 2 on the standard scale; or

(b) on conviction on indictment, to imprisonment for two years or a fine, or both.”.

(7) In Schedule 28, for paragraph 1(1) substitute–

“1.(1) In this Schedule “authorisation” under a repealed enactment includes a licence, registration, approval or other permission granted under a repealed enactment and “authorised” is to be construed accordingly.”.

(8) In Schedule 29–

(a) omit “Deposit Guarantee Scheme Act 1998”;

(b) for “Financial Services (Occupational Pension Schemes) Act 2006” substitute “Financial Services (Occupational Pensions Institutions) Act 2006”;

(c) omit “Financial Services (Supervisory Acts) Order 2007”;

(d) omit “Insurance Companies (Special Purpose Vehicles) Regulations 2009”; and

(e) for “Financial Services (Distributed Ledger Technology) Regulations 2017” substitute “Financial Services (Distributed Ledger Technology Providers) Regulations 2017”.

Dated 15<sup>th</sup> January 2020.

A J ISOLA,  
Minister with responsibility for financial services,  
and for the Government.

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**EXPLANATORY MEMORANDUM**

These regulations amend the Financial Services Act 2019 to give effect in Gibraltar to the EU Prospectus Regulation ((EU) 2017/1129) and make other miscellaneous amendments to that Act.