



**Financial Services
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Introduction to the Regulatory and Legal Framework of Financial Services in Gibraltar

The Commission

The Gibraltar Financial Services Commission (“FSC”) is a statutory body corporate established by the Financial Services Commission Act, 2007.

Gibraltar, although not a separate member state, is incorporated into the European Union by virtue of the United Kingdom’s membership. In light of this, Gibraltar is required to transpose all EU Directives such as the Markets in Financial Instruments (2004/39/EC), Market Abuse Directive (2003/6/EC) and Capital Requirements Directive (2006/48/EC and 2006/49/EC).

The Commission members are appointed by the Minister with responsibility for financial affairs. The Commission has a separate Chairman appointed from within the members of the Commission.

The Chief Executive Officer, who is also the Commissioner of Banking and the Commissioner of Insurance, is charged with the responsibility of supervising institutions carrying on finance business in or from within Gibraltar.

The FSC’s website has a Regulator to Regulator (“R2R”) section (<http://www.fsc.gi/fsc/home.htm>) which provides an outline of the FSC’s powers and provides a description of the processes through which regulatory co-operation with regulators worldwide can be achieved.

The International Monetary Fund conducted a review of Gibraltar in 2006 and the findings of the report (and the Commission’s responses) can be found on: <http://www.fsc.gi/imf/imf.htm>.

Commission’s functions and responsibilities

The Financial Services Commission’s Mission Statement is:

“To provide financial services regulation in an effective and efficient manner in order to protect the public from financial loss and enhance Gibraltar’s reputation as a quality financial centre”

The functions of the Commission are to keep under review the operation of Gibraltar legislation and the effectiveness of supervision of financial services; to monitor the extent to which Gibraltar legislation and supervision complies with European Union obligations and supervisory standards governing financial services in the United Kingdom where Community law applies; to protect the public against financial loss arising out of dishonesty, incompetence or malpractice; to advise the Government of Gibraltar and the Government of the United Kingdom on matters concerning financial services; and to draw up codes for regulating the terms of service of persons employed by the Commission.

The functions of the Commission are contained within Section 6 of the Financial Services Commission Act 2007 (FSCA). Section 9 of the FSCA permits the delegation of these functions to the Chief Executive appointed under Section 8 or, with the consent of the Minister, to another person.

In carrying out the statutory duties (Section 7 of the FSCA), the Commission shall discharge its obligations in such a manner (so far as is reasonably possible) which;

- (i) *is compatible with the regulatory objectives, namely ;*
 - (a) *the promotion of market confidence;*
 - (b) *the reduction of systemic risk;*
 - (c) *the promotion of public awareness;*
 - (d) *the protection of the good reputation of Gibraltar;*
 - (e) *the protection of consumers; and*
 - (f) *the reduction of financial crime.*
 - (ii) *has regard to generally accepted principles of good corporate governance, and*
 - (iii) *the Commission considers most appropriate for the purposes of meeting those objectives; and*
- shall have regard to;*
- (i) *the need to use resources in the most efficient and effective way;*
 - (ii) *the principle that the duty to manage a business falls upon the senior management of that business;*
 - (iii) *the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;*
 - (iv) *the desirability of facilitating innovation in connection with financial services business;*
 - (v) *the international character of financial services and markets and the desirability of maintaining the competitive position of Gibraltar;*
 - (vi) *the desirability of minimising, as far as reasonably practicable, the adverse effects of regulation on competition and consumer choice;*
 - (vii) *the need to maintain the good international reputation of Gibraltar generally and as a jurisdiction for the conduct of financial services business;*

(viii) the policy of the Government, as advised to the Commission by the Minister, where it relates to matters of general application regarding the authorisation, licensing, recognition and registration of financial services business which, in the judgement of the Minister, affects or relates to the macro economic or other public interest of Gibraltar.

The Financial Services Commission is responsible¹ for the following sectors:

- Banking
- Investment Services
- Collective Investment Schemes
- Exchanges and Clearing Houses (although non are in existence to date)
- Insurance Mediation
- Insurance Companies
- Insurance Management
- Trust and Company Management
- Occupational Pensions Institutions
- Money Services Business

The FSC's statutory functions provide the FSC formal licensing, supervisory and regulatory powers over all firms authorised under the Supervisory Acts² for compliance against relevant legislation, rules or guidance notes as well as financial crime.

The Financial Services Commission is authorised under section 24 (3) of the Financial Services Commission Act, 2007 to issue guidance notes, guidance notes supplement many of our legislations in providing extra guidance/rules for licensed entities to comply with:

24 (3) The Commission may issue guidance consisting of such information

and advice as it considers appropriate–

(a) with respect to the operation of this or any other Supervisory Act and of any rules made under them;

(b) with respect to any matters relating to functions of the Commission;

(c) for the purpose of meeting the regulatory objectives of the Commission; and

(d) with respect to any other matters about which it appears to the Commission to be desirable to give information or advice.

¹ The Financial Services Commission is appointed as competent authority for various pieces of legislation by “The Minister”. When the FSC is appointed as competent authority, this appears in the Gibraltar Gazette. Please note that when the FSC has been made competent authority by “the Minister”, these powers are passed to the Financial Services Commission

² Please see: <http://www.gibraltarlaws.gov.gi/articles/2007s108.pdf>

The Financial Services Commission is funded by charging annual fees to authorised institutions and is also empowered with fining powers in the form of “Penalty Fees”. The relevant pieces of legislation which covers the annual and penalty fees are:

- Financial Services (Fees) Regulations 2007
- Financial Services (Markets in Financial Instruments) (Penalty Fees) Regulations 2007
- Financial Services (Penalty Fees) regulations 1993

Current treatment of Regulator requests

Preconditions of information exchange

The FSC may disclose information to an overseas regulatory authority necessary to enable that authority to exercise its regulatory functions, including the conduct of civil or administrative investigations or enforcement proceedings, to enforce laws or regulations administered by the authority provided that;

- the Chief Executive Officer has satisfied himself that the intended recipient overseas authority is subject to adequate legal restrictions on further disclosures which must include a provision of an undertaking of confidentiality;
- the Chief Executive Officer receives an undertaking from the recipient foreign regulatory authority not to disclose the information provided without the consent of the Chief Executive Officer;
- the Chief Executive Officer is satisfied that the request for assistance by the foreign regulator is required for the purposes of the foreign regulator’s statutory functions, including the conduct of civil or administrative investigations or enforcement proceedings, to enforce laws or regulations administered by the authority.

Where a request for co-operation has been received, the Chief Executive Officer will need to take into account the following considerations:-

- whether the request relates to possible breaches in law or other regulatory requirements which have no close parallel in Gibraltar;
- the seriousness of the matter to which the request relates to, the importance to the request of the information sought in Gibraltar - “the Necessity Test”.

The Necessity Test

In a case heard in the Court of Appeal for Gibraltar (Financial Services Commissioner V The Queen (on the application of a Gibraltar company, X, Y and Z, other respondents)³) it was determined that information may be disclosed if the necessity test was satisfied. Essentially the conditions that need to be satisfied are:

³ <http://intranet/fsc2006/download/adobe/appealsep2003.pdf>

That the information that has been requested has been acquired by the Chief Executive officer in the course of carrying out his functions as Chief Executive officer and is, therefore, to be regarded by him as confidential information by virtue of the relevant section of the Act. In the absence of consent from all those individuals and bodies identified from that information, he is to remind himself that he cannot comply with the Request unless he is satisfied that one of the grounds in the relevant section of the Act exists.

In deciding whether to comply with the Request the Chief Executive Officer has to ask himself the following questions:

- Is the requesting body an Authority, which appears to exercise functions similar to that of the Commission?
- Is the disclosure of the information necessary to assist the requesting body?
- If so, is it in the interests of the public in Gibraltar that The Chief Executive Officer should disclose it to the requesting body?

The answer to all three of the above needs to be in the affirmative.

In the last few years the Commission has dealt with a range of requests, 22 in 2006, 33 requests in 2007 and to date in 2008 32 requests. These range from fitness and properness checks on individuals and firms to information to assist other regulators with investigations.

Legal basis for investment services requests

The Financial Services (Investment and Fiduciary Services) Act and Financial Services (Markets in Financial Instruments) Act 2006 provide the legal framework for the supervision of firms providing investment services and insurance mediation in or from within Gibraltar.

Provisions to obtain information

The powers to seek and obtain information from "relevant persons" are vested in the Chief Executive officer or any other person appointed by the Chief Executive Officer to act on his behalf (known under the Act as the "appointed person"). The definition of relevant person under the Financial Services (Investment and Fiduciary Services) Act includes:

- a) licensee, an authorised Gibraltar investment firm and an authorised European investment firm;
- b) an exempted person;
- c) the operator, trustee or custodian of an authorised or recognised collective investment scheme;
- d) any director or officer of an investment exchange or a clearing house;
- e) any person who is, or who has at any time been, directly or indirectly employed (whether or not under a contract of service) by any of the persons mentioned in paragraphs (a) to (c) above; and
- f) any person who has, or who has at any time had, any direct or indirect proprietary, financial or other interest in or connection with any of the persons mentioned in paragraphs (a) to (c) above.

Section 33 of the Financial Services (Investment and Fiduciary Services) Act sets out the powers to compel the production of information and documents. Under said section the authority may require a relevant person:

- a. to attend before the Authority, or before a person duly appointed by the Authority in that behalf (an "appointed person") at a specified time and place, and to answer questions and otherwise furnish information appearing to the Authority or to the appointed person to be relevant to any investment business or controlled activity carried on by that person;
- b. to furnish the Authority or an appointed person on any occasion or at specified times or intervals, with such information, books or papers as the Authority or the appointed person may reasonably require about any specified matter relating to an investment business or to a controlled activity, being, if the Authority or the appointed person so requires, information verified in a specified manner.

Section 34 extends the exercise of these powers to an application for a licence or authorisation or any person who appears to the authority to be carrying on an investment business or controlled activity.

Section 38 also grants powers allowing the Authority to appoint one or more persons to investigate and report on:

- a) the affairs of any person, including a person falling within paragraph (a) or paragraph (b) of section 32, suspected of carrying on an investment business or a controlled activity contrary to any of the provisions of this Act, or in a manner which is otherwise prejudicial to the public, to any investor or potential investor, or to the reputation of Gibraltar as a financial centre; or
- b) the affairs of, or of the manager, operator, trustee or custodian of, an authorised or a recognised scheme, in so far as they relate to the activities carried on in or from within Gibraltar or any other collective investment scheme, if it appears to the Authority that it is in the interests of the investors or potential investors or of the reputation of Gibraltar as a financial centre so to do.
- c) the affairs of a recognised institution in relation to items 7 to 12 business suspected of being carried out in or from within Gibraltar in contravention of the provisions of this Act or any regulations or rules made hereunder or upon the request of the relevant supervisory authority and in such case the appointed person shall carry out the investigation in such manner as that supervisory authority may require and shall, if so required by the Authority, report on such investigation directly to that supervisory authority;
- d) for the purposes of paragraph (c) "relevant supervisory authority" shall have the meaning given to it in the Banking Act".

The appointed person under this section shall have the powers conferred on the Authority under and by section 33.

Confidentiality Provisions

As a general rule all the information obtained under the Financial Services (Investment Services and Fiduciary) Act is confidential and may not be disclosed. Section 58(2) permits disclosure if it appears to be necessary:

- a) to enable the Authority to carry out any of its statutory functions; or
- b) in the interests of the prevention or detection of crime; or
- c) in connection with the discharge of any international obligation to which Gibraltar is subject; or
- d) to assist, in the interests of the public, any authority which appears to the Authority to exercise in a place outside Gibraltar functions corresponding to those of the Authority; or
- e) to comply with the directions of the Supreme Court

Section 54 of the Financial Services (Markets in Financial Instruments) Act states that the Commission shall cooperate with, and assist the competent authority of other member States whenever necessary for the purpose of carrying out its duties under this Act. Section 56 refers to the powers to exchange information with the competent authorities of other member states. The powers to provide information under the Financial Services (Markets in Financial Instruments) Act and Financial Services (Markets in Financial Instruments) Regulations are restricted to competent authorities in other EEA jurisdictions.

Main relevant pieces of legislation

In respect of disclosures, most are currently made via the Financial Services Commission Act. Section 23 of the Financial Services Commission Act states under what provisions the Commission will be able to provide information to other signatories of the MMOU when requested by such. Essentially the Commission needs to be satisfied that this comes under the regulatory sphere of the Commission and that the disclosure is necessary.

The Financial Services Commission Act empowers the implementation of the Commission and its powers over Acts in respect of the areas which it supervises.

The Financial Services (Markets in Financial Instruments) Act and the underlying Financial Services (Markets in Financial Instruments) Regulations are the main pieces of legislation governing securities firms. These 2 pieces of legislation implement the Markets in Financial Instruments Directive (2004/39/EC). Additionally the Commission has issued 7 guidance notes⁴ providing further details of the requirements for firms conducting investment activity.

The Financial Services (Investment and Fiduciary Services) Act also covers requirements for investment firms and disclosures.

The Market Abuse Act implements the Market Abuse Directive (2003/6/EC) and is the main piece of legislation which covers regulates market abuse in the securities and derivatives markets. Additionally the Commission has

⁴ These can be found at: <http://www.fsc.gi/r2b/mifid.htm>



issued a Guidance note on acceptable market practices in respect of Market Abuse.

Financial Services Supervisory Co-operation Act

This Proposed Act aims to consolidate and update all the powers under the various Financial Services Acts.

This Act is currently with Government of Gibraltar who have legislative power in Gibraltar.

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Please note that all answers are interlinked in some shape or form and therefore should ideally be reviewed together.

Response to Question 1

1. Please identify and explain the general or specific provisions of your laws, rules and regulations (and provide copies of these provisions) that enable you, or separate governmental body in your jurisdiction, to obtain:

Response to Question 1(a)

(a) contemporaneous records sufficient to reconstruct all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to those transactions; ■ (as required by Paragraph, 7(b)(ii) of the MOU)

Competent authority

The Gibraltar Financial Services Commission is the competent authority in our legislation to regulate securities and derivatives trading in Gibraltar, these activities are regulated under the Financial Services (Markets in Financial Instruments) Act⁵. This Act applies to all types of investment firms that deal with securities and derivatives⁶.

Records to be maintained by firms

Regulated firms are required to maintain records of all transactions, for further details of records of transactions that should be maintained please refer to the response to question 6 below.

As per the MiFID requirements, there is a requirement for transaction reporting. For firms who are satisfied that a report will be made to the authorities responsible for regulating the market in which the trade is being made there is no requirement to report directly to the Commission, however, firms have to ensure that these records are being reported to a competent authority. This exemption is not allowed for firms authorised under Article 9 of Directive 2006/49/EC. Specific details of what should be covered in the reports submitted under subsection (4) of the Financial Services (Markets in Financial Instruments) 2006 are covered in the “Transaction Reporting Guidance Note” issued under Financial Services (Markets in Financial Instruments) 2006⁷.

The FSC has issued a guidance note under Financial Services (Markets in Financial Instruments) 2006 entitled “Provision of Information, Client Reporting and Record Keeping⁸” of which section 1.2. on “Record Keeping” indicates the type of information that is to be recorded and allows the FSC to advise of recommended timeframes for storage of such information, the minimum being set at five years for MiFID business. Firms are also required to observe certain organisational requirements to ensure that the

⁵ The Financial Services (markets in Financial Instruments) Act implements the Markets in Financial Instruments Directive (2004/39/EC). Firms carrying out investment activities would need to meet the requirements of this Act.

⁶ Please note that the jurisdiction does not currently have a Stock Exchange.

⁷ <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note6-Transaction%20Reporting.pdf>

⁸ <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note4-Provision%20of%20Information%20Client%20Reporting%20and%20Record%20Keeping.pdf>



relevant systems and controls are in place and that record keeping requirements are adhered to.

Regulation 25(3) to 25(6) of the Financial Services (Markets in Financial Instruments) Act 2006, covers the obligation to uphold integrity of markets, report transactions and maintain records. Namely:

(3) It shall be a condition subject to which an authorisation under this Act is granted that investment firms keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and other information required by the competent authority to prevent the use of the financial system for the purpose of money laundering.

(4) It shall be a condition subject to which an authorisation under this Act is granted that investment firms which execute transactions in any financial instruments admitted to trading on a regulated market report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. This obligation shall apply whether or not such transactions were carried out on a regulated market.

(6) Reports under subsection (4) shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned.

Obtaining information on transactions

Section 33 of the Financial Services (Investment and Fiduciary Services) Act, provides for officers of the FSC to require access to records, take copies of any book or paper produced and to require the person who was required to produce such documentation to provide explanations. In practice prior notification would normally be given.

33. (1) The Authority may require a relevant person⁹ (a) to attend before the Authority, or before a person duly appointed by the Authority in that behalf (an "appointed person") at a specified time and place, and to answer questions and otherwise furnish information appearing to the Authority or to the appointed person to be relevant to any investment business or controlled activity earned on by that person:

(b) to furnish the Authority or an appointed person on any occasion or at specified times or intervals, with such information, books or papers as the Authority or the appointed person may reasonably require about any specified matter relating to an investment business or to a controlled activity, being if the Authority or the appointed person so requires, information verified in a specified manner.

⁹ Definition includes all types of regulated entities and persons linked to such firms.



(2) Where by virtue of paragraph (b) of subsection (1) the Authority has power to require the production of any books or papers from a relevant person, the Authority shall have the like power to require production of those books or papers from any person who appears to the Authority to be in possession thereof.

Section 34 extends the exercise of these powers to an application for a licence or authorisation or any person who appears to the authority to be carrying on an investment business or controlled activity.

In respect of records which are to be maintained by licensed firms of the identity of clients, firms should meet the requirements of the 3rd Money Laundering Directive, which have been implemented via the Anti Money Laundering Guidance Notes attached in the pack. There are various requirements on the document retention that authorised firms must maintain. This is dealt with in further detail in question one.

Taking of Evidence

Section 37 of the Market Abuse Act¹⁰ allows the FSC to apply to a justice of the peace for a warrant to enter premises and obtain information in relation to transactions. Section 37 states that:

“A justice of the peace may issue a warrant under this section if satisfied on information on oath given on behalf of the Minister or the competent authority that there are reasonable grounds for believing that the first or second set of conditions is satisfied. The first set of conditions is–

(a) that a person has failed (wholly or in part) to comply with a request for information made under this Act; and

(b) that on the premises specified in the warrant–

(i) there are documents which have been required; or 3) The second set of conditions is–

(a) that a contravention of Part II of this Act has been (or is being) committed by any person;

(b) that there are on the premises specified in the warrant documents or information relevant to whether that contravention has been (or is being) committed; and

(c) that if a request for information were made under this Act–

(i) it would not be complied with; or

(ii) the documents or information to which it related would be removed, tampered with or destroyed.”

The Evidence Act sets out the statutory requirements for the taking of evidence in Gibraltar for use overseas in both civil and criminal cases.

Under this Act the Supreme Court has the power to render assistance to a foreign court to obtain evidence in Gibraltar for use in criminal proceedings outside Gibraltar. Three conditions precedent must be fulfilled before the Supreme Court can exercise the jurisdiction conferred upon it to make an order under this Act, namely:

¹⁰ The Market Abuse Act 2005 implements the Market Abuse Directive (2003/6/EC).



(i) there must be an application to the Court for an order for evidence to be obtained in Gibraltar;

(ii) the Court must be satisfied that such application is made in pursuance of a request by or on behalf of a Court or tribunal described as “the requesting court” exercising jurisdiction outside Gibraltar; and

(iii) the Court must be satisfied that the evidence to which the application relates is to be obtained for the purposes of criminal proceedings which have been instituted before the requesting court.

The court’s powers are limited to the making of an order for the provision of oral or written testimony and or for the production of documents by way of order.

In civil cases, it is not a pre-requisite that civil proceedings have been instituted and it would be possible to issue a Letter of Request where civil proceedings are contemplated. There must, however, be sufficient grounds to show that proceedings are contemplated. Fishing expeditions are not permitted. The type of evidence which may be obtained for civil proceedings is wider and includes for example the inspection, photographing, preservation, custody or detention of any property, the taking of samples of any property and the medical examination of any person.

The procedure for obtaining the evidence involves: an application to the Supreme Court for an order for the appointment of a Special Examiner to examine the witness to obtain the evidence. The witness is then summonsed before the appointed Special Examiner where he is examined in accordance with the terms of the Court Order, following which the evidence is transmitted to the Requesting authority via the Registrar of the Supreme Court.

Response to question 1(b)

(b) records for securities and derivatives transactions that identify:

(1) the client: -

- i. name of the account holder; and**
- ii. person authorized to transact business;**

(2) the amount purchased or sold;

(3) the time of the transaction;

(4) the price of the transaction; and

(5) the individual and the bank or broker and brokerage house that handled the transaction. (as required by Paragraph 7(b) (ii) of the MOU)

Requirements in AML Guidance Notes

The Anti Money Laundering Guidance Notes (which implement the 3rd Money Laundering Directive¹¹) are issued by the Financial Services

¹¹ The above mentioned anti money laundering guidance notes are “supervisory or regulatory” guidance for the purposes of Section 20A of the Crime (Money Laundering and Proceeds) Act 2007 and are issued:

a) Under Section 20A(2) of the Crime (Money Laundering and Proceeds) Act, as read with Section 23(g) of the Interpretation and General Clauses Act;



Commission these also require for certain information to be recorded. The Guidance Notes cover the obligation to maintain adequate records of transactions and also detail some requirements in respect of retrieving such information. The following sections depict the specific requirements in respect of this question:

10.3 Transaction Records

R108 Section 10P(2)(b) requires institutions to retain, for at least five years, records of all transactions undertaken in respect of relevant financial business.

The precise nature of the records required is not specified, but the objective is to ensure, in so far as is practicable, that in any subsequent investigation the company/business can provide the authorities with its section of the audit trail. These record keeping requirements are separate from those of the financial services regulators, but there is a considerable degree of overlap.

For each transaction consideration should be given to retaining a record of :

- o the name and address of its customer;*
- o the name and address (or identification code) of its counterparty;*
- o what the transaction was used for, including price and size;*
- o whether the transaction was a purchase or a sale;*
- o the form of instruction or authority;*
- o the account details from which the funds were paid (including, in the case of cheques, sort code, account number and name);*
- o the form and destination of payment made by the business to the customer;*
- o whether the investments, etc were held in safe custody by the business or sent to the customer or to his/her order and, if so, to what name and address.*

10.4 Record Keeping By Eligible Introducers

Section 10P(4) to (7) specifically addresses the responsibility for record keeping in respect of business introduced by eligible

-
- b) under the powers conferred upon the Commission appointed under Section 24 of the Financial Services Commission Act 2007 in pursuit of the functions outlined in Section 6 of that Act;
 - c) by the Financial Secretary;
 - d) by the following supervisory authorities as defined in Section 19 of the Crime (Money Laundering and Proceeds) Act 2007;
 - e) the Financial Services Commission;
 - f) the Authority appointed under Section 2(1) of the Financial Services (Investment and Fiduciary Services) Act 1989;
 - g) the Commissioner of Banking and the Banking Supervisor;
 - h) the Commissioner of Insurance and the Insurance Supervisor.

These can be found at: <http://www.fsc.gi/amlgn/home.htm>

introducers. *If the eligible introducer is itself authorised under the Financial Services, Banking, or Insurance Companies Acts for relevant financial business, the principal can rely on an assurance that the eligible introducer will keep, on the principal's behalf, the necessary records in respect of both verification of identity and transactions. It is of course necessary for the principal to keep copies of the records itself.*

10.5 Format and Retrieval Of Records

R109 To satisfy the requirements of the law enforcement agencies, it is important that all types of records are capable of retrieval without undue delay.

It is not necessary to retain documents in their original hard copy form, provided that the firm has reliable procedures for holding records in microfiche or electronic form, as appropriate, and that these can be reproduced without undue delay. In addition, an institution may rely on the records of a third party, such as a bank or clearing house in respect of details of payments made by customers. However, the primary requirement is on the institution itself and the onus is thus on the business to ensure that the third party is willing and able to retain and, if asked to, produce copies of the records required.

However, the record requirements are the same regardless of the format in which they are kept or whether the transaction was undertaken by paper or electronic means. Documents held centrally must be capable of distinguishing between the transactions relating to different customers and of identifying where the transaction took place and in what form.

The Regulations do not state the location where relevant records should be kept but the overriding objective is for financial sector businesses to be able to retrieve relevant information without undue delay.

When setting document retention policy, firms must weigh the statutory requirements and the needs of the investigating authorities against normal commercial considerations. When original vouchers are used for account entry, and are not returned to the customer or his agent, it is of assistance to the law enforcement agencies if these original documents are kept for at least one year to assist forensic analysis, and this can also provide evidence to a financial institution when conducting its own internal investigations. However, this is not a requirement of the anti-money laundering legislation and there is no other statutory requirement in Gibraltar that would require the retention of these original documents.

It is also of assistance to law enforcement, particularly in cases where a third party has been relied upon to undertake verification of identity procedures or to confirm identity, that copies of all records relating to verification of identification are retained in Gibraltar.

Institutions are asked to ensure that when original documents which would normally have been destroyed are required for investigation purposes, they check that the destruction policy has actually been

adhered to before informing the law enforcement agencies that the documents are not available.

Where documents verifying the identity of a customer are held in one part of a group, they do not need to be held in duplicate form in another. However, if the documents are held in another jurisdiction, they must wherever possible (subject to local legislation) be freely available on request within the group, or otherwise be available to the investigating agencies under due legal procedures and mutual assistance treaties. Access to group records must not be impeded by confidentiality or data protection restrictions.

Financial sector businesses should also take account of the scope of money laundering legislation in other countries, and should ensure that group records kept in other countries that are needed to comply with Gibraltar legislation are retained for the required period. Particular care needs to be taken to retain or hand over the appropriate records when an introducing branch or subsidiary ceases to trade or have a business relationship with a customer whilst the relationship with other group members continues, or where a company holding relevant records becomes detached from the rest of the group.”

Record Keeping in respect of points 2-5

The FSC has issued a guidance note under Financial Services (Markets in Financial Instruments) Act entitled “Provision of Information, Client Reporting and Record Keeping¹²” of which section 1.2. on “Record Keeping” indicates the type of information that is to be recorded and allows the FSC to advise of recommended timeframes for storage of such information, the minimum being set at five years for MiFID business. Firms are also required to observe certain organisational requirements to ensure that the relevant systems and controls are in place and that record keeping requirements are adhered to. Section 3 of the said Guidance note specifically states:

3. Record Keeping

MiFID requires a firm to maintain adequate and orderly records of its internal organisation and to arrange for records to be kept of all services and transactions it undertakes, in respect of investments and services covered by MiFID. The scope of all services and transactions includes for example oral advice and telephone orders.

Records must be retained in a medium that allows the storage of information in a way accessible for future reference by the FSC, and in such a manner that the following is met:

¹² <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note4-Provision%20of%20Information%20Client%20Reporting%20and%20Record%20Keeping.pdf>



- *The FSC must be able to access these readily and to reconstitute each key stage of the processing of each transaction.*
- *It must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained.*
- *It must not be possible for the records otherwise to be manipulated or altered.*

Furthermore such records should be sufficient for the FSC to determine, and monitor, that the firm has complied with all the relevant obligations, in respect of clients or potential clients. This concept ensures that the firm can evidence a transparent audit trail, which in effect would be prudent commercial practice - to the extent that there may be contractual claims if evidence of trading is not kept properly.

When considering these requirements a firm should take into account the nature, scale and complexity of its business and the nature and range of the investment services and activities undertaken by the firm. In order to comply with the relevant record keeping requirements, firms should review existing record-keeping arrangements and identify gaps and consider training of staff. Branches of firms should also note that the FSC must have direct access to records.

Records must be kept for at least five years, however firms should note that further obligations under other legislative provisions may require records to be kept for a longer period.

Exceptions to this general five year period include client agreements and terms of business which set out the rights and obligations of the firm and its clients. Such information should be maintained for at least the duration of the relevant client relationship. This requirement also applies regardless of whether the firm was required to enter into the agreement under MiFID or chose to enter into it for other purposes.

Furthermore, the FSC may, in exceptional circumstances, exercise its right to require firms to retain any or all of those records for such longer period as is justified by the nature of the instrument or transaction, if such is necessary to enable the exercise of its supervisory functions. For example, following the termination of the authorisation of a firm, the FSC may request that the firm retain records for the outstanding term of the five year period. The requirement to maintain records for five years, also applies to telephone conversations or electronic communications where no alternative records are maintained.

In the case of telephone records, these must be capable of being converted to a written record, subject to this being in such a form and manner that would allow the FSC to reconstitute each key stage of the processing of each transaction.

As per the MiFID requirements, there is a requirement for transaction reporting. For firms who are satisfied that a report will be made to the

authorities responsible for regulating the market in which the trade is being made there is no requirement to report directly to the Commission, however, firms have to ensure that these records are being reported to a competent authority. This exemption is not allowed for firms authorised under Article 9 of Directive 2006/49/EC. Specific details of what should be covered in the reports submitted under subsection (4) of the Financial Services (Markets in Financial Instruments) Act 2006 are covered in the “Transaction Reporting Guidance Note” issued under Financial Services (Markets in Financial Instruments) Act 2006¹³.

The transaction report requires details of:

- Reporting firm identification
- Instrument identification
- Instrument code type
- Instrument type
- Cancellation flag
- Transaction reference number
- Counterparty
- Quantity
- Quantity Notation
- Buy/sell indicator
- Price notation
- Unit Price
- Price multiplier
- Trading day and time
- Maturity date
- Venue identification
- Trading capacity
- Underlying instrument identification
- Underlying instrument identification code type
- Strike price
- Derivative type
- Put/call

Further details

The details below will only be required at the specific request of the relevant competent authority:

- *Reporting firm identification (if the unique code referred to above is not sufficient to identify the counterparty)*
- *Instrument identification (The unique code, agreed between all the competent authorities, applicable to the financial instrument in question must be used)*
- *Counterparty (If a unique code, or unique harmonised identification code referred to above is not sufficient to identify the counterparty)*

Firms are required to under Part IV of the Financial Services (Markets in Financial Instruments) Regulations to have access/require/demand

¹³ <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note6-Transaction%20Reporting.pdf>



information/data, this also applies in respect of the identity of clients of licensed entities.

Section 33 of the Financial Services (Investment and Fiduciary Services) Act 1989 provides for the FSC to request access to records, take copies of any book or paper produced and to require the person who was required to produce such documentation to provide explanations:

33. (1) *The Authority may require a relevant person-*
- (a) to attend before the Authority, or before a person duly appointed by the Authority in that behalf (an "appointed person") at a specified time and place, and to answer questions and otherwise furnish information appearing to the Authority or to the appointed person to be relevant to any investment business or controlled activity earned on by that person:*
 - (b) to furnish the Authority or an appointed person on any occasion or at specified times or intervals, with such information, books or papers as the Authority or the appointed person may reasonably require about any specified matter relating to an investment business or to a controlled activity, being if the Authority or the appointed person so requires, information verified in a specified manner.*
- (2) Where by virtue of paragraph (b) of subsection (1) the Authority has power to require the production of any books or papers from a relevant person, the Authority shall have the like power to require production of those books or papers from any person who appears to the Authority to be in possession thereof.*

Section 37 of the Market Abuse Act allows the FSC to apply to a justice of the peace for a warrant to enter premises and specifically states that:

- "A justice of the peace may issue a warrant under this section if satisfied on information on oath given on behalf of the Minister or the competent authority that there are reasonable grounds for believing that the first or second set of conditions is satisfied. The first set of conditions is-*
- (a) that a person has failed (wholly or in part) to comply with a request for information made under this Act; and*
 - (b) that on the premises specified in the warrant-*
 - (i) there are documents which have been required; or*
- 3) The second set of conditions is-*
- (a) that a contravention of Part II of this Act has been (or is being) committed by any person;*
 - (b) that there are on the premises specified in the warrant documents or information relevant to whether that contravention has been (or is being) committed; and*
 - (c) that if a request for information were made under this Act-*
 - (i) it would not be complied with; or*
 - (ii) the documents or information to which it related would be removed, tampered with or destroyed."*



Response to Question 1(c)

(c) Information located in your jurisdiction identifying persons who beneficially own or control non-natural persons organized in your jurisdiction. (as required by Paragraph 7(b)(ii) of the MOU)

Gibraltar holds public records of Company Profiles which are available from Companies House,¹⁴ for a nominal fee. This would reflect the registered ownership of any corporates as well as details of the directors, registered address of incorporated companies in Gibraltar¹⁵. Changes of these also need to be notified to Companies House and would then be reflected on the profile for the corporate. However some shareholders may elect to keep ownership of such shares confidential. This is done using a Nominee Shareholder

The jurisdiction allows for entities to be established a private and public limited companies, unlimited private company, trusts, partnerships (see footnote number 15). Details of these can be found in the Companies Act. Protected Cell Companies are also allowed under the Protected Cell Companies Act 2001.

Ownership of regulated investment firms need to be pre-approved by the Commission. In respect of companies incorporated in Gibraltar (please see footnote number 15), these can be owned via various methods, however, licensed entities are required to obtain details of the ultimate beneficial owner as stated below. All licensed firms should maintain details of the beneficial ownership of clients.

Additionally the company secretary is obliged to maintain a register of shareholders/directors etc, details of this are set out in Companies Act. In Gibraltar providing company management and company secretarial services is a regulated activity, and as such these firms are required to maintain adequate records of the companies they manage under the Financial Services (Conduct of Business) Regulations.

Section 10B of the Crime (Money Laundering and Proceeds) Act requires all firms to seek satisfactory evidence of the identity of those with whom they deal. Unless satisfactory evidence of the identity of potential customers is obtained in good time, the business relationship must not proceed.

Section 10A of the Crime (Money Laundering and Proceeds) Act 2007 details the meaning of customer due diligence measures, namely:

10A. "Customer due diligence measures" means– (a) *identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;* (b) *identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant financial business is satisfied that it knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal*

¹⁴ <http://www.companieshouse.gi/>

¹⁵ <http://www.companieshouse.gi/newindex.html> - maintains records of incorporations and companies that are dissolved and provide this information to the public. Companies House is also the registrar for limited partnerships, trusts, business names etc.



arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and (c) obtaining information on the purpose and intended nature of the business relationship.

As prescribed by the Crime (Money Laundering and Proceeds) Act 2007, any business relationship formed by any person acting in the course of relevant financial business is an established business relationship where that person has through the application of customer due diligence measures obtained, satisfactory evidence of the identity of the person who, in relation to the formation of that business relationship, was the applicant for business.

Section 19 of the Crime (Money Laundering and Proceeds) Act lists the duties of the supervisory authority:

“19A. A supervisory authority must effectively monitor the relevant persons for whom it is the supervisory authority and take necessary measures for the purpose of securing compliance by such persons with the requirements of this Act.

(2) Where under section 19 there is more than one supervisory authority for a relevant person, the supervisory authorities shall agree between them which one shall act as the supervisory authority for that person and shall notify that person accordingly.

The Financial Services Commission has issued Anti-money Laundering Guidance Notes based on the requirements of the 3rd Money Laundering Directive and which depict more specific guidelines about what would be required of regulated financial institutions. Section 7.1.2.1 of these Guidance Notes provides specific guidelines on the requirement to ascertain the identity of “Beneficial Owners”:

“The term “beneficial owner” is to be interpreted throughout these Notes as meaning the following;

“The person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted and includes, at least, the following;

In the case of a corporate entity;

1. The natural person(s) who ultimately own or control a legal entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Community legislation or subject to equivalent international standards; a percentage of 25% plus one share shall be deemed to meet this criterion;

2. The natural person(s) who otherwise exercises control over the management of a legal entity;

In the case of a legal entity, such as foundations, and legal arrangements such as trusts which administer and distribute funds;

3. *Where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity;*

4. *Where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;*

5. *The natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity.”*

Supervisors, investment firms etc. are to report evidence of money laundering to the Gibraltar Financial Intelligence Unit¹⁶ e.g. Section 20 of the Crime (Money Laundering and Proceeds) Act.

The Gibraltar Financial Intelligence Unit (“GFIU”) was established in January 1996 to facilitate the receipt, analysis and dissemination of disclosures made by financial and other institutions and is a division of the Gibraltar Police and Customs Department.

The GFIU ‘s main tasks are to receive, research and allocate intelligence arising from suspicious disclosures. It has a well established financial intelligence database. It seeks to establish and foster close liaison with the Money Laundering Reporting Officers (MLRO’s) in the respective disclosing institutions.

It acknowledges receipt of disclosures and provides feedback to the disclosing institution with regards to the disclosure. It seeks to develop financial intelligence training and education in respect of financial and other institutions as well as training of its own staff. It maintains strict confidentiality with regards to any information supplied by other institutions or persons.

The GFIU are a member of the “Egmont Group” of Financial Intelligence Units across the world (for further information on the Egmont Group please see: <http://www.egmontgroup.org/>) where information is sent/shared via a secure link.

Under Section 18 – Internal reporting procedures, states that:

Internal reporting procedures maintained by a person are in accordance with this section if they include provision–

(a) identifying a person (“the appropriate person”) to whom a report is to be made of any information or other matter which comes to the attention of a person handling relevant financial business and which, in the opinion of the person handling that business, gives rise to a knowledge or suspicion that another person is engaged in money laundering;

¹⁶ The GFIU is a part of the Royal Gibraltar Police.



(b) requiring that any such report be considered in the light of all other relevant information by the appropriate person, or by another designated person, for the purpose of determining whether or not the information or other matter contained in the report does give rise to such a knowledge or suspicion;

(d) for securing that the information or other matter contained in a report is disclosed to the GFIU where the person who has considered the report under the procedures maintained in accordance with the preceding provisions of this section knows or suspects that another person is engaged in money laundering.

The FSC as Competent Authority for the guidance notes issued as a result of the 3rd Money Laundering Directive, conducts risk assessment onsite visits on all regulated firms. At this juncture, the FSC would determine the adherence to requirements. In addition, investment firms are required to submit a statement of compliance¹⁷ where firms have to confirm adherence to regulatory requirements.

¹⁷ For contents of the statement of compliance, please see:
<http://www.fsc.gi/formselector/forms/statecomp.pdf>



Response to Question 2

2. Please identify and explain the general or specific provision of your laws, rules and regulations (and provide copies of these provisions) that enable you, or a separate governmental body in your jurisdiction, to take or compel a person's statement, or, where permissible, testimony under oath.

Requesting reports/information

Section 33A of Financial Services (Investment and Fiduciary Services) Act allows the Commission to request a report from a relevant person (in such form as may be required) on any matter which the authority may reasonably require.

33A.(1) The Authority may, by notice in writing given to a relevant person, require him to provide the Authority, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with a report on any aspect of, or any matter about which, the Authority may reasonably require for the performance of its functions under this or any other Act for which it exercises its regulatory powers.

(2) The Authority may require the report to be in such form as may be specified in the notice.

(3) The person appointed to make a report required under subsection (1) must be a person—

*(a) nominated or approved by the Authority; and
(b) appearing to the Authority to have the professional skills necessary to make a report on the matter concerned.*

(4) The Costs of producing a report under subsection (1) shall be borne by the relevant person required to provide the report.

Investigating powers

Under the Market Abuse Act 2005, the competent authority may take steps as it considers necessary to establish whether there has been a contravention of the law. In carrying out this investigation the competent authority can use a statement made by a person in compliance with a requirement imposed by virtue of this section;

16.(1) If it appears to the competent authority that there are circumstances suggesting that a person¹⁸ is in contravention of Part II of this Act, the competent authority may take such steps as it considers necessary and appropriate to establish whether or not there has been any such contravention. Where the competent authority is of the opinion that there has been a contravention of Part II, it shall report the results of its investigation to the Minister and to the Attorney General and it may disclose to the public every measure or sanction

¹⁸ includes an investment firm or a credit institution

that will be imposed for the contravention, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

(2) In carrying out an investigation under subsection (1) the competent authority may seek the assistance of–

(a) any statutory authority in Gibraltar having regulatory responsibilities in respect of persons carrying on in Gibraltar an investment business which in whole or in part consists of dealing in securities;

(b) an EEA authority, and any reference in this section to a person having an obligation to assist the competent authority or to provide information to that authority shall apply to a statutory authority falling within paragraph (a).

(3) A person who is or may be able to give information concerning a contravention of Part II shall be required–

(a) to produce to the competent authority any documents in his possession or under his control which appear to be relevant to the investigation;

(b) to produce to the competent authority at a specified time and place any specified documents which appear to the competent authority to relate to any matter relevant to the investigation; and

(c) otherwise to give to the competent authority all assistance in connection with the investigation which that person is reasonably able to give.

(4) In this section, “document” includes information recorded in any form, and, in relation to information recorded otherwise than in legible form, the power to require its production includes power to require the production of a copy of it in legible form.

(5) Where documents are produced, the competent authority may take copies or extracts from them.

(6) A statement made by a person in compliance with a requirement imposed by virtue of this section may only be used in evidence against him if–

(a) that person has himself introduced the statement in evidence;

(b) the prosecution of that person relates to–

(i) a failure or refusal by that person to produce documents or give assistance in accordance with subsection (3);

(ii) an omission by that person to disclose material which should have been disclosed; or

(iii) an untruthful statement by that person.

(7) A person shall not under this section be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the Supreme Court.



(8) A person shall not under this section be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless—

- (a) the person to whom the obligation of confidence is owed consents in writing to the disclosure or production; or*
- (b) the making of the requirement was authorised by the Minister.*

(9) Where a person claims a lien on a document, its production under this section shall be without prejudice to his lien.

(10) No person shall be bound to comply with a requirement imposed by a person exercising powers granted under this section unless that person has, if required, produced evidence of his authority.

(11) A person who is found by a court to be contravening the provisions of this Act in proceedings instituted as a result of an investigation under this section may in the same proceedings be ordered to pay the expenses of the investigation to such extent as may be specified in the Order.

The Evidence Act sets out the statutory requirements for the taking of evidence in Gibraltar for use overseas in both civil and criminal cases. Under this Act the Supreme Court has the power to render assistance to a foreign court to obtain evidence in Gibraltar for use in criminal proceedings outside Gibraltar.

Section 9 of the Evidence Act states that when an application is made to the court for an order for evidence to be obtained in Gibraltar and the court must be satisfied that:

- (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction in a country or territory outside Gibraltar; and
- (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the court shall have the powers conferred on it by the following provisions of this Act.

Under Section 10 (2) of the Evidence Act the court’s powers are limited to the making of an order for the provision of oral or written testimony and or for the production of documents by way of order¹⁹.

In civil cases, it is not a pre-requisite that civil proceedings have been instituted and it would be possible to issue a Letter of Request where civil proceedings are contemplated. There must, however, be sufficient grounds

¹⁹ Act refers to an order, however, they are often referred to as Special Examinations

to show that proceedings are contemplated. Fishing expeditions are not permitted. The type of evidence which may be obtained under section 10 for civil proceedings is wider and includes for example the inspection, photographing, preservation, custody or detention of any property, the taking of samples of any property.

Under Part IV of the Financial Services (Markets in Financial Instruments) Regulations the competent authority has the right to access any document in any form whatsoever and to obtain a copy of it.

Additionally Section 37 of the Market Abuse Act allows the Commission to apply to a justice of the peace to enter premises and obtain information.

Courts ability to summon witness

Under the Criminal Procedure Act 1961 Section 70, the court has the Power to summon witnesses, or examine any person in attendance if his evidence appears to be essential to the decision of the case:

70. Any court may, at any stage of any criminal proceedings, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the counsel for the prosecution or the defendant or his counsel, shall have the right to cross-examine any such person, and the court shall adjourn the case for such time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.

The Mutual Legal Assistance (European Union) Act 2005²⁰ section 12 (1) (2) allows for arrangements to be made for evidence to be taken in Gibraltar in connection with criminal proceedings or investigations in an EU State. Additionally under this Act, there is a power to direct that a search warrant be applied for.

In all cases, the request must be issued by a court exercising criminal jurisdiction or a prosecution authority in a State or territory outside Gibraltar; or any other authority which has the function of making such requests for assistance.

In such cases the procedure is fairly simply, once consent to proceed has been given, the Attorney General nominates a court to receive the

²⁰ The Mutual Legal Assistance (International) Act 2005 Act reproduces in identical terms the Mutual Legal Assistance (European Union) Directive and allows us to provide the same assistance to non-EU States who have entered into a reciprocal agreement on mutual legal assistance in criminal matters with the Government of Gibraltar.

evidence, the witness is then summonsed to court to give the evidence. As a matter of practice, the witness is given sufficient time to prepare the evidence (documents etc.) which he is being compelled to give.

In order for a country to access this legislation the Government of the requesting state should contact the Chief Secretary of the Government of Gibraltar to seek into a reciprocal agreement under this new Act.

Furthermore under Section 36 of the Market Abuse Act, the Attorney General may institute any proceedings, whether civil or criminal, in respect of any contravention of this Act. Under Section 41 where the Commission has grounds to believe a regulated person or company has breached provisions of the Act the Commission can terminate the licence or prohibit the company from conducting certain activities.

Section 12 of the Mutual Legal Assistance (International) Act states that:

“(1) Where a request for assistance in obtaining evidence in Gibraltar is received by the Central Authority it may

(a) if the conditions in section 13 are met, arrange for the evidence to be obtained under section 14; or

(b) direct that a search warrant be applied for under or by virtue of section 15.

(2) The request for assistance may be made only by

(a) a court exercising criminal jurisdiction, or a prosecuting authority, in a State or territory outside Gibraltar;

(b) any other authority in such a State or territory which appears to the Central Authority to have the function of making such requests for assistance.

(3) Requests for assistance should be made in English or accompanied by a certified translation into English and any supporting documentation, if not in English, shall be accompanied by a certified translation into English.

(4) Requests for assistance shall indicate as follows

(a) the authority making the request;

(b) the object of and the reason for the request;

(c) where possible, the identity and the nationality of the person concerned;

(d) where necessary, the name and address of the person to be served; and

(e) the offence or alleged offence and a summary of the facts.

(5) Requests under this Act addressed to the Central Authority may be sent and returned through the national central offices of the International Criminal Police Organisation.

Response to Question 3

Please identify and explain the general or specific provisions of your laws, rules and regulations (and provide copies of these provisions) that enable you to provide to foreign authorities:

Response to Question 3(a)

(a) the information identified in 1(a) above;

Regulation 56 of the Financial Services (Markets in Financial Instruments) Act states that the Commission is required to provide information to other member states:

“The competent authority²¹ shall supply the competent authorities of other member States with the information required for the purposes of carrying out their duties pursuant to the provisions of the directive”.

Part IV of the Financial Services (Markets in Financial Instruments) Regulations details the Commission’s powers to obtain records which would help reconstruct transactions. This covers the power to obtain and require the production of records. The Commission may by notice in writing require the relevant person²² to provide information as specified in the notice. The Commission may also require a report from the accountant in respect of the matter. The power to produce documents also includes taking copies and requesting an explanation from the licensed institution or any past employees/directors of the licensee.

Part IV also provides the Commission powers for the purposes of the prudential supervision of a licensed entity. These include the inspection of the premises of business, to require the firm or past directors/controllers/managers to provide records in their possession or control in relation to the regulated activity; require the individuals involved to explain any matter within their knowledge that relates to the business of the relevant person.

In relation to investigations (Section 58) the Commission may appoint one or more persons to investigate and report on the nature, conduct or state of the regulated business. Under these powers the Commission may also request further investigations into any holding company, subsidiary or related company.

Section 23 of the Financial Services Commission Act states under what provisions the Commission will be able to provide information to other signatories of the MMOU when requested by such. Essentially the Commission needs to be satisfied that this comes under the regulatory sphere of the Commission and that Section 2 below is satisfied. In this

²¹ Financial Services Commission

²² As defined by 53(b) of the Financial Services (Markets in Financial Instruments) Regulations 2007 means any person who is authorised or who appears to be carrying out licensable activity or who may have information.

respect the Gibraltar Financial Services Commission does not consider that there is any legislative distinction between having or not having an independent interest in the matter.

(1) Save as may be provided for by any other Act, any information from which an individual or body can be identified and which is acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants.

(2) Save as may be provided for by any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Commission to be necessary—

(a) to enable the Commission to carry out any of its statutory functions;

(b) in the interests of the prevention or detection of crime;

(c) in connection with the discharge of any international obligation to which Gibraltar is subject;

(d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;

(e) to comply with the directions of the Supreme Court; or (f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions: provided always any such disclosure is consistent with any applicable Community obligation.

Response to Question 3(b)

(b) the information identified in 1(b) above;

As mentioned above, Part IV of the Financial Services (Markets in Financial Instruments) Regulations details the Commission's powers to obtain records which would help reconstruct transactions. This covers the power to obtain and require the production of records. The Commission may by notice in writing require the relevant person²³ to provide information as specified in the notice. The Commission may also require a report from the accountant in respect of the matter. The power to produce documents also includes taking copies and requesting an explanation from the licensed institution or any past employees/directors of the licensee.

Part IV also provides the Commission powers for the purposes of the prudential supervision of a licensed entity. These include the inspection of the premises of business, to require the firm or past directors/controllers/managers to provide records in their possession or control in relation to the regulated activity; require the individuals involved to

²³ As defined by 53(b) of the Financial Services (Markets in Financial Instruments) Regulations 2007 means any person who is authorised or who appears to be carrying out licensable activity or who may have information.



explain any matter within their knowledge that relates to the business of the relevant person.

In relation to investigations (Section 58) the Commission may appoint one or more persons to investigate and report on the nature, conduct or state of the regulated business. Under these powers the Commission may also request further investigations into any holding company, subsidiary or related company.

Response to Question 3(c)

(c) the information identified in 1(c) above;

Part IV (Section 56) of the Financial Services (Markets in Financial Instruments) Regulations 2007:

56(3) The reference in sub-regulation (1) to an authorised officer shall include a reference to an officer or agent of the relevant supervisory authority of any EEA State and the reference in that subsection to powers of inspection, production, examination and access shall be similarly restricted by the limitations imposed under regulation 55.

In addition, section 55 of the same Regulations states:

55.(1) An authorised officer may exercise the powers conferred by regulation 54 for the purpose of assisting an institution's home competent authority in the performance of any material supervisory functions; and an authorised officer shall exercise those powers in any case where such an officer is requested to do so by that authority and is satisfied that the request is made for that purpose.

(2) Subject to subsection (3) any reference in regulation 54(1)(a) to an authorised officer includes a reference to an officer or agent of the relevant home competent authority.

(3) Powers under regulation 54 shall not be exercised by an officer or agent of the relevant competent authority unless a proper request has previously been communicated by that home competent authority to the competent authority.

(4) For the purposes of this section the material supervisory functions of the relevant home competent authority are—

(a) any functions which correspond to those of the competent authority under the Act; and

(b) any other functions which the home competent authority has in respect of the activities of the institution and in respect of which, by virtue of any community obligation, the competent authority may be required to provide information.

Part V of the Market Abuse Act (transposed from the Market Abuse Directive) has a section entitled "Powers Exercisable to Assist EEA Authorities":

22.(1) The competent authority shall cooperate with EEA authorities, whenever necessary, for the purpose of carrying out their functions and duties under the Directive.

(2) The powers referred to in section 16 are exercisable by the competent authority for the purpose of assisting an EEA authority

which in exercise of Article 16 of the Directive has requested assistance in connection with enquiries being carried out by that EEA authority or on its behalf for the purposes specified in subsection (3).

(3) The purposes referred to in subsection (2) are the investigation or prosecution of an alleged breach of obligations under the Directive arising in the State of an EEA authority as a result of the transposition in that State of the Directive.

(4) The competent authority shall not exercise the powers conferred by section 16 for the purposes of assisting an EEA authority if the Minister is satisfied that the assistance requested by the EEA authority— (a) would adversely affect the sovereignty, security or public policy of Gibraltar; or (b) relates to the same matters and the same persons in respect of whom proceedings in Gibraltar have been initiated or a court in Gibraltar has delivered a judgment.

(5) Sections 17, 18 and 19 apply to any exercise of the powers contained in section 16 for the purposes of this section.

(6) The competent authority shall inform the Minister of all requests for co-operation received by it from an EEA authority and any action that it proposes to take under this section.

Furthermore, section 10 of the Mutual Legal Assistance (International) Act states:

Sending requests for assistance.

10.(1) A request for assistance under section 9 may be sent— (a) to a court exercising jurisdiction in the place where the evidence is situated; or (b) to any authority recognised by the government of the State or territory in question as the appropriate authority for receiving requests of that kind.

(2) In cases of urgency, a request for assistance may be sent to the International Criminal Police Organisation, for forwarding to any court or authority mentioned in subsection (1).

Response to question 3(d)

(d) the information obtained through the powers described in 2 above;

Powers to arrange for evidence to be obtained.

Section 13 of the Mutual Legal Assistance (International) Act 2005 states that:

13. (1) If the Governor has signified by notice in the Gazette that Her Majesty has, by Order in Council, directed that, subject to such exceptions, adaptations or modifications as may be specified in the order, the provisions of sections 1 to 3 of the United Kingdom's Evidence(Proceedings in Other Jurisdictions) Act, 1975, shall have effect in relation to international proceedings of any description specified in the order, then the provisions of sections 9 to 11 of this Act shall have effect in relation to international proceedings of the description specified in the order.

(2) If an Order in Council has directed that section 1(4) of the Perjury Act 1911 shall have effect in relation to international proceedings to which the order applies as it has effect in relation to a judicial

proceeding in a tribunal of a foreign state, then the provisions of section 203(4) of the Criminal Offences Act³ shall have similar effect.

(3) In this section “international proceedings” means proceedings before the International Court of Justice or any other court, tribunal, commission, body or authority (whether consisting of one or more persons) which, in pursuance of any international agreement or any resolution of the General Assembly of the United Nations, exercises any jurisdiction or performs any functions of a judicial nature or by way of arbitration, conciliation or inquiry or is appointed (whether permanently or temporarily) for the purpose of exercising any jurisdiction or performing any such functions.

Part V of the Market Abuse Act (transposed from the Market Abuse Directive) has a section entitled “Powers Exercisable to Assist EEA Authorities”:

22.(1) The competent authority shall cooperate with EEA authorities, whenever necessary, for the purpose of carrying out their functions and duties under the Directive.

(2) The powers referred to in section 16 are exercisable by the competent authority for the purpose of assisting an EEA authority which in exercise of Article 16 of the Directive has requested assistance in connection with enquiries being carried out by that EEA authority or on its behalf for the purposes specified in subsection (3).

(3) The purposes referred to in subsection (2) are the investigation or prosecution of an alleged breach of obligations under the Directive arising in the State of an EEA authority as a result of the transposition in that State of the Directive.

(4) The competent authority shall not exercise the powers conferred by section 16 for the purposes of assisting an EEA authority if the Minister is satisfied that the assistance requested by the EEA authority— (a) would adversely affect the sovereignty, security or public policy of Gibraltar; or (b) relates to the same matters and the same persons in respect of whom proceedings in Gibraltar have been initiated or a court in Gibraltar has delivered a judgment.

(5) Sections 17, 18 and 19 apply to any exercise of the powers contained in section 16 for the purposes of this section.

(6) The competent authority shall inform the Minister of all requests for co-operation received by it from an EEA authority and any action that it proposes to take under this section.

Response to Question 3(e)

(e) information and documents held in your files. (as required by Paragraph 7(b)(i) of the MOU)

Regulation 56 of the Financial Services (Markets in Financial Instruments) 2006 states *“The competent authority shall supply the competent authorities of other member States with the information required for the purposes of carrying out their duties pursuant to the provisions of the directive. (2) The competent authority, when exchanging information with other competent authorities under subsection (1), may indicate at the time of communication that such information must not be disclosed without its express agreement,*



and that such information is exchanged solely for the purposes for which it has given its agreement.”

Section 23 of the Financial Services Commission Act states under what provisions the Commission will be able to provide information to other signatories of the MMOU, this is stated in the following extract:

(1) Save as may be provided for by any other Act, any information from which an individual or body can be identified and which is acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants.

(2) Save as may be provided for by any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Commission to be necessary—

(a) to enable the Commission to carry out any of its statutory functions;

(b) in the interests of the prevention or detection of crime;

(c) in connection with the discharge of any international obligation to which Gibraltar is subject;

(d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;

(e) to comply with the directions of the Supreme Court; or (f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions: provided always any such disclosure is consistent with any applicable Community obligation.

The Gibraltar Financial Services Commission does not consider that there is any legislative distinction between having or not having an independent interest in the matter.

Response to Question 4

Please identify and explain the general or specific provisions of your laws, rules and regulations (and provide copies of these provisions) that enable you to provide the information and documents referenced in 3 above to foreign authorities in response to requests concerning the following:

Response to Question 4(a)

(a) insider dealing, market manipulation, misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives, including solicitation practices, handling of investor funds and customer orders;

Under Section 16 of the Market Abuse Act 2005 if the competent authority believes that there are circumstances suggesting that a person is in contravention of Part II of this Act i.e. insider dealing, market manipulation, etc the competent authority may take such steps as it considers necessary and appropriate to establish whether or not there has been any such contravention. Where the competent authority is of the opinion that there has been a contravention of this Act, it shall report the results of its investigation to the Minister and to the Attorney General and it may disclose to the public every measure or sanction that will be imposed for the contravention, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

(2) In carrying out an investigation under subsection (1) the competent authority may seek the assistance of— (a) any statutory authority in Gibraltar having regulatory responsibilities in respect of persons carrying on in Gibraltar an investment business which in whole or in part consists of dealing in securities; (b) an EEA authority, and any reference in this section to a person having an obligation to assist the competent authority or to provide information to that authority shall apply to a statutory authority falling within paragraph (a)

(3) A person who is or may be able to give information concerning a contravention of Part II shall be required— (a) to produce to the competent authority any documents in his possession or under his control which appear to be relevant to the investigation;

(b) to produce to the competent authority at a specified time and place any specified documents which appear to the competent authority to relate to any matter relevant to the investigation; and

(c) otherwise to give to the competent authority all assistance in connection with the investigation which that person is reasonably able to give.



(4) In this section, “document” includes information recorded in any form, and, in relation to information recorded otherwise than in legible form, the power to require its production includes power to require the production of a copy of it in legible form.

You will note that under Section 16 (3)(c) of the Act gives the competent authority to request “*all assistance in connection with the investigation which that person is reasonably able to give*”.

Under Section 22 of the same Act.

(1) The competent authority shall cooperate with EEA authorities, whenever necessary, for the purpose of carrying out their functions and duties under the Directive.

Section 22(4) (a) for the purposes of assisting an EEA authority if the Minister is satisfied that the assistance requested by the EEA authority-

(a) would adversely affect the sovereignty, security or public policy of Gibraltar; or

(b) relates to the same matters and the same persons in respect of whom proceedings in Gibraltar have been initiated or a court in Gibraltar has delivered a judgment.

(5) Sections 17, 18 and 19 apply to any exercise of the powers contained in section 16 for the purposes of this section.

(6) The competent authority shall inform the Minister of all requests for co-operation received by it from an EEA authority and any action that it proposes to take under this section.

Section 197 of the Criminal Offences Act 1960 stipulates that a person who by any deception dishonestly obtains for himself or another any pecuniary advantage is guilty of an offence and is liable on conviction to imprisonment for five years. These powers rest with the Commissioner of Police.

The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—

(a) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or

(b) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

Section 23 of the Financial Services Commission Act states under what provisions the Commission will be able to provide information to other signatories of the MMOU when requested by such.

Response to question 4(b)

(b) the registration, issuance, offer, or sale of securities and derivatives, and reporting requirements related thereto;

Under the Financial Services (Takeover Bids) the competent authority has a duty to assist authorities of EEA states, section 7 states that:

7(1) The competent authority shall co-operate with the authorities of other EEA States-

(a) to the extent necessary for the competent authority to carry out his functions under this Act; and

(b) to the extent necessary to the authorities of other EEA States for carrying out functions pursuant to legislation implementing the Directive in those States.

(2) Information exchanged pursuant to subsection (1) is covered by the same obligation of professional secrecy to which persons employed or formerly employed by the competent authority are subject pursuant to section 6.

(3) In pursuance of his duties under subsection (1), the competent authority-

(a) shall serve legal documents necessary to enforce measures taken by the authorities of other EEA States in connection with bids, as well as such other assistance as may reasonably be requested for the purpose of investigating any actual or alleged breaches of legislation implementing the Directive in such States;

(b) may request the authorities of other EEA States to serve legal documents necessary to enforce measures taken by the competent authority in connection with bids, as well as such other assistance as may reasonably be requested for the purpose of investigating any actual or alleged breaches of this Act.

(4) Co-operation under this section may include the sharing of information that the competent authority is not prevented from disclosing by virtue of any statutory provision or rule of law.

(5) References in this section to authorities of other EEA States are to- (a) *authorities designated by other EEA States for the purposes of Article 4(1) of the Directive; and*

(b) any other person or body that exercises functions of a public nature, under legislation in any country or territory outside Gibraltar, that appear to the competent authority to be similar to his own functions under this Act.

(a) in Gibraltar; or

(b) in Gibraltar and one or more other EEA States.

Under Section 22 of the Market Abuse Act.

(1) The competent authority shall cooperate with EEA authorities, whenever necessary, for the purpose of carrying out their functions and duties under the Directive.

Section 23 of the Financial Services Commission Act states under what provisions the Commission will be able to provide information to other signatories of the MMOU when requested by such.

Response to Question 4(c)

(c) market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents;

Under the Financial Services (Investment and Fiduciary Services) Act Regulation 33 grants the Commission powers which can be exercised in relation to an applicant for a licence or for authorisation under Part III of the Act and any person who appears to be holding or carrying on any investment activity in or from within Gibraltar.

Response to Question 4(d)

(d) markets, exchanges, and clearing and settlement entities.

Under section 5(1) of the Financial Services (Listing of Securities) 2006, The Listing Authority or, as the case may require, the regulatory authority shall cooperate, whenever necessary for the purposes of carrying out their duties, with the competent authorities of any member State and shall exchange information useful for that purpose. Please note that there are currently no stock exchange or clearing and settlements agencies in Gibraltar.

You will note from Question 2 that under the Evidence Act in civil cases, it is not a pre-requisite that civil proceedings have been instituted and it would be possible to issue a Letter of Request where civil proceedings are contemplated. There must, however, be sufficient grounds to show that proceedings are contemplated. The type of evidence which may be obtained for civil proceedings is wider and includes for example the inspection, photographing, preservation, custody or detention of any property, the taking of samples of any property and the medical examination of any person.

Section 23 of the Financial Services Commission Act states under what provisions the Commission²⁴ will be able to provide information to other signatories of the MMOU:

(1) Save as may be provided for by any other Act, any information from which an individual or body can be identified and which is acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants.

(2) Save as may be provided for by any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Commission to be necessary—

(a) to enable the Commission to carry out any of its statutory functions;

(b) in the interests of the prevention or detection of crime;

(c) in connection with the discharge of any international obligation to which Gibraltar is subject;

(d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;

(e) to comply with the directions of the Supreme Court; or (f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions: provided always any such disclosure is consistent with any applicable Community obligation.

The Gibraltar Financial Services Commission does not consider that there is any legislative distinction between having or not having an independent interest in the matter.

Under the Financial Services (Investment and Fiduciary Services) Act Regulation 33 grants the Commission powers which can be exercised in relation to an applicant for a licence or for authorisation under Part III of the Act and any person who appears to be holding or carrying on any investment activity in or from within Gibraltar.

²⁴ The Financial Services Commission

Response to Question 5

Please identify and explain the general or specific provisions of your laws, rules and regulations (and provide copies of these provisions) that enable you to provide assistance referenced in 4 above to a foreign authority, regardless of whether you have an independent interest in the matter. (as required by Paragraph 7 of the MOU²⁵)

In respect of the Financial Services Commission Act the Commission disclosures can be provided to other regulators provided that it appears to the Commission to be necessary as per below:

(1) Save as may be provided for by any other Act, any information from which an individual or body can be identified and which is acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants.

(2) Save as may be provided for by any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Commission to be necessary—

(a) to enable the Commission to carry out any of its statutory functions;

(b) in the interests of the prevention or detection of crime;

(c) in connection with the discharge of any international obligation to which Gibraltar is subject;

(d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;

(e) to comply with the directions of the Supreme Court; or

(f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions: provided always any such disclosure is consistent with any applicable Community obligation.

The Gibraltar Financial Services Commission does not consider that there is any legislative distinction between having or not having an independent interest in the matter.

Under the Financial Services (Investment and Fiduciary Services) Act Regulation 33 grants the Commission powers which can be exercised in relation to an applicant for a licence or for authorisation under Part III of the Act and any person who appears to be holding or carrying on any investment activity in or from within Gibraltar.

²⁵ Scope of Assistance



Disclosures under Financial Services (Markets in Financial Instruments) and the Financial Service (Market Abuse) Act are limited to providing disclosures to regulators in the EEA but these can be made regardless of whether we have an independent interest in the matter.

If the disclosure is to be made on behalf of the GFIU due to a money laundering enquiry, any restrictions on providing the information to foreign bodies are laid out in section 5 of the Crime (Money Laundering and Proceeds) Act:

5A.(1) Where the Commission of the European Communities adopts a decision pursuant to article 40(4) of the Money Laundering Directive, the Minister may, by notice in the Gazette, prohibit the disclosure of information, by persons subject to the provisions of this Act, to any person who is situated in the State or Territory to which the notice relates.

(2) A person who contrary to subsection (1) makes a disclosure concerning a State or Territory in respect of which the Minister has notified under subsection (1) is guilty of an offence and is liable-

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both; or

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both.”.

Response to Question 6

Please identify and explain the general or specific provisions of your laws, rules and regulations (and provide copies of these provisions) that require maintenance of the following information and documents (including the period of time for which such information or documents are required to be maintained):

Please refer to Question 1 when reviewing this question.

Response to question 6(a)

(a) information identified in 1 (a) above;

Under the Financial Services (Markets in Financial Instruments) Act 2006, Section 13 in relation to Organisational Requirements, refers to the requirements in this respect:

(1) The competent authority shall take all necessary steps to ensure that investment firms comply with the organisational requirements set out in subsections (2) to (8).

(2) Investment firms shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Act as well as appropriate rules governing personal transactions by such persons.

(4) Investment firms shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end investment firms shall employ appropriate and proportionate systems, resources and procedures.

(5) Investment firms –

(c) 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.

(6) Investment firms shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Act, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

The FSC has also issued guidance notes in this respect under Financial Services (Markets in Financial Instruments) Act the most relevant guidance note is: "Provision for information, Client Reporting and Record Keeping"²⁶.

²⁶ <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note4-Provision%20of%20Information%20Client%20Reporting%20and%20Record%20Keeping.pdf>



Under Section 25 of the Financial Services (Markets in Financial Instruments) Act, in relation to the obligation to uphold integrity of markets, report transactions and maintain records, states that:

(3) It shall be a condition subject to which an authorisation under this Act is granted that investment firms keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and other information required by the competent authority to prevent the use of the financial system for the purpose of money laundering.

(4) It shall be a condition subject to which an authorisation under this Act is granted that investment firms which execute transactions in any financial instruments admitted to trading on a regulated market report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. This obligation shall apply whether or not such transactions were carried out on a regulated market.

One of the requirements under MiFID is the obligation for transaction reporting. Specific details of what should be covered in the reports submitted under subsection (4) of the Financial Services (Markets in Financial Instruments) Act 2006 are covered in the “Transaction Reporting Guidance Note” issued under Financial Services (Markets in Financial Instruments) 2006²⁷.

Regulation 25(3) to 25(6) of the Financial Services (Markets in Financial Instruments) Act 2006, covers the obligation to uphold integrity of markets, report transactions and maintain records.

Under Section 37 of the Market Abuse Act, in relation to entry of premises under warrant, states that:

(5) Any document of which possession is taken under this section may be retained –

(a) for a period of three months.

Response to question 6(b)

(b) information identified in 1 (b) above;

Under the FSC’s Guidance Notes for Anti Money Laundering, Requirement 107 states that:

Records of identity must be kept for at least five years from the date when the relationship with the customer has ended. In accordance with Section 10P of the Crime (Money), this is the date of:

²⁷ <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note6-Transaction%20Reporting.pdf>



- a. *the carrying out of the one-off transaction, or the last in a series of linked one-off transactions; or*
- b. *the ending of the business relationship; or*
- c. *the commencement of proceedings to recover debts payable on insolvency.*

Where formalities to end a business relationship have not been undertaken but a period of five years has elapsed since the date when the last transaction was carried out, then the five year retention period commences on the date of the completion of that last transaction.

Regulation 109 states that:

The record requirements are the same regardless of the format in which they are kept or whether the transaction was undertaken by paper or electronic means. Documents held centrally must be capable of distinguishing between the transactions relating to different customers and of identifying where the transaction took place and in what form. The Regulations do not state the location where relevant records should be kept but the overriding objective is for financial sector businesses to be able to retrieve relevant information without undue delay.

Additionally, the FSC has issued a guidance note under Financial Services (Markets in Financial Instruments) 2006 entitled “Provision of Information, Client Reporting and Record Keeping²⁸” of which section 1.2. on “Record Keeping” indicates the type of information that is to be recorded and allows the FSC to advise of recommended timeframes for storage of such information, the minimum being set at five years for MiFID business. Firms are also required to observe certain organisational requirements to ensure that the relevant systems and controls are in place and that record keeping requirements are adhered to.

Under the Financial Services (Markets in Financial Instruments) Act 2006, Section 25(6) and 25(7) - Obligation to uphold integrity of markets, report transactions and maintain records, states that:

(6) Reports under subsection (4)²⁹ shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned.

(7) Reports under subsection (4) are to be made to the competent authority either by the investment firm itself, a third party acting on its behalf or by a trade-matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed. In cases where transactions

²⁸ <http://www.fsc.gi/download/adobe/Investment/MiFID%20Guidance%20Note4-Provision%20of%20Information%20Client%20Reporting%20and%20Record%20Keeping.pdf>

²⁹ Provides general provisions to provide information



are reported directly to the competent authority by a regulated market, an MTF, or a trade-matching or reporting system approved by the competent authority, the obligation on the investment firm laid down in subsection (4) may be waived by the competent authority either generally or individually as he sees fit.

As per the MiFID requirements, there is a requirement for transaction reporting. Specific details of what should be covered in the reports submitted under subsection (4) of the Financial Services (Markets in Financial Instruments) 2006 are covered in the “Transaction Reporting Guidance Note” issued under Financial Services (Markets in Financial Instruments) 2006.

Response to question 6(c)

(c) information identified in 1 (c) above. (as required by Paragraph 7 of the MOU)

As prescribed by the Crime (Money Laundering and Proceeds) Act 2007, any business relationship formed by any person acting in the course of relevant financial business is an established business relationship. Where that person has through the application of customer due diligence measures obtained, satisfactory evidence of the identity of the person who, in relation to the formation of that business relationship, was the applicant for business.

As per the MiFID requirements, there is a requirement for transaction reporting. Specific details of what should be covered in the reports submitted under subsection (4) of the Financial Services (Markets in Financial Instruments) 2006 are covered in the “Transaction Reporting Guidance Note” issued under Financial Services (Markets in Financial Instruments) 2006.

Section 10B of the Crime (Money Laundering and Proceeds) Act requires all firms to seek satisfactory evidence of the identity of those with whom they deal. Unless satisfactory evidence of the identity of potential customers is obtained in good time, the business relationship must not proceed.

Section 10A of the Crime (Money Laundering and Proceeds) Act 2007 details the meaning of customer due diligence measures.

Under the Crime (Money Laundering and Proceeds) Act 2007, Section 10B, Application of customer due diligence measures, states that:

A relevant financial business must apply customer due diligence measures when it–

1(a) establishes a business relationship;

(b) carries out an occasional transaction amounting to 15,000 euro or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;

(c) suspects money laundering or terrorist financing;



(d) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification.

Under Section 10C of the Crime (Money Laundering and Proceeds) Act 2007, Ongoing monitoring, states that:

(1) A relevant financial business must conduct ongoing monitoring of a business relationship.

(2) "Ongoing monitoring" of a business relationship means the scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant financial business's or person's knowledge of the customer, his business and risk profile and keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date.

Under Section 10H of the Crime (Money Laundering and Proceeds) Act 2007– Enhanced customer due diligence and ongoing monitoring, states that:

A relevant financial business must apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring–

(a) in accordance with sections 10I to 10K;

(b) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.

Under Section 10P of the Crime (Money Laundering and Proceeds) Act 2007 in relation to Record Keeping:

(1) Subject to subsection (4), a relevant financial business must keep the records specified in subsection (2) for at least the period specified in subsection (3).

(2) The records are–

(a) a copy of, or the references to, the evidence of the customer's identity obtained pursuant to section 10B, 10C, 10E, 10H, 10I, 10J, 10K or 10M(4);

(b) the supporting records (consisting of the original documents or copies) in respect of a business relationship or occasional transaction which is the subject of customer due diligence measures or ongoing monitoring.

(3) The period is five years beginning on–

(a) in the case of the records specified in subsection (2)(a), the date on which–



- (i) the occasional transaction is completed; or*
- (ii) the business relationship ends; or*

- (b) in the case of the records specified in subsection (2)(b)–*
 - (i) where the records relate to a particular transaction, the date on which the transaction is completed;*
 - (ii) for all other records, the date on which the business relationship ends.*

(4) A relevant financial business who is relied on by another person must keep the records specified in subsection (2)(a) for five years beginning on the date on which he is relied on for the purposes of sections 10B, 10E, 10H, 10I, 10J, 10K or 10M(4) in relation to any business relationship or occasional transaction.

(5) A person referred to in section 10N(2)(a) or (b) who is relied on by a relevant financial business must, if requested by the person relying on him within the period referred to in subsection (4)–

(a) as soon as reasonably practicable make available to the person who is relying on him any information about the customer (and any beneficial owner) which he obtained when applying customer due diligence measures; and

(b) as soon as reasonably practicable forward to the person who is relying on him copies of any identification and verification data and other relevant documents on the identity of the customer (and any beneficial owner) which he obtained when applying those measures.

Under Section 10P of the Crime (Money Laundering and Proceeds) Act 2007, the section on Record Keeping, states that:

(1) Subject to subsection (4), a relevant financial business must keep the records specified in subsection (2) for at least the period specified in subsection (3).

(2) The records are–

(a) a copy of, or the references to, the evidence of the customer's identity obtained pursuant to section 10B, 10C, 10E, 10H, 10I, 10J, 10K or 10M(4);

(b) the supporting records (consisting of the original documents or copies) in respect of a business relationship or occasional transaction which is the subject of customer due diligence measures or ongoing monitoring.

(3) The period is five years beginning on–

(a) in the case of the records specified in subsection (2)(a), the date on which–

(i) the occasional transaction is completed; or



(ii) the business relationship ends; or

(b) in the case of the records specified in subsection (2)(b)–

(i) where the records relate to a particular transaction, the date on which the transaction is completed;

(ii) for all other records, the date on which the business relationship ends.

Under Section 10Q – Policies and Procedures, states that:

(1) A relevant financial business must establish and maintain appropriate and risk-sensitive policies and procedures relating to–

(a) customer due diligence measures and ongoing monitoring;

(b) reporting;

(c) record-keeping;

(d) internal control;

(e) risk assessment and management;

(f) the monitoring and management of compliance with, and the internal communication of, such policies and procedures, in order to prevent activities related to money laundering and terrorist financing.

(2) The policies and procedures referred to in subsection (1) include policies and procedures–

(a) which provide for the identification and scrutiny of–

(i) complex or unusually large transactions;

(ii) unusual patterns of transactions which have no apparent economic or visible lawful purpose; and

(iii) any other activity which the relevant financial business regards as particularly likely by its nature to be related to money laundering or terrorist financing;

(b) which specify the taking of additional measures, where appropriate, to prevent the use for money laundering or terrorist financing of products and transactions which might favour anonymity;

Under Section 18 – Internal reporting procedures, states that:

Internal reporting procedures maintained by a person are in accordance with this section if they include provision–

(a) identifying a person (“the appropriate person”) to whom a report is to be made of any information or other matter which comes to the attention of a person handling relevant financial business and which, in the opinion of the person handling that business, gives rise to a knowledge or suspicion that another person is engaged in money laundering;



(b) requiring that any such report be considered in the light of all other relevant information by the appropriate person, or by another designated person, for the purpose of determining whether or not the information or other matter contained in the report does give rise to such a knowledge or suspicion;

(d) for securing that the information or other matter contained in a report is disclosed to the GFIU where the person who has considered the report under the procedures maintained in accordance with the preceding provisions of this section knows or suspects that another person is engaged in money laundering.

Under Section 20 (1) – Criminal Offences, a person who fails to comply with any, requirement in sections, is guilty of an offence and liable–

(a) on summary conviction, to a fine not exceeding level 5 on the standard scale;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

(2) In deciding whether a person has committed an offence under subsection (1), the court must consider whether he followed any relevant guidance which was at the time issued by a supervisory authority or any other appropriate body.

Under Section 33 of the Financial Services (Investment and Fiduciary Services) Act 1989, power to require information and production of documents, etc states that:

(1) The Authority may require a relevant person–

(a) to attend before the Authority, or before a person duly appointed by the Authority in that behalf (an “appointed person”) at a specified time and place, and to answer questions and otherwise furnish information appearing to the Authority or to the appointed person to be relevant to any investment business or controlled activity carried on by that person;

(b) to furnish the Authority or an appointed person on any occasion or at specified times or intervals, with such information, books or papers as the Authority or the appointed person may reasonably require about any specified matter relating to an investment business or to a controlled activity, being if the Authority or the appointed person so requires, information verified in a specified manner.

(2) Where by virtue of paragraph (b) of subsection (1) the Authority has power to require the production of any books or papers from a relevant person, the Authority shall have the like power to require production of those books or papers from any person who appears to the Authority to be in possession thereof.



(3) The powers conferred by paragraph (b) of subsection (1) or by subsection (2) to require a person to produce books or papers includes power–

(a) to take copies of any book or paper produced;

(b) to require the person who was required to produce such books or papers to provide explanations thereof; and

(c) to require a person to state, to the best of his knowledge and belief, where the said books and papers might be found.

(4) A statement made by a person in compliance with a requirement under this section may be used in evidence against him.

(5) Any power conferred by this section to require the production of books or papers includes power to require the reproduction in a legible form of any record maintained otherwise than in a legible form.

The Financial Services Commission has issued Anti-Money Laundering Guidance Notes based on the requirements of the 3rd Money Laundering Directive and which depict more specific guidelines about what would be required of regulated financial institutions. Section 7.1.2.1 of these Guidance Notes provides specific guidelines on the requirement to ascertain the identity of “Beneficial Owners”:

Response to Question 7

Please identify and explain (and provide copies of) any domestic secrecy or blocking laws, rules and regulations that relate to the collection for, or provision to, foreign authorities of:

Response to question 7(a)

(a) the information identified in 1(a) above;

There are no domestic secrecy or blocking laws that specifically relate to the Financial Services (Markets in Financial Instruments) Act 2006 (identified in the response to question 1(a)) and that covers the obligation to uphold integrity of markets, report transactions and maintain records.

Disclosures under Financial Services (Markets in Financial Instruments) and the Financial Service (Market Abuse) Act are limited to providing disclosures to regulators in the EEA

Response to Question 7(b)

(b) the information identified in 1(b) above;

There are no domestic or blocking laws which specifically relates to the Financial Services (Markets in Financial Instruments) Act however section 49 (4) of the Financial Services (Markets in Financial Instruments) Act 2006 requires the competent authority to ensure that any decision it takes pursuant to this Act is “properly reasoned.”

In relation to the transaction reporting under the MiFID requirements, there are no domestic secrecy or blocking laws that apply to transaction reporting however for firms who are satisfied that a report will be made to the authorities responsible for regulating the market in which the trade is being made there is no requirement to report directly to the Commission, this exemption is not allowed for firms under Article 9 of Directive 2006/49/EC. These records would then be provided centrally in the EEA for transaction monitoring purposes.

Furthermore in relation to section 33 of the Financial Services (Investment and Fiduciary Services) Act also identified in question 1(b) above there is are no domestic secrecy or blocking laws that that restrict the FSC's power to request access to records, take copies of any book or paper produced and to require the person who was required to produce such documentation to provide explanations. Section 34 stipulates that the Authority may exercise its power under section 33 in relation to:

- (a) an applicant for a licence or for authorisation under Part III of the 1998 Act³⁰; or*
- (b) any person who appears to the Authority to be carrying on, or holding himself out as carrying on, any investment business or a controlled activity in or from within Gibraltar.*

³⁰ Financial Services (Markets in Financial Instruments) Act

Under the Market Abuse Act the competent authority can only cooperate with EEA authorities. Powers to assist an EEA authority are stated under Section 22, of the Act:

(1) The competent authority shall cooperate with EEA authorities, whenever necessary, for the purpose of carrying out their functions and duties under the Directive.

(2) The powers referred to in section 16 are exercisable by the competent authority for the purpose of assisting an EEA authority which in exercise of Article 16 of the Directive has requested assistance in connection with enquiries being carried out by that EEA authority or on its behalf for the purposes specified in subsection (3).

(3) The purposes referred to in subsection (2) are the investigation or prosecution of an alleged breach of obligations under the Directive arising in the State of an EEA authority as a result of the transposition in that State of the Directive.

(4) The competent authority shall not exercise the powers conferred by section 16 for the purposes of assisting an EEA authority if the Minister is satisfied that the assistance requested by the EEA authority—

(a) would adversely affect the sovereignty, security or public policy of Gibraltar; or

(b) relates to the same matters and the same persons in respect of whom proceedings in Gibraltar have been initiated or a court in Gibraltar has delivered a judgment.

Under the Financial Services (Markets in Financial Instruments) Act, 2006.

Refusal to cooperate (57)

(1) The competent authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity or to exchange information pursuant to the provisions of this Act only where—

(a) such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of Gibraltar;

(2) Where the competent authority refuses to act on a request for cooperation as set out in subsection (1), it shall notify the requesting competent authority accordingly, providing as detailed information as possible.

Response to Question 7(c)

(a) the information identified in 1(c) above;

There are no specific domestic secrecy or blocking laws that relate to The Crime (Money Laundering and Proceeds) Act 2007 however there is a restriction on disclosure under section 5A (1)

5A.(1) Where the Commission of the European Communities adopts a decision pursuant to article 40(4) of the Money Laundering Directive, the Minister may, by notice in the Gazette, prohibit the disclosure of information, by persons subject to the provisions of this Act, to any person who is situated in the State or Territory to which the notice relates

Section 8.1 of the Money Laundering Guidance Notes refers to the obligation to make a disclosure either internally to the MLRO or by the MLRO to the GFU if there is knowledge or suspicion or has reasonable grounds to suspect.

It should be noted that under section 9(2) of the Terrorism Act, the requirement to make a disclosure is if there is a “suspicion or belief”.

The Register of Companies at Companies House will give details of a company's registered shareholders. However some shareholders may elect to keep ownership of such shares confidential. This is done using a Nominee Shareholder. This information can however be obtained by the FSC from the company manager using its powers under Section 33 of the Financial Services (Investment and Fiduciary Services) Act or any of the powers mentioned above,

Response to question 7(d)

(d) the information identified in 2 above; and

There are no secrecy laws or blocking laws which relate to the taking of evidence under the Evidence Act there must be an application to the Court for an order for evidence to be obtained in Gibraltar and the Court must be satisfied that the evidence to which the application relates to is obtained for the purposes of criminal proceedings which have been instituted by the requesting court.

There are no domestic secrecy or blocking laws that impede or restrict the collection and sharing of information with foreign authorities however in order to be able to use the powers granted under the Criminal Evidence Act and the Mutual Legal Assistance the Request must be issued by a court exercising criminal jurisdiction or a prosecution authority in a State or territory outside Gibraltar; or any other authority which has the function of making such requests for assistance

In relation to the competent authority's power under the Market Abuse Act there are no secrecy or blocking laws however the competent authority may use its powers under the Act if it appears to the competent authority that there are circumstances suggesting that a person is in contravention of Part II of this Act. Furthermore In carrying out this investigation the competent authority can use a statement made by a person in compliance with a requirement imposed by virtue of this section may only be used in evidence against him if that person has himself introduced the statement in evidence. Note that the Commission's powers to disclose are restricted to authorities in the EEA.

Response to Question 7(e)

(e) the information identified in 3(e) above.

There are no secrecy or blocking laws that specifically apply to Regulation 56 of the Financial Services (Markets in Financial Instruments) 2006 however when exchanging information with other competent authorities under subsection (1), may indicate at the time of communication that such information must not be disclosed without its express agreement, and that such information is exchanged solely for the purposes for which it has given its agreement. This power however, is restricted to other EEA authorities.

The Financial Services Commission Act 2007 stipulates that any information acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants however Section 23 (1) (2) allow information to be disclosed if its disclosure appears to the Commission to be necessary:

- (a) to enable the Commission to carry out any of its statutory functions;*
- (b) in the interests of the prevention or detection of crime;*
- (c) in connection with the discharge of any international obligation to which Gibraltar is subject;*
- (d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;*
- (e) to comply with the directions of the Supreme Court; or*
- (f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions:*

Response to Question 8

Please identify and explain (and provide copies of) any specific or general provisions of your laws, rules and regulations which restrict or limit the following uses by foreign authorities of information and documents identified above in 1 (a)-(c), 2 and 3(e) provided by you:

Response to question 8(a)

(a) for the purpose of ensuring compliance with (including investigation of potential violations of) laws and regulations related to:

- (1) 4(a) above;**
- (2) 4(b) above;**
- (3) 4(c) above;**
- (4) 4(d) above.**

Response to question 8(a)1

In Question 4(a), the legislation covered was the Market Abuse Act 2005 Section 16 for Insider dealing, market manipulation, misrepresentation of material information.

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(7) A person shall not under this section be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the Supreme Court.

(8) A person shall not under this section be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless—

- (a) the person to whom the obligation of confidence is owed consents in writing to the disclosure or production; or*
- (b) the making of the requirement was authorised by the Minister.*

Under the Financial Services Commission Act, 2007, Section 23 – Confidentiality, states that:-

(1) Save as may be provided for by any other Act, any information from which an individual or body can be identified and which is acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants.

(2) Save as may be provided for by any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Commission to be necessary—

(a) to enable the Commission to carry out any of its statutory functions;

(b) in the interests of the prevention or detection of crime;

(c) in connection with the discharge of any international obligation to which Gibraltar is subject;

(d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;

(e) to comply with the directions of the Supreme Court; or

(f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions:

provided always any such disclosure is consistent with any applicable Community obligation.

(3) Without prejudice to subsections (1) and (2), any information communicated to the Commission by any Department of the Government of Gibraltar shall, if that Department so requests be regarded as confidential, by the Commission and by its members, officers and servants; and no such information shall be disclosed except in compliance with the directions of the Supreme Court.

Response to Question 8(a)2

Under the Market Abuse Act 2005, Section 14 – Protected Disclosures, states that:-

(1) Any person professionally arranging transactions in securities who reasonably suspects that a transaction might constitute market abuse shall notify the competent authority without delay.

(2) The notification under subsection (1) may be done by mail, electronic mail, teletype or telephone, provided that in the latter case, confirmation is notified by any written form upon request by the competent authority.

(3) The notification referred to in subsection (1) shall contain the following information–

(a) a description of the transactions, including the type of order;

(b) the reasons for the suspicion that the transactions might constitute market abuse;

(c) the means for identification of the persons on behalf of whom the transactions have been carried out, and of other persons involved in the relevant transactions;

(d) the capacity in which the person subject to the notification obligation operates; and

(e) any information which may have significance in reviewing the suspicious transactions, and where that information is not available at the time of notification, the notification shall include at least the reasons why the notifying person suspects that the transactions might constitute market abuse. All remaining information shall be provided to the competent authority as soon as possible.

(4) The competent authority shall transmit information received under subsection (1) immediately to the EEA authority of the regulated markets concerned.



(5) A disclosure is not to be taken to breach any restriction on the disclosure of information (however disclosed) if–

(a) the information or other matter–

(i) causes the person making the disclosure (the discloser) to know or suspect; or

(ii) gives him reasonable grounds for knowing or suspecting, that another person has engaged in market abuse;

(b) the information or other matter disclosed came to the discloser in the course of his trade, profession, business or employment; and

(c) the disclosure is made to the competent authority or to a nominated officer as soon as is practicable after the information or other matter comes to the discloser.

(6) A disclosure to a nominated officer is a disclosure which is made to a person nominated by the discloser's employer to receive disclosures under this section, and is made in the course of the discloser's employment and in accordance with the procedure established by the employer for the purpose.

(7) For the purposes of this section, references to a person's employer include any body, association or organisation (including voluntary organisation) in connection with whose activities the person exercises a function (whether or not for gain or reward) and references to employment must be construed accordingly.

Under the Financial Services (Takeover Bids) Act 2006, Section 16 –
Disclosure states:-

(1) The Minister may make regulations–

(a) to ensure that a bid is made public in such a way as ensures market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information;

(b) providing for the disclosure of all information and documents required by sections 13 in such manner as ensures that they are both readily and promptly available to holders of securities at least on the regulated markets of which the offeree company's securities are admitted to trading and to the representatives of the employees of the offeree company and the offeror or, where there are no such representatives, to the employees themselves.



(2) Regulations made under subsection (1) may provide for such consequential matters, including fees, offences and penalties as the Minister may deem appropriate.

Furthermore under the Financial Services Commission Act Section 23 also deals with confidentiality.

Response to Question 8(a)3

Under Financial Services (Markets in Financial Instruments) Act 2006, Section 56 – Exchange of Information³¹, states:

(1) The competent authority shall supply the competent authorities of other member States with the information required for the purposes of carrying out their duties pursuant to the provisions of the directive.

(2) The competent authority, when exchanging information with other competent authorities under subsection (1), may indicate at the time of communication that such information must not be disclosed without its express agreement, and that such information is exchanged solely for the purposes for which it has given its agreement.

(3) The competent authority-

(a) may transmit any information received under this Act to the competent authority of other member States;

(b) shall not transmit such information to other bodies or persons without the express agreement of the competent authority which disclosed it; and

(c) shall use the information solely for the purposes for which those authorities give their agreement, except in duly justified circumstances, in which case the competent authority shall immediately inform the authority that sent the information.

On a general note, under the Evidence Act 1948, Section(s) 9 and 10 state:-

Application to court for assistance in obtaining evidence for civil proceedings in the other court.

9. Where an application is made to the court for an order for evidence to be obtained in Gibraltar and the court is satisfied—

(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction in a country or territory outside Gibraltar; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that

³¹ The Financial Services Commission Act 2007 also covers Collective Investment Schemes

court is contemplated, the court shall have the powers conferred on it by the following provisions of this Act.

Power of court to give assistance.

10. (1) Subject to the provisions of this section, the court shall have power, on any such application as is mentioned in section 9 by order to make such provision for obtaining evidence in Gibraltar as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

Response to question 8(a)4

Under the Evidence Act 1948, Section 9 (b), states that: *Application to court for assistance in obtaining evidence to be obtained in Gibraltar and the court is satisfied-*

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the court shall have the powers conferred on it by the following provisions of this Act.

Section 10 (1) states that:

Subject to the provisions of this section, the court shall have power, on any such application as is mentioned in section 9 by order to make such provision for obtaining evidence in Gibraltar as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) but subject to the provisions of this section, an order under this section may, in particular, make provision-

- (a) for the examination of witnesses, either orally or in writing;*
- (b) for the production of documents;*
- (c) for the inspection, photographing, preservation, custody or detention of any property;*
- (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;*
- (e) for the medical examination of any person;*
- (f) without prejudice to paragraph (e), for the taking and testing of samples of blood from any person.*

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court (whether or not proceedings of the same description as those to



which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

Furthermore Section 23 of the Financial Services Commission Act also covers this.

Response to Question 8(b)

(b) for the purpose of conducting a civil or administrative enforcement proceeding, assisting in a self-regulatory organization's surveillance or enforcement activities or assisting in a criminal prosecution. (As required by Paragraph 10(a) of the MOU)³²

Although restrictions are mentioned above, there is nothing towards the effect that other MMOU's cannot disclose any information in any criminal proceedings in that particular country under paragraph 10(a) of the MOU.

Under the Evidence Act 1948, Section 10 – Power of court to give assistance, states:

(1) Subject to the provisions of this section, the court shall have power, on any such application as is mentioned in section 9 by order to make such provision for obtaining evidence in Gibraltar as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) but subject to the provisions of this section, an order under this section may, in particular, make provision–

(a) for the examination of witnesses, either orally or in writing;

(b) for the production of documents;

(c) for the inspection, photographing, preservation, custody or detention of any property;

(d) for the taking of samples of any property and the carrying out of any experiments on or with any property;

(e) for the medical examination of any person;

(f) without prejudice to paragraph (e), for the taking and testing of samples of blood from any person.



(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(4) An order under this section shall not require a person–

(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power.

(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct, money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the court.



Response to Question 9

Please identify and explain (and provide copies of) any general or specific provisions of your laws, rules and regulations that provide for the confidentiality of:

Response to question 9(a)

(a) requests for assistance made to you by foreign authorities, the contents of such requests, and any matters arising under such requests, including consultations between or among the authorities, and unsolicited assistance; and (As required by Paragraph 11(a) of the MOU³³).

Confidentiality provisions for staff of Commission

Under the Financial Services Commission Act 2007, Section 23 – Confidentiality states:

(1) Save as may be provided for by any other Act, any information from which an individual or body can be identified and which is acquired by the Commission in the course of carrying out its functions shall be regarded as confidential by the Commission and by its members, officers and servants.

(2) Save as may be provided for by any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Commission to be necessary–

(a) to enable the Commission to carry out any of its statutory functions;

(b) in the interests of the prevention or detection of crime;

(c) in connection with the discharge of any international obligation to which Gibraltar is subject;

(d) to assist, in the interests of the public, any authority which appears to the Commission to exercise in a place outside Gibraltar functions corresponding to those of the Commission;

(e) to comply with the directions of the Supreme Court; or

³³ Paragraph 11(a) states – Each Authority will keep confidential requests made under this Memorandum of Understanding, the contents of such requests, and any matters arising under this Memorandum of Understanding, including consultations between or among the Authorities, and unsolicited assistance. After consultation with the Requesting Authority, the Requested Authority may disclose the fact that the Requesting Authority has made the request if such disclosure is required to carry out the request



(f) for the purpose of assisting or enabling any person appointed to carry out a review in accordance with section 13 to discharge his functions:

provided always any such disclosure is consistent with any applicable Community obligation.

(3) Without prejudice to subsections (1) and (2), any information communicated to the Commission by any Department of the Government of Gibraltar shall, if that Department so requests be regarded as confidential, by the Commission and by its members, officers and servants; and no such information shall be disclosed except in compliance with the directions of the Supreme Court.

(4) A person who discloses information, or who causes or permits the disclosure of information, in contravention of this section, is guilty of an offence and liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both;

(b) on summary conviction, to a fine not exceeding £500.

Furthermore, the Commission staff handbook states the confidentiality provisions and this needs to be signed by staff.

GFIU, Supervisors, investment firms etc. are to report evidence of money laundering. This is acknowledged under *Section 20 of the Crime (Money Laundering and Proceeds) Act*.

Under Section 58 of the Financial Services (Investments and Fiduciary Services) Act 1989, states that:-

(1) Save as may be provided by any other Act, any information from which an individual or body can be identified which is acquired by the Authority in the course of carrying out its functions (whether under this or any other Act) shall be regarded as confidential by the Authority and by its members, officers and servants.

(2) Save as may be provided by any other Act, no such information as is referred to in subsection (1) shall be disclosed, without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the Authority to be necessary—

(a) to enable the Authority to carry out any of its statutory functions; or

(b) in the interests of the prevention or detection of crime; or

(c) in connection with the discharge of any international obligation to which Gibraltar is subject; or

(d) to assist, in the interests of the public, any authority which appears to the Authority to exercise in a place outside Gibraltar functions corresponding to those of the Authority; or

(e) to comply with the directions of the Supreme Court: Provided that the Authority shall not disclose information received by virtue of the provisions of Council Directive 92/30/EEC unless it is satisfied that to do so would not contravene the provisions of Article 12 of Council Directive 77/780/EEC.

Confidentiality provisions for Commission duties

Under Financial Institutions (Prudential Supervision) Act, 1997, Schedule 2 (Sections 8, 9 and 10) there are certain provisions with how the Commission should deal with information/requests from foreign authorities:-

(8) Notwithstanding paragraphs 2 to 5, member States may, with the aim of strengthening the stability, including integrity, of the financial system, authorise the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches in company law. Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met: - the information shall be for the purpose of performing the task referred to in the first subparagraph, - information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2, - where the information originates in another member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Where, in a member State, the authorities or bodies referred to in the first subparagraph perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector the possibility of exchanging information, provided for in the first subparagraph may be extended to such persons under the conditions stipulated in the second subparagraph.

In order to implement the final indent of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the competent authorities which have disclosed the information, the names and precise responsibilities of the persons to whom it is to be sent. Member States shall communicate to the Commission and to the other member States the names of the authorities or bodies which may receive information pursuant to this paragraph.

(9) This Article shall not prevent a competent authority from transmitting to central banks and other bodies with a similar function in their capacity as monetary authorities information intended for the



performance of their tasks, nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of paragraph 5. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article.

(5) Sections 17, 18 and 19 apply to any exercise of the powers contained in section 16 for the purposes of this section.

(6) The competent authority shall inform the Minister of all requests for co-operation received by it from an EEA authority and any action that it proposes to take under this section.

Response to question 9(b)

(b) documents and information received from foreign authorities. (As required by Paragraph 11(b)³⁴ of the MOU).

Under the Market Abuse Act 2005, there are exceptions from restrictions on disclosure in section 19, in relation to EEA authorities:

(2) Where information is supplied to the primary recipient (as defined in section 18(3))³⁵ by an EEA authority, that information may not, without the consent of the supplying EEA authority, be disclosed to any person except for the purposes of the exercise by the primary recipient of his functions under this Act or any relevant proceedings taken thereto.

Under the Financial Services Commission Act 2007, Section 23 (as seen in response to question 9(a)) refers to this.

Under Financial Institutions (Prudential Supervision) Act, 1997, Schedule 2 (Section 10) refers to confidentiality provisions in respect of information received from foreign regulators.

(10) This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 2 to 5 to a clearing house or other similar body recognised under national law for the provision of clearing or settlement services for one of their member States' markets if they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults by market participants. The information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2.

³⁴ Paragraph 11(b) states – The Requesting Authority will not disclose non-public documents and information received under this Memorandum of Understanding, except as contemplated by paragraph 10(a) or in response to a legally enforceable demand. In the event of a legally enforceable demand, the Requesting Authority will notify the Requested Authority prior to complying with the demand, and will assert such appropriate exemptions or privileges with respect to such information as may be available. The Requesting Authority will use its best efforts to protect the confidentiality of non-public documents and information received under this Memorandum of Understanding.

³⁵ The “primary recipient” means, as the case may be (a) the competent authority; (b) any officer, servant or agent of the competent authority.



Member States shall, however, ensure that information received under paragraph 3 may not be disclosed in the circumstances referred to in this paragraph without the express consent of the competent authorities which disclosed it.

Under the Financial Services (Markets in Financial Instruments) Act 2006, Section 56 on Exchange of information also makes reference to this.

- (3) The competent authority -*
- (a) may transmit any information received under this Act to the competent authority of other member States;*
 - (b) shall not transmit such information to other bodies or persons without the express agreement of the competent authority which disclosed it.*