

# MFSA

MALTA FINANCIAL SERVICES AUTHORITY

## Consultation Procedure

### Consultation on the proposed changes to the Investment Services Rules largely to transpose the UCITS IV Directive

*The MFSA invites comments by not later than 1<sup>st</sup> June, 2011 on the draft revised Investment Services Rules for Retail Collective Investment Schemes attached to this document which transpose various articles of the UCITS IV Directive as detailed further in this Circular. Interested parties are to send their comments in writing addressed to the Director – Securities and Markets Supervision Unit, MFSA. The industry will be required to comply with the new requirements by 1<sup>st</sup> July 2011.*

#### Explanatory Note

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holders and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

#### Background

Reference is made to the Feedback Statement issued on 13<sup>th</sup> April 2011 wherein the Authority had advised that after considering the replies received to its original consultation dated 14<sup>th</sup> March 2011, regarding the implementation of the UCITS IV Directive (hereinafter referred to as “the Directive” or “Directive 2009/65/EC”) into Maltese Law, it concurred that the Directive would be best transposed and implemented if applied through the Investment Services Rules. Consequently, the MFSA has reconsidered the approach of transposing the requirements of the Directive primarily through Legal Notices. Furthermore, it decided that in order to be in a position to effect any required clarifications to the applicable requirements without undue delay should the need arise, the main provisions of the Directive will be transposed by way of Investment Services Rules.

The purpose of this circular is to provide a summary of the proposed revisions to the Investment Services Rules for Retail Collective Investment Schemes (hereinafter referred to as “the Rule Book”), to cater for the transposition of part of the Directive. Revisions have also been made to certain sections of the Rule Book to reflect the content of the Companies Act (SICAV Incorporated Cell Companies) Regulations, 2010 and the Investment Services Act (Contractual Funds) Regulations, 2011. This circular also serves the purpose of a consultation document on the proposed amendments to the Rule Book which are explained hereunder.

## **Part A to the Investment Services Rules for Retail Collective Investment Schemes**

### **Part A of the Rule Book is being amended primarily to:**

- [i] Replace the references made to Directive 85/611/EEC with reference to the recast Directive 2009/65/EC, the relevant Level II Implementing Measures and the ESMA Level III Guidelines;
- [ii] Replace all references to Undertakings for Collective Investment in Transferable Securities and Management Companies Regulations, 2004 with reference to the new proposed Investment Services Act (Marketing of UCITS) Regulations, 2011;
- [iii] Replace all references to the “Simplified Prospectus” with references to the “Key Investor Information Document/ (KIID)”;
- [iv] Revise Section 4 by:
  - Updating Sections 4.1 and 4.2 to refer to the Investment Services Act (Contractual Funds) Regulations, 2011 and the Companies Act (SICAV Incorporated Cell Companies) Regulations, 2010;
  - Updating Section 4.2 entitled “Maltese UCITS Schemes” to reflect the provisions of Directive 2009/65/EC;
  - Updating Section 4.4 entitled “European UCITS Schemes” to reflect the provisions of Directive 2009/65/EC and the Investment Services Act (Marketing of UCITS) Regulations, 2011;
- [v] Reorganise Section 7 into two sections namely: Section 7.1 dealing with Service Providers of Maltese Non-UCITS Retail Schemes and Section 7.2 dealing with Service Providers of Maltese UCITS Schemes;
- [vi] Revise Section 9 to include the application documents required in the case of Incorporated Cell Companies and Incorporated Cells;
- [vii] Revise Section 12 to reflect the provisions of Directive 2009/65/EC, the Investment Services Act (Marketing of UCITS) Regulations, 2011 and Regulation No. 584/2010<sup>1</sup>;
- [viii] Revise Section 13 to reflect the provisions of the Investment Services Act (Licence and Other Fees) Regulations, 2011.

*The proposed changes to Part A are being indicated by way of tracked changes.*

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<sup>1</sup> Commission Regulation (EU) No 584/2010 of 1<sup>st</sup> July, 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities.

## **Schedule A to Part A of the Investment Services Rules for Retail Collective Investment Schemes**

Schedule A has been revised to cater for the possibility of forming a Retail Collective Investment Scheme as an Incorporated Cell Company. Accordingly, Section 1 has been reorganised into two Sections namely Section 1 Form 1 containing details of the Scheme and Section 1 Form 2 containing details of an Incorporated Cell operating as a Sub-Fund of a Scheme. The Checklist has also been updated to reflect the revisions which were made in Section 9 of Part A of the Rule Book.

*The proposed changes to Schedule A are being highlighted in the relevant document.*

## **Schedule C to Part A of the Investment Services Rules for Retail Collective Investment Schemes**

The contents of the original Schedule C have been replaced with the contents of the Notification Form prescribed in *Annex I* of Regulation No. 584/2010.

## **Schedule D to Part A of the Investment Services Rules for Retail Collective Investment Schemes**

Schedule D has been updated to reflect the provisions of Directive 2009/65/EC, the Investment Services Act (Marketing of UCITS) Regulations, 2011 and Regulation No. 584/2010.

*The proposed changes to Schedule D are being indicated by way of tracked changes.*

## **Part B to the Investment Services Rules for Retail Collective Investment Schemes**

### **Part BI of the Rule Book is being amended primarily to:**

- [i] Replace the references made to Directive 85/611/EEC with reference to the recast Directive 2009/65/EC, the relevant Level II Implementing Measures and the ESMA Level III Guidelines;
- [ii] Replace all references to Undertakings for Collective Investment in Transferable Securities and Management Companies Regulations, 2004 with reference to the new proposed Investment Services Act (Marketing of UCITS) Regulations, 2011;
- [iii] Replace all references to the “Simplified Prospectus” with references to the “Key Investor Information Document/ (KIID)”;
- [iv] Include new points in Section 1.2. namely a new point (v) to refer to Incorporated Cell Companies and Incorporated Cells and a new point (vii) to refer to a new Appendix VII dealing with Money Market Funds. The original point (v) dealing with Feeder Funds and Funds of Funds has been renumbered as point (vi);
- [v] Renumber the original Section 15 as Section 16 and introduce a new Section 15 providing supplementary conditions for schemes established as umbrella funds and set up as Incorporated Cell Companies as referred to in Section 1.2(v).

*The proposed changes to Part BI are being indicated by way of tracked changes.*

**Part BII of the Rule Book is being amended primarily to:**

- [i] Replace the references made to Directive 85/611/EEC with reference to the recast Directive 2009/65/EC, the relevant Level II Implementing Measures and the ESMA Level III Guidelines;
- [ii] Replace all references to Undertakings for Collective Investment in Transferable Securities and Management Companies Regulations, 2004 with reference to the new proposed Investment Services Act (Marketing of UCITS) Regulations, 2011;
- [iii] Revise Section 1 by:
  - including, in Section 1.1, references to the Investment Services Act (UCITS Management Company Passport) Regulations, 2011; the Investment Services Act (Marketing of UCITS), Regulations, 2011 and the Investment Services Act (UCITS Merger) Regulations, 2011;
  - amending Section 1.2 to:
    - [a] include in point (iii) a reference to a new Appendix VIII prescribing supplementary licence conditions applicable to self-managed schemes;
    - [b] include a new point (v) to refer to a new section on Incorporated Cell Companies and Incorporated Cells;
    - [c] renumber the original point (v) dealing with Feeder Funds and Funds of Funds as point (vi);
    - [d] include a new point (vii) to refer to supplementary licence conditions for schemes which qualify as Feeder UCITS or Master UCITS;
    - [e] include a new point (viii) to refer to a new Appendix dealing with Money Market Funds;
- [iv] Revise Section 2 by:
  - reflecting the provisions of Directive 2009/65/EC and the Investment Services Act (UCITS Management Company Passport) Regulations, 2011 in SLCs 2.1 to 2.5;
  - reflecting the provisions of *Article 13* of Directive 2009/65/EC in SLCs 2.6 to 2.10;
- [v] Include a new Section 3A to transpose/implement the provisions of *Articles 85* and *87* of Directive 2009/65/EC;
- [vi] Rename Section 6 and reorganise it into two sections as follows:

- Section 6.1 – “The Prospectus” (SLCs 6.1.1 to 6.1.18) to include the following Articles of Directive 2009/65/EC:

*Articles 13(1)(i), 54(3), 55(3), 63(1), (3) and (5), 69(1) and (2), 70(1) (2) and (3), 71(1) and (2), 72, 74, 75(2) and (4).*

The Section also includes a reference to Regulation No. 583/2010.

- Section 6.2 – “The Key Investor Information Document” (SLCs 6.2.1 to 6.2.18) to include the following Articles of Directive 2009/65/EC:

*Articles 78, 79, 80, 81, 82 and 118(2).*

The Section also includes a reference to Regulation No. 583/2010 and to the Level III Guidelines issued by ESMA on the Key Investor Information Document.

- [vii] Rename Section 8 and include the following Articles of Directive 2009/65/EC:

*Articles 63(4), 70(4), 76 and 77.*

- [viii] Revise Section 11 to reflect the provisions of Directive 2009/65/EC and the Investment Services Act (Marketing of UCITS) Regulations, 2011. In particular this Section includes the following Articles of Directive 2009/65/EC:

*Articles 93(1) to (3) and 94(1)(b).*

- [ix] Revise Section 12 to reflect *Article 84* of Directive 2009/65/EC in SLC 12.6.

- [x] Replace the contents of Section 13 with a reference to a new Appendix VI on Risk Management, Counterparty Risk Exposure and Issuer Concentration applicable to Maltese Retail Collective Investment Schemes set up as Maltese UCITS.

- [xi] Revise Section 16 to reflect the provisions of Directive 2009/65/EC on self-managed schemes, in particular the following Articles:

*Articles 12, 13, 14(1) and 29(1), (2) and (3).*

This section also refers to a new Appendix VIII dealing with supplementary licence conditions applicable to self-managed schemes and transposing in part the requirements prescribed by Directive 2010/43/EU<sup>2</sup>. Furthermore, the SLCs dealing with the Investment Committee which were included in the original Section 16 have been included in Appendix VIII.

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<sup>2</sup> Commission Directive 2010/43/EU of 1<sup>st</sup> July, 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

[xii] Renumber the original Section 18 as Section 19 and introduce a new Section 18 providing supplementary conditions for schemes established as umbrella funds and set up as Incorporated Cell Companies as referred to in Section 1.2.

[xiii] Include a new Section 20 providing supplementary conditions for schemes which qualify as Feeder UCITS or Master UCITS. This section includes the following Articles of Directive 2009/65/EC:

*Articles 58, 59, 60, 61(1), 62(1) and (2), 63, 64, 65, 66 and 67.*

This section also includes the following Articles of Directive 2010/42/EU<sup>3</sup>:

*Articles 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24(1), 25, 27 and 28.*

[xiv] Renumber Section 19 dealing with use of repurchase/ reverse repurchase and stock borrowing/ stock lending agreements as Section 21.

*The proposed changes to Part BII are being indicated by way of tracked changes.*

#### **Appendix I to Part B of the Investment Services Rules for Retail Collective Investment Schemes**

Annex II of Appendix I has been revised to include the provisions of *Annex I Schedule A* of Directive 2009/65/EC. Annex IV dealing with the Simplified Prospectus has been deleted.

*The proposed changes to Appendix I are being indicated by way of tracked changes.*

#### **Appendix II to Part B of the Investment Services Rules for Retail Collective Investment Schemes**

Appendix II has been revised to conform to the provisions of *Annex I Schedule B* of Directive 2009/65/EC.

*The proposed changes to Appendix II are being indicated by way of tracked changes.*

#### **Appendix III to Part B of the Investment Services Rules for Retail Collective Investment Schemes**

Appendix III has been revised to conform to the provisions of the Investment Services Act (Contractual Funds) Regulations, 2011.

*The proposed changes to Appendix III are being indicated by way of tracked changes.*

#### **Appendix VI to Part B of the Investment Services Rules for Retail Collective Investment Schemes**

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<sup>3</sup> Commission Directive 2010/42/EU of 1<sup>st</sup> July, 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure

Appendix VI has been renamed as “Rules on Risk Management, Counterparty Risk Exposure and Issuer Concentration applicable to Maltese Retail Collective Investment Schemes set up as Maltese UCITS”. This Appendix implements:

*Articles 5(2), 23(4) Para 2, 40, 41, 42, 43, 44 and 45 of Directive 2010/43/EU; and*

*Guidelines on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS [CESR/10-788]; and*

*Guidelines to competent authority and UCITS management companies on risk measurement and the calculation of global exposure for certain types of structured UCITS [ESMA/2011/112].*

### **Appendix VII to Part B of the Investment Services Rules for Retail Collective Investment Schemes**

This new Appendix VII prescribes the supplementary conditions applicable to schemes set up as money market funds. This Appendix implements:

*Article 50 of Directive 2009/65/EC; and*

*Guidelines on a common definition of European money market funds [CESR/10-049].*

### **Appendix VIII to Part B of the Investment Services Rules for Retail Collective Investment Schemes**

This new Appendix VIII prescribes the supplementary licence conditions applicable to retail collective investment schemes set up as self-managed UCITS Schemes. It is further organised into four Annexes as follows:

- Annex I includes the provisions regulating the conflict of interests policy which must be implemented on an ongoing basis by a Scheme. This Annex includes the following articles of Directive 2010/43/EC:

*Articles 17, 18, 19, 20 and 21.*

- Annex II includes the conduct of business rules which must be implemented on an ongoing basis by a Scheme. This Annex includes the following articles of Directive 2010/43/EC:

*Articles 22, 23, 24, 25, 26, 27, 28 and 29.*

- Annex III includes the provisions regulating the establishment and the role of the Investment Committee which must be set up by the Scheme. The SLCs included under this Annex are SLCs 16.7 to 16.11 which were originally included in Part BII of these Rules.

- Annex IV stipulates the provisions regulating the risk management function which must be implemented on an ongoing basis by a Scheme. This Annex includes the following articles of Directive 2010/43/EC:

*Articles 12, 38 and 39.*

## **Contacts**

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## **Communications Unit**

**13<sup>th</sup> May 2011**