

## INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS

### PART BIV: STANDARD LICENCE CONDITIONS APPLICABLE TO INVESTMENT SERVICES LICENCE HOLDERS WHICH QUALIFY AS CUSTODIANS

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#### Introduction

*Part BIV of the Investment Services Rules for Investment Services Providers applies to Investment Services Licence Holders which have been authorised to act as Custodians of Collective Investment Schemes and are therefore in possession of a Category 4 Investment Services Licence issued in terms of the Investment Services Act.*

#### 1. General Requirements applicable to Custodians of Collective Investment Schemes

The Standard Licence Conditions prescribed in this section shall apply where the Licence Holder proposes to act as Custodian of a Collective Investment Scheme which is third-party managed or self-managed.

#### Eligibility Criteria

1.01 The Licence Holder is required to have a Category ~~4a or 4b~~ Investment Services Licence and an established place of business in Malta.

1.02 ~~A Category 4a Licence Holder shall be:~~

- ~~a. A credit institution, constituted and licenced under the Laws of Malta; or~~
- ~~b. A branch established in Malta, of a credit institution authorised in an EU Member State or EEA State; or~~
- ~~c. A branch established in Malta of an overseas credit institution which is subject to prudential requirements at least equivalent to the requirements applicable to Maltese credit institutions; or~~
- ~~d. A company incorporated in Malta which is wholly owned by a credit institution, provided that the liabilities of the Licence Holder are guaranteed by a credit institution and the credit institution is either a Maltese credit institution or is an overseas credit institution which is subject to prudential requirements at least equivalent to the requirements applicable to Maltese credit institutions; or~~
- ~~e. A company incorporated in Malta which is wholly owned by a Maltese or~~

**Comment [IA1]:** SLC 1.02 has been replaced by regulations 13, 25 and 43(3) of the proposed regulations

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~~foreign institution or company which is deemed by the MFSA to be an institution or company which provides unit holders with protection equivalent to that provided by a Licence Holder fulfilling the requirements of (a), (b), (c) or (d) above and provided the liabilities of the company acting as Custodian are guaranteed by the institution or company and the institution or company has paid-up share capital of EUR 5 million or its equivalent in foreign currency; or~~

- f. ~~An investment firm in Malta or a branch of an investment firm established in another Member State or EEA State subject to capital adequacy requirements in accordance with Directive 2013/36/EU and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 28 (2) of Directive 2013/36/EU.~~

~~In the case of (d) and (e) above, the Licence Holder shall be required to have a minimum of one Director on its Board who is resident in Malta.~~

~~A Category 4a Licence Holder shall be eligible to act as custodian of all types of collective investment schemes.~~

**Comment [IA2]:** Replaced by regulation 4(2) of the proposed regulations

- 1.03 ~~A Category 4b Investment Services Licence Holder shall be one of the entities listed in SLC 1.02 or:~~

**Comment [IA3]:** SLC 1.03 has been replaced by regulation 36 of the proposed regulations

- a. ~~a Category 2 Licence Holder (excluding fund managers); or~~  
b. ~~a Recognised Fund Administrator~~

~~A Category 4b Licence Holder shall be eligible to act as a custodian to:~~

- i. ~~AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with Article 21(8)(a) of the AIFM Directive or which generally invest in issuers or non-listed companies in order to acquire control of such companies in accordance with Article 26 of the AIFM Directive; and~~
- ii. ~~Third country AIFs, which are marketed in the EU/EEA in terms of Article 36 of the AIFM Directive.~~

- 1.04 The Licence Holder shall commence its Investment Services Business within twelve months of the date of issue of the Category 4 Investment Services Licence.

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If, for any reason the Licence Holder is not in a position to comply with this condition, it shall notify the MFSA in writing setting out the reason/s for such a delay together with an updated business plan indicating the proposed date of commencement of business. On the basis of the information provided and the circumstances of the case, the MFSA may decide to suspend or cancel the Licence in accordance with the relevant provisions of the Act.

- 1.05 The Licence Holder shall co-operate in an open and honest manner with the MFSA and inform it promptly of any relevant information. The Licence Holder shall supply the MFSA with such information and returns as the MFSA requires.
- 1.06 Where a Standard Licence Condition demands that the Licence Holder notifies the MFSA of an event, such notification shall be made to the MFSA formally, in a durable medium. The request to notify the MFSA of an event shall not be satisfied merely by the fact that the information which ought to be notified to the MFSA is included in a standard regulatory return.
- 1.07 The business of the Licence Holder shall be effectively directed or managed by at least two individuals in satisfaction of the “dual control” principle. Such persons shall be of sufficiently good repute and sufficiently experienced so as to ensure the sound and prudent management of the Licence Holder.

Moreover, the Licence Holder shall take reasonable steps to ensure continuity and regularity in the performance of Investment and Ancillary Services. To this end, the Licence Holder shall employ appropriate and proportionate systems, resources and procedures.

- 1.08 The Licence Holder shall notify the MFSA in writing of:
  - a. a change in the name or business name (if different) at least one month in advance of the change being made.
  - b. a change of address: at least one month in advance.
  - c. the departure of a Director or Senior Manager: within 14 days of the departure. The Licence Holder shall also request the Director or Senior Manager to confirm to MFSA that their departure had no regulatory implications or to provide relevant details, as appropriate. A copy of such request shall be provided to MFSA together with the Licence Holder’s notification of departure.
  - d. the ultimate beneficial ownership of any party directly or indirectly controlling 10 per cent or more of the Licence Holder’s share capital on becoming aware of the situation.

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- e. any acquisitions or disposals of shares which fall within the disclosure provisions of Article 10 of the Act – immediately upon becoming aware of the proposed acquisition or disposal. It should be noted that MFSA has the right to object to such an acquisition.
- f. the provision of a related company loan, within 15 days of making the loan; provided that Licence Holder which falls under any one of the following categories need not comply with these requirements:
  - i. credit institutions licensed in terms of the Banking Act, 1994; or
  - ii. financial institutions licensed in terms of the Financial Institutions Act, 1994.
- g. any proposed material change to its business (whether that business constitutes licensable activity under the Act or not) – at least one month before the change is to take effect (where a new or amended Investment Services Licence is required, the new business shall not begin until the new Investment Services Licence has been granted or the amendment has been approved).
- h. any evidence of fraud or dishonesty by a member of the Licence Holder’s staff immediately upon becoming aware of the matter.
- i. a decision to make a material claim on any insurance policy held in relation to the Licence Holder’s business. Notification should be provided as soon as the decision is taken.
- j. any actual or intended legal proceedings of a material nature by or against the Licence Holder immediately after the decision has been taken or on becoming aware of the matter.
- k. any material changes in the information supplied to the MFSA – immediately upon becoming aware of the matter. This shall include the obligation to notify the MFSA on a continuous basis of any changes or circumstances which give rise to the existence of close links, as defined in Appendix 9, between the Licence Holder and any other person.
- l. the fact, where applicable, that it has not provided any Investment Service or carried out any investment activity for the preceding six months, setting out the reasons for such inactivity and providing a business plan for future activity.
- m. any other material information concerning the Licence Holder, its business or its staff in Malta or abroad – immediately upon becoming aware of the matter.

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1.09 The Licence Holder shall obtain the written consent of the MFSA before:

- a. making any change to its share capital or the rights of its shareholders.
- b. establishing a branch in Malta or abroad.
- c. acquiring 10 per cent or more of the voting share capital of another company.
- d. taking any steps to cease its Investment Services business.
- e. agreeing to sell or merge the whole or any part of its undertaking.
- f. making an application to a Regulator abroad to undertake any form of licensable activity outside Malta.
- g. the appointment of a Director or Senior Manager responsible for the Investment Services business of the Licence Holder or of a Compliance Officer in terms of SLC 1.22 and/ or Money Laundering Reporting Officer in advance. The request for consent to the appointment shall be accompanied by a Personal Questionnaire (“PQ”), in the form set out in Schedule F to Part A of these Rules – duly completed by the person proposed, which shall in the case of a proposed Compliance Officer and/ or Money Laundering Reporting Officer, include sufficient details of the individual’s background, training and/ or experience relevant to the post, to enable an adequate assessment by the MFSA.

In the case of a proposed Compliance Officer and/or Money Laundering Reporting Officer, the request shall also be accompanied by the Competency Form set out in Schedule I to Part A of these Rules.

Where the person proposed had within the previous five years submitted a PQ to the MFSA, the request for consent need not be accompanied by a new PQ. In such instances, it shall be accompanied by a confirmation by the proposed person as to whether the information included in the PQ previously submitted is still current, and indicating any changes or up-dates thereto. This confirmation is to be countersigned by an authorised official of the Licence Holder, confirming that he/she has seen the said PQ.

For the purposes of the above and (h) below, ‘Senior Manager’ should be interpreted as the person occupying the most senior role following that of Director, so that in the case where there are various management grades, it is the most senior manager who will require the MFSA’s authorisation.

- h. the change in the responsibilities of a Director or Senior Manager in advance. The request for consent of the change in responsibilities of a Director or Senior

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Manager shall be accompanied by a PQ unless the individual concerned had within the previous three years submitted a PQ to the MFSA in connection with another role occupied by such individual with the same Custodian, in which case it shall be accompanied by a confirmation by the Director or Senior Manager as to whether the information included in the PQ previously submitted is still current, and indicating any changes or up-dates thereto.

A change in the responsibilities of a Director or Senior Manager should only be notified to the MFSA when such a change is material, which shall include a change in the status or seniority of the person concerned (upwards or downwards).

The request for authorisation shall include all relevant details in order to enable the MFSA to assess whether the persons concerned are sufficiently competent to undertake such activities. For this purpose, details of relevant experience, training and/or qualifications will be required. Applicants should also complete Sections 4, 5, 6 and 7 of the Application for an Investment Services Licence (Schedule A to these Rules).

- 1.10 The Licence Holder shall maintain sufficient records to be able to demonstrate compliance with the conditions of its Investment Services Licence.
- 1.11 The Licence Holder shall co-operate fully with any inspection or other enquiry, or compliance testing carried out by the MFSA, or an inspector acting on its behalf.
- 1.12 The Licence Holder shall pay promptly all amounts due to the MFSA.
- 1.13 The Licence Fee shall be payable by the Licence Holder on the day the Licence is first issued, and thereafter a supervisory fee will become due annually within one week from the anniversary of that date.
- 1.14 The Licence Holder shall notify the MFSA of any breach of the conditions of the Licence as soon as it becomes aware of the breach.
- 1.15 If so required by the MFSA, the Licence Holder shall do everything in its power to delay the cessation of its Investment Services business, or the winding-up of such business so as to comply with conditions imposed by the MFSA, in order to protect the interests of customers.
- 1.16 A request for a variation of a Licence by the Licence Holder shall be submitted to the MFSA in writing, giving details of the variation requested and the reasons thereof.

### **General Organisational Requirements**

- 1.17 The Licence Holder shall:

- a. establish, implement and maintain decision-making procedures and an organisational structure which clearly and in a documented manner specifies reporting lines and allocates functions and responsibilities;
- b. ensure that its relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities;
- c. establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the Licence Holder;
- d. employ personnel with the skills, knowledge and expertise necessary for the discharge of responsibilities allocated to them;
- e. establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the Licence Holder;
- f. maintain adequate and orderly records of its business and internal organisation; and
- g. ensure that the performance of multiple functions by its relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly and professionally.

For these purposes, the Licence Holder shall take into account the nature, scale and complexity of its business, and the nature and range of Investment and Ancillary Services undertaken in the course of that business.

1.18 The Licence Holder shall establish, implement and maintain:

- a. systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question;
- b. an adequate business continuity policy aimed at ensuring, in the case of an interruption to its systems and procedures, the preservation of essential data and functions and the maintenance of Investment Services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of its Investment Services and related activities;
- c. accounting policies and procedures that enable it to deliver in a timely manner to the MFSA upon request, financial reports which reflect a true and fair view of its financial position and which comply with all applicable accounting standards and rules.

- 1.19 The Licence Holder shall monitor and, on a regular basis evaluate, the adequacy and effectiveness of its systems, internal control mechanisms and arrangements established in accordance with SLCs 1.17 and 1.18 above and take appropriate measures to address any deficiencies.

## Compliance

- 1.20 The Licence Holder shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by same to comply with its obligations under the Act, the Regulations issued thereunder and these Rules, as well as with its obligations under other applicable legislation, in particular the Prevention of Money Laundering Act, 1994, the Prevention of Financial Markets Abuse Act, 2005, and Regulations issued thereunder, as well as to detect the associated risks, and shall put in place adequate measures and procedures designed to minimize such risk and to enable the MFSA to exercise its powers effectively.

For this purpose the Licence Holder shall take into account the nature, scale and complexity of its business and the nature and range of Investment Services and activities undertaken in the course of that business.

- 1.21 The Licence Holder shall establish and maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:
- a. to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures implemented and the actions taken to address any deficiencies in the Licence Holder's compliance with its obligations;
  - b. to advise and assist the relevant persons responsible for carrying out Investment Services and activities to comply with the Licence Holder's legal and regulatory obligations.
- 1.22 In order to enable the compliance function to discharge its responsibilities properly, the Licence Holder shall ensure that the following conditions are satisfied:
- a. the compliance function shall have the necessary authority, resources, expertise and access to all relevant information;
  - b. a Compliance Officer shall be appointed and shall be responsible for the compliance function and for any reporting as to compliance required by these Rules;
  - c. the relevant persons involved in the compliance function shall not be involved in the performance of services or activities which they monitor;



- d. the method of determining the remuneration of the relevant persons involved in the compliance function shall not compromise their objectivity and shall not be likely to do so.

However, MFSA may exempt a Licence Holder from the requirements of points (c) or (d) if the Licence Holder is able to demonstrate to the satisfaction of the MFSA, that in view of the nature, scale and complexity of its business, and the nature and range of Investment Services and related activities, the requirement under that point is not proportionate and that its compliance function continues to be effective.

Moreover, with respect to (b) above, the appointment of an individual as Compliance Officer, is subject to MFSA's prior approval. Such person may also act as the Licence Holder's Money Laundering Reporting Officer. Reference should be made to SLC 1.10 (g) in this regard.

## **Risk Management**

1.23 The Licence Holder shall take the following actions with a view to manage its risks:

- a. establish, implement and maintain adequate risk management policies and procedures, which identify the risks relating to its activities, processes and systems, and where appropriate, set the level of risk tolerated by the Licence Holder. In so doing, the Licence Holder shall also adopt remuneration policies and practices that are consistent with and promote sound and effective risk management;
- b. adopt effective arrangements, processes and mechanisms to manage the risks relating to the Licence Holder's activities, processes and systems, in light of that level of risk tolerance;
- c. monitor the following:
  - i. the adequacy and effectiveness of the Licence Holder's risk management policies and procedures;
  - ii. the level of compliance by the Licence Holder and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with point (b) above; and
  - iii. the adequacy and effectiveness of measures taken to address any deficiencies in those arrangements and procedures, including failures by the relevant persons to comply with such arrangements or follow such procedures.

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## Enforcement

- 1.24 The Licence Holder shall at all times observe the Licence Conditions which are applicable to it, as well as all the relative requirements which emanate from the Act and regulations issued thereunder. In terms of the Act, the MFSA has various sanctioning powers which may be used against the Licence Holder which does not comply with its regulatory obligations. Such powers include the right to impose administrative penalties.

## 2. Financial Resources Requirements, Accounting and Record Keeping

### General

- 2.01 The Licence Holder shall at all times maintain own funds equal to or in excess of its capital resources requirement. This shall constitute the Licence Holder's Financial Resources Requirement.

Provided that the Licence Holder which is a credit institution licensed in terms of the Banking Act, 1994 or a branch established in Malta of a credit institution authorised in an EU Member State or EEA State, or of an overseas credit institution which is subject to prudential requirements at least equivalent to the requirements applicable to Maltese credit institutions as outlined in SLC 1.02(a), (b) and (c), is not subject to the above-mentioned financial resources requirement and needs not prepare and submit any Interim or Annual Financial Return referred to in the SLCs which follow.

- 2.02 The meaning of own funds and the capital resources requirement applicable to Custodians as well as the methodology for calculating a Licence Holder's satisfaction of its Financial Resources Requirement, are set out in Appendix I to these Rules.
- 2.03 The Licence Holder shall comply with any further financial resources requirements set by the MFSA. If the MFSA so determines, the Licence Holder will be given due notice in writing of the additional financial resources requirements which shall be applied.
- 2.04 The Licence Holder shall immediately advise the MFSA if at any time it is in breach of its Financial Resources Requirement. In this case, the MFSA may, if the circumstances justify it, allow the Licence Holder a limited period within which to restore its financial resources to the required level.
- 2.05 The Licence Holder shall ensure compliance with this section of the Investment Services Rules for Investment Services Providers and Appendix 1 to these Rules. A Licence Holder which is found to be in breach of these requirements may be subject to regulatory action in terms of Article 104 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

### Accounting / Record Keeping

- 2.06 The Licence Holder shall maintain proper accounting records to show and explain its own transactions, assets and liabilities.

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- 2.07 The accounting records shall:
- a. disclose with reasonable accuracy, at all times, the financial position of the Licence Holder; and
  - b. enable the financial statements required by the MFSA to be prepared within the time limits specified in the conditions of the Investment Services Licence.
- 2.08 In particular, the financial records shall contain:
- a. entries from day to day of all sums of money received and expended and the matters to which they relate;
  - b. a record of all income and expenses, explaining their nature;
  - c. a record of all assets and liabilities, including any guarantees, contingent liabilities or other financial commitments; and
  - d. entries from day to day of all transactions on the Licence Holder's own account.
- 2.09 The Licence Holder shall retain accounting records for a minimum period of ten years. During the first two years they shall be kept in a place from which they can be produced within 24 hours of their being requested.
- 2.10 The Licence Holder shall agree with the MFSA its Accounting Reference Date (financial year end).

### **Reporting Requirements**

- 2.11 The Licence Holder shall have internal control mechanisms and administrative and accounting procedures which permit the verification of their compliance with these Rules as well as effective procedures for risk assessment and effective control and safeguard arrangements for information processing systems.

The Licence Holder shall in each year prepare an Annual Financial Return in the form set out in Appendix II signed by at least two directors or partners or any other persons authorised to sign by way of a Board Resolution. In the latter case, the Custodian is expected to provide a certified true copy of such Board Resolution to the MFSA.

- 2.12 The Annual Financial Return shall be submitted to the MFSA within one month of the Accounting Reference Date. In addition, the Annual Audited Financial Return shall be submitted to the MFSA within four months of the Accounting Reference

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Date.

- 2.13 Audited annual financial statements prepared in accordance with International Financial Reporting Standards, together with a copy of the auditors' management letter and the auditors' report pursuant to SLC 2.26 shall be submitted to the MFSA within four months of the Accounting Reference Date.

A Licence Holder which is also a credit institution in terms of the Banking Act, 1994 shall be required to submit to MFSA, together with its annual financial statements, a separate note supported by an auditor's confirmation, disclosing the net revenue derived from activities for which an investment services licence was issued to it, that is the gross revenue derived from such activities less any commissions that are directly related to the acquisition of the said gross revenue, paid or payable to third parties.

- 2.14 In addition to the Annual Financial Return and audited annual financial statements, Category 4 Licence Holders shall prepare an Interim Financial Return, in the form set out in Appendix II, at dates three, six and nine months after the Accounting Reference Date. The first Interim Financial Return should cover the three months immediately following the Accounting Reference Date, the second Interim Financial Return should cover the six months immediately following the Accounting Reference Date and the third Interim Financial Return should cover the nine months immediately following the Accounting Reference Date. In the event of a change to the Accounting Reference Date, the dates for the preparation of the Interim Financial Returns shall be agreed with the MFSA.
- 2.15 The Interim Financial Return shall be submitted to the MFSA within one month of the date up to which it has been prepared. It shall be signed by at least two directors or partners or any other persons authorised to sign by way of a Board Resolution. In the latter case, the Licence Holder is expected to provide a certified true copy of such Board Resolution to the MFSA.
- 2.16 The Licence Holder shall prepare and submit such additional financial returns as the MFSA may require.
- 2.17 The Licence Holder shall be responsible for the correct compilation of the Financial Returns. The nature and content of the financial returns shall be as follows:
- a. they shall be in the form set out in Appendix II;
  - b. they shall be in agreement with the underlying accounting records;
  - c. accounting policies shall be consistent with those adopted in the audited annual financial statements and shall be consistently applied. These accounting policies should adequately cater for the following:

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- i. amounts in respect of items representing assets or income may not be offset against amounts in respect of items representing liabilities or expenditure, as the case may be, or vice versa, unless duly authorised by the MFSA; and
  - ii. balances representing clients' money and/ or assets held/ controlled by the Licence Holder must not form part of the Licence Holder's Balance Sheet;
- d. information to be included in the financial returns shall be prepared in accordance with International Financial Reporting Standards;
  - e. investments shall be included in the balance sheet at valuations arrived at in accordance with the provisions of International Financial Reporting Standards;
  - f. financial returns shall not be misleading as a result of the misrepresentation or omission or miscalculation of any material item;
  - g. where the Annual Financial Return has been submitted before the relevant audited annual financial statements have been produced it shall be updated to reflect the information in the audited annual financial statements and submitted to the MFSA together with the audited annual financial statements;
  - h. in the case of an individual or individuals in partnership or association, financial returns shall be prepared to show relevant figures for the Investment Services business exclusively. If required by the MFSA to do so, the individual (or individuals) shall submit, in addition, a statement of personal assets and liabilities.
- 2.18 If so notified in writing by the MFSA, the Licence Holder shall be required to prepare and submit additional financial information for the purposes of consolidated supervision.
- 2.19 The Licence Holder shall notify the MFSA immediately upon becoming aware:
- a. that it is in breach of the requirements in respect of financial resources, records, reporting or procedures and controls;
  - b. that it will be unable to submit an Annual or Interim Financial Return on the due date.

The notice shall give reasons and shall explain what action is being taken to rectify matters.

2.20 The Licence Holder shall notify the MFSA immediately if:

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- a. it is notified that its auditor intends to qualify the audit report;
- b. it becomes aware of actual or intended legal proceedings against it;
- c. it decides to claim on a professional indemnity or other policy relating to its Investment Services business;
- d. the Licence Holder's counterparties in repurchase and reverse repurchase agreements or securities and commodities-lending and securities and commodities-borrowing transactions default on their obligations.

## Audit

2.21 The Licence Holder shall appoint an auditor approved by the MFSA. The Licence Holder shall replace its auditor if requested to do so by the MFSA. The MFSA's consent shall be sought prior to the appointment or replacement of an auditor.

The Licence Holder shall make available to its auditor the information and explanations he needs to discharge his responsibilities as an auditor and in order to meet the MFSA's requirements.

2.22 The Licence Holder shall not appoint an individual as an auditor, nor appoint an audit firm where the individual directly responsible for the audit, or his firm is:

- a. a director, partner, qualifying shareholder, officer, representative or employee of the Licence Holder;
- b. a partner of, or in the employment of, any person in (a) above;
- c. a spouse, civil partner, parent, step-parent, child, step-child or other close relative of any person in (a) above;
- d. a person who is not otherwise independent of the Licence Holder;
- e. person disqualified by the MFSA from acting as an auditor of a Licence Holder.

For this purpose, an auditor shall not be regarded as an officer or an employee of the Licence Holder solely by reason of being auditor of that Custodian.

2.23 The Licence Holder shall obtain from its auditor a signed letter of engagement defining clearly the extent of the auditor's responsibilities and the terms of his appointment. The Licence Holder shall confirm in writing to its auditor its agreement to the terms in the letter of engagement. The auditor shall provide the MFSA with a

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letter of confirmation in the form set out in Annex II to the Application Form for an Investment Services Licence.

- 2.24 The letter of engagement shall include terms requiring the auditor:
- a. to provide such information or verification to the MFSA as the MFSA may request;
  - b. to afford another auditor all such assistance as he may require;
  - c. to vacate his office if he becomes disqualified to act as auditor for any reason;
  - d. if he resigns, or is removed or not reappointed, to advise the MFSA of that fact and of the reasons for his ceasing to hold office. The auditor shall also be required to advise the MFSA if there are matters he considers should be brought to the attention of the MFSA;
  - e. in accordance with article 18 of the Act, to report immediately to the MFSA any fact or decision of which he becomes aware in his capacity as auditor of the Licence Holder which:
    - i. is likely to lead to a serious qualification or refusal of his audit report on the accounts of the Licence Holder; or
    - ii. constitutes or is likely to constitute a material breach of the legal and regulatory requirements applicable to the Licence Holder in or under the Act;
    - iii. gravely impairs the ability of the Licence Holder to continue as a going concern; or
    - iv. relates to any other matter which has been prescribed.
  - f. in accordance with article 18 of the Act, to report to the MFSA any facts or decision as specified in (e) above of any person having close links, as defined in Appendix 9, with the Licence Holder, of which the auditor becomes aware in his capacity as auditor of the Licence Holder or of the person having such close links.
- 2.25 If at any time the Licence Holder fails to have an auditor in office for a period exceeding four weeks the MFSA shall be entitled to appoint a person to fill the vacancy; the fees and charges so incurred being payable by the Licence Holder.
- 2.26 In respect of each annual accounting period, the Licence Holder shall require its auditor to prepare a management letter in accordance with International Standards on



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Auditing. The auditor must also confirm to the MFSA that the audit has been conducted in accordance with International Standards on Auditing and whether, in the auditor's opinion:

- a. the Annual Financial Return together with the audited annual financial statements are in agreement with the Licence Holder's accounting records;
- b. the Annual Financial Return has been prepared in accordance with the MFSA's requirements and is consistent with the audited annual financial statements;
- c. the Licence Holder's Financial Resources have been properly calculated in accordance with the MFSA's requirements and exceed the Licence Holder's Financial Resources Requirement as at the Accounting Reference Date;
- d. proper accounting records have been kept, and adequate systems for their control have been maintained, as required by the MFSA, during the period covered by the Annual Financial Return;
- e.
  - i. the Licence Holder has maintained throughout the period covered by the Annual Financial Return, systems adequate to safeguard Customers' Assets and Clients' Money; or
  - ii. based on review procedures performed, nothing has come to the auditor's attention that causes the auditor to believe that the Licence Holder held Customers' Assets or Clients' Money during the period covered by the Annual Financial Return.
- f. all information and explanations necessary for the purpose of the audit have been obtained.

2.27 Where, in the auditor's opinion, one or more of the requirements have not been met, the auditor shall be required to include in his report a statement specifying the relevant requirements and the respects in which they have not been met. Where the auditor is unable to form an opinion as to whether the requirements have been met, the auditor shall be required to specify the relevant requirements and the reasons why he has been unable to form an opinion.

2.28 The Licence Holder in receipt of a management letter from its auditor which contains recommendations to remedy any weaknesses identified during the course of the audit, is required to submit to the MFSA by not later than six months from the end of the financial period to which the management letter relates, a statement setting out in detail the manner in which the auditor's recommendations have been/are being implemented. In the instance where the Licence Holder has not taken/is not taking any action in respect of any one or more recommendations in the auditor's management letter, the reasons are to be included.

2.29 The Licence Holder is required to include in the Directors' Report (which should form part of the annual report to members of the company), a statement regarding breaches of SLCs or other regulatory requirements which occurred during the reporting period, and which were subject to an administrative penalty or other regulatory sanction.

Where there have been no breaches, it is sufficient merely to say so. However, if there have been breaches, a summary must be provided of the breach(es) committed and regulatory sanction imposed.

## **2A Capital Resources Requirements**

### ***Conditions for Category 4a Licence Holders***

2.30 A Category 4a Licence Holder shall apply the requirements set out in SLC 7.29 to 7.30 and 7.42 to 7.60 of Part BI of these Investment Services Rules for the maintenance and reporting of capital resources.

**3. Supplementary Conditions applicable to a Custodian of a UCITS Scheme**

The Supplementary Conditions prescribed in this section shall apply where the Licence Holder proposes to act as a Custodian of a UCITS Scheme which is third-party managed or self-managed.

~~Where the Licence Holder proposes to act as Custodian of a non-UCITS Retail Scheme which is managed by a *de minimis* AIFM, it shall also comply with the SLCs prescribed in this Section in addition to the SLCs prescribed in Sections 1 and 2 of these Rules.~~

**Comment [IA4]:** Refer to Part 5 of the proposed regulations

Where the Licence Holder also proposes to act as Custodian of an AIF, the Licence Holder shall comply with this Section when acting as Custodian of a UCITS and with Section 4 when acting as Custodian of the AIF.

~~3.01 The Licence Holder shall be a separate person from the Manager of a Scheme for which it acts as Custodian, and shall act independently of each other and solely in the interests of the Unit Holders. Since independence may be compromised in a variety of ways, any facts, relationships, arrangements, or circumstances which may at any stage bring that independence into question shall be declared to the MFSA as soon as the Licence Holder becomes aware of any such matter.~~

**Comment [IA5]:** Refer to regulation 14 of the proposed regulations

3.02 The Licence Holder shall have the business organisation, systems, and appropriate expertise and experience deemed necessary by the MFSA for it to carry out its functions.

3.03 Neither the Licence Holder nor any of its associates shall deal with the Scheme as a Principal unless the terms of the transaction or arrangement are on an arm's length basis.

~~3.04 The Licence Holder shall ensure that the sale, issue, repurchase, redemption and cancellation of Units effected by or on behalf of the Scheme are carried out in accordance with MFSA requirements, if any, applicable to the Scheme and with the Scheme's Constitutional Documents and most recent Prospectus.~~

**Comment [IA6]:** Refer to regulation 15(1)(a) of the proposed regulations

3.05 The Licence Holder shall, where applicable, supervise the operation of a Scheme to ensure that the Manager complies with the investment restrictions of the Scheme.

~~3.06 The Licence Holder shall ensure that the value of Units is calculated in accordance with the provisions of the Constitutional Documents and the most recent Prospectus of the Scheme.~~

**Comment [IA7]:** Refer to regulation 15(1)(b) of the proposed regulations

~~3.07 The Licence Holder shall carry out the instructions of the Manager, or the Scheme as applicable, unless they conflict with the MFSA requirements, if any, applicable to the Scheme and with the Scheme's Constitutional Documents and most recent~~

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### ~~Prospectus.~~

**Comment [IA8]:** Refer to regulation 15(1)(c) of the proposed regulations

3.08 ~~The Licence Holder shall ensure that in transactions involving a Scheme's assets, consideration is remitted to it within time limits which are in accordance with accepted market practice in the context of a particular transaction.~~

**Comment [IA9]:** Refer to regulation 15(1)(d) of the proposed regulations

3.09 ~~The Licence Holder shall ensure that a Scheme's income is applied in accordance with the Scheme's Constitutional Documents and most recent Prospectus.~~

**Comment [IA10]:** Refer to regulation 15(1)(e) of the proposed regulations

3.10 The Licence Holder shall enquire into the conduct of the Manager or the Scheme in each annual accounting period and report thereon to the holders of Units in accordance with MFSA's requirements, if any, applicable to the Scheme and with any applicable provisions of its Agreement with the Scheme or (in the case of a Scheme constituted as a Unit Trust or Common Contractual Fund) its Manager.

3.11 ~~The custodian agreement shall state that the Licence Holder will be liable to the Manager, the Scheme, and to the holders of units for any loss suffered by them as a result of the Licence Holder's fraud, wilful default or negligence including the unjustifiable failure to perform its obligations, or its improper performance thereof.~~

**Comment [IA11]:** Refer to regulation 20 of the proposed regulations

~~Liability to unit holders may be invoked directly or indirectly through the Manager, depending on the legal nature of the relationship between the Licence Holder, the Manager and the unit holders.~~

**Comment [IA12]:** Refer to regulation 20 of the proposed regulations

3.12 ~~The liability of the Licence Holder shall not be diminished if it has entrusted to a third party some or all of the assets in its safe keeping. This shall be stated in the custodian agreement.~~

**Comment [IA13]:** Refer to regulation 20 of the proposed regulations

3.13 The Licence Holder shall not enter into a contract for the sale of assets when such assets are not in the ownership of the Scheme.

3.14 When servicing a Scheme formed in accordance with or existing under the laws of Malta duly licensed by the MFSA, the Custodian shall:

- a. advise the MFSA if the value of the Scheme falls below EUR 2.33 million; and
- b. notify the MFSA of any breach of the Scheme's Licence Conditions or of any of the provisions of the Constitutional Documents of the Scheme as soon it becomes aware of the breach.

3.15 ~~The Licence Holder shall notify the MFSA of the intended termination of its appointment to act as custodian of a Scheme.~~

**Comment [IA14]:** Refer to regulation 8(2) of the proposed regulations

3.16 The Licence Holder shall comply with the requirements laid out in the Investment Services Act (Control of Assets) Regulations, 1998 as may be amended from time to

time.

- 3.17 When the Licence Holder is servicing either a merging UCITS or a receiving UCITS, the Licence Holder shall verify:
- (a) the identification of the type of merger and the UCITS involved;
  - (b) the planned effective date of the merger and
  - (c) the rules applicable, respectively, to the transfer of assets and the exchange of units with the requirements of the UCITS Directive and the fund rules or instruments of incorporation of their respective UCITS.
- 3.18 Where the UCITS has appointed a management company, which is not licensed in Malta to provide it with investment management services then the Licence Holder shall enter into an information agreement with such management company as may have been appointed by the UCITS, to regulate the flow of information deemed necessary to allow it to perform the functions set out in Article 32 of the UCITS Directive and in other regulatory requirements applicable to Custodians in Malta.
- 3.19 The information agreement referred to in SLC 3.18 above shall provide for the following:
- (a) A description of the procedures including those related to the safe-keeping, to be adopted for each type of asset of the UCITS entrusted to the Licence Holder;
  - (b) A description of the procedures to be followed where the management company envisages a modification of the scheme rules or prospectus of the UCITS, and identifying when the Licence Holder should be informed, or where a prior agreement with the Licence Holder is needed to proceed with the modification;
  - (c) A description of the means and procedures by which the Licence Holder will transmit to the management company all relevant information that the latter needs to perform its duties including a description of the means and procedures related to the exercise of any rights attached to financial instruments, and the means and procedures applied in order to allow the management company and the UCITS to have timely and accurate access to information relating to the accounts of the UCITS;
  - (d) a description of the means and procedures by which the Licence Holder will have access to all relevant information it needs to perform its duties;
  - (e) A description of the procedures by which the Licence Holder has the ability to enquire into the conduct of the management company and to assess the quality of information transmitted, including by way of on-site visits;

- (f) A description of the procedures by which the management company can review the performance of the Licence Holder in respect of its contractual obligations.
- 3.20 The details referred to in SLC 3.19 (c) and (d) may be included either in the information agreement or in a separate written agreement.
- 3.21 In addition to the information provided for in SLC 3.19, the information agreement shall also provide for:
- a. the conditions under which the agreement may be amended or terminated;
  - b. the conditions which are necessary to facilitate transition to another Custodian and, in case of such transition the procedure by which the Licence Holder shall send all relevant information to the appointed Custodian;
  - c. the confidentiality obligations applicable to the parties to the agreement which shall be subject to the ability of either the MFSA or the European regulatory authorities of the management company's home Member State or EEA State where the management company is a European management company in gaining access to relevant documents and information;
  - d. a list of all the information that needs to be exchanged between the UCITS, its management company and the Licence Holder related to the subscription, redemption, issue, cancellation and repurchase of units of the UCITS;
  - e. information on the tasks and responsibilities of the parties to the agreement in respect of obligations relating to the prevention of money laundering and the financing of terrorism, where applicable;
  - f. the period of validity of the agreement.
- 3.22 Where either the Licence Holder or the management company have appointed third parties in order to carry out their duties, the information agreement shall also provide for the following:
- a. an undertaking by the relevant third parties to the agreement to provide details, on a regular basis, of any third parties appointed by the Custodian of a Maltese UCITS or the manager to carry out their respective duties;
  - b. an undertaking that, upon request by one of the parties, the other party will provide information on the criteria used for selecting the third party and the steps taken to monitor the activities carried out by the selected third party;
  - c. a statement that the liability of the Licence Holder shall not be affected by the

fact that it has entrusted to a third party all or some of the assets in its safe-keeping.

- 3.23 Where the Manager appointed by the UCITS has been appointed as Manager for other UCITS, the information agreement may also provide for such other UCITS. In such cases the agreement shall list the UCITS covered.
- 3.24 In cases where the parties to the agreement agree to the use of electronic transmission for part or all of the information that flows between them, the agreement shall contain provisions ensuring that a record is kept of such information.
- 3.25 The information agreement shall be regulated by Maltese Law.
- 3.26 A Licence Holder which is a custodian of a Maltese UCITS which is a master UCITS must conform to the Investment Services Rules for Retail Collective Investment Schemes on Feeder and Master UCITS.
- 3.27 A Licence Holder which a Custodian of a Maltese UCITS, the latter being a master UCITS, shall immediately inform the MFSA, the feeder UCITS and the custodian of the feeder UCITS about any irregularities it detects with regard to the Maltese UCITS which is a master UCITS which are deemed to have a negative impact on the feeder UCITS.
- 3.28 The irregularities referred to in SLC 3.27 which the Custodian of a Maltese UCITS which is a master UCITS detects in the course of carrying out its functions and which may have a negative impact on the feeder UCITS shall include, but are not limited to:
- a. errors in the net asset value calculation of the Maltese UCITS which is a master UCITS;
  - b. errors in transactions for or settlements of the purchase, subscription or request to repurchases or redeem units in the Maltese UCITS which is a master UCITS undertaken by the feeder UCITS;
  - c. errors in the payment or capitalisation of income arising from the Maltese UCITS which is a master UCITS, or in the calculation of any related withholding tax;
  - d. breaches of the investment objectives policy or strategy of the Maltese UCITS which is a master UCITS, as described in its fund rules or instrument of incorporation, Prospectus or Key Investor Information document;
  - e. breaches of investment and borrowing limits set out in the law or in the scheme rules, instruments of incorporation, prospectus or Key Investor Information document.

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~~3.29 The Licence Holder shall enable the MFSA to obtain, on request, all information that the Custodian would have obtained whilst discharging its duties and that is necessary for the MFSA to supervise the UCITS for which it acts as custodian together with compliance with the UCITS Directive.~~



**4. Supplementary Conditions applicable to a Custodian of an AIF**

**The Supplementary Conditions prescribed in this section shall apply in the following instances:**

- (i) where the Licence Holder proposes to act as Custodian of an EU AIF which:
  - is managed by an EU AIFM (other than a *de minimis* AIFM); or
  - is self-managed.

Licence Holders are to note that the SLCs outlined in this Section shall apply in the case where the Scheme is licenced as a Professional Investor Fund which is managed by an EU AIFM and is fully compliant with the provisions of the AIFMD.

- (ii) where the Licence Holder proposes to act as Custodian of a non-EU AIF which is marketed in the EU by an EU AIFM (other than a *de minimis* AIFM):

Licence Holders are to note that the SLCs outlined in this section shall not apply to third country AIFs that are not marketed in the EU or in the EEA (refer to article 34 of the AIFM Directive).

- (iii) where the Licence Holder also proposes to act as Custodian of both UCITS and AIFs;
- (iv) where the Licence Holder proposes to act as Custodian of a non-UCITS Retail Scheme which:
  - is managed by an EU AIFM (other than a *de minimis* AIFM); or
  - is self-managed.

~~4.01 The appointment of the Licence Holder as a Custodian of an AIF shall be evidenced by a written contract.~~

~~4.02 The written contract referred to in SLC 4.01 shall, *inter alia* regulate the flow of information deemed necessary to allow the Licence Holder to perform its functions for the AIF for which it has been appointed as Custodian as provided in the provisions of the Act, the Regulations issued thereunder and these Rules.~~

~~4.03 In complying with SLC 4.02 above, the Licence Holder shall also refer and comply with the applicable provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regards to exemptions, general operating conditions, depositaries, leverage, transparency and supervision prescribing particulars that need to be included in the written contract referred to above.~~

**Comment [IA15]:** Custodians of AIFs shall be exclusively regulated by the provisions of the proposed regulations

**Comment [IA16]:** Refer to regulation 5 of the proposed regulations

**Comment [IA17]:** Refer to regulation 5 of the proposed regulations

**Comment [IA18]:** Refer to regulation 5 of the proposed regulations

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~~4.04 In order to avoid conflicts of interest between the Licence Holder, the AIFM and/or the AIF and/or its investors:~~

**Comment [IA19]:** Refer to regulation 26(1)(a) and (b) of the proposed regulations

~~(a) An AIFM shall not be licenced to act as a Custodian.~~

~~(b) A prime broker acting as counterparty to an AIF shall not act as Custodian unless, it has functionally and hierarchically separated the performance of its functions as Custodian from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF. Delegation by the Custodian to such prime broker of its custody tasks in accordance with SLCs 4.15 to 4.18 of these Rules is allowed if the relevant conditions are met.~~

~~4.05 The Licence Holder appointed to act as a Custodian for an AIF shall not be appointed as external valuer of that AIF, unless it has functionally and hierarchically separated the performance of its custodian functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.~~

**Comment [IA20]:** Refer to regulation 26(1)(c) of the proposed regulations

~~4.06 The Licence Holder shall in general ensure that the AIF's cash flows are properly monitored and shall in particular, ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the Licence Holder acting on behalf of the AIF at one of the entities listed hereunder:~~

**Comment [IA21]:** Refer to regulation 27(1) and (2) of the proposed regulations

~~a. a central bank;~~

~~b. a credit institution authorised in accordance with Directive 2000/12/EC;~~

~~c. a bank authorised in a third country;~~

~~d. or another entity of the same nature in the relevant market where cash accounts are required provided such entity is subject to prudential regulation and supervision which have the same effect as Union law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC.~~

~~4.07 Where the cash accounts are opened in the name of the Licence Holder acting on behalf of the AIF, no cash of the entity referred to in SLC 4.06 and none of the Licence Holder's own cash shall be booked on such accounts.~~

**Comment [IA22]:** Refer to regulation 27(3) of the proposed regulations

~~4.08 The assets of the AIF or the AIFM acting on behalf of the AIF shall be entrusted to the Licence Holder for safe keeping as follows:~~

**Comment [IA23]:** Refer to regulation 28(1) of the proposed regulations

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~~(a) For financial instruments that can be held in custody:~~

~~[i] The Licence Holder shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the Licence Holder's books and all financial instruments that can be physically delivered to the Licence Holder;~~

~~[ii] For that purpose, the Licence Holder shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the Licence Holder's books are registered in the Licence Holder's books within segregated accounts in accordance with the principles set out in SLC 2.90 and 2.91 of Part BI of the Investment Services Rules for Investment Services Providers, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the provisions of the Act, the Regulations and the Rules issued thereunder.~~

~~(b) For other assets:~~

~~[i] The Licence Holder shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;~~

~~[ii] The assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available on external evidence;~~

~~[iii] The Licence Holder shall keep its records up to date.~~

~~4.09 In addition to the tasks referred to in SLCs 4.06 to 4.08 the Licence Holder shall:~~

~~[a] Ensure that the sale, issue, re purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the provisions of the Act, the Rules and Regulations issued thereunder, and the fund rules or instruments of incorporation;~~

~~[b] Ensure that the value of the units or shares of the AIF is calculated in accordance with the provisions of the Act, the Rules and Regulations issued thereunder, the fund rules or instruments of incorporation and the procedures prescribed in SLCs 2.17 to 2.33 of Part BIII of the Investment Services Rules for Investment Services Providers;~~

~~[c] Carry out the instructions of the AIFM, unless they conflict with the~~

**Comment [IA24]:** Refer to regulation 29(1) of the proposed regulations

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provisions of the Act, the Rules and Regulations issued thereunder, the AIF's fund rules or instruments of incorporation;

[d] Ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;

[e] Ensure that an AIF's income is applied in accordance with the provisions of the Act, the Rules and Regulations issued thereunder and the fund rules or instruments of incorporation.

4.10 In complying with SLCs 4.06 to 4.09, the Licence Holder shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

4.11 In the context of their respective roles, the AIFM and the Licence Holder shall act honestly, fairly, professionally, independently and in the interests of the AIF and the investors of the AIF.

4.12 A Licence Holder shall not carry out activities with regard to the AIF or the AIFM on behalf of the AIF that may create conflicts of interest between the AIF, the investors in the AIF, the AIFM and itself, unless the Licence Holder has functionally and hierarchically separated the performance of its Custodian tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

4.13 The Licence Holder shall not reuse the assets referred to in SLC 4.08 without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

4.14 The Licence Holder shall not delegate to third parties its functions as described in this Section save for those referred to in SLC 4.08.

4.15 The Licence Holder may delegate to third parties the functions referred to in SLC 4.08 subject to the following conditions:

[a] The tasks are not delegated with the intention of avoiding the requirements prescribed in the Act, the Rules and Regulations issued thereunder;

[b] The Licence Holder can demonstrate that there is an objective reason for delegation;

[c] The Licence Holder has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the

**Comment [IA25]:** Refer to regulation 26(2) of the proposed regulations

**Comment [IA26]:** Refer to regulation 26(3) of the proposed regulations

**Comment [IA27]:** Refer to regulation 28(3) of the proposed regulations

**Comment [IA28]:** Refer to regulation 30(1) of the proposed regulations

**Comment [IA29]:** Refer to regulation 30(2) of the proposed regulations

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~~periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangement of the third party in respect of the matters delegated to it; and~~

- ~~[d] The Licence Holder ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
  - ~~[i] The third party has structures and the expertise that are adequate and proportionate to the nature and the complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;~~
  - ~~[ii] For custody tasks referred to in SLC 4.08(a) the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial statements are in its possession;~~
  - ~~[iii] The third party segregates the assets of the Licence Holder's clients from its own assets and from the assets of the Licence Holder in such a way that they can at any time be clearly identified as belonging to clients of a particular Licence Holder;~~
  - ~~[iv] The third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the Licence Holder; and~~
  - ~~[v] The third party complies with the general obligations and prohibitions set out in SLC 4.08 and SLCs 4.11 to 4.13.~~~~

~~4.16 Notwithstanding SLC 4.15(d)(ii), where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements prescribed in SLC 4.15(d)(ii), the Licence Holder may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements:~~

- ~~(a) The investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and~~
- ~~(b) The AIF, or the AIFM on behalf of the AIF, must instruct the Licence Holder to delegate the custody of such financial instruments to such local entity.~~

~~Provided that the third party may, in turn sub delegate those functions, subject to the same requirements. In such a case, SLCs 4.23 and 4.24 shall apply *mutatis mutandis*~~

**Comment [IA30]:** Refer to regulation 30(2) of the proposed regulations

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to the relevant parties.

**Comment [IA31]:** Refer to regulation 30(3) of the proposed regulations

4.17 For the purposes of SLCs 4.14 to 4.16, the provision of services as specified by Directive 98/26/EC by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third country securities settlement systems shall not be considered a delegation of its custody functions.

**Comment [IA32]:** Refer to regulation 30(4) of the proposed regulations

4.18 In complying with SLCs 4.15(c) and (d)(iii), the Licence Holder shall also refer and comply with the provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regards to exemptions, general operating conditions, depositaries, leverage, transparency and supervision prescribing the due diligence duties of Licence Holders as well as the segregation obligations.

4.19 The Licence Holder shall be liable to the AIF or to the investors of the AIF, for the loss by the Licence Holder or a third party to whom the custody of financial instruments held in custody in accordance with SLC 4.08(a) has been delegated.

**Comment [IA33]:** Refer to regulation 31(1) of the proposed regulations

4.20 In the case of such a loss of a financial instrument held in custody, the Licence Holder shall return a financial instrument of an identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF without undue delay. The Licence Holder shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

**Comment [IA34]:** Refer to regulation 31(2) of the proposed regulations

4.21 The Licence Holder shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the Licence Holder's negligent or intentional failure to properly fulfil its obligations pursuant to the provisions of the Act, the Regulations and the Rules issued thereunder.

**Comment [IA35]:** Refer to regulation 31(3) of the proposed regulations

4.22 In complying with SLCs 4.19 to 4.21 above, the Licence Holder shall also refer and comply with the provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regards to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

**Comment [IA36]:** Refer to regulation 31(4) of the proposed regulations

4.23 The Licence Holder's liability shall not be affected by any delegation referred to in SLCs 4.14 to 4.17.

4.24 Notwithstanding SLC 4.23, in case of a loss of financial instruments held in custody by a third party pursuant to SLCs 4.14 to 4.17, the Licence Holder may discharge itself of liability if it can prove that:

[a] All requirements for the delegation of its custody tasks set out in SLCs. 4.14

to 4.17 are met;

- [b] A written contract between the Licence Holder and the third party expressly transfers the liability of the Licence Holder to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the Licence Holder to make such a claim on their behalf; and
- [c] A written contract between the Licence Holder and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the Licence Holder's liability and establishes the objective reason to contract such a discharge.

4.25 The Licence Holder shall also refer and comply with the provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regards to exemptions, general operating conditions, depositaries, leverage, transparency and supervision prescribing the conditions subject to which and circumstances in which there is an objective reason to contract a discharge pursuant to SLCs 4.23 and 4.24.

4.26 Where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in SLC 4.15(d)(ii), the Licence Holder can discharge itself of liability provided that the following conditions are met:

- (a) The rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this SLC;
- (b) The investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
- (c) The AIF or the AIFM on behalf of the AIF instructed the Licence Holder to delegate the custody of such financial instruments to a local entity;
- (d) There is a written contract between the Licence Holder and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- (e) There is a written contract between the Licence Holder and the third party that expressly transfers the liability of the Licence Holder to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the Licence Holder to make such a claim against that local entity in respect of the loss of financial instruments or for the Licence Holder to make

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such a claim on their behalf.

4.27 ~~Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the Licence Holder, the AIFM and the investors.~~

**Comment [IA37]:** Refer to regulation 31(5) of the proposed regulations

4.28 ~~The Licence Holder shall make available to the MFSA, on request, all information which it has obtained while performing its duties and that may be necessary for the European Regulatory Authority of the AIF or the AIFM. If the European regulatory authorities of the AIF or the AIFM are different from those of the Licence Holder, the MFSA shall share the information received without delay with the European Regulatory Authorities of the AIF and the AIFM.~~

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4.29 A Licence Holder acting as custodian of an AIF which has no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in accordance with Article 21(8)(a) of the AIFM Directive or which generally invest in issuers or non-listed companies in order to acquire control of such companies in accordance with Article 26 of the AIFM Directive shall be obliged to comply with the following SLCs prescribed in this Part of the Rules:

**Comment [IA38]:** Refer to regulation 33 of the proposed regulations

- (i) SLC 1.01, 1.04 to SLC 1.24 dealing with the general requirements applicable to custodians of collective investment schemes, the general organizational requirements applicable, compliance, risk management and enforcement;
- (ii) SLC 2.01 to SLC 2.29 dealing with the financial resources requirements, accounting and record keeping requirements; and
- (iii) The applicable provisions prescribed in Part 4b of the Investment Services Act (Control of Assets) (Amendment) Regulations, 2016; SLC 4.01 to SLC 4.18; SLC 4.21 to SLC 4.23 and SLC 4.28 dealing with the supplementary conditions applicable to a custodian of an AIF:

~~Provided that SLCs 4.19 to 4.27 shall apply to a Category 4b Licence Holder solely in so far as such Licence Holder holds in custody financial instruments as prescribed in Article 21(8) AIFMD and in relation to such instruments only.~~

4.30 A Licence Holder acting as custodian of a third country AIF which is marketed in the EU/EEA in terms of Article 36 of the AIFM Directive, shall be obliged to comply with the following SLCs prescribed in this Part of the Rules:

- (i) SLC 1.01, 1.04 to SLC 1.24 dealing with the general requirements applicable to custodians of collective investment schemes, the general organizational requirements applicable, compliance, risk management and enforcement;



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(ii) SLC 2.01 to SLC 2.29 dealing with the financial resources requirements, accounting and record keeping requirements; and

(iii) The applicable provisions prescribed in Part 4b of the Investment Services Act (Control of Assets) (Amendment) Regulations, 2016

SLC 4.01 to SLC 4.04(a), SLC 4.06 to 4.11, SLC 4.28 and SLC 4.31 dealing with the supplementary conditions applicable to a custodian of an AIF.

~~4.31 A Licence Holder acting as custodian of an AIF in terms of SLC 4.30 shall also ensure compliance with the SLCs prescribed hereunder.~~

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~~4.32 The Licence Holder shall be liable for any loss or prejudice suffered by the AIFM, the AIF or the unit holders or participants in the AIF due to the Licence Holder's fraud, willful default or negligence including the unjustifiable failure to perform in whole or in part the Licence Holder's obligations arising under these Rules, the terms and conditions of the agreement appointing the Licence Holder, the deed or other instrument establishing or regulating the AIF, the conditions of the collective investment scheme licence which may be held by the AIF, the conditions of any investment services licence or such other requirements as may be laid down by the MFSA.~~

Comment [IA39]: Refer to regulation 39(1) of the proposed regulations

~~4.33 The Licence Holder shall not be liable for any loss or prejudice suffered by the AIF or the unit holders or participants in the AIF as a result of the acts or omissions of the AIFM except where and to the extent that the Licence Holder has failed to perform its functions and duties in terms of these Rules.~~

~~For the purposes of this SLC, the term 'Licence Holder' includes such third party to who functions; duties or assets may be delegated or entrusted in terms of SLC 4.35.~~

Comment [IA40]: Refer to regulation 39(2) of the proposed regulations

~~4.34 Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the Licence Holder, the AIFM and the investors.~~

Comment [IA41]: Refer to regulation 39(3) of the proposed regulations

~~4.35 The Licence Holder may delegate to third parties in whole or in part the functions referred to in SLC 4.06 to 4.09 subject to the following conditions:~~

Comment [IA42]: Refer to regulation 40(1) of the proposed regulations

~~(a) The tasks are not delegated with the intention of avoiding the requirements prescribed in these Rules;~~

~~(b) The Licence Holder has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated its~~

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~~tasks and of the arrangement of the third party in respect of the matters delegated to it; and~~

- ~~(e) The Licence Holder ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:~~
- ~~i. The third party has structures and the expertise that are adequate and proportionate to the nature and the complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;~~
  - ~~ii. As far as the custody tasks referred to in SLC 4.08(a) are concerned, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial statements are in its possession;~~
  - ~~iii. The third party segregates the assets of the Licence Holder's clients from its own assets and from the assets of the Licence Holder in such a way that they can at any time be clearly identified as belonging to clients of a particular Licence Holder;~~
  - ~~iv. The third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the Licence Holder; and~~
  - ~~v. The third party complies with the general obligations and prohibitions set out in SLC 4.06 to 4.13 inclusive.~~

~~4.36 Notwithstanding SLC 4.15(d)(ii) of this Part to the Rules, where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements prescribed in SLC 4.15(d)(ii), the Licence Holder may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements:~~

- ~~(a) The investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and~~
- ~~(b) The AIF, or the AIFM on behalf of the AIF, must instruct the Licence Holder to delegate the custody of such financial instruments to such local entity.~~

~~Provided that the third party may, in turn sub-delegate those functions, subject to the same requirements.~~

**Comment [IA43]:** Refer to regulation 40(1) of the proposed regulations

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4.37 ~~The provision of services as specified by Directive 98/26/EC by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third country securities settlement systems shall not be considered a delegation of the Licence Holder's custody functions.~~

**Comment [IA44]:** Refer to regulation 40(3) of the proposed regulations