

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

CONSULTATION ON THE PROPOSED IMPLEMENTATION OF THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE

[MFSA REF.: 14/2013]

18th September 2013

Closing Date: 2nd October 2013

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.

1. Introduction

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 also known as the [Alternative Investment Fund Managers Directive](#) ('AIFMD') was published in the Official Journal of the European Union on 1st July 2011. Member States were required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the provisions of the Directive by 22nd July 2013.

2. Transposition of the AIFMD into Maltese Law

To date, the Authority has consulted with the industry on the following:

- Amendments to the Investment Services Act;
- The Investment Services Act (Alternative Investment Fund Manager Passport) Regulations; Investment Services Act (Marketing of Alternative Investment Funds) Regulations; Investment Services Act (Alternative Investment Fund Manager Third Country) Regulations; and Investment Services Act (Alternative Investment Fund Managers) Regulations;
- Revisions to the Investment Services Rules for Investment Service Providers;
- Revisions to the Investment Services Rules for Professional Investor Funds;
- Revisions to the Investment Services Rules for Retail Collective Investment Schemes;
- Questionnaire on Operational Arrangements of Fund Managers and Self-Managed Schemes;
- The Rulebook applicable to De Minimis Licence Holders; and
- The Rulebook applicable to Alternative Investment Funds.

3. Depositary Lite Regime

The AIFMD contemplates the possible provision of services by a *depositary lite* in two instances namely:

1. Article 36 AIFMD provides the conditions for the marketing by a Maltese or European AIFM of third country AIFs in the Union. In particular, Article 36 provides *inter alia* that the AIFM must ensure compliance with all the requirements of the Directive with the exception of Article 21. This notwithstanding, the AIFM must still ensure that one or more entities are appointed to carry out the duties referred to in Articles 21(7), (8) and (9) AIFMD; and
2. Article 21(3) [third subparagraph] AIFMD provides that in relation to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial

investment 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) or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and which can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitment inherent in those functions.

3.1. Proposed transposition and implementation of depositary lite provisions

The MFSA has prepared a framework for the provision of services by a depositary lite. In particular, the Authority is proposing that in addition to the entities which, in terms of SLC 1.02 of Part BIV of the Investment Services Rules for Investment Services Providers¹, may provide the services of a depositary, the following licenced entities will be allowed to provide the services of depositary lite namely:

- (i) Recognised Fund Administrators; and
- (ii) Category 2 Licence Holders [MiFID Investment Firms]

The entity wishing to provide the services of depositary lite will be required to adhere to a minimum own funds requirement amounting to €125,000 and to obtain a Category 4 Licence to provide solely and exclusively the prescribed activities.

The specific rules proposed for Category 4 Licence Holders providing *depositary lite services* will form part of Part BIV of the Rules.

The revised Parts BIII and BIV are being circulated with this consultation document in track changes. In particular, Licence Holders are to consider the proposed changes to:

- [I] Part BIII
 - Section 5: The Role of the Custodian – SLCs 5.01 and 5.02.
- [II] Part BIV
 - Section 1: General Requirements applicable to Custodians of UCITS and AIFs – SLC 1.03; and
 - Section 4: Supplementary Conditions applicable to a Custodian of an AIF – SLCs 4.29 to 4.37.

¹ Hereinafter referred to as ‘the Rules’.

4. Contacts

Interested parties are to send their comments in writing by not later than 2nd October 2013. Any comments and feedback are to be addressed to Dr. Isabelle Agius – Regulatory Development Unit by e-mail on iagius@mfsa.com.mt

Any queries or requests for clarifications in respect of the above should be addressed to: Dr. Isabelle Agius, Regulatory Development Unit, Tel: 25485359 or by e-mail on iagius@mfsa.com.mt, Dr. Monica Nally Hennessy, Securities and Markets Supervision Unit, by e-mail on MNallyHennessy@mfsa.com.mt or Mr. Jonathan Sammut, Securities and Markets Supervision Unit on Tel: 25485452 or by e-mail on jsammut@mfsa.com.mt

Communications Unit
Malta Financial Services Authority
MFSA Ref: 14/2013
18th September 2013

INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS

PART BIII: STANDARD LICENCE CONDITIONS APPLICABLE TO INVESTMENT SERVICES LICENCE HOLDERS WHICH QUALIFY AS AIFMs

Introduction

Part BIII of the Investment Services Rules for Investment Services Providers applies to Investment Services Licence Holders which provide services in terms of the AIFMD. Therefore, Part BIII does not apply to Investment Services Licence Holders which qualify as MiFID Firms, UCITS Fund Managers, or Custodians.

SECTION: TRANSITIONAL ARRANGEMENTS

Licence Holders performing activities outlined in SLC 1.03 of these Rules and licenced in terms of the Act prior to 22 July 2013, shall take all necessary measures to comply with the SLCs prescribed in this Part of the Investment Services Rules by 22 July 2013 and shall thereafter submit an application for authorisation [Schedule A2] within 1 year from such date being 22 July 2014.

Licence Holders, in so far as they manage AIFs of the closed-ended type prior to 22 July 2013 which do not make any additional investments after 22 July 2013 may continue to manage such AIFs without submitting an application for authorisation in terms of these Rules. However, these shall still subject to the requirements set in this Part of the Investment Services Rules.

Licence Holders in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to the 22 July 2013 and are constituted for a period of time which expires at the latest 3 years after 22 July 2013, may continue to manage such AIFs without needing to comply with the SLCs prescribed in this Part of the Rules with the exception of:

- [1] SLCs 7.01 to 7.03 of this Part of the Rules and SLCs 2.01 to 2.07 of Appendix 13 to these Rules; and
- [2] Where relevant SLCs 9.01 to 9.21 of this Part of the Rules and SLCs 2.08 to 2.10 of Appendix 13 to these Rules.

Alternatively such Licence Holders may submit an application for authorisation in terms of these Rules.

SECTION 1 – PART BIII: INVESTMENT SERVICES LICENCE HOLDERS – CATEGORY 2 – DE MINIMIS

[I] INTRODUCTION

1. Licence Holders which satisfy one of the following conditions shall not be subject to this Part of the Investment Services Rules but shall comply with the requirements laid down in this section:

- (a) Either directly or indirectly, through a company with which the Licence Holder is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or
- (b) Either directly or indirectly, through a company with which the Licence Holder is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

Where the conditions prescribed above are no longer met, the *de minimis* Licence Holder concerned shall inform the MFSA thereof and shall apply for an extension to its *de minimis* Category 2 Licence to a full AIFM Category 2 Licence. This application shall be made within 30 days from the date of notification to the MFSA.

Provided that in complying with the requirements prescribed in SLC 1, the Licence Holder shall further comply with Articles 3 and 4 of the EU 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.

2. The activities of the Licence Holder shall ordinarily be limited to the management of collective investment schemes which are not marketed to retail investors. However, the Licence Holder may also, with the approval of the Authority, be allowed to market collective investment schemes to retail investors, subject to compliance with SLCs 41 to 58 of these Investment Services Rules. The Licence Holder may also, with the approval of the Authority provide other Investment Services.

When the *de minimis* Licence Holder is also authorised to provide investment advice and/or portfolio management services to retail and/or Professional Clients and/or Eligible Counterparties it shall:

- [a] disclose its interest in any collective investment scheme(s) in respect of which it

provides investment advice;

- [b] not be permitted in the course of the provision of portfolio management services, to invest all or part of the investor's portfolio in units of collective investment schemes it manages or in which it has an interest, unless it receives prior general written consent from the client following disclosure of its interest; and
- [c] not be permitted to provide portfolio management services to any Custodian which performs custodial duties for collective investment schemes in respect of which it acts as Manager.

The *de minimis* Licence Holder shall not use the Scheme's assets for its own purposes.

3. The *de minimis* Licence Holder shall not benefit from any rights to passport granted in terms of the Alternative Investment Fund Managers Directive unless they choose to apply for a full AIFM Category 2 licence, subject to all the conditions prescribed in Sections 1 to 10 of Part BIII of this Rule Book.

4. The *de minimis* Licence Holder shall comply with the following requirements:

- [i] The Licence Holder shall provide information to the MFSA on the AIFs that it manages including their investment strategies;
- [ii] The Licence Holder shall regularly, provide the MFSA with information on the main instruments in which it is trading and on the principal exposures and most important concentrations of the AIFs that it manages in order to enable the MFSA to monitor systemic risk effectively:

Provided that in complying with the requirements prescribed in paragraph [ii] above, the Licence Holder shall submit to the MFSA the information prescribed in Annexes 1 and 2 to these Rules and shall further 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 regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

- [iii] The Licence Holder shall notify the MFSA in the event it no longer meets the conditions referred to in SLC 1.
- [iv] The Licence Holder shall provide the MFSA with any additional information required from time to time. In particular, 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 Auditing, which shall be submitted to the MFSA. The auditor must also confirm to the MFSA that the audit has been conducted in accordance with International Standards on Auditing and whether,

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in the auditor's opinion the methodology used by the Licence Holder to calculate its assets under management complies with the requirements of the Alternative Investment Fund Management Directive.

5. The *de minimis* Licence Holder shall commence its Investment Services business within twelve months of the date of issue of the Investment Services Licence.

If, for any reason the *de minimis* 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.

6. The *de minimis* Licence Holder shall co-operate in an open, honest and transparent manner with the MFSA and inform it promptly of information relevant to the supervision of the Licence Holder. The *de minimis* Licence Holder shall supply the MFSA with such information and returns as the MFSA may request.

7. Where a Standard Licence Condition requires that a *de minimis* Licence Holder notifies the MFSA of any particular 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.

8. The *de minimis* Licence Holder shall notify the MFSA in writing of:

- (a) a change in the Licence Holder's 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) any material changes to the conditions for initial authorisation, in particular material changes to the information provided during the application process at least one month in advance of the change being made;
- (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;
- (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 departure of a Director or Senior Manager: within 14 days of the departure.

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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;

- (g) any evidence of fraud, dishonesty or irregular behaviour by a member of the Licence Holder's staff immediately upon becoming aware of the matter;
- (h) a decision to make a material claim on any insurance policy held in relation to the Licence Holder's Investment Services business. Notification should be provided as soon as the decision is taken;
- (i) 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;
- (j) 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;
- (k) establishing a branch abroad;
- (l) making application to an overseas Regulator to undertake any form of licensable activity outside Malta;
- (m) 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.

9. The *de minimis* 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) acquiring 10 per cent or more of the voting share capital of another company;
- (c) taking any steps to cease its investment services business;
- (d) agreeing to sell or merge the whole or any part of its undertaking;
- (e) appointing Director or Senior Manager, Compliance Officer, Money Laundering Reporting Officer and any persons engaged in portfolio management, risk management or investment advice at least twenty one business days in advance. The request for consent shall be accompanied by a Personal Questionnaire for all above mentioned parties with the exception of the investment advisor, *in the form*

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set out in *Schedule F to Part A of the Investment Services Rules* – duly completed by the person proposed.

In the case of a proposed Portfolio Manager, Investment Advisor, Compliance Officer and /or Money Laundering Reporting Officer and Risk Manager, the request shall also be accompanied by the Competency Form set out in *Schedule I to Part A of the Investment Services Rules* duly completed by the person proposed.

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 (e) above and (f) 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.

- (f) the change in the responsibilities of a *Director or Senior Manager* at least twenty one business days in advance. The request for consent of the change in responsibilities of a *Director or Senior 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 Licence Holder, 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);

10. The *de minimis* Licence Holder shall maintain sufficient records to be able to demonstrate compliance with the conditions of its Investment Services Licence. The records shall be maintained for a minimum period of five years and shall be available to the MFSA upon request.

Additionally records which set out the respective rights and obligations of the *de minimis* Licence Holder and the client under an agreement to provide services, or the terms on which the Licence Holder provides services to the client shall be retained for at least the duration of the relationship with the client.

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However, the MFSA may in exceptional circumstances require the Licence Holder to retain for such longer periods any or all of those records as is justified by the nature of the instrument or transaction, if it is considered necessary for MFSA to exercise its supervisory functions.

11. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the MFSA and in such a form and manner that the following conditions are met:
 - (a) MFSA must be able to readily access the records and to reconstitute each key stage of the processing of each transaction;
 - (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
 - (c) it must not be possible for the records to be otherwise manipulated or altered.
12. The *de minimis* 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.
13. The Licence Fee shall be payable by the *de minimis* 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.
14. The *de minimis* Licence Holder shall pay promptly all amounts due to the MFSA.
15. The *de minimis* Licence Holder shall notify the MFSA of any breach of the conditions of the Licence as soon as the Licence Holder becomes aware of the breach.
16. If so required by the MFSA, the *de minimis* Licence Holder shall use all its powers 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 investors.

[III] ORGANISATION REQUIREMENTS

17. The *de minimis* Licence Holder shall comply with any requirements for local presence which the Authority may issue from time to time in the form of guidance to the industry.
18. The *de minimis* Licence Holder shall have an established place of business in Malta and 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;
- 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 *de minimis* 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.

19. The *de minimis* 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.

20. The *de minimis* Licence Holder shall be a separate person from the Custodian of a Scheme for which it acts as Manager and shall act independently of each other and solely in the interests of the Unit holders. Since independence may be compromised in

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various ways, any facts, relationships, arrangements or circumstances which arise which may at any stage bring that independence into question shall be declared to the MFSA as soon as the *de minimis* Licence Holder becomes aware of any such matter.

21. The *de minimis* Licence Holder shall monitor and, on a regular basis evaluate, the adequacy and effectiveness of its systems, internal control mechanisms and arrangements and take appropriate measures to address any deficiencies.
22. The *de minimis* Licence Holder shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure 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. The *de minimis* Licence Holder shall, for this purpose appoint a Compliance Officer who shall be responsible for monitoring compliance with the applicable requirements.
23. The *de minimis* Licence Holder shall establish, implement and maintain adequate risk management policies and procedures in respect of the Schemes under management. The *de minimis* Licence Holder shall also adopt effective arrangements, processes and mechanisms to manage the risks relating to the Schemes' activities, processes and systems:

Provided that this requirement shall apply in proportion to the nature, scale and complexity of the Schemes managed.
24. In the event that the *de minimis* Licence Holder wishes to delegate to third parties the carrying out on its behalf of one or more of its functions, it shall first notify MFSA. Such notification shall include details of the nature of functions to be delegated and of the entity or entities to which the *de minimis* Licence Holder proposes to delegate such functions.
25. A *de minimis* Licence Holder shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the MFSA to monitor the *de minimis* Licence Holder's compliance with all obligations.
26. An operational function of a *de minimis* Licence Holder shall be regarded as critical or important if a defect or failure in its performance would materially impair the continuing compliance of a *de minimis* Licence Holder with the conditions and

obligations of its authorisation or its other obligations under these Rules, or its financial performance, or the soundness or the continuity of its Investment Services and activities.

27. Without prejudice to the status of any other function, the following functions shall not be considered as critical or important:
- (a) the provision to the *de minimis* Licence Holder of advisory services, and other services which do not form part of the investment business of the Licence Holder, including the provision of legal advice to the Licence Holder, the training of personnel, billing services and the security of the premises and personnel; and
 - (b) the purchase of standardised services, including market information services and the provision of price feeds.
28. When the *de minimis* Licence Holder outsources critical or important operational functions or any Investment Services or activities, the *de minimis* Licence Holder remains fully responsible for discharging all of their obligations under these.

[III] CONDUCT OF BUSINESS

29. When providing Investment Services, a *de minimis* Licence Holder shall act honestly, fairly and professionally in accordance with the best interests of its clients and shall comply with the relevant provisions of the Act, the Regulations issued thereunder, these Rules as well as with other relevant legal and regulatory requirements, in particular those set out in the Prevention of Money Laundering Act, 1994, and the Prevention of Financial Markets Abuse Act, 2005 and Regulations issued thereunder. The *de minimis* Licence Holder is also expected to take due account of any relevant Guidance Notes which may be issued by the MFSA, as well as the Implementing Procedures issued by the FIAU in terms of the Prevention of Money Laundering and Financing of Terrorism Regulations to assist the *de minimis* Licence Holder in complying with its legal and regulatory obligations.
30. The *de minimis* Licence Holder shall establish a record that includes the document or documents agreed between it and the Schemes/ funds under management and which set out the rights and obligations of the parties, and the other terms on which the *de minimis* Licence Holder will provide services to the Schemes/ funds under management. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.
31. The *de minimis* Licence Holder shall ensure that accurate clear and appropriate information is provided in a comprehensible form to investors such that they are reasonably able to understand the nature and risks of the Investment Service to be provided. The *de minimis* Licence Holder shall ensure that all information, including marketing communications addressed to investors or potential investors is accurate, fair, clear and not misleading and contains a statement to the effect that the licence

holder qualifies as a *de minimis* Licence Holder under Maltese law and that its licence is restricted to portfolio management to collective investment schemes which may only be marketed to professional investors.

32. The *de minimis* Licence Holder shall ensure that investors in the schemes under its management are provided with adequate reports on the services to be provided. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the investors.
33. The *de minimis* Licence Holder shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of investors in the schemes under its management. These shall include staff dealing arrangements applicable to persons who are involved in activities that may give rise to a conflict of interest.
34. The *de minimis* Licence Holder its associates or the schemes under its management shall not deal with the investors as a Principal unless the terms of the transaction or arrangement are on an arm's length basis.

[IV] FINANCIAL RESOURCES AND REPORTING

35. The *de minimis* Licence Holder shall maintain financial resources sufficient for the proper performance of its functions. It shall have sufficient financial resources at its disposal to enable it to conduct its business effectively and to meet its liabilities.

Without prejudice to the generality of the foregoing, the *de minimis* Licence Holder shall have an initial capital of €125,000 which shall be maintained on an on-going basis.

The meaning of own funds and the capital resources requirement applicable to the different categories of Licence Holders, as well as the methodology for calculating a Licence Holder's satisfaction of its Financial Resources Requirement, are set out in Appendix 1.

36. The *de minimis* Licence Holder shall maintain proper accounting records to show and explain the *de minimis* Licence Holder's own transactions, assets and liabilities.
37. The accounting records shall:
 - a. disclose with reasonable accuracy, at all times, the financial position of the *de minimis* 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.

- c. be retained 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.
38. The *de minimis* Licence Holder shall appoint an auditor approved by the MFSA. The *de minimis* 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.
39. The *de minimis* 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.
40. The *de minimis* Licence Holder shall submit to the MFSA within four months of the accounting reference date, the audited annual financial statements prepared in accordance with EU International Financial Reporting Standards, together with a copy of the auditors' management letter and the auditors' report required by SLC 4[iv] above.
- [V] SUPPLEMENTARY LICENCE CONDITIONS APPLICABLE TO DE MINIMIS LICENCE HOLDERS MARKETING AIFs IN MALTA TO RETAIL INVESTORS**
41. An AIF can only be marketed to retail investors in Malta by a *de minimis* Licence Holder if it is in possession of an authorisation granted to it for this purpose by the MFSA in terms of the applicable SLCs issued in terms of the Investment Services Act.
42. An AIF falling within the definition of a complex product in terms of MiFID and in terms of the ESMA's "*MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements*" [CESR/09-559] will not be authorised for marketing in Malta.
43. Where an AIF is to be marketed to retail investors in Malta, the AIF or the *de minimis* Licence Holder on behalf of the AIF shall submit an application to the MFSA requesting authorisation to market the AIF in Malta to retail investors. The application shall be accompanied by the following documentation:
- a) A prospectus of the AIF;
 - b) A declaration by the Directors of the *de minimis* Licence Holder that the AIF is not a complex financial instrument in terms of MiFID together with justifiable reasons why the Directors of the *de minimis* Licence Holder deem the AIF not to be a complex financial instrument.
44. The Application shall be accompanied by such fees as may be prescribed in the Investment Services Act (Licence and other Fees) Regulations.

45. A *de minimis* Licence Holder wishing to market an AIF to retail investors in Malta shall also be subject to the requirements prescribed hereunder.

Disclosure Requirements for Information to Retail Clients, including Marketing Communications - General

46. All information, including marketing communications addressed by the *de minimis* Licence Holder to retail investors or potential retail investors is subject to the requirements of Article 11 of the Act and shall be fair, clear and not misleading by complying with the conditions set out below. Marketing communications (which include ‘investment advertisements’ as defined in Article 2(1) of the Act) shall:

- a) be clearly identifiable as such; and
- b) be considered to be fair, clear and not misleading if they comply with the conditions prescribed in SLCs 48 to 54 of this Section.

For the avoidance of doubt the following are not subject to the rules contained in SLCs 48 to 54 but are still subject to the requirements of this SLC, requiring them to be “fair, clear and not misleading”:

- a) marketing communications which falls within the definition of “advertorial” as defined in the Glossary to these Rules; and
- b) marketing communications which consist only of one or more of the following: the name of the *de minimis* Licence Holder, a logo or other image associated with the *de minimis* Licence Holder, a contact point, a reference to the AIFs managed by the *de minimis* Licence Holder.

47. The *de minimis* Licence Holder shall ensure that appropriate records of all issued and/or approved marketing communications are maintained and made available for inspection by the MFSA within 24 hours of its request, for not less than five years from the date of publication or broadcast. Such records should include:

- a) the name of the individual who approved the communications;
- b) the date of approval of the information;
- c) the publication/s in which the marketing communication was included; and
- d) evidence to support any statement made in the information and which is not a statement of fact.

Marketing Information and Other Information for retail clients and potential retail clients

For further Guidance as to how these following Rules may be complied with, the *de minimis* Licence Holder may refer to the section entitled: “Disclosure Requirements for information to clients including marketing communications [Adverts]” contained in the Guidance Notes for Investment Services Rules for Investment Services Providers.

48. The *de minimis* Licence Holder shall ensure that all information it addresses to, or disseminates in such a way that it is likely to be received by retail investors or potential retail investors, including marketing communications, satisfies the following conditions. It shall:
- a) include the name of the *de minimis* Licence Holder;
 - b) be accurate, and in particular shall not emphasise any potential benefits of the AIF without also giving a fair and prominent indication of any relevant risks;
 - c) be sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;
 - d) not disguise, diminish or obscure important items, statements or warnings.
49. Where the information contains an indication of past performance of an AIF the following conditions shall be satisfied:
- a) that indication must not be the most prominent feature of the communication;
 - b) the information must include appropriate performance information which covers the immediately preceding 5 years, or the whole period for which the AIF has been offered, if less than 5 years, or such longer period as the *de minimis* Licence Holder may decide, and
 - c) in every case that performance information must be based on complete 12 month periods;
 - d) the reference period and the source of information must be clearly stated;
 - e) the information must contain a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
 - f) where the indication relies on figures denominated in a currency other than that of the country in which the retail investor or potential retail investor is resident, the currency must be clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
 - g) where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed.

50. Where the information relates to future performance, the following conditions shall be satisfied:
- a) the information must not be based on or refer to simulated past performance;
 - b) it must be based on reasonable assumptions supported by objective dates;
 - c) where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed;
 - d) it must contain a prominent warning that such forecasts are not a reliable indicator of future performance.
51. Where the information includes or refers to simulated past performance of the AIF, the following conditions shall be satisfied:
- a) the simulated past performance must be based on the actual past performance of one or more Instruments or financial indices which are the same as, or underlie, the AIF concerned;
 - b) in respect of the actual past performance referred in point (a), the conditions set out in points (a) to (c), (e) and (f) of SLC 49 must be complied with;
 - c) the information must contain a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.
52. Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each investor which may be subject to change in the future.
53. The information shall not use the name of the MFSA or other competent Authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the *de minimis* Licence Holder.
54. Where a marketing communication contains an offer or invitation of the following nature and specifies the manner of response or includes a form by which any response may be made, it shall include such information referred in SLCs 55 to 58 and as is relevant to the offer or invitation:
- a) an offer to enter into an agreement in relation to investment into the AIF with any person who responds to the communication;
 - b) an invitation to any person who responds to the communication to make an offer to enter into an agreement for investment in the AIF.

However, paragraph (a) shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the investor or the potential investor must refer to another document or documents, which, alone or in combination, contain that information.

Information about the AIFs

These requirements which are similar to the ones emanating from MiFID are being imposed on de minimis Licence Holders which market units of AIFs to Retail investors on the basis that in this case the de minimis Licence Holder will have a direct interface with retail clients and should accordingly be subject to the same marketing requirements established under MiFID for Investment Firms providing similar services.

55. The *de minimis* Licence Holder shall provide retail investors or potential retail investors with a general description of the nature and risks of the AIFs, taking into account, in particular, the investor's categorisation as either a retail investor. That description must explain the nature of the AIF, as well as the risks particular to that specific type of instruments in which the AIF invests in sufficient detail to enable the investor or potential investor to take investment decisions on an informed basis.
56. The description of risks shall include, where relevant to the AIF concerned and the status and level of knowledge of the investor or potential investor, the following elements:
 - a) The risks associated with the AIF including an explanation of leverage and its effects and the risk of losing the entire investment;
 - b) The volatility of the price of the units in the AIF.
57. Where the AIF being marketed to retail investors or potential retail investors incorporates a guarantee by a third party, the information about the guarantee shall include sufficient detail about the guarantor and the guarantee to enable the retail investor or potential retail investor to make a fair assessment of the guarantee.
58. The *de minimis* Licence Holder shall provide retail investors or potential retail investors with the following general information, where relevant:
 - a) The name and address of the *de minimis* Licence Holder, and the contact details, necessary to enable investors to communicate effectively with the *de minimis* Licence Holder;
 - b) The languages in which the investor may communicate with the *de minimis* Licence Holder, and receive documents and other information from the *de minimis* Licence Holder;

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- c) The methods of communication to be used between the *de minimis* Licence Holder and the client including, where relevant, those for the sending and reception of orders;
- d) A statement of the fact that the *de minimis* Licence Holder is licensed by the MFSA together with the address of the MFSA;
- e) A description, which may be provided in summary form, of the conflicts of interest policy maintained by the *de minimis* Licence Holder;
- f) At any time that the client requests it, further details of that conflicts of interest.

[VI] ADDITIONAL CONDITIONS

59. The *de minimis* Licence Holders referred to in SLC 1 above shall, where applicable further comply with the relevant requirements prescribed in the following Regulations of the European Commission namely:
- i. EU Commission Implementing Regulation (EU) No 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt-in under Directive 2011/61/EU of the European Parliament and of the Council; and
 - ii. The applicable articles of the EU 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.

1. GENERAL REQUIREMENTS

- 1.01 Each AIF managed shall have a single Licence Holder which shall be responsible for ensuring compliance with the provisions of the Investment Services Act, the Regulations and the Investment Services Rules issued thereunder. The Licence Holder shall either be:
- (a) An external manager, which is the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF; or
 - (b) Where the legal form of the AIF permits an internal management, and where the AIF's governing body chooses not to appoint an external AIFM pursuant to paragraph (a) above, the AIF itself, which shall be licenced as a self-managed AIF and shall then carry out the function of the Licence Holder.
- 1.02 Notwithstanding paragraphs (a) and (b) above of SLC 1.01, the SLCs prescribed in this Part of the Rules shall not apply to AIFMs in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.
- 1.03 The Licence Holder shall not engage in activities other than those prescribed hereunder and the additional management of UCITS subject to authorisation in terms of the Act and in terms of Part BII of the Investment Services Rules for Investment Services Providers. The activities the Licence Holder can be licenced to provide are the following:
- (a) Investment management functions which the Licence Holder shall at least perform when managing an AIF:
 - [i] Portfolio management;
 - [ii] Risk management.
 - (b) Other functions that a Licence Holder may additionally perform in the course of the collective management of an AIF:
 - [i] Administration
 - legal and fund management accounting services;
 - customer inquiries;
 - valuation and pricing, including tax returns;
 - regulatory compliance monitoring;
 - maintenance of unit-/shareholder register;

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- distribution of income;
- unit/shares issues and redemptions;
- contract settlements including certificate dispatch;
- record keeping.

[ii] Marketing;

[iii] Activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the Licence Holder, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of AIFs and the companies and other assets in which it has invested.

1.04 Without prejudice to SLC 1.03, the MFSA may authorise the Licence Holder to provide, in addition to the activities outlined in SLC 1.03 above, the following services:

- a. management of portfolios of investments including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;
- b. non-core services comprising:
 - i. investment advice concerning one or more of the instruments listed in the Act;
 - ii. safekeeping and administration in relation to shares or units of collective investment undertakings;
 - iii. reception and transmission of orders in relation to financial instruments.

1.05 The Licence Holder shall not be authorised to provide:

- a) Only the services referred to in SLC 1.04 above;
- b) Non-core services referred to in SLC 1.04(b) above without also being authorised to provide the services referred to in SLC 1.04(a) above;
- c) Only the activities referred to in SLC 1.03(b) above; or
- d) The services referred to in SLC 1.03(a)(i) above without also providing the services referred to in SLC 1.03(a)(ii) above or vice versa.

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- 1.06 The Licence Holder shall provide the MFSA with the information it requires to monitor compliance with the conditions referred to in the Act and any Rules and Regulations issued thereunder.
- 1.07 Investment firms authorised under the Investment Services Act and credit institutions authorised under the Banking Act, 1994 shall not be required to obtain an authorisation under these Rules in order to provide investment services such as individual portfolio management in respect of AIFs.
- 1.08 Investment firms shall, directly or indirectly, offer units or shares of AIFs to, or place such units or shares with investors in the European Union only to the extent the units or shares can be marketed in accordance with the provisions of the Investment Services Act (Alternative Investment Fund Managers Passport) Regulations, 2013.
- 1.09 The following SLCs shall apply to the provision of services referred to in SLC 1.04 by Licence Holders:
- (a) SLC 10.2 of Part A of the Investment Services Rules for Investment Service Providers;
 - (b) Schedule C to Part A of the Investment Services Rules for Investment Service Providers;
 - (c) SLCs 1.04, 1.17 to 1.29, 2.01 to 2.03, 2.05 to 2.06, 2.13 to 2.27 to 2.30, 2.31 to 2.53, 2.59 to 2.69, 2.74 to 2.81, 2.83 to 2.85, 2.86 to 2.89, 2.90 to 2.94, 2.96 to 2.103, 2.105, 2.111 to 2.113, 2.117, 3.01 to 3.23, 4.01 to 4.10, 6.01 to 6.14, 7.01 to 7.04, 7.06 to 7.14, 7.32(e) of Part BI of Investment Services Rules for Investment Service Providers;
 - (d) Appendices 1 and 2 of the Investment Services Rules for Investment Service Providers;
 - (e) Investment Services Act (Control of Assets) Regulations, 1998 (Part 2 Regulations 3, 5 and 7);
 - (f) European Passport Rights for Investment Firms Regulations, 2007 – Regulation 6; and
 - (g) Part CI of the Investment Services Rules for Investment Service Providers.
- 1.10 The Licence Holder shall commence its Investment Services business within 12 months of the date of issue of the Investment Services Licence.

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.

- 1.11 The MFSA may restrict the scope of the authorisation in particular as regards the investment strategies of AIFs which the Licence Holder is allowed to manage.

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- 1.12 Without prejudice to the generality of Article 6(6) of the Act, the MFSA shall inform an applicant for a licence to provide services as an AIF Manager in writing within three months of the submission of a complete application, whether or not authorisation has been granted. The MFSA may prolong this period for up to three additional months, where it considers necessary due to the specific circumstances of the case and after having notified the applicant accordingly.

Provided that for the purpose of this SLC, an application is deemed to be complete if the applicant has at least submitted the information referred to in the Checklist to the Application Form in Schedule A2 to Part A of these Rules to the satisfaction of the Authority.

- 1.13 The Licence Holder may start managing AIFs in Malta with investment strategies described in accordance with the Application Form submitted to the MFSA as soon as the licence is granted, but not earlier than 1 month after having submitted any missing information referred to hereunder:
- (a) Information on arrangements made for the delegation and sub-delegation to third parties of functions referred to in SLCs 4.01 to 4.09;
 - (b) The memorandum and articles of association of each AIF which the Licence Holder manages or intends to manage;
 - (c) Information on the arrangements made for the appointment of the custodian for each AIF which the Licence Holder intends to manage;
 - (d) Any additional information referred to in SLC 7.04 of these Rules for each AIF which the Licence Holder manages or intends to manage.
- 1.14 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.
- 1.15 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.
- 1.16 The Licence Holder's Investment Services Business 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.

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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.

1.17 The Licence Holder shall notify the MFSA in writing of:

- a. a change in the Licence Holder's 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. any material changes to the conditions for initial authorisation, in particular material changes to the information provided during the application process at least one month in advance of the change being made;

Provided that if the MFSA decides to impose restrictions or reject these changes, it shall within 1 month of receipt of such notification, inform the Licence Holder;

Provided further, that the MFSA may prolong the afore-mentioned one month period where it considers this to be necessary because of the specific circumstances of the case and after having notified the Licence Holder accordingly.

The changes shall be implemented if the MFSA does not oppose the changes within the relevant assessment period.

- d. A change in the appointment of the external valuer;
- e. 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;
- f. any changes to 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;
- g. 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;

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- h. any proposed material change to its business (whether that business constitutes licensable activity under the Act or not) – at least one month before effecting the change (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);
- i. any evidence of fraud or dishonesty by a member of the Licence Holder's staff immediately upon becoming aware of the matter;
- j. a decision to make a material claim on any insurance policy held in relation to the Licence Holder's Investment Services business. Notification should be provided as soon as the decision is taken;
- k. 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 as provided in SLC 6.26(b);
- l. 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;
- m. 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;
- n. the relevant details required pertaining to any introducers which may be appointed by the Licence Holder.

1.18 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;

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- g. the appointment of a Director or Senior Manager responsible for the Investment Services business of the Licence Holder or of the Licence Holder's Compliance Officer in terms of SLC 1.26 and/ or Money Laundering Reporting Officer, at least twenty one business days in advance. The request for consent of the appointment shall be accompanied by a Personal Questionnaire ("PQ"), in the form set out in Schedule F 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 at least twenty one business days in advance. The request for consent of the change in responsibilities of a Director or Senior 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 Licence Holder, 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);

- i. any persons, whether Directors, Senior Managers or other employees are engaged in any of the following activities:

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- Portfolio management
- Risk management
- Investment advice

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 A2 to these Rules).

- 1.19 The Licence Holder shall maintain sufficient records to be able to demonstrate compliance with the conditions of its Investment Services Licence.
- 1.20 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.
- 1.21 The Licence Holder shall pay promptly all amounts due to the MFSA.
- 1.22 The Licence Fee shall be payable by the Licence Holder on the day the Licence is first issued and, thereafter annually within one week from the anniversary of that date.
- 1.23 The Licence Holder shall notify the MFSA of any breach of the conditions of the Licence as soon as the Licence Holder becomes aware of the breach.
- 1.24 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 the conditions imposed by the MFSA in order to protect the interests of AIF and of the investors of the AIF.
- 1.25 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 and the reasons therefore.

Compliance

- 1.26 The Licence Holder shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the Licence Holder 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.

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The Licence Holder shall, for this purpose, 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.

- 1.27 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 put in place in accordance with the requirements of SLC 1.26, 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.
- 1.28 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 1.18(g) in this regard.

2 ADMINISTRATIVE PROCEDURES AND INTERNAL CONTROL MECHANISMS

- 2.01 The Licence Holder shall at all times use adequate and appropriate human and technical resources that are necessary for the proper management of AIFs.
- 2.02 The Licence Holder shall be required to have sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms, in particular, having regard also to the nature of the AIFs managed.

In particular these will include rules for personal transactions by its employees or for the holding or management of investments in order to invest on its own account and ensuring at least, that each transaction involving AIFs may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the AIFs managed by the Licence Holder are invested according to the memorandum and articles of association, the prospectus and any other legal provisions in force.

- 2.03 The Licence Holder shall also refer and comply with the applicable provisions 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 on the requirements prescribed in SLC 2.01 above.

Permanent Risk Management Function

- 2.04 The Licence Holder shall functionally and hierarchically separate the functions of risk management from the operating units including from the functions of portfolio management.
- 2.05 The MFSA shall review the functional and hierarchical separation of the functions of risk management in accordance with SLC 2.04 above in accordance with the principle of proportionality, on the understanding that the Licence Holder shall, in any event, be able to demonstrate that specific safeguards against conflicts of interest allow for the independent performance of risk management activities and that the risk management process satisfies the requirements of SLCs 2.04 to 2.09 and is consistently effective.
- 2.06 The Licence Holder shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each alternative investment fund investment strategy and to which each alternative investment fund is or may be exposed.
- 2.07 The Licence Holder shall review the risk management systems with appropriate frequency at least once a year and adapt them whenever necessary.

Provided that the frequency of the periodic review shall be decided by the senior management in accordance with the principle of proportionality given the nature, scale and complexity of the business of the Licence Holder and the AIFs it manages.

2.08 The Licence Holder shall at least:

- [i] Implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
- [ii] Ensure that the risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
- [iii] Ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as provided for in its instruments of incorporation, prospectus and offering document.

Provided that in complying with SLC 2.08 above, the Licence Holder shall submit to the MFSA the information prescribed in Appendix 14 to these Rules dealing with results of stress tests and shall further 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 regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

2.09 The Licence Holder shall set a maximum level of leverage which it may employ on behalf of each AIF it manages as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:

- [i] The type of the AIF;
- [ii] The investment strategy of the AIF;
- [iii] The sources of leverage of the AIF;
- [iv] Any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
- [v] The need to limit the exposure to any single counterparty;
- [vi] The extent to which the leverage is collateralised;
- [vii] The asset-liability ratio;

[viii] The scale, nature and extent of the activity of the Licence Holder on the markets concerned.

- 2.10 In complying with SLCs 2.04 to 2.08 above, 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 on the following matters namely:
- (a) The risk management systems to be employed by Licence Holders in relation to the risks which they incur on behalf of the AIFs that they manage;
 - (b) The appropriate frequency of review of the risk management system;
 - (c) How the risk management function is to be functionally and hierarchically separated from the operating units including the portfolio management function;
 - (d) Specific safeguards against conflicts of interest referred to in SLC 2.05;
 - (e) The requirements referred to in SLC 2.08.

Liquidity Management Policy

- 2.11 The Licence Holder shall, for each AIF it manages which is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable the Licence Holder to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investment of the AIF complies with its underlying obligations.
- 2.12 The Licence Holder shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly.
- 2.13 In complying with SLC 2.11 and 2.12 above, the Licence Holder shall submit to the MFSA the information prescribed in Appendix 15 to these Rules dealing with results of stress tests and shall further 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 regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
- 2.14 The Licence Holder shall ensure that, for each AIF managed, the investment strategy, the liquidity profile and the redemption policy are consistent.

- 2.15 In complying with SLC 2.14 concerning the alignment of the investment strategy, the liquidity profile and the redemption policy, 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.

Investment in securitisation positions

- 2.16 The Licence Holder shall comply with the requirements on securitisation as prescribed in 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.

Valuation

- 2.17 The Licence Holder shall ensure that for each AIF it manages, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the AIF can be performed in accordance with SLCs 2.17 to 2.33, the fund rules or the instruments of incorporation.
- 2.18 The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the AIF shall be those prescribed in the Investment Services Rules in the case where the AIF is established in Malta and/or the fund rules or instruments of incorporation.
- 2.19 The Licence Holder shall also ensure that the net asset value per unit or share of the AIF is calculated and disclosed to investors in accordance with SLCs 2.17 to 2.33, the fund rules or instruments of incorporation.
- 2.20 The valuation procedures used shall ensure that the assets are valued and the net asset value per unit or share is calculated at least once a year.
- 2.21 If the AIF is of the open-ended type, such valuations and calculations shall also be carried out at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency.
- 2.22 If the AIF is of the closed-ended type, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the relevant AIF.
- 2.23 The Licence Holder shall inform the investors of the valuations and calculations as prescribed in the fund rules or instruments of incorporation.

2.24 In complying with SLCs 2.19 to 2.23, 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 on the following matters:

- (a) The criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per unit or share; and
- (b) The frequency of valuation carried out by open-ended AIFs which is both appropriate to the assets held by the AIF and its issuance and redemption policy.

2.25 The Licence Holder shall ensure that the valuation function is either performed by:

- (a) An external valuer, being a legal or natural person independent from the AIF, the Licence Holder and any other persons with close links to the AIF or the Licence Holder;
- (b) The Licence Holder itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon employees is prevented.

The custodian appointed for an AIF shall not be appointed as an 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.

2.26 Where an external valuer performs the valuation function, the Licence Holder shall demonstrate that:

- [a] The external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;
- [b] The external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with SLCs 2.17 to 2.23 above; and
- [c] The appointment of the external valuer complies with the requirements of SLCs 4.01 to 4.03.

2.27 In complying with SLC 2.26, the Licence Holder shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No. 231/2013 of 19

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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.

- 2.28 The appointed external valuer shall not delegate the valuation function to a third party.
- 2.29 The Licence Holder shall notify the appointment of the external valuer to the MFSA which may require that another external valuer be appointed instead, where the conditions prescribed in SLC 2.26, are not met.
- 2.30 The external valuer shall perform the valuation impartially and with all due skill, care and diligence.
- 2.31 In the case where the valuation function is not performed by an independent external valuer, the MFSA may require the Licence Holder to have its valuation procedures and/or valuations verified by an external valuer, or, where appropriate by an auditor.
- 2.32 The Licence Holder shall be responsible for the proper valuation of the assets of the AIF, the calculation of the net asset value and the publication of that net asset value. The Licence Holder's liability towards the AIF and its investors shall, therefore not be affected by the fact that the Licence Holder has appointed an external valuer.
- 2.33 Notwithstanding SLC 2.32, and irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the Licence Holder for any losses suffered by the Licence Holder as a result of the external valuer's negligence or intentional failure to perform its tasks.

Enforcement

- 2.34 In cases where the Licence Holder is unable to ensure compliance with the provisions of the Investment Services Act, the Regulations and the Investment Services Rules issued thereunder for which an AIF or another entity on its behalf is responsible, it shall immediately inform the MFSA and, if applicable the European Regulatory Authority of the AIF concerned. The MFSA shall require the Licence Holder to take the necessary steps to remedy the situation.
- 2.35 If notwithstanding the steps referred to in SLC 2.34 above being taken, the non-compliance persists, and in so far as it concerns the Licence Holder or an AIF set up in Malta or in another EU Member State or EEA State, the Licence Holder shall be required by the MFSA to resign. In such a case, the AIF shall no longer be marketed in any of the Member States or EEA States.
- 2.36 The MFSA shall inform the European Regulatory Authorities of the Licence Holder's host Member States or EEA States.

3 CONDUCT OF BUSINESS

- 3.01 The Licence Holder shall be expected to comply with the conduct of business rules prescribed hereunder. In particular the Licence Holder shall:
- a. act honestly, with due skill, care and diligence and fairly in conducting its activities;
 - b. act in the best interests of the AIFs or the investors of the AIFs it manages and the integrity of the market;
 - c. have and employ effectively the resources and procedures that are necessary for the proper performance of its business activities;
 - d. take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs it manages are fairly treated;
 - e. comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the AIFs or the investors of the AIFs it manages and the integrity of the market;
 - f. treat all AIF investors fairly.
- 3.02 In complying with SLC 3.01, 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 specifying the criteria to be used by the Authority to assess whether the Licence Holder complies with its obligations under SLC 3.01.
- 3.03 No investor in an AIF shall obtain preferential treatment unless such preferential treatment is disclosed in the relevant AIF's fund rules or instruments of incorporation.
- 3.04 Each Licence Holder, the authorisation of which also covers the discretionary portfolio management services referred to in SLC 1.04(a) shall:
- [a] Not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;
 - [b] With regards to the services referred to in SLC 1.04, be subject to the Investor Compensation Scheme Regulations.

Remuneration

- 3.05 The Licence Holder shall have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profile of the Licence Holder or of the AIFs it manages, that are consistent with and promote sound and effective risk management and do not encourage risk taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIFs it manages.
- 3.06 The Licence Holder shall determine the remuneration policy and practice in accordance with the principles outlined in Appendix 12.

Conflicts of Interest

- 3.07 The Licence Holder shall take all reasonable steps to identify conflicts of interest that arise in the course of managing AIFs between:
- a. the Licence Holder, including its managers, employees or any person directly or indirectly linked to the Licence Holder by control, and the AIF managed by the Licence Holder or the investors in that AIF;
 - b. the AIF or the investors in that AIF, and another AIF or the investors in that AIF;
 - c. the AIF or the investors in that AIF and another client of the Licence Holder;
 - d. the AIF or the investors in that AIF, and a UCITS Scheme managed by the Licence Holder or the investors in that UCITS Scheme; or
 - e. two clients of the Licence Holder.
- 3.08 The Licence Holder shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors.
- 3.09 The Licence Holder shall segregate within its operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest.
- 3.10 The Licence Holder shall assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the investors of the AIFs.

- 3.11 Where organisational arrangements made by the Licence Holder to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure with reasonable confidence, that risks of damage to investors' interests will be prevented, the Licence Holder shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures.
- 3.12 Where the Licence Holder on behalf of an AIF uses the services of a prime broker, the terms shall be set out in a written contract. In particular any possibility of transfer and reuse of AIF assets shall be provided for in that contract and shall comply with the fund rules or instruments of incorporation. The contract shall provide that the custodian be informed of the contract.

The Licence Holder shall exercise due skill, care and diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

- 3.13 In complying with SLCs 3.07 to 3.13, 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 prescribing the reasonable steps which the Licence Holder is expected to take in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

4 OUTSOURCING AND SUB-DELEGATION

- 4.01 A Licence Holder which intends delegating to third parties the task of carrying out functions on its behalf shall notify the MFSA before the delegation arrangements become effective. The Licence Holder shall comply with the following requirements:
- a. the Licence Holder must be able to justify its entire delegation structure on objective reasons;
 - b. the delegate must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced;
 - c. where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision, or where that condition cannot be met, only subject to prior approval by the MFSA;
 - d. where the delegation concerns portfolio management or risk management and is conferred on a third country undertaking, in addition to the requirements outlined in point (c) above, cooperation between the MFSA and the supervisory authority of the undertaking must be ensured;
 - e. the delegation must not prevent the effectiveness of supervision of the Licence Holder, and in particular, must not prevent the Licence Holder from acting, or the AIF from being managed, in the best interests of its investors;
 - f. the Licence Holder must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the Licence Holder is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.
- 4.02 The Licence Holder shall review the services provided by each delegate on an ongoing basis.
- 4.03 No delegation of portfolio management or risk management shall be conferred on:
- (a) The custodian or a delegate of the custodian; or
 - (b) Any other entity whose interests may conflict with those of the Licence Holder or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential

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conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

- 4.04 The liability of the Licence Holder towards the AIF and its investors shall not be affected by the fact that the Licence Holder has delegated functions to a third party, or by any further sub-delegation, nor shall the Licence Holder delegate its functions to the extent that in essence, it can no longer be considered to be the manager of the AIF and to the extent that it becomes a letter-box entity.
- 4.05 The delegate may sub-delegate any of the functions delegated to it provided that the following conditions are met:
- (a) The Licence Holder consented prior to the sub-delegation;
 - (b) The Licence Holder notified the MFSA before the sub-delegation arrangements become effective;
 - (c) The conditions prescribed in SLC 4.01 and 4.02 are fulfilled on the understanding that all references to the 'delegate' are read and construed as referring to the 'sub-delegate'.
- 4.06 No sub-delegation of portfolio management or risk management shall be conferred on:
- (a) The custodian or a delegate of the custodian; or
 - (b) Any other entity whose interests may conflict with those of the Licence Holder or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management 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.
- 4.07 The relevant delegate shall review the services provided by each sub-delegate on an ongoing basis.
- 4.08 Where the sub-delegate further delegates any of the functions delegated to it, the conditions prescribed in SLC 4.05 shall apply *mutatis mutandis*.
- 4.09 In complying with SLCs 4.01 to 4.08 above, 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.

5 THE ROLE OF THE CUSTODIAN

5.01 The Licence Holder shall ensure that a single custodian is appointed for each AIF it manages in accordance with the following:

- (i) For a Non-UCITS retail collective investment scheme licensed in Malta, a Custodian having a Category 4 investment services licence issued by the Authority;
- (ii) For a fund which qualifies as a Professional Investor Fund or an AIF licenced in Malta, a Custodian having a Category 4 investment services licence issued by the Authority or a credit institution having its registered office in the EU and authorised in accordance with Directive 2006/48/EC;
- (iii) For an AIF established in a EEA Member State other than Malta, a Custodian which complies with the requirements applicable in the said Member State;

(iv) For 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 and 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, the Licence Holder shall ensure that an entity in possession of a Category 4 Investment Services Licence is appointed:

Provided that the entity appointed in terms of paragraph (iv) above, shall only be obliged to comply with the SLCs prescribed in SLC 4.29 of Part BIV to these Investment Services Rules.

- (v) For an AIF established in a third country, a Custodian which is established in the country of the AIF and which is either a credit institution or an investment firm subject to effective prudential regulation including minimum capital requirements and supervision which have the same effect as EU Law and are effectively enforced or a Custodian having a Category 4 investment services licence issued by the Authority.

Provided that in complying with paragraph (v) above, the Licence Holder shall also refer to 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.

Provided further that the appointment of a Custodian established in a third country shall at all times be subject to the following conditions:

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- (a) The European Regulatory Authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, where the AIFM is licenced in Malta, the MFSA, have signed cooperation and exchange of information arrangements with the competent authorities of the Custodian;
- (b) The third country where the Custodian is established is not listed as a Non-Cooperative Country and Territory by the FATF;
- (c) The Member States in which the units or shares of the non-EU AIF are intended to be marketed, and where the AIFM is licenced in Malta, the MFSA, have signed an agreement with the third country where the Custodian is established which fully complies with the standards prescribed in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including multilateral tax agreements;
- (d) The Custodian shall by contract be liable to the AIF or to the investors of the AIF, consistently with article 21(12) and (13) of the AIFM Directive and shall expressly agree to comply with article 21(11) of the AIFM Directive.

5.02 For third country AIFs, which are marketed in the EU/EEA in terms of Article 36 of the AIFM Directive, the Licence Holder shall ensure that one or more entities are appointed to carry out the duties of cash flow monitoring, safekeeping and general oversight as described in Article 21(7), (8), and (9) respectively of the AIFM Directive. Where such entity is established in Malta, it shall be in possession of a Category 4 Investment Services Licence:

Provided that the entity/ies appointed in terms of SLC 5.02 above, shall only be obliged to comply with the SLCs prescribed in SLC 4.30 and thereafter with SLCs 4.31 to 4.37 of Part BIV of these Investment Services Rules.

5.03 For the purpose of SLCs 5.01 and 5.02, the Licence Holder may not be appointed as custodian.

5.04 The Licence Holder shall further advise the MFSA of the identity of the entity/ies appointed in terms of SLCs 5.01 and 5.02.

5.05 The Licence Holder shall ensure that the appointment of the custodian shall be evidenced by a written contract. This contract shall *inter alia*, regulate the flow of information deemed necessary to allow the custodian to perform its functions for the AIF for which it has been appointed as custodian.

5.06 In complying with SLC 5.05 above, the Licence Holder shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No

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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 prescribing the particulars that need to be included in the written contract referred to above.

- 5.07 The Licence Holder shall ensure that in the execution of its obligations in terms of the AIFM Directive, the Custodian complies with Part BIV of the Investment Services Rules for Investment Services Providers, where the entity is established in Malta or article 21 of the AIFM Directive where the Custodian is established in another Member State.

6 FINANCIAL RESOURCES

6.01 The Licence Holder shall at all times have financial resources sufficient for the proper performance of its functions. The financial resources of the Licence Holder shall at all times exceed the level prescribed hereunder. The Licence Holder shall maintain own funds equal to or in excess of its capital resources requirement. This shall constitute the Licence Holder's Financial Resources Requirement.

6.02 Without prejudice to the generality of SLC 6.01, the Licence Holder must have an initial capital of at least EUR 125,000.

Provided that an AIF which is an internally managed AIF shall have an initial capital of at least EUR 300,000.

6.03 For the purposes of these Rules, the term 'initial capital' shall be comprised of:

(a) *Equity capital*: meaning share capital subscribed by shareholders or other proprietors, in so far as it has been paid up, plus share premium accounts but excluding cumulative preference shares; and

(b) *Reserves*: meaning revenue reserves, interim or year-end net profits/retained profits for the year, unrealised fair value movements in held for trading financial instruments, and other reserves.

6.04 Where the value of the portfolios of AIFs managed by the Licence Holder exceeds EUR 250 million, the Licence Holder will be required to provide an additional amount of own funds which is equal to 0.02% of the amount by which the value of the portfolios of the Licence Holder exceeds EUR 250 million:

Provided that the required total of the initial capital and the additional amount of own funds shall not exceed EUR 10 million.

6.05 For the purposes of SLC 6.04 above, AIFs managed by the Licence Holder, including AIFs for which the Licence Holder has delegated functions in accordance with SLCs 4.01 to 4.08, but excluding AIF portfolios that the Licence Holder is managing under delegation, shall be deemed to be the portfolios of the Licence Holder.

6.06 Without prejudice to the amounts prescribed in SLC 6.04 above, the own funds of the Licence Holder shall never be less than one quarter of the fixed overheads requirement as outlined in Appendix I to these Rules dealing with Financial Resources Requirements and Guidance on the compilation of the Financial Return.

6.07 The MFSA may authorise a Licence Holder not to provide up to 50% of the additional amount of own funds referred to in SLC 6.04 above, if it benefits from a guarantee of the same amount given by a credit institution or an insurance undertaking which has

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its registered office in Malta, in another Member State or EEA State or in a third country where such credit institution or insurance undertaking is subject to prudential rules considered by the MFSA as equivalent to those prescribed by Union Law.

- 6.08 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.
- 6.09 The Licence Holder shall immediately advise the MFSA if at any time it is in breach of its Financial Resources Requirement immediately upon becoming aware of the breach. 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.

Professional Indemnity Insurance Requirement

- 6.10 To cover professional liability risks resulting from activities which the Licence Holder may carry out pursuant to these Rules, the Licence Holder shall either:
- a. Have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
 - b. Hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.
- 6.11 The Licence Holder shall purchase the Professional Indemnity Insurance from an EU or non-EU undertaking authorised to provide professional indemnity insurance in accordance with Union law or Maltese law. The Professional Indemnity Insurance can also be provided by a third party entity.
- 6.12 For the purposes of demonstrating to the satisfaction of the MFSA that the above requirement is being complied with on an ongoing basis, the Licence Holder shall upon request by the MFSA submit a copy of the renewal cover note or such other written evidence as the MFSA may require to establish compliance with these Rules.
- 6.13 The Licence Holder shall, within two days from the date it becomes aware of any circumstances specified in paragraphs (a) to (g) below, inform the MFSA in writing where:
- (a) during the term of the policy, the Licence Holder has notified insurers of an incident which may give rise to a claim under the policy;
 - (b) during the term of a policy, the insurer has cancelled the policy or has notified its intention of doing so;

- (c) the policy has not been renewed or has been cancelled and another policy satisfying the requirements prescribed in this section has not been taken out from the day on which the previous policy lapsed or was cancelled;
 - (d) during the term of a policy, the terms or conditions are altered in any manner so that the policy no longer satisfies the requirements prescribed in this section;
 - (e) the insurer has intimated that it intends to decline to indemnify the insured in respect of a claim under the policy;
 - (f) the insurer has given notice that the policy will not be renewed or will not be renewed in a form which will enable the policy to satisfy the requirements prescribed in this section;
 - (g) during the term of a policy, the risks covered by the policy or the conditions or terms relating thereto are altered in any manner.
- 6.14 Own funds including any additional own funds as referred to in SLC 6.10(a), shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.
- 6.15 SLC 6.02 and SLCs 6.04 to 6.07 shall not apply to Licence Holders which are also UCITS Fund Managers.
- Provided that SLCs 6.10 and 6.14 and the applicable articles 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 regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision shall be applicable to Licence Holders which are also UCITS Fund Managers.
- 6.16 In complying with SLC 6.10 above, 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.

Reporting Requirements

- 6.17 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.

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The Licence Holder shall in each year prepare an Annual Financial Return in the form set out in Appendix 2B to these Rules 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.

- 6.18 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 Date.
- 6.19 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 as required by SLC 6.31 shall be submitted to the MFSA within four months of the Accounting Reference Date.
- 6.20 In addition to the Annual Financial Return and audited financial statements, the Licence Holder shall prepare an Interim Financial Return, in the form set out in Appendix 2A to these Rules, 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 MFSA.
- 6.21 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.
- 6.22 The Licence Holder shall prepare and submit such additional financial returns as the MFSA may require.
- 6.23 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 2B;
 - 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;
- 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.

6.24 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 notification shall give reasons and shall explain what action is being taken to rectify matters.

6.25 The Licence Holder shall notify the MFSA immediately if:

- a. it becomes aware of actual or intended legal proceedings against it;
- b. it decides to claim on a professional indemnity or other policy relating to its Investment Services business;

- c. 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

- 6.26 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.

- 6.27 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, 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. a 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 an auditor of that Licence Holder.

- 6.28 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 letter of confirmation in the form set out in Annex II to the Application Form for an Investment Services Licence.
- 6.29 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;

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- 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; or
 - 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.
- 6.30 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.
- 6.31 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 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;

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- c. the Financial Resources of the Licence Holder have been properly calculated in accordance with the MFSA's requirements and exceed the Financial Resources Requirement of the Licence Holder 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.
- 6.32 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.
- Provided that where the auditor intends to qualify the report, it shall notify the MFSA immediately thereof.
- 6.33 A Licence Holder which receives a management letter from its auditor which contains recommendations to remedy any weaknesses identified during the course of the audit, shall be 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.
- 6.34 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.

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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.

7 DISCLOSURE AND REPORTING REQUIREMENTS

Annual Report

- 7.01 The Licence Holder, shall, for each of the European AIFs it manages and for each of the AIFs it markets in an EU or EEA Member State, make available an annual report for each financial year no later than 6 months following the end of the financial year. The contents of the annual report shall be those prescribed in Appendix 13.
- 7.02 The Licence Holder shall provide the annual report to investors on request.
- 7.03 The Licence Holder shall make the annual report available to the MFSA and where applicable, the European Regulatory Authority of the home Member State or EEA State of the AIF. The AIF's annual report shall be published and provided to investors in the AIF, and submitted to the MFSA within six months respectively of the end of the period concerned.

Disclosure to investors

- 7.04 The Licence Holder shall, for each European AIF it manages and for each of the AIFs it markets in an EU Member State or EEA State, make available to AIF investors, in accordance with the fund rules or instruments of incorporation, the information prescribed in Section 3 of Appendix 13.

Disclosure to the MFSA

- 7.05 The Licence Holder shall regularly report to the MFSA on the principal markets and instruments in which it trades on behalf of the AIFs it manages as outlined in Section 4 of Appendix 13.
- 7.06 In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system or to promote long-term sustainable growth, the MFSA may impose additional reporting requirements following a specific request by ESMA to do so.

8 SUPPLEMENTARY REPORTING OBLIGATIONS FOR LICENCE HOLDERS MANAGING SPECIFIC TYPES OF AIFs – LEVERAGED AIFs

Use of information by the MFSA, supervisory cooperation and limits to leverage

- 8.01 The Licence Holder shall demonstrate that the leverage limits set by it for each AIF it manages are reasonable and that it complies with those limits at all times. The MFSA shall assess the risks that the use of leverage by a Licence Holder with respect to the AIFs it manages could entail, and, where deemed necessary in order to ensure the stability and integrity of the financial system, the MFSA, after having notified ESMA, the ESRB and the European Regulatory Authorities of the relevant AIF, shall impose limits to the level of leverage that the Licence Holder is entitled to employ or other restrictions on the management of the AIF with respect to the AIFs under its management, to limit the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets. The MFSA shall duly inform ESMA, the ESRB and the European Regulatory Authorities of the AIF, of actions taken in this respect, through the procedure stipulated in the MFSA Act and the Investment Services Act.
- 8.02 The notification referred to in SLC 8.01 shall be made not less than 10 working days before the proposed measure is intended to take effect or to be renewed.
- 8.03 The notification referred to in SLC 8.01 shall include details of the proposed measure, the reasons for the measure and when the measure is intended to take effect.
- 8.04 In exceptional circumstances, the MFSA may decide that the proposed measure takes effect within the period of 10 working days referred to in SLC 8.02.
- 8.05 In complying with SLC 8.01 above, the Licence Holder shall also refer and be guided by Article 112 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 regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision specifying the circumstances in which the Competent Authority may exercise its power to impose leverage limits or other restrictions on AIFMs.

9 SUPPLEMENTARY SLCs FOR LICENCE HOLDERS MANAGING AIFs WHICH ACQUIRE CONTROL OF NON-LISTED COMPANIES AND ISSUERS

9.01 The SLCs included in this Section shall apply to the following:

- (a) Licence Holders managing one or more AIFs which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with SLC 9.02;
- (b) Licence Holders cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those Licence Holders jointly, acquire control of a non-listed company in accordance with SLC 9.02.

9.02 For the purposes of this section, with regards to non-listed companies, the term 'control' shall mean more than 50% of the voting rights of the companies.

When calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of the following entities shall be taken into account, subject to the control as referred to above being established:

- (a) An undertaking controlled by the AIF; and
- (b) a natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF.

The percentage of voting rights shall be calculated on the basis of all shares to which voting rights are attached even if the exercise thereof is suspended.

Notwithstanding the definition of 'control'¹ as provided in the Glossary to these Investment Services Rules, for the purpose of SLCs 9.12 – 9.14 and SLCs 9.18 to 9.20 in regard to issuers, control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

9.03 The SLCs included within this section shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community as transposed and implemented in Malta through the Employee (Information and Consultation) Regulations.

9.04 This section shall not apply where the non-listed companies concerned are:

¹ 'Control' means control as defined in Article 1 of Directive 83/349/EEC.

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- (a) Small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; or
- (b) Special purpose vehicles with the purpose of purchasing holding or administrating real estate.

9.05 Without prejudice to SLCs 9.01 and 9.04, SLC 9.07 shall also apply to Licence Holders managing AIFs that acquire a non-controlling participation in a non-listed company.

9.06 SLCs 9.12 to 9.14 and SLCs 9.18 to 9.20 shall also apply to Licence Holders managing AIFs that acquire control over issuers. For the purposes of those SLCs, SLCs 9.01 and 9.04 shall apply *mutatis mutandis*.

Notification of the acquisition of major holdings and control of non-listed companies

9.07 When an AIF acquires, disposes of or holds shares of a non-listed company, the Licence Holder managing such AIF shall notify the MFSA of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30% 50% and 75%.

9.08 When an AIF acquires individually or jointly, control over a non-listed company pursuant to SLC 9.01, in conjunction with SLC 9.02, the Licence Holder managing such an AIF shall notify the following of the acquisition of control by the AIF:

- (a) The non-listed company;
- (b) The shareholders of which the identities and addresses are available to the Licence Holder or can be made available by the non-listed company or through a register to which the Licence Holder has or can obtain access; and
- (c) The MFSA.

9.09 The notification required under SLC 9.08 shall contain the following additional information:

- (a) The resulting situation in terms of voting rights;
- (b) The conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
- (c) The date on which control was acquired.

- 9.10 In its notification to the non-listed company, the Licence Holder shall request the Board of Directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the Licence Holder and of the information referred to in SLC 9.09. The Licence Holder shall use its best efforts to ensure that the employees' representatives, or where there are none, the employees themselves, are duly informed by the board of directors in accordance with SLCs 9.07 to 9.11.
- 9.11 The notifications referred to in SLCs 9.07 to 9.09 shall be made as soon as possible, but no later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

Disclosure in the case of acquisition of control

- 9.12 When an AIF acquires individually or jointly, control over a non-listed company or an issuer pursuant to SLC 9.01, in conjunction with SLC 9.02, the Licence Holder managing such an AIF shall make the information referred to in SLC 9.13 available to:
- (a) The company concerned;
 - (b) The shareholders of the company of which the identities and addresses are available to the Licence Holder or can be made available by the company or through a register to which the Licence Holder has or can obtain access; and
 - (c) The MFSA.

The MFSA may require that the information referred to in SLC 9.13 is also made available to the competent authorities of the non-listed company which the MFSA may designate to that effect.

- 9.13 The Licence Holder shall make available:
- (a) The identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
 - (b) The policy for preventing and managing conflicts of interest, in particular between the Licence Holder, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the Licence Holder and/or the AIF and the company is concluded at arm's length; and
 - (c) The policy for external and internal communication relating to the company in particular as regards employees.

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- 9.14 In its notification to the company pursuant to SLC 9.12(a), the Licence Holder shall request the Board of Directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in SLC 9.12. The Licence Holder shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with SLCs 9.12 to 9.17.
- 9.15 When an AIF acquires individually or jointly, control of a non-listed company pursuant to SLC 9.01, in conjunction with SLC 9.02, the Licence Holder managing such AIF shall ensure that the AIF, or the Licence Holder acting on behalf of the AIF, disclose its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment to:
- (a) The non-listed company; and
 - (b) The shareholders of the non-listed company of which the identities and addresses are available to the Licence Holder or can be made available by the non-listed company or through a register to which the Licence Holder has or can obtain access.
- 9.16 In addition, the Licence Holder managing the relevant AIF shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in SLC 9.15 to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.
- 9.17 When an AIF acquires control of a non-listed company pursuant to SLC 9.01, in conjunction with SLCs 9.02, the Licence Holder managing such AIF shall provide the MFSA and the AIF's investors with information on the financing of the acquisition.

Asset Stripping

- 9.18 When an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to SLC 9.01, in conjunction with SLC 9.02, the Licence Holder managing such an AIF shall for a period of 24 months following the acquisition of control of the company by the AIF:
- (a) Not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in SLC 9.19;
 - (b) In so far as the Licence Holder is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in SLC 9.19; and

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- (c) In any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in SLC 9.19.

9.19 The obligations imposed on the Licence Holder pursuant to SLC 9.18 shall relate to the following:

- a. any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
- b. any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
- c. to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point (a).

9.20 For the purposes of SLC 9.19:

- (a) the term 'distribution' referred to in SLC 9.19(a) and (b) shall include, in particular, the payment of dividends and of interest relating to shares;
- (b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital; and
- (c) the restriction set out in SLC 9.19(c) shall be subject to points (b) to (h) of Article 20(1) of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

Supplementary Licence Conditions concerning the additional information which needs to be included in the annual report of AIFs exercising control of non-listed companies

- 9.21 When an AIF acquires, individually or jointly, control of a non-listed company pursuant to SLC 9.01 in conjunction with SLC 9.02, the Licence Holder managing such AIF shall include the additional information prescribed in SLCs 2.08 to 2.10 of Appendix 13 in the annual report.

10 SUPPLEMENTARY LICENCE CONDITIONS APPLICABLE TO AIFMS MARKETING AIFs IN MALTA TO RETAIL INVESTORS

Note: These Supplementary Licence Conditions are intended to complement Regulation 6 of the Investment Services Act (Marketing of AIFs) Regulations, 2013 and Regulation 30 of the Investment Services Act (AIFM Third Country) Regulations, 2013.

In the context of this section of Part B III of the Rule Book, AIFM shall refer to a Licence Holder or a European AIFM passporting into Malta or a Third Country AIFM where marketing to retail investors is carried out in Malta.

- 10.01 An AIF can only be marketed to retail investors in Malta by an AIFM if it is in possession of an authorisation granted to it for this purpose by the MFSA in terms of the applicable regulations issued in terms of the Investment Services Act.
- 10.02 An AIF falling within the definition of a complex product in terms of MiFID and in terms of the ESMA's "MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements" [CESR/09-559] will not be authorised for marketing in Malta.
- 10.03 Where an AIF is to be marketed to retail investors in Malta, the AIF or the AIFM on behalf of the AIF shall submit an application to the MFSA requesting authorisation to market the AIF in Malta to retail investors. The application shall be accompanied by the following documentation:
- a) A prospectus of the AIF;
 - b) A declaration by the Directors of the AIFM that the AIF is not a complex financial instrument in terms of MiFID together with justifiable reasons why the Directors of the AIFM deem the AIF not to be a complex financial instrument;
- 10.04 The Application shall be accompanied by such fees as may be prescribed in the Investment Services Act (Licence and other Fees) Regulations.
- 10.05 An AIFM wishing to market an AIF to retail investors in Malta shall also be subject to the requirements prescribed hereunder.

Disclosure Requirements for Information to Retail Clients, including Marketing Communications

General

- 10.06 All information, including marketing communications addressed by the AIFM to retail investors or potential retail investors is subject to the requirements of Article 11 of the Act and shall be fair, clear and not misleading by complying with the

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conditions set out below. Marketing communications (which include ‘investment advertisements’ as defined in Article 2(1) of the Act) shall:

- c) be clearly identifiable as such; and
- d) be considered to be fair, clear and not misleading if they comply with the conditions prescribed in SLCs 10.08 to 10.14.

For the avoidance of doubt the following are not subject to the rules contained in SLCs 10.08 – 10.18 but are still subject to the requirements of this SLC, requiring them to be “fair, clear and not misleading”:

- c) marketing communications which falls within the definition of “advertorial” as defined in the Glossary to these Rules; and
- d) marketing communications which consist only of one or more of the following: the name of the AIFM, a logo or other image associated with the AIFM, a contact point, a reference to the AIFs managed by the AIFM.

10.07 The AIFM shall ensure that appropriate records of all issued and/or approved marketing communications are maintained and made available for inspection by the MFSA within 24 hours of its request, for not less than five years from the date of publication or broadcast. Such records should include:

- e) the name of the individual who approved the communications;
- f) the date of approval of the information;
- g) the publication/s in which the marketing communication was included; and
- h) evidence to support any statement made in the information and which is not a statement of fact.

Marketing Information and Other Information for retail clients and potential retail clients

For further Guidance as to how these following Rules may be complied with, the AIFM may refer to the section entitled: “Disclosure Requirements for information to clients including marketing communications [Adverts]” contained in the Guidance Notes for Investment Services Rules for Investment Services Providers.

10.08 The AIFM shall ensure that all information it addresses to, or disseminates in such a way that it is likely to be received by retail investors or potential retail investors, including marketing communications, satisfies the following conditions. It shall:

- a) include the name of the AIFM;

- b) be accurate, and in particular shall not emphasise any potential benefits of the AIF without also giving a fair and prominent indication of any relevant risks;
- c) be sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;
- d) not disguise, diminish or obscure important items, statements or warnings.

10.09 Where the information contains an indication of past performance of an AIF the following conditions shall be satisfied:

- a) that indication must not be the most prominent feature of the communication;
- b) the information must include appropriate performance information which covers the immediately preceding 5 years, or the whole period for which the AIF has been offered, if less than 5 years, or such longer period as the AIFM may decide, and
- c) in every case that performance information must be based on complete 12 month periods;
- d) the reference period and the source of information must be clearly stated;
- e) the information must contain a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- f) where the indication relies on figures denominated in a currency other than that of the country in which the retail investor or potential retail investor is resident, the currency must be clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- g) where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed.

10.10 Where the information relates to future performance, the following conditions shall be satisfied:

- a) the information must not be based on or refer to simulated past performance;
- b) it must be based on reasonable assumptions supported by objective dates;
- c) where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed;

- d) it must contain a prominent warning that such forecasts are not a reliable indicator of future performance.
- 10.11 Where the information includes or refers to simulated past performance of the AIF, the following conditions shall be satisfied:
- a) the simulated past performance must be based on the actual past performance of one or more Instruments or financial indices which are the same as, or underlie, the AIF concerned;
 - b) in respect of the actual past performance referred in point (a), the conditions set out in points (a) to (c), (e) and (f) of SLC 10.09 must be complied with;
 - c) the information must contain a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.
- 10.12 Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each investor which may be subject to change in the future.
- 10.13 The information shall not use the name of the MFSA or other competent Authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the AIFM.
- 10.14 Where a marketing communication contains an offer or invitation of the following nature and specifies the manner of response or includes a form by which any response may be made, it shall include such information referred in SLCs 10.15 to 10.18 and as is relevant to the offer or invitation:
- a) an offer to enter into an agreement in relation to investment into the AIF with any person who responds to the communication;
 - b) an invitation to any person who responds to the communication to make an offer to enter into an agreement for investment in the AIF.

However, paragraph (a) shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the investor or the potential investor must refer to another document or documents, which, alone or in combination, contain that information.

Information about the AIFs

These requirements which are similar to the ones emanating from MiFID are being imposed on AIFMs which market units of AIFs to Retail investors on the basis that in this case AIFMs will have a direct interface with retail clients and should accordingly be

subject to the same marketing requirements established under MiFID for Investment Firms providing similar services.

- 10.15 The AIFM shall provide retail investors or potential retail investors with a general description of the nature and risks of the AIF s, taking into account, in particular, the investor's categorisation as either a retail investor. That description must explain the nature of the AIF , as well as the risks particular to that specific type of instruments in which the AIF invests in sufficient detail to enable the investor or potential investor to take investment decisions on an informed basis.
- 10.16 The description of risks shall include, where relevant to the AIF concerned and the status and level of knowledge of the investor or potential investor , the following elements:
- a) The risks associated with the AIF including an explanation of leverage and its effects and the risk of losing the entire investment;
 - b) The volatility of the price of the units in the AIF;
- 10.17 Where the AIF being marketed to retail investors or potential retail investors incorporates a guarantee by a third party, the information about the guarantee shall include sufficient detail about the guarantor and the guarantee to enable the retail investor or potential retail investor to make a fair assessment of the guarantee..
- 10.18 The AIFM shall provide retail investors or potential retail investors with the following general information, where relevant:
- a) The name and address of the AIFM, and the contact details, necessary to enable investors to communicate effectively with the AIFM;
 - b) The languages in which the investor may communicate with the AIFM, and receive documents and other information from the AIFM;
 - c) The methods of communication to be used between the AIFM and the client including, where relevant, those for the sending and reception of orders;
 - d) A statement of the fact that the AIFM is licensed by the MFSA together with the address of the MFSA;
 - e) A description, which may be provided in summary form, of the conflicts of interest policy maintained by the AIFM;
 - f) At any time that the client requests it, further details of that conflicts of interest.

INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS

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

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.

Therefore, Part BIV does not apply to Investment Services Licence Holders which qualify as MiFID Firms, UCITS Fund Managers or Alternative Investment Fund Managers.

Category 4 Licence Holders which also hold another category of Investment Services Licence should also comply with Part BI of these Rules when providing MiFID Services.

1. General Requirements applicable to Custodians of UCITS and AIFs

- 1.01 The Licence Holder is required to have a Category 4 Investment Services Licence.
- 1.02 The Licence Holder is required to have an established place of business in Malta and 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;
 - 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 foreign institution or company which is deemed by the MFSA to be an institution or company which provides unit-holders with protection equivalent

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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 Article 20(1) of Directive 2006/49/EC 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 9 of Directive 2006/49/EC.

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.

1.03 In addition to the entities prescribed in SLC 1.02 above, the following namely:

- a. a Category 2 Investment Services Licence Holder (excluding management companies); and
- b. a Recognised Fund Administrator

shall be eligible to apply for a Category 4 Investment Services Licence 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 and 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,
- 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.

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

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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.
 - 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.

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- 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.

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.

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- 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 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 the Compliance Officer in terms of SLC 1.22 and/ or Money Laundering Reporting Officer, at least twenty one business days in advance. The request for consent of 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 at least twenty one business days in advance. The request for consent of the change in responsibilities of a Director or Senior 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

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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;
- 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 1.19 and 1.20 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.

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

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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 a 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, 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 136 of Directive 2006/48/EC of the European Parliament and the Council relating to the taking up and pursuit of the business of credit institutions.

Accounting / Record Keeping

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

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- 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 Date.

2.13 Audited annual financial statements prepared in accordance with International

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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:
 - i. amounts in respect of items representing assets or income may not be offset against amounts in respect of items representing liabilities or

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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:

- a. it is notified that its auditor intends to qualify the audit report;

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

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- 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 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:

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- 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

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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.

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 Custodian of a UCITS Scheme. 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.
- 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.
- 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.
- 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 Prospectus.
- 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.
- 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.

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- 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.
- 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.
- 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.
- 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.
- 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.

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- 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.
- 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

These Supplementary Conditions shall apply where the Licence Holder proposes to act as Custodian of an AIF. Where the Licence Holder also proposes to act as a Custodian of UCITS Schemes, the Licence Holder shall comply with this Section when acting as Custodian of an AIF and with Section 3 when acting as Custodian of a UCITS Scheme.

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

- 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.

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:

(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

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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 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

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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 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;

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- [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* to the relevant parties.

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.

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.

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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.

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.

- 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.
- 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.
- 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.

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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 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.

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.

4.29 A Licence Holder acting as custodian of an AIF in terms of SLC 1.03(i) of this Part of the Rules shall be obliged to comply with the following SLCs prescribed in this Part of the Rules:

(i) SLC 1.01 to SLC 1.24 dealing with the general requirements applicable to custodians of UCITS and AIFs, the general organizational requirements applicable, compliance, risk management and enforcement;

(ii) SLC 2.01 to SLC 2.29 dealing with the financial resources requirements.

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accounting and record keeping requirements; and
(iii) SLC 4.01 to SLC 4.28 dealing with the supplementary conditions applicable to a custodian of an AIF.

4.30 A Licence Holder acting as custodian of an AIF in terms of SLC 1.03(ii) of this Part of the Rules shall be obliged to comply with the following SLCs prescribed in this Part of the Rules:

- (i) SLC 1.01 to SLC 1.24 dealing with the general requirements applicable to custodians of UCITS and AIFs, 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) SLC 4.01 to SLC 4.13 and SLC 4.28 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 1.03(ii) shall also ensure compliance with the SLCs prescribed hereunder.

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.

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.

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.

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:

- (a) The tasks are not delegated with the intention of avoiding the requirements

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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 tasks and of the arrangement of the third party in respect of the matters delegated to it; and
- (c) 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

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(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.

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.