

Consultation Procedure

Proposals for Legal Notices / Ministerial Regulations and for new laws and amendments to existing laws

Explanatory Note

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly these proposals are not binding and are subject to changes and revisions following representations received not only from licence-holders and other involved parties, but also following the necessary review and vetting by the Office of the Attorney General and the relevant Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind.

In the case of primary legislation in particular, Bills may and do undergo revisions during the Parliamentary stages.

This consultation is also being exercised at the request and on behalf of the Ministry of Finance.

Note for Consultation

(Investment Services Act, 1994)

1.0 Background

The MFSA is proposing to amend Regulation 3(1) of the Investment Services Act (Exemption) Regulations, 2007 (Legal Notice 329 of 2007) – hereinafter referred to as “the Exemption Regulations” - as follows:

- a. Paragraph (d) of this regulation shall be reworded to reflect more accurately the requirements of Article 2(d) of the Markets in Financial Instruments Directive, which it is intended to transpose;
- b. A new sub-paragraph (iv) is proposed to be added to paragraph (h) of this regulation, exempting overseas based custodians of closed-ended retail schemes based in Malta from the requirement of the relative licence under the Investment Services Act, subject to certain conditions and for the reasons explained below.

Interested persons are kindly asked to submit any comments, which they may have in relation to this draft legislation (attached), in writing, to **the Director – Securities Unit**, by not later than the **1st September, 2009**.

2.0 Proposed Exemption for Certain Overseas Based Custodians.

The MFSA is proposing to extend the exemption currently contained in Regulation 3(1)(h) of the Exemption Regulations to EU/EEA based custodians of closed-ended retail collective investment schemes which are based in Malta on condition that such persons:

- (i) are authorised in an EU/EEA Member State as a credit institution *or* are members of a group of companies which includes a credit institution authorized in an EU/EEA Member State and
- (ii) offer their services to retail schemes which are closed-ended *and* whose units are listed on a regulated market.

It is being proposed to limit the exemption to EU/EEA based credit institutions and members of banking groups based and regulated in the EU/EEA in order to ensure the

institutions servicing such local funds are subject to appropriate regulatory standards and prudential requirements in the interests of the fund's investors .

Closed ended collective investment schemes have the following main attributes which differentiate them from open-ended collective investment schemes:

- a. they issue a fixed amount of share capital;
- b. their units are typically transferable in the same manner as shares of ordinary companies and are typically traded on stock exchanges rather than being redeemed directly by the fund itself;
- c. their unit prices are set by supply and demand whereas an open ended scheme is typically obliged to issue and redeem its units upon unit-holders' request at its Net Asset Value per unit.

Therefore, the MFSA considers the role of Custodian in a closed-ended scheme to primarily relate to the safekeeping of the fund's assets since:

- a. the extent of reliance on the Custodian's duty to verify the accuracy of the fund's NAV calculation is not so vital (units are not issued and redeemed at NAV but are transferred between unit-holders at prices set by demand and supply); and
- b. the Custodian need not ensure, on an ongoing basis, that redemption and subscription requests are satisfied by the fund in line with the general procedures laid down in the fund's constitutional documents and prospectus (unit subscriptions and redemptions are not effected upon investors' demand on a continuous basis).

The role of the Custodian for open-ended retail schemes, including UCITS, is considered to be more important as a safeguard for investors. Accordingly, it is considered important to retain the local Custodian requirement for retail open-ended schemes [both UCITS (this is a requirement of the UCITS Directive) and non-UCITS].

10th August, 2009

**Chairman
Malta Financial Services Authority**

**Minister for Finance, the Economy and
Investment**

L.N. of 2009

**INVESTMENT SERVICES ACT, 1994
(CAP. 370)**

Investment Services Act (Exemption) (Amendment) Regulations, 2009.

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Minister for Finance, the Economy and Investment acting on the advice of the Malta Financial Services Authority as the competent authority for the purposes of the Act, has made the following regulations:

Citation and commencement.

L.N.1329 of 2007.

Amends regulation 3 of the principal regulations.

1. The title of these regulations is the Investment Services Act (Exemption) (Amendment) Regulations and shall be read and construed as one with the Investment Services Act (Exemption) Regulations, 2007 hereinafter referred to as “the principal regulations”.

2. Subregulation (1) of regulation 3 of the principal regulations shall be amended as follows:

(i) paragraph (d) thereof shall be substituted as follows:

“(d) a person who deals on own account in terms of paragraph 3 of the First Schedule to the Act and does not provide any other investment services, unless such person dealing on own account is a market maker or deals on own account outside a regulated market or a multilateral trading facility on an organized, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;”;

(ii) in paragraph (h) thereof, immediately after sub-paragraph (iii) there shall be added the following new sub-paragraph:

“(iv) providing the services of acting as trustee or custodian in terms of paragraph 5 (c) of the First Schedule to the Act, in relation to a collective investment scheme licensed under the Act which does not qualify as a Professional Investor Fund in terms of the Investment Services Rules, provided that:

(a) such person is authorised in a Member State or EEA State to provide the services of custodian to collective investment schemes and considered by the competent

authority to be of sufficient standing and repute and is either:

(i) authorized in a Member State or EEA State as a credit institution under Directives 2006/48/EC and 2006/49/EC of the European Parliament and of the Council of the 14 June 2006 relating to the taking up and pursuit of the business of credit institutions; or

(ii) forms part of a group of companies which also includes an entity which is authorised as a credit institution under Directives 2006/48/EC and 2006/49/EC of the European Parliament and of the Council of the 14 June 2006 relating to the taking up and pursuit of the business of credit institutions and satisfies any additional criteria which may be set by the competent authority; and

(b) the collective investment scheme to which such person acts as trustee or custodian is:

(i) of the closed ended type; and

(ii) listed on a regulated market in a Member State or EEA State.”.