

## **INVESTMENT SERVICES RULES FOR RETAIL COLLECTIVE INVESTMENT SCHEMES**

### **PART B**

#### **APPENDIX IX: ADDITIONAL RULES APPLICABLE TO SELF-MANAGED SCHEMES ESTABLISHED AS RETAIL AIFs**

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This Appendix includes the supplementary obligations which must be fulfilled by a scheme which is set up as a self-managed Maltese retail AIF. This Appendix is divided in five sections as follows:

**Section 1** on general licencing requirements which must be implemented by the scheme and the permissible activities;

**Section 2** includes the operational requirements and conduct of business requirements which must be implemented on an ongoing basis by a scheme;

**Section 3** includes the provisions regulating the establishment and the role of the Investment Committee which must be set up by a scheme;

**Section 4** stipulates the provisions regulating the risk management function and the liquidity management function which must be implemented on an ongoing basis by a scheme;

**Section 5** includes the transparency obligations which must be complied with on an ongoing basis by a scheme;

**Section 6** includes additional requirements which must be complied with by schemes which acquire control of non-listed companies and issuers.

For the purposes of this Appendix, any reference to the term “scheme” shall be understood as referring to a retail collective investment scheme set up as a self-managed retail AIF in Malta.

**SECTION 1: GENERAL LICENCING REQUIREMENTS AND PERMISSIBLE ACTIVITIES**

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**1. PERMISSIBLE ACTIVITIES**

- 1.01. A self-managed scheme may only be authorised to provide the licensable activities which consist in the internal management of the AIF as provided hereunder:
- (a) investment management functions which the scheme shall at least perform:
    - [i] portfolio management;
    - [ii] risk management.
  - (b) other functions that a scheme may additionally perform in the course of the collective management thereof:
    - [i] administration
      - legal and fund management accounting services;
      - customer inquiries;
      - valuation and pricing, including tax returns;
      - regulatory compliance monitoring;
      - maintenance of unit or shareholder register;
      - distribution of income;
      - unit/shares issues and redemptions;
      - contract settlements including certificate dispatch;
      - record keeping.
    - [ii] marketing;
    - [iii] activities related to the scheme's assets, namely services necessary to meet the fiduciary duties of the scheme, 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 the scheme and the companies and other assets in which it has invested.
- 1.02. Without prejudice to the generality of Article 6(6) of the Act, in the case of an application for a licence, the MFSA shall inform the applicant in writing within three months of the submission of a complete application, whether or not the licence 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 Rule, 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 A to Part A of these Rules to the satisfaction of the MFSA.

- 1.03. The scheme shall commence its activities as soon as the licence has been granted.
- 1.04. A scheme may start providing an investment service 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 Rules 4.02 to 4.03, 5.01 to 5.06 and 6.01 to 6.04 of Section 2 of this Appendix;
  - (b) the scheme's memorandum and articles of association;
  - (c) information on the arrangements made for the appointment of the depositary in accordance with the Investment Services Act (Custodians of Collective Investment Schemes) Regulations;
  - (d) any additional information referred to in Rule 6.05 of Section 2 of this Appendix.
- 1.05. The MFSA may restrict the scope of the authorisation in particular as regards the investment strategies a scheme is allowed to adopt.

## **2. FINANCIAL RESOURCES REQUIREMENTS**

- 2.01. The scheme shall have sufficient financial resources at its disposal to enable it to conduct its business effectively, to meet its liabilities and to be prepared to cope with the risks to which it is exposed.
- 2.02. Without prejudice to the generality of Rule 2.01, the scheme must have own funds which are equivalent to an initial capital of at least EUR 300,000.
- 2.03. The scheme's financial resources shall at all times exceed the level prescribed. It shall maintain own funds equal to or in excess of its capital resources requirement and these shall constitute the scheme's financial resources requirement.
- 2.04. Where the value of the scheme's portfolio exceeds EUR 250 million, it 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 portfolio of the scheme 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.

- 2.05. Without prejudice to the amounts prescribed in Rule 2.04, the scheme's own funds shall never be less than the amount required under Article 97 of Regulation (EU) No. 575/2013<sup>1</sup> i.e. one quarter of the preceding year's fixed overheads.
- 2.06. The MFSA may authorise a scheme not to provide up to 50% of the additional amount of own funds referred to in Rule 2.04 above, if it benefits from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in Malta, in another Member State or EEA State or in a third country where it is subject to prudential rules considered by the MFSA as equivalent to those prescribed by Union Law.
- 2.07. The scheme shall comply with any further financial resources requirements set by the MFSA. If the MFSA so determines, the scheme will be given due notice in writing of the additional financial resources requirements which shall be applied.
- 2.08. The scheme 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 scheme a limited period within which to restore its financial resources to the required level.
- *Professional liability cover*
- 2.09. To cover professional liability risks resulting from activities which the scheme may carry out pursuant to these Rules, the scheme shall either:
- (a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
  - (b) hold professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.
- 2.10. The scheme 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.
- 2.11. For the purposes of demonstrating to the satisfaction of the MFSA that the above requirement is being complied with on an ongoing basis, the scheme shall submit a copy of the cover note or such other written evidence as the MFSA may require to establish compliance with these Rules.
- 2.12. The scheme shall, within two days from the date it becomes aware of any circumstances specified in (a) to (g) below, inform the MFSA in writing where:

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<sup>1</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms

- a. during the term of the policy, the scheme 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.
- 2.13. Own funds including any additional own funds as referred to in Rule 2.09(a), shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.
- 2.14. In complying with Rule 2.13 above, the scheme 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.

## **SECTION 2: OPERATIONAL ARRANGEMENTS**

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### **1. OPERATIONAL ARRANGEMENTS**

- 1.01. The scheme shall at all times use adequate and appropriate human and technical resources that are necessary for its proper management.
- 1.02. The scheme 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 scheme itself.
- 1.03. 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 the scheme 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 scheme are invested according to the constitutional documents, the prospectus and any other legal provisions in force.
- 1.04. In adhering with the requirements prescribed in Rules 1.01 to 1.03 above, the scheme 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.

### **2. INVESTMENT IN SECURITISATION POSITIONS**

- 2.01. The scheme 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.

### **3. VALUATION**

- 3.01 The scheme shall ensure that appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the scheme can be performed in accordance with Rules 3.01 to 3.16, the constitutional documents and/or prospectus.
- 3.02 The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the scheme shall be those prescribed in the Investment Services Rules, the instruments of incorporation and/or prospectus.

- 3.03 The scheme shall also ensure that the net asset value per unit or share thereof is calculated and disclosed to investors in accordance with Rules 3.01 to 3.16, the instruments of incorporation and/or prospectus.
- 3.04 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.
- 3.05 If the scheme is an open-ended AIF, such valuations and calculations shall also be carried out at a frequency which is both appropriate to the assets held by the scheme and its issuance and redemption frequency.
- 3.06 If the scheme is a closed-ended AIF, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the scheme.
- 3.07 The scheme shall inform the investors of the valuations and calculations as prescribed in the instruments of incorporation and/or prospectus.
- 3.08 The scheme shall ensure that the valuation function is either performed by:
- (a) an external valuer, being a legal or natural person independent from the scheme and any other persons with close links to the scheme; or
  - (b) the scheme 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.
- 3.09 The depositary appointed for a scheme shall not be appointed also as external valuer thereof, unless it has functionally and hierarchically separated the performance of its depositary 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 scheme.
- 3.10 Where an external valuer performs the valuation function, the scheme shall demonstrate that:
- (a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provision 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 Rules 3.01 to 3.07; and
  - (c) the appointment of the external valuer complies with the requirements of Rules 7.01 to 7.03 of this Section and with the 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.

- 3.11 The external valuer shall not delegate the valuation function to a third party.
- 3.12 The scheme shall notify the appointment of the external valuer to the MFSA. The MFSA may require that another external valuer be appointed instead, where the conditions prescribed in Rule 3.10 are not met.
- 3.13 The valuation shall be performed impartially and with all due skill, care and diligence.
- 3.14 Where the valuation function is not performed by an independent external valuer, the MFSA may require the scheme to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate by an auditor.
- 3.15 The scheme shall be responsible for the proper valuation of its assets, the calculation of the net asset value and the publication of that net asset value. The scheme's liability towards its investors shall, therefore not be affected by the fact that the scheme has appointed an external valuer.
- 3.16 Notwithstanding Rule 3.15 and irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the scheme for any losses suffered thereby as a result of the external valuer's negligence or intentional failure to perform its tasks.
- 3.17 In complying with the provisions prescribed in Rules 3.02 to 3.16, the scheme shall 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. CONDUCT OF BUSINESS**

- 4.01. The scheme shall comply with the conduct of business rules prescribed hereunder. In particular it shall:
- a. act honestly, with due skill, care and diligence and fairly in conducting its activities;
  - b. act in the best interests of the investors 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 investors;
  - e. comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the investors and the integrity of the market;
  - f. treat all investors fairly.



- 4.02. No investor in the scheme shall obtain preferential treatment unless such preferential treatment is disclosed in the relevant instruments of incorporation and/or prospectus.
- 4.03. In complying with Rules 4.01 and 4.02 the scheme 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. REMUNERATION**

- 5.01. The scheme 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 scheme, that are consistent with and promote sound and effective risk management and do not encourage risk taking which is inconsistent with the risk profiles, the instruments of incorporation and/or prospectus of the scheme.
- 5.02. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits for those categories of staff, including senior management, risk takers, control functions and any employee 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 scheme, the scheme shall comply with the following principles in a way and to the extent that it is appropriate to its size, internal organisation and the nature, scope and complexity of its activities:
- (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, constitutional documents and/or prospectus of the scheme;
  - (b) the remuneration policy is in line with the business strategy, the objectives, values and interests of the scheme or the investors of the scheme, and includes measures to avoid conflicts of interest;
  - (c) the scheme's management body, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;

- (d) the implementation of the remuneration policy, is at least annually, subject to central and independent review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
- (e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;
- (f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;
- (g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or scheme concerned and of the overall results thereof, and when assessing individual performance. Financial as well as non-financial criteria are taken into account;
- (h) the assessment of performance is set in a multi-year framework appropriate to the scheme's life-cycle in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the scheme's redemption policy and its investment risks;
- (i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;
- (j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;
- (k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;
- (l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;
- (m) subject to the legal structure of the scheme, and the constitutional documents and/or prospectus, a substantial portion, and in any event at least 50% of any variable remuneration consists of units or shares of the scheme, or equivalent

ownership interests, or share-linked instruments or equivalent non-cash instruments:

Provided that the instruments referred to in this paragraph shall be subject to an appropriate retention policy designed to align incentives with the interests of the scheme and the investors thereof. The MFSA may restrict the types and designs of those instruments or ban certain instruments as appropriate. This paragraph shall be applied to both the portion of the variable remuneration component deferred in line with paragraph (n) and the portion of the variable remuneration component not deferred;

- (n) a substantial portion, and in any event at least 40% of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the scheme and is correctly aligned with the nature of the scheme's risks:

Provided that the period referred to in this paragraph shall be at least three to five years unless the life cycle of the scheme is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60% of the amount is deferred.

- (o) the variable remuneration including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the scheme as a whole, and justified according to the performance of the business unit, the Scheme and the individual concerned:

Provided that the total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the scheme occurs, taking into account both current compensation and reduction in payouts of amounts previously earned, including through malus or clawback arrangements;

- (p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the scheme;

Provided that if the employees leave the scheme before retirement, discretionary pension benefits shall be held by the scheme for a period of 5 years in the form of instruments as defined in paragraph (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments defined in paragraph (m), subject to a 5 year retention period;

- (q) staff are required to undertake not to use personal hedging strategies or remuneration – and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;

- (r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements prescribed in these Investment Services Rules.
- 5.03. The principles stipulated in Rule 5.02 shall apply to remuneration of any type paid by the scheme, to any amount paid directly by the scheme itself, including carried interest, and to any transfer of units or shares of the scheme, made to the benefits of those categories of staff including senior management, risk takers, control functions and any employee receiving total remuneration that takes them to the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profile of the scheme.
- 5.04. A scheme that is significant in terms of its size, its internal organisation and the nature, the scope and the complexity of its activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgement on remuneration policies and practices and the incentives created for managing risk.
- 5.05. The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the scheme and which are taken by the management body in its supervisory functions. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the scheme. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the scheme.
- 5.06. The scheme shall further comply with any guidelines on sound remuneration policies which shall be issued by ESMA.

## **6. CONFLICTS OF INTEREST**

- 6.01. The scheme shall act honestly, fairly and with integrity – in the best interests of its investors/ shareholders and of the market. Such action shall include:
  - i. avoiding conflicts of interest where this is possible and, where it is not, ensuring - by way of disclosure, internal procedures or otherwise – that investors are treated fairly.
  - ii. the following procedures should be followed during meetings (including but not limited to Investment Committee Meetings), where a member considers that s(he) has or may have a conflict of interest:
    - a. that person should declare that interest to the other members either at the meeting at which the issue in relation to which s(he) has an interest first arises, or if the member was not at the date of the meeting interested in the issue, at the next meeting held after s(he) became so interested;

- b. unless otherwise agreed to by the other members, a member shall avoid entering into discussions in respect of any contract or arrangement in which s(he) is interested and should withdraw from the meeting while the matter in which s(he) has an interest is being discussed;
  - c. the interested member should not vote at a meeting in respect of any contract or arrangement in which s(he) is interested, and if s(he) shall do so, his/ her vote shall not be counted in the quorum present at the meeting;
  - d. the minutes of the meeting should accurately record the sequence of such events.
- iii. abiding by all relevant laws and regulations, including in respect of prevention of money laundering;
- iv. not making any claim of independence or impartiality which is untrue or misleading; and
- v. not making misleading or deceptive representations to investors.
- 6.02. The scheme 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 investors.
- 6.03. The scheme 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.
- 6.04. The scheme shall assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the investors.
- 6.05. Where organisational arrangements made by the scheme 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 scheme 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.
- 6.06. In complying with Rules 6.01 to 6.05, the scheme 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.

## **7. DELEGATION AND SUB-DELEGATION**

- 7.01. A scheme 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 scheme shall comply with the following requirements:
- a. the scheme must be able to justify its entire delegation structure on objective reasons;
  - b. the delegate must possess 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 paragraph (c) above, there must be a cooperation agreement in place between the MFSA and the supervisory authority of the third country;
  - e. the delegation must not prevent the effectiveness of supervision of the Scheme, and in particular, must not prevent the scheme from being managed, in the best interests of its investors;
  - f. the scheme 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 scheme 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.
- 7.02. The scheme shall review the services provided by each delegate on an ongoing basis.
- 7.03. No delegation of portfolio management or risk management shall be conferred on:
- a. the depositary or a delegate of the depositary; or
  - b. any other entity whose interests may conflict with those of the scheme or its investors, 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 scheme.
- 7.04. The liability of the scheme towards the investors shall not be affected by the fact that the scheme has delegated functions to a third party, or by any further sub-delegation, nor shall the scheme delegate its functions to the extent that in essence, it becomes a letter-box entity.
- 7.05. The delegate may sub-delegate any of the functions delegated to it provided that the following conditions are met:

- a. the scheme consented prior to the sub-delegation;
  - b. the scheme notified the MFSA before the sub-delegation arrangements became effective;
  - c. the conditions prescribed in Rules 7.01 and 7.02 are fulfilled on the understanding that all references to the ‘delegate’ are read and construed as referring to the ‘sub-delegate’.
- 7.06. No sub-delegation of portfolio management or risk management shall be conferred on:
- a. the depositary or a delegate of the depositary; or
  - b. any other entity whose interests may conflict with those of the scheme or its investors, 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 scheme.
- 7.07. The relevant delegate shall review the services provided by each sub-delegate on an ongoing basis.
- 7.08. Where the sub-delegate further delegates any of the functions delegated to it, the conditions prescribed in Rule 7.05 shall apply *mutatis mutandis*.
- 7.09. In complying with Rules 7.01 to 7.08 above, the Scheme 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.

## **8. DEALINGS BY OFFICIALS OF THE SCHEME**

- 8.01. Where the scheme allows its officials to deal for their own account, it is responsible for ensuring that such a practice does not lead to abuse. The standards and procedures to be adopted should include the following:
- a) the scheme must take appropriate steps to ensure that officials act in conformity with the statutory requirements concerning insider dealing and market abuse;
  - b) internal mechanisms should be established to prompt the compliance officer’s intervention if and when in respect of any staff member, abnormal behaviour or patterns concerning investment transactions are observed.
- 8.02. All transactions undertaken by officials on their own account should be at “arm’s length” – but this does not preclude discounts being allowed to officials.



### **SECTION 3: ESTABLISHMENT AND ROLE OF THE INVESTMENT COMMITTEE**

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#### **1. THE INVESTMENT COMMITTEE**

- 1.01. The management of the assets of the scheme shall be entrusted with the board of directors, at least one member of whom must be resident in Malta.
- 1.02. The board of directors shall establish an in-house Investment Committee made up of at least three members, whose composition may include members of the board of directors. The terms of reference of this Investment Committee shall regulate the proceedings of the committee and any changes thereto are subject to the prior approval of the MFSA.
- 1.03. The majority of Investment Committee meetings – the required frequency of which should depend on the nature of the scheme’s investment policy, but which should be at least quarterly – are to be physically held in Malta:

Provided that Investment Committee meetings are deemed to be physically held in Malta if the minimum number of members that form a quorum necessary for a meeting are physically present in Malta.

- 1.04. The minutes of meetings of the Investment Committee shall be available in Malta for review during MFSA’s compliance visits.
- 1.05. The role of the Investment Committee will be to:
- a. monitor and review the scheme’s investment policy;
  - b. establish and review guidelines for investments by the scheme;
  - c. issue of rules for stock selection;
  - d. set up the portfolio structure and asset allocation; and
  - e. make recommendations to the board of directors of the scheme.
- 1.06. Where the scheme has not appointed an Investment Committee, the functions mentioned in Rule 1.05 shall be undertaken by the scheme’s directors and thereafter any reference to Investment Committee in these Rules and any other applicable laws and regulations shall be construed as a reference to the board of directors of the scheme..
- 1.07. The Investment Committee may delegate the day-to-day investment management of the assets of the scheme to one or more of the scheme’s officials referred to as “the portfolio manager/s”.
- 1.08. The portfolio managers will effect day-to-day transactions within the investment guidelines set by the Investment Committee and in accordance with the investment objectives, policy and restrictions described in the scheme’s prospectus.



- 1.09. The scheme shall obtain the written consent of the MFSA before the appointment or replacement a member of the Investment Committee or a portfolio manager. The MFSA reserves the right to object to the proposed replacement or appointment and to require such additional information it considers appropriate. The MFSA shall be entitled to be satisfied, on a continuing basis, of the fitness and properness, including competence, of the members of the Investment Committee and of the portfolio manager/s.
- 1.10. The request for consent of the appointment of a member of the Investment Committee or a portfolio manager shall be accompanied by a PQ in the forms set out in Schedule E to Part A of these Rules together with a detailed CV of the person proposed.
- 1.11. The scheme shall notify the MFSA in writing of the departure of a member of the Investment Committee and/ or a portfolio manager within 14 days of the departure. The scheme shall also request the Investment Committee and/ or the portfolio manager, as applicable, to provide the MFSA with the relevant details concerning the individual's resignation. A copy of such request shall be provided to MFSA.
- 1.12. The scheme shall have adequate arrangements, in agreement with and subject to the approval of the MFSA, to ensure adequate monitoring of the activities of the portfolio manager/s and the Investment Committee.
- 1.13. The scheme shall on a continuing basis ensure that it has sufficient management resources to effectively conduct its business.

## **SECTION 4: PERMANENT RISK MANAGEMENT FUNCTION AND LIQUIDITY MANAGEMENT FUNCTION**

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### **1. PERMANENT RISK MANAGEMENT FUNCTION**

- 1.01. The scheme shall functionally and hierarchically separate the functions of risk management from the operating units including from the functions of portfolio management.
- 1.02. The MFSA shall review the functional and hierarchical separation of the functions of risk management in accordance with Rule 1.01 above in accordance with the principle of proportionality, on the understanding that the scheme 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 Rules 1.01 to 1.08 and is consistently effective.
- 1.03. The scheme shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to its investment strategy and to which it is or may be exposed.
- 1.04. The scheme 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 scheme.

- 1.05. The scheme shall at least:
  - a. implement an appropriate, documented and regularly updated due diligence process, according to its investment strategy, objectives and risk profile;
  - b. ensure that the risks associated with each investment position of the scheme and their overall effect on the scheme's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
  - c. ensure that the scheme's risk profile shall correspond to the size, portfolio structure and investment strategies and objectives of the scheme as provided for in its instruments of incorporation and/or prospectus.
- 1.06. In complying with Rule 1.05 above, the scheme shall submit to the MFSA the information prescribed in Annex 3 to this Appendix 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.

- 1.07. The scheme shall set a maximum level of leverage which it may employ 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*:
- a. the type of scheme;
  - b. the scheme's investment strategy;
  - c. the sources of leverage of the scheme;
  - d. any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
  - e. the need to limit the exposure to any single counterparty;
  - f. the extent to which the leverage is collateralised;
  - g. the asset-liability ratio;
  - h. the scale, nature and extent of the activity of the scheme on the markets concerned.
- 1.08. In complying with Rules 1.01 to 1.07 above, the scheme 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.

## **2. LIQUIDITY MANAGEMENT POLICY**

- 2.01. A scheme which is not an unleveraged closed-ended AIF shall employ an appropriate liquidity management system and adopt procedures which enable it to monitor the its liquidity risk and to ensure that the liquidity profile of the scheme's investment complies with its underlying obligations.
- 2.02. The scheme shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the its liquidity risk and monitor it accordingly.
- 2.03. In complying with Rule 2.02 above, the scheme shall submit to the MFSA the information prescribed in Annex 3 to this Appendix 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.
- 2.04. The scheme shall ensure that the investment strategy, the liquidity profile and the redemption policy are consistent.

- 2.05. In complying with Rules 2.01 to SLC 2.04, the scheme 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.

## **SECTION 5: TRANSPARENCY REQUIREMENTS**

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### **1. DISCLOSURE TO INVESTORS**

- 1.01 The scheme shall make available to investors, in accordance with the instruments of incorporation, the information prescribed in Appendix 1 on contents of the prospectus before they invest in the scheme as well as any material changes thereto.
- 1.02 The scheme shall also make available an annual report as outlined in this Section. The annual report for each financial year shall be made available no later than 6 months following the end of the financial year. It shall be made available to investors upon request.
- 1.03 The annual report of a scheme shall contain at least the following information:
- (a) a balance sheet or a statement of assets and liabilities;
  - (b) an income and expenditure account for the financial year;
  - (c) a report on the activities of the financial year;
  - (d) any material changes in the information listed in Rule 1.01 and Rules 6.01 to 6.07 of Appendix I to these Rules during the financial year covered by the report;
  - (e) the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the scheme to its staff, and number of beneficiaries, and where relevant, carried interest paid by the scheme;
  - (f) the aggregate amount of remuneration broken down by senior management and members of the staff of the scheme whose actions have a material impact on its risk profile.
- 1.04 Where the scheme is required to make public an annual financial report in accordance with Directive 2004/109/EC<sup>2</sup> only such additional information referred to in Rule 1.03 above needs to be provided to investors on request, either separately or as an additional part of the annual financial report. In the latter case, the annual financial report shall be made public no later than 4 months following the end of the financial year.
- 1.05 The accounting information given in the annual report shall be prepared in accordance with the accounting standards of the home Member State or EEA State of the Scheme and with the accounting rules laid down in the fund rules or instruments of incorporation.
- 1.06 The accounting information given in the annual report shall be audited by a certified auditor and in accordance with the accounting rules laid down in the instruments of

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<sup>2</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

incorporation and the prospectus. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

- 1.07 In complying with the requirements prescribed in Rules 1.02 to 1.06 above, the scheme 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 regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
- 1.08 In respect of each annual accounting period, the scheme shall require its auditor to prepare a management letter in accordance with International Standards on Auditing. The management letter shall be sent to MFSA.

## **2. DISCLOSURE TO THE MFSA**

- 2.01 The scheme shall regularly report to the MFSA on the principal markets and instruments in which it trades as outlined in this Section.
- 2.02 The scheme shall provide information on the main instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of the scheme.
- 2.03 In complying with Rules 2.01 and 2.02, the scheme shall submit to the MFSA the information prescribed in Annexes 1<sup>3</sup> and 2 to this Appendix and shall further comply with:
- (a) 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;
  - (b) the [ESMA Guidelines on reporting obligations under Articles 3\(3\)\(d\) and 24\(1\), \(2\) and \(4\) of the AIFMD](#) [ESMA/2014/869]; and
  - (c) any guidance which the MFSA may issue from time to time on AIFMD reporting.
- 2.04 The scheme shall provide the MFSA with the following information:
- (a) the percentage of the scheme's assets which are subject to special arrangements arising from their illiquid nature;
  - (b) any new arrangements for managing the liquidity of the scheme;

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<sup>3</sup> The templates provided in Annexes 1 and 2 are to be used as reference. Schemes shall also refer to:

- (a) the [Reporting Guidelines for Alternative Investment Fund Managers](#) issued by the MFSA; and
- (b) the [FAQ](#) issued by the MFSA on reporting of transparency information to be submitted to the MFSA pursuant to articles 3 and 24 of the AIFMD.

- (c) the scheme's current risk profile and the risk management systems employed thereby to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
  - (d) information on the main categories of the assets in which the Scheme has invested; and
  - (e) the results of the stress tests performed in accordance with Rules 1.05(b) and 2.02 of Section 4 of this Appendix.
- 2.05 In complying with Rule 2.04 above, the scheme shall submit to the MFSA the information prescribed in Annex 3<sup>4</sup> to this Appendix and shall further comply with:
- a) 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; and
  - b) the [ESMA Guidelines on reporting obligations under Articles 3\(3\)\(d\) and 24\(1\), \(2\) and \(4\) of the AIFMD](#) [ESMA/2014/869].
- 2.06 The scheme shall, on request provide the MFSA with an annual report for each financial year, in accordance with Rules 1.03 and 1.04 of this Section.
- 2.07 A scheme employing leverage on a substantial basis shall provide the MFSA with information about the overall level of leverage employed thereby, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which the Scheme's assets have been reused under leveraging arrangements.
- 2.08 The information provided pursuant to Rule 2.06 shall include the identity of the five largest sources of borrowed cash or securities, and the amounts of leverage received from each of those sources for the Scheme.
- 2.09 In complying with Rule 2.08 above, the scheme shall submit to the MFSA the information prescribed in Annex 4<sup>5</sup> to this Appendix and shall further comply with:
- a) 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; and

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<sup>4</sup> The template provided in Annex 3 is to be used as reference. Schemes shall also refer to:

- (a) the [Reporting Guidelines for Alternative Investment Fund Managers](#) issued by the MFSA; and
- (b) the [FAQ](#) issued by the MFSA on reporting of transparency information to be submitted to the MFSA pursuant to articles 3 and 24 of the AIFMD.

<sup>5</sup> The template provided in Annex 4 is to be used as reference. Schemes shall also refer to:

- (a) the [Reporting Guidelines for Alternative Investment Fund Managers](#) issued by the MFSA; and
- (b) the [FAQ](#) issued by the MFSA on reporting of transparency information to be submitted to the MFSA pursuant to articles 3 and 24 of the AIFMD.

- b) the [ESMA Guidelines on reporting obligations under Articles 3\(3\)\(d\) and 24\(1\), \(2\) and \(4\) of the AIFMD](#) [ESMA/2014/869].
- 2.10 Where necessary for the effective monitoring of systemic risk, the MFSA may require information in addition to that prescribed in this Section on a periodic as well as on an *ad hoc* basis. The MFSA will inform ESMA about the additional information requirements.
- 2.11 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.
- *Additional reporting obligations for leveraged schemes - Use of information by the MFSA, supervisory cooperation and limits to leverage*
- 2.12 The scheme shall demonstrate that the leverage limit it set is reasonable and that it complies with that limit at all times. The MFSA shall assess the risks that the use of leverage by a scheme could entail.
- 2.13 Where deemed necessary in order to ensure the stability and integrity of the financial system, the MFSA, after having notified ESMA and the ESRB, shall impose limits to the level of leverage that the scheme is entitled to employ or other restrictions on the management of the scheme, 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 and the ESRB of actions taken in this respect, through the procedure stipulated in the MFSA Act and the Investment Services Act.
- 2.14 The notification referred to in Rule 2.13 shall be made not less than 10 working days before the proposed measure is intended to take effect or to be renewed.
- 2.15 The notification referred to in Rule 2.13 shall include details of the proposed measure, the reasons for the measure and when the measure is intended to take effect.
- 2.16 In exceptional circumstances, the MFSA may decide that the proposed measure takes effect within the period of 10 working days referred to in Rule 2.13.
- 2.17 In complying with Rules 2.12 to 2.16 above, the scheme 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.



## **SECTION 6: SUPPLEMENTARY RULES FOR SCHEMES WHICH ACQUIRE CONTROL OF NON-LISTED COMPANIES AND ISSUERS**

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### **1. INTRODUCTION**

1.01 The Rules included in this Section shall apply to the following:

- a. one or more scheme 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 Rule 1.02;
- b. schemes cooperating with each other on the basis of an agreement pursuant to which such schemes jointly, acquire control of a non-listed company in accordance with Rule 1.02.

1.02 For the purpose of this section, with regards to non-listed companies<sup>6</sup>, 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 scheme, in addition to the voting rights held directly by the scheme, 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 scheme; and
- b. a natural or legal person acting in its own name but on behalf of the scheme or on behalf of an undertaking controlled by the scheme.

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

Notwithstanding the definition of ‘control’<sup>7</sup> as provided in the Glossary to these Rules, for the purpose of Rules 3.01 to 3.03 and Rules 4.01 to 4.03 with 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.

1.03 The Rules 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

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<sup>6</sup> “Non-listed company” means a company which has its registered office in the Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of article 4(1) of Directive 2004/39/EC.

<sup>7</sup> “Control” means control as defined in Article 1 of Directive 83/349/EEC, or a similar relationship between a natural or legal person and an undertaking; for this purpose a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.

implemented in Malta through the prescribed in the Employee (Information and Consultation) Regulations.

- 1.04 This section shall not apply where the non-listed companies concerned are:
- (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 administering real estate.
- 1.05 Without prejudice to Rules 1.01 and 1.04, Rule 2.01 shall also apply to schemes that acquire a non-controlling participation in a non-listed company.
- 1.06 Rules 3.01 to 3.03 and Rules 4.01 to 4.03 shall also apply to schemes that acquire control over issuers. For the purposes of those Rules, Rules 1.01 and 1.04 shall apply *mutatis mutandis*.
- 2. NOTIFICATION OF THE ACQUISITION OF MAJOR HOLDINGS AND CONTROL OF NON-LISTED COMPANIES**
- 2.01 When a scheme acquires, disposes of or holds shares of a non-listed company, it shall notify the MFSA of the proportion of voting rights of the non-listed company held by the scheme any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.
- 2.02 When a scheme acquires, individually or jointly, control over a non-listed company pursuant to Rule 1.01, in conjunction with Rule 1.02, the scheme shall notify the following of the acquisition of control by the scheme:
- a. the non-listed company;
  - b. the shareholders of which the identities and addresses are available to the scheme or can be made available by the non-listed company or through a register to which the scheme has or can obtain access; and
  - c. the MFSA.
- 2.03 The notification required under Rule 2.02 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.
- 2.04 In its notification to the non-listed company, the scheme 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 scheme and of the information referred to in Rule 2.03. The scheme 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 Rules 2.01 to 2.05.

- 2.05 The notifications referred to in Rules 2.01 to 2.03 shall be made as soon as possible, but no later than 10 working days after the date on which the scheme has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

### **3. DISCLOSURE IN THE CASE OF ACQUISITION OF CONTROL**

- 3.01 When a scheme acquires, individually or jointly, control over a non-listed company or an issuer pursuant to Rule 1.01, in conjunction with Rule 1.02, the scheme shall make the information referred to in Rule 3.02 available to:
- a. the company concerned;
  - b. the shareholders of the company of which the identities and addresses are available to the scheme or can be made available by the company or through a register to which the scheme has or can obtain access; and
  - c. the MFSA.

Provided that the MFSA may require that the information referred to in Rule 3.02 is also made available to the competent authorities of the non-listed company which the MFSA may designate to that effect.

- 3.02 The scheme shall make available:
- a. the identity of the schemes that have acquired control;
  - b. the policy for preventing and managing conflicts of interest, in particular between the scheme and the company, including information about the specific safeguards established to ensure that any agreement between the scheme 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.
- 3.03 In its notification to the company pursuant to Rule 3.01(a), the scheme 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 Rule 3.01. The scheme 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 Rules 3.01 to 3.06.
- 3.04 When a scheme acquires, individually or jointly, control of a non-listed company pursuant to Rule 1.01, in conjunction with Rule 1.02, the scheme shall ensure that it

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

3.05 In addition, the scheme 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 Rule 3.04 to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

3.06 When a scheme acquires control of a non-listed company pursuant to Rule 1.01, in conjunction with Rule 1.02, it shall provide the MFSA and the investors with information on the financing of the acquisition.

#### **4. ASSET STRIPPING**

4.01 When a scheme, individually or jointly, acquires control of a non-listed company or an issuer pursuant to Rule 1.01, in conjunction with Rule 1.02, it shall for a period of 24 months following the acquisition of control of the company by the scheme:

- (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 Rule 4.02;
- (b) in so far as the scheme is authorised to vote 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 Rule 4.02;
- (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 Rule 4.02.

4.02 The obligations imposed on the scheme pursuant to Rule 4.01 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 not be 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).

**4.03 For the purposes of Rule 4.02:**

- a. the term 'distribution' referred to in Rule 4.02(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 Rule 4.02(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.

**5. ADDITIONAL INFORMATION TO BE INCLUDED IN THE ANNUAL REPORT OF SCHEMES EXERCISING CONTROL OF NON-LISTED COMPANIES**

- 5.01 When a scheme acquires, individually or jointly, control of a non-listed company pursuant to Rule 1.01 in conjunction with Rule 1.02, it shall include the additional information prescribed hereunder in the annual report.
- 5.02 When a scheme acquires individually or jointly, control of a non-listed company pursuant to Rule 1.01, in conjunction with Rule 1.02 of this Section, it shall either:
  - i. request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with Rule 5.03 hereunder, is made available by the board of directors of the company to the employees' representatives, or, where there are none, to the employees themselves with the period such annual report has to be drawn up in accordance with the Investment Services Rules;
  - ii. include in the annual report the information referred to in Rule 5.03 hereunder relating to the relevant non-listed company.
- 5.03 The additional information to be included in the annual report of the company or the scheme in accordance with Rule 5.02 above shall include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report shall also give an indication of:

- i. any important events that have occurred since the end of the financial year;
- ii. the company's likely future development;
- iii. the information concerning acquisitions of own shares prescribed in article 22(2) of Council Directive 77/91/EEC<sup>8</sup>.

5.04 The scheme shall either:

- i. request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in Rule 5.02(ii) relating to the company concerned to the employees' representative of the company concerned, or, where there are none, to the employees themselves by no later than 6 months following the end of the financial year; or
- ii. make available the information referred to in Rule 5.02(i) to the Scheme's investors, in so far as already available, by no later than 6 months following the end of the financial year and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the applicable legal requirements.

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<sup>8</sup> 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