L.N. 240 of 1998

INVESTMENT SERVICES ACT, 1994
(ACT NO. XIV OF 1994)

Investment Services Act (Control of Assets) Regulations, 1998

BY virtue of the powers vested in him by paragraph (b) of subsection (1) of section 12 of the Investment Services Act, 1994, the Minister of Finance, acting on the advice of the Malta Financial Services Centre, has made the following regulations:—

Part 1
Preliminary

Citation and commencement.

1. (1) These regulations may be cited as the Investment Services Act (Control of Assets) Regulations, 1998.

(2) These regulations shall come into force on the 1st November, 1998.

Interpretation.

2. (1) Any reference in these regulations to the Act is a reference to the Investment Services Act, 1994, and subject to the provisions of paragraph (2) of this regulation, the provisions of section 2 of the said Act shall also apply to these regulations.

(2) In these regulations, unless the context otherwise requires –

"assets" means movables and immovable property of any kind;

"control of assets" means the holding or control of assets belonging to, or on behalf of a customer, by a person hereinafter referred to as the subject person, acting in the course of rendering an investment service under the Act, and includes custody of assets;

"custodian" means a custodian qualified in accordance with regulation 14 of these regulations;

"customer" means any person or scheme whose assets are held under the control of a subject person;

"manager" means the manager of a scheme;

"scheme" means a collective investment scheme;

"subject person" means a person who is in possession of an investment services licence under the Act or is otherwise authorised or approved by the competent authority or is acting under an exemption from the requirement of such a licence in terms of the Investment Services Act (Exemption) Regulations, 1995, and includes a custodian.

L.N. 6 of 1995.

(3) For the purposes of regulations 9 and 20 of these regulations, "group company" in relation to a subject person or custodian, means any body corporate which is the subject person's or custodian's subsidiary or parent company, or a subsidiary of the subject person's or custodian's parent company; and the terms "parent" and "subsidiary" shall be construed in accordance with subsection (2) of section 2 of the Companies Act, 1995.

Act XXV of 1995.

(4) The provisions of these regulations shall not apply to a person in possession of a stockbroker's licence issued under the Malta Stock Exchange Act to the extent that the control of assets exercised by such a person is carried out within the terms and conditions of such a licence.

Cap. 345.

Part 2
General

Assets held under control constitute a distinct patrimony.

3. (1) A subject person having the control of assets belonging to a customer in the course of rendering an investment service to such customer, shall hold such assets solely for and on behalf of and in the interest of the customer.

(2) Notwithstanding anything stated in section 1894 of the Civil Code or in the agreement entered into between the subject person and the customer or the fact that a customer's assets held under the control of a subject person are registered in the name and title of or are otherwise vested in the subject person, such assets shall be deemed to constitute a distinct patrimony, separate from that belonging to the subject person and from that of other customers the assets of whom are also held under the control of the subject person.

Cap. 16.

(3) Except as expressly provided in the agreement entered into between the subject person and the customer and notwithstanding the provisions of the Civil Code, the control of assets belonging to a customer by a subject person shall not give or be deemed or construed to give to the subject person any rights over such assets nor shall it create any form of loan between the subject person and the customer and this notwithstanding the nature of the assets or the rights or obligations of the subject person in relation to the assets.

Customer enjoys right of ownership in assets.

4. (1) A customer whose assets are held under the control of a subject person enjoys a right of ownership in such assets notwithstanding that they may be registered in the name and title of or are otherwise vested in the subject person. Where such assets are held by the subject person as part of a common pool of identical assets or are otherwise held in a clients' or common account, the customer shall have an undivided share in ownership of all the assets held collectively by the subject person in such a pool or account.

(2) The records, accounts and other statements held or issued by the subject person in terms of paragraph (3) of regulation 7 of these regulations shall, saving any proof to the contrary, constitute evidence of their contents and of the right of ownership of the customer as provided in paragraph (1) of this regulation.

Assets held under control not subject to the rights of creditors of the subject person.

5. (1) The creditors of a subject person shall have no claim or right of action on or against the assets held under the control of the subject person for and on behalf of and in the interest of any customer and such assets shall not be affected in any manner by the provisions of laws and regulations in force regulating the insolvency or bankruptcy of the subject person.

(2) In the event of any such insolvency or bankruptcy or related order or resolution, or in the event that the competent authority so requires, the subject person or any administrator or receiver or other officer appointed to represent it by any court or otherwise, shall on demand of any customer or of the competent authority, immediately transfer the control, possession and title to all assets held by or in the name of the subject person on behalf of the customer to another subject person or to such other person as may be instructed by the customer or by the competent authority.

(3) In the event that any assets held under the control of the subject person are, at the request of any creditor of the subject person, made subject to any precautionary or executive act or warrant granted by any Court in terms of the Code of Organization and Civil Procedure, Cap. 12. the customer on whose behalf such assets are being held or the competent

authority may, by application to the Court, request the release of the assets from such act or warrant and the Court shall, on production of evidence as it may deem fit, accede to the application without undue delay.

Applicability of Duty on Documents and Transfers Act, 1993, and Income Tax Act.

Act XVII of 1993. Cap. 123.

6. (1) The delivery of the assets of a customer to a subject person and from a subject person to a customer or another subject person for the purpose of the control of assets in terms of these regulations shall not be deemed to constitute a chargeable transfer for the purposes of the Duty on Documents and Transfers Act, 1993 and for the purposes of subsection (1) of section 5 of the Income Tax Act, where the delivery of such assets does not constitute a change in the beneficial owner of the assets.

(2) For the purpose of this regulation, beneficial owner means a person who is the real owner of, or who is otherwise beneficially entitled to, the assets held under control by the subject person, as is provided in regulation 4 of these regulations.

Part 3
Control of Assets

Functions and duties of subject person.

7. (1) A subject person having the control of assets belonging to a customer shall safeguard such assets and the interest of the customer therein.

(2) The subject person shall carry out such functions and duties as shall be required in accordance with these regulations, the terms and conditions of the agreement entered into with the customer, the conditions of any investment services licence, and such other requirements as may be laid down by the competent authority.

(3) The subject person shall maintain proper and adequate records and accounts of all customers' assets held under control. The records and accounts shall identify the customers to whom such assets belong and shall clearly indicate that the assets of every customer are separate and distinct form the assets belonging to the subject person and from other customers' assets held by the subject person. The records and accounts shall, upon due notice being given to the subject person, indicate where any pledge or other right over assets held under the control of the subject person has been given by the customers to any third parties, and where any order by any Court has been made in connection with such assets.

(4) The subject person entrusted with the control of assets belonging to customers shall, to every extent reasonably possible, segregate in a proper manner the assets of every customer from the

assets belonging to the subject person and form the assets of other customers:

Provided that the subject person may, with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any investment services licence and such other requirements as may be laid down by the competent authority and without prejudice to the customer's right of ownership over the assets held under control, place and keep such assets in a common pool of identical assets or otherwise deposit them in a clients' or common account.

(5) The subject person shall make appropriate arrangements for the protection of customers' assets held under control and shall ensure that such assets are placed under adequate systems to safeguard such assets from damage, misappropriation or other loss and which permit the delivery of such assets only in accordance with the terms and conditions of the agreement entered into with the customer.

(6) Where it is not reasonably possible for the subject person to carry out any of the duties specified in this regulation due to the nature of the assets and of the arrangements whereby control is exercised, the said duties may be varied with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any investment services licence and such other requirements as may be laid down by the competent authority.

Liability of the subject person.

8. (1) A subject person having the control of assets belonging to customers shall be liable for any loss or prejudice suffered by the customers due to the subject person's fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part the subject person's obligations arising under these regulations, the terms and conditions of the agreement entered into with the customers, the conditions of any investment services licence or such other requirements as may be laid down by the competent authority.

(2) For the purposes of this regulation, subject person includes such other subject person to whom functions, duties or assets may be delegated or entrusted in terms of regulation 9 of these regulations.

Subject person may delegate functions and duties or entrust assets to another subject person.

9. (1) A subject person may delegate part of the functions and duties under regulation 7 of these regulations to another subject person which is qualified and competent to take the control of customers' assets; and may entrust or deposit all or part of a customer's assets held under control with such other subject person.

(2) The liability of the subject person for its own acts or omissions under regulation 8 of these regulations shall not be affected or reduced as a result of the subject person delegating functions and duties, or entrusting all or part of the assets belonging to a customer, to another subject person.

(3) Where the subject person delegates or entrusts functions, duties or assets in terms of paragraph (1) of this regulation to a person which is a group company, without prejudice to the liability of such person, the subject person shall be liable for any loss or prejudice suffered by the customers as a result of the acts, omissions or insolvency of such person.

(4) Where the subject person delegates or entrusts functions, duties or assets in terms of paragraph (1) of this regulation to a person which is not a group company, without prejudice to the liability of such person, the subject person shall be liable for any loss or prejudice suffered by the customers as a result of the acts or omissions of such person unless the subject person can prove that such person was and remains qualified and competent to carry out the functions and duties delegated and that the subject person exercised reasonable care to oversee that the functions and duties delegated were undertaken by such person competently.

(5) The liability of the subject person under paragraphs (3) and (4) of this regulation may be varied or reduced with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any investment services licence and such other requirements as may be laid down by the competent authority:

Provided that the subject person discloses fully to the customer any risks that may be associated with the nature of the arrangements whereby control is to be exercised and that the agreement with the customer shall clearly define the extent of liability of the subject person.

(6) Where the subject person delegates or entrusts functions, duties or assets in accordance with specific written instructions from the customer, the subject person shall not be liable for any loss or prejudice suffered by that customer as a result of the acts or omissions of the person to whom functions, duties or assets are delegated or entrusted as requested by the customer.

Use of clearing, settlement and de-materialised systems and settlement risk.

10. (1) Where reasonably required by the nature of the assets and of the arrangements whereby control is to be exercised, a subject person may, with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the

customer, the conditions of any investment services licence and such other requirements as may be laid down by the competent authority, make use of any market clearing system, settlement system, de-materialised book entry system, centralised custodial depository or similar system for the purpose of the control of assets in terms of these regulations.

(2) Such systems as are provided for in paragraph (1) of this regulation may also be used to effect all transactions including conveyance, assignment, transfer, transmission and pledging of assets held under the control of the subject person and the law of the country in which the system is maintained shall apply to the validity of such transactions notwithstanding the provisions of any other law.

(3) The agreement with the customer shall clearly define the extent of liability of the subject person for any losses that may be incurred by the customer as a result of the use of such systems.

Subject person's fees.

11. The subject person shall have the right to charge fees to the customer and to be reimbursed for expenses in accordance with the terms and conditions of the agreement entered into with the customer. The subject person may, if authorised to do so by the terms and conditions of the said agreement, exercise a right of retention over the customer's assets held under control, to the extent of any lawfully due but unpaid fees and expenses, until such fees and expenses are paid.

Termination of the control of assets.

12. (1) Without prejudice to any requirements as may be laid down by the competent authority, an agreement for the control of assets belonging to a customer may be terminated by the customer, by the subject person, or by order of the competent authority.

(2) Upon the termination of an agreement for the control of assets, the subject person shall convey for no consideration the assets held for the customer, as instructed by the customer or by the competent authority, without prejudice to the subject person's right to payment of any lawfully due fees or expenses in terms of the agreement entered into with the customer and to any obligations arising in favour of the customer thereunder.

Part 4
Custody of assets of collective investment schemes

Applicability.

13. The provisions of Parts 1 and 2 and regulations 7 and 10 to 12 of Part 3 of these relegations shall apply to the custody of assets of schemes under this Part, and for the purposes of this Part, unless the context otherwise requires, any references in Parts 1, 2 and 3 to "subject

person", "control of assets" and "customer" shall be construed to refer to "custodian", custody of assets" and "scheme" respectively.

Qualifications of a custodian.

14. A custodian shall be:

(a) a bank, credit or financial institution constituted, registered and licensed under the laws of Malta, or

(b) a bank, credit or financial institution of standing and repute, constituted, registered and licensed outside Malta, which is recognised as such by the competent authority, or

(c) such other body corporate, unincorporated body or association acceptable to the competent authority, providing the services of a custodian,

having the business organisation, systems, experience and expertise deemed necessary by the competent authority for it to act as custodian.

Custody of assets of a scheme.

15. (1) The custody of all the assets of a scheme shall be entrusted by the scheme or the manager, where acting on behalf of the scheme, to a custodian appointed by an instrument in writing with the approval of the competent authority.

(2) The custody of the assets of a scheme may, without prejudice to the provisions of the Act and subject to the approval of the competent authority, be entrusted to a custodian which does not hold an investment service licence under the Act.

Functions and duties of the custodian.

16. (1) The custodian shall take custody of all the assets of any scheme and shall safeguard such assets and the interests of the scheme and of the holders of units or participants in the scheme.

(2) In addition to the functions and duties specified in regulation 7 of these regulations, the custodian shall carry out monitoring, oversight, administrative and such other functions required in accordance with the terms and conditions of the agreement appointing it as custodian, the deed or other instrument establishing or regulating the scheme, the conditions of the collective investment scheme licence which may be held by the scheme, the conditions of any investment services licence and such other requirements as may be laid down by the competent authority.

Independence of custodian from management of collective investment scheme.

17. In the exercise of its functions, duties and responsibilities, the custodian shall act independently of the manager and of the management of the scheme and solely in the interest of the holders of units or participants in the scheme and of the scheme itself:

Provided that the custodian shall act upon the instructions of the manager and the manager shall act upon the instructions of the custodian to the extent required by the conditions of any investment services licence, such other requirements as may be laid down by the competent authority, and the conditions of the deed or other instrument establishing or regulating the scheme.

Administration and management of manager and custodian.

18. Except as may be authorised by the competent authority, a person shall not act as a member of the board of directors or similar organ or as an officer responsible for the administration and management of the manager and at the same time hold a similar position with the custodian entrusted with the custody of the assets of any scheme managed by the manager.

Liability of the custodian.

19. (1) The custodian shall be liable for any loss or prejudice suffered by the manager, the scheme or the holders of units or participants in the scheme due to the custodian's fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part the custodian's obligations arising under these regulations, the terms and conditions of the agreement appointing the custodian, the deed or other instrument establishing or regulating the scheme, the conditions of the collective investment scheme licence which may be held by the scheme, the conditions of any investment services licence or such other requirements as may be laid down by the competent authority.

(2) The custodian shall not be liable for any loss or prejudice suffered by the scheme or the holders of units or participants in the scheme as a result of the acts or omissions of the manager except where and to the extent that the custodian has failed to perform its functions and duties in terms of regulation 16 of these regulations.

(3) For the purposes of this regulation, custodian includes such other subcustodian to whom functions, duties or assets may be delegated or entrusted in terms of regulation 20 of these regulations.

Custodian may delegate functions and duties or entrust assets to a sub-custodian.

20. (1) The custodian may, with the consent of the scheme or the manager, where acting on behalf of the scheme, delegate all or part of the functions and duties under regulation 16 of these regulations to a sub-custodian, and may also entrust or deposit all or part of the assets of the scheme held in custody with such sub-custodian.

(2) The liability of the custodian for its own acts or omissions under regulation 19 of these regulations shall not be affected or reduced as a result of the custodian delegating functions and duties or entrusting all or part of the assets of the scheme to a sub-custodian.

(3) Where the custodian delegates or entrusts functions, duties or assets in terms of paragraph (1) of this regulation to a person which is either a group company or is the manager or associate of the manager, without prejudice to the liability of such person, the custodian shall be liable for any loss or prejudice suffered by the scheme or the holders of units or participants in the scheme as a result of the acts, omissions or insolvency of such person:

Provided that the custodian may not delegate to the manager any function of oversight in respect of the manager or any function of custody or control of the assets, nor may the custodian delegate to an associate of the manager any function of oversight in respect of the manager.

(4) Where the custodian delegates or entrusts functions, duties or assets in terms of paragraph (1) of this regulation to a person which is not a group company nor the manager nor associate of the manager, without prejudice to the liability of such person, the custodian shall be liable for any loss or prejudice suffered by the manager, the scheme or the holders of units or participants in the scheme as a result of the acts or omissions of such person unless the custodian can prove that such person was and remains qualified and competent to carry out the functions and duties delegated to it and that the custodian exercised reasonable care to oversee that the functions and duties delegated were undertaken by such person competently.

(5) The liability of the custodian under paragraphs (3) and (4) of this regulation may be varied or reduced with the written consent of the scheme or the manager, where acting on behalf of the scheme, and in accordance with the terms and conditions of the agreement appointing the custodian, the deed or other instrument establishing or regulating the scheme, the conditions of the collective investment scheme licence which may be held by the scheme, the conditions of any investment services licence and such other requirements as may be laid down by the competent authority:

Provided that the custodian discloses fully to the scheme or the manager, where acting on behalf of the scheme, any risks that may be associated with the nature of the custody arrangements, and that the agreement appointing the custodian shall clearly define the extent of liability of the custodian. Any such risks shall also be fully disclosed to the holders of units or participants in the scheme.

(6) For the purposes of this regulation, "associate" in relation to the manager means a body corporate which forms part of the same group of companies as the manager.

21. The termination of the appointment of the custodian in accordance with the provisions of regulation 12 of these regulations shall not come into effect prior to the appointment of another custodian and the conveyance of the assets held in custody by the outgoing custodian to the new custodian. Termination of custody.