L.N. 366 of 2003

SPECIAL FUNDS (REGULATION) ACT
(CAP. 450)
Special Funds (Control of Assets) Regulations, 2003

IN exercise of the powers conferred by paragraph (b) of sub-article (1) of article 50 of the Special Funds (Regulation) Act, the Minister of Finance and Economic Affairs, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Part 1
Preliminary

Citation and commencement.

1. (1) The title of these regulations is the Special Funds (Control of Assets) Regulations, 2003.

(2) These regulations shall come into force on the 1st January, 2004.

Interpretation.

2. (1) Any reference in these regulations to the Act is a reference to the Special Funds (Regulation) Act, 2002, and subject to the provisions of sub-regulation (2) of this regulation, the provisions of article 2 of the said Act shall also apply to these regulations.

(2) In these regulations unless the context otherwise requires-

"assets" means movable 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 a service under the Act, and includes custody of assets;

"custodian" means a Retirement Fund Administrator maintaining custody of the fund's assets or a Retirement Fund Custodian qualified in accordance with regulation 14 of these regulations;

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

"fund" means a Retirement Fund as defined in article 2 of the Act;

"Retirement Fund Custodian" means a person duly registered with the Authority to act as a Retirement Fund Custodian in terms of sub-regulation (1) of regulation 3 of the Special Funds (Registration of Retirement Fund Custodians) Regulations, 2003;

"subject person" means a person who is in possession of a registration under the Act to act as a Retirement Scheme Administrator, a Retirement Fund Administrator or as a Retirement Fund Custodian.

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

CAP. 386.

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 a service under the Act to such customer, shall hold such assets solely for and on behalf of and in the interest of the customer.

Cap.16.

(2) Notwithstanding anything stated in article 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.

(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 enjoys 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 sub-regulation (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 sub-regulation (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 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 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 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, the customer on whose behalf such assets are being held or the 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.

Cap. 12.

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

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, and for the purposes of sub-article (1) of article 5 of the Income Tax Act, where the delivery of such assets does not constitute a change in the beneficial owner of the assets.

Cap. 364.

Cap.123.

(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 persons

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 registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time.

(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 from 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 from the assets of other customers:Provided that the subject person may, in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any registration, and such other requirements as may be laid down by the 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' account or in a 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 or in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time.

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 registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time.

(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.

(3) This regulation shall not apply to a custodian as defined in sub-regulation (2) of regulation 2 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 sub-regulation (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 sub-regulation (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 sub-regulations (3) and (4) of this regulation may be varied or reduced with the written consent of the customer or in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time:

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) This regulation shall not apply to a custodian as defined in sub-regulation (2) of regulation (2) of these regulations.

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 or in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time, make use of any market 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 sub-regulation (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.

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 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 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 Retirement Funds

Applicability.

13. The provisions of Parts 1 and 2 and regulations 7 and 10 to 12 of Part 3 of these regulations shall apply to the custody of assets of funds 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 "fund" respectively**.**

Qualifications of a custodian.

14. A custodian shall be:

(a) a credit institution licensed under the Banking Act; or

(b) an entity licensed as a Custodian for Collective Investment Schemes under the Investment Services Act; or

(c) a credit institution licensed in a country where, in the opinion of the Authority, it is subject to an adequate level of regulatory supervision, having an established place of business in Malta; or

(d) such other entity acceptable to the Authority;

having the business organisation, systems, experience and expertise deemed necessary by the Authority for it to maintain custody of assets.

Custody of assets of a fund.

15. The custody of all the assets of a fund shall be to a custodian appointed by an instrument in writing with the approval of the Authority.

Functions and duties of the custodian.

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

(2) In addition to the functions and duties specified in regulation 7 of these regulations, the custodian shall carry out the 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 fund and the conditions of registration of the fund by the Authority, and such other requirements as may be laid down by the latter from time to time.

Independence of the custodian from the Asset Management of a Retirement Fund.

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

Provided that where the Retirement Fund Administrator maintains custody of the fund's assets, it shall only act upon the instructions of the fund and, or of the Asset Manager and the fund and, or the Asset Manager shall act upon the instructions of the custodian to the extent required by the conditions of its registration which may be stipulated by the Authority and by the conditions of the deed or other instrument establishing the fund:

Provided further that where the Retirement Fund Administrator appoints a separate entity to act as a Retirement Fund Custodian, the latter shall only accept instructions from the former.

Administration and management of Asset Manager and custodian.

18. Except as may be authorised by the Authority, a person shall not act as a member of the board of directors of the fund or of the Asset Manager, or similar organ or as an officer responsible for the administration and management of the Asset Manager and at the same time hold a similar position with the custodian.

Liability of the custodian.

19. (1) The custodian shall be liable for any loss or prejudice suffered by, the fund, or the participants in the fund 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 fund, the conditions of registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time.

(2) For the purposes of this regulation, custodian includes such other persons 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 another person.

20. (1) The custodian may, with the consent of the fund, or in the case of the Retirement Fund Custodian, with the consent of the Retirement Fund Administrator, delegate all or part of the functions and duties under regulation 16 of these regulations to another person and, may entrust or deposit all or part of the assets of the fund held in custody with such other person.

(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 fund, to another person in terms of sub-regulation (1) of this regulation.

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

(4) Where the custodian delegates or entrusts functions, duties or assets in terms of sub-regulation (1) of this regulation to a person which is not a group company, without prejudice to the liability of such person, the custodian shall be liable for any loss or prejudice suffered by fund or by the participants in the fund, 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 sub-regulations (3) and (4) of this regulation may be varied or reduced with the written consent of the fund, and, in the case of a Retirement Fund Custodian with the written consent of the Retirement Fund Administrator, and in accordance with the terms and conditions of the agreement appointing the custodian, the deed or other instrument establishing or regulating the fund, the conditions of

registration which may be required by the Authority, and such other requirements as may be laid down by the latter from time to time:

Provided that the custodian discloses fully to the fund, 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 fund and to the participants in the fund.

Termination of custody

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.

Ippubblikat mid-Dipartiment ta' l-Informazzjoni (doi.gov.mt) — Valletta — *Published by the Department of Information (doi.gov.mt) — Valletta*
Mitbugh fl-Istamperija tal-Gvern — *Printed at the Government Printing Press*

Prezz 20ċ – *Price 20c*