L.N. 239 of 2006

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (Performance Fees) Regulations, 2006

IN exercise of the powers conferred by paragraph (b) of sub-article (1) of article 12 of the Investment Services Act, the Prime Minister and Minister of Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

Citation.

1. The title of these regulations is the Investment Services Act (Performance Fees) Regulations, 2006.

Interpretation.

2. (1) In these regulations, unless the context otherwise requires:

"the Act" means the Investment Services Act; Cap. 370.

"accounting period" means the financial period determined by reference to the accounting reference date, this being a specified date in a calendar year;

"the competent authority" means the Malta Financial Services Authority appointed under article 2A of the Act;

"equalisation" means an accounting method designed to ensure the equal treatment of unit holders irrespective of the timing of their investment;

"NAV" means the net asset value;

"performance fee" means a fee based on performance determined by reference to the growth in net asset value over a given period;

"professional investor fund" means a collective investment scheme formed in accordance with, or existing under the laws of Malta, duly licensed by the competent authority as a professional investor fund;

"relevant index" means an index which is published in an appropriate manner and which is an appropriate benchmark to measure a scheme's performance, by reference to a scheme's investment objective and asset allocation;

"scheme" means a collective investment scheme.

(2) Words and expressions which are also used in the Act shall in these regulations have the same meaning as in the Act.

Applicability of regulation.

3. These regulations shall apply to schemes formed, set up or established in accordance with, or existing under the laws of Malta, whether formed, set up or established before or after the coming into force of these regulations and licensed under the Act:

Provided that these regulations shall not apply to schemes licensed as professional investor funds.

Adoption of performance fees.

4. A performance fee may only be adopted on the basis that it is:

(a) fair and reasonable; in determining the reasonableness of such fee, consideration should be made to the other applicable fees to a scheme;

(b) easy to understand and calculate;

(c) clearly disclosed and explained to investors;

(d) paid at a reasonable frequency; and

(e) payable only in the form specified in regulation 5.

Payment of performance fees.

5. (1) Performance fees may be payable on:

(a) new high NAV per share over the life of the scheme, where the starting price is the initial offer price or any other benchmark if this is higher, or

(b) the out-performance of a relevant index.

(2) In the event of paragraph (a) of sub-regulation (1) of this regulation:

(a) no performance fee shall be paid or accrued until the NAV per share exceeds the "water mark", that is, the highest of either the previous highest NAV per share on which the

performance fee was paid (if any), the initial offer price, or any other benchmark. The performance fee shall only be payable on the increase over the "water mark"; and

(b) where a relevant index exists, such index should be used as a benchmark as is referred to in paragraph (a) of this sub-regulation. In the case of such index being the "water mark", the performance fee shall only be payable on the amount by which the scheme out performs the index.

(3) In the event of paragraph (b) of sub-regulation (1) of this regulation, the index must be relevant to the scheme. The performance fee shall only be payable on the amount by which the scheme out performs the index. Any underperformance of the index in preceding periods since launch shall be recouped before a fee becomes due in subsequent periods:

Provided that a performance fee shall not be payable if its NAV per share is below its initial offer price.

Disclosure of performance fee in prospectus.

6. The prospectus shall contain clear disclosure on the performance fee, particularly:

(a) details on the calculation of the performance fee, including the accrual basis and details of when the fee is actually paid, the calculation period for determining the fee and the first such period;

(b) a risk warning that the increase in NAV which is used as a basis for the calculation of performance fees, may be comprised both of realised gains as well as unrealised gains as at the end of the calculation period, and as a result, performance fees may be paid on unrealised gains which may subsequently never be realised by the scheme;

(c) a risk warning that performance fees may incentivise the manager and, or advisor to the scheme to take higher risks in its investment decisions or advice;

(d) details regarding any maximum amount or percentage of NAV that a performance fee might represent in any one accounting period and appropriate warnings in case where there is no maximum;

(e) worked examples showing the operation and impact of performance fees; and

(f) details related to the treatment of unit holders, including:

(i) reference to any method, such as equalisation, which is to be adopted by the scheme with the objective of ensuring equal treatment of unit holders, irrespective of the timing of their investment in or redemption from the scheme, as well as a description of the methodology to be used in this regard; or

(ii) where no such method is to be used, disclosure to this effect, together with an explanation of the potential inequalities which could arise.

Adequate controls.

7. (1) The scheme or its manager or administrator as applicable, shall adopt appropriate controls and structures for the on-going supervision of the procedures and processes in the calculation and payment of performance fees.

(2) The custodian of a scheme shall ensure that performance fees are payable in accordance with regulation 5 of these regulations and shall also verify the calculation of the performance fee.

Guidelines.

8. The competent authority may from time to time issue guidelines in terms of article 6 of the Act for the better carrying out of the provisions of these regulations.

Transitional provision.

9. Schemes which at the time of publication of these regulations have a performance fee structure in place, shall be required to comply with these regulations as from the accounting period commencing following their coming into force:

Provided that schemes whose next accounting period commences within a period of less than eight weeks from the date of coming into force of these regulations, shall be required to comply with these regulations as from the commencement of the subsequent accounting period.

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