L.N. 241 of 2011

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (Marketing of UCITS) Regulations, 2011

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

PRELIMINARY

Citation, commencement and scope.

1. (1) The title of these regulations is the Investment Services Act (Marketing of UCITS) Regulations, 2011.

(2) These regulations shall come into force on 1st July, 2011.

(3) These regulations provide for the requirements applicable to the marketing of Maltese UCITS in other Member States or EEA States, and to the marketing of European UCITS in Malta.

(4) These regulations have the purpose of implementing Articles 1, 2(1)(b) and (e), 3, 91(1) and (3), 92, 93, 94, 96 and 108 of Directive 2009/65/EC of the UCITS Directive and Article 30 of the Implementing Directive, and they shall be interpreted and applied accordingly.

Interpretation

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

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

"closed ended scheme" means a collective investment scheme with fixed share capital, which complies with any additional criteria established in the Investment Services Rules issued by the competent authority in terms of the Act;

"ESMA" means the European Securities and Markets Authority established in terms of Article 1 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November, 2010;

"European management company" means a management company authorised by a European regulatory authority in a Member

State or EEA State, other than Malta, and the regular business of which is the management of UCITS;

"European UCITS" means a UCITS authorised by a European regulatory authority in a Member State or EEA State, other than in Malta;

"feeder UCITS" means a UCITS or subfund thereof which has been approved to invest at least eighty five per cent of its assets in units of another UCITS or subfund thereof in terms of the UCITS Directive;

"Implementing Directive" means Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure;

"key investor information" shall have the same meaning assigned to it in the Investment Services Rules;

"Maltese management company" means a management company licensed by the competent authority, having its head office and registered office situated in Malta, and the regular business of which is the management of UCITS;

"Maltese UCITS" means:

(a) an investment company, a partnership *en commandite* or a limited partnership with its registered office and head office situated in Malta and licensed in terms of the Act;

(b) where the UCITS is constituted as a common fund, a UCITS domiciled in Malta in terms of the Investment Services Act (Contractual Funds) Regulations, and licensed in terms of the Act;

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(c) where the UCITS is established as a unit trust, a unit trust whose proper law is the law of Malta;

"master UCITS" means a UCITS which:

(a) has, among its unit-holders, at least one feeder UCITS;

(b) is not itself a feeder UCITS; and

(c) does not hold units of a feeder UCITS;

"Member State" means a Member State of the European Union;

"Regulation No. 584/2010" means Commission Regulation (EU) No. 584/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities;

"UCITS" means the undertaking for collective investment in transferable securities in terms of regulation 3(2). For the purpose of these regulations, a UCITS shall also include subfunds thereof;

"UCITS Directive" means Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) and includes any implementing measures that have been or may be issued thereunder;

"UCITS home Member State or EEA State" means the Member State or EEA State in which the UCITS is authorised pursuant to Article 5 of the UCITS Directive.

(2) For the purposes of these regulations:

(a) "common fund" shall be construed as referring to UCITS constituted as contractual funds and unit trusts; and

(b) "constitutional documents" shall be construed as referring to the fund rules, trust deeds and instruments of incorporation, as the case may be.

(3) Words and expressions which are also used in the Act but which are not defined herein shall have the same meaning as in the Act.

(4) In the event that any of these regulations conflicts with the provisions of the UCITS Directive, the latter shall prevail.

SCOPE

Scope.

3. (1) These regulations shall apply to Maltese UCITS wishing to market their units in a Member State or an EEA State, and

also to European UCITS wishing to market their units in Malta, in terms of the UCITS Directive.

(2) For the purpose of these regulations, UCITS shall mean undertakings which are harmonised in accordance with the UCITS Directive and which have -

(a) as sole object the collective investment in transferable securities or in other liquid financial assets, as specified in the Investment Services Rules, of capital raised from the public and which operate on the principle of risk-spreading; and

(b) units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption:

Provided that if a master UCITS has at least two feeder UCITS as unit holders, paragraph (a) shall not apply, giving the master UCITS the choice whether or not to raise capital from other investors.

(3) The undertakings referred to in sub-regulation (2) may be constituted as:

(a) common funds which are managed either by Maltese or European management companies; or

(b) investment companies or limited partnerships with variable share capital.

(4) These regulations shall not apply to:

(a) investment companies and limited partnerships, the assets of which are invested through the intermediary of subsidiary companies mainly otherwise than in transferable securities;

(b) collective investment schemes of the closed-ended type;

(c) collective investment schemes which raise capital without promoting the sale of their units to the public within the European Union or EEA States or any part thereof:

Provided that if a master UCITS has at least two feeder

UCITS as unit holders, it shall have the choice as to whether or not to raise capital from other investors;

(d) collective investment schemes the units of which, under the constitutional documents, may be sold only to the public in third countries;

(e) categories of UCITS whose investment and borrowing policies do not conform with those specified in the provisions of the Investment Services Rules;

(f) collective investment schemes that are not harmonised in accordance with the UCITS Directive; or

(g) a Maltese UCITS which is a master UCITS and which does not raise capital from the public in Malta, but has one or more feeder UCITS established in Malta.

(5) A Maltese UCITS which is subject to these regulations shall not convert itself into a collective investment scheme which would not be subject to these regulations, and any purported conversion shall be null and void.

MARKETING OF MALTESE UCITS IN A MEMBER STATE OR IN AN EEA STATE

Marketing of Maltese UCITS.

4. (1) Where a Maltese UCITS proposes to market its units in a Member State or EEA State other than Malta, it shall first submit a written notification letter of its intention to the competent authority.

(2) The notification letter shall be made in the form and manner prescribed in Regulation No. 584/2010 and shall furthermore include the following information:

(a) information on the arrangements made for marketing of the units of the Maltese UCITS in the Member State or EEA State, including where relevant in respect of share classes; and

(b) an indication that the units of the Maltese UCITS will be marketed by the management company that manages the Maltese UCITS.

(3) The Maltese UCITS shall enclose the following documents with the notification letter:

(a) the latest version of its constitutional documents

and its prospectus;

(b) where appropriate, its latest annual report and any subsequent half-yearly report translated in accordance with regulation 5; and

(c) the key investor information document as provided for in the Investment Services Rules and translated in accordance with regulation 5.

(4) The competent authority shall verify whether the information and documentation submitted by the Maltese UCITS in accordance with sub-regulations (2) and (3) is complete and, if satisfied, shall produce an attestation that the Maltese UCITS fulfils the conditions imposed by the UCITS Directive in the manner and form prescribed by Regulation No. 584/2010.

(5) The competent authority shall transmit the complete information and documentation referred to in sub-regulations (1), (2) and (3) to the European regulatory authority of the Member State or EEA State in which the Maltese UCITS proposes to market its units, by not later than ten working days from the date of receipt of the notification letter accompanied by the complete documentation referred to in sub-regulation (3). The competent authority shall also transmit to such European regulatory authority the attestation issued pursuant to sub-regulation (4):

Provided that in transmitting the notification to the European regulatory authority of the Member State or EEA State, the competent authority shall comply with the requirements of the provisions of Regulation No. 584/2010.

(6) The notification letter referred to in sub-regulation (2), and the attestation referred to in sub-regulation (4), shall be provided in a language customary in the sphere of international finance, unless the competent authority and the European authority of the Member State or EEA State in which the Maltese UCITS wishes to market its units agree that the said documents be provided in an official language of both Member States.

(7) Upon transmission of the documentation, the competent authority shall immediately notify the Maltese UCITS thereof and the Maltese UCITS may commence marketing its units in the Member State or EEA State as from the date of such notification.

(8) For the purposes of the notification procedure under this regulation, the Maltese UCITS shall not be required by the European

regulatory authority of the Member State or EEA State in which it wishes to market its units, to submit any additional documents, certificates or information other than those requested in this regulation.

(9) The European regulatory authority of the Member State or EEA State in which the Maltese UCITS intends to market its units shall have access, by electronic means, to the documents referred to in sub-regulation (3) and, if applicable, to any translation thereof.

(10) The Maltese UCITS shall keep the documentation referred to in sub-regulation (3) and the translations thereof updated. The Maltese UCITS shall notify any amendments to the documents referred to in sub-regulation (3) to the European regulatory authority of the Member State or EEA State in which it is marketing its units and shall indicate where those documents can be obtained electronically.

(11) In the event of a change in the information regarding the arrangements made for marketing communicated in the notification letter in accordance with subregulations (1) and (2), or a change regarding share classes to be marketed, the Maltese UCITS shall give written notice thereof to the European regulatory authority of the Member State or EEA State in which it is currently marketing its units prior to implementing the change.

Documents and information to be provided to investors by the Maltese UCITS.

5. (1) Where a Maltese UCITS markets its units in another Member State or EEA State, it shall provide investors within the territory of such Member State or EEA State with the key investor information document translated in the official language, or one of the official languages of the Member State or EEA State in which it is marketing its units or into a language approved by the European regulatory authority of such Member State or EEA State, together with the following information and documents prescribed hereunder free of charge and upon request:

(a) a prospectus;

(b) an annual report for each financial year; and

(c) a half-yearly report covering the first six months of the financial year.

(2) The information and documents prescribed in sub-regulation (1)(a) to (c) shall be provided to investors in the manner prescribed by the European regulatory authority of the Member State or EEA State in which the Maltese UCITS is marketing its units.

(3) The Maltese UCITS shall, at its discretion, translate the documents referred to in sub-regulation (1)(a) to (c) into the official language or one of the official languages of the Member State or EEA State in which it markets its units, into a language approved by the European regulatory authority of that Member State or EEA State or in a language customary in the sphere of international finance.

(4) The Maltese UCITS shall be responsible to provide accurate translations of the information or documents referred to in sub-regulation (1), and such translations shall faithfully reflect the content of the original information.

(5) The requirements prescribed in sub-regulations (1) to (4) shall also be applicable to any changes to the information and documents referred to therein.

(6) The frequency of the publication of the issue, sale, repurchase or redemption price of units of the Maltese UCITS in terms of sub-regulation (1)(c) shall be subject to applicable provisions prescribed in the Investment Services Rules.

(7) The Maltese UCITS proposing to market its units in another Member State or EEA State shall, in accordance with the laws, regulations and administrative provisions in force in that Member State or EEA State, take the measures necessary to ensure that facilities are available therein for making payments to unit holders, re-purchasing or redeeming units and making available the information which the Maltese UCITS is obliged to provide.

(8) For the purpose of pursuing its activities, the Maltese UCITS may use the same reference to its legal form in terms of regulation 3(3), in its designation in the Member State or EEA State in which it markets its units as it uses in Malta.

(9) A Maltese UCITS shall make public in an appropriate manner the issue, sale, repurchase or redemption price of its units each time it issues, sells, repurchases or redeems them, in accordance with Investment Services Rules.

Breaches by Maltese UCITS.

6. The competent authority shall take appropriate measures if it receives notification from the European regulatory authority of the Member State or EEA State in which the Maltese UCITS is marketing its units, that such European regulatory authority has clear and demonstrable grounds to believe that a Maltese UCITS, the units of which are being marketed within its territory, is in breach of the obligations arising from the provisions of the UCITS Directive, and which provisions do not however confer supervisory and regulatory

powers on such European regulatory authority.

Supervision of Maltese UCITS marketing units in a Member State or EEA State other than Malta.

7. (1) The competent authority alone shall have the power to take action against a Maltese UCITS if it infringes the provisions of the Act, any regulations issued thereunder or any applicable Investment Services Rules, as well as any regulation laid down in the constitutional documents or prospectus.

(2) Where the units of a Maltese UCITS are being marketed in a Member State or EEA State other than Malta, the competent authority shall, without delay, notify the European regulatory authority of that Member State or EEA State of any decision to withdraw the authorisation of the Maltese UCITS, or any other serious measure taken against a Maltese UCITS, or any suspension of the issue, repurchase or redemption of the units of a Maltese UCITS imposed upon it.

(3) Where the units of the Maltese UCITS are marketed by a European management company, the competent authority shall also proceed to notify any measure taken in accordance with sub-regulation (2) to the European regulatory authority of the Member State or EEA State where the European management company is registered.

MARKETING OF EUROPEAN UCITS IN MALTA

Marketing of European UCITS in Malta.

8. (1) A European UCITS may market its units in Malta and shall be exempt from the provisions of article 4 of the Act, provided that prior to commencement of its marketing in Malta, the competent authority has received from the European regulatory authority of the UCITS home Member State or EEA State a notification letter made in the form and manner prescribed in Regulation No. 584/2010, which notification letter shall furthermore include the following information:

(a) information on the arrangements made for marketing by the European UCITS of its units in Malta, including where relevant in respect of share classes; and

(b) an indication that the units of the European UCITS will be marketed by the management company that manages the European UCITS.

(2) Together with the notification letter, the European UCITS shall enclose the following:

(a) the latest version of its constitutional documents and its prospectus in Maltese or English;

(b) where appropriate, its latest annual report and any subsequent half-yearly report in Maltese or English;

(c) the key investor information document as provided for in the Investment Services Rules in Maltese or English; and

(d) an attestation drawn up by the European regulatory authority that the European UCITS fulfils the conditions of the UCITS Directive, prepared in the manner and form prescribed by Regulation No. 584/2010.

(3) The competent authority shall ensure that a European UCITS is able to market its units in Malta upon notification, in accordance with sub-regulations (1) and (2).

(4) The European UCITS may access the Maltese market as from the date of notification to the competent authority by the European regulatory authority of the UCITS home Member State or EEA State in accordance with sub-regulations (1) and (2).

(5) The competent authority shall receive the complete documentation and information referred to in sub-regulation (1) and (2) from the European regulatory authority of the UCITS home Member State or EEA State in the manner prescribed by Articles 3 and 4 of Regulation No. 584/2010:

Provided that the notification letter and the attestation referred to in sub-regulations (1) and (2) shall be provided to the competent authority in a language customary in the sphere of international finance, unless the competent authority and the European regulatory authority of the UCITS home Member State or EEA State agree that said documents be provided in an official language of both Member States.

(6) For the purpose of the notification procedure set out in this regulation, the competent authority shall not request any additional documents, certificates or information other than those provided in this regulation. In addition, the competent authority shall not impose any additional requirements or administrative procedures on the European UCITS in respect of the field governed by the UCITS Directive.

(7) Any laws, regulations and administrative provisions which do not fall within the field governed by the UCITS Directive relating to the matters referred to in Schedule A and which are specifically relevant to the arrangements made for marketing of units in Malta by a European UCITS, shall be easily accessible and, for this purpose,

shall, in a clear and unambiguous manner, be made available in the English language on the competent authority's website, which shall be regularly updated. Such information may be provided by the competent authority in the form of a narrative description, or a combination of a narrative description and a series of references or links to source documents.

(8) The competent authority shall have access by electronic means, to the documents referred to in sub-regulation (2)(a), (b) and (c) and, if applicable, to any translation thereof.

(9) The European UCITS shall keep the documentation referred to in sub-regulation (2) and the translations thereof up to date. In addition it shall notify the competent authority of any amendments to the documents referred to in sub-regulation (2) and shall indicate where such documentation can be obtained electronically.

(10) In the event of a change in the information regarding the arrangements made for marketing communicated in the notification letter in accordance with sub-regulation (1), or a change regarding share classes to be marketed, the European UCITS shall give written notice thereof to the competent authority prior to implementation of the change.

Documents and information to be provided to Maltese investors by the European UCITS.

9. (1) Where a European UCITS markets its units in Malta, it shall provide investors in Malta with the key investor information document in English or in Maltese and with the following information and documents prescribed hereunder free of charge and upon request:

(a) a prospectus;

(b) an annual report for each financial year; and

(c) a half-yearly report covering the first six months of the financial year.

(2) The information and documents prescribed in sub-regulation (1)(a) to (c) shall be provided to investors in the manner prescribed by the Investment Services Rules. This information and documentation shall be translated, at the choice of the European UCITS, into the official language or one of the official languages of Malta, into a language approved by the competent authority or into a language customary in the sphere of international finance.

(3) The European UCITS shall be responsible for providing accurate translations of the information referred to in sub-regulations

(1) and (2), which translation shall faithfully reflect the content of the original information.

(4) The requirements prescribed in sub-regulations (1) to (3) shall also be applicable to any changes to the information and documents referred to therein.

(5) The European UCITS marketing its units in Malta shall, in accordance with the laws, regulations and administrative provisions in force in Malta, take the measures necessary to ensure that facilities are available in Malta for making payments to unit holders, re-purchasing or redeeming units and making available the information which the European UCITS is obliged to provide.

(6) For the purpose of pursuing its activities, the European UCITS may use the same reference to its legal form in its designation in Malta as it uses in the home Member State or EEA State in which it is authorised.

(7) A European UCITS marketing its units in Malta shall, in an appropriate manner, make public the issue, sale, repurchase or redemption price of its units each time it issues, sells, repurchases or redeems them, in accordance with Investment Services Rules.

Breaches by European UCITS.

10. (1) The European regulatory authority of the UCITS home Member State or EEA State shall have the sole power to take action against a European UCITS marketing its units in Malta, if the European UCITS infringes any law, regulation or administrative provision of the UCITS home Member State or EEA State or any regulation laid down in constitutional documents. However, the competent authority may nonetheless take action against that European UCITS if it infringes any laws, regulations and administrative provisions in force in Malta, falling outside the scope of the UCITS Directive or the requirements set out in Articles 92 and 94 of the said Directive.

(2) Where the competent authority has clear and demonstrable grounds to believe that a European UCITS, the units of which are being marketed in Malta, is in breach of the obligations arising from the provisions of the Act, these regulations or the Investment Services Rules, which do not confer supervisory and regulatory powers on the competent authority, the competent authority shall refer those findings to the European regulatory authority of the UCITS home Member State or EEA State, which shall take appropriate measures.

(3) If, despite the measures taken by the European regulatory authority of the UCITS home Member State or EEA State, or because

such measures prove to be inadequate, or because the European regulatory authority of the UCITS home Member State or EEA State fails to act within a reasonable timeframe, the European UCITS persists in acting in a manner that is clearly prejudicial to the interests of the Maltese investors, the competent authority may, as a consequence, take either of the following actions:

(a) after informing the European regulatory authority of the UCITS home Member State or EEA State, the competent authority may take all the appropriate measures needed in order to protect investors, including the possibility of preventing the European UCITS concerned from carrying out any further marketing of its units in Malta; or

(b) if necessary, bring the matter to the attention of ESMA.

(4) The competent authority shall, without delay, inform the European Commission and ESMA of any measure taken pursuant to sub-regulation (3)(a).

MISCELLANEOUS

Revocation. L.N. 207 of 2004.

11. The Undertakings for Collective Investments in Transferable Securities and Management Companies Regulations, 2004 are hereby repealed.

SCHEDULE A

[Regulation 8(7)]

The following categories of information on the relevant laws, regulations and administrative provisions are to be made available on the competent authority's website in terms of regulation 8(7):

(a) the definition of the term "marketing of UCITS" or the equivalent legal term either as stated in national legislation or as developed in practice;

(b) requirements for the contents, format and manner of presentation of marketing communications, including all compulsory warnings and restrictions of the use of certain words or phrases;

(c) without prejudice to Chapter IX of the UCITS Directive, details of any additional information required to be disclosed to investors;

(d) details of any exemptions from rules or requirements governing arrangements made for marketing applicable in Malta with respect to certain classes of UCITS or certain categories of investors;

(e) requirements for any reporting or transmission of information to the competent authority and the procedure for lodging updated versions of required documents;

(f) requirements for any fees or other sums to be paid to the competent authority or any other statutory body in Malta either when marketing commences or periodically thereafter;

(g) requirements in relation to the facilities to be made available for the purposes of making payments to unit holders, repurchasing or redeeming units and making available the information which UCITS are required to provide to unit holders;

(h) conditions for the termination of marketing of units of UCITS in Malta by a European UCITS;

(i) detailed contents of the information required by Malta to be included in part B of the notification letter as referred to in Article 1 of Regulation No. 584/2010;

(j) the e-mail address designated for the purposes of receiving notification of updates and amendments to the documents referred to in regulation 4(3).

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