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Taqsima B

L.N. 114 of 2013

INVESTMENT SERVICES ACT (CAP. 370)
Investment Services Act (Alternative Investment Fund Manager) (Passport) Regulations, 2013

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Minister for 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 (Alternative Investment Fund Manager) (Passport) Regulations, 2013.

(2) These regulations shall come into force on 22nd July 2013.

(3) These regulations shall apply to Maltese Alternative Investment Fund Managers providing services in a Member State or EEA State, other than Malta, through the establishment of a branch or under the freedom to provide services, and to European Alternative Investment Fund Managers providing services in Malta through the establishment of a branch or under the freedom to provide services.

(4) These regulations transpose and implement, in part, the provisions of Article 4(1)(a), (b), (c), (h), (j)(i) and (ii), (k), (l), (p), (q) and (r)(i) and (ii), (w), (x), Article 33(1) to (6), Article 45(1) to (8) and Article 61(2) of the AIFM 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.

"the AIFM Directive" means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 as amended from time to time, and includes any implementing measures that may be issued thereunder;

"Alternative Investment Fund" or "AIF" means a collective investment scheme, including subfunds thereof, which raises capital from a number of investors, with a view to investing it in accordance

with a defined investment policy for the benefit of those investors, and which does not qualify as a UCITS Scheme in terms of the UCITS Directive;

"Alternative Investment Fund Manager" or "AIFM" means a legal person whose regular business is managing one or more AIFs;

"branch", when relating to an AIFM, means a place of business which is a part of an AIFM, which has no legal personality and which provides the services for which the AIFM has been authorised; all the places of business established in the same Member State or EEA State by an AIFM with its registered office in another Member State or EEA State or in a third country shall be regarded as a single branch;

Cap. 330.

"competent authority" means the Malta Financial Services Authority established by the Malta Financial Services Authority Act, which body shall also carry out the duties as competent authority for all purposes of the AIFM Directive;

"ESMA" means the European Securities and Markets Authority established by Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of the 24 November 2010;

"established" means:

(a) in relation to an AIF, the place where the AIF is authorised or registered or if the AIF is not authorised or registered, the place where the AIF has its registered office;

(b) in relation to an AIFM, the place where the AIFM has its registered office.

"European AIF" means:

(a) an AIF which is authorised or registered in a Member State or EEA State, other than Malta, under the applicable national law; or

(b) an AIF which is not authorised or registered in a Member State or EEA State but has its registered office and, or head office in a Member State or EEA State other than Malta;

"European AIFM" means an AIFM which has its registered office in a European Member State or EEA State, other than Malta;

"European AIFM home Member State or EEA State" means the Member State or EEA State, other than Malta, in which the European AIFM has its registered office;

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"European AIFM host Member State or EEA State" means:

(a) a Member State or EEA State, other than the home Member State or EEA State, in which a European AIFM manages European AIFs; or

(b) a Member State or EEA State, other than the home Member State or EEA State, in which a European AIFM markets units or shares of a European AIF;

"European regulatory authority" means the body or bodies designated by a Member State or an EEA State other than Malta in accordance with Article 44 of the AIFMD to carry out the duties provided for in the AIFM Directive;

"home Member State of the AIF" means:

(a) the Member State or EEA State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State or EEA State in which the AIF has been authorised or registered for the first time; or

(b) if the AIF is neither authorised nor registered in a Member State or EEA State, the Member State or EEA State in which the AIF has its registered office and, or head office;

"Maltese AIF" means:

(a) an AIF which is authorised or registered in Malta, in accordance with Maltese law; or

(b) an AIF which is not authorised or registered in Malta but has its registered office and, or head office in Malta;

"Maltese AIFM" means an AIFM which is licenced in terms of the Act and which has its registered office in Malta;

"Maltese AIFM host Member State or EEA State" means:

(a) a Member State or EEA State, other than Malta, in which a Maltese AIFM manages European AIFs; or

(b) a Member State or EEA State, other than Malta, in which a Maltese AIFM markets units or shares of a European AIF;

"managing AIFs" means performing at least investment

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management functions referred to in point 1(a) or (b) of Annex I of the Directive for one or more AIFs;

"marketing" means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF that it manages to or with investors domiciled or with a registered office in a Member State or EEA State;

"Tribunal" means the Financial Services Tribunal established in terms of the Malta Financial Services Authority Act;

Cap. 330.

"the UCITS Directive" means Council Directive 85/611/EEC of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time, and includes any implementing measures that may be issued thereunder.

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

(3) In the event that any of these regulations conflict with the provisions of the AIFM Directive, the latter shall prevail.

FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT BY MALTESE AIFMs

Freedom of establishment of Maltese AIFMs - Direct management of a European AIF.

3. (1) A Maltese AIFM may manage a European AIF directly provided the Maltese AIFM is authorised to manage that type of AIF.

(2) A Maltese AIFM intending to manage a European AIF for the first time shall communicate the following information to the competent authority:

(a) the Member State or EEA State in which it intends to manage AIFs directly;

(b) a programme of operations stating the particular services which the Maltese AIFM intends to perform and identifying the AIFs it intends to manage.

(3) The competent authority shall within one month of receiving the complete documentation submitted in accordance with sub-regulation (2) transmit the complete documentation to the European regulatory authority of the Maltese AIFM host Member State or EEA State. The competent authority shall also enclose a

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statement to the effect that the Maltese AIFM is licensed in terms of the Act:

Provided that such transmission shall occur only if the Maltese AIFM's management of the European AIF complies and will continue to comply with the provisions of the AIFM Directive and if the Maltese AIFM otherwise complies with the provisions of the AIFM Directive.

(4) The competent authority shall immediately notify the Maltese AIFM about the transmission of the notification pursuant to sub-regulation (3).

(5) Upon receipt of the transmitted notification referred to in sub-regulation (4), the Maltese AIFM may start to provide its services in the host Member State or EEA State.

(6) In the event of a change to any of the information communicated in accordance with sub-regulation (2), the Maltese AIFM shall give written notice of such change to the competent authority at least one month before implementing planned changes, or immediately after an unplanned change has occurred.

(7) Where, pursuant to a planned change, the Maltese AIFM's management of the European AIF would no longer comply with the provisions of the AIFM Directive or the Maltese AIFM would otherwise no longer comply with the provisions of the AIFM Directive, the competent authority shall inform the Maltese AIFM without undue delay that it is not to implement the change.

(8) Where the Maltese AIFM proceeds with the implementation of the planned change, notwithstanding the notification made pursuant to sub-regulations (6) and (7), or if an unplanned change has taken place pursuant to which the Maltese AIFM's management of the European AIF no longer complies with the provisions of the AIFM Directive or the Maltese AIFM otherwise no longer complies with the provisions of the AIFM Directive, the competent authority shall take all due measures in accordance with the provisions of the Act and any regulations issued thereunder.

(9) If the planned changes are acceptable because they do not affect the compliance by the Maltese AIFM's management of the European AIF with the provisions of the AIFM Directive, or the compliance by the Maltese AIFM with the provisions of the AIFM Directive, the competent authority shall, without undue delay, inform the European regulatory authority of the Maltese AIFM host Member State or EEA State of those changes.

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Freedom of establishment of Maltese AIFMs - Establishment of a branch.

4. (1) A Maltese AIFM may manage a European AIF through the establishment of a branch in another Member State or EEA State, provided the Maltese AIFM is authorised to manage that type of AIF.

(2) A Maltese AIFM intending to manage a European AIF in another Member State or EEA State for the first time and establish a branch shall communicate the following information to the competent authority:

(a) the Member State or EEA State in which it intends to establish a branch;

(b) a programme of operations stating the particular services which the Maltese AIFM intends to perform and identifying the AIFs it intends to manage;

(c) the organisational structure of the branch;

(d) the address in the home Member State or EEA State of the AIF from which documents may be obtained;

(e) the names and contact details of the persons responsible for the management of the branch.

(3) The competent authority shall within two months of receiving the complete documentation submitted in accordance with sub-regulation (2), transmit the said complete documentation to the European regulatory authority of the host Member State or EEA State where the Maltese AIFM intends establishing a branch. The competent authority shall also enclose a statement to the effect that the Maltese AIFM is licensed in terms of the Act:

Provided that such transmission shall occur only if the Maltese AIFM's management of the European AIF complies and will continue to comply with the provisions of the AIFM Directive and the Maltese AIFM itself otherwise complies with the provisions of the AIFM Directive.

(4) The competent authority shall immediately notify the Maltese AIFM about the transmission pursuant to sub-regulation (3).

(5) Upon receipt of the transmission notification referred to in sub-regulation (4), the Maltese AIFM may start to provide its services in the host Member State or EEA State.

(6) In the event of a change to any of the information communicated in accordance with sub-regulation (2), the Maltese

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AIFM shall give written notice of such change to the competent authority at least one month before implementing planned changes, or immediately after an unplanned change has occurred.

(7) Where, pursuant to a planned change, the Maltese AIFM's management of the European AIF would no longer comply with the provisions of the AIFM Directive or the Maltese AIFM itself would otherwise no longer comply with the provisions of the AIFM Directive, the competent authority shall inform the Maltese AIFM without undue delay that it shall not implement the change.

(8) Where the Maltese AIFM proceeds with the implementation of the planned change, notwithstanding the notification received pursuant to sub-regulations (6) and (7), or if an unplanned change has taken place pursuant to the which the Maltese AIFM's management of the European AIF no longer complies with the provisions of the AIFM Directive or the Maltese AIFM otherwise no longer complies with the provisions of the AIFM Directive, the competent authority shall take all due measures in accordance with the provisions of the Act and any regulations issued thereunder.

(9) If the planned changes are acceptable because they do not affect the compliance of the Maltese AIFM's management of the European AIF with the provisions of the AIFM Directive, or the compliance by the Maltese AIFM of the provisions of the AIFM Directive, the competent authority shall, without undue delay, inform the European regulatory authority of the AIFM host Member State or EEA State of those changes.

Breaches by Maltese AIFMs.

5. (1) The competent authority shall be responsible for the prudential supervision of a Maltese AIFM, whether the Maltese AIFM manages and, or markets AIFs in another Member State or EEA State or not, without prejudice to the provisions of the AIFM Directive conferring responsibility for supervision on the European regulatory authority of the host Member State or EEA State of the Maltese AIFM.

(2) The supervision of the Maltese AIFM's compliance with Articles 12 and 14 of the AIFM Directive shall be the responsibility of the European regulatory authority of the host Member State or EEA State where the Maltese AIFM manages and, or markets AIFs through a branch in that Member State or EEA State.

(3) A Maltese AIFM managing or marketing AIFs in a Member State or EEA State other than Malta whether or not through a branch, may be required by the European regulatory authority of the host Member State or EEA State to provide information necessary for

the supervision of its compliance with the applicable regulatory requirements for which that European regulatory authority is responsible.

(4) Where a Maltese AIFM is managing and, or marketing AIFs in a Member State or EEA State other than Malta, whether or not through a branch, and is in breach of one of the regulatory requirements for which the European regulatory authority is responsible for ensuring compliance, the competent authority shall receive notification from the European regulatory authority of the host Member State or EEA State of its request made to the Maltese AIFM to put an end to that breach.

(5) If the Maltese AIFM refuses to provide the European regulatory authority with information falling under its responsibility, or fails to take the necessary steps to put an end to breach referred to in sub-regulation (4), the European regulatory authority shall inform the competent authority thereof.

(6) Where the competent authority receives a notification from a European regulatory authority pursuant to sub-regulation (5), the competent authority shall, at the earliest opportunity:

(a) take all appropriate measures to ensure that the Maltese AIFM concerned provides the information requested by the European regulatory authority of the host Member State or EEA State, pursuant to sub-regulation (3) or puts an end to the breach referred to in sub-regulation (4);

(b) request the necessary information from the relevant supervisory authorities in third countries:

Provided that the competent authority shall communicate to the European regulatory authority of the host Member State or EEA State the nature of the measures taken pursuant to this sub-regulation.

(7) Where a Maltese AIFM continues to refuse to provide the information requested by the European regulatory authority in the host Member State or EEA State pursuant to sub-regulation (3) or persists in breaching the legal or regulatory provisions referred to in sub-regulation (4) in force in the host Member State or EEA State, despite the measures taken by the competent authority pursuant to sub-regulations (5) and (6), or due to the inadequacy or unavailability of such measures in Malta, the competent authority shall be notified of any measures that are proposed to be taken by the European regulatory authority of the host Member State or EEA State against

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the Maltese AIFM to prevent or penalise further irregularities by the Maltese AIFM.

(8) Where the European regulatory authority of the host Member State or EEA State of the Maltese AIFM has clear and demonstrable grounds for believing that such Maltese AIFM is in breach of regulatory provisions in relation to which such European regulatory authority has no responsibility for supervising compliance, the competent authority shall receive notification of such breach from the European regulatory authority in the host Member State or EEA State. The competent authority shall take appropriate measures including if necessary, request additional information from the relevant supervisory authorities in third countries.

(9) Where despite the measures taken by the competent authority, or due to the inadequacy of such measures or because the competent authority fails to act within a reasonable time, a Maltese AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the market in the host Member State or EEA State, the competent authority shall receive notification by the European regulatory authority of the host Member State or EEA State of any measures proposed to be taken in order to protect the investors of the relevant AIF, the financial stability and integrity of the market in the European Member State or EEA State including the possibility of preventing the Maltese AIFM concerned to further market the units or shares of the relevant AIF in the host Member State or EEA State.

FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT BY EUROPEAN AIFMs

Freedom of establishment of European AIFMs - Direct management of a European AIF.

6. (1) A European AIFM may manage a Maltese AIF directly in Malta provided the European AIFM is authorised to manage that type of AIF. The European AIFM shall be exempt from the provisions of article 3 of the Act.

(2) A European AIFM intending to manage Maltese AIFs in Malta for the first time shall communicate the following information to the European regulatory authority in its home Member State or EEA State:

(a) the intention to manage AIFs directly in Malta;

(b) a programme of operations stating the particular services which the European AIFM intends to perform and identifying the AIFs it intends to manage.

(3) The competent authority shall, within one month from

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submission by the European AIFM to the European regulatory authority of the complete documentation in accordance with subregulation (2), receive the complete documentation from the European regulatory authority of the European AIFM's home Member State or EEA State. The competent authority shall receive a statement to the effect that the European AIFM is authorised by the European regulatory authority in terms of the AIFM Directive:

Provided that such transmission shall occur only if the European AIFM's management of the Maltese AIF complies and will continue to comply with the provisions of the AIFM Directive and the European AIFM otherwise complies with the provisions of the AIFM Directive.

(4) Upon notification by the European regulatory authority of the home Member State or EEA Member State to the European AIFM that the transmission referred to in sub-regulation (3) has occurred, the European AIFM may start to provide its services in Malta.

(5) The competent authority shall not impose any additional requirements on the European AIFM concerned in respect of matters which are covered by the AIFM Directive.

(6) In the event of a change to any of the information communicated in accordance with sub-regulation (2), which changes do not affect the compliance by the European AIFM's management of the Maltese AIF with the provisions of the AIFM Directive or the compliance by the European AIFM of the provisions of the AIFM Directive, the competent authority shall receive notification of such changes from the European regulatory authority of the home Member State or EEA State of the European AIFM.

Freedom of establishment of European AIFMs - Establishment of a branch.

7. (1) A European AIFM may manage a Maltese AIF in Malta through the establishment of a branch provided the European AIFM is authorised to manage that type of AIF. The European AIFM shall be exempt from the provisions of article 3 of the Act.

(2) A European AIFM intending to manage a Maltese AIF in Malta for the first time through the establishment of a branch shall communicate the following information to the European regulatory authority in its home Member State or EEA State:

(a) the intention to manage AIFs directly in Malta;

(b) a programme of operations stating the particular services which the European AIFM intends to perform and identifying the AIFs it intends to manage;

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(c) the organisational structure of the branch;

(d) the address in the home Member State or EEA State of the AIF from which documents may be obtained;

(e) the names and contact details of the persons responsible for the management of the branch.

(3) The competent authority shall within two months from submission by the European AIFM of the complete documentation in accordance with sub-regulation (2), receive the complete documentation from the European regulatory authority of the European AIFM's home Member State or EEA State. The competent authority shall receive a statement to the effect that the European AIFM is authorised by the European regulatory authority in terms of the AIFM Directive:

Provided that such transmission shall occur only if the European AIFM's management of the Maltese AIF complies and will continue to comply with the provisions of the AIFM Directive and the European AIFM otherwise complies with the provisions of the AIFM Directive.

(4) Upon notification by the European regulatory authority of the home Member State or EEA Member State to the European AIFM that the transmission referred to in sub-regulation (3) has occurred, the European AIFM may start to provide its services in Malta.

(5) The competent authority shall not impose any additional requirements on the European AIFM concerned in respect of matters which are covered by the AIFM Directive.

(6) In the event of a change to any of the information communicated in accordance with sub-regulation (2), which changes do not affect the compliance by the European AIFM's management of the Maltese AIF with the provisions of the AIFM Directive or the compliance by the European AIFM of the provisions of the AIFM Directive, the competent authority shall receive notification of such changes from the European regulatory authority of the home Member State or EEA State of the European AIFM.

Breaches by European AIFMs.

8. (1) The competent authority may require a European AIFM managing or marketing AIFs in Malta, whether or not through a branch, to provide the information necessary for the supervision of the European AIFM's compliance with the applicable regulatory provisions for which the competent authority is responsible:

Provided that the requirements imposed shall not be more

stringent than those which the competent authority imposes on Maltese AIFMs for monitoring compliance with the same provisions.

(2) Where the competent authority ascertains that a European AIFM managing and, or marketing Maltese, and, or European AIFs in Malta, whether or not through a branch, is in breach of one of the provisions in relation to which the competent authority is responsible for supervising compliance, the competent authority shall require the European AIFM concerned to put an end to that breach and shall proceed to notify the European regulatory authority of the home Member State or EEA State thereof.

(3) If the European AIFM concerned refuses to provide the competent authority with information for which such authority is responsible, or fails to take the necessary steps to put an end to the breach identified in sub-regulation (2), the competent authority shall inform the European regulatory authority of its home Member State or EEA State thereof:

Provided that the competent authority shall be notified by the European regulatory authority of the nature of any measures taken.

(4) Where a European AIFM continues in its refusal to provide information requested by the competent authority in terms of sub-regulation (1), or persists in breaching the legal or regulatory provisions referred to in sub-regulation (2) in force in Malta, despite the measures taken by the European regulatory authority of the home Member State or EEA State or due to the inadequacy or unavailability of such measures in the said Member State or EEA State, the competent authority may, after informing the European regulatory authority of the home Member State or EEA State of the European AIFM, take appropriate measures, including those laid down in Articles 46 and 48 of the AIFM Directive, to prevent or penalise further irregularities and, in so far as necessary, to prevent the European AIFM from initiating any further transactions in Malta. Where the function carried out in Malta by the European AIFM is the management of AIFs, the competent authority may require that the European AIFM cease managing those AIFs.

(5) Where the competent authority has clear and demonstrable grounds for believing that a European AIFM is in breach of the obligations arising from provisions in relation to which the competent authority has no responsibility for supervising compliance, the competent authority shall refer those finding to the European regulatory authority of the home Member State or EEA State of the European AIFM, which shall take appropriate measures, including if

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necessary, request additional information from the relevant supervisory authorities in third countries.

(6) Where a European AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the Maltese market, despite the measures taken by the European regulatory authority in the home Member State or EEA State of the European AIFM, or due to the inadequacy of such measures in the European Member State or EEA State or because the European regulatory authority fails to act within a reasonable time, the competent authority may, after informing the European regulatory authority in the home Member State or EEA State, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and integrity of the Maltese market, including the possibility of preventing the European AIFM concerned to further market the units or shares of the relevant AIF in Malta.

(7) The supervision of a European AIFM's compliance with Articles 12 and 14 of the AIFM Directive shall be the responsibility of the competent authority where the European AIFM manages and, or markets AIFs through a branch established in Malta.

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