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Taqsima B

L.N. 219 of 2016

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (List of Notified AIFs) Regulations, 2016

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

Citation and scope.

1. (1) The title of these regulations is the Investment Services Act (List of Notified AIFs) Regulations, 2016.

(2) These regulations shall not apply to alternative investment funds which at any time are in possession of a collective investment scheme licence granted by the competent authority in terms of article 4 of the Act. A licensed collective investment scheme may not be converted into a Notified AIF.

Interpretation.

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

"the Act" shall mean the Investment Services Act; Cap. 370.

"alternative investment fund" or "AIF" means any 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 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 also referred to as the "UCITS Directive";

"alternative investment fund manager" or "AIFM" means a legal person whose regular business is managing one or more AIFs;

"Alternative Investment Fund Managers Directive" or "AIFMD" 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 have been or may be issued thereunder;

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"competent authority" means the Malta Financial Services Authority established by the Malta Financial Services Authority Act; Cap. 330

"Directive 2004/39/EC" means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"governing body" means the body with ultimate decision making authority in an AIFM or in an alternative investment fund, as the case may be, comprising the supervisory and the managerial functions;

"List of Notified AIFs" shall be understood as referring to the List of Notified AIFs which is held by the competent authority on its website in terms of these regulations;

"Notified AIF" means an AIF which has been notified to the competent authority by the AIFM for inclusion in the List of Notified AIFs and is included in the List of Notified AIFs maintained by the competent authority in terms of regulation 6;

"professional investor" shall be understood as referring to the investor category defined in regulation 8(1)(a);

"qualifying investor" shall be understood as referring to the investor category defined in regulation 8(1)(b);

"Regulation (EU) No 694/2014" means Commission Delegated Regulation (EU) No 694/2014 of 17 December 2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers.

(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.

AIFM.

3. An AIFM may submit to the competent authority a request for inclusion in the List of Notified AIFs as an AIF established in Malta and meeting the criteria prescribed in regulation 4, provided that the AIFM fulfils at least one of the following conditions:

(a) the AIFM is in possession of an investment services licence granted in terms of article 3 of the Act to provide fund management services to AIFs established in Malta; or

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(b) the AIFM is authorised to provide services to an AIF established in Malta in accordance with regulations 6 and 7 of the Investment Services Act (Alternative Investment Fund Manager) (Passport) Regulations. S.L. 370.22

4. (1) An AIF in relation to which a notification may be submitted in terms of these regulations may be established using any one of the following structures: AIFs.

(a) an investment company with variable share capital under the Companies Act (Investment Companies with Variable Share Capital) Regulations; S.L. 386.02

(b) an investment company with fixed share capital under the Companies Act (Investment Companies with Fixed Share Capital) Regulations; S.L. 386.04

(c) an incorporated cell company under the Companies Act (SICAV Incorporated Cell Company) Regulations; S.L. 386.14

(d) an incorporated cell of a Recognised Incorporated Cell Company under the Companies Act (Recognised Incorporated Cell Companies) Regulations; S.L. 386.15

(e) a limited partnership under the Companies Act; Cap. 386

(f) a unit trust under the Trusts and Trustees Act; or Cap. 331

(g) a contractual fund under the Investment Services Act (Contractual Fund) Regulations. S.L. 370.16

(2) The AIF can be established as an open-ended or a closed-ended collective investment scheme as defined in Regulation (EU) No 694/2014.

(3) The AIFM may not submit a notification, in terms of regulation 5, to the competent authority for the following categories of collective investment schemes:

(a) AIFs which are not externally managed by an AIFM;

(b) AIFs which are not marketed and sold exclusively to professional and, or qualifying investors;

(c) AIFs established to invest through loans in terms of the Act and regulated by the applicable Investment Services Rules; or

(d) AIFs which invest in non-financial assets as

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specified by the competent authority.

(4) For the better carrying out of the provisions of these regulations, the competent authority may issue and publish Investment Services Rules laying down additional requirements in relation to the conditions for inclusion and retention of AIFs on the List of Notified AIFs including but not limited to the conditions related to the notification of specific categories of AIFs.

Applicability of these regulations.

5. Where the provisions of these regulations conflict with the provisions of the regulations referred to in regulation 4(1), the provisions of these regulations shall prevail.

Notification process.

6. (1) A written request for an AIF or for one or more subfunds of a Notified AIF to be included in the List of Notified AIFs shall be made in accordance with the provisions of this regulation.

(2) Prior to the submission of a written request for notification by the AIFM, the governing body of the AIF shall approve a resolution certifying that the prospectus of the AIF satisfies the minimum criteria prescribed by the competent authority in the applicable Investment Services Rules.

(3) The request for notification of an AIF referred to in sub-regulation (1) shall be made in the form and manner required by the competent authority and shall contain such information as the authority may prescribe. The request for notification shall be accompanied by such fee as may be prescribed by the competent authority.

(4) The competent authority shall reject notifications which do not comply with the requirements prescribed in these regulations and the applicable Investment Services Rules.

(5) The AIFM shall submit the duly completed written notification request together with the accompanying documents to the competent authority within thirty (30) calendar days from the date of the resolution of the governing body of the AIF approving the AIF's prospectus in terms of sub-regulation (2) and prior to the effective date of the prospectus:

Provided that the effective date of the prospectus shall be a date after the inclusion of the AIF in the List of Notified AIFs.

(6) The competent authority shall, within ten (10) working days from the date of filing of the duly completed notification request together with the accompanying documents, include the AIF in the List of Notified AIFs and, thereafter, the prospectus may be dated.

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(7) Where the competent authority decides to reject a request for notification of an AIF, it shall give notice in writing thereof to the AIFM.

(8) The inclusion of an AIF in the List of Notified AIFs shall not imply that the AIF is in possession of a licence granted in terms of article 4 of the Act.

(9) The competent authority shall have the right to remove an AIF from the List of Notified AIFs at any time after it has been placed on such list.

(10) The inclusion of an AIF in the List of Notified AIFs is a concession and a privilege revocable by the competent authority at any time at its sole discretion on notice to the AIFM. The burden of proving that the AIF should be retained on the List of Notified AIFs shall rest at all times on the AIFM.

(11) For the better carrying out of the provisions of these regulations, the competent authority may issue and publish Investment Services Rules laying down additional requirements in relation to the following:

(a) the contents and format of the request for notification of an AIF; and

(b) the accompanying documentation and the contents and formats thereof including, *inter alia*, the prospectus.

Due diligence.

7. (1) Prior to submitting a request for notification of an AIF, the AIFM shall carry out the necessary due diligence process to ensure that the service providers and the governing body of the AIF satisfy, at the time of notification, the high standards of fitness and properness specified by the competent authority.

(2) The AIFM shall undertake and ensure that each service provider and member of the governing body of the AIF maintain such standards on an ongoing basis and immediately notify the competent authority of any change in such circumstances as they become known to the AIFM.

(3) The AIFM shall keep records of all evidence of, and correspondence regarding, the due diligence process carried out in relation to the service providers and the members of the governing body of the AIF. Such records shall be made available for inspection upon request by the competent authority.

(4) For the better carrying out of the provisions of these

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regulations, the competent authority may issue and publish Investment Services Rules laying down requirements in relation to the fitness and properness standards expected by the competent authority.

Target investor base.

8. (1) Notified AIFs may only be marketed to the following categories of investors:

(a) professional investors, being investors which are considered to be professional clients or may, on request, be treated as professional clients within the meaning of Annex II to Directive 2004/39/EC; and, or

(b) qualifying investors, being investors that fulfil the following criteria:

(i) invest a minimum amount of EUR 100,000 or its currency equivalent in the AIF which investment may not be reduced below this minimum amount at any time by way of a partial redemption; and

(ii) declare in writing to the AIFM and the AIF that they are aware of and accept the risks associated with the proposed investment.

(2) Where the AIFM intends to market the Notified AIF on a cross-border basis under the Investment Services Act (Marketing of Alternative Investment Funds) Regulations, the Notified AIF shall be marketed to professional investors as defined in sub-regulation (1)(a) or as otherwise permitted in the applicable jurisdiction where the AIFM is marketing the AIF.

S.L. 370.21

(3) For the better carrying out of the provisions of these regulations, the competent authority may issue and publish Investment Services Rules laying down the investor eligibility criteria applicable to qualifying investors.

Compliance with ongoing obligations.

9. The AIFM shall ensure that an AIF included in the List of Notified AIFs complies on an ongoing basis with the provisions of the Act, any applicable rules or regulations issued thereunder, including these regulations:

Provided that where applicable the AIFM shall also comply with any obligations in respect of the AIF, its investors and the AIFM's regulator under AIFMD and the relevant rules and regulations thereunder;

Provided further that for the better carrying out of the

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provisions of these regulations, the competent authority may issue and publish Investment Services Rules outlining the ongoing obligations which must be complied with by the AIFM in relation to the Notified AIF.

Appointment of Money Laundering Reporting Officer.

10. (1) The AIFM shall appoint a money laundering reporting officer to carry out the money laundering reporting function in relation to the Notified AIF.

(2) The AIFM may delegate the money laundering reporting function to the fund administrator of the Notified AIF. In such cases, the fund administrator shall be responsible for fulfilling the reporting obligations of the Notified AIF:

Provided that where the AIFM has delegated the money laundering function in accordance with this sub-regulation, the administrator of the Notified AIF shall be required to confirm to the AIFM and the governing body of the AIF that the record-keeping, reporting, ongoing monitoring, risk management and any other measure being conducted by the administrator comply with the requirements prescribed in the Prevention of Money Laundering and Funding of Terrorism Regulations and the Implementing Procedures issued thereunder.

S.L. 373.01

(3) For the better carrying out of the provisions of these regulations, the competent authority may issue and publish Investment Services Rules laying down the obligations of the Notified AIF and the AIFM pursuant to the Prevention of Money Laundering and Funding of Terrorism Regulations and the Implementing Procedures issued thereunder.

S.L. 373.01

Removal of the AIF from the List of Notified AIFs.

11. (1) The AIFM shall submit a request to the competent authority for removal of the Notified AIF from the List of Notified AIFs in the following circumstances:

(a) upon expiration of the duration of the AIF or its winding up;

(b) in any case where the custodian has given notice of termination under the custody agreement or is in liquidation or subject to bankruptcy proceedings or has had its license to provide custody services in respect of AIFs suspended or cancelled:

Provided that the AIFM shall request the competent authority to remove the Notified AIF from the List of Notified AIFs where the transitional period agreed to between the parties in terms of regulation 8 of the Investment Services Act

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(Custodians of Collective Investment Schemes) Regulations, 2016, will expire in less than ten (10) working days and the AIFM has not entered in any arrangements with a substitute custodian or where at any time during such transitional period, it becomes clear to the AIFM that a replacement custodian will not be appointed before the end of the transitional period;

(c) in any case where the AIFM has given notice of termination or is in liquidation or subject to bankruptcy proceedings or has had its license to act as an AIFM suspended or cancelled and an eligible replacement AIFM has not been appointed;

(d) in any case where any member of the governing body of the AIF or any service provider appointed by the AIF or by the AIFM on behalf of the Notified AIF fails to comply on an ongoing basis with the required high standards of fitness and properness and the AIFM has not arranged for a replacement member of the governing body or service provider to be appointed;

(e) in all other cases as may be specified in the agreement between the Notified AIF and the AIFM as grounds for requesting removal of the Notified AIF from the List of Notified AIFs in terms of this regulation;

(f) in all other cases as may be specified in the custody agreement between the Notified AIF or the AIFM on behalf of the Notified AIF and the custodian as grounds for requesting removal of the Notified AIF from the List of Notified AIFs in terms of this regulation; and

(g) in all other cases as may be prescribed in the Investment Services Rules.

(2) Upon removal from the List of Notified AIFs, the AIF must cease trading other than for the purpose of winding down the operations of the AIF or subfund and the AIF or subfund must then be liquidated or otherwise terminated in accordance with the requirements of Maltese law.

(3) For the better carrying out of the provisions of these regulations, the competent authority may issue and publish Investment Services Rules laying down the conditions applicable in relation to the removal of the AIF from the List of Notified AIFs.

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Amendments to the prospectus of a Notified AIF.

12. (1) The AIFM shall submit a notification to the competent authority of any amendments to the prospectus of a Notified AIF together with an updated copy thereof provided that the prospectus complies with the applicable Investment Services Rules. In addition, the AIFM shall also submit a resolution of the governing body of the AIF certifying that the amendments to the prospectus comply with the standards prescribed in the Investment Services Rules.

(2) The AIFM shall submit a notification in terms of sub-regulation (1) within thirty calendar (30) days from the date of the resolution of the governing body of the AIF approving the amendments to the prospectus of the Notified AIF.

(3) The competent authority shall acknowledge receipt of the amendments to the prospectus within ten (10) working days from the date of filing of the notification request with the competent authority.

(4) Changes to the prospectus shall not be effective until such time as they are acknowledged by the competent authority.

Power to issue Rules.

13. For the better carrying out of the provisions of these regulations, the competent authority may from time to time issue and publish Investment Services Rules outlining additional requirements in respect of these regulations.

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