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L.N. 294 of 2023

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (List of Notified AIFs) (Amendment) Regulations, 2023

IN EXERCISE of the powers conferred by article 12 of the Investment Services Act, the Minister responsible for the regulation of financial services, 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 (List of Notified AIFs) (Amendment) Regulations, 2023, and these regulations shall be read and construed as one with the Investment Services Act (List of Notified AIFs) Regulations, hereinafter referred to as "the principal regulations".

S.L. 370.34.

Amends the title of the principal regulations.

2. In the title of the principal regulations, for the words "List of Notified AIFs" there shall be substituted the words "Notified CISs".

Amends regulation 1 of the principal regulations.

3. Regulation 1 of the principal regulations shall be amended as follows:

(a) in sub-regulation (1) thereof, for the words "(List of Notified AIFs)", there shall be substituted the words "(Notified CISs)";

(b) immediately after sub-regulation (1) thereof, there shall be added the following new sub-regulation:

"(1a) Unless the context otherwise requires, any references in any other law or in any rule issued by the competent authority, made to the Investment Services Act (List of Notified AIFs) Regulations shall be read and construed as a reference to these regulations."; and

(c) in sub-regulation (2) thereof, immediately after the words "alternative investment funds" there shall be added the words "and professional investor funds,".

Amends regulation 2 of the principal regulations.

4. Sub-regulation (1) of regulation 2 of the principal regulations shall be amended as follows:

(a) immediately after the definition "competent authority", there shall be added the following new definition:

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" "custodian" means a licence holder authorised in terms of the Act to provide custodian services and which qualifies as a Depositary or Depositary Lite in terms of the Investment Services Rules;";

(b) immediately after the definition "Directive 2004/39/EC", there shall be added the following new definitions:

" "Due Diligence Service Provider" means a service provider appointed in terms of regulation 18, that shall satisfy the requirements laid out in the applicable Investment Services Rules;

"fund manager" means a legal person who manages one or more Notified PIFs;";

(c) in the definition "governing body", immediately after the words "alternative investment fund", there shall be added the words "or in a professional investor fund,";

(d) immediately after the definition "List of Notified AIFs", there shall be added the following new definition:

" "List of Notified PIFs" shall be construed as a reference to the List of Notified PIFs which is held by the competent authority on its website in terms of these regulations;";

(e) immediately after the definition "Notified AIF", there shall be added the following new definitions:

" "Notified CIS" means a Notified AIF or a Notified PIF;

"Notified PIF" means a PIF which has been notified to the competent authority for inclusion in the List of Notified PIFs and is included in the List of Notified PIFs held by the competent authority in terms of regulation 17;

" "professional investor fund" or "PIF" means a collective investment scheme which qualifies as a professional investor fund in terms of the Investment Services Rules;";

(f) the definition "professional investor" shall be deleted;

(g) the definition "qualifying investor" shall be deleted.

Adds new Part to the principal regulations.

5. Immediately after regulation 2 of the principal regulations,

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there shall be added the following new heading and new regulation:

"**Part A: Notified AIFs**

Interpretation Part A.

2A. For the purposes of this Part:

"professional investor" shall be construed as a reference to the investor category, in relation to Notified AIFs, as defined in Investment Services Rules issued pursuant to regulation 8(3);

"qualifying investor" shall be construed as a reference to the investor category, in relation to Notfied AIFs, as defined in Investment Services Rules issued pursuant to regulation 8(3)".

Amends regulation 4 of the principal regulations.

6. Sub-regulation (3) of regulation 4 of the principal regulations shall be amended as follows:

(a) for the words "AIFM may not", there shall be substituted the words "AIFM shall not"; and

(b) in paragraph (d) thereof, for the words "as specified by the competent authority.", there shall be substituted the words "as laid down in Investment Services Rules.".

Amends regulation 6 of the principal regulations.

7. In sub-regulation (3) of regulation 6 of the principal regulations, for the words "as the authority may prescribe. The request for notification shall be accompanied by such fee as may be prescribed by the competent authority.", there shall be substituted the words, "as may be prescribed or as may be laid down by the competent authority in the Investment Services Rules. The request for notification shall be accompanied by such fee as may be prescribed.".

Amends regulation 8 of the principal regulations.

8. Regulation 8 of the principal regulations shall be amended as follows:

(a) sub-regulation (1) thereof shall be substituted by the following new sub-regulation:

"(1) Notified AIFs shall only be marketed to professional investors and, or qualifying investors.";

(b) in sub-regulation (2) thereof, the words "as defined in sub-regulation (1)(a)" shall be deleted; and

(c) in sub-regulation (3) thereof, the words "applicable to qualifying investors" shall be deleted.

Amends regulation 13 of the principal regulations.

9. In regulation 13 of the principal regulations, for the words "the provisions of these regulations", there shall be substituted the

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words "the provisions of this Part" and for the words "in respect of these regulations", there shall be substituted the words "in respect of this Part".

Adds a new Part to the principal regulations.

10. Immediately after regulation 13, there shall be added the following new Parts and the following new regulations:

"**Part B: Notified PIFs**

Interpretation Part B.

14. For purposes of this Part:

"professional investor" shall be construed as a reference to the investor category, in relation to Notified PIFs, as defined in Investment Services Rules issued by the competent authority pursuant to regulation 25.

"qualifying investor" shall be construed as a reference to the investor category, in relation to Notified PIFs, as defined in Investment Services Rules issued by the competent authority pursuant to regulation 25.

PIFs.

15. (1) A PIF in relation to which a notification may be submitted in terms of these regulations may be established using any one of the following structures:

S.L. 386.02.

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

SL. 386.04.

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

S.L 386.14.

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

S.L. 386.15.

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

Cap. 386

(e) a limited partnership under the Companies Act;

Cap. 331.

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

S.L. 370.16.

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

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(2) A notification to the competent authority in terms of regulation 17, shall not be submitted for the following categories of collective investment schemes:

(a) PIFs which are not externally managed by a fund manager as defined in regulation 2;

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

(c) PIFs which invest in non-eligible assets as laid down in Investment Services Rules.

Applicability of these regulations.

16. Where the provisions of these regulations conflict with the provisions of the regulations referred to in regulation 15(1), the provisions of these regulations shall prevail.

Notification process.

17. (1) A written request for a PIF or for one or more sub-funds of a Notified PIF to be included in the List of Notified PIFs shall be made in accordance with the provisions of this regulation.

(2) Prior to the submission of a written request for notification under this regulation, the governing body of the PIF shall approve a resolution certifying that the Offering Memorandum of the PIF satisfies the minimum criteria laid down by the competent authority in the applicable Investment Services Rules.

(3) The request for notification of a PIF 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 may be prescribed or as may be laid down by the competent authority in the Investment Services Rules. The request for notification shall be accompanied by such fee as may be prescribed.

(4) The competent authority shall reject notifications which do not comply with the requirements prescribed in these regulations and the applicable Investment Services Rules, including where the competent authority determines that anyone referred to in sub-regulation (1) or sub-regulation (2) does not meet the competent authority's standards for fitness and properness.

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(5) The PIF, or a person duly authorised by it to act on its behalf, 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 PIF approving the PIF's Offering Memorandum in terms of sub-regulation (2), and prior to the effective date of the Offering Memorandum:

Provided that the effective date of the Offering Memorandum shall be a date subsequent to the date of inclusion of the PIF in the List of Notified PIFs.

(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, which shall be to the satisfaction of the competent authority, include the PIF in the List of Notified PIFs and, thereafter, the Offering Memorandum shall be dated.

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

(8) The inclusion of a PIF in the List of Notified PIFs shall not imply that the PIF 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 a PIF from the List of Notified PIFs at any time after it has been placed on such list where the competent authority deems this fit in the interest of safeguarding investors, the integrity of the markets and, or the stability and reputation of the financial sector, including in those circumstances where:

(a) it considers that any of the members of the governing body, any service provider, including the Due Diligence Service Provider, or functionary that the PIF may appoint is not a fit and proper person to carry out the functions required of them in connection with the Notified PIF;

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(b) it considers that the Notified PIF does not fulfil the requirements of any provision of the Act, or of any Investment Services Rules or regulations made thereunder, or there has been a contravention of any such provision as aforesaid, or an obligation or condition to which the Notified PIF is subject, has not been satisfied or complied with;

(c) information has been furnished to the competent authority by or on behalf of or in relation to the Notified PIF which is false, inaccurate or misleading;

(d) the Notified PIF has not commenced those activities in relation to which it was placed by the competent authority on the List of Notified PIFs, or has ceased to carry on such activities;

(e) for any other reason, it considers it desirable to remove the Notified PIF from the list of Notfied PIFs for the protection of investors and the general public and the reputation of Malta taking into account Malta's international commitments;

(f) the Notified PIF is either declared bankrupt, or goes into liquidation, or makes a composition with its creditors, or is otherwise dissolved; or

(g) made pursuant to a request under regulation 22.

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

Due diligence.

18. (1) Prior to submitting a request for notification of a PIF, the PIF shall appoint a Due Diligence Service Provider to carry out the necessary due diligence process to ensure that the governing body, founder shareholders, Money Laundering Reporting Officer (MLRO) and any other service providers or functionaries the PIF may appoint, satisfy at the time of notification, the high standards of fitness and properness required by the competent authority in terms of the Investment Services Rules.

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(2) The Due Diligence Service Provider appointed in terms of this regulation shall undertake and ensure that each member of the governing body, founder shareholder, Money Laundering Reporting Officer (MLRO) and any other service provider or functionary the PIF may appoint, maintains such standards on an ongoing basis, and shall immediately notify the competent authority of any change in such circumstances as they become known to such Due Diligence Service Provider.

(3) The Due Diligence Service Provider appointed in terms of this regulation shall keep records of all evidence of, and correspondence regarding, the due diligence process carried out in relation to the governing body of the PIF, founder shareholders, Money Laundering Reporting Officer (MLRO), and any other services providers or functionaries the PIF may appoint. Such records shall be made available for inspection upon request by the competent authority.

(4) Without prejudice to any other power of the competent authority in terms of the Act and any other law, the provisions of articles 13, 15 and 16 of the Act shall *mutatis mutandis* apply to any Due Diligence Service Providers appointed in terms of this regulation.

Target investor base.

19. (1) Notified PIFs may only be marketed to professional investors and, or qualifying investors.

(2) A Notified PIF may only be promoted in jurisdictions outside Malta if it satisfies the relevant rules of such jurisdictions.

Compliance and ongoing obligations.

20. (1) The Notified PIF shall ensure that it complies on an ongoing basis with the provisions of the Act, any applicable rules or regulations issued thereunder, including these regulations:

Provided that notwithstanding the provisions of this Act or any other law, the governing body of the Notified PIF shall be jointly and severally liable with the Notified PIF.

(2) A Due Diligence Service Provider appointed or proposed to be appointed in terms of regulation 18 shall also satisfy the requirements and comply with any applicable provisions of the Act, regulations or rules issued thereunder, and with any other applicable law.

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Appointment of Money Laundering Reporting Officer. S.L. 373.01.

21. (1) The Notified PIF, by written agreement with the Due Diligence Service Provider appointed in terms of regulation 18, shall appoint a money laundering reporting officer (MLRO) within the meaning of regulation 15 of the Prevention of Money Laundering and Funding of Terrorism Regulations, to carry out the money laundering reporting function in relation to the Notified PIF.

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

Provided that where the money laundering function has been delegated in accordance with this sub-regulation, the administrator of the Notified PIF shall be required to confirm to the Due Diligence Service Provider appointed in terms of regulation 18 and to the governing body of the PIF that the recordkeeping, 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.

Request for removal of the PIF from the List of Notified PIFs.

22. (1) The Notified PIF shall submit a request to the competent authority for the removal of the Notified PIF from the List of Notified PIFs in the following circumstances:

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

(b) where the Notified PIF has appointed a custodian, in any case where such custodian has given notice of termination or is in liquidation or subject to bankruptcy proceedings or has had its authorisation to act as a custodian suspended or cancelled, and an eligible replacement custodian has not been appointed or adequate alternative arrangements for the safekeeping of the Notified PIF's assets have not been established;

(c) where it becomes clear to the governing body that adequate safekeeping arrangements are no longer in place;

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(d) in any case where the fund manager of the Notified PIF has given notice of termination or is in liquidation or subject to bankruptcy proceedings or has had its authorisation to act as a fund manager suspended or cancelled and an eligible replacement fund manager has not been appointed;

(e) in any case where any member of the governing body of the Notified PIF or any functionary or service provider, including the Due Diligence Service Provider, appointed by the PIF fails to comply on an ongoing basis with the required high standards of fitness and properness, and no replacement member of the governing body or functionary or service provider has been appointed, or arrangements are in place to be appointed;

(f) in all other cases as may be specified in the agreement between the Notified PIF and its fund manager as grounds for requesting removal of the Notified PIF from the List of Notified PIFs in terms of this regulation;

(g) where the Notified PIF has a custodian appointed, in all other cases as may be specified in the custody agreement between the Notified PIF and the custodian as grounds for requesting removal of the Notified PIF from the List of Notified PIFs in terms of this regulation; and

(h) in all other cases as may be laid down in the Investment Services Rules.

(2) Upon removal from the List of Notified PIFs, the PIF shall cease trading, other than for the purpose of winding down the operations of the Notified PIF or the sub-fund, as the case may be, and the Notified PIF or the sub-fund shall then be liquidated or otherwise terminated in accordance with the requirements of Maltese legislation.

Offering Memorandum of the Notified PIF.

23. (1) Notified PIFs shall be exempt from obtaining the approval of the competent authority in terms of article 11(1)(a) of the Act.

(2) The exemption provided in sub-regulation (1) shall also be applicable to any amendments to the Offering Memorandum of a Notified PIF.

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Custodians of NPIFs. S.L. 370.32.

24. Where a custodian is appointed, the Provisions of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations, applicable to custodians of Professional Investor Funds, shall be *mutatis mutandis* applicable to custodians of Notified PIFs.

Power to issue Rules.

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

(2) Without prejudice to the generality of sub-regulation (1), Investment Services Rules issued in accordance with this regulation may *inter alia* provide:

(i) additional requirements in relation to the conditions for inclusion and retention of PIFs on the List of Notified PIFs, including but not limited to the conditions related to the notification of specific categories of PIFs;

(ii) additional requirements in relation to the contents and format of the request for notification of a PIF;

(iii) additional requirements in relation to the accompanying documentation and the contents and formats thereof;

(iv) additional requirements in relation to the Offering Memorandum and the contents and format thereof;

(v) requirements in relation to the fitness and properness standards expected by the competent authority;

(vi) the criteria for eligibility for appointment as a service provider in terms of regulation 18;

(vii) the criteria for eligibility for appointment as a fund manager of a Notified PIF;

(viii) additional criteria regarding investor eligibility;

(ix) the ongoing obligations that shall be complied with by the Due Diligence Service Provider appointed in terms of regulation 18 in relation to the Notified PIF; and

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(x) the conditions applicable in relation to the removal of the PIF from the List of Notified PIFs.".

Part C: Administrative Penalties, Administrative Measures and Appeals

Administrative penalties, other administrative measures and appeals.

26. (1) Without prejudice to any other power assigned to the competent authority under the Act, these regulations or any other law, where a person falling within the scope of these regulations fails to comply with any of the provisions of these regulations or any rules issued thereunder which further implement these regulations, the competent authority may, by notice in writing impose on such person an administrative penalty and other administrative measures in accordance with article 16A of the Act.

(2) A right of appeal to the Financial Services Tribunal shall lie from the decisions which the competent authority shall take under these regulations and the provisions of article 19 of the Act shall apply *mutatis mutandis*.".

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