

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

MFSA launches AIFMD applications process

The MFSA launched the new [Investment Services Rulebooks](#) on 27 June 2013. The Authority has been accepting applications for licences in terms of the Alternative Investment Fund Managers Directive [Directive 2011/61/EU hereinafter referred to as the 'AIFMD'] and the related Commission Delegated Regulation [Commission Delegated Regulation (EU) No 231/2013, hereinafter referred to as the 'Level II Regulation']

[1] NEW APPLICATIONS

As from 22 July 2013:

1. new licences for *investment management services* provided to Collective Investment Schemes which are not UCITS, will be issued pursuant to the provisions of the Investment Services Act and in compliance with the revised Investment Services Rules for Investment Services Providers, in particular with the new [Part BIII regulating Alternative Investment Fund Managers \(AIFMs\)](#);
2. new licences for *Collective Investment Schemes* targeting professional investors will be issued in compliance with new [Investment Services Rules for Alternative Investment Funds \(AIFs\)](#);
3. new licences for professional investor funds (PIFs) may continue to be issued under the **updated** Investment Services Rules for Professional Investor Funds in the following cases:
 - (i) applicants who opt to apply to be licensed as a '*de minimis*' self-managed AIF;
 - (ii) applicants who opt to apply for a PIF licence provided the PIF is managed by a *de minimis* AIFM;
 - (iii) applicants who opt to apply for a PIF licence provided the PIF is managed by a AIFM in full compliance with the AIFMD;
 - (iv) applicants who opt to apply for a PIF licence provided the PIF is managed by a non-EU AIFM in terms of the relevant conditions of the AIFMD under which other EU-Member States may allow them to market to professional investors in their territory;
4. new licences for non-UCITS retail schemes will be issued under **updated** Investment Services Rules for Non-UCITS Retail Collective Investment Schemes;
5. Private Collective Investment Schemes will continue to be issued with a recognition certificate as these fall outside of scope of the AIFMD.

[11] REVISION OF EXISTING LICENCES

Managers and self-managed schemes that are already licensed under the current Investment Services Rules have a **one year** transitional period with effect from 22 July 2013 in order to satisfy the requirements of the AIFMD and convert to an AIFM or Self-Managed AIF Licence as applicable. This process may be carried out by submitting a duly filled in [Self-Assessment Form for Fund Managers \(or Self-Assessment Form for Self-Managed Collective Investment Schemes Applying for an AIFM Licence, as the case may be\)](#).

- *Applications for conversion to AIFM compliant Licence by 22 July 2013*

The Authority has advised by means of Circular dated 10 May 2013 that existing licence holders wishing to convert to an AIFM Licence as soon as the AIFMD comes into force on 22 July 2013 should have already notified the Authority and submitted the relevant Self-Assessment Form, duly completed, by not later than Monday, 10 June 2013. The same cut-off date applies to Self-Managed Collective Investment Schemes requiring an AIFM Licence by the same date. MFSA has started processing these applications and following due consideration applicants who are deemed by the Authority to be AIFMD compliant will be issued with a revised AIFM licence which will be operative from 22 July 2013. The MFSA will use its best endeavours to process any questionnaires submitted after this deadline so that the revised licence may be issued at the earliest possible date following the coming into force of the Directive.

- *Transitional period for existing Licence Holders.*

AIFMD Managers and self-managed funds licensed under the outgoing framework may opt to avail themselves of the transitional period. In order to be in line with the European Commission's interpretation that all managers should fully comply with the Directive by 22 July 2014, these Licence Holders should ensure that their Self-Assessment Form is submitted to the MFSA by 31 March 2014 at the latest. These Licence Holders are also advised to use the transitional period to adapt to the new AIFMD framework and should note that during this period the MFSA will require compliance on a 'best efforts' basis. In any case all Licence Holders shall ensure that they are fully compliant with the AIFMD by 22 July 2014.

Umbrella Collective Investment Schemes (including PIFs) that are self-managed or are managed by third party managers that have opted for the transitional period may continue to establish new sub-funds under the current Rules until 22 July 2014.

- *Revision of current licence to a 'De Minimis' AIFM licence*

Managers and self-managed funds who choose to be classified as a 'de minimis' AIFM/AIFs should also submit the relevant [Self-Assessment Form](#) by not later than 31 March 2014.

- *'De Minimis' Professional Investor Fund option*

Self-managed PIFs that fall under the AIFMD's 'de minimis' thresholds may continue operating under an updated PIF framework provided they submit a [Self-Assessment Form for Self-Managed Schemes applying as De Minimis Licence Holders](#) by 31 March 2014. A revised self-managed PIF licence shall be approved if the MFSA is satisfied that the PIF in question falls below the thresholds specified in

the updated Investment Services Rules for Professional Investor Funds and is in a position to comply with the provisions of the said Rules by the same date.

- *Non-UCITS Retail Collective Investment Schemes*

An AIFMD-compliant version of the [Investment Services Rules for Non-UCITS Retail Collective Investment Schemes](#) will come into effect on 22 July 2013. The AIFM must ensure that all existing non-UCITS retail schemes under management are fully compliant with these Rules once the AIFM is in possession of its revised licence.

A “*de minimis*” option for self-managed non-UCITS retail schemes is also available in the Rules.

[III] PASSPORTING

- *Passporting of AIFM services*
 - Management Passport:** EU AIFMs may passport their services and manage EU AIFs either directly or by establishing a branch pursuant to the provisions of the Directive as transposed in the [Investment Services Act \(Alternative Investment Fund Manager\) \(Passport\) Regulations, 2013](#); additionally, these AIFMs may also be authorised to manage UCITS in accordance with Directive 2009/65/EC;
 - Marketing Passport:** EU AIFMs may also market the units or shares of an EU AIF pursuant to the provisions of the Directive as transposed in the [Investment Services Act \(Marketing of Alternative Investment Funds\) Regulations, 2013](#);
 - Portfolio Investment Services:** according to article 6(4) of the AIFMD, AIFMs may also be authorised to provide discretionary portfolio services on a client-by-client services regulated in accordance with certain provisions of Directive 2004/39/EC (MiFID). These services will be included in the MFSA’s passport notification to the host EEA Member States. Firms should be aware however that in line with an opinion expressed by the Commission, certain Member States may refuse passporting of these MiFID services
- *Transitional cross-border and third-country services arrangements applicable until July 2015*
 - Authorised EU AIFMs may continue to manage/market without a passport non-EU AIFs on a private placement basis in the EU until 22 July 2015 subject to the full Directive provisions but with a depository lite, and may have the opportunity to obtain a full EU passport in 2015 pending ESMA’s deliberations;
 - Non-EU AIFMs may continue to manage/market without a passport non-EU AIFs/ EU AIFs on a private placement basis in the EU without requiring *full* AIFMD compliance and without a depository until 2015. Thereafter an EU passport may be granted subject to full Directive applicability.

[IV] DELEGATION OF MANAGEMENT FUNCTIONS

Under the AIFMD, managers that intend to delegate any functions to third parties shall notify the competent authority accordingly and must be able to justify the entire delegation structure on objective reasons. Notwithstanding this, the AIFM shall at all times retain the power to perform senior management functions in particular in relation to the implementation of investment policy and investment strategies. It shall also have the expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation.

Subject to the foregoing the MFSA may allow certain portfolio and risk management tasks to be delegated in line with the Directive (including partial delegation of both activities) and shall determine the extent of delegation that may be allowed following a review of the proposed delegation structure.

Any delegation of management duties to a Sub-Manager would have to be notified to the MFSA and would have to be in accordance with a number of conditions, as contained in Section 4 of [Part BIII of the Investment Services Rules for Investment Services Providers](#). The liability of the AIFM will in no case be affected by delegation of any its functions to third parties.

- *Remuneration Policy*

In line with Article 13 of the AIFMD, the MFSA's approach is that remuneration policies and practices shall apply at the level of the AIFM - specifically to "those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage."

The approach adopted by the MFSA does not require that entities to which portfolio management or risk management activities may have been delegated be subject to similar remuneration requirements as the AIFM.

[V] DEPOSITARY ARRANGEMENTS

The MFSA has negotiated a derogation at EU level which has been incorporated in the Directive and which will allow Malta-based AIFs and AIFMs to make use of the services of an AIFMD-compliant depositary based in another EU or EEA Member State until 22 July 2017. Thereafter a Maltese AIFM or self – managed AIF must employ the services of a depositary located in Malta.

- *Delegation of Functions and contractual discharge of liability*

In terms of [Part BIV of the Investment Services Rules for Investment Services Providers](#) the delegation by a Depositary/ Custodian to a prime broker of any of its custody tasks in accordance with SLCs 4.15 to 4.18 of these Rules is allowed if the relevant conditions are met. These include the condition that the Licence Holder should be able to demonstrate that there is an objective reason for delegation.

Subject to other conditions stipulated in SLCs 4.23 and 4.24, the Licence Holder would only be able to discharge itself of liability in the case of an appropriate delegation of the said custody tasks if, among other conditions, this is done by means of written contracts as specified in paragraphs [b] and [c] of SLC 4.24.

The justification for contractual discharge should be based on clear and objective reasons which may include those in article 102 of the Level II Regulation.

Subject to these essential requisites being satisfied, the MFSA accepts that the arrangements themselves may take different forms that cater for the different scenarios that may exist, provided the chosen model is within the scope of Article 21 of the AIFMD and the Level II Regulation.

The MFSA will be providing guidance to the industry on Depository/ PB models for fund structures which it may consider in this context.

- *Depository “lite”*

In terms of Article 21(3)(c) of the AIFMD, funds which have no redemption rights exercisable during the five year period from the date of initial investment and which generally do not invest in assets that must be held in custody may appoint as Custodian an entity which carries out a depository (safe-keeping and oversight) function as approved by the MFSA.

A depository “lite” regime will also apply to EU AIFMs managing non-EU AIFs marketed in the EU (at least until July 2015).

[VI] **CO-OPERATION WITH NON-EU JURISDICTIONS**

The MFSA has signed co-operation arrangements with 34 non-EU securities regulators, with responsibility for the supervision of alternative investment funds (AIFs), including jurisdictions such as the USA, Canada, Brazil, India, Switzerland, Australia, Hong Kong and Singapore. ESMA negotiated the agreements on behalf of all 27 EU Member State securities regulators.

These arrangements are a key element in ensuring compliance with the AIFMD and are a pre-condition to allowing non-EU AIFMs access to EU markets or to perform fund management activities on behalf of EU managers. The arrangements also cover co-operation in the cross-border supervision of depositaries and AIFMs’ delegates.

The arrangements will apply from 22 July 2013 and will facilitate the exchange of information, cross-border on-site visits and mutual assistance in the enforcement of the respective supervisory laws.

[VII] **MFSA WEBSITE INFORMATION**

The MFSA website contains a [dedicated section](#) with all the updated Investment Services Rules, relevant legislation, application forms, information guides, Q&A and other information related to the transposition of the AIFMD.

This section may be accessed from a banner link on the MFSA homepage or directly through the following link: <http://mfsa.com.mt/pages/viewcontent.aspx?id=506>

Communications Unit
Malta Financial Services Authority
27 June 2013

NOTE

This statement is intended to provide guidance to:

- new applicants for alternative investment fund manager (AIFM) licences
- new applicants for alternative investment fund (AIF) licences
- existing holders of professional investor fund (PIF) licences
- existing holders of investment management and self-managed PIF licences applying for revised AIFMD compliant licences
- existing holders of Non-UCITS Collective Investment Scheme Licences