

Chapter 4 – SALES PROCESS AND SELLING PRACTICES

Introduction

When selling their Products and Services to Clients, Regulated Persons have an obligation to act honestly, fairly and in accordance with the best interest of such Clients. They must also behave with utmost good faith, integrity, due skill, care and diligence vis-à-vis their Clients. Accordingly, Regulated Persons are required to do everything which is possible to satisfy the needs and requirements of their Clients and shall place the interests of the latter before all other considerations.

In particular, Regulated Persons which fall under points (i) or (ii) of the definition of “Regulated Person” in the Glossary to these Rules are obliged to classify their clients as Eligible Counterparties, Professional Clients or Retail Clients. This classification is important because it reflects the level of protection given to such clients. Accordingly, Eligible Counterparties are afforded the least level of protection because they are deemed to be very knowledgeable about and experienced in the Products and Services which the Regulated Person is offering. On the other hand, Retail Clients are afforded the greatest amount of protection because they are deemed to possess little, if any, knowledge and experience in the Services and Products concerned.

Furthermore, when providing Advice or Portfolio Management Services with respect to Financial Instruments and/or Insurance Based Investment Products, Regulated Persons are required to carry out a suitability assessment. This is done to establish whether a particular Financial Instrument or Insurance Based Investment Product meets the objectives of the Client, whether the client can withstand the proposed investment in the light of his/her financial circumstance, and whether the latter has sufficient knowledge and experience in such Financial Instruments or Insurance Based Investment Products. When the Regulated Person is offering Services other than portfolio management and advice in relation to Financial Instruments and Insurance Based Investment Products, it is required to carry out an assessment to ensure that the Client has sufficient knowledge and experience in the said Instruments or Insurance Based Investment Products. **The ‘promote and sell’ regime which featured in Investment Services Rules for Investment Services Providers is hereby being abolished and all Services must be offered either on an advisory basis or at the initiative of the client.**

Closely related, but separate, to the overall information and disclosure requirements are the rules relating to client agreements. The requirement of having a written (or equivalent) agreement between Regulated Persons and Clients is considered to be important in providing a high level of legal certainty. In fact, although until now Regulated Persons were not required to enter into a written (or equivalent) agreement with Professional clients, this was nevertheless a common practice adopted on the market.

This Chapter also deals with the requirement for Regulated Persons to keep a record including the document or documents agreed between the Regulated Person and the Client setting out the rights and obligations of the parties, as well as any other terms on which the Regulated Person will provide services to the client. These Rules also set out a requirement for Regulated Persons who provide an investment service or certain specific ancillary services to both Retail and Professional Clients, to enter in a written basic agreement, in paper or another durable medium, which agreement should set out the essential rights and obligations of the Regulated Person and the Client to whom such service is being provided. This requirement has also been extended to Regulated Persons offering Advice, however only when such Regulated Person provides a periodic assessment of the suitability of the Financial instrument or Service being recommended to the Client. Moreover, this Chapter also provides a clearer indication as to what constitutes the 'essential rights and obligations' which should be covered by the written agreement.

Finally, this Chapter also contains a Section regulating the manner in which Regulated Persons should handle complaints by their clients.

Section 1: GENERAL PRINCIPLES

Application

- R.4.1.1 The Rules and the relative Guidance set out under Part A are applicable to all Regulated Persons.
- R.4.1.2 The Rules set out under Part B are applicable to persons falling under point (iv) of the definition of Regulated Person in the Glossary to these Rules.
- R.4.1.3 The Rules set out under Part C are applicable to persons falling under point (i) of the definition of Regulated Person in the Glossary to these Rules.

Part A: Rules Applicable to all Regulated Persons

General Principles

- R.4.1.4 When providing Products, Services and/or, where appropriate, Ancillary Services to Clients, a Regulated Person shall:
- (a) act honestly, fairly and professionally in accordance with the best interests of its Clients;
 - (b) at all times carry out the regulated activities with utmost good faith, integrity, due skill, care and diligence;
 - (c) do everything which is reasonably possible to satisfy the needs and requirements of its Clients and shall place the interests of those Clients before all other considerations. Subject to these requirements and interests, a Regulated Person shall have proper regard for others;
- R. 4.1.5 In order to comply with the requirements of Rule 4.1.3 above, a Regulated Person shall, *inter alia*:
- (a) seek from its Clients information relevant to the Product or Service requested;

- (b) in the completion of any document, make it clear that all the answers or statements are the Client's own responsibility. The Client should always be required to assume responsibility for the completed document and advised that, incomplete and/or inaccurate information may prejudice the Client's rights and, in the case of insurance, may result in a claim being repudiated;
- (c) make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the Client;
- (d) not withhold from the Client any written evidence or documentation relating to the Product or Service or Ancillary Service without adequate and justifiable reasons being disclosed in writing and without delay to the Client;
- (e) not recklessly, negligently or deliberately mislead a Clients to the real or perceived advantages or disadvantages of any Product, Service or Ancillary Service;
- (f) ensure that all instructions from or on behalf of a Client are processed properly and promptly;
- (g) have proper regard for the wishes of a Client who seeks to terminate any agreement with it to carry out business;
- (h) seek to avoid conflicts of interest;
- (i) not exert undue pressure or undue influence on a Client ;
- (j) without prejudice to the pursuit of its legitimate commercial aims, not prevent access to basic financial Services, through its policies, procedures, or working practices,.
- (k) give Advice only on those Products, Services or Ancillary Services in which the Regulated Person is knowledgeable and seek or recommend other specialist Advice when necessary;
- (l) treat all information supplied by the Client with complete confidentiality
- (m) not requesting Clients to sign declarations to the effect that s/he has understood and accepts certain features of the product or that s/he is relying on his/her own skill, judgement and expertise in order to make the investment in the Notes

when it is the obligation of the Regulated Person to assess the suitability or the appropriateness of such Products vis-à-vis the Client.

R.4.1.6 Any information acquired by a Regulated Person from a Client shall not be used or disclosed except in the normal course of negotiating, maintaining or renewing a Product or Service for that Client or in accordance with the provisions of specific legislation or unless the consent of the Client has been obtained.

R.4.1.7 Where a Regulated Person deals with a person who is acting for a Client under a power of attorney, the Regulated Person shall:

- (a) obtain a certified copy of the power of attorney;
- (b) ensure that the power of attorney allows the person to act on the Client's behalf; and
- (c) operate within the limitations set out in the power of attorney.

R.4.1.8 When providing Products ,Services or Ancillary Services from a place of business or from any other place accessible to the public, the Regulated Person shall display the licensing, authorisation, enrolment or registration certificate or an official copy thereof issued by the Authority, in a prominent position in that place and in a part thereof to which the public has access.

R.4.1.9 The Regulated Person shall:

- (a) acknowledge receipt to the Client of all money received in connection with a Product , Service or Ancillary Service and, in the case of insurance, distinguish the premium, document duty and motor vehicle licence fee, where applicable, and any charge or fee imposed shall be disclosed separately;
- (b) have printed on the receipt or contract note, the full name, business address, licence number (where applicable) of the Regulated Person;
- (c) show the full name and address and official means of identification of the Client in the receipt or contract note;
- (d) make reference in the receipt or contract note to the type of Product or Service in respect of which the money was paid including, where applicable, the policy number or other reference number;

- (e) show, on the receipt or contract note, the name and address of the Product manufacturer offering or issuing the Product;
- (f) sign and date the receipt or contract note and give a copy to the Client.

The original receipt or contract note shall be given to, and be retained by, the Client .

R.4.1.10 A Regulated Person shall not –

- (a) make inaccurate or unfair criticism of any other Regulated Person or any Product offered by such other Regulated Persons ;
- (b) make comparisons with other types of Products or Services unless the differing characteristics of each Product or Service are made clear;
- (c) persuade or attempt to persuade a Client to surrender or cancel any Product or Service which such Client may have already purchased.
- (d) entice persons to purchase products or services it offers by giving or promising to give any gifts to any person on condition that such person either purchases a service or a product or fixes an appointment with the Regulated Person to discuss the products and/or services which the Regulated Person offers.

R.4.1.11 A Regulated Person shall explain to the Client words and expressions of a technical nature which are used in a document in either the Maltese or the English language depending on which language the Client understands better.

Personal visits and contact with Clients

R.4.1.12 A Regulated Person shall avoid making unsolicited or unarranged calls to Clients unless otherwise requested by a Client. When such calls are made the Regulated Person shall identify himself/herself by showing identification documents. The Regulated Person shall make known his regulated status (and disclose the name and any other relevant particulars of the Regulated Person, licence number (where applicable) and show the Regulated Person's business card). In the case of a Tied Intermediary or a Tied Agent, the Regulated Person shall disclose the fact that that he/she is a tied intermediary of another Regulated Person.

R.4.1.13 The Regulated Person shall ensure that staff who deal with Clients only engage in unsolicited calls ("cold calls") on condition that they:

- (a) are civil and considerate,
- (b) do not use undue pressure, deception or artificiality,
- (c) make plain their purpose,
- (d) avoid contacts during unsocial hours observe the Conduct of Business Rules in this section and ensure that no deals are finalised on the sole basis of a telephone conversation unless previously agreed otherwise in writing with the Client, and
- (e) do not promote any complex products by means of cold calling;

R.4.1.14 The Regulated Person shall ensure that staff engaged in the sale of Products do not harass or cajole Clients or force them to purchase a Product or Service. The sales person shall not continue with the sales dialogue if requested by the Client to desist.

R.4.1.15 The Regulated Person shall avoid providing Services and Products in the home of the Client except in cases where the Client's mobility or other circumstances prohibit the Client from going to Regulated Person's offices.

R.4.1.16 Where the Regulated Person engages in more than one Regulated Activity, it shall not make use of Client information held by it or any other entity within its group, with respect to the provision of a particular Regulated Activity, for the purposes of marketing another Regulated Activity to such Clients unless it obtains the explicit consent of the Client in question.

The Regulated Person shall accompany the request for such consent with a warning that the nature and risks of the Products and Services which are going to be offered to the Client differ from those of the Products and Services which have been offered to the Client to date. The Regulated Person should also warn Clients that they should seek to ensure that they clearly understand all the relevant risks before purchasing any new Products and/or Services.

Telephone Contact with Clients

R.4.1.17 A Regulated Person may make telephone contact with a Client who is an existing Client, only if:

- (a) the Regulated Person has, within the previous twelve months, provided that Client with a Product or Service similar to the purpose of the telephone contact;

- (b) the Client holds a Product, which requires the Regulated Person to maintain contact with the Client in relation to that Product;
- (c) the Client has given his or her consent to being contacted in this way by the Regulated Person.

R.4.1.18 A Regulated Person shall ensure that, where it makes a telephone contact on the basis of a referral, it retains a record of the referral.

Personal Visits and Telephone Contact

R.4.1.19 When making a personal visit or telephone contact in accordance with this Rule Book, the representative of a Regulated Person shall immediately and in the following order:

- (a) identify himself or herself by name, and the name of the Regulated Person on whose behalf he or she is being contacted and the commercial purpose of the contact;
- (b) inform the Client that the meeting is being recorded, if this is the case;
- (c) where relevant, disclose to the Client, the source of the business lead or referral supporting the telephone contact;
- (d) explain the purpose(s) for which a personal visit is to be/being made, including the types of Products and Services to be discussed during the personal visit;

R.4.1.20 A Regulated Person shall abide by a request from a Client not to make a personal visit or telephone contact to him or her again and this request shall be recorded by the Regulated Person.

Record Keeping Requirements

R.4.1.21 Regulated Persons shall record in written minutes or notes all relevant information related to relevant face-to face conversations with Clients. The information recorded is at the discretion of the Regulated Person but shall include at least the following:

- (a) date and time of meeting;
- (b) location of meeting;

- (c) identity of the attendees;
- (d) initiator of the meeting;
- (e) the reason as to why the unsolicited call was made; and
- (f) other relevant information about the client order including the price, volume, type of order and when it shall be transmitted or executed.

Part B: Rules applicable to persons falling under point (iv) of the definition of Regulated Person in the Glossary to these Rules.

R.4.1.22 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (iv) of the definition of Regulated Person in the Glossary to these Rules.

R.4.1.23 If the Client advises the Regulated Person enrolled as a tied insurance intermediary of an incident which might give rise to a claim, the Regulated Person shall, without delay, inform the insurance company of that incident and give prompt Advice to the Client to pursue the matter further with the insurance company concerned.

R.4.1.23 Where a Regulated Person enrolled as a tied insurance intermediary is a bank, and, in the course of its transactions:

- (a) the Regulated Person is in the process of granting credit or loan facilities to a Client against security of a policy of life assurance, or
- (b) carries out tied insurance intermediaries activities in general business classes 1, 2 and 16 restricted to payment protection contracts of insurance issued in relation to loan repayments and class 14 restricted to export credit contracts of insurance,

that Regulated Person shall refrain from exerting any undue or improper pressure on its Clients but shall allow them the greatest possible freedom of choice with regard to such contracts of insurance and shall, in this context, abide by the requirements of R.1.4.92 in Chapter 1 (Disclosures) of this Rulebook.

Part C: **Rules applicable to persons falling under point (i) of the definition of Regulated Person in the Glossary to these Rules.**

R.4.1.24 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (i) of the definition of Regulated Person in the Glossary to these Rules.

R.4.1.25 A Regulated Person may appoint a Tied Agent which is:

- (a) established in Malta , provided that such Tied Agent is registered by the MFSA, or
- (b) established in a Member State or EEA State provided that such Tied Agent is either:
 - i. registered as a Tied Agent in such Member State or EEA State, or
 - ii. registered in Malta if the Member State or EEA State in which such Tied Agent is established does not provide for the registration of Tied Agents within its jurisdiction.

R.4.1.26 The responsibility for the control and monitoring of the activities of Tied Agents rests with the senior management of the Regulated Person. In this regard, the Regulated Person shall ensure that the Tied Agents it appoints:

- (a) report to it on a regular basis with respect to the activities carried out by the Tied Agent;
- (b) pass on to the Regulated Person all the necessary documentation for processing and/or record keeping purposes, promptly;
- (c) continue to satisfy the registration requirements and the eligibility criteria referred in Part A of the Investment Services Rules for Investment Services Providers on an on-going basis;
- (d) do not hold or control clients' money or assets;
- (e) comply with the requirements of the Conduct of Business Rules and Investment Services Rules for Investment Services Providers which are relevant to the activities they carry out on behalf of the Regulated Person. Particular attention should be given by the Regulated Person to ensuring compliance, by the Tied Agent, with the relevant requirements in this Section and in Chapter 1 (Disclosures).

- R.4.1.27 The Regulated Person shall ensure that the Tied Agents it appoints, shall, where appropriate make a prior appointment to call Clients. Unsolicited or unarranged calls shall be made between 9.00 a.m. and 7.00 p.m. Monday to Friday (excluding public holidays) and Saturday from 9.00 a.m. to 5.00 p.m., unless otherwise requested by a Client.
- R.4.1.28 The Regulated Person shall look into any concerns that may arise at any time regarding its Tied Agents' fit and proper status and take the necessary action. The necessary action may include, for example, increased monitoring or, if appropriate, suspension or termination of the appointment. In all cases, the Regulated Person should report any concerns it may have in this regard, to the MFSA, without delay.
- R.4.1.29 The Regulated Person shall take reasonable steps to ensure that each of its Tied Agents:
- (a) carry on only those activities which are permissible in terms of the definition of Tied Agent in the Glossary to these Rules and provided such activities are in line with the terms of the terms of the Tied Agent's appointment by the Regulated Person;
 - (b) carries on the activity for which the Regulated Person has accepted responsibility in a way which is, and is held out as being, clearly distinct from any of the Tied Agent's other business, irrespective of whether such other business is regulated or not.
- R.4.1.30 The Regulated Person will be held responsible for any breaches of the applicable Rules committed by any of the Tied Agents it appoints.
- R.4.1.31 When carrying out Tied Agent activities from a place of business or from any other place accessible to the public, the Regulated Person shall require the Tied Agent to display in a prominent position in that place, or in a part thereof to which the public has access, the certificate of registration or an official copy thereof issued by the Authority.
- R.4.1.32 The Regulated Person shall maintain all records, including those relating to the "Know Your Client" procedures and evidence that the Tied Agent has carried out the necessary suitability and/or appropriateness tests in terms of this Rulebook pertaining to the activities performed by the Tied Agents on the Regulated Person's behalf, as are necessary to demonstrate compliance by the Tied Agent with the relevant provision of these Rules. Such records shall be made available to MFSA officials during Compliance Visits.
- R.4.1.33 The Regulated Person shall ensure that its Tied Agents:
- i. do not act as such for other Regulated Persons; and

- ii. are not involved in any activities which may give rise to a conflict of interest which could be detrimental to the Regulated Person's clients.

R.4.1.34 The Regulated Person is to inform the MFSA of any decision to terminate a Tied Agent's appointment and shall confirm whether such a decision was taken due to any issues of a regulatory nature or concern.

Section 2: CLIENT CATEGORISATION

Application

R.4.2.1 For the purposes of this Section, the term 'Regulated Person' shall refer to persons falling under points (i) or (ii) of the definition of Regulated Person in the Glossary.

General Rules

R.4.2.2 A Regulated Person shall, before providing a Service within the meaning of points (i) and (ii) of the definition of Service in the Glossary to these Rules, classify a Client to whom the Service is to be offered as a Professional Client, as a Retail Client or as an Eligible Counterparty.

G.4.2.1 A Regulated Person shall allow a Client to request re-categorisation as a Client that benefits from a higher degree of protection. In such cases, a Regulated Person shall notify a Client that is categorised as a professional Client or an eligible counterparty of its right to request a different categorisation whether or not the Regulated Person will agree to such requests.

R.4.2.3 A Regulated Person shall:

- (a) notify a new Client of its categorisation as a retail Client, Professional Client or eligible counterparty in accordance with this chapter; and
- (b) prior to the provision of Services, inform a Client in a durable medium about:
 - i. any right which that Client has to request a different categorisation; and
 - ii. any limitations to the level of Client protection that such a different categorisation would entail.

Professional Clients

R.4.2.4 A Professional Client may be either a *per se* professional Client or an Elective Professional Client.

R.4.2.5 The Regulated Person shall inform Professional Clients that they are responsible for keeping the Regulated Person informed about any change, which could affect their current categorisation. Should the Regulated Person become aware however that the Client no longer fulfils the initial conditions, which made him/her eligible for professional treatment, the Regulated Person shall take appropriate action.

***Per Se* Professional Clients**

R.4.2.6 The Regulated Person shall deem a person which falls under the definition of Professional Client in terms of the Glossary to these Rules as a *Per Se* Professional Client unless and to the extent that it may be considered to be an Eligible Counterparty or is given a different categorisation under this Section.

Elective Professional Clients

R.4.2.7 A Regulated Person may treat a Client as an Elective Professional Client if it complies with (a) , (b) and (c) below:

- (a) The Regulated Person undertakes an adequate assessment of the expertise, experience and knowledge of the Client, undertaken by the Regulated Person, gives reasonable assurance, in the light of the nature of the transactions or Services envisaged, that the Client is capable of making his own investment decisions and of understanding the risks involved (“the qualitative test”).
- (b) In the course of the assessment referred to (a) above, as a minimum, two of the following criteria shall be satisfied:
 - i. The Client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter of the previous four quarters;
 - ii. The size of the Client’s Instrument portfolio, defined as including cash deposits and Instruments exceeds EUR 500 000;
 - iii. The Client works or, which requires knowledge of the transactions or Services envisaged.
 - iv. The Client has worked in the financial sector for at least one year in a professional position ; (“the quantitative test”); and
- (c) the following procedure is followed:
 - i. they shall state in writing to the Regulated Person that they wish to be treated as a Professional Client, either generally or in respect of a particular Service or transaction or type of transaction or Product;
 - ii. the Regulated Person shall give such Clients a clear written warning of the protections and investor compensation rights they may lose;

- iii. Clients shall state in writing in a separate document from the contract, that they are aware of the consequences of losing such protections..

R.4.2.8 If the Client is not a natural person, the qualitative test should be performed in relation to the person authorised to carry out transactions on its behalf.

G.4.2.2 The fitness test applied to managers and directors of Regulated Persons is an example of the assessment of expertise and knowledge involved in the qualitative test.

R.4.2.9 Before deciding to accept any request for re-categorisation as an elective professional Client, a Regulated Person must take all reasonable steps to ensure that the Client requesting to be treated as an elective professional Client satisfies the qualitative test and the quantitative test referred to above.

G.4.2.3 Professional Clients are responsible for keeping the Regulated Person informed about any change that could affect their current categorisation.

R.4.2.10 If a Regulated Person becomes aware that a Client no longer fulfils the initial conditions that made it eligible for categorisation as an elective professional Client, the Regulated Person must take the appropriate action. Where such appropriate action involves re-categorising that Client as a Retail Client, the Regulated Person must notify that Client of its new categorisation.

Eligible Counterparties

R.4.2.11 An Eligible Counterparty is a Client that is either a per se Eligible Counterparty or an Elective Eligible Counterparty.

A Client can only be an Eligible Counterparty in relation to Eligible Counterparty business.

Per Se Eligible Counterparties

R.4.2.12 Regulated Persons authorised to execute orders on behalf of Clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with Eligible Counterparties without being obliged to comply with the following rules in respect of those transactions or in respect of any ancillary service directly relating to those transactions: r.3.2, R.2.5, R.4.4.7, R.1.2.5, R.4.4.55, R.4.3.6,R3.37, R.3.10. R.3.24, R.3.24, R.1.4.8, R.1.4.9, R.4.4.6, R.4.4.10, R.4.4.11, R.4.4.37, R.4.4.30, R.4.4.40, R.4.4.44, R,4,4,57,R.5.3, R.5.27, R.5.30, R.5.32.R.5.50, R.5.7, R.5.33. R.1.3.14, R.5.24. R.5.12 R.5.35, R.5.16, R.5.18

R.4.2.13 Each of the following as an Eligible Counterparty (including an entity that is not from an EU member State or an EEA state that is equivalent to any of the following) unless and to the extent it is given a different categorisation under this Chapter:

- (a) An investment firm
- (b) A credit institution
- (c) An insurance company;
- (d) A UCITS or a UCITS management company;
- (e) A pension fund or a pension fund management company;
- (f) Another financial institution authorized or regulated under EU Law or the national law of an EU Member State;
- (g) Undertakings which are exempt from the requirements of the MIFID in terms of Article 2 (1) (k) and (l) thereof;
- (h) A national government and its corresponding offices including public bodies that deal with public debt;
- (i) Central bank and supranational organization.

R.4.2.14 Classification as an Eligible Counterparty by a Regulated Person shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as Professional or Retail Clients.

Elective Eligible Counterparty

R.4.2.15 A Regulated Person may treat a Client as an elective Eligible Counterparty if:

- (a) the Client is an undertaking and requests such categorisation and is an elective professional client, but only in respect of the Services or transactions for which it could be treated as a professional client; and
- (b) the Regulated Person has obtained express confirmation from the prospective counterparty that it agrees to be treated as an eligible counterparty. A Regulated Person may obtain a prospective counterparty's confirmation that it agrees to be treated as an eligible counterparty either in the form of a general agreement or in respect of each individual transaction.

R.4.2.16 Regulated Persons may recognise and treat as Eligible Counterparties, other undertakings meeting pre-determined proportionate requirement, including quantitative thresholds. In the event of a transaction where the proposed Counterparties are located in different jurisdictions, the Regulated Person shall defer to the status of the Client undertaking as determined by the law or measures of the Member State in which that undertaking is established.

When it enters into a transaction with a Client undertaking in accordance with this Rule, the Regulated Person shall obtain the express confirmation from the Client that it agrees to be treated as an Eligible Counterparty. The Regulated Person may obtain such confirmation either in the form of a general agreement or in respect of each individual case.

- R. 4.2.17 Regulated Persons shall follow the following procedure when a Clients requests to be treated as an Elective Eligible Counterparty,:
- (a) The Regulated Person shall provide the Client with a clear written warning of the protections which may be lost;
 - (b) The Regulated Person shall request the Client to confirm, in writing, that it wishes to be treated as an Elective Eligible Counterparty either generally or in respect of a particular Service or transaction or type of transaction or Product and that it is aware of the consequences in terms of the protections it may lose.

Transactions Executed with Eligible Counterparties

- R.4.2.18 The Regulated person may treat as Eligible Counterparties third country entities equivalent to those categories of entities as referred to in the definition of “Eligible Counterparty” in the Glossary .
- R.4.2.19 A Regulated Person may also recognise as Eligible Counterparties third country undertakings such as those referred to in R.4.2.15 on the same conditions and subject to the same requirements as those laid down in R.4.2.15 and R.4.2.16.
- R.4.2.20 In its relationship with Eligible Counterparties Regulated Person shall act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business.

Retail Clients

- R.4.2.21 The Regulated Person shall treat as a Retail Client any Client which does not satisfy the requirements of either the classification of an “Eligible Counterparty” or of the Professional Investor, or any Client who has requested to be treated as a Retail Investor .

Higher Level of Protection

R.4.2.22 The Regulated Person may, either on its own initiative or at the request of the Client concerned:

- (a) treat as a Professional or Retail Client, a Client that might otherwise be classified as an Eligible Counterparty;
- (b) treat as a Retail Client, a Client that is considered as a Professional Client or an Eligible Counterparty

and if it does so, the Client shall be re-categorised accordingly, provided that the request of the Client shall be in writing and shall indicate whether it is general or whether it refers to one or more particular Service or transactions or type of transactions or Product.

R.4.2.23 In the cases referred to in R.4.2.22 above, the Regulated Person shall:

- (a) warn the Client, prior to any provision of Services, that, on the basis of the information available to it, the Client is deemed to be a Professional Client or an Eligible Counterparty, and will be treated as such unless the Regulated Person and the Client agree otherwise;
- (b) inform the Client that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.

G.4.2.4 If a Regulated Person already has an agreement with the Client, it should also consider any contractual requirements concerning the amendment of that agreement.

R.4.2.24 If a per se Eligible Counterparty requests treatment as a Client whose business with the Regulated Person is subject to conduct of business protections, but does not expressly request treatment as a Retail Client, and the Regulated Person agrees to that request, the Regulated Person must treat that Eligible Counterparty as a Professional Client.

The request made by the Eligible Counterparty, in terms of this Rule shall be made in writing and shall indicate whether it is general or whether it refers to one or more particular services or transaction or type of transactions or Product.

R.4.2.25 If a per se Professional Client or a per se Eligible Counterparty requests treatment as a Retail Client, the Client will be classified as a Retail Client if it enters into a written agreement with the Regulated Person to the effect that it will not be treated as a

professional Client or Eligible Counterparty for the purposes of the applicable conduct of business regime.

This agreement shall specify the scope of the re-categorisation, such as whether it applies to one or more particular services or transactions, to one or more types of Product or transactions.

Policies and Procedures to Categorise Clients

R.4.2.26 The Regulated Person shall implement appropriate written internal policies and procedures to categorise Clients.

G.4.2.5 *The Regulated Person should have proper organisational requirements enabling it to classify Clients in a quick and easy manner. This notwithstanding, it should be ensured that the classification given by the Regulated Person is appropriate and any Services offered to the Client are to be provided on the basis of that classification.*

G.4.2.6 *A Regulated Person's Client classification policy should cater for the procedure which the Regulated Person's employees shall adopt in order to classify Clients under one of the following sub-headings (a), (b) or (c) below. Such procedures may be structured as follows:*

(a) First Tier Classification: - Eligible Counterparties

Does the **Client** have any one of the following statuses?

- i) *An investment firm;*
- ii) *A credit institution;*
- iii) *An insurance company;*
- iv) *A UCITS or a UCITS management company;*
- v) *A pension fund or a pension fund management company;*
- vi) *Another financial institution authorized or regulated under EU Law or the national law of an EU Member State;*
- vii) *Undertakings which are exempt from the requirements of the MIFID in terms of Article 2 (1) (k) and (l) thereof;*

- viii) *A national government and its corresponding offices including public bodies that deal with public debt;*
- ix) *Central bank and supranational organization.*

If so, the Client may be classified as an 'eligible counterparty'.

(b) Second Tier Classification: - Professional Clients

Professional Client Test – No 1:

*Does the **Client** fall in any one of the following categories?*

[1] *An entity which is required to be authorised or regulated to operate in financial markets. The list below should be understood as including: [i] all authorised entities carrying out the characteristic activities of the entities mentioned: [ii] entities authorised by a Member State under a Directive, [iii] entities authorised or regulated by a Member State without reference to a Directive, and [iv] entities authorised or regulated by a non-Member State:*

- (a) *Credit Institutions;*
- (b) *Investment Firms;*
- (c) *Other authorised or regulated financial institutions;*
- (d) *Insurance Companies;*
- (e) *Collective investment schemes and management companies of such schemes;*
- (f) *Pension funds and management companies of such funds;*
- (g) *Commodity and commodity derivatives dealers;*
- (h) *Locals;*
- (i) *Other institutional investors.*

[2] *Is the Client an entity which meets two of the following requirements?*

- i) *Balance sheet total: EUR 20,000,000*
- ii) *Net turnover: EUR 40,000,000*
- iii) *Own funds: EUR 2,000,000*

[3] *National and regional governments, public bodies that manage public debt, Central banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.*

[4] *Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.*

If the Client falls under anyone of [1] – [4] above, it may be classified as a ‘Professional Client’.

Professional Client Test – No 2:

A Client who does not fall under any of the above categories may also be treated as a professional Client upon request if further to an assessment, such Client is found to possess sufficient experience, knowledge and expertise to enable him/her to make his/her own investment decisions and properly assess the risks that such investment incurs.

In the course of this assessment, two of the following criteria should be satisfied:

- a) the Client invests at an average frequency of ten transactions per quarter during the previous four quarters, subject to the transactions being of a significant size;*
- b) the Client’s financial instrument portfolio exceeds EUR 500,000;*
- c) the Client has worked in the financial sector for at least one year in a professional position.*

In addition to satisfying two of the above-mentioned criteria, Clients which have requested to be treated as Professional Clients shall:

- i) state in writing that they wish to be treated as a professional client, either generally or in respect of a particular investment Service or transaction or type of transaction or Product;*
- ii) be given a clear written warning of the protections and invest or compensation rights they may lose; and*
- iii) state in writing in a separate document from the contract, that they are aware of the consequences of losing such protections.*

(c) Third Tier Classification:- Retail Clients:

Clients who are not categorised as eligible counterparties or Professional Clients shall be classified as Retail Clients.

Record Keeping Requirements

R.4.2.27 A Regulated Person shall make a record of the form of each notice provided and each agreement entered into under this Chapter. This record must be made at the time that the standard form is first used and retained for the relevant period after the Regulated Person ceases to carry on business with Clients who were provided with that form.

R.4.2.28 A Regulated Person shall make a record in relation to each Client :

- (a) of the categorisation established for the Client under this section, including sufficient information to support that categorisation;
- (b) who elects to be treated as a Professional Client. Such record should include documentation evidencing satisfaction of the relevant requirements indicated in this Section;
- (c) of evidence of despatch to the Client of any notice/warning required under this section and a copy of the actual notice provided; and
- (d) of any agreement entered into with the Client under this section.

This record shall be made at the time of categorisation and should be retained for at least five years after the Regulated Person ceases to carry on business with or for that Client, or for any other period which the MFSA may require.

G.4.2.7 *If a Regulated Person provides the same form of notice to more than one Client, it need not maintain a separate copy of it for each Client, provided it keeps evidence of dispatch of the notice to each Client.*

Vulnerable Clients

G.4.2.8 *A vulnerable client is a Retail Client who, due to personal circumstances, is especially susceptible to detriment. The following is a non-exhaustive list of personal circumstances which may cause the person in such circumstances to be considered to be a vulnerable client:*

- (a) *Low literacy, numeracy and financial capability skills;*
- (b) *Physical disability;*
- (c) *Severe or long-term illness;*

- (d) *Mental health problems;*
- (e) *Low income and/or debt and/or unexpected bills – particularly when combined with other circumstances ;*
- (f) *Caring responsibilities (including matters relating to powers of attorney);*
- (g) *Old age (for example, being over 80), which may be associated with cognitive or dexterity impairment, sensory impairments such as hearing or sight, onset of ill-health, and being uneasy with new technologies;*
- (h) *Youth and associated lack of experience;*
- (i) *Changes in circumstances (for example, job loss, bereavement, divorce);*
- (j) *Lack of English language skills;*

G.4.2.9 A Regulated Person should adopt a pre-emptive approach in identifying potential vulnerability and establishing mitigating processes, which should be flexible and tailored.

G.4.2.10 A Regulated Person should recognise that vulnerability is not restricted to the client's situation but might actually be aggravated by the actions or processes of the Regulated Person itself. Examples could include complex telephone menu systems and automated services, with limited or no possibility for human interaction; or the provision of complex and lengthy information, making it hard for clients to differentiate between promotional material and important messages / warnings about products. Such occurrences could give rise to added pressures on vulnerable clients, thus resulting in consequential detriment.

G.4.2.11 In relation to vulnerable clients Regulated Persons should adopt more cautious practices in their operations The following is an indicative list of what may constitute good practices to be adopted by a Regulated Person in this regard:-

- (a) *Offering of clear and straightforward financial products which do not include any hidden surprises which might only surface in adverse situations;*
- (b) *Employing a marketing strategies which in no way exploit vulnerabilities;*
- (c) *having a number of available options for communication in relation to the method of communication and delivery of service. Such means should be designed in an inclusive manner to meet the needs of different clients with varying circumstances;*

- (d) *Providing clients with tailored treatment in the event of a change in circumstances which would require a flexible approach;*
- (e) *Client-handling staff members should dedicate sufficient time to listening to clients carefully, and should also be adequately trained to identify signs of vulnerability and to act accordingly;*
- (f) *having procedures in place to escalate vulnerability issues to someone who has the authority and discretion to adapt terms and conditions to a particular situation;*
- (g) *Offering flexibility, for example, by adopting alternative formats for transmission of information, and not relying solely on automated means of communication;*
- (h) *Having in place more effective record keeping procedures with respect to any disclosed information by clients, to avoid situations where clients have to repeat the same information to different business departments;*
- (i) *ensuring that vulnerable clients are given sufficient time in order to be able to assess and reflect upon the product or service that they are being sold, including any related terms and conditions. This is particularly important in view of the possibility that, due to their difficult situation, vulnerable clients might be less cautious and be more trusting than usual towards Regulated Persons, possibly neglectful in taking the necessary time to make certain considerations*

Section 3: ADVICE AND NON-ADVICE

Application

- R.4.3.1 The Rules and the relative Guidance set out under Part A shall apply to all Regulated Persons.
- R.4.3.2 The Rules and the relative Guidance set out under Part B shall apply to persons falling under points (i), (ii) and (iv) of the definition of “Regulated Person” in the Glossary to these Rules.
- R.4.3.3 The Rules and relative Guidance set out Part C are applicable to Regulated Persons falling under point (i) of the definition of Regulated Persons in the Glossary to these Rules.

Part A: Rules applicable to All Regulated Persons

General Principles

- R.4.3.4 A Regulated Person shall be deemed to provide Advice for the purposes of these Rules if it provides a Personal Recommendation relating to Products to Clients or their agents.

G.4.3.1 *There are three main elements to a Personal Recommendation:*

- i. there shall be a recommendation;*
- ii. the recommendation shall be presented as suitable or purported to be suitable for the person to whom it is made or based on the person’s circumstances; and*
- iii. the recommendation shall relate to taking certain steps in respect of a particular Product or financial instrument, for example "I recommend that you buy XYZ Company shares".*

Whether or not a Personal Recommendation is given depends in part on whether the client is led to think that one is being given. Therefore it is important for the Regulated Person to clearly indicate whether it is providing advice or not.

- G.4.3.2 *To establish whether an activity constitutes Advice, Regulated Persons should consider whether the process is limited to, and likely to be perceived by the Client as assisting*

them to make their own choice of Product that has the particular features that the Client regards as important. Reference should also be made to Appendix 2 of this Chapter for further guidance as to what constitutes Advice

- G.4.3.3 A Product might be presented as suitable to a Client either explicitly or implicitly. A Product would be explicitly presented as suitable if a Regulated Person were to say to a Client ‘this Product would be the best option for you’.*
- G.4.3.4 Where a Regulated Person provides only selective information to a Client, for example, when comparing one Product against another, or when a Client has indicated the benefits he seeks in a Product, such selective information, depending on the circumstances may amount to an implied recommendation and hence Advice.*
- G.4.3.5 If a Product was presented to a Client in some other way that would influence the Client to take a course of action in relation to a specific Product over others, this is likely to be an implicit recommendation.*
- G.4.3.6 A clear, prominent and understandable disclaimer stating that no Advice is being provided or that no recommendation is being made is unlikely to be sufficient to avoid having presented a recommendation for the purposes of determining whether Advice has actually been given. Accordingly, the fact that a Regulated Person states that its Product would suit a particular Client’s need and includes a disclaimer saying that this was not Advice, would not necessarily change the basic nature of the communication and it may still constitute a Personal Recommendation and hence the provision of Advice.*
- G.4.3.7 In clarifying the circumstances when a Personal recommendation is being given, a Regulated Person is expected to take into account the Questions and Answers entitled ‘Understanding the definition of Advice under MiFID’ as issued by the Committee of European Securities Regulators (CESR) . This Paper may be downloaded from ESMA’s website: http://www.esma.europa.eu/mt/system/files/10_293.pdf (copy and paste in browser).*
- G.4.3.8 The difference between ‘information’ and ‘Advice’ is the element of opinion or judgement on the part of the Regulated Person. In making a Personal recommendation, and hence providing Advice, the Regulated Person would need to make a judgement or assessment that would result in one or more Products being identified as suitable a Client , whether as a result of information that Client provides or otherwise.*
- G.4.3.9 Merely providing information to Clients should not itself normally amount to Advice, provided that the Client is left to exercise their own opinion on the action to take*

Part B: **Rules applicable to persons falling under points (i), (ii) or (iv) of the definition of “Regulated Person” in the Glossary to these Rules**

R.4.3.5 For the purposes of this Part, the term Regulated Person shall refer to a person falling under point (i), (ii) or (iv) of the definition of Regulated Person in the Glossary to these Rules.

Regulated Persons providing Independent Advice

R.4.3.6 Where a Regulated Person informs the Client that Advice is provided on an independent basis, that Regulated Person shall conduct a fair and comprehensive analysis of the market by assessing a sufficient range of Products available on the market which shall be sufficiently diverse with regard to their type and issuers or Product providers to ensure that the Client’s needs and objectives can be suitably met and shall not be limited to Products issued or provided by:

- (a) the Regulated Person itself or by entities having close links with the Regulated Person; or
- (b) other entities with which the Regulated Person has such close legal or economic relationships, such as contractual relationships, as to pose a risk of impairing the independent basis of the Advice provided.

R.4.3.7 A Regulated Person informing a Client that Advice is provided on an independent basis shall define and implement a selection process to assess and compare a sufficient range of Financial Instruments available on the market. The selection process should include all of the following elements:

- (a) a diversified selection of Financial Instruments by type, issuer, or Product provider, which is not limited to Financial Instruments issued or provided by the Regulated Person or by entities having close links or other relevant close legal or economic relationship with the Regulated Person should be considered;
- (b) the number and variety of Financial Instruments considered should be proportionate to the scope of advisory Services offered by the independent investment adviser;
- (c) the number and variety of Financial Instruments considered is adequately representative of Financial Instruments available on the market;

- (d) the quantity of Financial Instruments issued by the Regulated Person itself or by entities closely linked to the Regulated Person itself is proportionate to the total amount of Financial Instruments considered; and
- (e) the criteria for comparing the various Financial Instruments should include all relevant aspects such as risks, costs and complexity as well as the characteristics of the investment firm's Clients, and should ensure that neither the selection of the instruments that may be recommended nor the recommendations that are made to Client are biased.

R.4.3.8 If such a comparison would not be possible because of the business model or the specific scope of the Service provided, the Regulated Person providing Advice should not be allowed to claim itself as "independent".

R. 4.3.9 A Regulated Person that provides Advice on an independent basis and that focuses on certain categories or a specified range of Products should comply with the following requirements:

- a) the Regulated Person is able to market itself in a way that only attracts Clients with a preference for certain categories or a range of Financial Instruments;
- b) Clients should be able to easily identify a preference for the specified classes or range of Financial Instruments and be able to self-select with a high degree of accuracy;
- c) Clients indicate that they are only interested in investing in the specified category or range of Financial Instruments; and
- d) the Regulated Person is able to easily confirm whether its Service is appropriate for each new Client, i.e. that its business model matches the Client's needs and objectives, and the range of Financial Instruments that are suitable for the Client. If this is not the case, the Regulated Person must not provide such a Service to the Client.

Regulated Persons providing both independent and Non-Independent Advice

R.4.3.10 Non-Independent Advice is any advice which does not qualify as Independent Advice within the meaning of R. 4.3.6.

R.4.3.11 A Regulated Person offering Advice on both an independent basis and on a non-independent basis should comply with the following obligations:

- (a) in good time before the provision of its Services, the Regulated Person should inform Retail Clients, in a durable medium, whether the Advice will be independent or non-independent and make the relevant disclosures as required in the Chapter entitled Disclosures.
- (b) the Regulated Person should not hold itself out as “independent” for its business as a whole. However a Regulated Person may hold itself out as acting independently in respect of the Services for which it provides independent Advice; and
- (c) it should have adequate organisational requirements and controls in place to ensure that both types of Advice, Services and Advisers are clearly separated from each other. To this end the Regulated Person should not allow a staff member to provide both independent and non-independent advice. These requirements and controls should also ensure that Clients are not confused about the type of Advice that they are receiving and are given the type of Advice that is appropriate for them.

G.4.3.10 A Regulated Person that gives Advice in relation to certain Products on the basis of a fair analysis, but offers non-independent Advice in relation to other Products should not hold itself out as acting independently for its business as a whole, for example by holding itself out as an independent financial adviser. However, it may disclose that it gives Advice in relation to a specified type of Products on the basis of a fair analysis provided it makes it clear to Clients that it provides non-independent Advice for other Products .

G.4.3.11 A Regulated Person specializing in a relevant market should take reasonable care to establish and maintain appropriate systems and controls to ensure that it does not make a Personal Recommendation if there is a Product outside the abovementioned market which would meet the needs and objectives of the Client.

G.4.3.12 If a Regulated Person chooses to use a third party to conduct a fair and comprehensive analysis, within the meaning of R.4.3.6 of the market, in which the Relevant Person specialises, the Regulated Person is responsible for ensuring the criteria used by the third party are sufficient to meet the “fair and comprehensive” requirement.

G.4.3.13 A personal recommendation on a Product having a number of underlying investments would not of itself meet the requirements for providing independent Advice even if the Product has a wide range of underlying investments. In order to satisfy the rule on Regulated Persons holding themselves out as independent, the Regulated Person should ensure that it is not bound by any form of agreement with a Manufacturer that restricts the personal recommendation the Regulated Person can provide or imposes any

obligation that may limit the Regulated Person's ability to provide a personal recommendation which is independent.

G.4.3.14 A Regulated Person may be owned in whole or part by, or be financed by or provide finance to, a Manufacturer without contravening the 'independent' requirement provided the Regulated Person ensures that that ownership or finance does not prevent the Regulated Person from providing a personal recommendation which is independent.

R.4.3.12 A Regulated Person which:

- (a) holds itself out to a Client as acting independently; and
- (b) relies upon a single platform Service to facilitate the majority of its personal recommendations in relation to the Products it offers;

shall take reasonable steps to ensure that, as appropriate, the platform Service provider bases its selection of Products on a comprehensive, fair and unbiased analysis of the relevant market.

G.4.3.15 When a Regulated Person considers whether a platform Service provider's selection of Products is based on an unbiased analysis of the relevant market, a Regulated Person should take into account any fees, commission or non-monetary benefits the platform Service provider receives in relation to those Products.

Part C: Rules applicable to persons falling under point (i) or (ii) of the definition of 'Regulated Person' in the Glossary to these Rules.

Investment Research

R.4.3.13 For the purposes of this Part, the term "Regulated Person" shall refer to a person falling under point (i) and (ii) of the definition of 'Regulated Person' in the Glossary to these Rules.

R.4.3.14 "Investment research" means research or other information intended to suggest an investment strategy, explicitly or implicitly, concerning one or several Financial Instruments or the issuers of Financial Instruments, including any opinion as to the present or future value or price of such Financial Instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:

- (a) it is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;
- (b) if the suggestion in question were made by a Regulated Person to a Client, it would not constitute the provision of investment Advice.

R.4.3.15 If a Regulated Person provides an investment research service to its Clients or otherwise provides suggestions intended for distribution channels or the public generally, it will not be deemed to be providing Advice.

R.4.3.16 A recommendation of the type covered by Regulation 2(1) of the Prevention of Financial Markets Abuse (Fair Presentation of Investment Recommendations and Disclosure of Conflicts of Interest) Regulations, 2005 (Legal Notice 106 of 2005), but relating to Financial Instruments, that does not meet the conditions set out in R. 4.3.14, shall be treated as an Advertisement for the purposes of these Rules, and any Regulated Person which produces or disseminates the recommendation shall ensure that it is clearly identified as such.

Such recommendation shall also be subject to the requirements of R.4.3.18 below.

R.4.3.17 The Regulated Person shall ensure that any such recommendation contains a clear and prominent statement that (or, in the case of an oral recommendation, a clear statement should be made to the effect that) it has not been prepared in accordance with legal requirements designed to promote the independence of investment research and that it is not subject to any prohibition on dealing ahead of the dissemination of investment research.

R.4.3.18 A Regulated Person which produces, or arranges for the Production of investment research that is intended or likely to be subsequently disseminated to Clients of the Regulated Person or to the public, under its own responsibility or that of a member in its group (if the Regulated Person is a member of a group), shall ensure that the implementation of all the measures set out in R. 3.15 to R.3.17 (in Conflicts of Interests Chapter)) in relation to the financial analysts involved in the Production of the investment research and other relevant persons whose responsibilities or business interests may conflict with the interests of the persons to whom the investment research is disseminated.

R.4.3.19 The Regulated Person which is covered under R.4.3.18 shall have in place arrangements designed to ensure that the following conditions are satisfied:

- (a) financial analysts and other relevant persons must not undertake personal transactions or trade other than as market makers acting in good faith and in the ordinary course of market making or in the execution of an unsolicited Client order, on behalf of any other person, including the Regulated Person, in Financial Instruments to which investment research relates, or in any related financial Instruments, with knowledge of the likely timing or content of that investment research which is not publicly available or available to Clients and cannot readily be inferred from information that is so available, until the recipients of the investment research have had a reasonable opportunity to act on it;
- (b) in circumstances not covered by point (a), financial analysts and any other relevant persons involved in the Production of investment research must not undertake personal transactions in Financial Instruments to which the investment research relates, or in any related Instruments, contrary to current recommendations, except in exceptional circumstances and with the prior approval of a member of the Regulated Person's legal or compliance function;
- (c) the Regulated Person itself, financial analysts and other relevant persons involved in the Production of investment research must not accept inducements from those with a material interest in the subject matter of the investment research;
- (d) the Regulated Person itself, financial analysts, and other relevant persons involved in the Production of the investment research must not promise issuers favourable research coverage;
- (e) issuers, relevant persons other than financial analysts, and any other persons must not before the dissemination of investment research be permitted to review a draft of the investment research for the purpose of verifying the accuracy of factual statements made in that research, or for any other purpose other than verifying compliance with the Regulated Person's legal obligations, if the draft includes a recommendation or a target price.
- (f) A physical separation must exist between the financial analysts involved in the Production of investment research and other relevant persons whose responsibilities or business interests may conflict with the interests of the persons to whom the investment research is disseminated. This provision should also require that when considered not appropriate to the size and organisation of the firm and the nature, scale and complexity of its business, the

investment firm shall be able to demonstrate it has put in place appropriate alternative information barriers.

For the purposes of this Rule, “related financial Instrument” means a Financial Instrument the price of which is closely affected by price movements in another Financial Instrument which is the subject of investment research, and includes a derivative on that other Financial Instrument.

R.4.3.20 The Regulated Person which disseminates investment research produced by another person to the public or to Clients shall be exempted from complying with the requirements of R 4.3.18 if the following criteria are met:

- (a) the person that produces the investment research is not a member of the group to which the Regulated Person belongs;
- (b) the Regulated Person does not substantially alter the recommendations within the investment research;
- (c) the Regulated Person does not present the investment research as having been produced by it;
- (d) the Regulated Person verifies that the producer of the research is subject to requirements equivalent to the requirements under these Rules in relation to the Production of that research, or has established a policy setting such requirements.

Section 4: ASSESSMENT OF CLIENT’S SUITABILITY AND APPROPRIATENESS

Application

- R.4.4.1 The Rules and the relative Guidance set out in Part A shall apply to Regulated persons falling under points (i) and (ii) of the definition of “Regulated Person” in the Glossary to these Rules and to Regulated Persons falling under points (iii) and (iv) of the definition of “Regulated Person” in the Glossary to these Rules only insofar as the latter are providing Advice in relation to Insurance Based Investment Products, except as otherwise indicated.
- R.4.4.2 The Rules and relative Guidance set out under Part B shall apply to persons falling under point (i) or (ii) of the definition of Regulated Persons in the definition of ‘Regulated Persons’ in the Glossary to these Rules.
- R. 4.4.3 The Rules and the relative Guidance set out in the Part C shall apply to Regulated Persons falling under points (iii) and part (iv) of the definition of Regulated Person in the Glossary to these Rules.
- R.4.4.4 For the purposes of this Section, any reference to “Portfolio Management” shall be deemed to refer to portfolio management services being provided by Regulated Persons under points (i) of the definition of “Regulated Person” in the Glossary to these Rules

Part A: Rules applicable to Regulated persons falling under points (i) and (ii) of the definition of “Regulated Person” in the Glossary to these Rules and to Regulated Persons falling under points (iii) and (iv) of the definition of “Regulated Person” in the Glossary to these Rules only insofar as the latter are providing Services in relation to Insurance Based Investment Products, except as otherwise indicated.

- R. 4.4.5 For the purposes of this Part the term ‘Regulated Person’ shall refer to persons falling under points (i) and (ii) of the definition of “Regulated Person” in the Glossary to these Rules and to Regulated Persons falling under points (iii) and (iv) of the definition of “Regulated Person” in the Glossary to these Rules only insofar as the latter are providing Advice in relation to Insurance Based Investment Products.
- R.4.4.6 Regulated Persons shall ensure and demonstrate to the MFSA, that natural persons giving advice or information about Products or Services to clients on behalf of the Regulated Person possess the necessary knowledge and competence to fulfil their obligations under these Rules.

G.4.4.1 The Regulated Person should ensure that its staff members providing advice or portfolio management services to clients, on its behalf, understand the role they play in the suitability assessment process and they possess the skills, knowledge and expertise necessary. This would include sufficient knowledge of the relevant regulatory requirements and procedures, to discharge their responsibilities.

G.4.4.2 The Regulated Person's staff must have the skills necessary to be able to assess the needs and circumstances of the client. They are also required to have sufficient expertise to understand the Products to be recommended (or purchased on the client's behalf), and to determine that the features of the Product match the needs and circumstances of the client

Suitability

R.4.4.7 A Regulated Person shall understand the Product it offers or recommends, assess the compatibility of the Product with the needs of the Clients to whom it provides Services, also taking account of the identified target market of end Clients, and ensure that Products are offered or recommended only when this is in the interest of the Client.

R.4.4.8 Regulated Persons shall implement policies and procedures to enable them to collect and assess all information necessary to conduct a suitability assessment for each Client.

G.4.4.3 For the purposes of the above Rule, Regulated Persons may use questionnaires completed by their Clients or during discussions with them.

Assessment of Suitability

R. 4.4.9 Information on Advice and, Portfolio Management services, should include information about the suitability assessment. 'Suitability assessment' should be understood as meaning the whole process of collecting information about a Client, and the subsequent assessment of the suitability of a given Product for that Client.

G.4.4.4 Information about the suitability assessment should help Clients to understand the purpose of the requirements and should encourage them to provide accurate and sufficient information about their knowledge, experience, financial situation and investment objectives. Regulated Persons should highlight to the client that it is important to gather complete and accurate information so that the Regulated Person can recommend suitable Products or Services for the client. It is up to the Regulated Person to decide how they will inform their clients about the suitability assessment and such information can be provided in a standardised format. The format used should however enable a posteriori controls to check if the information was provided.

G.4.4.5 Regulated Persons should take steps to ensure that the client understands the notion of investment risk as well as the relationship between risk and return on investments. To enable the client's understanding of investment risk, Regulated Persons should consider using indicative, comprehensible examples of the levels of loss that may arise depending on the level of risk taken, and should assess the client's response to such scenarios. The client should be made aware that the purpose of such examples, and their responses to them, is to help determine the client's attitude to risk (their risk profile), and therefore the types of Products (and risks attached to them) that are suitable.

R.4.4.10 When providing Advice or Portfolio management services to a Client, the Regulated Person must first obtain the necessary information regarding the Client's:

- (a) knowledge and experience in the investment field relative to the specific type of the Product or Service;
- (b) financial situation including his ability to bear losses; and
- (c) investment objectives including risk tolerance;

so as to enable the Regulated Person to recommend to the Client, Products which are suitable for him and, in particular, are in accordance with his risk tolerance and ability to bear losses.

G.4.4.6 Before providing Advice, or, Portfolio Management, Regulated Persons will always need to collect 'necessary information' about the Client's knowledge and experience, financial situation and investment objectives. The extent of information collected may vary. In determining what information is "necessary" and relevant, Regulated person should consider:

- (a) *the type of the Product or transaction that the Regulated Person may recommend or enter into (including the complexity and level of risk);*
- (b) *the nature and extent of the Service that the Regulated Person may provide or which the client is requesting;*
- (c) *the nature, needs and circumstances of the Client*

G.4.4.7 The information regarding the objectives of the Client shall include, where relevant, information on:

- (a) *the length of time for which the Client wishes to hold the Product,*

(b) *his preferences regarding risk taking, his risk profile and*

(c) *the purposes for buying the Product.*

G.4.4.8 *The information regarding the knowledge and experience of the Client should include, where relevant, information in the investment field relevant to the specific type of Product or Service being offered to him/her by the Regulated Person including:*

(a) *the type of Service, or Product with which the Client is familiar;*

(b) *the nature, volume, frequency of the Client's transactions in the relevant Product and the period over which they have been carried out; and*

(c) *the level of education, profession or relevant former profession of the Client.*

G.4.4.9 *Regulated Persons should consider the knowledge and experience of a Client and properly discuss with the Client the nature of the assessment of the risk they are willing and able to take. This should enable the Regulated Persons to secure the Client's engagement and check understanding. Where a Regulated Person does not adequately communicate and check understanding of the level of risk a Client is agreeing to take, this can lead to unsuitable recommendations.*

G.4.4.10 *Information necessary to conduct a suitability assessment includes different elements which may impact, for example, the client's financial situation or investment objectives. When determining what information is necessary, Regulated Persons should keep in mind the impact that any change regarding that information could have concerning the suitability assessment.*

Information to be collected will also depend on the needs and circumstances of the Client. .

G.4.4.11 *The level of information gathered by a Regulated Person should be appropriate to the nature and complexity of the Product or Service being sought by the Client, but shall be to a level that allows the Regulated Person to provide a professional Service and include details (where applicable) of the Client's:*

(a) *Needs and objectives including, where relevant:*

i. the length of time for which the Client wishes to hold a Product or financial instrument or wishes to receive a Service,

- G.4.4.12 *While the extent of the information to be collected may vary, the standard for ensuring that a recommendation or an investment made on the Client's behalf is suitable for the Client will always remain the same. The principle of proportionality allows firms to collect the level of information proportionate to the Products and Services they offer, or on which the Client requests specific Advice or portfolio management services. It does not allow Regulated Persons to lower the level of protection due to clients.*
- G.4.4.13 *When providing access to complex or risky Products, Regulated Persons should carefully consider whether they need to collect more in-depth information about the Client than they would collect when less complex or less risky Products are at stake. This is so firms can assess the Client's capacity to understand, and financially bear, the risks associated with such Products.*
- G.4.4.14 *In the case of illiquid Financial Instruments, as part of the suitability assessments being carried out by Regulated Persons falling under point (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules, the 'necessary information' to be gathered will include information on the length of time for which the Client is prepared to hold the investment. As information about a Client's financial situation will always need to be collected, the extent of information to be collected may depend on the type of financial instruments to be recommended or entered into. For example, for illiquid or risky financial instruments, 'necessary information' to be collected may include all of the following elements as necessary to ensure whether the Client's financial situation allows him to invest or be invested in such instruments:*
- (a) the extent of the Client's regular income and total income, whether the income is earned on a permanent or temporary basis, and the source of this income (for example, from employment, retirement income, investment income, rental yields, etc);*
 - (b) the Client's assets, including liquid assets, investments and real property, which would include what financial investments, personal and investment property, pension funds and any cash deposits, etc. the client may have. The Regulated Person should, where relevant, also gather information about conditions, terms, access, loans, guarantees and other restrictions, if applicable, to the above assets that may exist;*
 - (c) the Client's regular financial commitments, which would include what financial commitments the client has made or is planning to make (Client's debits, total amount of indebtedness and other periodic commitments, etc)*

G.4.4.15 In determining the information to be collected, Regulated Persons falling under point (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules should also take into account the nature of the Service to be provided. This means that:

- (a) when advisory services are to be provided, Regulated Persons should collect sufficient information in order to be able to assess the ability of the Client to understand the risks and nature of each of the financial instruments that the firm envisages recommending to that Client;*
- (b) when portfolio management services are to be provided, as investment decisions are to be made by the Regulated Person on behalf of the client, the level of knowledge and experience needed by the Client with regard to all the Products that can potentially make up the portfolio may be less detailed than the level that the Client should have when an advisory service is to be provided. Nevertheless, even in such situations, the Client should at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of Product that can be included in the portfolio. Regulated Persons should gain a very clear understanding and knowledge of the investment profile of the client.*

R.4.4.11 The Regulated Person shall ensure that where it provides Advice recommending a package of Services or Products bundled together, the overall bundled package is suitable.

G.4.4.16 If a Regulated Person provides Advice to a Client about a Product which it presents as suitable for, or based on a consideration of the circumstances of, that Client, and that Advice is not in fact suitable for the Client, or is not based on a consideration of his circumstances, the Regulated Person may, depending on the circumstances of the particular case, be acting in contravention of the requirements to:

- i. act honestly, fairly and professionally in accordance with the best interests of the Client; and*
- ii. provide information to the Client that is fair, clear and not misleading.*

G.4.4.17 Poor outcomes in assessing the risk a Client is willing and able to take can occur if Regulated Persons, in particular:

- (a) fails to collect and account for all the information relevant to assessing the risk a Client is willing and able to take as part of suitability considerations, for example because they:*

- i. fail to assess a Client’s capacity for loss;*
 - ii. do not have a robust process to identify Clients that are best suited to placing their money in cash deposits because they are unwilling or unable to accept the risk of loss of capital;*
 - iii. use poor questions and answers to establish the risk a Client is willing and able to take;*
 - iv. inappropriately interpret the Client’s responses to questions (particularly where Regulated Persons rely on tools with sensitive scoring or attribute inappropriate weighting to answers); or*
- (b) use vague, unclear or misleading descriptions or illustrations to check the risk that a Client is willing and able to take.*

R.4.4.12 The Rules contained in R.4.4.13 to R.4.4.29 and the relative Guidance shall only apply to Regulated Persons falling under point (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules.

R.4.4.13 Where Advice is provided to a Professional Client, the Regulated Person shall be entitled to assume that in relation to the Products, transactions and services for which it is so classified, the Client has the necessary level of experience and knowledge and that the Client is able to financially bear any related investment risks consistent with the investment objectives of that Client.

G.4.4.18 *Although a Regulated Person would not be generally required to obtain information in the case of a Professional Client, such information should be obtained where the client’s investment objectives demand it. For example, where the Client is seeking to hedge a risk, the Regulated Person will need to have detailed information on that risk in order to be able to propose and effective hedging instrument.*

G.4.4.19 *Information to be collected will also depend on the needs and circumstances of the Client,. For example, a Regulated Person is likely to need more detailed information about the Client’s financial situation where the Client’s investment objectives are multiple and/or long term, than when the Client seeks a short-term secure investment.*

More in depth information would usually need to be collected for older and potential vulnerable clients asking for Advisory Services for the first time.

R.4.4.14 The responsibility to undertake the suitability assessment lies with the Regulated Person. When undertaking this, the Regulated Person shall inform Clients, clearly and simply, that the reason for assessing suitability is to enable the Regulated Person to act

in the Client's best interest. At no stage should Regulated Persons create any ambiguity or confusion about their own responsibilities in the process.

- G.4.4.20* *Regulated Persons should not state or give the impression that it is the client who decides on the suitability of the investment, or that it is the client who establishes which product fits his own risk profile.*
- R.4.4.15 The suitability assessment is not limited to recommendations to buy a Product. Every personal recommendation given to the Client, or decision whether to trade, should be suitable. This would include a recommendation to whether or not to buy, hold or sell an investment.
- R.4.4.16 Regulated persons shall have, and be able to demonstrate, adequate policies and procedures to ensure that they understand the essential facts about their clients and the nature, features, including costs and risks of Products selected for their Clients and that they assess, while taking into account cost and complexity, whether equivalent financial instruments could meet their Client's profile.
- R.4.4.17 The Regulated Person shall implement policies and procedures designed to ensure it only recommends Products, or makes investments on behalf of its clients, if the Regulated Person understands the characteristics of the Product involved.
- R.4.4.18 Where a Regulated Person offers or has access to a limited range of Products, or investment choices associated with Products, it should take reasonable care to establish and maintain appropriate systems and controls to ensure that if there is no Product in the Regulated Person's range of Products which meets the needs and objectives of the Client, no personal recommendation is made and no decision to trade on behalf of the Client is taken.
- R.4.4.19 When providing Advice and, portfolio management services that involve switching investments (either by selling a Product and buying another, or by exercising a right to make a change in regard to an existing instrument), a Regulated Person shall collect the necessary information on the Client's existing investments and the recommended new investments to undertake an analysis of the costs and benefits of the switch, such that the Regulated Person is reasonably able to demonstrate that the benefits of switching are greater than the costs.
- R.4.4.20 Where the Regulated Person has an ongoing relationship with the Client, the Regulated Person shall have, and be able to demonstrate appropriate procedures to maintain adequate and up-to date information about the Client to the extent necessary to fulfil the requirements of R.4.4.10 above.
- G.4.4.21* *When providing Advice on an ongoing basis or the ongoing service of portfolio management, Regulated Persons need to maintain adequate and updated information*

about the client in order to be able to perform the suitability assessment required. Regulated Persons will therefore have to adopt procedures defining:

- (a) what part of the information collected should be subject to updating and at which frequency;*
- (b) how the updating should be done and what action should be undertaken by the Regulated Person when additional or updated information is received or when the Client fails to provide the information requested.*

G.4.4.22 Frequency of updating might vary depending on, for example, Clients' risk profiles: based on the information collected about a Client under the suitability requirements, a firm will often determine the Client's risk profile, i.e. what type of Services or Products can in general be suitable for him taking into account his knowledge and experience, his financial situation and his investment objectives. A higher risk profile is likely to require more frequent updating than a lower risk profile. Certain events might also trigger an updating process; this could be so, for example, for clients reaching the age of retirement.

G.4.4.23 Updating may be carried out during periodic meetings with Clients or by sending an updating questionnaire to Clients. Relevant actions might include changing the Client's profile based on the updated information collected.

R.4.4.21 Regulated persons shall determine the extent of the information to be collected from Clients in the light of all the features of the Advice or portfolio management Services to be provided to those Clients.

R.4.4.22 Regulated Persons should take reasonable steps to ensure that the information collected about their Clients is reliable and up to date. This includes, but is not limited to:

- (a) ensuring that Clients are aware of the importance of providing accurate and up-to-date information;
- (b) undertaking valid and reliable assessments of their Client's knowledge and experience and risk as they are willing and able to take, including their ability to bear the investment risk;
- (c) ensuring all tools employed in the suitability assessment process appropriately designed for use with their Clients and are fit for purpose, with any limitations identified and actively mitigated through the suitability assessment process.

This includes, for example, any risk assessment profiling tools that may be used or tools to assess a Client's knowledge and experience;

- (d) ensuring questions used in the process are likely to be understood by Clients, capture an accurate reflection of the Client's views and needs, and the information necessary to undertake the suitability assessment; and
- (e) taking steps, as appropriate, to ensure the consistency of Client information. This includes, considering whether there are obvious inaccuracies in the information provided by Clients.
- (f) Ensuring that no undue reliance is made on any Clients' self assessment in relation to knowledge, experience and financial situation.

G.4.4.24 Although Clients are expected to provide correct, up-to-date and complete information necessary for the suitability assessment, Regulated Persons need to take reasonable steps to check the reliability of information collected about clients. Regulated Persons remain responsible for ensuring they have adequate information to conduct a suitability assessment. For example, Regulated Persons should consider whether there are any obvious inaccuracies in the information provided by their Clients. They will need to ensure that the questions they address to their Clients are likely to be understood correctly and that any other method used to collect information is designed in way to get the information required for a suitability assessment.

G.4.4.25 Where Regulated Persons rely on tools to be used by Clients as part of the suitability process (such as on-line questionnaires, or risk-profiling software), they should ensure that they have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results. Risk-profiling software could include some controls of coherence of the replies provided by Clients in order to highlight contradictions between different pieces of information collected.

G.4.4.26 Regulated Persons should also take reasonable steps to mitigate potential risks associated with the use of such tools. For example, potential risks may arise where Clients (on their own initiative or where encouraged by customer-facing staff) change their answers in order to get access to Products that may not be suitable for them.

G.4.4.27 In order to ensure the consistency of Client information, Regulated Persons should view the information collected as a whole. Regulated Persons should be alert to any relevant contradictions between different pieces of information collected, and contact the Client in order to resolve any material potential inconsistencies or inaccuracies. Examples of such contradictions are Clients who have little knowledge or experience and an aggressive attitude to risk, or who have a prudent risk profile and ambitious investment objectives.

- R.4.4.23 Where, when providing Advice or Portfolio Management, a Regulated Person does not obtain the information required under R.4.4.10, the Regulated Person shall refrain from providing the above mentioned services to the Client.
- R.4.4.24 As part of the process of identifying and recommending a Product to a Client, the Regulated Person shall assess whether an alternative Product, less complex and with lower costs, would better meet the Client's profile.
- R.4.4.25 Where a Client is a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person, in order to identify who should be subject to the suitability assessment, the Regulated Person should first rely on the applicable legal framework.
- R. 4.4.26 Where the applicable legal framework does not provide sufficient indications, and in particular where no sole representative has been appointed (as may be the case of a married couple), the Regulated Person, based on a policy it would have defined beforehand and that provides that the best interests of all the persons concerned and their need for protection are to be taken into consideration, should agree with the relevant persons (the representatives of the legal entity, the persons belonging to the group or the natural persons represented) as to who should be subject to the suitability assessment and how this assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives, should be collected (in any case the agreement shall ensure that the person carrying out transactions on behalf of the entity has the necessary level of knowledge and experience). The Regulated Person shall make a record of the agreement.
- R.4.4.27 Where a natural person is represented by another natural person is to be considered for the suitability assessment, the financial situation and the investment objectives should be those of the underlying Client (natural person who is being represented). The knowledge and experience should be that of the representative of the natural person or the person authorised to carry out transactions on behalf of the entity.
- G.4.4.28 *Regulated Persons should set a policy on who should be subject to the suitability assessment when dealing with a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person. The Regulated Person's policy should provide that the best interests of all the persons concerned and their need for protection are taken into consideration.*
- G.4.4.29 *Where there is no agreement and where the financial situations of the persons belonging to the group differ, the Regulated Person should consider the most relevant person in this respect (i.e. the person with the weakest financial situation). The same should be done when considering their investment objectives (i.e. the person with the most conservative*

investment objectives), or their experience and knowledge (i.e. the person authorised to carry out transactions with the least experience and knowledge).

G.4.4.30 In situations where two or more persons are authorised to carry out transactions on behalf of the group jointly (as may be the case for joint accounts), the client profile as defined by the Regulated Person should reflect the ability of the different relevant persons to take investment decisions, as well as the potential impact of such decisions on their individual financial situation and investment objectives

R.4.4.28 Where Advice or Portfolio Management Services are provided in whole or in part through an automated or semi-automated system, the responsibility to undertake the suitability assessment lies with the Regulated Person providing the Service and is in no way diminished owing to the use of an electronic system in making the personal recommendation or decision to trade. This includes Services where a Regulated Person executes an order, or transmits it to another Regulated Person for execution in response to pre-agreed signals such as a particular Client's decision to buy or sell); either without further intervention from the Regulated Person (amount to a form of portfolio management) or with the Client's agreement (amounting to a form of Advice).

R.4.4.29 In order to match Clients with suitable investments, Regulated Persons shall establish policies and procedures to ensure that they consistently take into account:

- (a) all available information about the Client that is likely to be relevant in assessing whether an investment is suitable, including the Client's current portfolio of investments (and asset allocation within that portfolio);
- (b) all material characteristics of the investments considered in the suitability assessment, including all relevant risks and any direct or indirect costs to the Client.

G.4.4.31 Regulated Persons that rely on tools in the suitability assessment process (such as model portfolios, asset allocation software or a risk-profiling tool for potential investments), should have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results

G.4.4.32 Such tools should be designed so that they take account of all the relevant specificities of each Client or Product. For example, tools that classify clients or Products broadly would not be fit for purpose.

G.4.4.33 *A Regulated Person should establish policies and procedures which enable it to ensure inter alia that:*

- (a) the Advice and portfolio management services provided to the Client take account of an appropriate degree of risk diversification;*
- (b) the Client has an adequate understanding of the relationship between risk and return, i.e. of the necessarily low remuneration of risk free assets, of the incidence of time horizon on this relationship and of the impact of costs on his investments;*
- (c) the financial situation of the Client can finance the investments and the Client can bear any possible losses resulting from the investments;*
- (d) any personal recommendation or transaction entered into in the course of providing an Advisory or portfolio management service, where an illiquid product is involved, takes into account the length of time for which the Client is prepared to hold the investment; and*
- (e) any conflicts of interest are prevented from adversely affecting the quality of the suitability assessment.*

Suitability Statement

R.4.4.30 A Regulated Person when providing Advice or Portfolio Management Services to a Client shall, before the transaction is made, provide the Client with a suitability statement.

Provided that in the case of in the case of Regulated Persons falling under point (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules, where the recommended Financial Instruments are likely to require the Client to seek a periodic review of their arrangements, this shall be brought to the Client's attention and included in the report. .

G.4.4.34 *The above Rule refers to cases where, for example, where a Client is likely to need to seek Advice to bring a portfolio of investments back in line with the original recommended allocation where there is a probability that the portfolio could deviate from the target asset allocation.*

Contents of the Suitability Statement

R.4.4.31 The suitability statement shall, as a minimum:

- (a) specify the Client's financial demands and needs;
- (b) provide an outline of the Advice given; and
- (c) explain why the Regulated Person has concluded that the recommended transaction is suitable for the Client, including how it meets the Client's objectives and personal circumstances with reference to the Product term required, Client's knowledge and experience and client's attitude to risk and capacity for loss ;.

The Rules in R.4.4.62 and R.4.4.63 shall not apply when the Regulated Person carries out distribution activity in the insurance of large risks, in the case of distribution by reinsurance intermediaries or reinsurance undertakings, or in relation to professional Clients.

G.4.4.35 *Suitability statements should be fair, clear and not misleading. They should serve their purpose, which is to explain to the Client how and why the Advice given meets the Client's needs and personal goals. In particular, in preparing a suitability statement, the Regulated Person should ensure that the suitability statement:*

- (a) *is tailored to the Client;*
- (b) *uses clear and plain language;*
- (c) *explains the reasons for all recommendations and how they relate to the Client's objectives;*
- (d) *highlights the risks associated with the recommendations;*
- (e) *explains the costs, charges and potential penalties attached to the recommendations;*
- (f) *provides a balanced view;*
- (g) *highlights if the Regulated Person has omitted any objectives, or has presented non-independent Advice;*

- (h) *highlights how the Client will be advantaged or disadvantaged by the Advice; and*
- (i) *where an existing plan has been cancelled, and a new one effected, is there evidence of comparisons on a like-to-like basis.*

G.4.4.36 *In preparing and issuing a suitability statement, the Regulated Person should also bear in mind that overly long reports may reduce a Client's ability to consider the recommendations being made. An alternative may be to attach appendices containing technical information.*

G.4.4.37 *A suitability statement should:*

- (a) *Contain a clear summary of a Client's objectives, needs, priorities and relevant existing investments, demonstrating the Regulated Person has taken account of these;*
- (b) *Use bold text to highlight key risks and changes associated with the recommendations.*
- (c) *Include the Client's own words taken from file notes, to add relevance to the recommendations;*
- (d) *Reference to Reports sent to the Client in advance of second meeting and fully discussed at the meeting.*
- (e) *Use bullet points instead of long sentences.*
- (f) *Be personalised so that it reflects the specific Client's needs identified in the fact finding exercise and why the Advice meets those needs. Generic objectives should not be used in suitability statements*

R.4.4.32 *In the case of suitability statements relating to Financial Instruments, the Regulated Person should establish appropriate safeguards in order to ensure that the Client does not incur a loss as a result an inaccurate or unfair presentation of the Personal Recommendation in the report presenting such Personal Recommendation. Such unfair or inaccurate presentation may relate, inter alia, to the manner in which the Personal Recommendation is indicated as suitable for the Client or to the disadvantages of the recommended course of action. .*

R.4.4.33 *In the case of suitability statements relating to Financial Instruments, where a Regulated Person provides a Service which involves periodic suitability assessments and reports, the subsequent reports after the initial Service is established would only need to cover any changes in the instrument(s) or Product(s) and / or the circumstances of the Client. It would not be necessary for these reports to repeat all the detail of the first report. A periodic report could simply refer back the original report to a varying degree depending*

on any changes, and could be shorter in cases where the ongoing assessment affirms the continued suitability of a previous recommendation or portfolio.

Record Keeping Obligations for Suitability Assessments

R.4.4.34 A Regulated Person is required to record all relevant information about the suitability assessment, such as information about the Client (including how that information is used and interpreted to define the Client's risk profile), and information about the Products recommended to the Client or purchased on the client's behalf. Those records should include:

- (a) any changes made by the Regulated Person regarding the suitability assessment, in particular any change to the Client's investment risk profile;
- (b) the types of Products that fit that profile and the rationale for such an assessment, as well as any changes and the reasons for them.

R.4.4.35 The Regulated Person shall at least:

- (a) ensure that record-keeping arrangements are designed to enable the detection of failures regarding the suitability assessment;
- (b) ensure that records kept are accessible for the relevant persons in the Regulated Person, and for the MFSA;
- (c) have adequate processes to mitigate any shortcomings or limitations of the record-keeping arrangements.

R.4.4.36 A Regulated Person shall retain any records relating to suitability for a minimum period of, five years, unless requested by the Authority to retain such records for longer periods.

G. 4.4.38 *The Regulated Person should retain copies of:*

- (a) *all fact finds and any other documentation which has been used to arrive at the personal recommendation made to the Client;*
- (b) *all suitability statements provided to Clients in terms of these Rules.*
- (c) *Any written Advice given to Clients; and*

(d) *Clients' Agreements*

G.4.4.39 *Record-keeping arrangements adopted by Regulated Persons should be designed to enable them to track ex-post why an investment was made or why a Product was purchased. This could be important in the event of a dispute between a client and the Regulated Person. It is also important for control purposes - for example, any failures in record-keeping may hamper the MFSA's assessment of the quality of a Regulated Person's suitability process, and may weaken the ability of management information to identify risks of mis-selling.*

Appropriateness

R. 4.4.37 When providing the service other than Advice or, in the case of Regulated Persons falling under points (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules, portfolio management, a Regulated Person shall ask the Client to provide information regarding his knowledge and experience in the field relevant to the specific type of product or service offered or demanded so as to enable the Regulated Person to assess whether the Service or Product envisaged is appropriate for the Client.

Assessment of Appropriateness

R.4.4.38 When assessing appropriateness, a Regulated Person shall determine whether the Client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded.

R.4.4.39 In case the Regulated Person considers, on the basis of the information received under R.4.4.37, that the Product or Service is not appropriate to the Client, the Regulated Person shall warn the Client. This warning may be provided in a standardised format .

R.4.4.40 In cases where the Client elects not to provide the information referred to under R.4.4.37, or where he provides insufficient information, the Regulated Person shall warn the Client that such a decision will not allow the Regulated Person to determine whether the Service or Product envisaged is appropriate for him. This warning may be provided in a standardised format.

R.4.4.41 The warnings referred to in R.4.4.39 and R.4.4.40 above shall only be provided to the client once a determination has been made by the Regulated Person either that the Product in question is not appropriate for the client or that the Client has not provided sufficient information to enable the Regulated Person to determine whether such Product is appropriate for the Client or otherwise.

G.4.4.40 *Although the warnings may be given in standardised format, they should not form an integral part of the document which the Regulated Person uses to test the Product's appropriateness vis a vis the client. They should be in separate documents which should only be provided to the Client in the circumstances envisaged by the above Rules.*

R.4.4.42 With respect to Professional Clients, the Regulated Person shall assume that such Clients have the necessary experience and knowledge in order to understand the risks involved in relation to those particular Services Products, for which such Clients are classified as Professional Clients.

R.4.4.43 The Regulated Person shall ensure that where a bundle of Services or Products is envisaged for the Client, the assessment shall consider whether the overall bundled package is appropriate.

Exemption from the Appropriateness Assessment

R.4.4.44 Regulated Persons falling under point (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules, providing Services consisting of execution or reception and transmission of Client orders with or without Ancillary Services, excluding the granting of credits or loans that do not comprise of existing credit limits of loans, current accounts and overdraft facilities of Clients; may provide those Services to their Clients without the need to obtain the information or make the determination provided for in R.4.4.37 and R.4.4.38 above where all the following conditions are met:

- (a) the Services or activities provided relate to any of the following:
 - i. shares admitted to trading on a regulated market or on an equivalent third-country market or on a Multilateral Trading Facility , where those are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative;
 - ii. bonds or other forms of securitised debt admitted to trading on a regulated market or on an equivalent third country market or on a Multilateral Trading Facility, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved;
 - iii. money-market instruments, excluding those that embed a derivative or incorporate a structure which makes it difficult for the Client to understand the risk involved;

- iv. shares or units in UCITS, excluding structured UCITS as referred to in the second subparagraph of Article 36(1) or Regulation (EU) No 583/2010 (UCITS Implementing Regulation);
- v. structured deposits, excluding those that incorporate a structure which makes it difficult for the Client to understand the risk of return or the cost of exiting the Product before term;
- vi. other non-complex Financial Instruments for the purposes of this Rule.

- (b) the Service is provided at the initiative of the Client;
- (c) the Client has been clearly informed that in the provision of that Service, the Regulated Person is not required to assess the appropriateness of the financial instrument or Service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules. Such a warning may be provided in a standardised format;
- (d) the Regulated Person complies with its obligations concerning conflicts of interest.

R.4.4.45 Regulated Persons falling under points (iii) and (iv) of the definition of Regulated Person in the Glossary to these Rules providing services other than Advice may provide such services to their Clients without the need to obtain the information or make the determination provided for in R.4.4.37 and R.4.4.38 where:

- (a) such services are offered in relation to :
 - i. contracts which only provide investment exposure to the financial instruments deemed non-complex in terms of R.4.4.44(a) and R.4.4.50 and do not incorporate a structure which makes it difficult for the Client to understand the risks involved; or
 - ii. other non-complex insurance-based investment products for the purpose of this Rule.
- (b) The conditions in paragraphs (b) to (d) referred to in R.4.4.44 are satisfied.

Complex Products

- R.4.4.46 Products not referred to in R.4.4.44 above and which do not meet the specific requirements of any of the criteria in R.4.4.50 should be considered to be complex.
- R.4.4.47 The Financial Instruments indicated in Appendix 3 to this Chapter constitute a non-exhaustive list of Financial Instruments which should be considered to be complex.
- R.4.4.48 The Financial Instruments indicated in points (i), (ii), (iii), (v), (vii), (viii), (ix), (xi), (xii), (xiii), (xv) and (xvi) in Appendix 3 to these Rules may only be sold to Retail Clients on an advisory basis, that is, after the satisfactory conclusion of a suitability assessment in terms of this Rulebook.
- R.4.4.49 Financial Instruments referred to in R.4.4.44(a) points (i) to (v) which do not satisfy the criteria indicated therein shall be considered complex and therefore cannot be assessed against the criteria for the assessment of other non-complex Financial Instruments in accordance with R.4.4.50.

Non-Complex Instruments

- R.4.4.50 A financial instrument which is not specified in points (i) to (v) of R.4.4.44(a) shall be considered as non-complex if it satisfies the following criteria:
- (a) It is not a derivative or other security giving the right to acquire or sell a transferable security or giving rise to a cash settlement determined by reference to transferable securities currencies, interest rates or yields, commodities or other indices or measures;
 - (b) there are frequent opportunities to dispose of, redeem, or otherwise realize that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
 - (c) it does not involve any actual or potential liability for the Client that exceeds the cost of acquiring the instrument;
 - (d) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average Retail Client to

- make an informed judgment as to whether to enter into a transaction in that instrument.
- (e) It does not incorporate a clause, condition or trigger that could fundamentally alter the nature or risk of the investment or pay out profile. This would include, investments that incorporate a right to convert the instrument into a different investment;
 - (f) It does not include any explicit charges that have the effect of making the investment illiquid even though technically frequent opportunities to dispose or redeem it would be possible.

Provision of Services ‘At the initiative of the Client’

The following Guidance shall apply to Regulated Persons falling under points (i) or (ii) of the definition of Regulated Person in the Glossary to these Rules.

G.4.4.41 A Service should be considered to be provided at the initiative of a Client unless the Client demands it in response to a personalised communication from or on behalf of the Regulated Person to that particular client, which contains an invitation or is intended to influence the client in respect of a specific Product or transaction. A Service can be considered to be provided at the initiative of the Client notwithstanding that the Client demands it on the basis of any communication containing a promotion or offer of Products made by any means that by its very nature is general and addressed to the public or a larger group or category of Clients.

G.4.4.42 There are two tests as to when a transaction may be considered to be at the initiative of the Client. At least one of these tests needs to be satisfied for the Regulated Person to consider a Client to be requesting a Service on his/her own initiative.

The two Tests:

Test A: *A Service may be considered to be provided at the initiative of the Client if it is demanded by the Client on the basis of any communication containing a promotion or offer of insurance-based investment Products, financial instruments made by any means that by its very nature is general and addressed to the public or larger group or category of Clients.*

Thus, this test depends on an evaluation of the MEDIUM of communication.

What is a means of communication that by ITS VERY NATURE is general and addressed to the public or larger group or category of Clients?

The test, here, is whether the medium of communication allows a wide audience. The following are examples of such means of communications which allow a wide audience:

- (a) Billboards*
- (b) Newspaper Adverts*
- (c) General Website (i.e. websites not requiring a Client password for access).*

*The following means of communications are excluded: letters, emails, text messages and telephone calls. These means of communications should only be subject to **Test B** below since **OF THEIR VERY NATURE**, they are not general and addressed to the public or larger group or category of Clients.*

Test B: *A Service is **NOT** provided at the initiative of the client (and therefore an appropriateness test is required) if the Client demands it in response to a communication **WHICH IS** a personalized communication **AND WHICH** contains an invitation or is intended to influence the Client in respect of a specific insurance-based investment Product, financial instrument or specific transaction.*

NB: *This test has two limbs which shall **BOTH** be satisfied for a transaction **NOT** to be considered to be requested at the initiative of the Client.*

*Thus, in order to consider a Service to be provided “at the initiative of the Client”, the Regulated Person shall show **EITHER** that:*

- (a) the communication was **NOT** personalized **OR THAT**;*
- (b) such communication neither did contain an invitation, nor was it intended to influence the Client in respect of a specific insurance-based investment Product or financial Instrument.*

G.4.4.43 *The key determinant as to what constitutes a “personalized communication ” should be the **likely perception of the Client upon receiving the communication** rather than the process that the Regulated Person has followed in deciding to make the communication to the Client. This means that:*

- (a) The evaluation should depend on the **CONTENT** of the communication. (a mass communication could still give the impression that it is a personalized communication).*

- (b) *The fact alone that the communication has been addressed to the recipient for the purposes of transmission does not make it a personalized communication*
- (c) *If the **CONTENT** of the communication **GIVES THE IMPRESSION THAT IT IS NOT PERSONALIZED**, it should not matter that the firm has only sent it to a particular group of Clients (rather than to all its Clients base).*

G.4.4.44 *The following guiding questions may be considered in this context:*

- (a) *Does the communication refer to the Client’s personal circumstances (e.g. the Product is indicated as suitable for the Client to whom it is being addressed given his/ her capital growth objective)? This would personalize the communication.*
- (b) *Does the communication include details of the Client’s existing holdings? This would personalize the communication.*
- (c) *Does the communication refer to characteristics of a target market/Client base in general (e.g, a letter with the heading “are you approaching the age of retirement”?) This is less likely to make the communication personalized.*
- (d) *Is the content of the communication changed for each potential Client? If so, this is likely to make the communication personalized.*
- (e) *If it is a personalized communication, does it contain an invitation or is it intended to influence a Client with reference to a specific insurance-based investment Product, financial instrument or transaction? A communication which is personalized but does not contain an invitation or is not intended to try and influence a Client about a specific Product, transaction or instrument, could still render any subsequent requests from the Client to be deemed to have been made ‘at the initiative of the Client’.*

G.4.4.45 *When does a communication deemed to contain an “invitation” or to be intended to “influence the Client with reference to a specific insurance-based investment Product, financial instrument or transaction”?*

An invitation may be defined as a “spoken or written request for someone’s presence or participation”.

- (a) *Application Forms*

An application form for the purchase of an instrument may be considered by the person receiving it as an invitation to actually purchase such instrument.

(b) Buy/Sell Recommendations.

The inclusion of buy/sell recommendations with mailshots / emails, irrespective of whether such recommendations are of a general nature or not should be considered as intended to influence the Client with respect to a particular Product, instrument or transaction.

G.4.4.46 *Regulated Persons should be guided by the following:*

- (a) Mailshots, emails, text messages and telephone calls should only be subject to Test B since they fall out of the scope of Test A.*
- (b) The nature of a communication could be affected by how its contents are phrased.*
- (c) “Generic” marketing material (e.g. a flyer) may still be deemed to be part of a personalized communication if accompanied by a covering letter which clearly refers to the recipient’s circumstances.*
- (d) The filtering of a mailing list (such that a communication is only sent to a portion of the Regulated Person’s Clients), does not automatically make the communication personalized if this is not apparent to the recipient from the content of the communication.*
- (e) The inclusion of an application form and/or a general buy/sell recommendation with a mailshot or a flyer may be considered as an invitation to the Client to carry out a particular transaction with respect to a particular Product or instrument. Moreover, the sending of such an application form with a mailshot may also be considered as influencing the Client’s decision with respect to a particular transaction. However, whether a transaction on the basis of such communication would be considered to be at the initiative of the Client would depend on whether it is obvious from the content of the mailshot that this has been personalized.*
- (f) A Client’s use of an e-brokerage facility to conclude a transaction would normally fulfil the condition that there should be no personal communication.*

- (g) *Where there is a clear personal contact between the Client and a representative of the Regulated Person, it would be difficult to argue that the Service is provided at the initiative of the Client, especially when there is a previous approach (albeit for other Products) by the representative. However, this does not mean that in every case the representative will be providing a non-execution only Service. There may well be cases where there is a continuous Regulated Person-Client relationship, but the Service would still be at the initiative of the Client. If the representative can prove that although the Client was personally approached for another Product, the Client finally bought another Product without any intervention on the part of the representative, the Service could be considered as provided ‘at the initiative of the Client’.*
- (h) *The matrix in Appendix 1 to this Chapter aims to apply the above two tests to certain practices resorted to by Regulated Persons when communicating with Clients, with a view to providing guidance as to when such communications result in the provision of Services “at the initiative of the Client.”*

Record Keeping Obligations for Appropriateness Assessments

- R.4.4.51 A Regulated Person shall maintain records of appropriateness assessments which it has undertaken. These records shall include:
- (a) the result of the appropriateness assessment;
 - (b) any warning given to the Client where the Services or Product purchased was assessment as potentially inappropriate for the Client, whether the Client asked to proceed with the purchase despite the warning and, if applicable, whether the Regulated Person accepted the Client’s request to proceed with the purchase after advising him of the consequences of such a decision; and
 - (c) any warning given to the Client where the latter did not provide sufficient information to enable the Regulated Person to undertake an appropriateness assessment, whether the Client asked to proceed with the purchase despite this warning and if applicable, whether the Regulated Person accepted the Client’s decision to proceed with the purchase after advising the Client of the consequences of such a decision.

The records indicated in (b) and (c) above shall be countersigned by the Client concerned.

Provisions Common to the Assessment of Suitability and Appropriateness

- R.4.4.52 A Regulated Person shall not encourage a Client not to provide information required for the purposes R.4.4.10 or R.4.4.37.
- R.4.4.53 A Regulated Person shall be entitled to rely on the information provided by its Clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.
- R.4.4.54 Where a Regulated Person provides a Service to a Professional Client, it shall be entitled to assume that, in relation to the Products, transactions and Services for which it is so classified, the Client has the necessary level of experience and knowledge for the purposes of R.4.4.10(a) or R.4.4.37.
- G.4.4.47 A Regulated Person shall gather and maintain a record of details of any material changes to a Client's circumstances prior to offering, recommending, arranging or providing a subsequent Product or Service to the Client. Where there is no material change, this shall be noted on a Client's records.*
- R.4.4.55 In cases where a Regulated Person a person falling under points (i) and (ii) of the definition of 'Regulated Person' in the Glossary to these Rules which is offering a Service as part of a Product which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of Clients and/or information requirements, this Service shall not be additionally subject to the obligations set out in this Chapter.

Suitability and Appropriateness Assessment Tools/Questionnaires

- R.4.4.56 A Regulated Person assessing a Client's knowledge and experience with respect to a Product, shall ensure that::
- (a) The Client understands the particular features of the product, especially in the case of complex products. This should entail clear answers from specific questions presented to the Client about the Product features in order to confirm that the Client is effectively aware of the features and risks of the Product in question;
 - (b) The paperwork used for the testing of knowledge and experience should clearly indicate the Service being provided to the Client and in the context of which the test is being carried out. Where an assessment of a Client's knowledge and

experience is carried out in the context of a service other than Advice and/or portfolio management, the Regulated Person shall undertake and declare that in providing these Services it has not provided personal recommendations to the client vis-à-vis the Product under consideration. This document should be signed by both the client and the Licence Holder.

- (c) In the case of Retail Clients, Regulated Persons shall provide the documentation used to assess the appropriateness or suitability of a product or instrument also in Maltese if the client so requests.

G.4.4.48 A 'tick-box' approach should not be used either to collect Client information or to assess suitability or appropriateness. Suitability and Appropriateness is not about collecting irrelevant information but such information as is necessary to achieve the intended outcome, which, in the case of the provision of Advice, is a suitable recommendation.

G.4.4.49 When using questionnaires to obtain information from Clients, the Regulated Person should not use questions that are not clearly worded, or where the content is unlikely to be understood, since these can result in a Client not giving answers that accurately reflect the risk they are willing and able to take.

G.4.4.50 The possibility of Clients misunderstanding the questions they are being asked could be exacerbated if the questions:

- (a) are vague, use double negatives or complex language that the Client may not understand;*
- (b) are not suitable for use with the Regulated Person's Client base, for example because they assume the Client has particular knowledge or experience such as a good level of financial knowledge or mathematical ability, and that the Client is comfortable in applying it; or*
- (c) are structured in a way that could invite different answers - for example, because they ask two questions in one and the Client might want to record a different answer to each sub-question.*

G.4.4.51 The number of questions Regulated Persons ask their Clients can vary significantly. The fewer the questions – coupled with a possibility of misinterpreting an answer – the greater the probability is of making an inaccurate assessment.

G.4.4.52 The resulting risk category may be effectively determined by the answer to one question. Where such sensitivity is built into a Regulated Person's approach, the Regulated Person needs to be aware of the reliance being placed on each answer and the risks associated

with doing so. The Regulated Person should take particular care to ensure that a Client understands each question and that the answers they give are an accurate reflection of their views.

G.4.4.53 Some questionnaires may invite a Client to select the option with which they most agree with. Options that are vague could be interpreted by Clients and Regulated Persons in different ways leading to poor outcomes.

G.4.4.54 A Regulated Person should not use a set of questions where a number of the questions asked have the option to answer 'neither yes or no' because a middle weighting may be attributed to these answers, and a Client that chooses this answer for all or some of these questions, could be assessed as having a risk profile in the middle of the scale of risk categories. This could result in an inaccurate assessment of the risk the Client is willing to take where the Client's answer reflects a 'non-answer' rather than a willingness to take the level of risk attributed.

G.4.4.55 Part of the skill of an adviser or discretionary manager is considering and evaluating different pieces of information to form a recommendation for the Client. It involves weighing up the advantages and disadvantages of alternative solutions by making trade-off decisions that best meet a Client's investment objectives and reflect their financial situation.

G.4.4.56 By bundling information on different factors together, the value of each distinct piece of information is potentially lost because arbitrary weightings are applied to different factors which may negate a preference or need. This can result in output that does not accurately reflect the trade-off decisions that a Client is willing or able to take. If such an approach is used, the tool, or wider suitability assessment process, needs to be capable of accounting adequately for each of the different pieces of information.

G.4.4.57 In other words, a Regulated Person needs to be able to demonstrate how any recommendation or transaction is suitable for a particular Client given each of the constituent parts of the suitability assessment.

G.4.4.58 Establishing risk categories with relatively broad definitions supported by brief sub-sections within each definition that in combination aided understanding. This may include:

- (a) a short summary description that is fair and balanced;*
- (b) bullet points that provide more detail of the risk of capital loss and the nature of typical investments in each category; and*

- (c) *a simple chart showing the 'shape' and variability of annual returns over a period that helps the Client to understand that they need to be comfortable to accept the gains and losses associated with a particular level of risk.*

(The above is considered as a good practice because it attempts to explain the risk in a number of different ways. It may include text and a visual representation, different elements of which might engage different Clients. The chart may include hypothetical returns illustrative of the level of risk described.

Part B: Rules Applicable to the Rules and relative Guidance set out under Part B shall apply to persons falling under point (i) or (ii) of the definition of Regulated Persons in the definition of 'Regulated Persons' in the Glossary to these Rules.

R.4.4.57 For the purposes of this Part, the term "Regulated Person" shall mean a person falling under point (i) or (ii) of the definition of Regulated Persons in the definition of 'Regulated Persons' in the Glossary to these Rules, other than UCITS Management Companies.

Provision of investment Services through the medium of another Regulated Person falling under point (i) of the definition of Regulated Person in the Glossary to these Rules or of another European Investment firm

R.4.4.58 An Regulated Person receiving an instruction to perform Services on behalf of a Client through the medium of another Regulated Person or European investment firm to rely on Client information transmitted by the latter Regulated Person or European Investment Firm. The Regulated Person or the European Investment Firm which . which mediates the instructions will remain responsible for the completeness and accuracy of the information transmitted.

G.4.4.59 *Conditions which apply for the reliance on others provisions to apply:*

- (a) *the third party shall provide the Regulated Person with an instruction to perform investment or Ancillary Services;*
- (b) *the third party shall be a Regulated Person or a European Investment Firm ;*
- (c) *the third party who provides the instructions shall be some-body other than the Regulated Person's Client.*

R.4.4.59 A Regulated Person which receives an instruction to undertake Services on behalf of a Client through the medium of another Regulated Person or European Investment firm, shall also be able to rely on any recommendations in respect of the Service or transaction that have been provided to the Client by such other Regulated Person or European Investment Firms. Where the Regulated Person mediates the instructions, it will remain responsible for the appropriateness for the Client of the recommendations or Advice provided.

R.4.4.60 A Regulated Person which receives Client instructions or orders through the medium of another Regulated Person or European investment firm shall remain responsible for concluding the Service or transaction, based on any such information or recommendations.

Part C: **Rules applicable Regulated Persons falling under point (iii) and (iv) of the definition of Regulated Person in the Glossary to these Rules.**

R.4.4.61 For the purposes of this Part, the term ‘Regulated Person’ shall mean a person falling under points (iii) and part (iv) of the definition of Regulated Person in the Glossary to these Rules.

R. 4.4.62 Prior to the conclusion of an insurance contract, the Regulated Person shall specify, on the basis of information obtained from the Client, the demands and the needs of that Client and shall provide the Client with objective information about the Product in a comprehensible form to allow that customer to make an informed decision. Any contract proposed shall be consistent with the Client’s insurance demands and needs.

R. 4.4.63 Where Advice is provided prior to the conclusion of any specific contract, the Regulated Person shall provide the Client with a Personalised Recommendation explaining why a particular Product would best meet the Client’s demands and needs.

R.4.4.64 The details referred to in R.4.4.62 and R.4.4.63 shall be modulated according to the complexity of the insurance Product being proposed and the type of Client.

Section 5: CONTRACTUAL ARRANGEMENTS WITH CLIENTS

Application

- R.4.5.1 The Rules and the relative Guidance set out under Part A are applicable to all Regulated Persons.
- R.4.5.2 The Rules and the relative Guidance set out under Part B are applicable to persons falling under point (i), (ii) and (v) of the definition of Regulated Person in the Glossary to these Rules.
- R.4.5.3 The Rules and the relative Guidance set out under Part C are applicable to persons falling under point (iii) of the definition of “Regulated Person” in the Glossary to these Rules.
- R.4.5.4 The provisions of this Section are without prejudice to any rights which may be available to professional and retail clients under the Consumer Affairs Act.

Part A: General Rules

- R.4.5.5 For the purposes of this Part the term “Regulated Person” shall refer to all Regulated Persons as defined in the Glossary to these Rules, except as otherwise indicated.
- R.4.5.6 A Regulated Person shall ensure that the terms of any contract or agreement entered into with a retail or professional Client for the provision of a Service or Product, are fair, clear and not misleading.
- R.4.5.7 A Regulated Person shall establish a record that includes the document or documents agreed between the Regulated Person and the Client that set out the essential rights and obligations of the parties, and the other terms on which the Regulated Person will provide services to the Client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.
- R.4.5.8 The Regulated Person shall not, in any communication or agreement with a Client (except where permitted by applicable legislation), exclude or restrict, or seek to exclude or restrict:
- (a) any legal liability or duty of care to a Client which it has under applicable law or under these Rules;

- (b) any other duty to act with skill, care and diligence which is owed to a Client in connection with the provision to that Client of a Product or Service; or
- (c) any liability owed to a Client for failure to exercise the degree of skill, care and diligence that may reasonably be expected of it in the provision of a Product or Service.

Part B: Rules Applicable to persons falling under point (i), (ii) and (v) of the definition of Regulated Person in the Glossary to these Rules

R.4.5.9 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (i), (ii) and (v) of the definition of Regulated Person in the Glossary to these Rules;

R.4.5.10 The “essential rights and obligations” of the parties should be set out in a written agreement which shall include the following:

- (a) a description of the Services, and where relevant the nature and extent of any Advice services to be provided;
- (b) in case of portfolio management services, the types of Products that may be purchased and sold and the types of transactions that may be undertaken on behalf of the Client, as well as any Products or transactions prohibited; and
- (c) a description of the main features of any of the Services to be provided relating to safekeeping and administration of Financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier, including where applicable the role of the Regulated Person with respect to corporate actions relating to Client Financial instruments and the terms on which securities financing transactions involving Client securities will generate a return for the Client.

Provided that in relation to Professional Clients, the provisions of this Rule shall apply to Regulated Persons who offer the services referred to in this Rule.

Provided further that in the case of a Regulated Person providing Advice, such Regulated Person shall be required to comply with this Rule only where a periodic assessment of the suitability of the Financial Instruments or Service recommended is provided by the Regulated Person.

Part C: **Rules Applicable to persons falling under point (iii) of the definition of Regulated Person in the Glossary to these Rules**

- R.4.5.11 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (iii) of the definition of Regulated Person in the Glossary to these Rules.
- R.4.5.12 A Regulated Person entering into a Contract of insurance shall ensure that such contract is made in a durable medium.
- R.4.5.13 A Regulated Person entering into a Contract of Life insurance shall ensure that it complies with the requirements set out in Title XI A of the Civil Code (Chapter 16 of the Laws of Malta) in relation to Life Insurance Contracts, in addition to any other applicable legislation and rules and regulations issued thereunder.

Section 6: COMPLAINT HANDLING BY REGULATED PERSONS

Application

- R.4.6.1 The Rules and the relative Guidance set out under Part A are applicable to all Regulated Persons.

Complaints Management Policy

- R.4.6.2 Regulated Persons shall ensure that a complaints management policy is put in place and set out in a written document. This policy shall be defined and endorsed by the Regulated Person's senior management, who shall also be responsible for its implementation and for monitoring compliance with it.

The complaints management policy shall be made available to all relevant staff of the Licence Holder through an adequate internal channel.

Complaints Management Function

- R.4.6.3 Regulated Persons shall have in place a complaints management function which enables them to investigate complaints fairly and to identify or mitigate any possible conflicts of interest.

Registration of Complaints

- R.4.6.4 Regulated Persons shall maintain a register in which every complaint and the action taken in its regard is recorded. The MFSA may at any time require the register to be produced for its review.

G.4.6.1 Regulated Persons are recommended to include in such register, for each complaint, the date on which it was received and the date on which it was resolved.

Reporting

- R.4.6.5 Regulated Persons shall provide information on complaints and complaints handling to the MFSA or to the Arbiter for Financial Services as and when required. This data shall cover the number of complaints received, differentiated as appropriate or as indicated

in any criteria that the MFSA or the Arbiter for Financial Services may from time to time establish.

R.4.6.6 Registered Persons shall analyse complaints-handling data on an on-going basis in order to ensure that they identify and address any recurring or systemic problems and any potential legal and operational risks.

Internal Follow-up of Complaints

G. 4.6.2 *Regulated Persons may carry out the above analysis by, inter alia:*

- (a) analysing the causes of individual complaints so as to identify root causes common to types of complaint;*
- (b) considering whether such root causes may also affect other processes or products, including those not directly complained of; and*
- (c) correcting, where reasonable to do so, such root causes.*

Provision of Information

R. 4.6.7 Regulated Persons shall:

- (a) on request or when acknowledging receipt of a complaint, provide written information regarding their complaints handling process;
- (b) publish details of their complaints handling process in an easily accessible manner
- (c) provide clear, accurate and up-to-date information about the complaints-handling process including:
 - i. details of how to make a complaint and
 - ii. the process that will be followed when handling a complaint
- (d) keep the complainant informed about further handling of the complaint.

G.4.6.3 *For the purposes of paragraph (b) in the above Rule, Regulated Persons should publish details of their complaints handling process in brochures, pamphlets, contractual documents or via the Regulated Person’s website.*

For the purposes of paragraph (c)(i), in the above Rule, Regulated Persons should include the type of information to be provided by the complainant and the identity and contact details of the person or department to whom this complaint should be directed.

For the purposes of paragraph (c)(ii), in the above Rule, Regulated Persons should provide information on when the complaint will be acknowledged, an indication of handling timelines, and the availability of the Consumer Complaints Unit within the MFSA and of alternative dispute resolution mechanisms in the case that a dispute remains unresolved.

Procedure for Responding to Complaints

R.4.6.8 Regulated Persons shall ensure that the following procedures are followed:

- (a) The Regulated Person shall, in writing, acknowledge receipt of any complaint within seven days of such receipt and shall also provide confirmation of the following:
 - i. the Regulated Person shall investigate the complaint;
 - ii. the Regulated Person shall, on completion of the investigation and without unnecessary delay, write to the complainant concerning the outcome of the investigation and describing its proposed course of action; and
 - iii. if the investigation is not completed within two months of receipt of the complaint, the Regulated Person shall inform the complainant of such fact within seven business days from the end of that period.
- (b) where a complaint is made orally, the Regulated Person shall make a summary of the complaint and request the complainant to confirm in writing the said summary;
- (c) the Regulated Person shall seek to gather and investigate all relevant evidence and information regarding the complaint;

- (d) where the investigation of a complaint is not completed within two months from receipt of the complaint, the Regulated Person shall, in the communication referred to in point (iii) of point (a) above:
 - i. inform the complainant about the causes of the delay;
 - ii. provide an indication as to when the investigation is likely to be completed; and
 - iii. inform the complainant that, if the complainant is not satisfied with the progress of the investigation, the matter may be referred by him to the Arbiter for Financial Services;

- (e) when providing a final decision that does not fully satisfy the complainant's demand, the Regulated Person shall provide a thorough explanation of the Regulated Person's position on the complaint and set out the complainant's option to maintain the complaint. Such decision should be provided in writing.

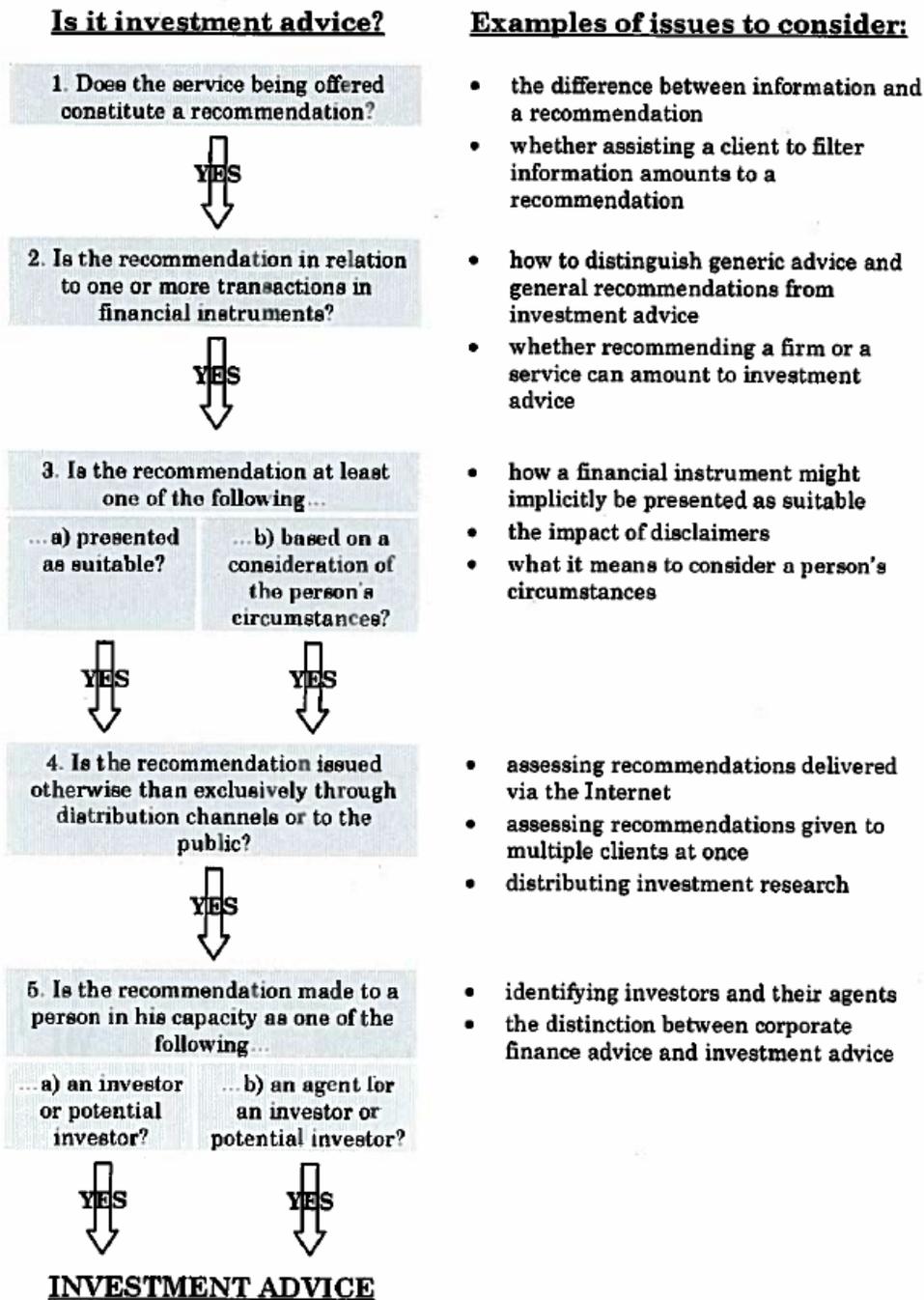
Appendix 1

It is important to note that in referring to this matrix and seeking to apply it in practice, Regulated Persons should take into account the particular circumstances of the scenario they are faced with in light of contents of this Guidance Note. The matrix should only serve as a rough guide and does not remove the need for Regulated Persons to exercise their own judgment.

Subsequent service/transaction at Initiative of the Client	Regulated Person sends envelope/ email addressed to Client including covering letter drawing recipients’ attention to enclosures/attachments which are a product leaflet and relevant application form and a general buy/sell recommendation.	Regulated Person sends envelope/email to Client containing/attaching a product leaflet and/or relevant application form and/or general recommendation (without covering letter)	Regulated Person sends a text message to a small number of selected Clients, referring to their existing investments and inviting them to consider products or instruments offered by the Regulated Person	Regulated Person sends mailshot to all or some of its existing Clients, referring to their particular circumstances, e.g. “Dear Mr. Borg, as you are reaching retirement, we have products which may suit your needs...”	Regulated Person distributes a communication advertising a particular product or its services. (e.g. flyer in newspaper or magazine)	Regulated Person issues advertorial in the newspaper advertising its services and referring to a general buy/sell recommendation with respect to a particular product/instrument	Regulated Person simply forwards primary issues application forms to Clients
TEST A:							
Is means of communication OF ITS VERY NATURE general (and hence excludes a personal communication)?	No	No	No	No	Yes	Yes	No
TEST B:							
Personalised Communication	No*	No	Yes	Yes	No	No	No
Contains an Invitation or is Intended to influence the Client	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Analysis	Transaction at initiative of Client	Transaction at initiative of Client	Transaction NOT at initiative of Client	Transaction NOT at Initiative of Client	Transaction at Initiative of Client	Transaction at Initiative of Client	Transaction at Initiative of Client

* Provided the covering letter includes a **prominent disclaimer** to the effect that it is a standard letter which has been sent to various clients and that it should not be construed by the recipient as a personal communication since it has not been tailored to suit the particular circumstances of the recipient.

Appendix 2: The Five Key Tests For Investment Advice.



Appendix 3

<u>Category of Instrument</u>	<u>Non-Exhaustive List of Complex Products</u>
<p>Debt instruments embedding a derivative meaning a component of a debt instrument that causes some or all of the cash flows that otherwise would result from the instrument to be modified according to one or more defined variables</p>	<ul style="list-style-type: none"> i. Convertible and exchangeable bonds ii. Indexed bonds and turbo certificates iii. Contingent convertible bonds iv. Callable or puttable bonds v. Credit-linked notes vi. Warrants
<p>Debt instruments incorporating a structure making it difficult for the Client to understand the risk</p>	<ul style="list-style-type: none"> vii. Debt instruments the return of which is dependent on the performance of a defined asset pool This category includes debt instruments the return or performance of which depends on the receivables either fixed or revolving generated by the assets in the underlying pool. <i>Examples: asset-backed securities and asset-backed commercial papers, Residential Mortgage Backed Securities (RMBS), Commercial Mortgage Backed Securities (CMBS), Collateralised Debt Obligations (CDOs).</i> viii. Debt instruments the return of which is subordinated to the reimbursement of debt held by others This category includes debt instruments structured in such a way that in the event of default by the issuer, the senior debt holders have priority access to the assets of the issuer over the subordinated holders. <i>Examples:</i>

	<ul style="list-style-type: none"> - <i>subordinated debt instruments;</i> - <i>certificates (as defined under Article 2(1)(27) of MiFIR).</i> <p>ix. Debt instruments where the issuer enjoys discretion to modify the cash flows of the instruments</p> <p>This category includes debt instruments structured in such a way that the anticipated revenue stream or repayment of principal is dependent on variables set by the issuer at its discretion.</p> <p>x. Debt instruments lacking a specified redemption or maturity date</p> <p>This category includes debt instruments structured in such a way that there is no specified maturity date and typically therefore no re-payment of the principal amount invested.</p> <p><i>Examples: perpetual bonds</i></p> <p>xi. Debts instruments having an unusual or unfamiliar underlying</p> <p>This category includes debt instruments structured in such a way that the anticipated revenue stream or repayment of principal is dependent on variables which are unusual or unfamiliar for the average retail investor.</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> - <i>debt instruments referencing underlying such as non-public benchmarks, synthetic indices, niche markets, highly technical measures (including price volatility and combinations of variables);</i> - <i>catastrophe bonds.</i> <p>xii. Debt instruments with complex mechanisms to determine or calculate the return</p>
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	<p>This category includes debt instruments structured in such a way that the anticipated revenue stream may vary frequently and/or markedly at different points of time over the duration of the instrument either because certain pre-determined threshold conditions are met or because certain time-points are reached.</p> <p>xiii. Debt instruments structured in a way that may not provide for a full repayment of the principal amount</p> <p>This category includes debt instruments presenting a structure or subject to a mechanism which, in certain circumstances, trigger a partial repayment (or no repayment) of the principal.</p> <p><i>Examples: debt instruments eligible for bail-in tool purpose</i></p> <p>xiv. Debt instruments issued by a special purpose vehicle (SPV) in circumstances in which the name of the debt instrument or the legal name of the SPV may mislead the investors as to the identity of the issuer or guarantor</p> <p>xv. Debt instruments with complex guarantee mechanisms</p> <p>This category includes debt instruments guaranteed by a third party and structured in a way that makes it complex for the investor to assess accurately how the guarantee mechanism affects the risk exposure of the investment.</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> - <i>debt instruments with a guarantee mechanism where the trigger for the guarantee depends upon one or several conditions in addition to the default of the issuer;</i> - <i>debt instruments with a guarantee mechanism where the level of guarantee or the</i>
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	<p><i>actual trigger of the guarantee are subject to time limitations.</i></p> <p>xvi. Debt instruments with leverage features</p> <p>This category includes debt instruments structured in such a way that the return or losses to the investor may occur at multiples to the initial investment.</p>
<p>Structured deposits incorporating a structure making it difficult for the Client to understand the risk of return</p>	<p>xvii. Structured deposits, in cases where:</p> <p>a. more than one variable affects the return received</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> - <i>structured deposits where a basket of instruments or assets have to outperform a specified benchmark for a return to be paid;</i> - <i>structured deposits where the return is determined by the combination of two or more indices.</i> <p>b. the relationship between the return and relevant variable or the mechanism to determine or calculate the return is complex</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> - <i>structured deposits structured in a way that the mechanism under which the price level of an index is reflected in the return involves different market data points (i.e. one or more thresholds have to be met), or several index measurements at different dates;</i> - <i>structured deposits structured in a way that the capital gain or interest payable step up or down in certain specific circumstances;</i> - <i>structured deposits structured in a way that the anticipated revenue stream may vary frequently and/or markedly at different points of time over the duration of the instrument.</i>

	<p>c. the variable involved in the calculation of the return is unfamiliar or unusual to the average retail investor</p> <p><i>Examples: structured deposits where the return is linked to a niche market, an in-house index or other non-public benchmark, a synthetic index, or a highly technical measure such as asset price volatility.</i></p> <p>d. the contract gives the credit institutions the unilateral right to terminate the agreement before maturity.</p>
<p>Structured deposits incorporating a structure making it difficult for the Client to understand the cost of exiting before term</p>	<p>xviii. Structured deposits, in cases where:</p> <p>a. An exit fee is not a fixed sum</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> - <i>structured deposits having a variable or “capped” exit fee (i.e. a fee up to 300 euros is charged in case of early exit);</i> - <i>structured deposits referring a variable factor such as an interest rate for the calculation of the exit fee.</i> <p>b. An exit fee is not a fixed sum for each month remaining until the agreed term</p> <p><i>Examples: structured deposits having a variable or capped exit fee per month remaining until the agreed term (i.e. a fee up to 50 euro per month in case of early exit).</i></p> <p>c. An exit fee is not a percentage of the original sum invested</p> <p><i>Examples: structured deposits having an exit fee that is at least equal to the amount of the returns accrued until the early exit date.</i></p>

