MFSA MALTA FINANCIAL SERVICES AUTHORITY

Feedback Statement

Feedback Statement

to the Consultation Document on Investment Services Rules for Investment Services Providers regarding Encouragement of Long-Term Shareholder Engagement

Ref: 07-2019

Date: 10 June 2019

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1. Introduction

On 8 May 2019, the Malta Financial Services Authority ('MFSA' or 'the Authority') issued the Consultation Document on Investment Services Rules for Investment Services Providers regarding Encouragement of Long-Term Shareholder Engagement [1] ('the Consultation Document') which presented the Authority's approach to a number of derogations granted to the Member States in Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 ('SRDII'). The Consultation Period closed on 24 May 2019.

The Consultation Document explained the role and obligations of both (i) Shareholders Intermediaries and (ii) the Asset Managers under the SRDII. It further identified six derogations which the general public, including the industry, was invited to provide feedback on.

The MFSA received three responses from the industry participants. This Feedback Statement summarises the feedback the MFSA received and sets out the final approach adopted by the Authority in respect of the derogations. It also outlines the specific amendments made to the relevant Investment Services Rules for Investment Services Providers.

The Authority would like to thank all the participants who provided feedback on the Consultation Paper.

[1] This Feedback Statement pertains strictly to the Consultation Paper Ref: 07-2019 as issued by the Securities and Markets Supervision and shall not be constituted as a feedback to any other Consultation Documents referring to the Directive (EU) 2017/828

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2. Feedback to Consultation Document

The feedback received from the industry concerned predominantly the section of the Consultation Document referring to Asset Managers.

Feedback on **Paragraph D:**

Industry Comment 1:

> *Implementation should take into consideration the size of the institutional investor's stake in the investee company particularly in matters relating to; conduct of dialogues with the investee companies, exercise of voting rights, cooperation with other shareholders and stakeholders. One has to consider the fact that the shareholding of domestic institutional clients or asset managers in international investee companies might not be significant enough to justify the costs of active participation. Often the small exposures would make it impossible for the manager to actually implement. A similar allowance is available in para (b).*

MFSA position:

Industry Comment 1 refers to the size of the institutional investor[2]'s shareholding in the investee company. Article 3a of the SRDII states that companies have the right to identify their shareholders. Companies having a registered office on their territory are only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0.5%. Hence, should the shareholding of an institutional investor fall below the above-mentioned threshold, the company does not have the obligation to engage with such a shareholder. In fact, the last sentence of letter (b) of Article 3g(1) states: *"Such disclosure may exclude votes that are insignificant due to the subject matter of the vote or the size of the holding in the company".* Moreover, we note that in its generality, Article 3g(1) allows the institutional investors and asset managers to either comply with the requirements set out in points (a) and (b) or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements. The licence holders (the asset managers) have the right not to disclose certain information under the disclosure obligation insofar as they publicly disclose a reason behind their decision.

2 'institutional investor' means:

(a) an undertaking carrying out activities of life assurance within the meaning of points (a), (b) and (c) of Article 2(3) of Directive 2009/138/EC of the European Parliament and of the Council (4), and of reinsurance as defined in point (7) of Article 13 of that Directive provided that those activities cover life-insurance obligations, and which is not excluded pursuant to that Directive;

(b) (b) an institution for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council (5) in accordance with Article 2 thereof.

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Furthermore, we note that the provisions as transposed from SRDII apply only in relation to investee companies which have their registered office in Malta. Should the investee company have its registered office in another Member State, the applicable legislation of such a Member State should be applicable.

Comment 2A:

> *Whilst we are in agreement to provide information through the licence holder's website, in our view, it would be more beneficial to include such information directly to the institutional investor through frequent client reporting.*

Comment 2B:

> *We would propose that an "either or" option is provided so that the company could choose between the website and other alternative means to provide required info. This would be considered when the services are provided to very limited clients and therefore including the information on the website visible to all might not be considered feasible. In such case the information would be provided directly to the relevant client by electronic means or incorporated within a periodic report to the client.*

MFSA position:

Comments 2A and 2B refer to the means by which the disclosure under Article 3g(1) is published by the institutional investor or asset manager. SRDII does not allow for a derogation of not publishing such disclosure on the relevant website or to implement an "either-or" approach. The MFSA's aim is to prevent licence holders from incurring additional expenses relating to publishing such disclosures through other additional medium which may be more costly for some licence holders. The Authority's position was that disclosure published on the respective website suffices, however based on the feedback received, the Authority allows licence holders to publish such disclosure **also** though additional means of communication, which shall be accessible online and free of charge.

We draw the attention to the fact that the public disclosure under Article 3g(1) – relating to the engagement policy – and the disclosure under article 3i – elaborated on below – differ in scope. Hence, for the sake of engagement policy, which should be disclosed publically, the periodic client reporting would not serve as the right channel of such general communication.

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Feedback on **Paragraphs E and F:**

Comment 3A:

Our understanding is that we will need to disclose this to in the annual report of the ManCo. Our suggestion would be to disclose this to the institutional client on annual basis. This is because the investment strategy and implementation can change with different institutional mandates.

Comment 3B:

For UCITS ManCos this is information should be disclosed in the financial statements of the UCITS on an annual basis rather than to other investors upon request. This would ensure equal and fair dissemination of information.

Comment 3C:

The directive in article 3i talks about the Asset Manager is to disclose on an annual basis, details like;

a) *reporting on the key material medium to long-term risks associated with the investments,*
b) *portfolio composition,*
c) *turnover and turnover costs,*
d) *how they make investment decisions based on evaluation of medium to long-term performance of the investee company, including non-financial performance, etc.*

The issue is that were an Asset Manager has multiple funds and strategies the above will be very different for each fund and would be difficult to be captured and articulated within the single asset manager's annual report.

We understand that in the UK the FCA states that this information can be included in the Fund's annual report. So allowing for such an option could also be a consideration for the Maltese regulator to implement.

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MFSA position

Comments 3A, 3B and 3C relate to the means by which the Asset Manager ensures adequate reporting towards the institutional investor on an annual basis. We note that for the sake of the SRDII, such disclosure is not intended to target any or all investors on behalf of which the asset manager engages in relation to the stewardship of shares, but only the institutional investors.

In relation to Part BII of the Investment Services Rules for Investment Services Providers which qualify UCITS Management Companies, it is noted that a new SLC (5.16A) is being introduced in order to properly transpose the obligations under Article 3i(2) of SRDII, namely: the information in paragraph 1 may to be disclosed together with the annual report referred to in Article 68 of Directive 2009/65/EC3.

With regard to Comments 3A and 3B, we note that the requirement under Article 3i(1) stipulates that asset managers shall disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h [of SRDII] how their investment strategy and implementation thereof complies with that arrangement and contributes to the *medium to long-term performance of the assets of the institutional investor or of the fund*. SRDII therefore caters for applicable disclosure in the case of both, investment on behalf of an institutional investor directly or an investment through a collective investment scheme. To support this stance, the Authority's approach was to allow *asset manager not managing assets on a discretionary client-by-client basis, to also disclose information to other investors of the same collective investment scheme at least upon request.*

Given that such disclosure does not cover Collective Investment Schemes targeting retail investors only, but also schemes targeting professional investors at large, the Authority does not see it necessary to implement further restrictions.

With regard to Comment 3C, we reiterate, that as noted in point E of the Consultation Paper, the Authority's approach was indeed to provide for the relevant information to be disclosed together with the annual report referred to in Article 68 of Directive 2009/65/EC or in Article 22 of Directive 2011/61/EU, or periodic communications referred to in Article 25(6) of Directive 2014/65/EU and the corresponding provisions in the Investment Services Rules for Investment Services Providers.

[3] *Article 68 of Directive 2009/65/EC*
(1) *An investment company* and, *for each of the common funds it manages*, a management company, shall publish the following: (a) a prospectus; (b) *an annual report for each financial year*; and (c) a half-yearly report covering the first six months of the financial year.
(2) The annual and half-yearly reports shall be published within the following time limits, with effect from the end of the period to which they relate: (a) four months in the case of the annual report; or (b) two months in the case of the half-yearly report.

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The Authority draws the attention to the second subparagraph of Article 3i(2) stating that where the relevant information is already publicly available, the asset manager is not required to provide the information to the institutional investor directly.

Additional comment:

> *As to implementation date, given the work involved we would appreciate if the Authority to grant an 'extended' timeframe for local firms to implement such requirements at least by end 2019.*

MFSA Position

We note that the Article 2 of the SRDII states that laws, regulations and administrative provisions necessary to comply with this Directive shall enter into force by 10 June 2019. Given the clear obligations at EU Level, the Authority is not in a position to extend any timeframes for applicability of the transposed rules.

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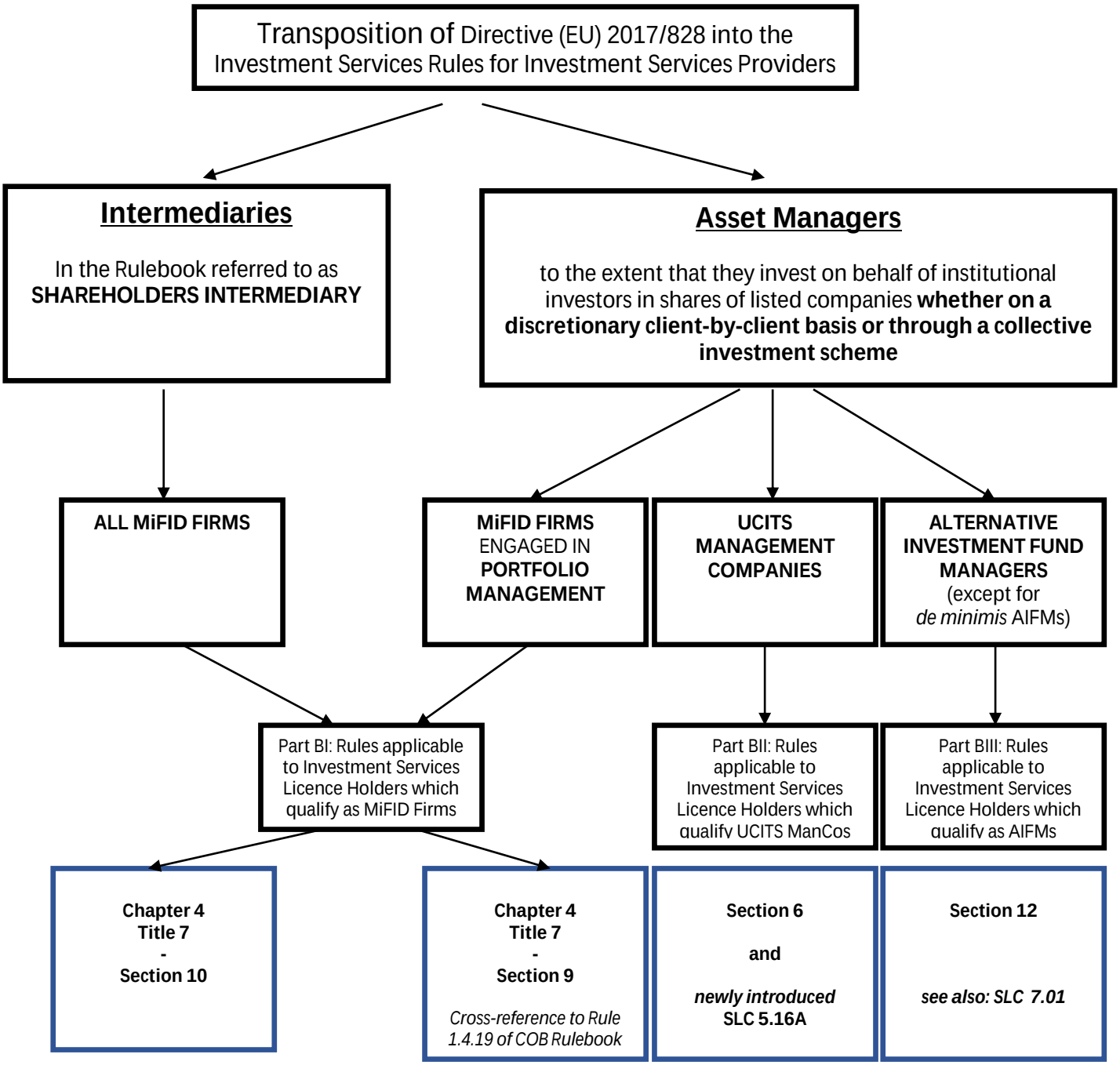
3. Amendments to the relevant Rulebooks



The amendments shall be applicable as from 10 June 2019, in line with entry into force of Directive (EU) 2017/828.

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