

**MFSA**

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MALTA FINANCIAL SERVICES AUTHORITY

**Proposed Regulatory Regime for  
Company Service Providers**

**Feedback Statement  
further to Industry Responses to  
MFSA Consultation  
[MFSA Ref 01-2014]**

**21<sup>st</sup> March, 2014**

## 1.0 Background

On the, 7<sup>th</sup> January, 2014, the MFSA issued a consultation document regarding the proposed rules for Company Service Providers, to be issued in terms of Article 8 of the Company Service Providers Act, 2013 (“the Act”).

The purpose of the proposed rules is to supplement the legal framework for Company Services Providers established by the Act itself and they shall include more detailed regulatory requirements by which persons registered in terms of the Act are expected to comply.

The MFSA has received a number of comments from a number of persons who could potentially become subject to the proposed regime as well as from the Financial Intelligence Analysis Unit, the Malta Institute of Accountants and the Institute of Financial Services Practitioners.

An outline of the main comments received and the MFSA’s position in relation thereto, is provided in Section 2.0.

## 2.0 Main Comments Received and MFSA’s position

**[2.1] Industry Comment:** It was indicated to the Authority that in cases where one Company Service Provider (“CSP”) fully owns another CSP or where company services are provided by two or more companies owned and controlled by the same person, a single registration requirement should be required, reflecting the practical reality of the situation.

### ***MFSA’s Position:***

MFSA considers that Article 3 of the Act requires registration by “*Any person resident or operating in or from Malta who acts as a company service provider by way of business, ...*”. There are no specific group exemptions in the Law allowing for members of the same group of companies to a single registration which would be applicable to all the companies comprised in that group. Accordingly, all separate legal entities, providing company services to third parties, must be specifically registered. In this the Authority will accept a single application form on behalf of entities which have identical shareholders and directors. A single business plan for the group would also be acceptable. However the Authority would require,, separate copies of the declarations contained in the application form for each applicant. A separate application fee for each applicant would also be due.

**[2.2] Industry Comment:** The Authority was requested to clarify the Rule which states that “*Persons appointed as directors or company secretary by a Registered Company Services Provider, are not subject to registration in terms of the Act in their own name.*” Furthermore the Authority was also asked how it will verify that a

person was appointed, as a director, company secretary, shareholder or partner to a third party, by a Registered Person.

**MFSA's Position:** The Authority will amend the relevant rule to clarify that where a person registered in terms of the Act, appoints its employees as a director, company secretary, partner or shareholder to a third party, those employees would not be subject to a registration requirement under the Act. The MFSA also expects such employees to retain documentary evidence that they have been appointed to their roles by their employers. The Authority may require sight of such evidence during its on site visits or at any other time as it may deem appropriate.

**[2.3] Industry Comment:** The Authority was requested to provide further clarification as to the extent of the segregation of funds which Registered Persons should implement. In particular, the MFSA was requested to clarify whether a separate account should be opened by the Registered Person for each client.

**MFSA's Position:** Registered Persons are to ensure that any funds in their possession belonging to a client are kept at all times separate from those of the Registered Person itself. Furthermore, non-fungible assets belonging to clients and which may come into the possession of the Registered Person must be kept separate and distinct both from the Registered Person's own assets and from other assets belonging to other clients. In the case of fungibles, for the purposes of compliance with the Rules it is not necessary for Registered Persons to open separate accounts for each client as long as appropriate records are kept and effective reconciliation procedures are in place.

**[2.4 ] Industry Comment:** With respect to the *De Minimis Rule*, the Authority was requested to consider raising the threshold of this rule which currently stands at 10 directorships (not taking into account directorships in entities regulated by the Authority).

**MFSA's Position:** The Authority has received conflicting views on this Rule. At the outset, the Authority wishes to point out that it has established the *De Minimis Rule* for the purposes of interpreting the phrase "*by way of business*". In this regard, , the Authority clarifies that in calculating whether a person falls below the established threshold, all appointments to companies (i.e. directorships and company secretariat) should be taken into account. Furthermore, it is also to be noted that persons which do not qualify to be considered to provide company services "*by way of business*" for the purpose of registration under the Company Service Providers Act may be still be considered to be subject persons for the purposes of the Prevention of Money Laundering Act and the Regulations issued thereunder and may therefore still be required to comply with all the AML regulations including the Implementing Procedures issued by the FIAU.

**[2.5] Industry Comment:** The Authority was also requested to consider extending the *de Minimis* rule to corporate entities.

**MFSA's Position:** The MFSA considers that the very fact that a company has been incorporated to provide company services is a very clear indication that such services

are being provided “by way of business” and hence such entities would be subject to registration in terms of the Act, irrespective of how many clients they may have.

**[2.6] Industry Comment:** The Authority was requested to clarify how the *de Minimis* Rule would apply in the case of group companies.

**MFSA’s Position:** The Authority would like to clarify that directorships held by the same person in the same group of companies shall only count as a single directorship for the purposes of calculating the threshold established in the *de Minimis* Rule.

**[2.7] Industry Comment:** An industry participant queried whether the *De Minimis* Rule should also apply to the service of arranging for others to act as directors or just for the persons actually holding office.

**MFSA Position:** The Authority considers that the *De Minimis* Rule should apply only with respect to persons actually holding the position of directors, company secretaries, partner in a partnership (or similar position in other legal entities).

**[2.8] Industry Comment:** The Authority was requested further clarifications of Rules explaining the term “*by way of business*” for the purposes of Article 3 of the Act. In particular, a question arose as to whether person carrying out director services without any remuneration is considered to be providing company services by way of business.

**MFSA’s Position:** The Rules provide that for a person to be considered to be providing company services “*by way of business*” for the purposes of Article 3 of the Act, that person must either hold himself out as providing company services by, inter alia, soliciting the services on offer to members of the public **OR** provide company services on a regular and habitual basis **AND** must be *directly or indirectly* in receipt of remuneration or other benefits for the provision of such services. With respect to latter mandatory requirement, the Authority would like to clarify that even where the company services provided by a person are being remunerated through another company which is associated or connected with the person providing such services or which belongs to the same group of companies, that person would still be deemed to be receiving indirect remuneration for the services provided, it would be subject to registration in terms of Article 3 of the Act.

**[2.9] Industry Comment:** The Authority was requested to clarify the terms “regular”, “habitual” and “frequent” as used in various instances in the text of the Rules.

**MFSA’s Position:** The Authority considers that the ordinary meaning of these terms should prevail in the light of the Rules which determine what is meant by the phrase “by way of business” for the purposes of Article 3 of the Act.

**[2.10] Industry Comment:** It was pointed out to the Authority that an apparent inconsistency exists the treatment of audit firms which are granted a warrant for the firm and other warrant holding professions in which the warrant is not held on a firm-wide basis, but only on an individual basis. This appears to be so because audit firms

which are warranted in their own name may rely on the exemption from registration available to warrant holders, whereas other professions which operate under a firm/partnership which is not warranted cannot rely on this exemption but must resort to the warranted status of the partners in order to benefit from the exemption in the law.

***MFSA's position:*** The law states that “any person resident or operating in or from Malta who acts as a company service provider by way of business shall apply to the Authority for registration.” Accordingly, audit firms having a separate legal entity and which are warranted in their own name may benefit from this exemption. Furthermore, an accountancy firm formed in terms of Article 10 of the Accountancy Profession Act and/or an auditing firm authorised to practice in the field of auditing in terms of article 10 of the Accountancy Profession Act would be considered as being equivalent to those persons in possession of a warrant to carry out the profession of a certified public accountant and would therefore be exempt from registration under the Act. Other professions where the “firm” does not have legal personality are consequently not “a person” for the purposes of the Act, Accordingly, the warranted partners of such “firms” or the warranted professionals involved in other arrangements (e.g. where a group of professionals act independently of each other but share offices) should notify the FIAU of their exempt status in the manner established by the FIAU as indicated on its website.

Lastly, the Authority would like to point out that persons (both legal as well as physical persons) who are exempt from registration with the MFSA remain subject persons for the purposes of Prevention of Money Laundering and Financial Terrorism Regulations and therefore are required to comply with the all the AML regulations including the Implementing Procedures issued by the FIAU.

***[2.11] Industry's comment:*** A query was raised as to whether notification to the FIAU for the purposes of Article 3(1) of the Act should be on an on-going basis.

***MFSA's position:*** The Authority has obtained confirmation that this notification is only to be done once, when the person concerned commences to provide company services. For the purposes of the transitory period, persons who are already providing company services and who are exempt from the requirement of registration may immediately make such notification to the FIAU on the form provided by the FIAU on its website at [www.fiaumalta.com](http://www.fiaumalta.com)

***[2.12] Industry's comment:*** The Authority was requested to further clarify whether persons exempt from registration in terms of Article 3(1) of the Act would still be obliged to appoint a Compliance Officer and be subject to other obligations under the Act.

***MFSA's position:*** MFSA would like to clarify that the provisions of the Act and the Rules for Company Service Providers apply only to persons who obtain a registration in terms of the Act. Accordingly, persons registered by the MFSA in terms of the Act are required to appoint a Compliance Officer and a Money Laundering Reporting Officer. However, the Authority would like to point out that although persons who are exempt from Registration are not required to abide by the Rules, such persons are still considered to be subject persons in terms of the PMLFTR and as such are still

bound by the requirements of the local Anti-Money Laundering legislation including the Implementing Procedures issued by the FIAU which also include the appointment of a Money Laundering Reporting Officer.

**[2.13] Industry's comment:** An industry participant indicated its opinion that directors (a) acting merely as directors, (b) who do not provide other corporate services, such as a registered office, company law compliance, etc (c) are not shareholders or directors in companies which provide such services, and (d) who are not covered by the warrant or trustee exemption – should be exempt from the requirement of registration even if they exceed the *de Minimis* threshold.

**MFSA's position:** MFSA considers in terms of the relative provisions Third Anti Money Laundering Directive, which are being transposed by the Act, there is no exemption from registrations for the type of directors indicated by the industry. Accordingly, the Authority is not in a position to grant such an exemption.

**[2.14] Industry's comment:** An industry participant indicated that the Rule 5, requiring Registered Persons to submit their financial statements within four months of their respective accounting reference date may be too tight. A six to nine month deadline was proposed instead.

**MFSA's position:** MFSA would like to clarify that the four-month deadline was established in line with the same requirement for other entities for which the MFSA is the competent authority. The reason for this shorter period of submission is to ensure that any shortcomings are detected as soon as possible and well before the 10 month deadline established under the Companies Act. Accordingly, the Authority will be retaining the 4 month deadline for the submission of financial statements of Company Service Providers.

**[2.15] Industry's comment:** A query was raised with respect to the reference to the suggestion that a Registered Person should consider obtaining cover under a professional indemnity insurance. It was considered that such a reference should not be included in the Rules which are of a prescriptive nature.

**MFSA's position:** MFSA agrees with this suggestion and will remove reference to the option to obtain PII cover from the Rules. This option however remains valid and will be included in any Guidance Notes relating to Registered Persons which the MFSA may issue in due course.

**[2.16] Industry's Comment:** It was pointed out that in reference to CSPs having responsibilities in relation to the maintenance of Malta's good reputation entails a subjective element with respect to the nature of the services provided by client companies. Furthermore, it was also indicated that the requirement for Registered Persons to inter alia, identify whether the activities of the proposed company would be legal in the country within which they will be carried out and whether these activities require any licensing or other authorisation is being deemed as being too onerous since CSPs cannot have expertise in all potentially regulated areas which do not only include financial services.

**MFSA's position:** The Authority would like to clarify that it shall be amending the relevant Rules to the effect that Registered Persons, providing the services of company formation should have procedures in place to:

- a. identify whether the activities of the proposed company would be legal in the country within which they will be carried out and whether these activities require any licensing or other authorisation (including, but not limited to, authorisation to conduct financial services activities).
- b. assess whether the persons involved in the proposed company and/or its activities would be deemed to be high risk. Examples include where the beneficial owner would be considered to be politically exposed, where the company is a part of a complex structure and where the proposed activities would be regarded as sensitive. Enhanced levels of due diligence and on-going monitoring by the Registered Person is required in such cases.
- c. assess the level of risk which the formation of the Company would present to the reputation of Malta. These procedures should address the way in which the Registered Person shall use available information to identify cases which may damage Malta's reputation, and these manner in which such cases should be handled in a responsible manner.

**[2.17] Industry's Comment:** A point was raised that requiring the Registered Person to know and have regular contact with the directors of client companies and establish the nature of the activities and assets of client companies may be difficult to abide by on an on-going basis in every case (proposed Rule 4.10 of the document issued for consultation refers). A risk based approach was suggested to be adopted in this context.

**MFSA's position:** The Authority agrees with issues raised by the industry in this respect and will be deleting this Rule.

**[2.18] Industry's Comment:** A deletion of the proposed Rules 4.06 and 4.07 in the document issued for consultation, was suggested because it was contended that the FIAU's Implementing Procedures and the AML laws and regulations as a whole comprehensively cover the intended purpose of these proposed rules.

**MFSA's position:** The MFSA considers that these Rules should still be retained since they complement the Implementing Procedures issued by the FIAU and are specific to the customer due diligence procedures which should be carried out by Registered Person, in the context of the services which they offer. The FIAU's Implementing Procedures are of a more general application which are also binding on subject persons which may be exempt from the requirement of registration in terms of the Act.

**[2.19] Industry's Comment:** Reference was made to the requirement that Registered Persons must request clients to consent to the transfer of business on cessation of business by the CSP. It was indicated that the proposed Rules fail to regulate the

situation when clients do not want, fail or are unable to provide such confirmation. It was also suggested that the Authority introduces a mechanism for termination of provision of registered office when the CSP wants to terminate this service and the client is uncooperative.

**MFSA's position:** The Authority acknowledges that it may be difficult for a Registered Persons wishing to cease operations to obtain consent from all its clients to transfer their business to another Registered Person. In this regard, the Authority will amend the rules to clarify to the effect that in the process leading to the cessation of company services business, the Registered Person shall be required to submit to the Authority a confirmation (where appropriate) that he has transferred this business to another appropriately registered person or to a person which is exempt from registration in terms of the Act.

**[2.20] Industry's Comment:** With respect to the Transitory Period during which current persons providing company services are requested to apply to the Authority to obtain registration in terms of the Act, clarification was requested as to whether persons who are currently providing company services and who have submitted an application for registration during the transitory period, may still provide such services pending the outcome of their application.

**MFSA's position:** The MFSA would like to clarify that that current company service providers can still continue to provide their services pending the outcome of their application, once they have submitted their application by the 24<sup>th</sup> March, 2014.

**[2.21] Industry's Comment:** With respect to the transitory period whereby persons currently providing company services within the meaning of the Act are required to apply for registration with the Authority by the 24th March, 2014, a query was raised as to where a prospective applicant asks MFSA for a ruling in terms of Article 3(4) of the Act on whether services being provided by such person constitute registrable activity and the Authority does not revert with a determination within the 24<sup>th</sup> March, 2014. In this scenario, the MFSA was requested to clarify whether the application for a determination would be deemed to be an application for the purposes of the 24th March deadline.

**MFSA's Position:** The Authority would like to clarify that in this scenario, once the application for a determination in terms of Article 3(4) of the Act has been submitted prior to the 24<sup>th</sup> March, 2014, if the Authority has not reverted with its determination by this date, then the person submitting the request for the Authority's determination shall be deemed to have acted within the 3 month deadline established in the Act for the purposes of regulating persons which are currently providing company services.

**[2.22] Industry's Comment:** The Authority was requested to clarify the instances where a person would be deemed to be acting as a Director in a personal capacity and hence will not be regarded as providing company services "by way of business".

**MFSA's position:** The MFSA would like to clarify that for a person to be deemed to be acting as a Director in a personal capacity and hence not providing directorship services by way of business, that must show that he/she has a beneficial (financial) interest in the company. The Rules have been amended to reflect this approach.



### **Financial Resources for Individuals Registered as Company Service Providers.**

The Authority also would like point out that where the Registered Person is an individual, a working capital of at least €2,500 must be maintained (in own funds) for as long as that person remains registered under the Act. In this regard, the Authority has expanded the Rules to state that in satisfying this requirement the individual concerned may consider obtaining a guarantee or an irrevocable letter of credit as follows:

Subject to the conditions set out below, the own funds of an individual person registered under the Act shall be constituted and held in the form of a guarantee provided by, or an irrevocable letter of credit establish with a bank or credit institution:

- a) licensed to carry on business of banking under the laws of Malta; or
- b) lawfully permitted to carry on business of banking in a country outside Malta acceptable to the Authority provided that the bank or credit institution is of first class standing.

The conditions referred to in the preceding paragraph are:

- i. the guarantee or the letter of credit shall be in favour of the Authority;
- ii. the content of the guarantee or letter of credit is to be approved in advance by the Authority; and
- iii. where the Registered Person who is an individual intends to effect any changes to the content of the guarantee or the letter of credit, such Registered Person shall immediately submit, in writing, to the Authority the particulars of the proposed changes; and no such changes shall be made without the Authority's approval.

### **Financial Resources for Corporate Entitles**

Where corporate entities applying for registration under the Act are also regulated by the Authority for other activities and are therefore subject to higher financial resources requirements than those established for Company Service Providers, such higher financial resources requirements shall be deemed to satisfy the requirements set out in the Rules and no additional financial resources would be required from such persons.

### **Application for Registration by Persons for whom the MFSA is the Competent Authority**

Persons who are already licensed, authorised, recognised or enrolled by the Authority in terms of any one of the laws for the purposes of which the MFSA has been designated as the competent authority and which are still subject to registration under the Act are required to apply for such registration by means of a letter to the Authority instead of the full application form. This letter shall indicate the type of licence/authorisation already held, the company services to be offered, the target

market for such services and the expected level of company service business. This letter should be accompanied by the prescribed application fee.

### **Contacts**

Should you have any queries regarding Company Service Providers please do not hesitate to contact:

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Any queries relating to the application process leading to a registration in terms of the Act should be addressed to Authorisations Unit by email at [au@mfsa.com.mt](mailto:au@mfsa.com.mt)