

CONSULTATION PROCEDURE

CONSULTATION ON THE PROPOSED AMENDMENTS TO THE TRUSTS AND TRUSTEES ACT AND OTHER RELATED LEGISLATION

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

TABLE OF CONTENTS

1. Introduction3

2. Amendments to the Trusts and Trustees Act (Cap. 331).....3

3. Introduction of a transitory provision 13

4. Discussions concerning the identification of courts 14

5. Compliance 15

6. Proposed new regulations 16

 6.1. Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations 16

 6.2. Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations 16

7. Unit Trusts and Sub-Trusts 17

8. Way Forward 17

This Consultation document reports on the main changes to the Trusts and Trustees Act and further outlines the contents of the regulations which are proposed to be issued under the Trusts and Trustees Act.

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of the following proposals:

- [I] Draft Bill amending the Trusts and Trustees Act;
- [II] Consolidated version of the Trusts and Trustees Act reflecting the changes being proposed;
- [III] Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations; and
- [IV] Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations.

Accordingly these proposals are not binding and are subject to changes and revisions. It is important that persons involved in the consultation bear these considerations in mind.

The proposed revised Trusts and Trustees Act and the Regulations attached to this consultation document are being issued for consultation. The Authority invites comments by not later than **15th February 2013**. Interested parties are to send their comments in writing on su@mfsa.com.mt

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Copies of this Consultation Document are available to download from the MFSA Website.

1. INTRODUCTION

The trust institute was fully incorporated into Maltese law in 2004 by means of the *Trusts (Amendment) Act*¹, which set out extensive amendments to the then existing *Trusts Act*, being renamed *Trusts and Trustees Act*, as well as to the Civil Code. These amendments have served as clear guidance for trustees to carry out their functions according to law. The consolidation of a law relating to trusts created certainty and this is reflected in the significant increase in the number of authorised trustees operating in Malta.

Through this Consultation Procedure the Authority is proposing amendments to the *Trusts and Trustees Act* (hereinafter referred to as the “Act” or “TTA”).

2. AMENDMENTS TO THE TRUSTS AND TRUSTEES ACT (CAP. 331)

2.1. *Amendment to Article 2*: The Authority is proposing to revise the following definitions reported in Article 2:

- *Definition of ‘the Act’*: A revision is being proposed to this definition to refer to the *Trusts and Trustees Act* rather than the *Malta Financial Services Authority Act*.
- *Definition of ‘Authority’*: A revision is being proposed to this definition to align it with the standard definition being adopted in all financial services legislation.
- *Definition of ‘close links’*: A definition of ‘close links’ is being introduced in line with the introduction of the concept of close links in Articles 43C and 44.
- *Definition of ‘commercial transaction’*: In order to clarify any doubts which may arise, the Authority is proposing to revise the definition of ‘commercial transaction’ to include the situation of a person settling an asset on trust as security for a loan, when such loan is obtained for commercial purposes.
- *Definition of ‘Notary Keeper’*: A definition of ‘notary keeper’ is being proposed to link the use of this term throughout the Act with the definition provided in the *Notarial Profession and Notarial Archives Act*.

¹ Act XIII of 2004

- *Definition of ‘operating in or from Malta’*: The Authority is proposing to revise the definition of the term ‘operating in Malta’ to extend it and include ‘from Malta’ in order to reflect the proposed amendment to Article 43(1).
- *Definition of ‘qualifying shareholding’*: This new definition is being introduced within the context of Article 2 to link the same with the proposed amendment to Article 43(4)(i)(e) as reported hereunder.
- *Definition of ‘securities’*: The Authority is proposing to introduce the definition of ‘securities’ within the context of Article 2 to link it with the proposed amendments to Article 43(12)(a).

2.2. *Amendment to Article 9*: The Authority is proposing to revise Article 9 as follows:

- *Revision of Article 9(2)*: Article 9(2) is being revised to dispel any doubts as to whether a beneficial interest should be transmitted by inheritance or not. The revised Article 9(2) clearly specifies that a beneficial interest under a trust cannot be inherited by the beneficiary’s heirs.
- *Revision of Article 9(12)*: An amendment is being proposed to Article 9(12) to clarify that a disclaimer of one’s whole interest may take place irrespective of whether the beneficiary has received some benefit from his interest or not.

2.3. *Amendment to Article 12*: The Authority is proposing to extend the perpetuity period of trusts to 125 years.

2.4. *Introduction of Article 14A*: The Authority is proposing the introduction of a new article on settlor reserved powers with the aim of regulating specific circumstances wherein the settlor may reserve powers under the terms of the trust. The following are the proposed powers that may be reserved or granted by the settlor under the terms of the trust:

- any beneficial interest in the trust property;
- any powers to appoint, add or remove any trustees, protectors or beneficiaries;
- any powers to appoint an investment adviser or investment manager.

2.5. *Amendment to Article 16*: The Authority is proposing to clarify Article 16(1) to clearly indicate that this provision is meant to apply when a trust terminates due to the lapse of a beneficiary’s interest or in the absence of a beneficiary and thus

distinguish it from Article 17(1). The current wording of this subarticle may give rise to confusion, especially when read in conjunction with the marginal note. Therefore, a revision of the subarticle is being proposed together with a revision of the marginal note.

2.6. *Amendment to Article 17:* A revision of Article 17(3) is being proposed to indicate clearly that the rule prescribed under this subarticle should not be applied in cases where the trust is a protective trust because it would undermine the very nature of the protective trust.

2.7. *Amendment to Article 18:* To ensure sufficient clarity with regards to the appointment of new trustees in situations of death or insolvency of a trustee, the Authority is proposing to deal with these two scenarios separately. Thus it is proposing to revise Article 18 as follows:

- *Revision of Article 18(7):* The Authority is proposing to limit Article 18(7) to cover solely the case of death of a trustee.
- *Introduction of Article 18(8):* The introduction of a new subarticle (8) is being proposed to deal with insolvency, dissolution and winding up of a corporate trustee.
- *Introduction of Article 18(9):* The introduction of a new subarticle (9) is being proposed to state that during the time until the trusteeship is accepted, the parties having control of trust property would still be obliged to ensure that the beneficiaries' interests are not prejudiced.

2.8. *Amendment to Article 19:* The Authority is proposing to extend the remit of Article 19 to cover the testamentary executor and the protector. In particular, the proposed amendments are the following:

- *Revision of Article 19(2):* A revised Article 19(2) is being proposed to deal with a situation where the appointed trustee does not want to accept appointment. The amendments provide that notification of such refusal may also be made to the testamentary executor or the protector, and not merely to the settlor or the other co-trustees, as the provision currently stands.
- *Revision of Article 19(3):* Currently Article 19(3) entitles the trustee referred to in Article 19(2) to apply to the court for relief from his appointment as a trustee in those cases where the settlor is dead or cannot be found and there are no other trustees. A revised Article 19(3) is being

proposed to allow for a testamentary executor or a protector to apply to the court for the appointment of a trustee.

- *Revision of Article 19(4):* A revised Article 19(4) is being proposed to empower the testamentary executor and the protector to directly apply to the court for the appointment of a trustee, in the case where the appointed trustee does not accept appointment.

Furthermore, currently Article 19(4) provides that notaries and notary keepers are bound to apply to the Court for the appointment of a trustee. In this regard, the revised Article 19(4) is proposing to indicate that such a duty would become incumbent on the notary once the latter is informed, and thus becomes aware of the death of the settlor.

- *Introduction of Article 19(5) and 19(6):* Two new subarticles are being proposed to provide that fiduciary obligations should be expressly imposed by law on all persons in control of trust property in order to preserve the trust assets, even pending acceptance of the trust, and the obligations incumbent on the trustee would commence once the trustee obtains control of the trust assets.

2.9. *Amendment to Article 20:* The Authority is proposing to amend Article 20(1) to rectify a typographical error.

2.10. *Amendment to Article 21:* The Authority is proposing to amend Article 21 as follows:

- *Revision of Article 21(1):* A revised Article 21(1) is being proposed to include the general duty of trustees to avoid any conflicts of interest.
- *Revision of Article 21(2):* Article 21(2) is being revised to extend to all authorised trustees the obligation which is presently incumbent on private trustees in terms of Article 43A(3)(i) i.e. the obligation to draw up an inventory. Furthermore, Article 21(2) be split into two subarticles as follows: [a] Article 21(2)(a) providing for the duty of trustees to carry out and administer the trust according to the terms of the trust; and [b] Article 21(2)(b) providing for the duty of any trustee to draw up an inventory of all trust assets upon taking up office.
- *Revision of Article 21(3):* Article 21(3) is being revised to further reinforce the obligation referred to in Article 21(1) and to provide that unless otherwise permitted by the TTA or by the terms of trust, a trustee

shall not generally enter into any transaction related to trust property that may give rise to a conflict of interest, without the authority of the Court.

- *Revision of Article 21(4):* Article 21(4) is being revised to introduce a period of ten years for which trustees are bound to keep accounts and records. This ten-year record retention period, which runs from the date of termination of the trust, aligns the TTA with the provisions of the Companies Act. Furthermore, this amendment should be considered together with the amendment to Article 43(7)(d) which is being discussed later on in this Consultation Document.
- *Revision of Article 21(7):* Article 21(7) is being revised to provide certainty that the duties of trustees are regulated by the terms of the trust in commercial transactions.
- *Introduction of Article 21(8):* This new subarticle aims at eliminating any possible conflicts of interest which may arise where a trustee is faced with a beneficiary subject to curatorship.

2.11. *Amendment to Article 24A:* Article 24A is being revised to correct a typographical error and to align the English version of the Act with the Maltese version which is correctly worded.

2.12. *Introduction of Article 24B:* Article 24B is being introduced to provide for the appointment of an enforcer in the case of a trust set up for a charitable purpose. The appointment of the enforcer is being proposed since such trusts do not have any beneficiaries to enforce the terms of the trust.

2.13. *Introduction of Article 24C:* The proposed Article 24C is related to Article 24B and aims at regulating the resignation or removal of the enforcer.

2.14. *Amendment to Article 29:* This amendment is being proposed due to the apparent conflict between Article 21(4) and Article 29(1). While the former provides that access to accounts must be provided to beneficiaries upon request, the latter seems to suggest that such right to access to information, including the accounts, would be subject to the terms of the trust instrument, thus giving rise to the possibility of limiting the right of access to accounts by inserting a provision to that effect in the trust deed. Given that the accountability of trustees is paramount and should be ensured at all times, the Authority is proposing to remove the reference to the terms of the trust in Article 29(1)(d) whilst ensuring that this proposed amendment will not prejudice what is provided for in subarticles (4) and (5) of the same Article.

- 2.15. *Amendment to Article 34:* Article 34(4) is being introduced to clarify that in the case of resignation or removal of a trustee with the consequential handing over of the property to the new trustee, the latter would be entitled to indemnification out of the trust property in respect of any claims against the outgoing trustee.
- 2.16. *Amendment to Article 35:* A revised Article 35(2) is being proposed to clarify that “class interest” does not refer to a fixed interest.
- 2.17. *Amendment to Article 36:* The Authority is proposing to amend Article 36 to provide for the possibility of the Court varying the terms of a charitable trust.
- 2.18. *Amendment to Article 41:* The Authority is proposing to remove the thirty-year prescriptive period referred to in Article 41(1) to reaffirm that a trustee can never acquire by prescription because this goes against the nature of fiduciary obligations.
- 2.19. *Amendment to Article 43:* One of the major changes which the Authority is proposing in this exercise of revision of the Act is that of limiting the granting of trustee licences only to companies. The Authority is considering such restriction primarily in the light of the risks involved in the trustee business and the onerous obligations imposed on trustees in terms of the Act. Furthermore, in the authorisation of trustees, the Authority applies the “four eyes” requirement which provides at least two individuals must effectively direct the business of the undertaking. This requirement can only be fulfilled where the trustee is backed by a corporate set-up. This restriction is also being imposed in the case of mandatories.

On the other hand, the Authority is not proposing to introduce such a restriction in the case of persons acting as administrators, directors or other functionaries of a foundation.

[i] Are you in favour of this decision by the Authority? Give reasons, should you disagree.

Reported hereunder are all the proposed amendments to Article 43 for consultation:

- *Amendment to Article 43(1):* A revised Article 43(1) is being proposed to clarify that the requirement to obtain authorisation from the Authority applies to any company whether this is resident or operating in or from Malta. The Authority is proposing to remove the possibility of an individual applying for authorisation as a trustee. Furthermore, the concept of “operating in or from Malta” is being introduced to align the

Act with other financial services legislation which have already incorporated this concept.

- *Amendment to Article 43(2) and Article 43(3)*: Articles 43(2) and (3) are being revised to align same with the general concept that a trustee licence can only be granted to a company.
- *Amendment to Article 43(4)*: The Authority is proposing to revise Article 43(4) primarily to align it with the decision to restrict the granting of a trustee licence to companies.

Furthermore, the Authority is also proposing to introduce a *minimum share capital requirement to trustees*. The Authority feels that trustees should have a minimum share capital requirement amounting to €25,000 apart from that referred to in the Companies Act for the registration of a company.

[i] Are you in favour of the introduction of a minimum share capital requirement?

[ii] Do you agree that the amount of €25,000 is reasonable?

The Authority also notes that all reputable trusts jurisdictions also have a minimum financial resources requirement applicable to trustees aimed at protecting beneficiaries. Very often this financial resources requirement is tailored in accordance with the size and structure of the trustee and the range of activities provided thereby. The Authority is hereby requesting comments from the industry as follows:

[i] Are you in favour of the introduction of a financial resources requirement?

[ii] Should the imposition of a financial resources requirement be restricted to holders of a full trustee licence with the exclusion of those entities which are licenced to provide fiduciary services which do not include acting as trustee?

The Authority is also considering a possible introduction of the requirement applicable to trustees to hold a Professional Indemnity Insurance Cover (hereinafter referred to as “PII”). Until now, the Authority has strongly recommended but never imposed a PII. Given the onerous nature of the office of trustee, the Authority considers that a suitable PII commensurate to the activities provided by the trustee is an

important element of the financial resources requirement. In view of the above, the Authority is considering the inclusion of the obligation of purchasing a PII commensurate to the portfolio of assets held by the trustee.

The Authority is hereby requesting comments from the industry as follows:

[i] Are you in favour of the introduction of an obligation to purchase a PII?

- *Amendment to Article 43(4)(f)*: A revised Article 43(4)(f) is being proposed to replace the concept of ‘direct or indirect interest in the company’ with the concept of ‘qualifying shareholding’.
- *Amendment to Article 43(6)*: At present the current Article 43(6)(a) can lead to the misconception that persons in possession of the licences mentioned in Article 43(6)(a)(i) – (v) are exempt from the requirement of obtaining authorisation to carry out trustee activities. An amendment is being proposed to clarify that such persons would only be exempt from the requirement of obtaining authorisation to act as trustees if the trustee activity being provided is incidental and ancillary to the main activity for which such persons are licensed.

The Authority is also proposing the introduction of a proviso at the end of this subarticle stating that any person in possession of any of the licences mentioned in Article 43(6), who intends to provide trustee activities as one of its main activities, would still be required to obtain authorisation in terms of the Act.

- *Amendment to Article 43(7)*: There seems to be a conflict between Article 43(7) and Article 43A(11) since the latter contemplates situations where authorisation may be required and also refers to Article 43(7) which, however, excludes the applicability of Article 43A. A clarification is being proposed in Article 43(7) stating that the exclusion of the applicability of Article 43A does not extend to Article 43A(11).

The Authority is also proposing to amend Article 43(7)(d) by extending the five year period to ten years. The ten year period starts running from the date of termination of the trust. This amendment should be read in conjunction with the amendment to Article 21(4) introducing a ten-year retention period for trusts records.

- *Amendment to Article 43(9):* A revised Article 43(9) is being proposed to restrict the concept of ‘qualified person’ to persons authorised to act as trustees in terms of Article 43(3) or Article 43(8).
- *Amendment to Article 43(12):* An amendment is being proposed to Article 43(12) to incorporate the concept of “operating in or from Malta”. Furthermore, the concept of ‘holding of property for another person’ is being replaced with that of ‘holding of securities and/or immovable property’, the reason being that the former concept was too wide.
- *Amendment to the current Article 43(13):* The current Article 43(13) is being replaced with a new subarticle outlining the conditions applicable to any company which intends acting as a mandatory in terms of Article 43(12).
- *Amendment to the current of Article 43(14):* The current Article 43(14) is being renumbered Article 43(17). The new subarticle (14) provides for the obligation of notification to the Authority of any change or circumstance which may have a bearing on the status as an authorised entity in terms of Article 43(13).
- *Introduction of new Article 43(15):* Article 43(15) is being introduced to outline the conditions applicable to any person who intends to act as an administrator, trustee, director or similar functionary exercising control over the assets of a private foundation. The proposed subregulation (15) takes into consideration two scenarios namely the case where the applicant is a company and the case where the applicant is an individual.
- *Introduction of Article 43(16):* Article 43(16) provides for the obligation of notification to the Authority of any change or circumstance which may have a bearing on the status as an authorised person in terms of Article 43(15).

2.20. *Amendment to Article 43A:* The Authority is proposing to amend Article 43A as follows:

- *Revision of Article 43A(2):* The Authority is proposing to revise Article 43A(2) to remove any misunderstanding it might give rise to by shifting the words “and in both cases” to a separate paragraph. This amendment will clearly indicate that the conditions prescribed in Article 43A(2)(i) – (iii) apply to both Article 43A(2)(a) and (b).

- *Revision of Article 43A(5):* The Authority is proposing to revise Article 43A(5) to clarify that the application thereof does not merely refer to any will, but specifically to wills containing a trust.
- *Revision of Article 43A(6):* Article 43A(6) is being revised to render the obligation prescribed therein enforceable against the trustee. A proviso is also being introduced indicating that if the trustee fails to fulfil the mentioned obligation, the depositary notary should not be held responsible for such default.

2.21. *Introduction of new Article 43C:* Article 43C is proposing to introduce a new Section within the TTA dealing with the duty of auditors to notify the Authority of specific circumstances of which they become aware in their capacity as auditors of corporate trustees. The Authority intends to further supplement this new section with further guidance included in the Code of Conduct for Trustees.

2.22. *Amendment to Article 44:* The Authority is proposing to amend Article 44 as follows:

- *Revision of Article 44(1):* The Authority is proposing the inclusion of a programme of operations with the application documents.
- *Introduction of Article 44(2):* The proposed Article 44(2) introduces the concept of close links in the Act.

2.23. *Amendment to Article 46:* Paragraph (d) of Article 46 is being revised to introduce a period of 12 months from the granting of the licence within which the trustee would not have commenced activities.

2.24. *Amendment to Article 57:* The Authority is proposing to amend Article 57 dealing with the Minister's powers to make regulations as follows:

- In particular, the following enabling clauses are being introduced to empower the Minister to make regulations or rules specifically aimed at:
 - i. Regulating the authorisation and regulation of sub-trusts in connection with collective investment schemes and retirement pension schemes;
 - ii. Regulating the registration, conservation and access of notarial trust deeds;
 - iii. Regulating the procedure of registration by the Authority of notaries acting as qualified persons;

- iv. Exempting any activities or classes of persons from the requirements in Article 43(12) and to impose conditions it may deem fit for eligibility for exemption; and
- v. Transposing, implementing and giving effect to the provision and requirements of EU Directives and Regulations where necessary.

These enabling powers are being introduced with the aim of keeping up with developments in the trusts market, and in response to various requests received from the industry.

- *Introduction of Article 57(3), (4) and (5):* The proposed subarticles enhance the powers of the competent authority to issue regulations in terms of the Act.

3. INTRODUCTION OF A TRANSITORY PROVISION

The table reproduced hereunder includes all the changes which are being introduced in the Act:

PROPOSED CHANGES	LICENCED ENTITIES				TRANSITORY PERIOD
	TRUSTEES	MANDATORIES	ADMINISTRATORS		
	CORPORATE	CORPORATE	INDIVIDUAL	CORPORATE	
Minimum Share Capital Requirement	√	√	X	X	2-years
Financial Resources Requirement	√	√	X	X	Proposal Stage
Professional Indemnity Insurance	√	X	X	X	6-months
Compliance Officer	√	√	X	√	6 months
Auditor	√	√	X	√	6 months
MLRO	√	√	X	√	6 months

Given the introduction of additional obligations linked to the process of authorisation of trustees such as the introduction of a minimum share capital requirement, the Authority feels that transitory arrangements should be provided for trustees and providers of other fiduciary services which are already authorised at the date of coming into force of the revised Act.

For this reason, the Authority is proposing the introduction of a transitory period of 2 years with regards to the compliance with the minimum share capital requirement prescribed in the Act for trustees and mandatories in terms of Article 43(4)(d) and Article 43(13) respectively. The aim is that of ensuring that the transition is as smooth as possible.

On the other hand, a transitory period of 6 months is being introduced for the appointment of a compliance officer and the auditor by trustees and providers of other fiduciary services.

The same transitional period of 6 months will be applicable with regards to the introduction of the Professional Indemnity Insurance Cover; however this will be dealt with in further detail in the Code of Conduct for Trustees.

- [i] **Do you agree that the introduction of these two transitional periods is sufficient for entities which are already authorised to conform to the revised Act?**

4. DISCUSSIONS CONCERNING THE IDENTIFICATION OF COURTS

The Trusts and Trustees Act defines the term “Court” as meaning “the Civil Court in its Voluntary Jurisdiction unless otherwise indicated or unless the context refers to any court seized of a matter in which case it is the court where the matter arises”.

Whilst the decision concerning the choice of the Civil Court in its Voluntary Jurisdiction was intentional, the Authority feels that at times there can be confusion as to whether an individual should proceed before the Civil Court in its contentious jurisdiction or in its voluntary jurisdiction.

Pursuant to the power entrusted to the Minister by virtue of Article 57(1)(d) to make rules of court for any purpose of this Act and of proceedings thereunder, providing by such rules for any matter referred to in section 29 of the COCP, the Authority is consulting with the industry as to whether the current Article 38 should be revised.

Any proposed amendments would prescribe the procedure regulating contentious and non-contentious matters which may arise during the operation of a trust. Whilst the Civil Court in its Voluntary Jurisdiction would remain the competent court in matters relating to trusts and trustees, the Authority is considering whether to introduce the principle that where, upon commencement of the proceedings, these become of a contentious nature, the Civil Court in its Voluntary Jurisdiction shall, at its own discretion and after having heard representations from the parties:

- [a] either opt to remain seized with the matter and thereafter assume the role of the First Hall Civil Court and decide the matter; or
- [b] acknowledge that the proceedings have become of a contentious nature and transfer the case before the First Hall Civil Court.

The Authority is also proposing also to reiterate the principle that any applications relating to trusts and trustees which are of a purely contentious nature shall be filed before the First Hall Civil Court.

The Authority is hereby requesting comments from the industry as follows:

- [i] **In principle, do you agree with the need to revise Article 38 of the Act?**
- [ii] **Do you agree with the issues raised by the Authority and the possible revision of Article 38 as is being proposed by the Authority?**
- [iii] **Do you have any proposals with regards to a possible revision of Article 38?**

Following receipt of comments from the industry, the Authority is proposing to engage in discussions with the Ministry of Justice and the Rule Making Board with a view to proposing any amendments.

5. COMPLIANCE

The Authority requires trustees to adhere strictly to the requirements imposed by the Trusts and Trustees Act as well as other requirements imposed by other laws and regulations which may be applicable thereto. As part of its licencing process, the Authority is proposing to request that potential applicants identify an individual who will be responsible for ensuring the Trustee's compliance with the requirements imposed by the Act, any regulations and rules issued thereunder. The role of Compliance Officer is onerous due to the extent of responsibility and the possibility of censure by the Authority where problems arise.

Trustees carry on a "relevant activity" for the purposes of the Prevention of Money Laundering and Funding of Terrorism Regulations. Accordingly, they are required to adhere to the Regulations and any relevant Guidance Notes issued by the Financial Intelligence Analysis Unit. Regulation 15 of the Prevention of Money Laundering and Funding of Terrorism Regulations requires that a trustee as subject person carrying out a relevant activity appoints a Money Laundering Reporting Officer.

Whilst the appointment of these two officials is already being fulfilled by some Trustees particularly with regards to the appointment of the MLRO, the Authority is

proposing to introduce this requirement in the Revised Code of Conduct for Trustees which will be issued shortly for consultation.

The Authority is hereby requesting comments from the industry as follows:

- [i] **Do you agree with the Authority’s proposal to reinforce further its recommendation to appoint a Compliance Officer?**

6. PROPOSED NEW REGULATIONS

The proposed amendments to the Trusts and Trustees Act are being supplemented with the following new proposed Legal Notices:

6.1. *Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations*

The purpose of the Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations is that of creating a framework which caters for the registration of notaries wishing to act as a qualified person in terms of Article 43 of the Act.

These regulations seek to provide the possibility to notaries who are acting as depositary notaries in terms of Article 43A of the Act to also act as qualified persons, as long as such notaries are registered in terms of these Regulations.

The Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations also deal with the application requirements which a notary must fulfil in order to be eligible for registration to act as a qualified person.

6.2. *Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations*

The purpose of the Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations is that of providing a clear procedure which is to be adopted by Notaries to ensure the protection of the private nature of the trust deed on the one hand and the public element which is innate in the public deed on the other hand.

Article 43A(6) of the Act imposes an obligation on the Depository Notary to hold all documents relative to the trust for safekeeping and registration in the manner as may be laid down by the Authority from time to time. These regulations aim at clarifying the manner in which Notaries can comply with the obligations prescribed under this

article as well as the formalities required under Article 84A(2) of the Notarial Profession and Notarial Archives Act.

These Regulations provide guidance on the following matters:

- 1) conservation and registration in volumes by the Publishing Notary for all notarial deeds published prior to the coming into force of these regulations;
- 2) conservation and registration in volumes by the Publishing Notary for all notarial deeds published after the coming into force of these regulations;
- 3) Safekeeping of documents by Depositary Notaries and
- 4) Accessibility of Trust Documents.

7. UNIT TRUSTS AND SUB-TRUSTS

The Authority is currently evaluating whether to issue regulations to provide for (i) the setting up of collective investment schemes in the form of umbrella unit trusts with one or more sub-trusts and (ii) the use of a “sub-trust” concept in relation to the establishment of retirement schemes in the form of a trust. An enabling provision is being introduced in Article 57 of the Act to pave the way for the possible issue of such regulations.

[i] Are you of the opinion that the constitution of sub-trusts in the above circumstances should be expressly regulated through statutory provisions?

[ii] If you agree with the possible issue of regulations, which issues do you feel should be expressly catered for therein?

8. WAY FORWARD

The Authority is also currently working on the following documents namely:

- [i] Updated and more detailed Code of Conduct for Trustees;
- [ii] Accounting Guidelines for Trustees; and
- [iii] Annual Compliance Return for Trustees.

The aforementioned documentation is expected to be issued for consultation during 2013.

Communications Unit
14th December 2012
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