

CONSULTATION PROCEDURE

CONSULTATION ON THE PROPOSED RULES FOR COMPANY SERVICES PROVIDERS

[MFSA REF.:01-2014]

Closing Date: 31st January, 2014

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Consultation on the proposed Rules for Company Services Providers.

1.0 Background

In terms of Article 3 of the Company Services Providers Act (“the Act”), any person resident or operating in or from Malta who acts as a company service provider by way of business, shall apply for registration with the Authority in terms of this Act. This requirement shall not apply to persons in possession of a warrant, or equivalent, to carry out the profession of advocate, notary public, legal procurator or certified public accountant and to persons authorised to act as a trustee or to provide other fiduciary duties in terms of the Trusts and Trustees Act.

Further to the consultation on the introduction of a regulatory regime for Company Services Providers issued on the 23rd November, 2013 and the relative Feedback Statement issued by the Authority on the 17th May, 2013, the Authority is hereby issuing, for consultation, the proposed Rules for Company Services Providers. These Rules shall be issued by the Authority in terms of Article 8 of the Act with the aim to supplement the legal framework for Company Services Providers established by the Act itself and shall include more detailed regulatory requirements by which persons registered in terms of the Act are expected to comply.

2.0 Highlights of the Proposed Rules

2.1 Definition of the expression “by way of business”

For the purposes of ascertaining whether a registration requirement under Article 3 of the Act, is triggered, it is being proposed that the expression “by way of business” shall mean that the provision of company service are being provided by a person who **EITHER**:

- (a) holds himself out as providing company services by, *inter alia*, soliciting the services on offer to members of the public; **OR**
- (b) provides company services on a regular and habitual basis

AND

(c) is being directly or indirectly in receipt of remuneration or other benefits for the provision of such services.

The Authority, taking into account a number of factors and criteria indicated in the proposed rules, shall conclusively determine whether the carrying out of a particular activity and/or the manner in which an activity is being carried out would be subject to registration in terms of the Act.

“Holding oneself out”

In the context of the above explanation of the expression “*by way of business*”, the Authority considers that the phrase “*holding oneself out*” involves actual representation to third parties. The test on whether one is “*holding oneself out*” cannot be confined to whether advertising or solicitation takes place. In this regard, the proposed Rules list a number of criteria which may indicate that a person may be deemed to be “*holding himself out*”.

Directorships

One of the services in relation to which registration under the Act is mandatory if carried out by way of business, is the provision of directorship services when this is carried out on a regular and habitual basis.

The Authority has been requested to clarify the extent to which it considered the provision of directorship services by an individual to be to fall within the regulatory remit of the Act. In this regard, the Authority is proposing that the following matters would be indicative of a person acting in a personal capacity and therefore **would not** be regarded as undertaking such activity “*by way of business*”:

- a. directorships of private companies where the director concerned is a 50% or more beneficial owner; and
- b. directorships of companies beneficially owned by family members.

The Authority is also proposing that the purposes of establishing whether an individual is holding himself out as providing directorship services by way of business, and therefore subject to registration under the Act, the Authority shall consider whether such individual holds more than ten directorships in companies other than those licenced, recognised or authorised 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. Accordingly, it is being proposed that individuals holding directorships in companies which are so licenced, recognised or authorised shall not be considered as providing directorship services by way of business, for the purposes of registration in terms of the Act.

The Authority is not proposing to prescribe a maximum number of directorship appointments an individual may hold, even after applying and obtaining registration as a Company Services Provider. However, the Authority is proposing to review, both at application stage and on an ongoing basis, an individual’s capacity and ability to effectively carry out the responsibilities commensurate to that individual’s engagements, bearing in mind the activities and complexities of the companies in which such individual holds a directorship.

2.2 The Fit and Proper Test and Regulatory Approval

In terms of Article 5 of the Act, an applicant for registration as a company services provider must show to the satisfaction of the MFSA that he is a fit and proper person.

Furthermore, where the applicant or the registered person is a corporate entity, its directors and its qualifying shareholders (holding 25% or more of the shares or voting rights) must also satisfy the fit and proper test.

In order for the Authority to carry out its fit and proper assessment, the latter would be required to submit a duly completed personal Questionnaire form which should also be accompanied with authenticated copies of any qualifications which the applicant may have. Where the applicant or its proposed qualifying shareholders are corporate entities, they shall be required to complete the questionnaire for qualifying shareholders other than individuals set out in the Rules.

Persons who have already been approved as fit and proper by the MFSA and who apply for registration as company services providers will be required to submit a declaration that there have been no material changes to the form which is currently held by the Authority. However, a fresh Personal Questionnaire form is required to be submitted if the one held by the Authority is more than 5 years old.

It is being proposed that the written approval of the MFSA be obtained with respect to changes in a registered person's qualifying shareholders, directors and senior management (which would include the Compliance Officer and the Money Laundering Reporting Officer).

2.3 Share Capital Requirement

It is being proposed that where the Registered Person is a body corporate it must have a minimum paid up share capital of €5,000 which must be maintained throughout the existence of the company. Where the Registered Person is an individual, a working capital of at least €2,500 is proposed to be maintained for as long as that individual remains registered under the Company Services Providers Act.

2.4 Appointment of Compliance Officer and Money Laundering Reporting Officer

In terms of the Prevention of Money Laundering and Funding of Terrorism Regulations, a person who provides company services within the meaning of the Act is considered to be a subject person and is therefore required to appoint a reporting officer (Money Laundering Reporting Officer). Furthermore, as stipulated by the said Regulations and the Implementing Procedures issued by the FIAU, the person appointed as a MLRO should be of sufficient seniority and command and shall not be a non-executive director of the Company Services Provider or its Company Secretary.

Furthermore, it is also being proposed that Registered Persons should also appoint a Compliance Officer who will be responsible for ensuring that the Register Person complies with the on-going obligations contained in the Rules.

It is being proposed that the approval of the MFSA be sought for the appointment of these two posts (which can be occupied by the same person).

2.5 On going obligations

Once a Registration is granted by the Authority to a person in terms of Article 3 of the Act, it is being proposed that a number of on-going obligations must be complied with by the registered person. Accordingly, it is being proposed that the MFSA must be notified by the Registered Person of certain developments which may occur as soon as they take place. These would include a change in the Registered Person's name or business name, a change of address, the termination of a Director, Compliance Officer and/or Money Laundering Reporting Officer.

Furthermore, it is also being proposed that the prior written consent of the MFSA is sought in certain circumstances, which would include, *inter alia*, making changes to the Registered Person's share capital or share holders' rights, the cessation of company services business and changes in the ultimate beneficial ownership of the Registered Person.

Organisational Requirements

From an organisational point of view, it is being proposed that Registered Persons would be required to ensure that they have in place systems, controls and procedures to ensure that staff perform their duties in a diligent and proper manner. Moreover, it is also being proposed that the Registered Person establishes and maintain adequate policies and procedures to identify breaches of the applicable regulatory requirements, and to minimise the risk of such breaches.

In terms of the proposed rules, the Registered Person would be required to have in place effective management and systems as well as suitably chosen, trained and supervised staff in order to comply with the Rules. The Registered Person shall ensure that the responsibilities and authority of each member of its staff are clear and appropriate to his or her qualifications and experience and that staff receive any training which is necessary for their roles.

The Registered Person would also be required to act in each client's best interest and to avoid or deal properly with any conflict of interest between clients or client companies or between itself and a client or client company.

It is being proposed that, where the Registered Person is a corporate entity, its business should be managed and/or directed by at least two individuals in satisfaction of the "dual control" principle.

Conduct of Business Rules

Registered Persons would be required to adhere to a series of Conduct of Business Rules which relate to, *inter alia*, the drawing up of client agreements, the requirement of segregation of funds, the procedures to be followed in client acceptance and due diligence, record keeping obligations and reporting requirements.

In general, it is being proposed that Registered Persons act with due skill, care and diligence in the client's best interests.

Client Agreements

In terms of the proposed Rules, the Registered Person would be required to discuss terms of business with each prospective client and keep a written record of the agreement reached with each client, including evidence of the client's agreement to these terms. The proposed Rules also indicate what basic information such agreements should contain.

Segregation of Funds

It is being proposed that Registered Person will be required to ensure that any funds in its possession but belonging to a client are kept at all times separately from those of the Registered Person itself and also from those of other clients.

Customer Acceptance and Due Diligence

In addition to the Implementing Procedures issued by the FIAU, the Authority is proposing that Registered Persons should comply with further specific requirements notably:

- a) ensuring that a person is of sufficient standing and repute prior to accepting to offer its services to such person;
- b) requesting a number of confirmations, in writing, from potential clients, including, *inter alia*, confirmation as to whether the latter has ever been convicted of an offence, ever been adjudged bankrupt or ever been the subject to an investigation by a government, professional or other regulatory body.

The Registered Person, in terms of the proposed Rules, would also be required to know and have regular contact with the directors of client companies and establish the nature of the activities and assets of client companies.

Record Keeping

It is being proposed that the Registered Person retains the records relating to provision of company services to clients for a period of 5 years during which the MFSA may require sight of such documents on demand. Such records shall contain all the information and details for the identity of the client and the information required under the Prevention of Money Laundering Act, 1994 and Regulations issued thereunder as well as by the Implementing Procedures issued by the FIAU.

In terms of the proposed Rules, Registered Persons will also be required to keep and preserve appropriate records in Malta which will at least include such records as are appropriate for their functions, as required by any applicable laws and will enable the provision of information to persons entitled to such information, on a timely basis. Records should be retained in a medium which allows the storage of information in a way which facilitates access for future reference by the MFSA.

Reporting Obligations

It is being proposed that Registered persons shall prepare an Annual Return in the form which may be prescribed by the MFSA from time to time. Such return should be signed by the individual who is registered under the Act or otherwise, in the case of Registered Persons which are commercial partnerships, by at least two directors or partners or any other persons authorised to sign by Board Resolution.

Audited annual financial statements prepared in accordance with International Financial Reporting Standards would also be required to be submitted to the MFSA within four months of the Registered Person's Accounting Reference Date.

It is also being proposed that Registered Persons who are individuals, submit a "Statement of Solvency" (pro forma included in the Rules) together with the Annual Financial Return together with a Certificate of Compliance to be personally signed by the individual Registered Person or him/herself. This certificate should include a statement regarding any breaches of the Act or of the Rules committed by the Registered Person during the period covered by the Certificate of Compliance.

Registered Persons would also be requested to notify the MFSA immediately if:

- a) they are notified that their auditor intends to qualify the audit report;
- b) they become aware of actual or intended legal proceedings against it;
- c) they decide to claim on a professional indemnity or other policy relating to their company services provider business

Disclosure Requirements

In terms of the proposed Rules, Registered Persons would be required to ensure that their status as registered persons in terms of the Act is disclosed in all advertisements and correspondence.

Complaints

Registered Persons will be required to establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from clients and to keep a record of each complaint and the measures taken for its resolution.

Outsourcing

In terms of the proposed Rules, it would be possible for Registered Persons to outsource some of their functions to third party subject to a number of conditions, Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of the Registered Person's internal control and the

ability of the MFSA to monitor the Registered Person's compliance with all obligations. In particular, under the proposed Rules, when the Registered Person outsources critical or important operational functions or the provision of company services, the Registered Person shall remain fully responsible for discharging all its obligations under the Rules.

For the purpose of this section of the Rules, it is being proposed that an operational function of a Registered person shall be regarded as critical or important if a defect or failure in its performance would materially impair the continuing compliance of a Registered person with the conditions and obligations of its registration or its other obligations under the proposed Rules, or its financial performance, or the soundness of the continuity of its provision of company services.

2.6 Rules for Registered Persons providing Company Formation Services

Rules which are specific to company formation. Such proposed Rules would refer to the requirements to:

- (a) carry out due diligence checks to identify and verify the ultimate beneficial ownership of the proposed company;
- (b) Ensure that the proposed name of the company is not in breach of the relative requirements under the Companies Act;
- (c) Be aware of any situations where the persons involved in the proposed company and/or its activities would be deemed to be high risk;
- (d) Assess the level of risk which the formation of the Company would present to the reputation of Malta.

In terms of these proposed Rules, Registered Persons which do not maintain an ongoing relationship with the companies they form shall be required to retain the documents relating to customer due diligence checks which the Registered persons had made in relation to those companies for a period of not less than five years.

2.7 Rules for Registered Persons acting as Directors in relation to other Legal Entities.

It is being proposed that Registered Persons who provide the service of acting as directors to other legal entities, in terms of their registration as company services provider be subject to Rules specific to Registered Persons providing these services. The aim of these proposed specific Rules is mainly to ensure that the client companies to whom the Registered Persons is offering directorship services abide by the applicable legislative requirements relating chiefly to Company Law and Anti Money Laundering legislation.

3.0 Publication of the Company Services Providers Act and Application Process

The Company Services Providers Act (Act XX of 2013) has been published on the 24th December, 2013. Accordingly, in terms of Article 18 of the Act, persons who

prior to the abovementioned date were carrying out the services of a company service provider have three months - that is up to the 24th March 2014, to apply to the Authority for registration in terms of Article 4 of the Act. In this regard, the Authority has published the Application Form together with the Personal Questionnaire and the Corporate Questionnaire, when applicable, which such persons are to submit to the Authority. These documents can be downloaded from <http://www.mfsa.com.mt/pages/viewcontent.aspx?id=520>

Applicants which are currently already providing corporate services within the meaning of the Act are required to submit, in addition to the relative application documents, a statement providing further details as to the services which are currently being offered and indicating how long have these services been offered by such persons.

Applications by prospective applicants for registration as a Company Service Provider are to be addressed to the Director, Authorisation Unit, Malta Financial Services Authority, Notabile Road, Attard BKR 3000. Any queries relating to the application process may be sent to au@mfsa.com.mt.

The Authority would like to point out that, subject to the transitional period referred to above, it is an offence to provide company services without registration in terms of Article 3 of Act XX of 2013.

4.0 Consultation Period and Contacts

Interested parties are requested to send their submissions on the proposed Rules in writing to Dr. Michelle Mizzi Buontempo, Deputy Director Securities and Markets Supervision Unit, Malta Financial Services Authority, Notabile Road, Attard (or by email at mmizzibuontempo@mfsa.com.mt) by not later than the 31st January, 2014.

Any queries regarding the proposed Rules are to be directed to: Dr. Michelle Mizzi Buontempo, Securities and Markets Supervision Unit Tel: 25485112, Email: mmizzibuontempo@mfsa.com.mt or Dr. Sarah Pulis, Securities and Markets Supervision Unit Tel: 25482532 Email: spulis@mfsa.com.mt

Communications Unit
Malta Financial Services Authority
7th January 2014
MFSA Ref: 01-2014