

QUALIFIED PERSONS

RULE ISSUED UNDER THE MFSA ACT

MFSA RULE 3 OF 2019

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REVISIONS LOG

VERSION	DATE ISSUED	DETAILS
1.00	xxxx	RULE ISSUED

1.0 Introduction

- 1.1 In terms of articles 16(2)(a) and 16(2)(c) of the Malta Financial Services Authority Act [CAP 330] (**'the Act'**), the Malta Financial Services Authority (**'the Authority'**), as established in terms of article 3 of the Act, may issue Rules regulating the procedures and requirements relating to the appointment of a qualified person, both when such qualified person shall be appointed by the Authority and when the Authority shall require a person to appoint such a qualified person.

2.0 Scope

- 2.1 This Rule shall determine the terms and conditions of the appointment of a qualified person, the powers and duties of the qualified person as well as the disclosure requirements which a qualified person shall be required to comply with in the exercise of his functions.
- 2.2 The purpose of this Rule is to also ensure that the Authority receives the required information from the qualified person and that the licence holder or any other person, fully cooperates and provides the qualified person with the required access and information for the purpose of the review process.
- 2.3 The Authority may appoint, or require a licence holder or any other person to appoint, a qualified person to carry out such tasks under such terms and conditions as the Authority may direct in the Terms of Reference, including, but not limited, to the following purposes:
- (a) where analysis is required in relation to specific areas of concern, and/ or to identify, measure and assess risks, in particular those arising from unexpected events that require immediate supervisory action;
 - (b) to gather information and to track the development of identified trends and risks, wherever these arise;
 - (c) for remedial action, including follow-ups of compliance visits and thematic reviews carried out by the Authority;
 - (d) for preventive purposes, in order to limit or reduce particular risks;
 - (e) where material changes are being proposed to the business model, the governance structure or internal systems of a firm, or in the case of a proposed change in control of such firm.

- 2.4 For the purposes of this Rule:
- 2.4.1 Words importing the masculine gender shall include females and words importing the female gender shall include males.
- 2.4.2 **The term “licence holder” refers to** any person, including any entity corporate or unincorporated, which may hold a licence or other authorisation issued by the Authority or which falls within the supervisory or regulatory authority of the Authority.
- 2.4.3 The term “audit” shall not be interpreted to mean the audit referred to in the standards outlined by the International Organization for **Standardization (“ISO”)** requirements for Auditors, unless determined and specified otherwise by the Authority. The required standards will be determined by the specific Terms of Reference on the particular area(s) of focus.

3.0 Registration Process

- 3.1 Any person who wishes to provide the services of a qualified person in terms of this Rule in relation to one or more areas of focus as may be determined by the Authority from time to time, shall apply in order to be included in the Register of Qualified Persons (**“the Register”**) to be established by the Authority.
- 3.2 The manner in which such person may apply to be on the Register of Qualified Persons is set out in the First Schedule to this Rule. When reviewing an application submitted in terms of this Rule, the Authority will have regard to and assess the skills and technical capabilities of the applicant, its systems and the internal resources available. It is the responsibility of the applicant to demonstrate to the Authority that it possesses the necessary knowledge, skills and experience, resources and independence to be able to undertake the tasks in respect of the area(s) of focus that are being applied for.
- 3.3 Upon being satisfied that the applicant fulfils the requirements of this Rule, the Authority shall register the qualified person in the Register which shall be made available on its website.
- 3.4 Any application submitted in terms of paragraph 3.1 shall be accompanied by a non-refundable application fee of five thousand Euro (€5,000).
- 3.5 Persons registered on the Register of Qualified Persons shall pay to the Authority an annual maintenance fee of five hundred Euro (€500).

4.0 Appointment Process

4.1 As soon as a qualified person is selected by the Authority, or by a licence holder or any other person, as the case may be, the qualified person shall provide the Authority with the following:

- i. a notification containing the details of the licence holder or of any other person in relation to which he has been appointed (where the qualified person is appointed by the licence holder or by any other person);
- ii. a declaration confirming that the qualified person as well as its employees and any affiliated entities are free from any potential or existing conflicts of interest and that there is sufficient detachment from the licence holder or any other person, as the case may be;
- iii. in case of potential or existing conflicts of interest, details of the relevant conflicts, including how the relevant conflicts are expected to be mitigated or managed; and
- iv. a confirmation that the qualified person is able to complete the required tasks within the time limit prescribed by the Authority in the Terms of Reference governing the appointment of the qualified person.

4.2 As part of the appointment process, the Authority may meet the qualified person in order to discuss matters, such as, the objective of the required review and the subject matter to be addressed, timescales, the required coverage of the review, costs, content and structure of the report (including whether any draft and interim progress reports are required) and information to be acquired during the review process.

4.3 In finalising its decision whether the appointment of a qualified person is required in respect of a licence holder or any other person, the Authority may inform the licence holder, or any other person, in advance.

On-going maintenance of the Register of Qualified Persons

4.4 A qualified person is required to immediately notify the Authority should there be any material change:

- i. in the information that was provided to the Authority when applying in terms of paragraph 3.1 (including changes in systems used or in the employees that were notified to the Authority as forming part of the team that will carry out the assigned tasks, including, where applicable, the independent compliance audit). In case of additions of new personnel, the notification shall be accompanied by a copy of a Curriculum Vitae of the additional persons. Such notification is to be submitted before the implementation of the changes in the composition of the team that is responsible for carrying out the assigned tasks; or

- ii. in the information provided in terms of paragraph 4.1 above.

4.5 Upon receiving the notification referred to in paragraph 4.4, the Authority shall either confirm its approval in writing for the proposed changes outlined in the notification or otherwise, prior to approving or refusing the proposed changes, may request any additional clarifications and/ or documentation, as may be necessary.

Removal from the Register of Qualified Persons

4.6 The Authority may remove a qualified person in the following circumstances:

- i. the qualified person maliciously or due to gross negligence fails to report to the Authority serious failures on the part of one or more of the licence holders or any other person in relation to which he was appointed to carry out the assigned tasks;
- ii. if the qualified person acts in breach of the agreement entered into with the licence holder or any other person concerned or with the Authority, as the case may be;
- iii. the qualified person fails to disclose to the Authority any conflict of interest that will prevent him from undertaking the review required of him with the necessary independence of mind;
- iv. the qualified person outsources to a third party any part of the assigned tasks **without the Authority's prior** written approval (this applies even if the said third party is a member of the same Group or network of member firms as the qualified person);
- v. if he or any person involved in carrying out the tasks, is interdicted, incapacitated or an undischarged bankrupt;
- vi. if he or any person involved in carrying out the tasks is convicted of any of the crimes affecting public trust, or of theft or of fraud or of knowingly receiving property obtained by theft or fraud; or
- vii. where the qualified person is a legal person, if such qualified person is wound up or has an administrator, receiver or liquidator appointed or made a compromise or similar arrangement with its creditors or ceased trading in circumstances where its creditors did not receive (or have not yet received) full settlement of their claims.

5.0 Terms of Reference

5.1 The Terms of Reference issued by the Authority to the qualified person shall, *inter alia*, indicate:

- (a) the tasks which a qualified person is required to perform;
- (b) the area(s) of focus applied for by the qualified person and the objective and subject matter of the required review;
- (c) the content, structure and extent of detail of the report to be prepared by the qualified person;
- (d) the date for the completion of the tasks assigned relating to the performance of the tasks assigned to the qualified person as required by the MFSA (including any draft, interim and final reports, as applicable).

Where the qualified person becomes aware that he may not be able to complete his tasks within the stipulated period, he shall communicate the matter to the licence holder or any other person, as applicable, and to the Authority, and shall specify any extra hours that are required for completion. A revised timeframe would need to be agreed with the Authority.

5.2 Where during the performance of his work, the qualified person finds that the scale or complexity of the engagement is materially **different from the qualified person's** understanding of the scope of the tasks required of him, the qualified person shall promptly inform the Authority, so that a mutually acceptable solution may be agreed upon. Where the Authority and the qualified person mutually agree on a **change in scope of the qualified person's work, the Terms of Reference will be** amended accordingly.

6.0 Powers of the Qualified Person

6.1 A qualified person shall have the following powers in order to be able to fulfil the duties prescribed in the Terms of Reference referred to in Section 5.0:

- (a) to report on the affairs of the licence holder or of any other person, in relation to which the qualified person is appointed;
- (b) to enter the premises occupied by the licence holder or by any other person in relation to which the qualified person is appointed, for the purpose of carrying out his assigned tasks;
- (c) subject to the Terms of Reference which govern the appointment of the qualified person, to require any information and documentation from the licence holder or from any other person in relation to which the qualified

person is appointed, to take copies of any documents, and, where necessary, to access the systems of the licence holder or of any other person from any web-enabled device.

7.0 Duties of a Qualified Person

7.1 Once appointed in relation to a licence holder or any other person, the qualified person shall:

- (a) fully cooperate and ensure a transparent and open dialogue with the Authority and the licence holder or any other person, as the case may be;
- (b) obtain and consider information on the relevant area(s) of focus set out in the Terms of Reference governing his appointment;
- (c) review all the documentation held by the licence holder or any other person in relation to which the qualified person has been appointed, with respect to the objective and subject matter as outlined in the agreement and Terms of Reference;
- (d) hold meetings with the Authority (as may be requested by the Authority itself), including in case of any difficulties encountered during the carrying out of his appointment;
- (e) **obtain the Authority's prior written approval if the appointed qualified person elects to outsource (or sub-contract) selected parts of the functions assigned to him to third party (ies) for the purposes of carrying out the tasks as specified in the Terms of Reference (this applies even if the said third party is a member of the same Group or network of member firms as the qualified person).**

Such request must include details as to whom the task(s) will be outsourced, together with information on how the qualified person will manage and monitor the work to be outsourced to third party(ies). The qualified person shall remain accountable for the outsourced/ sub-contracted tasks and shall ensure that the Authority is granted access to the documents and systems of the outsourced/ sub-contracted party(ies) which are related to the tasks outsourced/sub-contracted by the qualified person;

- (f) present draft and interim progress report(s), as may be requested by the Authority and as may be specified in the Terms of Reference. In such cases, the qualified person shall communicate directly with the Authority but, unless the circumstances of the case dictate otherwise, the Authority shall ensure that the licence holder or any other person, is informed about the exchanges of communication between it and the qualified person;

- (g) present a final report to the Authority which should *inter alia* include, in a clear and unambiguous way, his findings and conclusions (as necessary), as well as any limitations and sampling methodology used, whilst carrying out the tasks assigned to him under the Terms of Reference.

7.2 The Authority shall specify a time frame within which the qualified person is required to deliver the report or collect or update the relevant information.

7.3 The Authority may meet the licence holder or any other person and the qualified person together to discuss the final report. Depending on the objective and subject matter of the requested review, the Authority shall have the discretion of meeting and discussing the final report either solely with the qualified person, or else together with the licence holder or any other person.

8.0 Ongoing Disclosure Requirements of the Qualified Person

Conflicts of Interest

8.1 The qualified person shall undertake to avoid potential conflicts of interest throughout the duration of the agreement, as well as twelve (12) months after its completion in relation to all new engagements in order to ensure that any such engagements do not give rise to any conflicts of interest.

Confidentiality

8.2 The licence holder or any other person shall waive any duty of confidentiality owed by the qualified person to the licence holder or any other person which might limit the provision of information or opinion by that qualified person to the Authority. The qualified person shall, in turn, be required to treat any information retrieved from the licence holder or any other person as confidential, in line with the terms as specified in the agreement.

9.0 Payment Terms

9.1 Prior to his appointment, the qualified person shall provide the Authority with a detailed quotation of the fee payable for carrying out the required tasks. Such information is required both when the qualified person is selected by the Authority, or otherwise by the licence holder or any other person, as the case may be.

9.2 Following the appointment of the qualified person, any fee changes that may be required in view of reasons, such as, additional work that would need to be carried out by the qualified person as part of the review process, should be discussed and agreed with the Authority, before the additional work is carried out. In such case, the necessary details need to be provided to the Authority, explaining the basis behind the change in the agreed fee.

10.0 Agreement with the Qualified Person in terms of Article 16 of the Act

10.1 A qualified person shall enter into an agreement with the licence holder or any other person, or the Authority, as the case may be. Before the appointment of the qualified person, the Authority may request a copy of the draft agreement.

10.2 The agreement referred to in paragraph 10.1 shall contain the following minimum criteria:

- (a) identification of the parties involved;
- (b) the appointment of the qualified person;
- (c) Terms of Reference;
- (d) payment terms;
- (e) non-exclusivity clauses;
- (f) conflict of interest clauses;
- (g) disclosure and confidentiality clauses;
- (h) data protection clauses;
- (i) governing law and jurisdiction;
- (j) dispute resolution;
- (k) signatories to the agreement.

First Schedule

TO BE ISSUED WITH PUBLICATION OF RULE

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