

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

**PROPOSED RULES FOR TRUSTEES AND OTHER
FIDUCIARIES**

[MFSA REF: 17-2016]

[30th December 2016]

[CLOSING DATE: 31st January 2017]

Note: The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holders and other involved parties.

It should also be noted that this Consultation Document should be taken as a tool to assist stakeholders in the consideration of the proposed rules subject to this consultation procedure, and should not be treated as a substitute to a thorough reading of the actual rules.

It is important that persons involved in the consultation bear these considerations in mind.

CONSULTATION DOCUMENT

PROPOSED RULES FOR TRUSTEES AND OTHER FIDUCIARIES

1 INTRODUCTION

1.1 Background

Following a consultation procedure, a number of amendments were made to the Trusts and Trustees Act, which were brought into force by virtue of Act XI 2014 on 25th April 2014. The Feedback Statement in relation to the above-mentioned consultation procedure was issued on 18 October 2013 [[Feedback statement: 11/2012](#)], which reiterated the Authority's commitment to amplify the existing regulatory framework applicable to persons authorised in terms of the Trusts and Trustees Act. An internal review of the Code of Conduct subsequently ensued.

1.2 Rules for Trustees and Other Fiduciaries

At an early stage of the review, the Authority formed the opinion that the Code of Conduct should be replaced by a body of rules which it has termed the “ Rules for Trustees and Other Fiduciaries” (hereinafter “the Rules”). It was considered that the status of Rules would confer greater legal certainty to the regime since it would leave no room for doubt as to the nature of licence holder obligations and would provide for further standardisation within the industry.

In the interests of further clarity, the Authority has also taken the decision to expressly state the applicability of the Rules to mandatories and to administrators of private foundations as well as to trustees. To this end, the terminology used has been geared to cater for the institutions of mandate and foundation such that, for instance, the term “trust deed” has been supplemented by the terms “client agreement” and “deed of foundation” for those requirements that apply equally to trustees, mandatories and administrators. Furthermore, the generic term “Authorised Person” is used in preference to the specific term “trustee” other than in cases where the context requires specification of any one particular institute.

Certain Rules consist in a replication of the principles currently contained in the Code of Conduct. These will not be addressed in this consultation since they do not represent new obligations on Authorised Persons. On the other hand, a number of other Rules either consist in an elaboration on previously existing principles or introduce new requirements. These Rules will form the subject of this consultation.

Q1. Do you agree with the Authority's decision to replace the Code of Conduct with the proposed Rules for Trustees and Other Fiduciaries for the reasons stated above?

1.3 Structure of the Rules

It is being proposed that the Rules be divided into three parts as follows:

- [i] Part A contains general requirements that are applicable to all Authorised Persons;
- [ii] Part B contains requirements that are applicable to both individuals or bodies corporate that are authorised as either trustees or mandatories; and
- [iii] Part C contains requirements that are applicable to bodies corporate that are authorised as trustees or mandatories.

It is not excluded that future revisions of the Rules may include the addition of further parts as needs arise.

The Authority considers the above structure to be in the best interests of clarity since provides delineation between the general obligations binding all Authorised Persons and those obligations applicable only to specific Authorised Persons.

Q2. Do you agree with the structure that the Authority has adopted for the Rules?

2 CONTENT OF THE RULES – PART A

Part A of the Rules lays down general requirements and is applicable to all Authorised Persons.

2.1 Competence

The Code of Conduct currently lays down that, in determining whether a person is fit and proper to hold any particular position, the applicant's competence and soundness of judgement for fulfilling the responsibilities of that position will be assessed. Rule 2.8 of Part A of the Rules elaborates that at least two of the directors or two of the persons having responsibility for the management and administration of the Authorised Person shall have completed the course organised by the Institute of Financial Services Practitioners (the "IFSP") regarding the Law and Administration of Trusts, or any other equivalent qualification. In the event that this requirement is not fulfilled, authorisation will be restricted to providing fiduciary services other than that of acting as a trustee. It should be noted that this is a policy approach which has been adopted by the Authority for a number of years, and is now being included in the proposed Rules to provide further certainty throughout the industry.

2.2 Financial soundness and solvency

Rules 2.10 and 2.11 of Part A explicitly address the criterion of financial soundness and solvency as a facet of the fitness and properness test applied by the Authority to applicants for a licence. The proposed Rules lay down that, in determining an applicant's financial soundness and solvency, the MFSA will have regard to the general requirement that the business has sufficient resources to meet the financial demands on its business. Moreover, it is provided that the Authorised Persons referred to in Part B of the Rules (individuals or bodies corporate that are authorised to act as trustees or mandatories) are required to adhere to the financial resources requirements contained in that part.

2.3 Commencement of activities

Rule 2.13 of Part A clarifies that an Authorised Person is required to commence business within twelve months from the date of the granting of authorisation. This requirement complements the recent amendment to article 46 of the Trusts and Trustees Act which empowers the Authority to cancel or suspend an authorisation if the Authorised person does not commence its activities pursuant to its authorisation within twelve months of its issue or within such other period as may be specified in the authorisation.

2.4 Application process

Section 3 of Part A provides a detailed description of the stages involved in the process of the application for authorisation. The section also provides a comprehensive list of the documents required to be submitted by an applicant as well as a detailed overview of the content expected to be included in the applicant's programme of operations. It is to be noted that the requirements being proposed with regards to the applicant's programme of operations are, to a large extent, aligned with the information which the Authority's Authorisations Unit currently already expects applicants to submit in the form of a business plan.

2.5 Authorisation under article 43(8) of the Act

Article 43(8) of the Act provides that certain persons may apply to the Authority for a confirmation to provide trustee services in Malta. This procedure is addressed at specific applicants who would either already be in possession of an equivalent trustee licence or authorisation granted by a relevant regulatory authority in an approved jurisdiction, or else applicants who would be in possession of certain financial services licences and wish to act as trustee not in the course of their ordinary business for which they are licensed, or applicants registered as retirement scheme administrators in terms of the Special Funds (Regulation) Act. This provision therefore recognises that such applicants would already have undergone an assessment either by the MFSA itself or by another regulatory authority within an approved jurisdiction, and therefore provides for an expedited authorisation process.

In this respect, Rules are being introduced which clearly set out the requirements relative to authorisation under article 43(8), including *inter alia* a list of the information and documents required to be submitted by an applicant under this article.

2.6 Authorised Persons acting as Company Service Providers

The current provisions of Article 43(4)(i), 43(13)(i) and 43(15)(i) provide that any other activities or services provided by Authorised Persons, should be ancillary or incidental with the fiduciary services being provided by the Authorised Person. In this respect, company services as defined in the Company Service Providers Act, could only be provided by Authorised Persons if such company services were being provided as ancillary services to the fiduciary services being provided in terms of its authorisation.

However, following feedback received from the industry, the Authority has submitted a legislative proposal for an amendment to the above-mentioned provisions, whereby Authorised Persons shall be allowed to act as company service providers as defined in the Company Service Providers Act, notwithstanding the provisions of paragraphs (a) and (b) of each respective subarticle, subject to any rules or regulations which may be applicable under the Act.

To this end, the proposed Rules also include certain requirements which are applicable to Authorised Persons offering company services (Rules 5.1-5.6). For the sake of clarity, these proposed rules will only come into effect once the above-mentioned proposed amendments to the Trusts and Trustees Act come into force.

2.7 Annual Compliance Return

During a previous Consultation process, the Authority had stated its intention to draw up an Annual Compliance Return for trustees. The requirement to submit such return is contained in Rule 6.8 of Part A and has been made applicable to both trustees and other fiduciaries.

2.8 Disclosure of information to the Authority

Rules 6.12 and 6.13 of Part A lay down the instances wherein an Authorised Person is required to disclose certain information to the Authority. Rule 6.12 lists the occurrences which are merely required to be notified to the Authority while Rule 6.13 lists those circumstances which require the approval of the Authority prior to their taking effect.

2.9 Disclosure of information to interested persons

The Rules also address the situation whereby an Authorised Person may be required to disclose information to certain interested persons. Rule 6.14 of Part A lays down that, unless otherwise provided, any such information should be disclosed in a durable medium. It also lists certain

additional requirements such as, for instance, the requirement that disclosure is free of charge. A definition of “information in a durable medium” has been included in the Glossary to the Rules.

2.10 Retention of records

Rules 6.19 to 6.26 of Part A provide clarification regarding the Authorised Person’s obligation to keep records of the fiduciary relationship. These Rules include details such as the minimum retention period of records and the format within which records are to be preserved. An indicative list of the type of records which an Authorised Person is required to retain is also included in Guidance 5.1.

2.11 Minimum number of board meetings

The Authority expects the board of directors of an Authorised Person to meet regularly. Rule 6.4 of Part A lays down the requirement that board meetings be held on at least a quarterly cycle and that the majority be held in Malta.

2.12 Staff knowledge, competence and continued professional development (“CPD”)

The Authority expects that specified members of an Authorised Person’s staff show evidence of a certain level of knowledge and competence with regards to the Authorised Person’s business, particularly in relation to the role they carry out, and also expects them to continue developing their skills through the appropriate CPD channels. Rules 6.11 to 6.16 of Part A crystallise and elaborate on these requirements, including as regards the number of hours of CPD required to be undertaken and as regards the retention of records in this respect.

2.13 Complaints management policy and procedures

The Rules set out clear requirements regarding the complaints management policy that an Authorised Person is required to have in place and the procedures with which it is expected to comply. These requirements, which are in fact an amplification of the existing requirement emanating from the current Code of Conduct to have internal complaints procedures, are contained within section 6 of Part A of the proposed Rules and include relevant guidance thereto.

2.14 Customer due diligence

The current Code of Conduct refers to the requirement for an Authorised Person to have in place appropriate due diligence and anti-money laundering procedures. Section 7 of Part A of the proposed Rules reiterates and further elaborates on this requirement. Explicit reference is made to the obligation of the Authorised Person to acquire bank references and client confirmations *inter alia* to the effect that the client is acting on his own behalf and not on behalf of third parties.

2.15 Conduct of business and conflicts of interest

The section on Integrity and Ethics currently contained in the Code of Conduct has been included and elaborated upon in sections 9 and 11 on Conduct of Business and Conflicts of Interest respectively. Section 11 also includes guidance as to the manner in which an Authorised Person may proceed in ensuring that conflicts of interest are identified and disclosed.

2.16 Segregation of funds

Section 12 of Part A includes, and reiterates upon the current requirement for an Authorised Person to segregate the funds under its administration. However, it goes on to provide legitimacy, under certain conditions, to the placement of assets in a common pool or in a clients' or common account. Where any property is so kept, the Authorised Person is required to keep records of reconciliations in order to identify the assets pertaining to the respective different fiduciary relationships.

2.17 Delegation

Section 12 of Part A also amplifies on the requirements already in force as regards delegation. In particular, Rules 12.10 and 12.11 respectively address limitations on the Authorised Person's power of delegation and the non-discharge of the Authorised Person's obligations under the Act, any Regulations made thereunder and the Rules themselves.

3 CONTENT OF THE RULES – PART B

Part B of the Rules deals with the compliance function, financial resources and professional indemnity insurance. It is applicable to both individuals and body corporates authorised to act as trustees or mandatories.

3.1 Section I - Compliance

The rules on compliance require all relevant Authorised Persons to appoint a compliance officer in order to ensure the compliance of the Authorised Person with its legal and regulatory obligations under the Act, any Regulations made thereunder, the Rules themselves and any other applicable law.

The Rules require the compliance officer to be appropriately knowledgeable and experienced and to be based locally. Prior to his appointment, the person proposed as compliance officer will be required to complete the Authority's Personal Questionnaire. These documents would be required to be submitted to the Authority. The approval or otherwise of the proposed person would then take place in accordance with Rule 1.6 of this Part.

Once approved, the compliance officer will be required to adhere to the applicable Rules, including in particular Rule 1.9 relating to ongoing obligations. Meanwhile, the Authorised Person would be required to facilitate the role of the compliance officer by, for instance, granting the compliance officer unfettered access to all relevant information as prescribed under Rule 1.10.

3.2 Section II - Financial Resources

The rules on financial resources will require the Authorised Person to maintain a minimum capital of €15,000 for the entire duration of its authorisation. This requirement is already contained within Article 43(4)(i)(d) of the Act with respect to body corporates and Article 43(4)(ii)(d) in the case of individuals. However, the Rules provide further clarification with regards to body corporates in providing that the minimum capital is required to be issued and fully paid up and that no divestment of capital may take place unless the issued capital and the working capital collectively amount to a minimum of €15,000.

The Rules also require an Authorised Person to be able to demonstrate adequate financial resources for the nature and scope of the business it carries out (the "own funds requirement", *vide* Rule 2.6 of Part B). The Rules provide that the own funds requirement will be deemed to be satisfied if the funds are held in the form of liquid assets and, in this respect, guidance is provided as to what would be deemed to constitute liquid assets. Furthermore, it is provided that the own funds of an Authorised Person being an individual, may be constituted and held in the form of a guarantee or an irrevocable letter of credit issued by a credit institution that meets certain stated requirements.

3.3 Section III – Professional Indemnity Insurance Cover

Section III of Part B provides the rules relevant to the requirement to maintain insurance cover proportionate to the nature and size of the Authorised Person's business operations (the "PII requirement"), emanating from Article 43(4)(i)(e), 43(4)(ii)(e), 43(13)(i)(e) and 43(13)(ii)(d) of the Trusts and Trustees Act, as a result of the amendments introduced by virtue of Act XI of 2014. These rules establish the scope of the PII requirement both in terms of risk (Rules 3.3 and 3.5) and corporate structure (Rule 3.4) and also lay down the requirement of annual

submission to the Authority of a declaration stating the name of the insurance company providing the PII and the number of the relevant insurance policy (Rule 3.6). The declaration shall also include a statement to the effect that the amount insured amounts to the minimum cover required in terms of the Rules, which minimum cover shall be the greater of the three scenarios laid down in Rule 3.7.

The Rules also require the Authorised Person to notify the Authority of certain prescribed events affecting its PII cover (Rule 3.11) and they provide that any Authorised Person that intends to cease carrying on activities in terms of its authorisation or to sell or otherwise transfer its business to a third party must arrange for appropriate “run-off” PII in respect of any claims arising from past acts or omissions. Such run-off PII will be required to satisfy certain criteria (Rule 3.12).

The Rules state that the PII policy taken out by an Authorised Person should be governed by Maltese law (Rule 3.15). This provision is subject to the power of the Authority to permit an Authorised Person that forms part of a group of companies, the parent of which is established in another Member State or in an approved jurisdiction, to be covered by the PII policy of the parent company and/or the parent company and the other subsidiaries. In any such case, it shall be permissible for the PII policy to be governed by the law of such other Member State or approved jurisdiction.

Q3. Are the rules on PII cover sufficiently clear or should the Authority be more prescriptive with regards to the scope of the PII requirement (for instance, as regards the type of risks that ought to be covered by PII)?

Q4. Do you agree with the concept of run-off PII and with the criteria to which it is made subject in the Rules?

Q5. Do you agree that the governing law of the PII policy should be Maltese law yet subject to the proviso contained in Rule 3.15?

4 CONTENT OF THE RULES – PART C

Part C of the Rules addresses the audit function. It applies to bodies corporate (though not individuals) that are authorised to act as trustees or mandatories.

4.1 Audit

The rules on the audit function are made pursuant to Article 43C of the Act. The Rules lay down the requirement to appoint an auditor and they provide that the Authority’s consent should be sought prior to any such appointment or any replacement of the auditor. Furthermore, an Authorised Person shall replace its auditor if so requested to do by the Authority. The Rules lay down the exclusions according to which a given person may not be appointed auditor to an

Authorised Person (Rule 1.5) and the terms that should be included in an auditor's letter of engagement (Rule 1.7). The Rules then proceed to outline the duties of the auditor in terms of each accounting period (Rules 1.9 and 1.10) as well as the duties of the Authorised Person with respect to recommendations made by its auditor (Rule 1.11) and in relation to the content of the directors' report in terms of any regulatory breaches having occurred during the relevant reporting period (Rule 1.12). The Rules finally also lay down the requirement for an Authorised Person to submit a copy of its annual accounts to the Authority within four months from the end of each calendar year.

5 CONTACTS

The Authority invites comments on all matters covered in this consultation together with responses to the questions outlined above. Interested parties are to send their comments in writing by not later than **4 weeks from the issue of this Consultation Document**.

Kindly address any comments or enquiries to:

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