MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Explanatory Note

Date: 13th January 2010

Subject: Proposed Amendments to the Listing Rules

The Malta Financial Services Authority invites comments by the 13th April 2010 on the draft amendments that have been made to Chapters 2, 3, 5, 8, 11, 14 and 16 of the Listing Rules and on the proposed removal and restructuring of other Chapters of the Listing Rules as more fully explained in this Note. These amendments are being attached. The documents being circulated are in draft form and consist of proposals. Accordingly these proposals are not binding and are subject to changes and revisions following comments received. The proposed amendments include the input of the Working Committee representing the major stake holders in the industry, which Committee was set up by the Listing Authority to review the Listing Rules. Interested parties are invited to send their comments in writing addressed to the Director, Securities & Markets Supervision Unit, MFSA or via email on su@mfsa.com.mt.

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1. Introduction

The Listing Authority had some time ago identified the need for a comprehensive review of the Listing Rules to be carried out. Since it wished to seek the widest participation in the review process, a Working Committee, including representatives from the Authority as well as involved parties, was set up.

The purpose of this document is to highlight the principal amendments to the Listing Rules that the Authority is proposing to carry out which includes the input of the Working Committee. The said amendments are aimed at simplifying and updating the Listing Rules so that they can be understood and applied more easily by practitioners and entities operating in the Maltese capital market.

2. Chapter 1 of the Listing Rules – Listing Authority, compliance with and enforcement of the Listing Rules

At this stage no amendments are being proposed to this Chapter.

3. Chapter 2 of the Listing Rules – Sponsors

Amendments are proposed to Chapter 2 of the Listing Rules so as to increase the responsibilities of a sponsor given his important role in ensuring that an applicant satisfies all the conditions for the admissibility of securities to listing and complies with the requirements

for the drawing up of a prospectus. In view of this, it is recommended to introduce new draft Listing Rules 2.7 to 2.11 which deal with the conduct of the sponsor vis-à-vis the Listing Authority and the independence of the sponsor respectively. Draft Listing Rule 2.7 obliges sponsors to deal with the Listing Authority in an open and co-operative manner and to respond to all enquiries raised by the Listing Authority in a timely manner. Such draft Listing Rule would also require sponsors to disclose to the Listing Authority in a timely manner any material information relating to the sponsor or the applicant of which the sponsor has knowledge which concerns non-compliance with the Listing Rules.

With reference to the independence of the sponsor, draft Listing Rule 2.8 will prohibit a person from acting as a sponsor to an applicant if such person or the group of which it forms part has:

a) an interest, or a holding that is equivalent to 10 % or more of the equity or debt securities of the applicant or any other company in the applicant's Group. In assessing the percentage of the interest, the equity securities for which application for admissibility to listing has been made are to be treated as having already been issued; or
b) a business relationship with, other than his role as sponsor, or a financial interest in the applicant or any other company in the applicant's group that would give the sponsor or the sponsor's group a material interest in the outcome of the transaction.

However, if draft Listing Rule 2.9 is adopted, any interest that arises as a result of the sponsor's discretionary client holdings would not be taken into account when determining the threshold set out in paragraph (a) above. Furthermore, draft Listing Rule 2.10 would not consider a sponsor to be independent of an applicant if a director, partner or senior officer of the sponsor or another company in the sponsor's group has a material interest in the applicant or any other company in the applicant's group.

The Authority is also proposing the insertion of draft Listing Rules 2.17 and 2.18 so as to deal with the situation where more than one sponsor is appointed. Draft Listing Rule 2.17 will require an applicant to inform the Listing Authority how responsibility between the sponsors is to be allocated whilst draft Listing Rule 2.18 will expressly provide that the appointment of more than one sponsor will not relieve any of the sponsors so appointed of their responsibilities and obligations under the Listing Rules.

4. Chapter 3 of the Listing Rules – Conditions for admissibility to listing

The Authority is proposing to change the layout of Chapter 3 by dividing it into three parts dealing respectively with the conditions for listing for all securities, additional conditions for the listing of equity securities and conditions applicable to all other securities. In addition to this, the following are the main proposed changes to Chapter 3:-

a) *Market capitalisation*

It is being proposed that in the case of an application for the admissibility to listing of shares other than preference shares, the aggregate market value of the shares should be at least one million euros (€1,000,000) whilst in the case of an application for the admissibility to listing

of debt securities or preference shares (excluding tap issues where the amount of the debt securities is not fixed) the applicant will be required to offer at least one million euros (€1,000,000) of issued preference shares or debt securities.

b) *Issued share capital*

Currently Listing Rule 3.7 requires an applicant to have shareholders' funds less intangible assets of at least €582,343 (Lm250,000) and fully paid-up capital of least €232,937 (Lm100,000).

The Authority is recommending the removal of the shareholders' funds requirement and the introduction of different capital requirements for issues of shares and issues of debt securities. Thus, draft Listing Rule 3.15 will require an applicant to have fully paid-up capital of at least €1,000,000 in the case of an application for the admissibility to listing of shares whereas in the case of an application for the admissibility to listing of debt securities, the applicant will be required to have fully paid-up capital of €250,000.

c) *Equity securities – nature and duration of business activities*

Currently Listing Rule 3.8 requires applicants to have a trading record in all the major sections of their business of at least three financial years for which audited accounts are available and for which audited trading results support the expected market capitalisation. This requirement is not imposed by Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities. It is proposed to replace such Listing Rule with draft Listing Rule 3.18 which would require an applicant to show that:

- at least seventy five per cent (75%) of its business or that of its subsidiary undertakings or affiliates is supported by a historic revenue earning record of at least three financial years preceding the application for admissibility to listing;
- it controls the majority of its assets and has done so for at least the period referred to above; and
- it will be carrying on an independent business as its main activity.

In addition to this, draft Listing Rule 3.20 lists a number of instances in which an applicant will be considered as not satisfying the requirements of draft Listing Rule 3.18 if part or all of the applicant's business has one or more of the characteristics indicated in draft Listing Rule 3.20.

d) Shares in public hands

Current Listing Rule 3.20 will be substituted by draft Listing Rules 3.24 to 3.30 so as to adopt the exact wording of article 48 of Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities. The present Listing Rule 3.20 requires an applicant to demonstrate to the Listing Authority that at least twenty-five per cent (25%) of the class of shares in respect of which application is made are or shall be in the hands of the public in one or more recognised jurisdictions.

On the other hand, draft Listing Rule 3.26 (which transposes article 48(5) of Directive 2001/34/EC) will provide that "a sufficient number of shares shall be deemed to be have been distributed to the public either when the shares in respect of which an application for admissibility to listing has been made are in the hands of the public to the extent of at least 25% of the subscribed capital represented by the class of shares concerned or when, in view of the large number of shares of the same class and the extent of their distribution to the public, the market will operate properly with a lower percentage". Thus, the scope of draft Listing Rule 3.26 is wider than present Listing Rule 3.20 since it deems that sufficient shares are in the hands of the public if either at least 25% of the subscribed capital is in public hands or else given the large number of shares of the same class and the extent of their distribution to the public, it can be shown that the market will operate properly with a lower percentage.

Furthermore, the Authority recommends that the present definition of the term "public" in Listing Rule 3.20 is amended so as to provide that shares are not considered to be held in public hands if they are held, directly or indirectly, by:

a) a director of the applicant or of any of its subsidiary undertakings;
b) a person connected with a Director of the Applicant or of any of its Subsidiary Undertakings;
c) the trustees of any employees' share scheme or pension fund established for the benefit of any directors and employees of the applicant and its subsidiary Undertakings;
d) any person who under any agreement has a right to nominate a person to the board of directors of the applicant; and
e) a substantial shareholder.[1]

e) *Insertion of provisions of Chapter 4*

The Authority is of the view that it is more appropriate for the provisions of Chapter 4, other than those relating to employee share schemes, to form part of Chapter 3 as they refer to various methods how applicants and issuers may approach the market. A new Appendix 3.1 is being proposed which will list and define the different ways how an applicant or an issuer can approach the market, such as an offer for sale or subscription, a rights issue, an intermediaries offer and a bonus issue.

4. Chapter 4 of the Listing Rules – Methods of bringing securities to listing or trading

As stated in point 3(e) above, the provisions of Chapter 4 dealing with the methods of bringing securities to listing or trading will be inserted in Chapter 3 and Appendix 3.1 thereto. The provisions of Chapter 4 relating to employee share schemes will form part of Chapter 8 as explained in further detail below.

[1] Draft Listing Rule 3.27.

5. Chapters 5 to 7 of the Listing Rules – Prospectus and authorisation for admissibility to listing

The Authority is suggesting that the provisions of Chapters 5, 6 and 7 of the Listing Rules are combined in one chapter which would specifically regulate the contents and approval of the prospectus relating to an application for admissibility to listing of securities as well as the approval by the Listing Authority of such application. Another advantage of having a single chapter is that all the provisions transposing the Prospectus Directive will be contained in a single document.

Furthermore, it is recommended that new draft Listing Rules 5.70 and 5.71 are inserted in Chapter 5 of the Listing Rules so as to implement article 20 of the Prospectus Directive dealing with the approval of a prospectus drawn up by issuers incorporated in third countries.

A new Appendix 5.3 containing a declaration to be completed and signed by the directors of an applicant for admissibility to listing is proposed to be added to Chapter 5. At the moment, directors of an applicant requesting admissibility to listing of its securities are already requested by the Authority to fill in such declaration but the Authority is of the view that it would be better if such requirement were to emanate from the Listing Rules. The said declaration would need to be submitted together with the other documents that have to be provided to the Listing Authority under Chapter 5 in connection with an application for admissibility to listing of securities.

6. Chapter 8 of the Listing Rules – Continuing obligations of issuers

The Authority recommends that Chapters 8 and 9 of the Listing Rules are amalgamated so that Chapter 8 will contain all the provisions relating to the continuing obligations of issuers. In 2008 Chapters 8 and 9 had already been amended so as to transpose the provisions of Directive 2007/14/EC which lays down detailed rules for the implementation of certain provisions of Directive 2004/109/EC (Transparency Directive). The following are further recommended changes to Chapter 8:

a) *Corporate Governance Statement*

In view of the amalgamation of Chapters 8 and 9, the provisions implementing Directive 2006/46/EC have been re-numbered as draft Listing Rules 8.45s to 8.47.

b) *Audit committee*

In September 2008 the Listing Authority approved the amendments to the provisions of Chapter 8 dealing with the obligation of issuers to set up an audit committee so as to comply with article 41 of Directive 2006/43/EC (Statutory Audit Directive).

In addition to the amendments referred to above, the Authority is recommending the introduction of new draft Listing Rule 8.63 which lays down a number of circumstances that the board of directors should take into account in determining the independence or otherwise of a director for the purposes of draft Listing Rule 8.61.

Furthermore, in order to ensure that listed entities are in a position to comply with the requirements of article 41 of the Statutory Audit Directive, it is proposed to introduce draft Listing Rule 8.65 which would allow the board of directors to nominate a person who satisfies the independence and competence criteria prescribed by draft Listing Rule 8.61 if none of the nominations received from the shareholders satisfy these criteria. The board of directors will be entitled to exercise such a right notwithstanding the provisions of the Memorandum and Articles of Association of the issuer concerned.

In addition to this, draft Listing Rule 8.66 provides that if none of the persons elected as directors in terms of the Memorandum and Articles of the issuer in question satisfy the independence and competence criteria under Listing Rule 8.61, the board of directors will be entitled to appoint an additional director who satisfies the said criteria. However, the said right may only be exercised as long as there is a vacancy in the board and provided that the maximum number of directors prescribed by the Memorandum and Articles of the issuer is not exceeded.

The Authority appreciates the important role that the audit committee exercises with respect to related party transactions and, therefore, recommends the introduction of draft Listing Rule 8.78 which requires the terms of reference of the audit committee to contain sufficient guarantees and safeguards for the protection of the rights of shareholders and in particular in relation to related party transactions. Moreover, this draft Listing Rule will require such terms of reference to prohibit any member of the audit committee who has a direct or indirect interest in any contract, transaction or arrangement that is brought before the committee from being present and from voting at any meeting of the committee during which such contract, transaction or arrangement is being discussed.

c) *Transactions with related parties*

The Authority is proposing the following changes to the current Listing Rules dealing with related party transactions:-

(i) The issuer will be allowed to set up a committee other than the audit committee to review and approve related party transactions, provided that such committee satisfies the composition requirements prescribed by Listing Rule 8.61 and submits its terms of reference to the Listing Authority. References in this section to the "audit committee" shall also include any other committee established by the issuer for the purpose of vetting and approving related party transactions.

(ii) The current distinction between those situations where the audit committee is not considered by the Listing Authority as independent or is not providing sufficient guarantees/safeguards for the protection of shareholders' rights and those where the audit committee is deemed by the Listing Authority to be independent and to have sufficient measures in place for the protection of shareholders' rights will be removed. The independence of the members of the audit committee cannot be determined by the Listing Authority objectively in a vacuum but must be determined by the issuer on a case by case basis with reference to the proposed transaction in question.

(iii) Draft Listing Rule 8.84 will oblige the audit committee to take into consideration factors such as whether the proposed transaction is material within the context of the issuer's business and whether it gives preferential treatment to a related party. If after taking into account such factors, the audit committee is of the view that the proposed transaction will have a material effect on the issuer's business the issuer would have to issue a company announcement containing information on the transaction, the related party and the interest of such related party in the said transaction.

(iv) The present Listing Rules do not cater for the situation where the audit committee does not approve the proposed transaction between the issuer and a related party. In view of this, it is recommended that draft Listing Rule 8.86 is introduced so as to provide that if the issuer still wants to proceed with the transaction notwithstanding the objection of the audit committee, the issuer would have to issue the company announcement referred to above, send a circular to its shareholders containing the information prescribed by Chapter 11 of the Listing Rules (as amended) and obtain the approval of its shareholders either prior to the transaction being entered into or, if it is expressed to be conditional on such approval, prior to completion of the transaction. This draft Listing Rule will also oblige the board of directors to disclose the fact that the audit committee has not approved the related party transaction at the general meeting convened for this purpose.

(v) Since the Authority is proposing that Chapter 11 should deal with all circulars that an issuer is required to prepare under the Listing Rules, the Listing Rules stipulating the information to be included in a related party circular will be inserted in Chapter 11 (draft Listing Rule 11.16).

d) *Acquisitions and realisations*

Currently the Listing Rules adopt four tests in order to classify acquisitions and realisations carried out by an issuer and these are:-

i) the gross assets test;
ii) the consideration test;
iii) the profits test; and
iv) the gross capital test

It is recommended that the revised Listing Rules should no longer adopt the gross capital test because the other three tests are sufficient for the purposes of determining the impact of an acquisition or realisation on the financial position and business of the issuer. Furthermore, draft Listing Rules 8.94 to 8.103 will provide a clearer definition of the gross assets test, the consideration test and the profits test so as to facilitate the determination of whether an acquisition or realisation is a Class 1 or Class 2 transaction.

In addition to this, it is being proposed that after applying the three tests referred to in points (i) to (iii) above, a transaction will be classified either as a Class 1 transaction or as a Class 2 transaction. A Class 1 transaction will arise where any of the above three tests amounts to five per cent (5%) but less than thirty-five per cent (35%) whilst a Class 2 transaction will arise where any of the said tests amounts to thirty-five per cent (35%) or more.

In the case of a Class 1 transaction, draft Listing Rule 8.104 will oblige the issuer to publish a company announcement as soon as the terms of the transaction are agreed. Such obligation to issue a company announcement already exists under present Listing Rule 8.94 but the Authority is also recommending the insertion of draft Listing Rule 8.106 so as to specify the minimum information that such a company announcement should contain.

On the other hand, in the case of a Class 2 transaction, the Authority recommends that in addition to the obligation to issue a company announcement, the issuer should comply with the following procedures:-

- send a circular to its shareholders containing the information on the transaction in question in line with the requirements of Chapter 11 (as amended);
- obtain the prior approval of its shareholders by convening a general meeting for such purpose; and
- ensure that any agreement effecting the transaction is conditional on that approval being obtained.

However, it is recommended that issuers of debt securities would only be required to issue a company announcement if they intend to enter into a Class 2 transaction.

e) *Appendix 8.1 – the Code of Principles of Good Corporate Governance*

The Authority is proposing to amend Appendix 8.1 so as to divide it into main principles, supporting principles and code provisions. When preparing their corporate governance statement, listed companies will be required to divide such statement in two parts. The first part would deal generally with the company's adherence to the main principles whilst the second part would deal specifically with non-compliance with any of the code provisions. The "comply or explain" approach has been retained in that if an issuer does not comply with any one or more of the code provisions, it would need to provide a clear and careful explanation to shareholders as to how its actual practices are consistent with the main principle to which the code provision relates.

Furthermore, it is being proposed that Principle 8 dealing with the remuneration committee is amended so as to introduce code provisions requiring an issuer to include a remuneration statement in its annual report as indicated in the EU Recommendation 2004/913/EC on the remuneration of directors of listed companies. In view of this, code provisions will be inserted specifying what information should be included in the remuneration statement so as to be in line with the said EU Recommendation.

In addition to the above, it is recommended that Principle 8 of Appendix 8.1 should also provide for the creation by an issuer of a nomination committee whose principal function would be to propose to the board candidates for the position of director, including those persons who can be considered to be independent. It is recommended that the nomination committee should be composed entirely of directors, the majority of whom being non-executive directors and at least one of whom should be independent. Given that current Listing Rule 8.56 requires that at least one member of the audit committee should be competent in accounting and/or auditing and that at least one member of such committee

should be independent, establishing a nomination committee would place issuers in a better position to be able to find the persons possessing the necessary skills and qualities required by Listing Rule 8.56.

7. Chapter 9 of the Listing Rules – Financial information

As indicated above, it is proposed to insert the provisions of Chapter 9 relating to the publication of financial information by issuers in Chapter 8 so that there would be a single chapter dealing with the continuing obligations of listed companies. The provisions of Chapter 9 dealing with the annual financial report, the half yearly report, and the interim directors' report were amended in 2008 so as to transpose Directive 2007/14/EC implementing certain provisions of the Transparency Directive.

It is also recommended to amend the current provisions of Chapter 9 relating to the publication of profit forecasts and pro forma financial information so as to bring them in line with the requirements of Regulation 809/2004 implementing the Prospectus Directive.

8. Chapter 10 of the Listing Rules – Documents not requiring prior authorisation

The Authority is proposing that the present Listing Rules contained in Chapters 4 and 10 dealing with employee share schemes, long-term incentive schemes and discounted option arrangements are included in Chapter 8 (draft Listing Rules 8.148 to 8.158).

9. Chapter 11 of the Listing Rules – Circulars

The Authority is of the view that having a single chapter of the Listing Rules which contains all the instances in which a circular must be sent by an issuer to the holders of its securities will make the Listing Rules more user-friendly. Thus, it recommends the introduction of draft Listing Rule 11.1a which contains a list of the situations in which an issuer is obliged to send a circular to the holders of its securities. As a result of this amendment, the revised Chapter 11 will, in addition to the circulars currently mentioned therein, refer to circulars that must be issued in the following cases:-

a) related party transactions (draft Listing Rule 11.16);
b) Class 2 acquisitions and realisations (draft Listing Rules 11.17 to 11.25);
c) acquisition and resale by an issuer of its own securities (draft Listing Rules 11.11 and 11.12);
d) mergers (draft Listing Rules 11.25a to 11.33); and
e) employee share schemes, directors' share-based schemes and discounted option arrangements (draft Listing Rules 11.34 to 11.36).

10. Chapter 12 of the Listing Rules – Purchase of own securities

The Authority is suggesting the removal of Chapter 12 of the Listing Rules other than the provision relating to the contents of the circular that an issuer must send to its shareholders since it considers that the acquisition and resale by a company of its own securities is sufficiently catered for by the Companies Act. The contents of the circular issued in

connection with an acquisition by an issuer of its own securities will be included in Chapter 11 dealing with circulars.

11. Chapter 13 of the Listing Rules – Overseas companies

It is being proposed that Chapter 13 of the Listing Rules is removed since Chapter 5 of the Listing Rules (as amended) dealing with the contents, publication and approval of a prospectus, applies to all issuers including issuers registered in a third country. Likewise, Chapter 8 of the Listing Rules is applicable to all issuers (other than public sector issuers which are subject to Chapter 16) irrespective of their country of registration. Furthermore, Chapter 8 was amended in 2008 in order to transpose Directive 2007/14/EC implementing certain provisions of the Transparency Directive and as a result of these amendments, new Listing Rules were inserted laying down in which circumstances can an issuer registered in a non-EU or EEA Member State be considered to be subject to requirements which are equivalent to those imposed by the Transparency Directive and Directive 2007/14/EC. These Listing Rules have been re-numbered as draft Listing Rules 8.130a to 8.133f.

12. Chapter 14 of the Listing Rules – Property companies

The Authority is suggesting amendments only to Listing Rules 14.2 to 14.4 which deal with the classification of transactions by property companies and the instances in which a valuation report is required.

It is being proposed that Listing Rule 14.2 is included in that section of Chapter 8 dealing with acquisitions and realisations as new draft Listing Rule 8.103a. Since it is proposed to amend the provisions of Chapter 8 regulating acquisitions and realisations and it is being suggested that the gross capital test should be removed, the text of current Listing Rule 14.2 was amended so as to reflect these proposed amendments.

With reference to current Listing Rule 14.4 providing for those cases in which a valuation report must be prepared by an independent expert, the said requirement has been inserted in draft Listing Rules 5.2.14, 11.1.13 and 11.17.6. The instances in which a valuation report is required are:-

- where the company applying for admissibility to listing is a property company or the debt securities in connection with which an application for admissibility to listing is submitted will be secured on immovable property;
- where an issuer makes significant reference to the valuation of property in a prospectus or a circular; and
- in the case of an acquisition or disposal by the issuer of a property company which is not listed.

13. Chapter 15 of the Listing Rules – Admissibility requirements for collective investment schemes

At this stage, no amendments are being proposed to this Chapter.

14. Chapter 16 of the Listing Rules – Public sector issuers issuing debt securities

The Authority has sought to simplify this chapter by focusing on the contents of the offering document or prospectus that is drawn up by a public sector issuer, taking into consideration the fact that most of the information concerning public sector issuers is already publicly available. It also recommends the introduction of draft Listing Rule 16.3 which provides that if a public sector issuer elects to draw up a prospectus in compliance with the Prospectus Directive, such prospectus must be prepared in line with the requirements of Regulation 809/2004 and of Chapter 5 of the Listing Rules. Furthermore, draft Listing Rule 16.8 will require that in such case, the public sector issuer concerned would also be subject to the continuing obligations contained in Chapter 8 of the Listing Rules.

15. Chapter 17 of the Listing Rules – Second Tier Market requirements

At this stage, no amendments are being proposed to this Chapter.

16. Chapter 18 of the Listing Rules – Takeover bids

No amendments are proposed to this Chapter.