

**MFSA**

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MALTA FINANCIAL SERVICES AUTHORITY

**REGULATIONS AND PENSION RULES  
ISSUED UNDER THE  
RETIREMENT PENSIONS ACT**

**FEEDBACK STATEMENT ISSUED  
FURTHER TO INDUSTRY RESPONSES  
TO MFSA CONSULTATION DOCUMENT**

**MFSA REF: [08-2013]**

**JANUARY 2015**

## **1.0 Background**

On the 1st April 2013, the MFSA issued a consultation document on the Regulations and Pension Rules issued under the Retirement Pensions Act (“the Act”) (Cap.514) which came into force on the 1<sup>st</sup> January 2015.

The purpose of the Regulations and Pensions Rules is to supplement the legal framework for the licensing and regulation of Retirement Schemes, Retirement Funds and service providers related thereto, as well as for the requirement of recognition for persons carrying on back-office administrative activities and includes more detailed regulatory requirements by which persons licensed or recognised under the Act are required to comply.

Further to the consultation document, the MFSA is issuing a feedback statement on the comments received in relation to the Regulations and Pension Rules issued under the Act. Since the MFSA received a substantial amount of feedback, it was not possible to provide feedback on each and every comment. Therefore, an outline of the main comments received and the MFSA’s position in relation thereto is provided in Sections 2.0 and 3.0 below.

## **2.0 Main Comments received on the Regulations and the MFSA’s position.**

### **2.1 Retirement Pensions (Transitional Provisions) Regulations, 2014**

**Industry comment:** The pensions industry requested clarification as to how the transition will take place from the Special Funds (Regulation) Act (Cap.450) to the Act, in so far as licensing requirements are concerned, in particular, whether this will take the form of the requirement to submit new applications or whether this will be a matter of updating current constitutional documentation in the light of the new Pension Rules. Clarification was also sought as to whether an application fee will be requested by the Authority.

**MFSA’s Position:** The MFSA will be issuing a compliance letter in January 2015 explaining how the transitional process will take place in order to come in line with the provisions of the new Pension Rules issued under the Act. The Authority would like to highlight that the time frame of six months has been extended to one year in order to ensure a smooth compliance process by persons currently registered under the Special Funds (Regulation) Act. Until such time as a licence is granted by the Authority under the Act, the Retirement Pensions (Transitional Provisions) Regulations, 2014 provide that such persons will continue to be governed by the provisions of the Special Funds (Regulation) Act.

### 3.0 Main Comments Received on the Rules and the MFSA's position.

#### 3.1 Pension Rules for Occupational Retirement Schemes

**3.1.1 Industry Comment:** Clarification was sought as to who can contribute to an Open Scheme and whether a master trust arrangement which allows for any number of unrelated employers to become participating employers under the Scheme through a deed of adherence falls within the definition of an "Open Scheme".

**MFSA's Position:** The Authority confirms that open occupational Retirement Schemes are schemes usually established at the initiative of a Retirement Scheme or a Retirement Scheme Administrator (as applicable), whose membership is open to a number of unrelated employers and self-employed persons acceptable to the Retirement Scheme Administrator. The Authority would also like to clarify that an open occupational Retirement Scheme permits employees contributions. This is further explained in Part A of the Pension Rules for Occupational Retirement Schemes.

**3.1.2 Industry Comment:** Licence-holders pointed out that the Pension Rules allow for the commencement of payment of Retirement Benefits to be postponed to later than seventy years of age, if exceptionally agreed by the member and if provided for in the Scheme Document. The industry queried what circumstances are envisaged as being exceptions agreed to by the member.

**MFSA's Position:** After due consideration, in order to provide more clarity as to when the commencement of payment of Retirement Benefits may be made, the Authority has amended the Pension Rules so that payment **may not** be made on a date that is earlier than that on which such member has attained the age of fifty, or not later than that on which the member attains the age of seventy-five. Consequently the words "*or later if exceptionally agreed by the Member and if provided for in the Scheme Document*" have been removed from the Pension Rules.

**3.1.3. Industry Comment:** The industry suggested that where an Occupational Retirement Scheme is an open Scheme, it should be allowed to appoint an Investment Manager per sponsoring undertaking to enable each sponsoring employer's contribution to be managed in accordance with its own investment objectives/profile.

**MFSA's Position:** The Authority noted the comments above and in this respect amended the Pension Rules for Occupational Retirement Schemes to allow the Scheme to appoint an Investment Manager for every sponsoring undertaking within the Scheme.

**3.1.4 Industry Comment:** Clarification is sought as to whether an Investment Manager which is established in another Member State or EEA State and duly authorised for this activity in accordance with Directive 2004/39/EC is required to register with the MFSA as service provider. Clarification is also sought as to why an Investment Manager established in another Member State or EEA State needs to passport its services into Malta when it is not carrying on its investment management activities in or from within Malta, as this will preclude many large banks from providing these services through their EU subsidiaries.

***MFSA's Position:*** The Authority would like to clarify that an Investment Manager which is appointed by a Maltese Occupational Retirement Scheme and is established and duly authorised in a Member State or EEA State to carry out portfolio investment management in accordance with Directives 2009/65/EC, 2004/39/EC, 2006/48/EC, 2002/83/EC or 2011/61/EU, and passport its services in Malta shall be exempt from the licensing provisions of article 6 of the Act.

**3.1.5 *Industry Comment:*** An industry participant stated that in so far as the requirement for the assets of a Scheme to be entrusted to a Custodian for safekeeping is concerned, the title to the assets should be registered in the name of the Retirement Scheme Administrator, unless the Retirement Scheme Administrator wishes to appoint a Custodian and that in respect of an open scheme, the Retirement Scheme Administrator shall be entitled to appoint more than one Custodian in order to recognise the fact that the Scheme will hold notional accounts in respect of more than one unrelated employer.

***MFSA's Position:*** The Authority acknowledges that in the draft Pension Rules, it was not clear whether the appointment of a Custodian was a mandatory requirement or not. As long as the entity undertaking the investment management of the Scheme is a separate and independent entity from the entity undertaking the custody function of the Scheme, there is no need to appoint a separate Custodian for the safe-keeping of assets. Therefore, the Retirement Scheme Administrator can act as a Custodian if not undertaking the investment management function. Moreover, in the case of a Retirement Scheme, title to assets shall be registered in the name of a Retirement Scheme Administrator on behalf of the Scheme, or a Custodian on behalf of the Scheme, in a way which clearly distinguishes them from assets owned by the Retirement Scheme Administrator or Custodian (as applicable).

**3.1.6 *Industry Comment:*** A respondent commented that semi-annual compliance reports could be perceived as increasing the administrative burden unnecessarily and to consider maintaining the annual compliance reports of allowing short-form reporting for the half-yearly report.

***MFSA's Position:*** In terms of the Pension Rules, the compliance officer of the Retirement Scheme Administrator will now be required to prepare a compliance report on a six monthly basis. A copy of the Compliance Report is to be held in Malta at the office of the Retirement Scheme Administrator and made available to the MFSA during compliance visits or upon request by the Authority. The Authority is of the view that the Compliance Report does not impose any unnecessary administrative burdens.

**3.1.7 *Industry Comment:*** The market was of the view that the proposed rules concerning programmed withdrawal arrangements should be strengthened as the current and proposed regime in these arrangements left a lot of room for interpretation and lacked clarity.

***MFSA's Position:*** Following the substantial amount of feedback received from the market and frequent queries received by the Authority during its supervisory work, the Authority has redrafted the rules on Programmed Withdrawal Arrangements. As part of the redrafting process the Authority had a look at other jurisdictions to see how they address such arrangements in particular, the UK, OECD and countries falling under the Crown. The Title *Programmed Withdrawal Arrangements* has been renamed as *Retirement Benefits for a Defined Contribution*

*Retirement Scheme* since programmed withdrawal arrangements are only one type of retirement benefit offered to members. The revised Pension Rules clarify that retirement benefits are to be paid in the form of an initial cash lump sum, programmed withdrawals and/or life annuity and an additional cash lump sum. The rules relating to Retirement Benefits for a Defined Contribution Retirement Scheme shall not apply to members of Retirement Schemes licensed under the Act which qualify as Qualifying Recognised Overseas Pension Schemes (“QROPS”), under rules issued by Her Majesty’s Revenue and Customs (“UK HMRC”). Moreover, following various requests by the industry, the Pension Rules now include an interpretation of “sufficient retirement income”.

**3.1.8 Industry Comment:** Where the Scheme is set up as an Umbrella Fund, a respondent suggested that the procedure of approval per sub-fund should be explained further.

**MFSAs’ Position:** Ordinarily approval is given at sub-fund level on the basis that a sub-fund is unique in its own right as it has its own investment policy and target market. The approval process will depend very much on the structure being proposed and the purpose for which the sub-funds are to be used. Moreover, following the feedback received, and further discussions on the same, the Authority has decided to remove supplementary conditions of a Scheme set up as funds of funds.

**3.1.9 Industry Comment:** A respondent requested clarification as to whether it is a requirement for all Occupational Retirement Schemes to be unitised.

**MFSAs’ Position:** The MFSA would like to clarify that there exists no requirement for Occupational Retirement Schemes to be unitised. To further clarify this, the requirements applicable to unitised Schemes have been grouped together to be made applicable to Retirement Schemes set up as unitised Schemes.

### 3.2 Pension Rules for Personal Retirement Schemes

**3.2.1 Industry Comment:** A number of respondents queried whether the words “The Act also makes it illegal for a Retirement Scheme formed in accordance with or existing *under the laws of Malta to carry on any activity for the provision of Retirement Benefits in or from within a country, territory or other place outside Malta unless it is duly licensed under the Act*” implies that Maltese service providers will be prohibited to provide their services to non-Maltese based Schemes.

**MFSAs’ Position:** The Authority notes that the wording in the Pension Rules for Personal Retirement Schemes reflects the wording of article 4 of the Act. Moreover, article 6 of the Act specifically allows Maltese service providers to provide services (such as administration) to non-Maltese based Schemes. The Authority would like to clarify that the active marketing of a Scheme in Malta would be tantamount to a Scheme operating in Malta, and thus would require a licence under the Act. Moreover, it is important to point out that Personal Retirement Schemes do not benefit from the same passporting rights as Occupational Retirement Schemes.

**3.2.2 Industry Comment:** A respondent was of the view that where a Retirement Scheme Administrator delegates or appoints an independent Investment Manager or managers to a Scheme, there needs to be an understanding that the RSA's responsibilities should be more of oversight and responsibility for long term performance rather than for the day to day investment management of the assets. It was stated that if an Investment Manager is appointed to manage some or all of the assets of a Personal Retirement Scheme, it is not practical or desirable for the Retirement Scheme Administrator to have an effective veto on every transaction.

**MFSA's Position:** The Pension Rules for Personal Retirement Schemes expressly provide that when delegating/outsourcing functions to third parties, the Retirement Scheme Administrator retains responsibility for the overall operation, management and administration of the Personal Retirement Scheme and the investment management and custody of the assets of the Retirement Scheme. The Retirement Scheme Administrator is expected to put in place adequate monitoring arrangements to ensure that the appointed third parties carry out their functions in line with the stipulated requirements.

Moreover, the Pension Rules for Service providers in Part B.1.3 state that the Retirement Scheme Administrator is to supervise the operation of the Scheme to ensure that the Investment Manager, where appointed, complies with the investment objectives, restrictions and borrowing powers of the Scheme; where the Retirement Scheme Administrator undertakes the management of the assets of the Scheme, it shall have procedures in place to ensure that the Scheme is in compliance with any applicable investment restrictions and borrowing limitations. Therefore, the responsibility of the Retirement Scheme Administrator is not mitigated in any way when it delegates or outsources functions to third parties.

**3.2.3 Industry Comment:** A respondent pointed out the Retirement Scheme Administrator's retention of responsibility for the overall operation, management and administration of Personal Retirement Schemes and investment management of its assets when delegating/outsourcing functions to third parties found in Part A.1 conflicts with the notion of member-directed investments since it would be impracticable and virtually impossible to monitor the investment activities of every individual member if all investments were member directed.

**MFSA's Position:** The Pension Rules include provisions addressing supplementary conditions on member directed schemes. The Authority would like to highlight that, even in the case of member directed schemes, the Retirement Scheme Administrator will retain ultimate responsibility to ensure compliance by the member or any person acting on his behalf with the objective of the Retirement Scheme and with any applicable licence conditions and provisions of the law.

**3.2.4 Industry Comment:** A respondent queried whether the appointment of an Investment Manager, an Investment Advisor and a Back-Office Administrator is optional.

**MFSA's Position:** The Authority confirms that the appointment of an Investment Manager, an Investment Advisor or Back-Office Administrator by the Retirement Scheme Administrator to the Scheme is optional. However, the Authority would like to clarify that the function relating to the investment management is mandatory. If the investment management function is carried out

by the Retirement Scheme Administrator, there will be no need to appoint an Investment Manager.

**3.2.5 Industry Comment:** Licence-holders pointed out that the Pension Rules allow for the commencement of payment of Retirement Benefits to be postponed to later than seventy years of age if exceptionally agreed by the member and if provided for in the Scheme Document. The industry queried what circumstances are envisaged as being exceptions agreed to by the member.

**MFSA's Position:** Vide comments to paragraph 3.1.2 of this document

**3.2.6 Industry Comment:** A respondent commented that the requirement imposed on Retirement Scheme Administrators and on Back-Office Administrators to have an established place of business in Malta might amount to the restriction of freedom of services.

**MFSA's Position:** In so far as Retirement Scheme Administrators are concerned, the Authority confirms that it is crucial that the Retirement Scheme Administrator has an established place of business in Malta in light of the important role that the Retirement Scheme Administrator holds in the Scheme. In so far as Back-Office Administrators are concerned, the Back-Office Administrator may either be: the Retirement Scheme Administrator himself; an entity/person recognised to provide back-office administration services to Schemes under the Act; or any other entity which is considered by the Authority to be of sufficient standing and repute and has the business organisation, systems, experience and expertise deemed necessary by the Authority for it to undertake back office administrative services.

**3.2.7 Industry Comment:** A number of respondents requested clarification as to whether it is possible for a Scheme to appoint more than one Investment Manager to the Scheme.

**MFSA's Position:** The Authority wishes to clarify that the requirement imposed on the Scheme to appoint an investment manager does not mean that only one entity may be appointed. The Authority acknowledges the fact that in the context of member-directed schemes more than one investment manager may be appointed to the Scheme on behalf of each member.

**3.2.8 Industry Comment:** A respondent commented that the fact that the Investment Manager, where appointed, is responsible for the discretionary management of the assets of the Scheme provides no room for flexibility. In reality, in the context of member-directed schemes members may choose investments ranging from simple investment bonds to investment portfolios with full discretionary management. In the case of bonds, there may be little or no dealing or switching activity between underlying funds, especially if switches are requested by the member or the member's financial advisor, and the investment manager just takes on a monitoring role.

**MFSA's Position:** The Pension Rules contain supplementary conditions applicable to member-directed schemes. The Authority is of the opinion that the Retirement Scheme Administrator should always retain ultimate responsibility of the Scheme, even when an Investment Manager is appointed by the members.

**3.2.9 Industry Comment:** A respondent commented that Standard Licence Condition 1.3.5(c) allows for the appointment of investment managers established in the EU/EEA who are duly authorised in relation to portfolio management activities carried on in their home country but provides that asset managers must be passporting its services into Malta. The requirement to passport into Malta should not be required where the Retirement Scheme approaches the asset manager, as the asset manager is not holding himself out as providing investment services in or from Malta in that instance.

**MFSA's Position:** In a situation where a Maltese State Retirement Scheme appoints an Investment Manager or a Custodian authorised in a Member State or EEA State it is difficult to interpret this as not being a service provided in Malta and consequently such an Investment Manager or Custodian is required to passport its services into Malta.

**3.2.10 Industry Comment:** A respondent requested clarification on how the role of the Investment Manager fits in with a Scheme where the member is directing the investment, in this case, the member can appoint his own Investment Manager. A Scheme with a large number of members could end up having a relationship with a large number of Investment Managers appointed by individual members. The same respondent requested a clarification as to where advisors / managers appointed by the member fit into the regulatory framework.

**MFSA's Position:** The Authority would like to clarify that Part B.9 lays down supplementary conditions for member directed schemes.

**3.2.11 Industry Comment:** It was pointed out by the market that there existed a conflict in the Pension Rules, wherein it was not clear whether the appointment of a Custodian is a mandatory requirement or not.

**MFSA's Position:** The function relating to the custody of assets is mandatory. Depending on the structure and nature of the Personal Retirement Scheme, a Custodian separate from the Retirement Scheme Administrator may need to be appointed for the safe-keeping of assets. The MFSA would like to clarify that as long as the entity undertaking the investment management of the Scheme is a separate and independent entity from the entity undertaking the custody function of the Scheme, there is no need to appoint a separate Custodian for the safe-keeping of assets.

**3.2.12 Industry Comment:** A respondent commented that the Pension Rules for Personal Pension Schemes appears to allow only one Custodian to be appointed, whilst it is more likely that the investments be diversified, maybe internationally with multiple Custodians. The same respondent also commented that different members may have different Custodians. Clarification was sought on whether all the Custodians appointed will be checked and monitored.

**MFSA's Position:** The Authority acknowledges the fact that in the context of member-directed schemes more than one Custodian may be appointed to the Scheme. In so far as whether these will be checked and monitored, in terms of the Pension Rules, the Retirement Scheme Administrator shall retain ultimate responsibility to ensure compliance by the member or any person acting on his behalf with the objective of the Retirement Scheme and with any applicable licence conditions and provisions of the law.



**3.2.13 Industry Comment:** A respondent required clarification on whether the Investment Advisor appointed by the Scheme or by the member if member directed, is required to be Maltese regulated or can such person be any other entity subject to an equivalent level of regulatory supervision. Clarification was required as to whether the MFSA will do their own due diligence or rely on the Pension Scheme and how this will affect Investment Advisors already appointed.

**MFSA's Position:** The Authority would like to clarify where the Investment Advisor is appointed by the member, the Retirement Scheme Administrator is to ensure that the Investment Advisor meets the requirements applicable to member directed schemes. The Authority would like to clarify that the appointment of an Investment Advisor is not mandatory.

**3.2.14 Industry Comment:** A respondent requested clarification on how the role of an Investment Advisor differs from that of an Investment Manager.

**MFSA's Position:** The terms "Investment Manager" and "Investment Advisors" are defined in the Glossary to the Pension Rules. The role of an Investment Advisor is to give advice on investments in relation to the assets, whilst the role of an Investment Manager is that of managing the investments of a Retirement Scheme/Retirement Fund.

**3.2.15 Industry Comment:** A respondent commented on the fact that when a Scheme or a Retirement Scheme Administrator outsources certain key functions in connection with a Scheme, the fact that the MFSA still has the right to information might prejudice data protection rules.

**MFSA's Position:** The Authority would like to point out that it is a standard requirement, not limited to pension's legislation for the MFSA to ensure that it has effective access to the data related to any outsourced activities, since this will allow the MFSA to perform its functions properly. In this respect, reference is made to SLC 4.4.13 on the Pension Rules for Service Providers.

**3.2.16 Industry Comment:** The requirement of the Scheme Document to be signed by persons bound by it, including the contributor should apply only to Occupational Schemes. The market is of the view that if a member receives a copy of the document and confirms its receipt, a signature should not be required.

**MFSA's Position:** The Authority is of the view that the Scheme Document should be signed by the persons bound by it.

**3.2.17 Industry Comment:** In so far a retention of records is concerned , a respondent queried whether it is permissible to retain copies of records in electronic format for ten years, as opposed to paper copies.

**MFSA's Position:** In so far as the pensions legislation is concerned, the Authority confirms that the retention of documents in electronic format is permissible.

**3.2.18 Industry Comment:** A respondent commented that since the information required to be reported in the half-yearly report needs to be gathered from third parties, such as investment companies and then collated, one month does not give enough time to produce this report.

**MFSA's Position:** The Authority acknowledges that it may be difficult to submit the half-yearly report within one month. Therefore, Pension Rules now provide that the half-yearly report is to be submitted to the MFSA within two months of the end of the period concerned. For clarity's sake, the Pension Rules on Personal Retirement Schemes incorporate a new Appendix which sets out the contents of the half-yearly report.

**3.2.19 Industry Comment:** A respondent commented that since the Scheme's assets are to be invested in a prudent manner and in the best interest of members and beneficiaries and also in accordance with the investment rules laid out in its Scheme Particulars and otherwise in the Scheme Document. In the view of a respondent, this may prohibit the desire from the member to adopt a higher risk strategy for younger members.

**MFSA's Position:** The Authority expects that investments of Scheme's assets are to be done in a prudent manner in the interests of members and beneficiaries.

**3.2.20 Industry Comment:** A respondent requested a definition of "ancillary liquid assets" and queried who decides the proportion of ancillary liquid assets which can be maintained by the Scheme.

**MFSA's Position:** The Authority would like to clarify that "ancillary liquid assets" are assets which are easily realisable. Moreover, the Authority would like to clarify that it is within the Retirement Scheme Administrator's competence to decide the proportion of ancillary liquid assets which are to be maintained.

**3.2.21 Industry Comment:** A respondent commented that the requirement for the MFSA to be informed of any material information concerning the Scheme or its operation as soon as the Scheme becomes aware of that information is not practical. Where the Scheme has a large amount of members, it is not plausible for the Retirement Scheme Administrator to advise the MFSA of every change to its risk appetite of every investment policy.

**MFSA's Position:** The Authority would like to highlight that the requirements to be informed of any material changes relates to the Scheme or its operation.

**3.2.22 Industry Comment:** A respondent commented that the obligation to notify the MFSA as soon as the "Scheme" becomes aware of any information ought to specify which body relating to the Scheme must be aware of such information and be responsible to notify.

**MFSA's Position:** The Authority would like to clarify that it is the Retirement Scheme Administrator on behalf of the Scheme who has the obligation to inform the MFSA of such changes.

**3.2.23 Industry Comment:** The market was of the view that the proposed rules concerning programmed withdrawal arrangements should be strengthened as the current and proposed regime in these arrangements leaves a lot of room for interpretation and lacks clarity. Moreover, clarification was sought as to whether the lump sum is taxable as income.

**MFSA's Position:** Vide paragraph 3.1.7 of this document

**3.2.24 Industry Comment:** As part of the conditions relating to information for Schemes members, beneficiaries and contributors, the Pension Rules lay down that a Retirement Scheme Administrator should provide members with information on “applicable target level of benefits” on request. A respondent commented that such a suggestion would impose an onerous obligation on the Retirement Scheme Administrator since they would need to develop or source a complex system to generate such projections. Moreover, the MFSA would need to give detailed requirements including underlying assumptions, otherwise it adds significant risk on the Retirement Scheme Administrator. Another respondent was of the view that it is not appropriate for a Retirement Scheme Administrator of a Personal Scheme to have to provide target level benefit information.

**MFSA's Position:** The Authority is of the view that providing this information offers protection to members, beneficiaries and contributors and therefore this requirement has been retained in the Pension Rules. It is up to the Retirement Scheme Administrator to decide how to meet this obligation.

**3.2.25 Industry Comment:** A respondent commented that in the case of a Personal Retirement Scheme, there is no need to supply a full copy of the Scheme's annual report to a member since the full Annual Report of a SICAV will be substantial document, much of which would have no relevance to an individual member.

**MFSA's Position:** The Authority is of the view that it is up to the member to decide what information such person deems to be relevant for his own purposes. Moreover, the Authority would like to clarify that the documentation will only be provided if requested by the individual member. The Authority amended the Pension Rules so that in the case of Umbrella Funds, a member, beneficiary or contributor may receive accounts related to their specific Scheme.

**3.2.26 Industry Comment:** A respondent queried whether it is necessary for every member within a Scheme to be provided with the Scheme Document and its particulars.

**MFSA's Position:** The Scheme Document is the instrument which evidences or establishes a Retirement Scheme and which stipulates the retirement benefits and conditions under which these are granted. Moreover, the Scheme particulars describe the Scheme in sufficient detail for the contributors, members and beneficiaries to make an informed judgement as to the nature of the Scheme and how the assets of the Schemes are to be managed and invested and be fully aware of the risks to which they will be exposed. Consequently, the Authority believes that it is very important that the member is provided with such information.

**3.2.27 Industry Comment:** A respondent queried whether the need for members and beneficiaries to be notified of any changes to the Scheme's Investment Policy in advance of the change being implemented includes changes to the standard terms and conditions and fees or whether the prior approval should be restricted to material changes only. Clarification was sought on what changes are captured by this requirement.

**MFSAs' Position:** The MFSA would like to clarify this requirement refers only to the changes within the Investment Policy. The Authority believes that it is important for the member or beneficiary to be notified of any changes to the Investment Policy in advance.

**3.2.28 Industry Comment:** The Pension Rules provide that Schemes established as a trust, shall not be in the form of discretionary trusts. A respondent pointed out that since the allocation of monies to beneficiaries is under the discretion of the trustees, it would not be possible to run a Pension Scheme without a discretionary trust. A particular licence holder was concerned that this prohibition might disturb the basis of the existing trust agreement for existing members. Moreover, it was pointed out that not all beneficiaries on death would be defined at outset and the member's wishes might change during their lifetime.

**MFSAs' Position:** The Authority acknowledged the concerns of the industry and therefore, clarified what is meant by "discretionary trusts", that is, trusts which allow the trustee to decide which beneficiaries are to benefit in terms of the trust deed. The Authority would like to clarify that it is these type of trust arrangements which will not be permitted by the Authority.

**3.2.29 Industry Comment:** In so far as Supplementary Conditions in the case of member Directed Schemes are concerned the market welcomed the introduction of member directed schemes. However, they were of the view that there was some tightening up to do on the restrictions and the respective responsibilities of the parties involved, with consideration given to cross-over provisions in other requirements of the Rules. There was lack of clarity between the concept of allocated and segregated member accounts where investments are directed by the member or an Investment Advisor appointed by them and some of the responsibilities still being imposed on Retirement Scheme Administrators.

Primarily, licence-holders were concerned that even though investment decisions were to be taken completely by the members or the Investment Manager, the Retirement Scheme Administrator is required to ensure compliance with the objective of the Scheme and with any applicable provisions. Moreover, licence-holders pointed out that they would want to be in a position to control the investment of the member to ensure that the objective of the Scheme is met. A respondent commented that they support the ability of the member to select a range of options for the investment fund, such as "Cautious, Balanced, Growth, etc", but however it is important to give guidance to the Scheme's Investment Manager as to the risk appetite and investment horizon of the member.

Furthermore, in practice it was pointed out that in the case of member-directed schemes, members appoint their own Investment Manager and/or Investment Advisor. The draft rules did not make it clear whether the Investment Manager of the Scheme is to act as the Investment Manager of the member. Besides, the draft Pension Rules shifted the burden to verify whether

the Investment Manager is properly qualified and regulated to the member and not the RSA. Finally, there was some confusion as to the application of the Pension Rules to member directed schemes.

***MFSA's Position:*** Following the substantial feedback received from the market in relation to member directed schemes, the IPSU redrafted the supplementary conditions in the case of member directed schemes. In terms of the redrafted rules the Retirement Scheme Administrator is to retain ultimate responsibility to ensure compliance by the member or any person acting on his behalf with the objective of the Retirement Scheme and with any applicable licence conditions and provisions of the law. The Rules have been amended to clarify that the risk profile of the member must be taken into account. Moreover, specific rules have been introduced where the Scheme allows the member to appoint his own Investment Manager or Investment Advisor.

**3.2.30 *Industry Comment:*** A respondent requested a clarification on whether member directed schemes must be purposely set up or whether existing Schemes can be adjusted in a way to accommodate members who direct their plans and other clients who wish to avail themselves of the services of financial advisors.

***MFSA's Position:*** The MFSA has amended the Supplementary Conditions for member directed schemes to clarify that the direction for the investments must be provided for in the Scheme Document.

**3.2.31 *Industry Comment:*** A number of respondents requested clarification on the operation of the Investment Manager of the members in member directed schemes. One of the queries was whether the Investment Manager referred to under the member directed scheme is the same Investment Manager indicated in the Pension Rules for Personal Pension Schemes. Moreover, one of the respondents also queried whether it shall be the member's responsibility to ensure that any appointed party is properly qualified and regulated.

***MFSA's Position:*** Following the feedback received, the Authority has amended the Supplementary Conditions in the case of member directed schemes and now requires every member which chooses to appoint an Investment Manager to be approved by the Retirement Scheme Administrator and then enter into an agreement with the Retirement Scheme Administrator. This applies also when the Custodian is appointed.

**3.2.32 *Industry Comment:*** Appendix 1 which lays down the contents of the Constitutional Document of a Personal Scheme makes reference to "units", which is not relevant to some schemes.

***MFSA's Position:*** The MFSA would also like to highlight that it is not a requirement for Retirement Schemes to be unitised. To further clarify this, the requirements applicable to unitised Schemes have been grouped together to be made applicable to Retirement Schemes set up as unitised Schemes.

**3.2.33 Industry Comment:** For the purposes of the Investment Restrictions applicable to Personal Retirement Schemes which contains a prohibition for a Scheme to engage in transactions with any of its members or persons connected thereto, the industry requested the MFSA to provide a definition of connected persons.

**MFSA's Position:** The MFSA has now included a new definition of “connected person” in the Glossary of Terms of the Pension Rules modelled on the UK legislation.

**3.2.34 Industry Comment:** The investment restrictions which provide a general prohibition in relation to a Scheme engaging in borrowing in connection with property purchases on behalf of any of its members or connected persons thereto may create a restriction given that the current majority of Maltese Personal Retirement Schemes are QROPS and are able to accept transfers of assets from UK registered Pension Schemes, which can extend to commercial property interests which are subject to a mortgage. The restriction therefore technically prohibits the transfer of a property which is the subject of a mortgage debt. In the absence of any overriding implementing guidelines in OECD Core Principles of Occupational Pension Regulation, it is considered that Maltese Personal Retirement Schemes should be allowed to borrow in order to purchase investment property on the proviso that this is not occupied by either the member or by a connected person other than on fully commercial terms, which would need to be verified by an Independent Qualified Valuer, as defined in the Glossary of Terms and the maximum amount which can be borrowed in respect of the property could be restricted to 50%.

**MFSA's Position:** Following the concerns of the industry, the MFSA amended the investment restrictions applicable to Personal Retirement Schemes to allow borrowing in connection with property purchases on behalf of any of its members or connected persons thereto, only on fully commercial terms, provided that the Scheme may borrow up to 50% of the amount of property purchased which must be valued by an Independent Qualified Valuer.

**3.2.35 Industry Comment:** A respondent commented that whilst agreeing with the investment restrictions in principle, the restrictions appear to be too wide in their scope. The respondent suggested guidelines to ensure that there is sufficient liquidity within a portfolio to ensure that benefit payments can be met.

**MFSA's Position:** Since these are Personal Schemes, the Authority would like to clarify that it is the Retirement Scheme Administrator or the Investment Manager as applicable, who should ensure that the assets of the Scheme are sufficiently liquid and/or generate sufficient income to ensure that benefit payments can be met. A new investment restriction has been included so that the Retirement Scheme Administrator or the Investment Manager, as applicable, are to ensure that the assets of the Scheme are sufficiently liquid and/or generate sufficient retirement income to ensure that retirement benefits payments can be met closer to retirement date for commencement of retirement benefits.

### 3.3 Pension Rules for Retirement Funds

**3.3.1 Industry Comment:** Clarification was sought on whether, in the case of Retirement Funds, apart from safe-keeping of assets, the Custodian is also responsible also for monitoring the investment management function.

**MFSA's Position:** The Authority would like to clarify the role of the Custodian is limited to the safe-keeping of assets solely for, and on behalf of, and in the interest of, the Retirement Fund. The Pension Rules issued under the Act have been amended to reflect this role.

**3.3.2 Industry Comment:** In the case of Retirement Funds, it was pointed out by the industry that it is not clear who is responsible to make the necessary notifications to the Authority.

**MFSA's Position:** In terms of article 13(2) the Act, any person, by whatever name designated, shall be responsible for the operation, administration and management of the Retirement Fund and shall act in the best interests of the Retirement Fund. This person or the Retirement Fund itself, through its Board of Directors, can make the necessary notifications to the Authority.

**3.3.3 Industry Comment:** A respondent commented that the procedure to request MFSA's approval per sub-fund should be less comprehensive than the approval of a new Retirement Fund. Moreover, clarification was sought on whether the MFSA's approval in the case of sub-funds is given upon licencing and whether approval is required for each investment in each case.

**MFSA's Position:** Ordinarily approval is given at sub-fund level on the basis that a sub-fund is unique in its own right as it has its own investment policy and target market. The approval process will depend very much on the structure being proposed and the purpose for which the sub-funds are to be used.

### 3.4 Pension Rules for Service Providers

**3.4.1 Industry Comment:** A respondent commented that the statement that “*No body corporate, unincorporated body or association formed in accordance with or existing under the laws of Malta, shall provide or hold itself out as providing a service in or from within a country, territory or other place outside Malta unless licenced under this Act*” which reflects article 6 of the Act could be understood as permitting an overseas company being able to provide a service to a Malta Scheme only after they apply for a licence from the MFSA.

**MFSA's Position:** The Authority would like to clarify that the statement applies to structures established under Maltese Law. In order to allow service providers established outside Malta to provide services to a Retirement Scheme or Retirement Fund licensed under the Act, the Retirement Pensions Act (Exemption) Regulations, 2014 provide that Investment Managers and Custodians shall be exempt from article 6 of the Act if they satisfy the requirements found in regulations 3 and 4 respectively. Such exemption is not automatic but shall be subject to a determination in writing by the Authority that the requested exemption applies.

**3.4.2 Industry Comment:** A respondent suggested that the Pension Rules for Service Providers should allow for *in specie* transfer of assets to members or beneficiaries in satisfaction of rights to a cash payment in the case of transfers in and transfers out of a Scheme.

**MFSA's Position:** The Authority amended the Pension Rules for Personal Retirement Schemes to permit in specie transfers of assets, into or out of a Scheme, as long as an independent valuation of that asset is obtained by the Retirement Scheme Administrator, unless the assets are traded on a recognised investment exchange.

**3.4.3 Industry Comment:** Retirement Scheme Administrators who are also trustees will receive contributions and then invest funds by transferring them either to bond providers who are themselves Custodians or to Custodians appointed by the Investment Manager if assets are to be managed on a discretionary basis. Clarification is sought as to whether these arrangements are possible under the Pension Rules.

**MFSA's Position:** In so far as Retirement Schemes which are not member-directed, a Custodian is to be appointed by the Scheme or the Retirement Scheme Administrator, unless the custody function is carried out by the Retirement Scheme Administrator itself. In the case of member directed schemes, where the member appoints an Investment Manager on a discretionary basis over his/her investments, the appointment of a Custodian by the Investment Manager is permissible, provided that there is a direct link between the Retirement Scheme Administrator and the Custodian so that the Retirement Scheme Administrator can effectively monitor the Scheme in aggregate and as a whole and retain overall control. An arrangement is to be entered into between the Retirement Scheme Administrator, the Investment Manager and the Custodian setting out the services, roles and responsibilities of the Investment Manager and the Custodian. This arrangement is to include provisions for the direct access/communication by the Retirement Scheme Administrator with/to the Custodian and also for the regular reporting by the Custodian directly to the Retirement Scheme Administrator concerning the assets held under the custody of the Custodian if required by the Retirement Scheme Administrator;

**3.4.4 Industry Comment:** It was stated that Part B.2 (Pension Rules for Investment Managers) needs amending to account for the fact that an Investment Manager may not act for all member's within a Scheme. Moreover, no reference is made to the roles and responsibilities of an Investment Advisor (as opposed to Investment Manager). It is not clear what role an Investment Advisor can play in a Scheme

**MFSA's Position:** The role of the Investment Advisor features in both Personal and Occupational Retirement Schemes, and also in Retirement Funds. Moreover, specific rules where the individual members are allowed to appoint their own Investment Advisor are now found in B.9 Supplementary Conditions in the case of member directed schemes in the Pension Rules on Personal Schemes.

**3.4.5 Industry Comment:** In general, the responsibilities of the Custodian appointed by a Retirement Scheme have been drafted too widely and could lead to potential issues of allocation of responsibilities between the various service providers and may also lead to an unnecessary level of duplication of roles and increased costs to members. A respondent also stated that some



of the responsibilities noted in Part B.3 applicable to the Custodians are usually carried out by the Retirement Scheme Administrator.

***MFSA's Position:*** The Authority acknowledges that the role of the Custodian in the draft Pension Rules lacked clarity. The Pension Rules have been amended to clarify that the function relating to the custody of assets is mandatory and that the role of the Custodian is limited to the safekeeping of assets. The Retirement Scheme Administrator can carry out the custody function of a Retirement Schemes long as the entity undertaking the investment management of the Scheme shall be a separate and independent entity from the entity undertaking the custody function of the Scheme

***3.4.6 Industry Comment:*** Licence-holders requested clarification in relation to the registration requirements for all non-Malta back office administration companies that provide back office services to Maltese licenced Retirement Scheme Administrators. They are of the view that overseas Back Office Administrators who are themselves regulated by a foreign regulatory authorities, or those who carry out their business from out of Malta should not be required to comply with ongoing requirements applicable to persons caught under article 7 of the Act, but they should be in a position to go through a simple registration process with the MFSA and continue to be regulated or controlled by the authorities of the country from which they operate, provided that they have adequate levels of service and controls similar to those required by the MFSA.

***MFSA's Position:*** The Authority acknowledges the position of Retirement Scheme Administrators appointing non-Malta back office administration companies under the Act was not clear. The MFSA amended the draft Retirement Pensions (Exemption) Regulations, 2014 so that where the Authority is satisfied that such non-Malta back office administration companies are of sufficient standing and repute, they can offer their services to Maltese Retirement Schemes, without the need of obtaining a recognition in terms of the Act. This exemption is not automatically operative but its applicability is subject to a determination in writing by the competent authority that the requested exemption applies.

***3.4.7 Industry Comment:*** The industry requested clarifications as to the role of the Introducer and clarification as to what their commercial interest or link to the Scheme and Retirement Scheme Administrators is. The market commented that the role of the Introducer as envisaged by the Pension Rules does not seem to reflect the role carried out by current introducers in the market.

***MFSA's Position:*** The Authority would like to highlight that the regime applicable to "Introducers" is **limited to** persons carrying the role as envisaged by the Pension Rules and is not an attempt to regulate independent financial advisors whose role goes beyond the scope of the "Introducers" regime. The Authority notes that there seems to be issues of nomenclature as "independent financial advisors" are sometimes referred to as "introducers" but it is not possible for the Authority to make provision for all types of intermediaries carrying out similar roles. Where an independent financial advisor **gives advice** on financial matters, it is the responsibility of the Personal Retirement Scheme or the Retirement Scheme Administrator to ensure that such persons are regulated.

**FEEDBACK STATEMENT-  
REGULATIONS AND PENSION RULES ISSUED UNDER THE RETIREMENT PENSIONS ACT**

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Contacts

Any queries or requests for clarifications in respect of the above should be addressed by email on [ipsu@mfsa.com.mt](mailto:ipsu@mfsa.com.mt)

Any queries relating to the application process leading to a licence or recognition in terms of the Act should be address to Authorisation Unit by email at [au@mfsa.com.mt](mailto:au@mfsa.com.mt)

**Communications Unit**  
**7<sup>th</sup> January 2015**