

L.N. _____ of 2023

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (List of Notified AIFs) (Amendment) Regulations, 2023

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Minister, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Citation and commencement. S.L. 370.34

1. (1) The title of these regulations is the Investment Services Act (List of Notified AIFs) (Amendment) Regulations, 2023, and these regulations shall be read and construed as one with the Investment Services Act (List of Notified AIFs) Regulations, hereinafter referred to as “the principal regulations”.

(2) These Regulations shall come into force on such date as the Minister may by notice in the Gazette establish.

Amends Title and Regulation 1 of the Principal Regulations

2. (1) In the title of the principal regulations and in sub-regulation (1) of regulation 1 thereof, for the words “List of Notified AIFs” there shall be substituted the words “Notified CISs”.

(2) Immediately after sub-regulation (1) of regulation 1, there shall be added the following new sub-regulation:

(1a) Any references in any other law to the Investment Services Act (List of Notified AIFs) Regulations shall be read and construed as a reference to these regulations.

(3) In sub-regulation (2) of regulation 1, immediately after the words “alternative investment funds” there shall be added the words “and professional investor funds,”

Amends regulation 2 of the principal regulations.

3. Sub-regulation (1) of regulation 2 of the principal regulations shall be amended as follows:

(a) immediately after the definition “competent authority”, there shall be added the following new definition:

“custodian” means a licence holder authorised in terms of the Act and which qualifies as a Depositary or Depositary Lite in terms of the Investment Services Rules;”

(b) immediately after the definition “Directive 2004/39/EC”, there shall be added the following new definition:

“fund manager” shall mean a person which qualifies as a fund manager of a Notified PIF in terms of the Investment Services Rules;”

(c) in the definition “governing body”, immediately after the words “alternative investment fund”, there shall be added the words “or in a professional investor fund”;

(d) immediately after the definition “List of Notified AIFs”, there shall be added the following new definition:

““List of Notified PIFs” shall be understood as referring to the List of Notified PIFs in good standing which is held by the competent authority on its website in terms of these Regulations;”

(e) immediately after the definition “Notified AIF”, there shall be added the following new definitions:

““Notified CIS” means a Notified AIF or a Notified PIF;

“Notified PIF” means a PIF which has been notified to the competent authority for inclusion in the List of Notified PIFs and is included in the List of Notified PIFs maintained by the competent authority in terms of regulation 17;

““professional investor fund” or “PIF” means a collective investment scheme which qualifies as a professional investor fund in terms of the Investment Services Rules;”;

(f) the definition “professional investor” shall be deleted;

(g) the definition “qualifying investor” shall be deleted;

Inserts new Title and Regulation

4. Immediately after Regulation 2, there shall be added the following new Title and new Regulation:

“PART A: NOTIFIED AIFs

2A. For purposes of this title:

"professional investor" shall be understood as referring to the investor category defined in regulation 8(1)(a);

"qualifying investor" shall be understood as referring to the investor category defined in regulation 8(1)(b);"

Inserts new Title and Regulations

5. Immediately after Regulation 13, there shall be added the following new Title and new Regulations:

"PART B: NOTIFIED PIFs

14. For purposes of this title:

"qualifying investor" shall be understood as referring to the investor category defined in regulation 19;

PIFs

15. (1) A PIF in relation to which a notification may be submitted in terms of these regulations may be established using any one of the following structures:

- (a) an investment company with variable share capital under the Companies Act (Investment Companies with Variable Share Capital) Regulations;
- (b) an investment company with fixed share capital under the Companies Act (Investment Companies with Fixed Share Capital) Regulations;
- (c) an incorporated cell company under the Companies Act (SICAV Incorporated Cell Company) Regulations;
- (d) an incorporated cell of a Recognised Incorporated Cell Company under the Companies Act (Recognised Incorporated Cell Companies) Regulations;
- (e) a limited partnership under the Companies Act;
- (f) a unit trust under the Trusts and Trustees Act; or
- (g) a contractual fund under the Investment Services Act (Contractual Fund) Regulations.

(2) A notification to the competent authority in terms of regulation 17, cannot be submitted for the following categories of collective investment schemes:

- (a) PIFs which are not externally managed by a fund manager as defined in regulation 2;
- (b) PIFs which are not marketed and sold exclusively to qualifying investors;
- (d) PIFs which invest in non-eligible assets as specified by the competent authority.

Applicability of these regulations

16. Where the provisions of these regulations conflict with the provisions of the regulations referred to in regulation 15(1), the provisions of these regulations shall prevail.

Notification Process

17. (1) A written request for a PIF or for one or more sub-funds of a Notified PIF to be included in the List of Notified PIFs shall be made in accordance with the provisions of these regulations.

(2) Prior to the submission of a written request for notification, the governing body of the PIF shall approve a resolution certifying that the Offering Memorandum of the PIF satisfies the minimum criteria prescribed by the competent authority in the applicable Investment Services Rules.

(3) The request for notification of a PIF referred to in sub-regulation (1) shall be made in the form and manner required by the competent authority and shall contain such information as the authority may prescribe. The request for notification shall be accompanied by such fee as may be prescribed by the competent authority.

(4) The competent authority shall reject notifications which do not comply with the requirements prescribed in these regulations and the applicable Investment Services Rules.

(5) The governing body of the PIF, or a person duly authorised by it to act on its behalf, shall submit the duly completed written notification request together with the accompanying documents to the competent authority within thirty (30) calendar days from the date of the resolution of the governing body of the PIF approving the PIF's Offering Memorandum in terms of sub-regulation (2) and prior to the effective date of the Offering Memorandum:

Provided that the effective date of the Offering Memorandum shall be a date after the inclusion of the PIF in the List of Notified PIFs.

(6) The competent authority shall, within ten (10) working days from the date of filing of the duly completed notification request together with the accompanying documents, include the PIF in the List of Notified PIFs and, thereafter, the Offering Memorandum may be dated.

(7) Where the competent authority decides to reject a request for notification of a PIF, it shall give notice in writing thereof to the governing body of the PIF, or the person duly authorised by it to act on its behalf.

(8) The inclusion of a PIF in the List of Notified PIFs shall not imply that the PIF is in possession of a licence granted in terms of article 4 of the Act.

(9) The competent authority shall have the right to remove a PIF from the List of Notified PIFs at any time after it has been placed on such list.

(10) The inclusion of a PIF in the List of Notified PIFs is a concession and a privilege revocable by the competent authority at any time at its sole discretion on notice to the governing body of the notified PIF. The burden of proving that the Notified PIF should be retained on the List of Notified PIFs shall rest at all times on the governing body of the notified PIF.

Due Diligence

18. (1) Prior to submitting a request for notification of a PIF, the governing body of the PIF shall appoint a service provider to carry out the necessary due diligence process to ensure that the governing body, functionaries, and any additional service provider the PIF may appoint, satisfy at the time of notification, the high standards of fitness and properness specified by the competent authority.

(2) The service provider shall undertake and ensure that each functionary, member of the governing body of the PIF, and any additional service provider the PIF may appoint, maintains such standards on an ongoing basis and immediately notifies the competent authority of any change in such circumstances as they become known to it.

(3) The service provider shall keep records of all evidence of, and correspondence regarding, the due diligence process carried out in relation to the functionaries, the members of the governing body of the PIF, and any additional service provider the PIF may appoint. Such records shall be made available for inspection upon request by the competent authority.

(4) The provisions of Articles 13, 15 and 16 of the Act shall apply to service providers appointed in terms of this regulation *mutatis mutandis*.

Target investor base

19. Notified PIFs may only be marketed to qualifying investors, being investors that fulfil the following criteria:

- (a) invests a minimum of EUR 100,000 or its currency equivalent in the PIF which investment may not be reduced below this minimum amount at any time by way of a partial redemption;
- (b) declares in writing to the fund manager and the PIF that he is aware of and accepts the risks associated with the proposed investment;
- (c) satisfies at least one of the following:
 - (i) a body corporate which has net assets in excess of seven hundred and fifty thousand euros (€750,000) or which is part of a group which has net assets in excess of seven hundred and fifty thousand euros (€750,000) or, in each case, the currency equivalent thereof;
 - (ii) an unincorporated body of persons or association which has net assets in excess of seven hundred and fifty thousand euros (€750,000) or the currency equivalent;
 - (iii) a trust where the net value of the trust's assets is in excess of seven hundred and fifty thousand euros (€750,000) or the currency equivalent;
 - (iv) an individual whose net worth or joint net worth with that of the person's spouse, exceeds seven hundred and fifty thousand euros (€750,000) or the currency equivalent; or
 - (v) a senior employee or director of a functionary or service provider to the PIF.

Compliance and ongoing obligations

20. The governing body of the Notified PIF shall ensure that the Notified PIF complies on an ongoing basis with the provisions of the Act, any applicable rules or regulations issued thereunder, including these regulations:

Provided that where applicable the service provider appointed in terms of regulation 18 shall also comply with any applicable provisions of the Act, regulations issued thereunder or rules.

Appointment of Money Laundering Reporting Officer

21. (1) The governing body of the Notified PIF, in agreement with the service provider appointed in terms of regulation 18, shall appoint a money laundering reporting officer to carry out the money laundering reporting function in relation to the Notified PIF.

(2) The governing body of the Notified PIF may delegate the money laundering reporting function to the money laundering reporting officer of the fund administrator of the Notified PIF. In such cases, the fund administrator shall be responsible for fulfilling the reporting obligations of the Notified PIF:

Provided that where the money laundering function has been delegated in accordance with this sub-regulation, the administrator of the Notified PIF shall be required to confirm to the service provider appointed in terms of regulation 18 and the governing body of the PIF that the recordkeeping, reporting, ongoing monitoring, risk management and any other measure being conducted by the administrator comply with the requirements prescribed in the Prevention of Money Laundering and Funding of Terrorism Regulations and the Implementing Procedures issued thereunder.

Removal of the PIF from the List of Notified PIFs.

22. (1) The governing body of the Notified PIF, or a person duly authorised by it to act on its behalf, shall submit a request to the competent authority for removal of the Notified PIF from the List of Notified PIFs in the following circumstances:

- (a) upon expiration of the duration of the Notified PIF or its winding up;
- (b) Where it becomes clear to the governing body that adequate safekeeping arrangements are no longer in place;
- (c) in any case where the fund manager of the Notified PIF has given notice of termination or is in liquidation or subject to bankruptcy proceedings or has had its authorisation to act as a fund manager suspended or cancelled and an eligible replacement fund manager has not been appointed;
- (d) in any case where any member of the governing body of the Notified PIF or any functionary or service provider appointed by the PIF fails to comply on an ongoing basis with the required high standards of fitness and properness and no replacement member of the governing body or functionary or service provider has been or has been arranged to be appointed;
- (e) in all other cases as may be specified in the agreement between the Notified PIF and its fund manager as grounds for requesting removal of the Notified PIF from the List of Notified PIFs in terms of this regulation;
- (f) where the Notified PIF has a custodian appointed, in all other cases as may be specified in the custody agreement between the Notified PIF and the custodian as grounds for requesting removal of the Notified PIF from the List of Notified PIFs in terms of this regulation; and
- (g) in all other cases as may be prescribed in the Investment Services Rules.

(2) Upon removal from the List of Notified PIFs, the PIF must cease trading other than for the purpose of winding down the operations of the Notified PIF or sub-fund and the Notified PIF or sub-fund must then be liquidated or otherwise terminated in accordance with the requirements of Maltese law.

Offering Memorandum of the Notified PIF.

23. (1) Notified PIFs shall be exempt from obtaining the approval of the Competent Authority in terms of Article 11(1)(a) of the Act.

(2) The exemption provided in sub-regulation (1) shall also be applicable to any amendments to the Offering Memorandum of a Notified PIF.

Custodians of NPIFs

24. The Provisions of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations, applicable to custodians of Professional Investor Funds, shall be *mutatis mutandis* applicable to custodians of Notified PIFs.

Power to issue Rules

25. (1) For the better carrying out of the provisions of these regulations, the competent authority may from time-to-time issue and publish Investment Services Rules outlining additional requirements in respect of these regulations.

(2) Without prejudice to the generality of sub-regulation (1), Investment Services Rules issued in accordance with this regulation may *inter alia* lay down:

- (i) additional requirements in relation to the conditions for inclusion and retention of PIFs on the List of Notified PIFs including but not limited to the conditions related to the notification of specific categories of PIFs;
- (ii) additional requirements in relation to the contents and format of the request for notification of a PIF;
- (iii) additional requirements in relation to the accompanying documentation and the contents and formats thereof;
- (iv) additional requirements in relation to the Offering Memorandum and the contents and format thereof;
- (v) requirements in relation to the fitness and properness standards expected by the competent authority
- (vi) the criteria for eligibility for appointment as a service provider in terms of regulation 18;
- (vii) the criteria for eligibility for appointment as a fund manager of a Notified PIF;
- (viii) additional criteria regarding investor eligibility;
- (ix) the ongoing obligations that must be complied with by the service provider appointed in terms of regulation 18 in relation to the Notified PIF; and
- (x) the conditions applicable in relation to the removal of the PIF from the List of Notified PIFs.”

Inserts new Title and Regulation

6. Immediately after Regulation 24, there shall be added the following new Title and new Regulation:

“PART C: ADMINISTRATIVE MEASURES AND APPEALS

Administrative Penalties, other administrative measures and appeals

26. (1) Where a person falling within the scope of these regulations fails to comply with any provisions of such regulations or any rules issued thereunder further implementing such regulations, the competent authority may, by notice in writing and without recourse to a court hearing, impose on such person an administrative penalty and other administrative measures in accordance with article 16A of the Act.

(2) A right of appeal to the Financial Services Tribunal shall lie from the decisions which the competent authority shall take under these regulations and the provisions of article 19 of the Act shall apply mutatis mutandis.”