

Feedback Statement on the Proposed Establishment of a Framework for Notified Professional Investor Funds

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1 Introduction

On 28 October 2021, the Malta Financial Services Authority ('MFSA' or 'the Authority') published a [Discussion Paper on its Asset Management Strategy](#). The initiatives proposed through this strategy were classified into four strategic pillars:

- Pillar I: MFSA Supervisory Lifecycle Processes;
- Pillar II: Revisiting Current Fund Manager and CIS Regulatory Frameworks;
- Pillar III: Innovation through Regulation;
- Pillar IV: Regulatory Outreach and Collaboration Efforts with Industry Stakeholders and Internationally.

Within Pillar III, Proposal 9 invited stakeholders' feedback on the possible introduction of a regulatory framework for Notified Professional Investor Funds ('NPIFs'). The proposal seeks to provide an additional fund structure which complements existing fund frameworks, entailing potentially lower associated setup and other operational/regulatory costs currently experienced in operating a fully licensed fund. It also takes a more proportionate and risk-based approach to the onboarding process given the regulated status of the funds' service providers and the qualified status of the target investors. The proposal was well received by respondents, who highlighted that this framework could contribute towards Malta's attractiveness as a fund jurisdiction.

On 22 December 2022, the Authority launched a [stakeholder consultation](#) on a proposed rulebook for NPIFs and related service providers. The consultation period closed on 17 February 2023.

The consultation document had sought stakeholder feedback on:

- Draft Investment Services Rules for Notified Professional Investor Fund and related Service Providers - Part A
- Draft Investment Services Rules for Notified Professional Investor Fund and related Service Providers - Part B
- Draft New Section to be Inserted in Part A of the Investment Services Rules for Professional Investor Funds
- Draft Amendments to the Glossary to the Funds Rules

On 22 May 2023, the Authority launched another [stakeholder consultation](#) on the legislative amendments being proposed to promulgate the framework. The consultation period closed on 22 June 2023.

The consultation document had sought stakeholder feedback on proposed amendments to the following regulations:

- S.L. 370.34 – Investment Services Act (List of Notified AIFs) Regulations
- S.L. 370.02 – Investment Services Act (Exemption) Regulations
- S.L. 370.03 – Investment Services Act (Fees) Regulations
- S.L. 331.02 – Trusts and Trustees (Exemption) Regulations
- S.L. 386.02 – Companies Act (Investment Companies with Variable Share Capital) Regulations

This Feedback Statement highlights the key points of contributions received in relation to the aforementioned consultation documents and sets out the MFSA's response and position thereto.

The MFSA would like to thank stakeholders for their valid and detailed responses, all of which were noted and carefully considered. The Authority is pleased to note that the proposed framework was well received by stakeholders, who considered it as a positive development for the local fund industry.

2 Feedback on the NPIF Rulebook

2.1 Drafting Suggestions

Where necessary, and as applicable following careful consideration, certain errors identified by respondents have been amended and drafting suggestions to enhance clarity have been onboarded.

2.2 Eligible Investors

Section 3 of Part A of the proposed Rulebook states that NPIFs may only be marketed to Qualifying Investors, i.e., investors that fulfil the following criteria:

- a) Invest a minimum of €100,000 or its currency equivalent in the NPIF, which investment may not be reduced below this minimum amount at any time by way of a partial redemption; and
- b) Declare in writing to the fund manager and the NPIF that they are aware of and accept the risks associated with the proposed investment; and
- c) Satisfy at least one of the following:
 - i. A body corporate which has net assets in excess of €750,000 or which is part of a group which has net assets in excess of €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 €750,000 or the currency equivalent;
 - iii. A trust where the net value of the trust's assets is in excess of €750,000 or the currency equivalent;
 - iv. An individual whose net worth or joint net worth with that of the person's spouse, exceeds €750,000 or the currency equivalent; or
 - v. A senior employee or director of a service provider to the NPIF.

Feedback Received

Respondents questioned why the framework was being limited solely to qualifying investors and suggested that Professional Investors, as defined by the Markets in Financial Instruments Directive (Directive 2014/65/EU), should be allowed to invest in NPIFs.

MFSA Position

The MFSA has taken note of feedback received and does not consider that there are implications in allowing both type of investors in the NPIF framework, subject to the minimum investment amount being retained for both investors that qualify as Qualifying Investors and Professional Investors.

In this regard, the Authority will be making the necessary amendments to the proposed Regulations and Rules.

2.3 Governing Body

Section 5 of Part A of the proposed Rulebook sets out the main duties and responsibilities of the NPIF's governing body. Members of the governing body of a NPIF are to [i] act honestly and in good faith in what they consider to be the best interests of the NPIF and its investors; [ii] exercise reasonable care, skill, and diligence; [iii] have, both collectively and individually, an obligation to acquire and maintain sufficient knowledge and understanding of the NPIF's business to enable them to discharge their functions; [iv] appoint a service provider to carry out the necessary due diligence process prior to submitting a request for notification of a PIF; [v] continuously monitor the execution of the functions delegated to the service providers; and [vi] hold regular meetings and ensure that detailed minutes are taken to record accurately the matters discussed and considered.

Furthermore, the governing body is required to submit to the MFSA, on an annual basis, a Compliance Certificate in relation to the NPIF. This is to be drawn up and signed by the governing body and shall include confirmations regarding the NPIF's compliance with legal and regulatory requirements, including AML/CFT requirements.

Feedback Received

Respondents expressed their belief that the case of requiring at least one independent director is very strong and aligned with good practice. Respondents also suggested that the annual compliance certificate should be part of the annual fund return in order to aid and consolidate where possible compliance and reporting obligations.

MFSA Position

The Authority has duly taken note of the proposal regarding the requirement for an independent director to be appointed to the governing body of a NPIF. In this light, the MFSA has amended the rules to include a provision that at least one of the members of the governing body of the NPIF is to be independent from the Manager, Custodian (where appointed), Fund Administrator, Due Diligence Service Provider, and founder shareholders of the NPIF.

Specifically in relation to reporting, the Authority will not be requesting an annual fund return. The compliance certificate cannot therefore be integrated therewith. The rules requiring a NPIF to submit an annual fund return will be replaced by the following new Rule 3.03 which will be included in Part B of the NPIF Rulebook:

"The governing body of the NPIF shall also prepare and submit to the Authority, through the LH Portal:

- i. Annex 1 – AIFM – Specific Information to be reported (Article 3(3) and Article 24(1) AIFMD); and
- ii. Annex 2 - AIF – Specific Information to be reported (Article 3(3) and Article 24(1) AIFMD);

Provided that:

- a) NPIFs managed by those managers referred to in point (i) of Rule 6.01 of Part A of these Rules shall be exempt from submitting Annex 1 – AIFM – Specific Information to be reported (Article 3(3) and Article 24(1) AIFMD); and Annex 2 - AIF – Specific Information to be reported (Article 3(3) and Article 24(1) AIFMD), in view that the manager would itself be submitting this documentation to the Authority in terms of the applicable Rules; and
- b) NPIFs managed by those managers referred to in points (ii) and (iii) of Rule 6.01 of Part A of these Rules shall be exempt from submitting certain parts of Annex 1, as the Authority may determine in Guidance Notes to these Rules."

Further detail, particularly on the exemptions referred to in the proviso, will be provided in Guidance Notes/ FAQs to the NPIF framework, which the Authority will publish in due course.

2.4 Fund Manager

Section 6 of Part A of the proposed NPIF Rulebook states that a NPIF can only be managed by:

- "
- i. a *de minimis* AIFM in possession of an Investment Services Licence issued in terms of Article 6 of the Act and duly authorised by the MFSA to provide management services to collective investment schemes; or
 - ii. a *de minimis* AIFM which is authorised in an EU or EEA State, and which the Authority deems to be subject to regulation in an equal or comparable level to that it would have been subject to in Malta; or
 - iii. a third country AIFM which is authorised in a jurisdiction with whom the MFSA has signed a cooperation agreement in terms of the AIFMD, and which the Authority deems to be subject to regulation in an equal or comparable level to that it would have been subject to in Malta."

Feedback Received

A respondent questioned why NPIFs can only be managed by *de-minimis* AIFMs or third country AIFMs stating that this is restrictive and requested clarity on why full-AIFMs cannot manage NPIFs. Another respondent highlighted that by requiring EU *de Minimis* AIFMs to be authorised, the regime will be automatically excluding those EU *de Minimis* AIFMs which are only subject to registration in their respective member states or jurisdictions - but not authorisation -, and

hence creating a barrier to entry. A respondent also questioned the possibility of a non-EU AIFM launching an EU fund to be marketed in the EU.

MFSA Position

The Authority has taken note of feedback received. With respect to why full authorised AIFMs are excluded from the possibility of managing NPIFs, the Authority would like to highlight that in terms of the AIFMD, full authorised AIFMs must ensure that their funds under management are compliant with the provisions emanating from the Directive (depending on where the fund is located and marketed and unless an exemption applies). Accordingly, for NPIFs to be allowed to be managed by full AIFMs, the NPIF would then need to be fully aligned with and reflective of the AIFMD requirements.

Specifically with respect to the use of the term 'authorisation', this is here being used in its widest sense and would also include those de minimis AIFMs which are registered.

Notwithstanding the aforementioned, the Authority has revised R6.01 of Part A of the proposed NPIF Rulebook to read as follows:

"A Notified PIF shall be managed by:

- i. a de minimis AIFM in possession of an Investment Services Licence issued in terms of Article 6 of the Act and duly authorised by the MFSA to provide management services to collective investment schemes; or
- ii. a de minimis AIFM which is duly authorised in an EU or EEA State; or
- iii. a third country AIFM which is authorised in a jurisdiction with whom the MFSA has signed a bilateral cooperation agreement/ memorandum of understanding on securities, and which the Authority deems to be subject to regulation in an equal or comparable level to that it would have been subject to in Malta.

Provided that, where there is no bilateral cooperation agreement / memorandum of understanding on securities in place, the MFSA may accept other forms of agreements/memoranda of understanding which it deems acceptable."

Furthermore, with respect to 'marketing' of NPIFs, the Authority shall be providing additional clarity by including the following provision within the proposed framework:

"A NPIF may only be promoted in jurisdictions outside Malta if it satisfies the relevant rules of such jurisdictions".

2.5 Safekeeping

Section 8 of Part A of the proposed NPIF rules contains a number of provisions relating to safekeeping. It stipulates that the assets of the NPIF are to be subject to adequate safekeeping arrangements. Whilst a NPIF is not required to appoint a custodian in terms of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations, the NPIF may still entrust its assets to a Custodian or a Prime Broker for safekeeping. Where appointed, the custodian is to ensure compliance with the applicable provisions of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations and any other applicable provision of the rules. Where the NPIF opts not to appoint a custodian, the governing body and officers of the NPIF are to be considered responsible for the establishment of proper arrangements for the safekeeping of the NPIF's assets.

Feedback Received

A respondent requested clarifications on the applicability of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations.

MFSA Position

Regulation 24 of the Investment Services Act (Notified CISs) Regulations, as proposed, provides that, where a custodian is appointed, 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.

2.6 Due Diligence and Duties of the Due Diligence Service Provider

Section 10 of Part A of the proposed NPIF Rulebook sets out the requirements linked to due diligence, which includes the appointment of a third-party service provider, entrusted with conducting due diligence with respect to the NPIF, both at notification stage and on an ongoing basis. Section 11 of the proposed Rulebook then outlines the duties of the Due Diligence Service Provider. The appointed service provider is to carry out "fit and proper" assessments to ensure that the other service providers and functionaries, the governing body, founder shareholders and MLRO of the NPIF meet the standards of fitness and propriety expected by the Authority on the basis of four criteria: [i] competence; [ii] reputation; [iii] conflicts of interest and independence of mind; and [iv] time commitment.

Within the same section, it is established that a person may be eligible for appointment as a due diligence service provider if it has in place adequate processes and procedures, including

appropriate record-keeping arrangements and relevant experience related to said activity and is deemed competent by the MFSA to perform such services. Furthermore, to be eligible as a due diligence service provider for a NPIF, the person shall be either [i] a recognised fund administrator, [ii] an authorised (full) AIFM, or [iii] a Company Service Provider which is not under-threshold.

Feedback Received

A respondent asked for clarification regarding the approval process of the service provider prior to notification, particularly whether the appointment of a due diligence service provider for purposes of the NPIF regime, would necessitate the prior approval of the MFSA, or it was sufficient that the proposed person is duly authorised by the MFSA as a [i] a recognised fund administrator, [ii] an authorised (full) AIFM, or [iii] a Company Service Provider which is not under-threshold.

A group of respondents proposed to allow licensed *de Minimis* AIFMs and Malta based MFSA licensed MIFID firms to provide such services to NPIFs, given their licensed status which subjects them to MFSA supervision, their good understanding of fund structures and their performance of due diligence on persons connected to the NPIF, and their knowledge and expertise. Another respondent suggested that licensed depositaries should be allowed to provide such services on the basis that such entities would have the necessary resources and tools to conduct due diligence on the NPIF.

A respondent queried whether the due diligence service provider would need to assess the fitness and properness of the UBOs and Directors of the NPIF's fund manager and custodian. Similarly, another respondent suggested that it is made clear that due diligence assessments are to be undertaken on the fund manager and portfolio manager and also suggested that guidance is issued on what such assessments would cover.

Specifically on the entities who are eligible to provide due diligence services, one respondent queried whether: [i] Part A.I Recognised Fund Administrators of the Investment Services Rules for Recognised persons will be amended, since Section 2 thereof is rather prescriptive and only allows such entities to undertake the services in points (i) – (xi); and [ii] the Authority sees any conflict between allowing authorised full AIFMs to provide due diligence service and Article 6(2) of the AIFMD. The same respondent also questioned the likelihood of a *de minimis* AIFM resorting to a potential competitor (full-scope AIFM) to carry out this exercise and share confidential information therewith.

A respondent also pointed out that the Rules, as proposed, do not prohibit a fund administrator acting concurrently as [i] the due diligence service provider; [ii] the fund administrator; and [iii] the MLRO through its own MLRO sub-function. This respondent was of the view that this eventuality would give rise to a conflict of interest.

MFSA Position

The Authority has considered the responses put forward and has made a number of amendments thereto, primarily vis-à-vis eligibility for appointment as a due diligence service provider. These should *inter alia* provide further clarity on the matter and address certain matters raised by respondents. Rules 11.04 to 11.06, as amended, will read as follows:

- “11.04 A person may be eligible for appointment as a service provider in terms of Regulation 18 of the Regulations if it is either:
- i. a recognised fund administrator, in terms of the Investment Services Act; or
 - ii. a Company Service Provider, licensed under the Company Service Providers Act which are not under-threshold CSPs.
- 11.05 Further to Rule 11.04, a person shall only be eligible for appointment if:
- i. it submits to the Authority a self-declaration, in terms of Annex __ to these Rules, stating that it has in place adequate processes and procedures to perform such a role, including appropriate record-keeping arrangements and relevant experience in performing such activity; and
 - ii. in the case of those persons falling under Rule 11.04 (ii), prior to being appointed to perform such a service, such person shall submit a competency assessment form, in terms of Annex __ to these Rules, for the Authority’s approval.
- Provided that, until MFSA approval on the eligibility of the service provider (in terms of Regulation 18 of the Regulations) is obtained, the notification would not be considered complete and would therefore not be considered as submitted.
- 11.06 Pursuant to Rules 11.04 and 11.05, the Authority shall keep a register of persons approved to carry out the activity of a Service Provider appointed in terms of Regulation 18.”

Further to due consideration, it has been resolved that for the time being, the Authority will be limiting the eligibility to provide due diligence services to [i] recognised fund administrators and [ii] Company Service Providers which are not under-threshold. The Authority could potentially consider revising this position when the NPIF framework is more mature.

Specifically on the clarifications sought on recognised fund administrators and full scope AIFMs acting as due diligence service providers, the Authority is of the view that: [i] Part A.I Recognised Fund Administrators of the Investment Services Rules for Recognised persons explicitly states that the list of services provided therein “*is not to be interpreted as an*

exhaustive list of services which may be provided by a Fund Administrator.”, and therefore amendments thereto are not necessitated; and [ii] given potential issues arising in relation to Article 6(2) AIFMD and the provision of due diligence services to NPIFs by full AIFMs, the Authority has resolved to limit the framework at this stage, to recognised fund administrators and Company Service Providers which are not under-threshold.

Further to the above, queries raised by respondents on the fitness and properness assessments which are to be carried out by the due diligence service provider should be clarified by Guidance Notes/ FAQs which the Authority plans to issue in due course; however, as a general rule the due diligence service provider should be sufficiently comfortable with the extent of due diligence checks conducted.

The Authority has also taken note of stakeholder feedback on the potential conflict of interest should a fund administrator concurrently occupy various roles within the context of a NPIF. Whilst all functionaries are expected to assess whether they have any conflicts of interest before taking on any engagement; the roles of fund administrator and due diligence service provider are not seen as being conflicting.

2.7 Compliance

Section 12 of Part A of the proposed NPIF Rulebook outlines the main provisions regarding compliance with the regulatory framework. More specifically, the governing body of the NPIF is ultimately collectively responsible for the NPIF’s compliance with the applicable legal and regulatory requirements. Furthermore, Rule 12.02 stipulates that the local member of the governing body is to be tasked with compliance duties and with any reporting relating to compliance as required by the NPIF Rules.

Feedback Received

A respondent pointed out that, unlike other CIS frameworks, the NPIF framework does not require the appointment of a compliance officer. The same respondent also proposed that the Authority may wish to ensure that local directors, responsible for compliance duties, have the required experience to hold such a role.

Respondents also suggested that the NPIF framework should also allow NPIFs to appoint an external compliance officer, who will be subject to the same due diligence as a Director of the NPIF, to lead on matters relating to the compliance obligations of the NPIF and to be in charge of any reporting to the MFSA. This arrangement is supposed to provide a degree of flexibility in the structuring of the NPIF, without increasing the regulatory risk.

MFSA Position

The Authority has duly considered respondents' views on this section. Specifically with respect to ensuring that local directors, responsible for compliance duties, have the required experience to hold such a role, the Authority expects that this would be duly assessed by the due diligence service provider, both at authorisation stage and on an ongoing basis.

Moreover, with respect to allowing NPIFs to appoint a dedicated compliance officer, the Authority is of the view that the arrangement for compliance duties, as proposed in the framework, is adequate given the level of regulatory status of the fund, by also responsabilising the governing body of the NPIF, specifically the locally based director.

2.8 Ongoing Due Diligence

Section 2 of Part B of the NPIF Rulebook sets out the obligations of the NPIF and its service provider in relation to ongoing due diligence. In particular, the due diligence service provider shall carry out the appropriate due diligence exercise on an ongoing basis to ensure that the other service providers and functionaries, the governing body, founder shareholders and the MLRO of the NPIF satisfy the fitness and properness standards expected by the MFSA on an ongoing basis.

The due diligence service provider shall also immediately notify the MFSA in case any relevant change takes place that significantly alters the circumstances the initial due diligence exercise was carried out under. Moreover, any record, evidence and correspondence related to the due diligence process shall be retained at the offices of the NPIF, and such documents shall be kept updated by the service provider.

Feedback Received

A respondent proposed that in the event of a change of due diligence service provider, the new service provider should confirm in writing, to the MFSA, that it has no material issues in relation to the due diligence it has taken over or, in case that material issues are detected, these are to be addressed and eventually the due diligence process needs to be undertaken anew.

Respondents also suggested that the due diligence service provider should prepare a report to the board on an annual basis on the due diligence conducted.

MFSA Position

The Authority will require a declaration on due diligence conducted to be included in the certificate of compliance. This is submitted, to the MFSA, by the NPIF's governing body. In this manner, the due diligence service provider would be reporting to the governing body on checks conducted through a statement in the certificate of compliance confirming that due diligence is satisfactory.

Furthermore, the Authority is proposing the inclusion of a proviso to Rule 2.05 of Part B of the NPIF Rules, which will read as follows:

"Provided that in the event of a change of service provider (appointed in terms of Regulation 18), the incoming service provider shall provide a written confirmation, to the Authority, that there are no material issues in relation to the due diligence carried out by the previous service provider, and if there are material issues, due diligence needs to be undertaken afresh and any issues resolved."

2.9 Removal from the List of Notified PIFs

Section 7 of Part B of the proposed NPIF Rulebook states that the MFSA has the right to remove a NPIF, including any sub-fund, from the List of NPIFs at any time at its sole discretion, following due notification to the governing body of the NPIF. Furthermore, it also provides the circumstances under which the governing body of the NPIF, or a person authorised by it to act on its behalf, is to submit a request to the competent authority for removal of the NPIF from the List of Notified PIFs. It also provides the appropriate procedure therefor.

Feedback Received

Overall, the provisions regarding the removal from the List of Notified PIFs did not raise any major comments or remarks. Apart from proposing some amendments for purposes of clarity, a respondent also proposed an amendment to Rule 7.04 for the rules to provide that the NPIF or sub-fund will cease trading or be wound down irrespective of whether the removal from the list arises from the notification for removal or the MFSA exercising its discretion under Rule 7.01.

MFSA Position

The Authority has onboarded the proposed amendments vis-à-vis Rule 7.04 to clarify the circumstances under which the NPIF would cease trading or would be wound down. This, and the newly proposed Rule 7.05, will read as follows:

- “7.04 Following a notification for removal of a NPIF or sub-fund of a NPIF from the List of NPIFs, the MFSA will proceed to strike off the NPIF or sub-fund from the List of NPIFs.
- 7.05 Upon removal from the List of NPIFs, for whatever reason, the NPIF or sub-fund shall cease trading other than for the purpose of winding down the operations of the NPIF or the sub-fund and the NPIF or sub-fund must be liquidated or otherwise terminated in accordance with the requirements of Maltese law.”

2.10 Other Feedback

2.10.1 Leverage

Feedback Received

A respondent highlighted that the proposed rulebook does not make reference to leverage and requested a clarification on whether this would be permissible or otherwise.

MFSA Position

The framework does not contain any requirements on leverage – there are therefore no prohibitions thereon.

2.10.2 Conversions

Feedback Received

Stakeholders suggested that Part A of the proposed NPIF Rulebook should set out the possibility for a NPIF applying for a collective investment scheme licence in terms of Article 4 of the Investment Services Act as a Licensed PIF, subject to the satisfactory completion of the licensing process. The same stakeholder group also proposed also that the NPIF Rulebook should contain provisions setting out the possibility of a NPIF conversion into a NAIF or AIF, subject to satisfaction of the requirements applicable to these categories of collective investment schemes.

Moreover, respondents highlighted that the conversion from a licensed PIF to a NPIF or vice versa is not linked to a subscription process. They suggested that the Authority should expect PIFs to waive redemption fees on investors wishing to exit the PIF prior to the conversion, rather than subscription fees.

MFSA Position

The Authority agrees with feedback received and shall be making the necessary amendments in the respective rulebooks.

2.10.3 Investment Strategy

Feedback Received

One respondent proposed to exclude certain investment strategies, which may be deleterious to Malta as a fund jurisdiction.

MFSA Position

The Authority is addressing this concern by including an additional point (iv) to Rule 2.04 of Part A of the Rulebook making reference to the MFSA risk appetite statement, as follows:

“The notification process cannot be requested for the following collective investment schemes:

- i. ...
- ii. ...
- iii. ...
- iv. Collective Investment Schemes which engage in any activity, or have an investment strategy which is related to any activity, which goes contrary to the MFSA’s Risk Appetite Statement.”

Further guidance on this matter will be provided in Guidance Notes/ FAQ on the NPIF framework, which the Authority plans to issue in due course.

2.10.4 Use of Term ‘Principal Office’

Feedback Received

Respondents highlighted that the term principal office may be misleading as it is usually the words ‘registered office’ which is used. Respondents suggested that the rules should include the terminology “registered office” or “address indicated in the offering memorandum for such purpose”.

MFSA Position

Rules have been amended to refer to the “address of the NPIF indicated in the offering memorandum”.

2.10.5 Investment Committee

Feedback Received

A respondent remarked that the proposed framework does not make reference to the requirement of an Investment Committee and requested clarity thereon.

MFSA Position

The requirement for an Investment Committee was omitted from the framework as the framework does not allow NPIFs to be self-managed. The Authority may reconsider this position at a later stage.

2.10.6 Accounting Standards

Feedback Received

A respondent proposed that in Rule 3.02 of ‘Part B’ of the NPIF Rules, immediately following the sentence “The NPIF’s annual report shall be published and provided to investors in the NPIF and submitted to the MFSA within six (6) months of the end of the period concerned.”, the following wording is inserted: “The accounting information given in the annual report shall be prepared in accordance with generally accepted accounting principles and practice.

MFSA Position

The Authority is of the view that the rules should be neutral from an accounting perspective; however, the preparation of accounting information given in the annual report in accordance with generally accepted accounting principles and practice may be allowed on a case-by-case basis.

2.10.7 Independence of Auditor**Feedback Received**

A respondent asked whether an audit firm (or a related company) that has been appointed the Due Diligence Service Provider of the NPIF, would be considered not independent and as a result be prohibited from taking on the role of auditor for that NPIF. They highlighted that whilst it is acknowledged that there may be certain threats to independence in such a scenario, independence policies could indicate that with the implementation of appropriate safeguards (such as working under separate teams, using Chinese walls, etc) such threats to independence may be sufficiently mitigated and would render the services permissible.

MFSA Position

The Authority considers it important for an appointed auditor not to be involved in the provision of other services in relation to the same fund, so as to ensure the required level of independence.

In this regard, the Authority is of the view that entities (including when providing the service through a related entity) are not to act both as auditors and as a due diligence service provider, in relation to the same NPIF.

On a general note, the Authority would like to highlight that any auditors being appointed in relation to a NPIF, would require the prior approval of the MFSA. The Rules have also been clarified further in this respect.

3 Feedback Statement – Legislative Proposals

3.1 Drafting Suggestions

Where necessary, and as applicable following careful consideration, certain errors identified by respondents have been amended and drafting suggestions to enhance clarity have been onboarded.

3.2 Investment Services Act (List of Notified AIFs) (Amendment) Regulations

3.2.1 Definition of ‘governing body’

Feedback Received

A respondent suggested that, within the definition of “governing body” reference should also be made to fund managers to also capture third-party managers.

MFSA Position

Within the proposed legal notice, the term ‘governing body’ is not used in terms of the fund manager of the NPIF. It is always used in terms of the governing body of the NPIF itself. The definition as originally proposed shall be retained.

3.2.2 Providing for certain requirements as rules rather than the regulations

Feedback Received

A group of respondents suggested that certain matters, such as: [i] the list of categories of CISs that cannot be NPIFs; and [ii] the list of eligible investors; should be included in the rules rather than the regulations, to provide for flexibility should future changes be necessitated.

MFSA Position

The Authority has no objection to this approach with respect to certain provisions and shall be proposing the necessary amendments. The Authority is of the view that the matters highlighted by respondents are already covered by the rules.

3.2.3 **Responsibilising the governing body of the NPIF**

Feedback Received

A respondent commented that, the proposed NPIF framework differs from the NAIF framework as whilst the latter places a lot of onus on the AIFM, the NPIF framework places the responsibility on the board of directors of the fund. The respondent sought clarity on the rationale behind this departure.

MFSA Position

The Authority acknowledges that the NPIF framework takes a different approach to that taken within the NAIF framework. Since the inception of policy work on the NPIF framework, the Authority had sought to promulgate a framework which centres around the governing body of the NPIF rather than the manager. A key aspect taken into consideration by the Authority in this regard was that, unlike NPIFs, NAIFs can only be managed by EU full-AIFMs, that are subject to a fully harmonised regulatory framework. The framework could accordingly be structured as manager centric.

Whilst the Authority agrees that a high degree of responsibility is being placed on the governing body on the NPIF, it should be noted that a core feature of the proposed framework is that a third-party service provider is to be entrusted with conducting due diligence with respect to the NPIF, both at notification stage and on an ongoing basis. A degree of responsibility is also being placed on this service provider.

3.2.4 ***Mutatis mutandis* application of certain provisions of the ISA to due diligence service providers**

The proposed regulation 18(4) states: "(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*."

Feedback Received

A respondent requested clarification on whether this would imply that any foreign service providers would fall in scope of such extension.

MFSA Position

It should be noted that regulation 18(4) makes reference to "...service providers appointed in terms of this regulation...". The *mutatis mutandis* application of Articles 13,15 and 16 of the Investment Services Act would therefore only cover service providers appointed in

terms of regulation 18, i.e., due diligence service providers. The Rules then provide which entities are eligible to provide such services.

3.2.5 Compliance and Ongoing Obligations

As originally proposed Regulation 20 read as follows:

“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.”

Feedback Received

A respondent requested clarification on this regulation, specifically on the proviso requiring the service provider to ensure compliance with the provisions of the Act, regulations and rules.

MFSA Position

The proviso to regulation 20 states that the service provider appointed in terms of regulation 18 shall also comply with any applicable provisions of the NPIF framework. The service provider must therefore ensure that it itself is compliant. The rules would also provide additional clarity with respect to the obligations of the due diligence service provider. Nevertheless, the Authority shall be proposing amendments to Regulation 20 to ensure clarity of expectations.

3.3 Trusts and Trustees Act (Exemption) (Amendment) Regulations

3.3.1 Proposed inclusion of a new Regulation 3(ca)

Regulation 3(ca) as proposed, reads as follows:

“(ca) a person resident outside Malta where such person in Malta is acting as trustee of units in a collective investment scheme which is established as a professional investor fund that has been included by the competent authority on the List of Notified PIFs in terms of the Investment Services Act (Notified CISs) Regulations, provided that such person is established in an approved jurisdiction and does not act in Malta as a trustee on a regular and habitual basis or hold himself out as a trustee;”

Feedback Received

A respondent suggested that rather than inserting a new regulation 3(ca), the existing regulation 3(c) should be amended to add "*...is acting as trustee of units in a collective investment scheme which is licensed, recognised or included in the List of Notified PIFs or the List of Notified AIFs, in each case in terms of the Investment Services Act...*". In the respondent's view this would improve drafting by doing away with needless duplication, and also address the anomaly in that nominee holdings of units in NAIFs are not presently considered.

MFSA Position

The proposal to extend this exemption to also encompass the NAIF framework is being considered by the Authority. In order not to stall the promulgation of the NPIF framework, the Authority shall be handling this as a separate workstream.

4 Conclusion

Having considered stakeholder feedback, the Authority has made the necessary amendments in line with the above stated positions. The MFSA will now be liaising with the relevant bodies/institutions with respect to amend the legislative framework, as required to promulgate the Notified PIF framework.

The Authority has also finalised the amendments to the proposed rulebook in line with the above stated positions. The Authority will now be working on finalising the annexes, supporting documentation and other matters necessary for the implementation of the framework, including a dedicated application form and Guidance Notes with regards to the fitness and propriety assessment to be conducted by the appointed third-party service provider.

Any queries or requests for clarifications in respect of the above should be addressed by email on assetmanagementstrategy@mfsa.mt.