

INVESTMENT SERVICES RULES FOR RECOGNISED PERSONS

PART A.III: RECOGNISED INCORPORATED CELL COMPANY

These Investment Services Rules have been issued in terms of article 9A of the Investment Services Act, as a supplement to the Investment Services Rules for Recognised Persons and are applicable to Recognised Incorporated Cell Companies and to Incorporated Cells.

1. Regulation of Recognised Incorporated Cell Companies (“RICCs”)

A RICC may be established under the Companies Act (Recognised Incorporated Cell Companies) Regulations (hereinafter referred to as the ‘Regulations’) to provide administrative services to incorporated cells forming part of the same RICC in terms of the same Regulations

2. Definition of a Recognised Incorporated Cell Company (“RICC”)

The Regulations define a “recognised incorporated cell company” as a limited liability company formed, continued as, transformed or divided into a RICC in accordance with the Regulations and recognised by the competent authority in terms of article 9A of the Investment Services Act.

3. Definition of an incorporated cell (“IC”)

The Regulations define an ‘incorporated cell’ as a cell of a RICC created in accordance with the same Regulations and licensed as a Collective Investment Scheme in terms of article 4 of the Investment Services Act.

4. Requirement for a RICC Recognition

Regulation 3(2) states:

“A recognised incorporated cell company shall require recognition by the competent authority in terms of Article 9A of the Investment Services Act to provide incorporated cells with administrative services.”

A RICC established in terms of the Regulations is required to apply for recognition to carry out the activities referred to in 5 below in respect of ICs of the same RICC and shall not commence any such operation unless a Certificate of Recognition is issued to the RICC. Such recognition may be given subject to appropriate terms and conditions. A RICC may

not carry out any other activity that may require a licence under the Investment Services Act or other legislation.

A RICC may apply for and be issued with a Certificate of Recognition to provide administrative services to not more than one of the following categories of Schemes:

- (i) Retail UCITS schemes; or
- (ii) Retail non-UCITS schemes;
- (iii) Professional Investor Funds;
- (iv) Alternative Investment Funds; or
- (v) Private Collective Investment Schemes.

5. Administration Services

A RICC recognised in terms of Article 9A of the Investment Services Act may carry out the following services:

- i. Provision of administrative services related to the establishment of ICs;
- ii. Procurement of external service providers and approval of any changes thereto;
- iii. Negotiation of service provision agreements and changes thereto;
- iv. Submission of any model agreements to be used by ICs of a RICC;
- v. Submission to the competent authority of any changes or amendments to model agreements and submission of any new model agreements negotiated with service providers for approval of the competent authority;
- vi. Signature of tripartite agreements between service providers, the RICC and an IC based on the model agreements;
- vii. Standardisation of any other documentation to be used by ICs;
- viii. Approval and joint signature of any applications for licences (including variations, extensions thereof) to be submitted by, or on behalf of, ICs which are in the course of being formed;
- ix. provision of written declarations identifying any changes to model agreements already submitted to the competent authority, including a NIL declaration confirming that no changes have been made;
- x. Provision of ancillary services as may be approved by the competent authority.

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6. Criteria which MFSA will apply in considering an application for Recognition for the provision of administrative services by Recognised Incorporated Cell Companies

- 6.1 The MFSA shall not recognise an Applicant for recognition in terms of Article 9A of the Act unless it is satisfied that:
- i. such Applicant is a fit and proper person to provide administration services and
 - ii. such Applicant will comply in all respects with the provisions of the Act, any relevant Regulations and these Rules and,
 - iii. the Directors and officers of the Applicant are fit and proper persons to carry out the functions required of them.
- 6.2 When considering whether to grant recognition or otherwise to an Applicant, the MFSA must take account of:
- i. the degree of protection to the investors in the Funds to be serviced;
 - ii. the degree of protection to the reputation of Malta taking into account Malta's international commitments; and
 - iii. the promotion of competition and choice.
- 6.3 In all cases falling under the Act, the MFSA applies the same standards relating to the “fit and proper” status of the Applicant, the track record of the Applicant (and those associated with it), and the nature of the business.

The “fit and proper” test is one which must be satisfied at the stage when an application for Recognition is submitted to the Authority in terms of Article 9A of the Investment Services Act and on an ongoing basis once such recognition is granted. Each case is assessed on the basis of the relevant circumstances. The onus of proving that the required standards are met is on the Applicant and RICC. It is not the task of the MFSA to prove that an Applicant is not fit and proper either during the application process or thereafter. The MFSA's approach is cumulative, that is to say the Authority may conclude that an Applicant or a RICC has failed the test on the basis of considering several situations, each of which on its own would not lead to that conclusion. An open and honest relationship with the MFSA is essential. When arriving at its decision as to whether an Applicant or a RICC is fit and proper the MFSA will take account both of what is said and of what is not said (for example in respect of a director's criminal record). It should be noted that it is an offence to provide inaccurate, false or misleading information.

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7. The Application Process

When submitting an application for Recognition as a RICC, the promoter should ensure that the appropriate Application Form (Schedule III to this Part) is completed. The application process to be followed by an Applicant for Recognition in terms of article 9A of the Act, is summarised below.

There are three phases as follows:-

Phase One – Preparatory

- i. MFSA recommends that the promoters arrange to meet representatives of the MFSA to describe their proposal. This preliminary meeting should take place well in advance of submitting an Application for Recognition. Although guidance will be given on the applicable regulatory requirements and on the completion of the Application documents, responsibility for the formulation of the proposal and the completion of the Application documents will remain with the Applicant. It is essential that the Applicant submits a comprehensive (written) description of the proposed activity before the meeting.
- ii. The next stage is that the promoters submit a draft (rather than a Final) Application Form, together with supporting documents as specified in the Application Form itself.
- iii. The draft Application and the supporting documentation will be reviewed and comments provided to the Applicant. The MFSA may ask for more information and may make such further enquiries as it considers necessary. The “fit and proper checks” – which entail following up the information which has been provided in the Application documents, begin at this stage.

Phase Two – Pre-Recognition

- iv. Once the review of the draft Application and supporting documents has been completed and sufficient replies to the Authority’s due diligence enquiries have been received, the Authority will issue (provided it is satisfied that the Applicant meets the eligibility criteria for Recognition) its “in principle” approval for the Recognition of the Applicant.
- v. At this stage, the Applicant will be required to finalise any outstanding matters, such as incorporation of Company (or registration of partnership), submission of signed copies of the revised Application form together with supporting documents in their final format, and any other issues raised during the Application process.
- vi. The Applicant will be recognised as soon as all pre-Recognition issues are resolved.

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Phase Three – Post-Recognition /Pre-Commencement of Business

- vii. The Applicant may also be required to satisfy a number of post-Recognition matters prior to formal commencement of business.

The RICC acknowledges that the MFSA will not be liable in damages for anything done or omitted to be done unless the act or omission is shown to have been done or omitted to be done in bad faith.

The RICC acknowledges that the MFSA has the right, from time to time, to vary or revoke any condition or to impose new conditions.

8. Application Documents

A request for Recognition as in terms of article 9A of the Act should be supported by the following documents:

- i. a duly completed Application for recognition as a RICC;
- ii. a business plan, including a description of the Administration Services to be provided and details as to the type of ICs to whom such services will be provided;
- iii. Memorandum & Articles of Association;
- iv. a copy of the most recent audited accounts of the Applicant or in the case of a new entity, three year financial projections;
- v. a duly completed Personal Questionnaire in the form set out in Schedule II to Part A of these Rules by each Director and Qualifying Shareholder(s) of the Applicant as well as by the Applicant's proposed Sponsoring Agent;
- vi. resolution of the Directors of the Applicant confirming their intention to apply for a Recognition as a in terms of article 9A of the Act on behalf of the Applicant;
- vii. address of the premises in Malta from where the Administration Services will be rendered including the relevant contact details;
- viii. Memorandum and Articles of Association and most recent audited accounts of any Qualifying corporate shareholders of the Applicant;
- ix. a chart which illustrates the internal operational structure of the Applicant with respect to its proposed administration business (this should show names, reporting lines and roles);

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- x. where the Applicant forms part of a Group, a diagram showing the relationships between the Applicant and other members of the Group. The “family tree” submitted should give details up to the ultimate beneficial owner(s), showing percentage sizes of holdings in each entity; unless:
- a. the entity has one ultimate beneficial owner with a holding of over 50% of the voting rights; or
 - b. the entity has no less than fifty ultimate beneficial owners who between them account for over 50% of the voting rights.

If (a) or (b) apply, it will only be necessary to give details of the ultimate beneficial owners with holdings of 10% or more;

The MFSA may require an Applicant requesting recognition in terms of Article 9A of the Act to submit to the MFSA whatever additional information it deems appropriate for the purposes of determining whether it should grant Recognition to the Applicant.

9. Licensing of ICs

- 9.1 The application for recognition submitted in terms of Rule 4 above must be accompanied by an application for licencing of the first IC which is to be included in the platform structure of the RICC. Both applications shall be dealt with separately by the MFSA, however no IC may be granted a licence before a Recognition Certificate has been issued to its RICC.