

CONSULTATION WITH THE FINANCIAL SERVICES  
INDUSTRY WITH REGARDS TO THE VIRTUAL FINANCIAL  
ASSETS REGULATIONS TO BE ISSUED UNDER THE  
VIRTUAL FINANCIAL ASSETS ACT

MFSA REF: 07-2018

ISSUED: 4 JULY 2018

CLOSING DATE: 20 JULY 2018

MFSA

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MALTA FINANCIAL SERVICES AUTHORITY

THESE PROPOSALS ARE NOT BINDING AND ARE SUBJECT TO CHANGES AND REVISIONS FOLLOWING REPRESENTATIONS RECEIVED FROM LICENCE HOLDERS AND OTHER INVOLVED PARTIES. IT IS IMPORTANT THAT PERSONS INVOLVED IN THE CONSULTATION BEAR THESE CONSIDERATIONS IN MIND.

## 1 INTRODUCTION

As outlined in the Government Consultation Paper on [\*The establishment of the Malta Digital Innovation Authority; the Framework for the Certification of Distributed Ledger Technology Platforms and Related Service Providers; and a Virtual Currency Act\*](#), the MFSA had received positive feedback on the proposed introduction of a new legislative framework regulating ICOs and the provision of certain services in relation to virtual currencies. In this regard and in order to effectively safeguard the objectives of financial services regulation, the MFSA proceeded to draft the Virtual Financial Assets Act<sup>1</sup> (the 'Act'). The Act empowers the Minister to make regulations, acting on advice of the competent authority, to give effect to the provisions of the Act.

The MFSA has proceeded to draft the attached legal notice setting out regulations on [i] exemptions; [ii] fees; [iii] control of assets; and [iv] administrative penalties and appeals. The Authority is seeking feedback from the industry with regards to the draft regulations, the Virtual Financial Assets Regulations (the 'Regulations'), to be issued under the Act. The main aim of these Regulations is to safeguard financial stability, promote market integrity and ensure investor protection. The draft Legal Notice is annexed to this consultation paper.

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<sup>1</sup> Previously referred to as Virtual Currencies Act.

## 2 THE VIRTUAL FINANCIAL ASSETS REGULATIONS

Whilst the Act sets out the high level principles for the regulation of the field of Initial Virtual Financial Asset Offerings and Virtual Financial Assets and makes provision for matters ancillary or incidental thereto or connected therewith, the Regulations are aimed at providing more granularity, particularly with respect to (1) exemptions; (2) fees; and (3) control of assets. The Legal Notice also provides for administrative penalties for failure to comply with the provisions of the Regulations and for appeals thereto.

### 1. Exemptions

Regulation 3 of the proposed Legal Notice sets out an exhaustive list of persons who shall be exempt from the requirement of a VFA services licence in terms of Article 13 of the Act. Whilst it is being proposed that certain exemptions are automatically applicable, others will need to be notified to the MFSA prior to their application, whilst others shall be subject to a determination in writing by the MFSA. An exemption from the requirement of Article 29 of the Act is also being proposed.

### 2. Fees

The proposed Legal Notice sets out the respective application and supervisory fees for licence holders and VFA Agents. The fees, set out in Schedule I to the Regulations, vary for the different classes of licences and VFA Agents appointed in terms of Article 7, Article 14 or both Article 7 and 14. The *quanta* of the fees is based on the traditional framework and takes into account the respective risks posed.

### 3. Control of Assets

In order to provide protection for investors, it is being proposed that persons in possession of a licence under the Act or acting under an exemption from the requirement of such a licence under the Regulations are subject to additional requirements when holding and/or controlling clients' monies and/or assets. These requirements are set out in Regulations 9 to 23.

### 4. Administrative Penalties and Appeals

Regulation 24 of the proposed Legal Notice establishes that where persons falling within the scope of the Regulations fail to comply with any provision of the Regulations or rules issued thereunder, 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 48 of the Act. A right of appeal to the Financial Services Tribunal is also proposed.

## 3 CONCLUDING REMARKS

The consultation is open to the public from 4 July 2018 until the 20 July 2018. Interested parties are requested to submit their comments and feedback with respect to the above and/or attached drafts by email on [fintech@mfsa.com.mt](mailto:fintech@mfsa.com.mt) by not later than **20 July 2018**.

Communications Unit  
Malta Financial Services Authority  
MFSA Ref: 07-2018  
4 July 2018

L.N. \_\_\_\_\_ of 2018

**VIRTUAL FINANCIAL ASSETS ACT  
(CAP. XXX)**

**Virtual Financial Assets Regulations, 2018**

IN exercise of the powers conferred by article 38 of the Virtual Financial Assets Act, the Minister responsible for the regulation of Financial Services, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

**PRELIMINARY**

Title and Commencement      **1.** (1) The title of these regulations is the Virtual Financial Assets Regulations, 2018

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

Interpretation.      **2.** (1) In these regulations, unless the context otherwise requires –

Cap. Xxx      “*the Act*” means the Virtual Financial Assets Act;

“*assets*” means movable and immovable property of any kind and excludes financial instruments as defined in the Second Schedule to the Investment Services Act, whether issued in Malta or not;

Cap.371

“*Banking Act*” means the Banking Act, Chapter 371 of the Laws of Malta;

“*collective investment scheme*” shall have the same meaning as assigned to it under the Investment Services Act;

Cap. 330

“*competent authority*” means the Malta Financial Services Authority established by the Malta Financial Services Authority Act;

“*control of assets*” means the holding or control of assets belonging to, or on behalf of a customer, by a subject person acting in the course of rendering a VFA service under the Act, and includes custody of assets:

Provided that, for the purposes of these regulations, the terms “hold”, “control”, “safeguard” and “deposit” shall be deemed to encompass private cryptographic keys used in relation to virtual financial assets;

*"customer"* means any person whose assets are held under the control of a subject person;

*"credit institution"* shall have the same meaning as assigned to it under the Banking Act;

*"custodian"* means a licence holder in possession of a Category 4a or 4b investment services licence, as the context requires, issued in terms of the Investment Services Act;

*"Directive 2009/65/EC"* means Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time and includes any implementing measures that have been or may be issued thereunder;

*"Directive 2013/36/EU"* means Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, as amended from time to time and includes any implementing measures that have been or may be issued thereunder;

*"Investment Services Act"* means the Investment Services Act, Chapter 370 of the Laws of Malta;

*'market maker'* means a person who holds himself out, on a continuous basis, as being willing to deal on own account by buying and selling virtual financial assets against that person's proprietary capital at prices defined by that person;

*"qualifying money market fund"* means a collective investment undertaking authorised under Directive 2009/65/EC, or which is subject to supervision and, if applicable, authorised by the competent authority under the Act, and which satisfies all of the following conditions:

- a) its primary investment objective must be to maintain the net asset value of the undertaking either constant at par (net of earnings), or at the value of the investors' initial capital plus earnings;

- b) it must, with a view to achieving that primary investment objective, invest exclusively in high quality money market instruments with a maturity or residual maturity of no more than 397 days, or regular yield adjustments consistent with such a maturity, and with a weighted average maturity of 60 days. It may also achieve this objective by investing on an ancillary basis in deposits with credit institutions:

Cap. 376

Provided that for the purposes of paragraph (b), a money market instrument shall be considered to be of high quality if the collective investment scheme or the management company on behalf of the collective investment scheme performs its own documented assessment of the credit quality of money market instruments that allows it to consider a money market instrument as high quality. Where one or more credit rating agencies registered and supervised by ESMA have provided a rating of the instrument, the internal assessment carried out by the collective investment scheme or the management company on behalf of the collective investment scheme shall have regard to, inter alia, those credit ratings;

Cap. 370

- c) it must provide liquidity through same day or next day settlement;

"*subject person*" means a person who is in possession of a licence under the Act or is acting under an exemption from the requirement of such a licence in terms of these Regulations:

"*VFA service*" means any service falling within the Second Schedule to the Act when provided in relation to a virtual financial asset.

(2) Words and expressions used in these regulations which are also used in the Act but which are not defined herein shall have the same meaning as in the Act.

### EXEMPTIONS

Exemption from  
licensing

**3.** (1) The following persons are hereby being exempted for the purposes of the requirement for a license for VFA services in terms of Article 13 of the Act:

- (a) The Central Bank of Malta and the members of the ESCB and other national bodies performing similar functions in the Union, other public bodies charged with or intervening in the management of the public debt in the Union and international



financial institutions established by two or more Member States which have the purpose of mobilizing funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems;

- (b) The competent authority and any person who is appointed thereby in the course and for the purpose of its regulatory and supervisory functions;
- (c) A liquidator or a curator in bankruptcy acting in the course of the liquidation or bankruptcy;
- (d) Persons dealing on own account in terms of the Act and not providing any other VFA services or performing any other activities in virtual financial assets unless such persons:
  - i. are market makers; or
  - ii. deal on own account when executing client orders;

Persons exempt under points (f), (g) and (n) are not required to meet the conditions laid down in this point in order to be exempt.

For purposes of this exemption, dealing on own account shall mean the trading by a person in its own name and against proprietary capital resulting in conclusion of transactions in one or more virtual financial assets.

- (e) Persons which provide VFA services exclusively for their parent companies, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (f) A person licensed in terms of paragraph 5(c) of the First Schedule to the Investment Services Act to act as custodian in relation to a collective investment scheme or holding an equivalent authorisation issued by a European regulatory authority providing services in Malta in exercise of a European right:

Provided that such person shall solely be exempt from the provisions of the Act for the purposes of providing the VFA service listed in point (5) of the Second Schedule to the Act to a collective investment scheme;

- (g) A person licensed to provide the services of management of investments in terms of paragraph (4) of the First Schedule to the Investment Services Act to a collective investment scheme or holding an equivalent authorisation issued by a European regulatory authority providing services in Malta in exercise of a European right:

Provided that such person shall solely be exempt from the provisions of the Act for the purposes of providing the VFA services listed in points (4) and, or (6) of the Second Schedule to the Act to a collective investment scheme;

- (h) a person, being an individual, who manages assets, in terms of point (4) of the Second Schedule to the Act, in relation to a portfolio which includes virtual financial assets, for his spouse, descendants and ascendants in the direct line and their relative spouses, or his brothers and sisters, as long as such portfolio is owned by the person to whom such services are provided and does not constitute a collective investment scheme, and as long as the person providing the service does not do any of the following:

- (i) receive, directly or indirectly, any remuneration or other benefit for the service;
- (ii) hold himself out as providing a VFA service; or
- (iii) solicit members of the public to take such services;

- (i) a person who acts as manager, in terms of point (4) of the Second Schedule to the Act, of a portfolio which includes virtual financial assets belonging to him and to no other person, as long as:

- (i) such portfolio has not been established for investment purposes in the interest of other beneficiaries where such interest is legally enforceable; and
- (ii) such portfolio does not constitute a collective investment scheme;

- (j) a person providing a VFA service where that service is provided in an incidental manner in the course of a

professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service:

Provided that for the purposes of this paragraph, a service shall be deemed to be provided in an incidental manner in the course of a professional activity if the person providing such a service does not:

- (i) receive, directly or indirectly, any remuneration or other benefit for the service;
  - (ii) hold himself out as providing a VFA service; or
  - (iii) solicit members of the public to take such services;
- (k) a person providing investment advice in terms of point (6) of the Second Schedule to the Act, in the course of providing another professional activity not covered by the Act, provided that the provision of such advice is not specifically remunerated;
- (l) supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Development Finance Institutions and bilateral development banks, the World Bank, the International Monetary Fund and other supranational institutions and similar international organisations, in the event that such institutions or organisations manage collective investment schemes and in so far as those collective schemes act in the public interest;
- (m) securitisation special purpose entities; and
- (n) collective investment schemes licenced under the Investment Services Act or otherwise authorised by a European regulatory authority, providing services in Malta in exercise of a European right.

(2) The exemption laid down in paragraph (d) shall not be automatically operative but their applicability shall be subject to the determination in writing by the competent authority that the requested exemption applies.

(3) Any person who intends to apply any of the exemptions laid down in paragraphs (e), (f) and (g) shall notify the authority thereof, prior to the application of such an exemption.

Exemption from the requirement of Article 29.

4. The provisions of article 29 of the Act shall not apply to:

(a) any advertisement issued or caused to be issued by:

(i) the Government of Malta; or

(ii) the Central Bank; or

(iii) any international organization the members of which include Malta;

(b) any advertisement issued or caused to be issued by any person who is under these regulations exempt from the requirement of a licence, provided that the advertisement strictly relates to matters in respect of which such person is exempt;

(c) any advertisement issued or caused to be issued solely to:

(i) licence holders; or

(ii) a person whose ordinary business involves the acquisition and disposal of virtual financial assets; or

(iii) a person who is acting under an exemption from the requirement of a licence under these regulations provided that the advertisement relates to matters in respect of which such person is exempt;

(d) any advertisement contained in a publication published and circulated principally outside Malta, or in a sound or television broadcast transmitted principally for reception outside Malta, or any other communication using any other medium, originating outside Malta, unless the advertisement is directed to persons in Malta, or is otherwise intended to be made available to persons in Malta not being persons falling within the scope of paragraph (b) of this regulation:

Provided that the exemption described in this regulation shall not apply where the advertisement is issued, broadcast or transmitted by:

(i) A licence holder; or

(ii) A licence holder in exercise of a European right within the meaning of article 2, and subject to the provisions of article 60, of the Act.

## FEES

Payment of  
whitepaper  
review or  
application fee

**5.** Any person shall, upon submission of a whitepaper for registration or upon submission of an application for the granting of a registration, a licence or any other kind of authorisation, irrespective of whether the whitepaper is registered or whether the application is eventually accepted or not, pay to the competent authority the respective fee as established in the Second Column of Schedule I.

Payment of  
annual  
supervisory fee

**6.** There shall be paid to the competent authority the following annual supervisory fees, as applicable:

(a) Licence holders shall, upon the submission of the annual audited financial statements, pay an annual supervisory fee as established in the Third Column of Schedule I:

Provided that the first annual supervisory fee shall be due immediately once a licence is granted and, where applicable, shall be equal to a proportion of the minimum fee. The first annual supervisory fee payable shall be proportionate to the period remaining between the date of the granting of the licence and the established date for the submission of the annual audited financial statements;

(b) VFA agents shall, upon the anniversary of the date of the granting of registration, pay the annual supervisory fee established in the Third Column of Schedule I:

Provided that the first annual supervisory fee shall be due immediately once an authorisation is granted.

Licence  
Classification

**7.** (1) A person applying for a licence in terms of article 13 of the Act shall be classified at the discretion of the competent authority into one of the four categories which determine the requirements of licence holders as follows:

VFAA Class 1	Licence holders authorised to receive and transmit orders and, or provide investment advice in relation to one or more virtual financial assets and, or the placing of virtual financial assets.
VFAA Class 2	Licence holders authorised to provide any VFA service and to hold or control clients' money, but not to operate a VFA exchange or deal for their own account.
VFAA Class 3	Licence holders authorised to provide any VFA service and to hold or control clients' money, but not to operate a VFA exchange.
VFAA Class 4	Licence holders authorised to operate a VFA exchange and to hold or control clients' money, virtual financial assets and, or private cryptographic keys and custodian or nominee services solely in relation to the operation and activities of such VFA exchange.

(2) The competent authority shall set out in the licence the nature of the activities which particular licence holders may carry out.

Non-refundable  
or prorated fees

**8.** None of the fees established and due in terms of these regulations shall be refundable. Nor shall they be prorated, other than the first annual supervisory fee as established in regulation 6.

#### CONTROL OF ASSETS

Assets held under  
control constitute  
a distinct  
patrimony

**9.** (1) A subject person having the control of assets belonging to a customer in the course of rendering a VFA service to such customer, shall hold such assets solely for and on behalf of and in the interest of the customer.

(2) Notwithstanding anything stated in article 1894 of the Civil Code or in the agreement entered into between the subject person and the customer or the fact that a customer's assets held under the control of a subject person are registered in the name and title of or are otherwise vested in the subject person, such assets shall be deemed to constitute a distinct patrimony, separate from that belonging to the subject person and from that of other

customers the assets of whom are also held under the control of the subject person.

(3) Except as expressly provided in the agreement entered into between the subject person and the customer and notwithstanding the provisions of the Civil Code, the control of assets belonging to a customer by a subject person shall not give or be deemed or construed to give to the subject person any rights over such assets nor shall it create any form of loan between the subject person and the customer and this notwithstanding the nature of the assets or the rights or obligations of the subject person in relation to the assets.

Customer enjoys right of ownership in assets

**10.** (1) A customer whose assets are held under the control of a subject person enjoys a right of ownership in such assets notwithstanding that they may be registered in the name and title of or are otherwise vested in the subject person. Where such assets are held by the subject person as part of a common pool of identical assets or are otherwise held in a clients' or common account, the customer shall have an undivided share in ownership of all the assets held collectively by the subject person in such a pool or account.

(2) The records, accounts and other statements held or issued by the subject person in terms of regulation 13(3) shall, saving any proof to the contrary, constitute evidence of their contents and of the right of ownership of the customer as provided in subregulation (1).

Assets held under control not subject to the rights of creditors of the subject person

**11.** (1) The creditors of a subject person shall have no claim or right of action on or against the assets held under the control of the subject person for and on behalf of and in the interest of any customer and such assets shall not be affected in any manner by the provisions of laws and regulations in force regulating the insolvency or bankruptcy of the subject person.

(2) In the event of any such insolvency or bankruptcy or related order or resolution, or in the event that the competent authority so requires, the subject person or any administrator or receiver or other officer appointed to represent it by any court or otherwise, shall on demand of any customer or of the competent authority, immediately transfer the control, possession and title to all assets held by or in the name of the subject person on behalf of the customer to another subject person or to such other person as may be instructed by the customer or by the competent authority.

(3) In the event that any assets held under the control of the subject person are, at the request of any creditor of the subject person, made subject to any precautionary or executive act or warrant granted by any Court in terms of the Code of Organization and Civil Procedure, the customer on whose behalf such assets are being held or the competent authority may, by application to the Court, request the release of the assets from such act or warrant and the

Court shall, on production of evidence as it may deem fit, accede to the application without undue delay.

(4) Security interests, liens or rights of set-off over assets belonging to a customer and enabling a third party to dispose of the customer's assets in order to recover debts that do not relate to the customer or provision of services to the customer are not permitted except where this is required by the applicable law in a third country jurisdiction in which the assets belonging to the customer are held.

(5) Where a subject person is obliged to enter into agreements that create such security interests, liens or rights of set-off, it shall disclose that information to customers indicating to them the risks associated with those arrangements.

(6) Where security interests, liens or rights of set-off are granted by the subject person over assets belonging to the customer, or where the subject person has been informed that they are granted, these shall be recorded in customer's contracts and the subject person's own accounts to make the ownership status of customer's assets clear, such as in the event of an insolvency.

Applicability of  
Duty on  
Documents and  
Transfers Act and  
Income Tax Act

**12.** (1) The delivery of the assets of a customer to a subject person and from a subject person to a customer or another subject person for the purpose of the control of assets in terms of these regulations shall not be deemed to constitute a chargeable transfer for the purposes of the Duty on Documents and Transfers Act and for the purposes of article 5(1) of the Income Tax Act, where the delivery of such assets does not constitute a change in the beneficial owner of the assets.

(2) For the purpose of this regulation, beneficial owner means a person who is the real owner of, or who is otherwise beneficially entitled to, the assets held under control by the subject person, as is provided in regulation 10 of these regulations.

Functions and  
duties of the  
subject person

**13.** (1) A subject person having the control of assets belonging to a customer shall safeguard such assets and the interest of the customer therein.

(2) The subject person shall carry out such functions and duties as shall be required in accordance with these regulations, the terms and conditions of the agreement entered into with the customer, the conditions of any licence, and such other requirements as may be laid down by the competent authority.

(3) The subject person shall maintain proper and adequate records and accounts of all customers' assets held under control.

The records and accounts shall identify the customers to whom such assets belong and shall clearly indicate that the assets of every customer are



separate and distinct from the assets belonging to the subject person and from other customers' assets held by the subject person. The records and accounts shall, upon due notice being given to the subject person, indicate where any pledge or other right over assets held under the control of the subject person has been given by the customers to any third parties, and where any order by any Court has been made in connection with such assets.

(4) The subject person shall maintain accurate records and accounts in a way that ensures accuracy, and in particular their correspondence to the virtual financial assets and money held for the customers and that they may be used as an audit trail.

(5) The subject person shall conduct, on a regular basis, reconciliations between its records and accounts and those of any third parties with whom customer's virtual financial assets and money have been deposited in accordance with regulations 14 and 15.

(6) The subject person entrusted with the control of assets belonging to customers shall, to every extent reasonably possible, segregate in a proper manner the assets of every customer from the assets belonging to the subject person and from the assets of other customers:

Provided that the subject person may, with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any licence and such other requirements as may be laid down by the competent authority and without prejudice to the customer's right of ownership over the assets held under control, place and keep such assets in a common pool of identical assets or otherwise deposit them in a clients' or common account.

(7) The subject person shall make appropriate arrangements for the protection of customers' assets held under control and shall ensure that such assets are placed under adequate systems to safeguard such assets from damage, misappropriation or other loss and which permit the delivery of such assets only in accordance with the terms and conditions of the agreement entered into with the customer.

(8) Where it is not reasonably possible for the subject person to carry out any of the duties specified in this regulation due to the nature of the assets and of the arrangements whereby control is exercised, the said duties may be varied with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any licence and such other requirements as may be laid down by the competent authority.

(9) The subject person shall take the necessary steps to ensure that any customer virtual financial asset deposited with a third party in accordance with regulation 14 are identifiable separately from the virtual financial assets belonging to the subject person and from the virtual financial assets belonging to that third party, by means of differently titled accounts on the

books of the third party or other equivalent measures that achieve the same level of protection.

(10) The subject person shall take the necessary steps to ensure that the money belonging to the customer deposited in accordance with regulation 15 with a central bank, a credit institution or a bank authorised in a third country or a qualifying money market fund, are held in an account or accounts separately identifiable from any accounts used to hold money belonging to the subject person.

(11) The subject person shall implement adequate organizational arrangements to minimise the risk of the loss or diminution of assets belonging to the customer, or of rights in connection with those assets, as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence.

(12) If, for reasons of applicable law, including the law relating to property or insolvency, a subject person cannot comply with the provisions of this regulation to safeguard customers' rights, the subject person shall implement arrangements to ensure that customers' assets are safeguarded to meet the objectives outlined in this regulation.

(13) The competent authority may issue Rules providing requirements which have an equivalent effect in terms of safeguarding customers' rights if the applicable law of the jurisdiction in which the assets belonging to the customer are held prevents the subject persons from complying with the provisions of subregulation (9) or (10) of this regulation.

Deposit of  
customer virtual  
financial assets  
with third parties

**14.** (1) A subject person may deposit virtual financial assets held by it on behalf of its customers into an account or accounts opened with a third party:

Provided that such third party shall hold either a licence under this Act to provide the VFA service listed in point (5) of the second Schedule thereto or any other authorisation which is equivalent thereto issued by a European or overseas regulatory authority.

(2) The subject person shall exercise all due skill, care and diligence in the selection, appointment and periodic review of the third party and of the arrangements for the holding and safekeeping of those virtual financial assets.

(3) The subject person shall, in particular, take into account the expertise and market reputation of the third party as well as any legal requirements or market practices related to the holding of virtual financial assets that could adversely affect the rights of its clients.

Deposit of Client  
Money

**15.** (1) A subject person shall, on receiving any customer money, promptly place such money with any of the following:

- (a) a central bank;
- (b) a credit institution authorised in accordance with the provisions of Directive 2013/36/EU;
- (c) a bank authorised in a third country; or
- (d) a qualifying money market fund:

Provided that this subregulation shall not apply to a credit institution authorised under Directive 2013/36/EU in relation to deposits within the meaning of the aforementioned Directive and held by that institution.

(2) Where the subject person does not deposit customer money with a central bank, it shall exercise all due skill, care and diligence in the selection, appointment and periodic review of the credit institution, bank or money market fund where the money is placed and the arrangements for the holding of such money. The subject person shall furthermore, consider the need for diversification as part of its due diligence.

(3) Where the subject person deposits customer money in accordance with subregulation (2), it shall, in particular, take into account the expertise and market reputation of such institutions or money market funds with a view to ensuring the protection of the rights of its customers as well as any legal or regulatory requirements or market practices related to the holding of customers' money that could adversely affect such rights.

(4) The subject person shall ensure that customers give their explicit consent to the placement of their money in a qualifying money market fund.

(5) Where the subject person deposits customer money with a credit institution, bank or money market fund of the same group as the subject person, it shall limit the money deposited with any such group, entity or combination of any such group entities so that money does not exceed 20% of all such monies.

(6) The requirement prescribed in subregulation (5) can be waived by the competent authority where the subject person is able to demonstrate that, in view of the nature, scale and complexity of its business, and also the safety offered by the third parties considered in subregulation (5) and including in any case the small balance of customer money the subject person holds, the requirement prescribed in subregulation (5) is not proportionate.

(7) The subject person shall periodically review the assessment made in accordance with subregulation (6) and shall notify the initial and reviewed assessments to the competent authority

Use of clients'  
Virtual financial  
assets

**16.** (1) A subject person shall not use virtual financial assets which it holds on behalf of a customer for its own account or for the account of any

other person or customer of the subject person, unless both of the following conditions are met:

- (a) the customer has given his prior express consent to the use of the virtual financial assets on specified terms, as clearly evidenced in writing and affirmatively executed by signature or equivalent; and
- (b) the use of that customer's virtual financial assets is restricted to the specific terms to which the customer consents.

(2) The records of the subject person shall include details of each customer on whose instructions the use of virtual financial assets has been affected as well as the number of virtual financial assets belonging to each customer who has given his consent, so as to enable the correct allocation of any loss.

(3) The subject person shall take appropriate measures to prevent the unauthorised use of customer virtual financial assets for its own account or the account of any other person.

(4) The subject person shall adopt specific arrangements for all customers to ensure that the borrower of customer virtual financial assets provides the appropriate collateral.

(5) The subject person shall monitor the continued appropriateness of the collateral referred to in subregulation (5) and take the necessary steps to maintain the balance with the value of customer virtual financial assets.

Governance arrangements concerning the safeguarding of customer assets

**17.** (1) The subject person shall appoint a single officer of sufficient skill and authority with specific responsibility for matters relating to the compliance by the subject person with its obligations regarding the safeguarding of customer assets.

(2) The subject persons shall decide whether the appointed officer is to be dedicated solely to this task or whether the officer can discharge responsibilities effectively whilst having additional responsibilities.

Reports by external auditors

**18.** The subject person shall ensure that its external auditors report at least annually to the competent authority on the adequacy of the subject person's arrangements under these regulations:

Provided that this information shall form an integral part of the annual report to be submitted to the competent authority in terms of article 50(6) of the Act.

Provision of Information

**19.** (1) The subject person shall make information pertaining to customers' assets readily available to the following entities:

- (a) the competent authority; and
- (b) appointed insolvency practitioners.

(2) The information to be made available in terms of subregulation (1) shall include the following:

- (a) related internal accounts and records that readily identify the balances of assets held for each customer;
- (b) where customer money is held by the subject person in accordance with regulation 15, as well as details of the accounts where customer money is held and the relevant agreements with those entities;
- (c) where virtual financial assets held by the subject person in accordance with regulation 14, as well as details of accounts opened with third parties and the relevant agreements with those entities;
- (d) details of third parties carrying out any related outsourced tasks and details of any outsourced tasks;
- (e) key individuals of the subject person involved in related processes, including those responsible for oversight of the subject person's requirements in relation to the safeguarding of customer assets; and
- (f) agreements relevant to establish customer ownership over assets.

Liability of the subject person

**20.** (1) A subject person having the control of assets belonging to customers shall be liable for any loss or prejudice suffered by the customers due to the subject person's fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part the subject person's obligations arising under these regulations, the terms and conditions of the agreement entered into with the customers, the conditions of any licence or such other requirements as may be laid down by the competent authority.

(2) For the purposes of this regulation, subject person includes such other subject person to whom functions, duties or assets may be delegated or entrusted in terms of regulation 21.

Subject person may delegate functions and duties to entrust assets to another subject person

**21.** (1) A subject person may delegate part of the functions and duties under regulation 13 to another subject person which is qualified and competent to take the control of customers' assets; and may entrust or deposit all or part of a customer's assets held under control with such other subject person.

(2) The liability of the subject person for its own acts or omissions shall not be affected or reduced as a result of the subject person delegating functions and duties, or entrusting all or part of the assets belonging to a customer, to another subject person.

(3) Where the subject person delegates or entrusts functions, duties or assets in terms of subregulation (1) to a person which is a group company, without prejudice to the liability of such person, the subject person shall be liable for any loss or prejudice suffered by the customers as a result of the acts, omissions or insolvency of such person.

(4) Where the subject person delegates or entrusts functions, duties or assets in terms of subregulation (1) to a person which is not a group company, without prejudice to the liability of such person, the subject person shall be liable for any loss or prejudice suffered by the customers as a result of the acts or omissions of such person unless the subject person can prove that such person was and remains qualified and competent to carry out the functions and duties delegated and that the subject person exercised reasonable care to oversee that the functions and duties delegated were undertaken by such person competently.

(5) The liability of the subject person under subregulations (3) and (4) may be varied or reduced with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any licence and such other requirements as may be laid down by the competent authority:

Provided that the subject person discloses fully to the customer any risks that may be associated with the nature of the arrangements whereby control is to be exercised and that the agreement with the customer shall clearly define the extent of liability of the subject person.

(6) Where the subject person delegates or entrusts functions, duties or assets in accordance with specific written instructions from the customer, the subject person shall not be liable for any loss or prejudice suffered by that customer as a result of the acts or omissions of the person to whom functions, duties or assets are delegated or entrusted as requested by the customer.

(7) For the purposes of this regulation, "group company" in relation to a subject person means any body corporate which is the subject person's subsidiary or parent company or a subsidiary of the subject person's parent company, and the terms "parent" and "subsidiary" shall be construed in accordance with article 2(2) of the Companies Act.

Subject Person  
fees

**22.** The subject person shall have the right to charge fees to the customer and to be reimbursed for expenses in accordance with the terms and conditions of the agreement entered into with the customer. The subject person may, if authorised to do so by the terms and conditions of the said agreement, exercise a right of retention over the customer's assets held under control, to the extent of any lawfully due but unpaid fees and expenses, until such fees and expenses are paid.

Termination of  
the Control of  
Assets

**23.** (1) Without prejudice to any requirements as may be laid down by the competent authority, an agreement for the control of assets belonging to a customer may be terminated by the customer, by the subject person, or by order of the competent authority.

(2) Upon the termination of an agreement for the control of assets, the subject person shall convey for no consideration the assets held for the customer, as

instructed by the customer or by the competent authority, without prejudice to the subject person's right to payment of any lawfully due fees or expenses in terms of the agreement entered into with the customer and to any obligations arising in favour of the customer thereunder.

#### **ADMINISTRATIVE PENALTIES AND APPEALS**

Administrative  
Penalties, other  
administrative  
measures and  
appeals

**24.** (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 48 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 51 of the Act shall apply *mutatis mutandis*.

**SCHEDULE I**  
(Regulations 5 and 6)  
Fees

First Column	Second Column Application/Notification Fee	Third Column Supervisory Fee
	€	€
(a) Whitepaper registration	4,000	1,000 upon the submission of the certificate of compliance
(b) VFA agent		
Appointed in terms of article 7 of the Act	5,000	5,000
Appointed in terms of article 14 of the Act	5,000	5,000
Appointed in terms of both articles 7 and 14 of the Act	7,500	7,500
(c) Licences		
VFAA Class 1	3,000	For revenue up to €50,000  Further tranches of €50,000 up to a maximum of €1,000,000  350 per tranche or part thereof
VFAA Class 2	5,000	For revenue up to €250,000  4,500



		Further tranches of €250,000 up to a maximum of €5,000,000	400 per tranche or part thereof
VFAA Class 3	7,000	For revenue up to €250,000	6,000
		Further tranches of €250,000 up to a maximum of €50,000,000	400 per tranche or part thereof
VFAA Class 4	12,000	For revenue up to €1,000,000	25,000
		Further tranches of €1,00,000 up to a maximum of €100,000,000	2,500 per tranche or part thereof