



ABU DHABI GLOBAL MARKET
سوق أبوظبي العالمي

CONSULTATION PAPER NO 9 OF 2015

13 JULY 2015

**FINANCIAL SERVICES – SUPPLEMENTARY
RULES AND REGULATIONS**

WHY ARE WE ISSUING THIS PAPER?

1. The Board of Directors (the "**Board**") of Abu Dhabi Global Market ("**ADGM**") have issued this Paper to invite public comment on the Board's proposals to issue rules for governing insurance activity in ADGM as set out in two rulebooks: (i) the Prudential – Insurance Business Module ("**PIN**"); and (ii) the Captive Insurance Business ("**CIB**") and regulations and rules to regulate takeovers (the "**Takeover Regulations**"). It is intended that the proposed Takeover Regulations will be included within the Financial Services and Markets Regulations 2015 (the "**Regulations**") and proposed rules (the "**Takeover Rules**") will be created as contemplated by the Takeover Regulations.
2. An updated glossary (**GLO**) providing additional terms to assist in relation to PIN and CIB has been included (Please see Appendix 5).

WHO SHOULD READ THIS PAPER?

3. The proposals in this Consultation Paper would be of interest to individuals, organisations and investors with an interest in establishing a presence in ADGM for insurance activity or investing in business in ADGM, and their professional advisors.

HOW TO PROVIDE COMMENTS

4. All comments should be in writing and sent to the address or email specified below. If sending your comments by email, please use the Consultation Paper number in the subject line. You may, if relevant, identify the organisation you represent in providing your comments. The Board reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments. Comments supported by reasoning and evidence will be given more weight by the Board.

WHAT HAPPENS NEXT?

5. The deadline for providing comments on this proposal is **11 August 2015**. Once we receive your comments, we will consider whether any modifications are required to this proposal. We will then proceed to enact the rulebooks and the regulations. You should not act on these proposals until the relevant regulations and rules are issued by the Board. We shall issue a notice on our website telling you when this happens.

COMMENTS TO BE ADDRESSED TO:

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CHAPTER 1: THE PRUDENTIAL – INSURANCE BUSINESS MODULE

APPROACH TO THE PRUDENTIAL INSURANCE BUSINESS MODULE (PIN)

1. PIN applies to Authorised Persons in ADGM who are authorised under their Financial Services Permission to carry on one or more of the ADGM Regulated Activities constituting Insurance Business (Please see Appendix 1).
2. PIN contains rules under the following Chapter headings:
 - a. Application of PIN (Chapter 1);
 - b. Management and control of risk (Chapter 2);
 - c. Long-term insurance business (Chapter 3);
 - d. Capital adequacy (Chapter 4);
 - e. Measurement of assets and liabilities of insurers (Chapter 5);
 - f. Financial and other reporting by insurers (Chapter 6);
 - g. Actuaries (Chapter 7);
 - h. Consolidated supervision (Chapter 8);
 - i. Insurers in run-off (Chapter 9); and
 - j. Insurance special purpose vehicles (Chapter 10).
3. Appendices 1 to 10 supplement the various PIN Chapters.

APPROACH TO INSURANCE SPECIAL PURPOSE VEHICLES (ISPVS)

4. PIN applies to all Insurers unless certain provisions specify a narrower application. An important example of a narrower application of the rules to a specific category of insurer is the regime in PIN applicable to Insurance Special Purpose Vehicles ("ISPVs"). ISPVs are insurers which assume risks by way of reinsurance and in PIN are required to fully fund their exposures to those risks through the proceeds of a debt issuance or other financing arrangement where the repayment obligations under those arrangements are subordinated to the insurer's reinsurance obligations.
5. To reflect the fact that ISPVs fully fund their exposures in this way, ISPVs are not required to comply with requirements in PIN relating to the following: management and control of risk (Chapter 2), long-term insurance business (Chapter 3), capital adequacy (Chapter 4), financial reporting (Chapter 6), actuaries (Chapter 7), and insurers in "run-off" (Chapter 9).

ISSUES FOR CONSIDERATION

Q1: DO YOU AGREE THAT IT IS APPROPRIATE TO EXEMPT ISPVS FROM THESE CHAPTERS OF PIN?

APPROACH TO PENDING INTERNATIONAL RULEMAKINGS – E.G., SOLVENCY II

- PIN does not reflect pending or draft rules ahead of implementation of rules in other jurisdictions. The EU Solvency II Directive comes into force on 1 January 2016 and significantly enhances capital, governance, and disclosure requirements for insurers in the EU. However, it is not certain how Solvency II's provisions will be implemented in EU member states, so the Board takes the view that it is appropriate to wait until implementation before considering the appropriateness of similar rules in ADGM.

ISSUES FOR CONSIDERATION

Q2: DO YOU AGREE WITH THIS APPROACH?

CHAPTER 2 – THE CAPTIVE INSURANCE BUSINESS RULES (CIB)

APPROACH TO CAPTIVE INSURERS IN CIB

1. A captive insurer is an insurance company which is formed to insure or reinsure the risks of its parent or the parent's affiliates. Insurance coverage offered by a captive insurer may typically not be available in the commercial insurance market, or is only available at prohibitive prices. Additionally, a captive insurer can provide its owners with access to international reinsurance markets at a discount and help achieve tax planning advantages (Please see Appendix 2).
2. Captive insurers may also be involved in insuring unrelated third party risks. In CIB, captive insurers that insure unrelated third parties are expected to only underwrite risks arising from business or operations that are closely linked to the operations of the parent or group of companies to which the captive insurer belongs. ADGM can accommodate captives that derive most of their income from unrelated third party business, but these vehicles are assessed on a case-by-case basis and are typically subject to stricter prudential requirements in CIB.
3. The flexibility of the ADGM captives regime is expected to encourage new captive formation and help create an environment for innovation in insurance risk management in ADGM.

CLASSES OF CAPTIVE INSURER

4. In order to conduct captive insurance business, a captive must be incorporated in ADGM (*i.e.* branches of captives are not permitted in ADGM). CIB sets out four categories of captive insurer for the purpose of determining applicable capital rules:
 - a. A Class 1 Captive Insurer is permitted under the conditions of its Financial Services Permission to effect or carry out contracts of insurance only for risks related to or arising out of the business or operations of the group to which the insurer belongs.
 - b. A Class 2 Captive Insurer is permitted under the conditions of its Financial Services Permission to obtain no more than 20% of its gross written premium from third party risks arising from business or operations that are closely linked to the business or operations of the group to which the insurer belongs.
 - c. A Class 3 Captive Insurer is permitted under the conditions of its Financial Services Permission to effect or carry out contracts of insurance only for risks related to or arising out of the business or operations of persons who engage in similar, related or common businesses, activities, trade, services, or operations and is owned by these persons or by a body corporate of which all such persons are members.
 - d. A Class 4 Captive Insurer is a captive insurer which the Regulator decides does not meet the requirements for a Class 1 Captive Insurer, Class 2 Captive Insurer, or a Class 3 Captive Insurer. The Regulator may take into account the following considerations in reaching its decision:
 - i. the business rationale for making the entity a captive insurer;
 - ii. the use or non-use of the entity as a risk management tool;
 - iii. the nature of the interests of the shareholders or members of the entity and whether they are aligned, or have some commonality with, the policyholder;

- iv. any unique or expert knowledge of the shareholders or members of the Entity about the risks to be insured;
- v. the appropriateness of the structure for the proposed activities or whether the business is more akin to a commercial insurer; and
- vi. whether the entity provides insurance to policyholders in relation to activities connected, conducted, controlled, related, managed, serviced or sold by the shareholders or members of the entity to these policyholders.

ISSUES FOR CONSIDERATION

Q1: DO YOU AGREE WITH THE CATEGORISATION OF CAPTIVE INSURERS IN CIB?

MINIMUM CAPITAL REQUIREMENTS FOR CAPTIVE INSURERS

- 5. Chapter 2 of CIB contains prudential requirements for captive insurers adapted from those used in other leading captive jurisdictions. The framework has two main components:
 - a. a base capital requirement; and
 - b. a risk-based capital requirement that consists of a premium risk component and a technical provision risk component.
- 6. A captive insurer's minimum capital requirement is the higher of (a) the base capital requirement, (b) the premium risk component or (c) the technical provision risk component.
- 7. Captive insurers that insure unrelated third parties would typically carry higher risks and therefore would need to meet more stringent prudential and business conduct requirements.
- 8. Captive insurers that write liability insurance would require higher capital buffers due to the possible long-term nature of the risks and higher uncertainty in the claim pay-outs.

ISSUES FOR CONSIDERATION

Q2: THE BOARD INVITES COMMENTS ON THE CAPITAL REQUIREMENTS APPLICABLE TO CAPTIVE INSURERS IN ADGM.

CHAPTER 3: TAKEOVER REGULATIONS

APPROACH TO THE REGULATION OF TAKEOVERS

1. It is the intention of the ADGM to base the regulation of takeovers and mergers upon the principles contained in the UK's City Code on Takeovers and Mergers (the "**UK Code**") as they have been used as a precedent for the takeover laws of a number of jurisdictions, including the EU, Singapore, Hong Kong and the DIFC, and are necessarily compliant with European Council Directive 2004/25 on Takeover Bids (the "**EU Takeover Directive**"). This Consultation Paper discusses some of the key provisions of the UK Code by way of background to the approach proposed to be taken in the Takeover Regulations (Please see Appendix 3) which are intended to form part of the Regulations and the proposed Takeover Rules (Please see Appendix 4).
2. The UK Code, which was first adopted in 1968, is issued and administered by the Panel on Takeovers and Mergers (the "**UK Panel**"). The majority of the professionals who are members of the UK Panel are drawn from the private sector and include appointees and secondees from investment banks, large institutional investors and law firms.
3. The UK Code is based upon six general principles, each of which is intentionally expressed in broad terms, with those subject to the UK Code being expected to comply with the 'spirit' of the principles as well as the detailed rules of the UK Code. The general principles are:
 - (a) all holders of the securities of a target company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;
 - (b) the holders of the securities of a target company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the target company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business;
 - (c) the board of a target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;
 - (d) false markets must not be created in the securities of the target company, of the bidder company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;
 - (e) a bidder must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration; and
 - (f) a target company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.
4. The UK Code also contains 38 rules which complement the general principles listed above and which, similarly, are applied by the UK Panel in accordance with their spirit and purpose, with the UK Panel free to amend/relax their precise wording as they see fit. Key provisions include:

- (a) a requirement to make a mandatory offer in circumstances where a person or persons acting “in concert” acquire 30% or more of the voting rights in a company;
- (b) a restriction on the ability of the board of the target company to take action which would frustrate a takeover offer; and
- (c) a requirement that shareholders are given sufficient information to assess the merits of any offer.

5. There are a number of advantages to using the UK Code as a starting point:

- (a) the UK Code is a well-established and highly regarded yet flexible set of rules which has undergone evolution and improvement over a considerable period of time and is supported by regular input from the UK Panel (including guidance in the form of “practice statements”) which may be instructive in future;
- (b) the UK Code is regarded as providing a superior level of shareholder protection (the US takeover regime, for example, does not include a rule on mandatory offers);
- (c) while takeovers of ADGM companies are perhaps unlikely in the short term, the existence of a credible takeover regime based on the UK Code will enhance the attractiveness of ADGM as a listing venue;
- (d) a takeover code based on the UK Code could be policed by an independent panel of industry experts rather than the Courts, largely avoiding expensive litigation and increasing the speed at which differences are resolved; and
- (e) ADGM legislation closely based on the UK Code would be consistent with the ADGM Companies Regulations which have been based on the UK Act, and would also be consistent with the EU Takeover Directive and would be familiar to practitioners in the United Arab Emirates from the EU, Singapore, South Africa, and Hong Kong, among others.

TAKEOVER REGULATIONS

6. The Takeover Regulations intended to be incorporated within the Financial Services and Markets Regulation 2015 contain two principal chapters. Chapter 1 mandates the establishment of a takeover regulatory authority (the “**Panel**”) and authorises it to adopt and oversee the Takeover Rules regulating takeover bids and merger transactions. Chapter 2 deals with the compulsory acquisition of shares in ADGM companies following a successful takeover offer being made. Although both chapters are largely based on the corresponding chapters of Part 28 of the UK Act, a number of modifications have been made, in particular in Chapter 1.

THE PANEL

7. The Panel will have the authority to make the Takeover Rules, or regulating the conduct of takeover bids. The Takeover Rules will apply to takeover bids and merger transactions however effected, including by means of contractual offer, statutory merger or scheme of arrangement and other transactions which have as their objective or potential effect (directly or indirectly) obtaining or consolidating control of the relevant companies, as well as partial offers to shareholders for securities in the relevant companies. The Takeover Rules specify the relevant companies and other persons to which they apply (see below).

8. The Panel will also supervise takeover activity. The Panel will have considerable autonomy to provide for its own constitution and appointment procedures. However, a minimum constitutional structure is laid down, providing for the Panel to make arrangements for carrying out its functions and, in particular, to function through committees, sub-committees, officers and members of staff.
9. The Regulations confer on the Panel powers to make rulings and directions and to enforce these through the courts, to obtain information and documents from those involved in regulated activities and to impose sanctions on those who transgress its rules. The Regulations also expressly grant power to the Panel, on the application or with consent of a person, to direct that the application of any rule to that person be waived or modified. Cases where waivers or modifications may be particularly relevant include transactions which are subject to the dual jurisdiction of the Panel and an overseas regulatory authority, where the Panel may need to determine the extent to which the Panel's rules are applicable. Such waivers are generally required to be published by the Panel on its website. The Panel is also granted an express right to issue indicative non-binding guidance.
10. Sections 5 (*Rulings*), 14 (*Appeals*), 18 (*Enforcement by the court*), 19 (*No action for statutory duty etc.*) and 21 (*Exemption from liability in damages*) of the Regulations are intended to limit litigation by (a) channelling parties to seek decisions from the Panel before having recourse to the courts, (b) excluding new rights of action for breach of statutory duty, (c) protecting concluded transactions from challenge for breach of the Panel's rules and (d) exempting the Panel and its officers and staff from liability in damages for things done in, or in connection with, the discharge of the regulatory functions of the Panel.
11. However, it is not proposed that the Panel establish separate "judicial" committees to hear appeals from decisions of the Panel. Parties who wish to challenge such decisions may appeal to the ADGM court. In the UK, an appeal from decisions of the Panel lies with two judicial committees of the UK Panel, after which judicial review can be sought. We expect that a similar approach would be followed in ADGM, although we have not provided for prior review by two judicial committees of the Panel.

ISSUES FOR CONSIDERATION

Q1: IS THE APPROACH OF A REVIEW OF THE PANEL'S DECISION BY THE COURT APPROPRIATE FOR ADGM?

12. Similar provisions to Part 28 of the UK Act enabling the Panel to make rules for the payment of a levy or fees or charges for the purposes of meeting the Panel's expenses have also been included in the Regulations.

COMPANIES SUBJECT TO THE TAKEOVER REGIME

13. It is proposed that the following be relevant companies subject to the Takeover Rules:
 - a. companies whose voting shares are, or have been in the 5 years prior to the announcement of a possible offer, listed or admitted to trading on any recognised investment exchange within the Abu Dhabi Global Market, irrespective of their jurisdiction of incorporation;
 - b. any company registered in the Abu Dhabi Global Market (whether incorporated in or continued into the Abu Dhabi Global Market) as a public company at any time in the 5

years prior to the announcement of a possible offer and having more than 100 shareholders; and

- c. any company making an offer for any of the foregoing.

In addition, the directors, employees and advisers of the foregoing will be required to comply with the Takeover Rules. Open ended and closed ended investment companies would not be subject to the Takeover Rules.

ISSUES FOR CONSIDERATION

Q2: IN ADDITION TO PUBLIC COMPANIES DELISTED OR RE-REGISTERED AS PRIVATE COMPANIES (SUBJECT TO HAVING MORE THAN 100 SHAREHOLDERS) IN THE LAST FIVE YEARS, SHOULD THE TAKEOVER RULES APPLY TO OTHER TYPES OF COMPANIES?

IMPEDIMENTS TO TAKEOVERS

14. The EU Takeover Directive seeks to override, in certain circumstances, a number of defensive devices that may be adopted by companies prior to the bid, such as differential share structures under which minority shareholders may exercise disproportionate voting rights, restrictions on transfer of shares in the company articles or in contractual agreements and limitations on share ownership. As we expect that market pressures, in particular from institutional investors and underwriters, will result in there being few if any listed companies with differential voting structures, these provisions have not been included in the Takeover Rules. Market participants are invited to comment on this proposed approach.

COMPULSORY PURCHASE AND SALE OF SHARES

15. The Companies Regulations provide two methods by which to effect takeovers of companies:
 - a. a scheme of arrangement under Part 25; and
 - b. a merger under Part 26.

Upon approval of the scheme or merger by the requisite number of shareholders of the target company in accordance with the relevant Part of the Companies Regulations, the bidder acquires all shares in the company; there is no resulting residual minority shareholding in the target company.

16. Chapter 2 of the Takeover Regulations provide for rights of compulsory purchase (or “squeeze-out”) and compulsory sale (or “sell-out”) that are designed to address the problem of residual minority shareholders following a successful takeover bid. As noted above, the provisions of Chapter 2 closely follow the UK Act. Chapter 2 applies to all companies formed or registered under the Companies Regulations (see Section 39).
17. Squeeze-out rights enable a successful bidder to purchase compulsorily the shares of remaining minority shareholders who have not accepted the bid. Sell-out rights enable minority shareholders, in the wake of such a bid, to require the majority shareholder to purchase their shares for the same consideration as that offered pursuant to the takeover bid. Because they involve the compulsory purchase or acquisition of shares against the will of the holder of the shares or the acquirer, high thresholds apply to the exercising of such rights and there are protective rules on the price that must be paid for the shares concerned.

18. In order to acquire the minority shareholder's shares, the bidder must have acquired both 90% of the shares to which the offer relates, and 90% of the voting rights carried by those shares. Where the offer relates to shares of different classes, then, in order to acquire the remaining shares in a class, the bidder must have acquired 90% of the shares of that class to which the offer relates, and 90% of the voting rights carried by those shares. Similarly, a dual test is imposed in relation to the sell-out threshold. Shares held by the bidder, or associates of the bidder, prior to the offer being made do not count towards the 90% thresholds but shares which are acquired by the bidder, for example, in the market after the takeover offer is made do count towards the thresholds.
19. If the terms of the takeover offer give shareholders a choice of consideration, shareholders must be given six weeks from the date of the squeeze-out notice to make that choice.

TAKEOVER RULES

20. As with the UK Code, the Takeover Rules are not concerned with facilitating or impeding takeover bids or merger transactions, or with evaluating the financial or commercial aspects of such transactions, but seek to ensure that shareholders of target companies are treated equally and given sufficient time and information to evaluate proposed transactions. The rules also assist in maintaining, in conjunction with other regulatory regimes, the integrity of financial markets.
21. The UK Code contains an extensive set of 'notes' to aid with interpretation. While certain of these notes have been retained in the Takeover Rules (where they are referred to as "guidance") the Regulator, acting as ADGM's takeover regulator, may issue guidance separately on its website which could cover the matters addressed by the notes in the UK Code updated to address issues unique to ADGM.
22. Below is a brief summary of the most significant Takeover Rules and a discussion of those few areas in which the proposed approach in the rules derogates from that of the UK Code. References below to "Paragraphs" are to the paragraphs of the schedule of the rules.
23. Paragraph 2 (*secrecy before announcements; the timing and contents of announcements*): Paragraph 2 deals with the requirement of secrecy before an announcement of any offer or possible is made, and imposes an obligation on advisers to inform their clients on the need for secrecy. The provision also sets out the circumstances in which an announcement is required and who is responsible for making the announcement (i.e., whether the announcement is the responsibility of the bidder or target company). The provision also contains restrictions on the content of 'possible offer' announcements, including various shareholder protections in relation to the announcement of pre-conditions and proposed pricing. The 'put up or shut up' regime of the UK Code has also been preserved, with potential bidders having until 5.00pm on the 28th day following the announcement of a possible offer either to announce a firm intention to offer or to confirm that no offer will be made (in which case the potential bidder will be bound by the statement for a six month period). This regime is designed to provide target companies with greater protection against protracted periods of time when a possible takeover bid has not been ruled out.
24. Paragraph 2.7 (announcement of a firm intention to make an offer) and 23.8 (cash confirmation): These provisions require both the bidder's announcement of a firm intention to make an offer and its offer document to include a statement from its financial adviser that the bidder has sufficient resources available to it to satisfy full acceptance of the offer. Consequently, bidders should not announce takeovers offers prior to having committed financing in place.
25. Paragraph 8 (disclosure of dealings in shares): The Takeover Rules provide that, during an offer period, an enhanced disclosure regime applies to dealings in shares of the target (and the bidder, if shares in the

bidder are being offered as consideration). These rules apply to the bidder, the target company and to persons having an interest representing 1% or more of the share capital of the relevant company.

26. Paragraph 9 (*mandatory offer requirements*): Paragraph 9 requires a general offer to be made to the holders of any class of equity share capital and also to the holders of any other class of transferable securities carrying voting rights in a company which is subject to the Takeover Rules (unless the Panel consents otherwise) when:
- a. Any person acquires an interest in shares which, together with shares in which persons acting in concert with him are interested, carry 30% or more of the voting rights of the company; or
 - b. Any person, together with persons acting in concert with him, is interested in shares which carry between 30% and 50% of the voting rights of such a company, and such person, or his concert parties, acquires an interest in any other shares which increases the percentage of shares carrying voting rights in which he is interested. Market participants are invited to comment on whether persons interested in shares which carry between 30% and 50% of the voting rights of a company should be entitled to acquire a small number of additional shares each year without being obliged to make an offer under Paragraph 9.
27. It will be noted that the definition of “acting in concert” in the Takeover Rules is particularly relevant in determining whether a mandatory offer obligation has been triggered under Paragraph 9. The definition of “acting in concert” includes a number of rebuttable presumptions. If the scope of the definition of “acting in concert” were to be broadened in this way, we would propose to make the consequential change to the definition of “associate” in Section 36 of the Takeover Regulations. The Takeover Regulations treat shares held by “associates” similarly to shares held by the bidder, in particular for determining whether the 90% threshold for compulsory acquisition is met.

ISSUES FOR CONSIDERATION

Q3: SHOULD SIBLINGS (I.E. PERSONS HAVE AT LEAST ONE PARENT IN COMMON) AND FIRST COUSINS (I.E. PERSONS HAVE AT LEAST ONE GRANDPARENT IN COMMON) BE PRESUMED TO BE “ACTING IN CONCERT” WITH EACH OTHER FOR THE PURPOSES OF THE TAKEOVER RULES, GIVEN TYPICAL FAMILY STRUCTURES IN THE REGION?

28. Paragraph 20 (*restrictions on frustrating action*): Paragraph 20 contains various restrictions on the ability of the target board to take any action which may frustrate an offer or *bona fide* potential offer (e.g., by altering the target’s share capital or entering into contracts otherwise than in the ordinary course). It also contains restrictions on the ability of the target to provide inducement fees or other offer-related arrangements with a bidder or parties acting in concert with it.
29. Paragraph 21.1 (*inducement fees and other arrangements*): It is proposed that the Takeover Rules following the UK approach of prohibiting inducement fees (also referred to as break fees) between the bidder and the target.