



ABU DHABI GLOBAL MARKET  
سوق أبوظبي العالمي

# CONSULTATION PAPER NO. 1 OF 2017

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04 APRIL 2017

**PROPOSED MISCELLANEOUS  
AMENDMENTS TO ADGM REGULATIONS  
AND RULES**

## CONTENTS

INTRODUCTION.....	3
BACKGROUND.....	6
ITEM 1 – PRIVATE REAL ESTATE INVESTMENT TRUSTS .....	6
ITEM 2 – REGULATED ACTIVITY OF MANAGING A COLLECTIVE INVESTMENT FUND .....	8
ITEM 3 – APPLICATION OF FUND RULES TO ASSET MANAGERS .....	9
ITEM 4 – PUBLICATION OF THE NAMES OF MEMBERS OF INVESTMENT COMPANIES.....	10
ITEM 5 – OTHER PROPOSED MISCELLANEOUS AMENDMENTS.....	11

## INTRODUCTION

### WHY ARE WE ISSUING THIS PAPER?

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1. The Abu Dhabi Global Market ("**ADGM**") together with the Financial Services Regulatory Authority ("**FSRA**") and Registration Authority ("**RA**") has issued this Consultation Paper to invite public feedback and comments on proposed amendments to ADGM regulations and specific FSRA rulebooks.
2. We would like to invite comments on the proposal to make various amendments to the ADGM's regulations and FSRA Rules , including:
  - a. Amendments to the FSRA Fund Rule 13.5 and Islamic Finance Rule 6.8, which permit the establishment of private real estate investment trusts (REITs) as an Exempt Fund or Qualified Investor Fund;
  - b. Amendments to Sections 121, 122, 952(3) and 961 of the Companies Regulations 2015 (the "**Companies Regulations**") which restrict the publication of the names of unitholders who have invested in ADGM-based funds by becoming members of Investment Companies;
  - c. Amendment of Paragraph 59, Schedule 1 of the Financial Services and Markets Regulations 2015 ("**FSMR**") which amend the description of the Regulated Activity of Managing a Collective Investment Fund; and
  - d. Amendments to Rule 1.1.1 of the Fund Rules to exempt Authorised Persons engaged in the Regulated Activity of Managing Assets from the general application of the Fund Rules.

### WHO SHOULD READ THIS PAPER?

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3. This Consultation Paper may be of interest to persons who may be considering a Financial Services Permission in the ADGM, regiAuthorised Persons generally, and specifically those Authorised Persons engaged in the management of Funds and their respective professional advisors.

## HOW TO PROVIDE COMMENTS

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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. If relevant, please identify the organisation you represent when providing your comments. The FSRA reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making any comments. Comments supported by reasoning and evidence will be given more weight by the FSRA.

## WHAT HAPPENS NEXT?

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5. The deadline for providing comments on this proposal is **11 May 2017**. Once we receive your comments, we will consider whether any modifications are required to the proposed amendments to the ADGM's legislative framework. The Board and the FSRA will then proceed to enact the proposed legislative framework. You should not act on this proposal until the relevant regulations, rules or guidance are issued. We will issue a notice on our website when this happens.

## COMMENTS TO BE ADDRESSED TO:

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## **STRUCTURE OF THIS PAPER**

6. The amendments under consideration are summarized in this paper, which are organized as follows:
  - a. Annex A – Draft amendments to FSMR;
    - i. Appendix 1 - Draft amendments to the General Rules;
    - ii. Appendix 2 - Draft amendments to the Conduct of Business Rules;
    - iii. Appendix 3 - Draft amendments to the Captive Insurance Business Rules;
    - iv. Appendix 4 - Draft amendments to the Fund Rules;
    - v. Appendix 5 – Draft amendments to the AML Rules;
    - vi. Appendix 6 - Draft amendments to the Glossary;
    - vii. Appendix 7 - Draft amendments to the Fees Rules;
    - viii. Appendix 8 - Draft amendments to the Islamic Finance Rules;
  - b. Annex B – Draft Companies (Amendment) Regulations 2017;
    - i. Appendix 1 – Draft amendments to the Companies Regulations (Model Articles) Rules 2015; and
    - ii. Appendix 2 – Draft amendments to the Companies Regulations (Register of Auditors) Rules 2015.
  - c. Annex C – Draft Interpretation (Amendment) Regulations 2017.
7. Unless otherwise defined, capitalized terms referred to in this paper have the meanings attributed to such terms as contained in the Glossary.

## BACKGROUND

1. Since the ADGM became operational on 21 October 2015, we internally identified and received useful and constructive comments and observations from external stakeholders, identifying areas of interest and opportunity. These include the development of specialist funds as well as various miscellaneous amendments to both ADGM regulations and rules, which we believe should reduce the regulatory burden upon some firms based on a risk proportionate approach to our framework. In addition, we have taken this opportunity to make some consequential amendments that we have identified since commencing operations in October 2015.

## ITEM 1 - PRIVATE REAL ESTATE INVESTMENT TRUSTS

2. The existing FSRA Fund Rules permit the creation of Property Funds, which may be either an Exempt Fund or a Qualified Investor Fund (“QIF”). It also permits the establishment of Public Property Funds. Notwithstanding this flexibility, managers of QIF’s and Exempt Private Property Funds have identified a niche in the market where there is demand from investors for private property funds that have the key characteristics of a “Real Estate Investment Trust” or “REIT”, including the reference to the use of the term REIT. Currently, Fund Section 13.5 restricts the use of the term REIT by Domestic Funds to those Funds which have certain operational and investment features, namely:
  - a. Investments are primarily aimed at income generating real estate;
  - b. At least 80% of annual net income must be distributed to unitholders;
  - c. A Fund Manager of a REIT may borrow up to 65% of the total gross asset value of the fund; and
  - d. The fund must be a Public Fund.
3. The FSRA is considering amending the Fund Rules to enable the establishment of private REITs within the ADGM. These private REITs would only be available to Professional Clients. A number of comparable jurisdictions were considered with respect to private REITs availability and

whether any particular regulatory obligations were placed on them. While the term 'REIT' is restricted in many jurisdictions to denote a public fund, which is closed-ended and listed on an exchange, certain jurisdictions, including the United States and Canada, offer the fund managers the option of establishing and operating private REITs, but with certain obligations and controls.

4. In most of the jurisdictions reviewed, the status of a 'REIT' often entitles the fund to gain favourable taxation treatment. Mandatory distribution of a REIT's income allows it to reduce or avoid double taxation at both the fund and the unitholder levels. The availability of such tax concessions are typically restricted by the relevant tax authorities. In the case of Canada, a private REIT may only obtain favourable tax treatment if its unitholders possess unrestricted redemption rights. In the United States, a private REIT may be closed-ended, but must have a minimum number of unitholders (100), thereby ensuring that the REIT is a legitimate investment fund rather than a tax avoidance measure. As tax policy considerations are not relevant to the use of the term 'REIT' within the ADGM, the FSRA may have more flexibility to permit private REITs to be established within the ADGM.

#### ISSUES FOR CONSIDERATION

Q1: WHAT ADDITIONAL OBLIGATIONS (IF ANY) SHOULD BE PLACED UPON A PRIVATE FUND THAT WISHES TO REFER TO ITSELF AS A REIT?

5. The distribution policy of a REIT requires at least 80% of audited annual net income to be distributed to Unitholders. In circumstances where REIT assets are sold or revalued, gains may represent distributable income. In the case of a Public Fund, which is a REIT, those persons responsible for oversight of the fund are responsible to monitor the REITs adherence to such distribution policy. As a private REIT operating as an Exempt Fund or a QIF would lack mandatory independent oversight, such monitoring of distribution policy adherence may be undertaken by the Fund Manager.
6. In addition, Rule 13.5.5, which limits the amount of debt a REIT may incur, is to be expanded to include disclosure and rectification requirements

imposed upon Fund Managers in the event such limitations are breached. The FSRA's view, as expressed in a new Guidance Note, is that measures adopted by a Fund Manager to reduce the indebtedness of the REIT need not include the compulsory sale of assets, which could be detrimental to unitholders.

7. As a REIT may be Islamic in nature, parallel amendments to those contained in Fund Section 13.5 have also been made in IFR Section 6.8.

## **ITEM 2 – REGULATED ACTIVITY OF MANAGING A COLLECTIVE INVESTMENT FUND**

8. The existing definition of the Regulated Activity of Managing a Collective Investment Fund set out in Section 59 of Schedule 1 of FSMR contains two criteria, each of which must be met namely:
  - a. The firm must be legally accountable to the unitholders in the Collective Investment Fund for the management of property held for or within a Collective Investment Fund under the Collective Investment Fund's Constitution; and
  - b. The firm must establish, manage or otherwise operate or wind up a Collective Investment Fund.
9. The first criteria requiring the fund manager to be legally accountable to unitholders for the task of management of the fund's property in accordance with the fund's constitution may not be consistent with the commonly used external management structure employed by many funds. Fund structures based upon external management typically provide for Fund Managers to enter into a fund management agreement directly with the fund vehicle or general partner, such an arrangement does not always create direct contractual asset management duties between the fund manager and the fund's Unitholders.
10. While the specific duty to manage fund assets may not in all circumstances be directly owed to unitholders in an externally managed fund structure, other duties, both statutory (i.e. imposed via FSMR) and common law duties may exist directly between the fund manager and the fund's

unitholders. However, it may be unclear whether these obligations satisfy the description of the Regulated Activity of Managing a Collective Investment Fund, as the wording in Section 59(2) of Schedule 1 of FSMR specifically identifies the duty to manage fund assets, which are likely to only arise from a contractual obligation.

11. On the other hand, internally managed funds require the fund vehicle itself to engage individuals to manage the fund's assets. In such circumstances, the fund's constitution will contain provisions obligating the fund's management to perform this task, thereby satisfying the description of activities contained in part (a) of the description of the fund management activity under paragraph 59(2) of FSMR.
12. As both internally and externally managed domestic funds are possible within the ADGM, the proposed amendment would clarify that satisfaction of either limb would be sufficient to capture the activity of Managing a Collective Investment Fund.

### ITEM 3 – APPLICATION OF FUND RULES TO ASSET MANAGERS

13. The FSRA is proposing removing any possible implied conflict between COBS and the Fund Rules created by the current framework that expressly identifies firms engaged in Managing Assets in both rulebooks by simply deleting the reference to Managing Assets in Fund Rule 1.1.1(a).
14. Fund Rule 1.1.1 identifies the various Regulated Activities, which trigger the application of the Fund Rules; notably Rule 1.1.1 (a) refers to firms engaged in Managing Assets. Due to the collective nature of funds, the specific operational rules contained in the Fund Rules are predominantly applied to Managers of Collective Investment Funds; while the operational rules applying to firms engaging in Managing Assets are exclusively found in the Conduct of Business Rules (“COBS”). The express inclusion of firms engaged in Managing Assets suggests that the Fund Rules apply to such firms, which should not conflict with their obligations under the COBS Rules.
15. In contrast, Rule 1.1.3 of the Fund Rules applies to all Authorised Persons (including persons engaged in Managing Assets) which perform a Regulated

Activity or undertake a Transaction *in relation to a Domestic Fund or a Foreign Fund*. Thus, the proposed deletion of Rule 1.1.1(a) would not affect the application of relevant provisions of the Fund Rules to asset managers, which market fund units.

#### **ITEM 4 – PUBLICATION OF THE NAMES OF MEMBERS OF INVESTMENT COMPANIES**

16. The Companies Regulations contain an enhanced disclosure regime, which currently also obligates the RA to publish annual returns received from Investment Companies. Such returns include the names of individual members, who, in the case of an Investment Company, which operates as a fund vehicle, constitute the unitholders of the Domestic Fund.
17. The publication of the identities of members permits public disclosure of a unitholder's investment in an ADGM fund. Stakeholders (including the FSRA) have noted that such disclosure is generally inconsistent with the confidential nature of fund investment in other comparable jurisdictions. The Fund Rules compel a fund manager to maintain, or cause to be maintained, an accurate unitholder register, examination of which would typically be restricted to other unitholders.
18. The requirement to identify an Investment Company's members within its annual return provides the RA with information regarding the nationalities of ownership of the Investment Company. This information is then able to assist funds seeking to operate or hold title to assets in the UAE. Further, the RA must be able to fulfil its obligations of transparency with respect to certain information required to be maintained under international treaties entered into by the UAE.

19. The RA and the FSRA believe that a balanced approach is required, reflecting the desirability of maintaining the Registration Authority’s ability to monitor the identities and nationalities of members while maintaining the confidentiality of investments in ADGM funds structured as Investment Companies. The proposed amendment would compel disclosure of Investment Company shareholdings to the RA, while amending the enhanced disclosure regime to eliminate the disclosure of details of unitholders to the public.

#### ISSUES FOR CONSIDERATION

Q2: WHAT IS THE APPROPRIATE LEVEL OF DISCLOSURE OF INTERESTS IN A DOMESTIC FUND?

Q3: SHOULD UNIT TRUSTS, APART FROM THEIR OBLIGATIONS OF DISCLOSURE TO THE FSRA ALSO BE REQUIRED TO DISCLOSE THE IDENTITIES OF INVESTORS TO THE RA?

#### ITEM 5 – OTHER PROPOSED MISCELLANEOUS AMENDMENTS

##### 20. *Companies Regulations 2015*

Section 53(2) – The naming convention for restricted scope companies is to be refined to ensure that the term ‘restricted’ appears before the mandatory suffix, such as ‘Ltd.’ Or ‘Limited’.

Section 375(3) – The description of accounting records is to be amended to become consistent with the FSRA defined term ‘Accounting Records’ contained in the Glossary.

Sections 474, 478, 1032, 1034, 1039 – The ability of individuals to act as auditors within the ADGM is to be eliminated, as the RA is unable to license sole proprietorships within the ADGM.

Sections 867 - 869, 873, 874, 887, 889 – A simplified strike off regime is to be included amongst the miscellaneous amendments to the Companies Regulations 2015. Availability of this voluntary regime would be restricted to solvent small companies, which either do not engage in Regulated Activities or engage in them in a restricted FinTech capacity.

Section 1068c<sup>1</sup> - The suffix 'IC' is to be prescribed for both incorporated cell companies and investment companies. To avoid potential confusion, investment companies (which either must be, open-ended or closed ended) should adopt names, which include the suffix 'open-ended investment company' or 'OEIC' or alternatively 'closed-ended investment company' or 'CEIC'.

## 21. ***Financial Services and Markets Regulations 2015***

Section 205(2) – Currently the FSMR only refers to investigations regarding a suspicion of a breach of the regulations and not specifically breaches of the FSRA Rulebooks. It is proposed that this be amended in order that it be express and clear that the FSRA may commence an investigation based upon suspicions that either a Regulation or a Rule may have been breached.

Section 258(1) – Definitions. The defined term 'Takeover' is unused in FSMR and therefore, is proposed to be deleted; the defined term 'Fund Manager' has been harmonized with the Glossary.

Schedule 1, Section 77(2) – The indicative factors of transactions identified in subsections (a) and (b) which permit such transactions to be excluded from the Regulated Activity of 'Dealing as Agent' are not meant to be conjunctive; the word 'or' is to be added after subsection (a).

## 22. ***Interpretation Regulations 2015***

Section 1(1) – The names of the ADGM authorities are to be amended to substitute current names of ADGM authorities for the original names included in the Abu Dhabi Law No. 4 of 2013, as determined and resolved by the Board of ADGM.

## 23. ***General Rules (GEN)***

Rule 4.7 – It is proposed that this rule be deleted, as it reflects only a guidance note directing complaints about the FSRA to be sent in writing to

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<sup>1</sup> Contained in the **Companies (Amendment) Regulations 2015**.

the FSRA CEO. Guidance on the complaints process will be included in the next version of the Guidance and Policy Manual.

24. ***Conduct of Business Rules (COBS)***

Rule 14.2.8(d) and (e) – The inclusion of these provisions as Rules is incorrect as they were both intended as guidance. Accordingly, the numbering as (d) and (e) is intended to be removed.

Rule 8.2.1 – This Rule was intended to apply general requirements contained in the Market Infrastructure Rules applicable to ADGM based exchanges to both multilateral and organized trading facilities. It is now proposed to be amended to now include organised trading facilities.

25. ***Captive Insurance Business Rules(CIB)***

Rules 1.3.2, 2.3.5, 4.1, 4.2, 4.3, 8.1.1, 8.1.2, 10.3.2 – The unintended omission of a reference to protected cell companies has been corrected by removing the term ‘incorporated’ from the above-noted Rules; resulting in both incorporated cell companies and protected cell companies being employed in any Captive Insurance Business.

26. ***Funds Rules (FUNDS)***

Rule 3.4 – The application table which indicates which Rules apply to specific types of funds is to be amended for clarification purposes as follows:

- a. Rule 9.5.3 (mandatory disclosure statement) applies to an Exempt Fund, consistent with the text of Rule 9.5.3;
- b. Chapter 10 relating to the marketing of a Foreign Fund does not apply to any variety of Domestic Fund, consequently all references to Chapter 10 have been removed from the table;
- c. Rule 12.3.2(2)(b) (which mandates certain outsourcing / delegation requirements contained in Section 12.12) has been deleted from Qualified Investor Fund requirements, consistent with the text of the Section 12.12;

- d. Rule 16.4.5(b) (which requires the production of an auditor’s report for a fund) should not apply to either a Qualified Investor Fund or an Exempt fund in accordance with Table the in Rule 3.4 of the Funds Rules and in circumstances where unitholders have waived the audit requirement in accordance with Rule 16.3.9.

Rule 6.1.4 – The reference to “*registration or other legal formalities*” associated with fund formation as a prerequisite to registration of a Public fund with the FSRA is to be amended to require “*incorporation or other legal formalities*”.

Rule 7.1.2 – The concept of ‘*a Trustee as is otherwise acceptable to the Regulator*’ in connection with the formation of a domestic Investment Trust has been eliminated. As the domicile of a trust is equated to the domicile of the trustee, only a trustee located within the ADGM, with a Financial Service Permission granted by the FSRA, may act as a trustee of a domestic Investment Trust.

Section 8.1 – This Rule to be amended to further clarify the expectation that a fund manager marketing an Exempt fund or a Qualified Investor Fund in or from the ADGM will trigger a notification requirement. Notification by domestic fund managers who manage funds offered outside of the ADGM will enhance the supervision ability of the FSRA.

Rule 9.1.1 – The requirement to comply with Rule 9.5.4 (mandatory Exempt Fund disclosure statement) is only meant to apply to Exempt Funds and it is proposed that it will no longer apply to Qualified Investor Funds.

Rule 9.5.3 – In order for this Rule to be clearer in its application it is intended that the mandatory disclosure statement contained in Rule 9.5.3 required for both Public and Exempt funds, consistent with the requirements imposed by Rule 9.5.2.

Rule 10.1.3 – The mandatory disclosure statement associated with the marketing of Foreign Funds within the ADGM is to be amended to further clarify that the FSRA accepts no responsibility for reviewing or verifying the contents of the Foreign Fund’s prospectus.

Rule 10.1.6 – In order for the intention of this rule to be more clearly evident, the requirement to perform the suitability assessment required by COBS Rule 3.4.2 shall only apply to a Fund Manager when they are making a specific recommendation of a Foreign Fund Unit to a Retail Client. It is proposed that a suitability assessment will not be required when the Fund Manager is merely making an offer of units of a Foreign Fund to the general public.

Rule 12.3.2, Guidance Note 4 – A reference to Section 15.3 (custody of fund property in relation to Qualified Investor Funds) will be added to supplement the general rules concerning custody contained in Chapter 12 of the Fund Rules.

Rule 12.3.7 – This rule has been amended to state that either a Fund Administrator or, in the case of an Investment Trust, a Trustee must be appointed by a Fund Manager prior to commencing management of a Fund. A new guidance note is proposed to be added to clarify that fund administration may be performed by a Fund Manager in certain circumstances, consistent with Rule 12.3.10.

Rule 13.2.1, Guidance Note 4 – This guidance note relating to Exempt Funds has been deleted as it is not relevant to Rule 13.2.1, which only applies to Public Funds.

Rule 13.5.1(2)(c) – The requirement to notify the listed REIT's "*relevant listing authority*" is proposed to be replaced with the obligation to notify the "*exchange*" upon a Domestic listed REIT ceasing to meet the public REIT requirements contained in Fund Rules 13.5.1 to 13.5.5. This amendment more accurately reflects the requirement imposed upon listed funds both within and outside the ADGM.

Rule 16.4.2(7) – This subsection of Rule 16.4.2 is to be removed due to being duplicative; it merely obligates the Fund Manager to comply with Rule 16.4.2.

## 27. *Anti-Money Laundering and Sanctions Rules and Guidance (AML)*

Rule 1.1.1(2) – The reference to the inclusion of terrorist financing within the scope of money laundering duplicates the definition of Money Laundering contained in GLO and thus will be deleted.

Rule 8.6.1 – The reference to an Authorised Person is to be corrected to refer to a Relevant Person, which is defined to include an Authorised Person, a Recognised Body or a Person licensed by the RA (see AML 1.2.2).

Rule 12.4.3(2) – This rule is to be deleted as the periodic report prepared by the MLRO of the concerned Relevant Person for submission to its Senior Management or Governing Body need not be filed with the FSRA.

## 28. *Glossary (GLO)*

The following defined terms are to be added, deleted or amended in order for the FSRA Rule book to read more clearly and easily.

**Approved Asset** – Defined term to be inserted to correspond to use of capitalized term in Chapter 7 of the COBS Rules.

**Cell Company** – Defined term to be inserted to refer to both Protected and Incorporated Cell Companies; with the proposed amendments described in paragraph 26 above, this capitalized term will be used throughout the Captive Insurance Business Rules.

**Designated Fund** – To be deleted as not a term in use within the FSRA Rules.

**Eligible Bank** – Defined term to be inserted to correspond to use of capitalized term in COBS Rule 7.11.6 in connection with insurance money segregation.

**Personal Account Transaction** – Defined term to be inserted to correspond to usage of capitalized term in COBS Rule 6.2.

**Rulebook** – To be amended to include the full list of FSRA Rulebooks.

**Service Provider** – The reference in the definition to a “Service Agreement” (which is not a term currently in use) is to be replaced by the defined term “Delegation Agreement”.

**Soft Dollar Agreement** – Defined term to be inserted to correspond to usage of capitalized term in COBS Rule 3.6.

29. ***Fees Rules (FEES)***

Rule 1.1.2 – The application of the FEES Rules to be expanded to include Listed Entities, consistent with FEES Rule 3.9.

Rule 3.7.1(b) – The reference to an Authorised Person seeking to operate an exchange or clearing house is to be corrected to properly refer to a Recognised Body.

Rule 3.9.2 – The reference to an ‘entity’ with securities admitted to the Official List is to be amended to use the defined term “Listed Entity”.

Rule 4.3 – This Rule is intended to be deleted in its entirety as it is not intended that the FSRA levy a fee upon a Person seeking a review of the FSRA’s decisions under the FSMR.

30. ***Islamic Finance Rules (IFR)***

Rule 6.8.1 – The description of, and requirements associated with, an Islamic REIT are to be amended to become consistent with the changes proposed for the FUNDS Rules 13.5.1 (1) and (2), as described in Item 1, above, concerning private REITs.

31. ***Companies Regulations 2015 (Register of Auditors) Rules 2015***

Rules 4(1), 6(1), 7(2), 11(1), 11(2)(a), 11(5) – Consistent with the inability of the RA to license sole proprietorships, it is proposed that individuals will not be eligible to be included within the register of auditors maintained by the RA. In respect of removal on grounds of criminal conviction, the RA has

the discretion to revoke registered status of any audit firm upon the conviction of any individual responsible for audit work.

#### ISSUES FOR CONSIDERATION

Q4: DO YOU HAVE ANY CONCERNS ABOUT ANY OF THESE PROPOSALS? IF SO, WHAT ARE THESE CONCERNS AND HOW SHOULD THEY BE ADDRESSED?