



ABU DHABI GLOBAL MARKET  
سوق أبوظبي العالمي

# CONSULTATION PAPER NO. 3 OF 2017

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31 MAY 2017

**ADGM FOUNDATIONS REGIME**

# CONTENTS

INTRODUCTION.....	3
BACKGROUND.....	5
REGULATORY FRAMEWORK.....	6
ANNEX 1: PROPOSED FOUNDATIONS REGULATIONS .....	13

## INTRODUCTION

### WHY ARE WE ISSUING THIS PAPER?

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1. The Board of Directors (the "**Board**") of Abu Dhabi Global Market ("**ADGM**") have issued this Consultation Paper to invite public comment on the Board's proposals to issue regulations governing the establishment and operation of foundations in ADGM. A proposed draft of the Foundations Regulations is set out at Annex A to this Paper.

### WHO SHOULD READ THIS PAPER?

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2. The proposal in this Consultation Paper would be of interest to individuals, organisations and their professional advisors with an interest in establishing a foundation in ADGM.

### HOW TO PROVIDE COMMENTS

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3. 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?

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4. The deadline for providing comments on this proposal is 5 July 2017. Once we receive your comments, we will consider whether any modifications are required to this proposal. We will then proceed to publish the Foundations Regulations.
5. You should not act on these proposals until the relevant regulations 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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## BACKGROUND

1. The Board of ADGM, after careful consideration of the various legislative and regulatory regimes worldwide, has decided to introduce a Foundations regime in ADGM.
2. Foundations regimes currently exist in many financial centres, including common law jurisdictions such as Guernsey and Jersey, which have traditionally relied heavily on the traditional trust structure. ADGM has identified strong market demand for foundation structures in the MENA region. Our existing focus on wealth management and asset management make ADGM an ideal location for both new and existing foundations worldwide.
3. ADGM conducted a substantive benchmarking exercise across a variety of civil and common law jurisdictions, including Guernsey, Jersey, Liechtenstein, Austria and Seychelles.
4. Ultimately, the proposed Foundations Regulations have been modelled on the foundations regimes found in Jersey and Guernsey. The proposed ADGM Foundations Regulations follow international best practice and establish robust regulatory framework for foundations within ADGM.

## BACKGROUND – FOUNDATIONS

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5. Foundations, like trusts, are used for a variety of purposes, including wealth management, succession planning, asset protection and tax planning. While trusts have their roots in the common law, foundations are a civil law concept originating in continental Europe.
6. A foundation has features and uses similar to a company but operates more like a common law trust:-
  - a) it is an incorporated entity with a separate legal personality but which, unlike a company, does not have shareholders; and
  - b) it holds assets in its own name on behalf of beneficiaries or for particular purposes (or both), and operates in accordance with a constitution.

7. Unlike a company, a foundation cannot carry out commercial activities, other than those necessary, ancillary or incidental to its purposes.
8. Typically, a ‘founder’ establishes a foundation by entering into a deed of incorporation and then transferring assets to the foundation.

## **REGULATORY FRAMEWORK**

### **KEY FEATURES OF THE PROPOSED ADGM FOUNDATIONS REGIME**

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9. The proposed features of the ADGM foundations regime include the following:
  - a) Creating a new type of legal entity with its own distinct attributes;
  - b) Protecting the confidentiality of the foundation’s arrangements whilst ensuring that the Registrar has or can access sufficient information;
  - c) Safeguarding the founder’s ability to exercise control over a foundation whilst ensuring effective governance mechanisms are built into the regulations;
  - d) Facilitating migrations from other jurisdictions to ADGM and vice versa;
  - e) Incorporating appropriate protection mechanisms for ADGM foundations; and
  - f) Preserving a proactive role for ADGM Courts.

### **KEY POLICY CONSIDERATIONS OF THE FRAMEWORK**

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10. Key considerations regarding the proposed foundations regime include:
  - a) Client confidentiality;
  - b) Governance controls; and
  - c) Asset protection mechanisms.

## **Client Confidentiality**

11. Whilst potential users of foundations may wish to minimise disclosure of their private affairs and reduce the likelihood of the identity of the ultimate beneficial owner being revealed to the general public, these wishes must be balanced against ADGM's objectives and obligations, including international standards and the UAE's international treaty obligations.

### *Registration Information*

12. We have sought to balance preserving client confidentiality and maintaining transparency of ownership by splitting the formation process into two (2) separate elements - public and private. This approach was also adopted by Guernsey when they introduced their foundations regime.
13. Our approach involves two separate parts, namely:-

- a) Part A - Public Disclosure

A Foundation Charter, which contains limited information (the name of the foundation and the name of a fiduciary or nominee founder) will be submitted to the Registrar as part of registration requirements. This would be publicly available (along with the registered address, registration date and service provider) and would allow third parties to verify the existence of the foundation and enable the foundation to demonstrate that it is properly constituted and in good standing.

- b) Part B – Private/Confidential Disclosure

Foundation By-Laws governing, for example, the constitution of the foundation council would remain private and would only be provided to the Registrar upon request (and, if requested, would not to be made available for public inspection without consent of the founder). However, the Foundation By-Laws and other non-public information would be disclosed to governmental authorities in limited circumstances, such as those prescribed in the ADGM Companies Regulations 2015.

### *KYC Information*

14. Further to splitting the formation process, we propose that KYC information is submitted to and held by the Registrar, in particular the beneficiaries' details. This information would not be made public, unless in the public interest to do so or the Registrar is legally compelled to disclose this information.
15. This approach would, for example, enable information to be provided to a foreign regulatory authority in the event of a double tax treaty information request and also allow the Registrar to screen the applications through all levels of ownership up to the ultimate beneficial owners, to ensure appropriate due diligence and protect ADGM's reputation.
16. In our view, this option strikes the appropriate balance between the clients' need for confidentiality and privacy and ADGM's need to fulfil its functions and objectives.

#### ISSUES FOR CONSIDERATION

Q1: DO YOU AGREE WITH THIS APPROACH IN ORDER TO BALANCE THE CLIENTS' NEED FOR CONFIDENTIALITY AND ADGM'S NEED TO MEET ITS FUNCTIONS AND OBJECTIVES?

#### **Governance Controls**

17. As a foundation does not have a board of directors with fiduciary duties, one of the fundamental policy questions is to ensure there are safeguards in place to protect the wishes of the founder, safeguard the assets of the foundation, oversee the foundation council and provide the beneficiaries the right to some information whilst reducing the likelihood of potential interference in the ongoing management of the foundation. Examples of proposed governance controls are set out below.

#### *Guardians*

18. The role of a guardian is to supervise the foundation council and ensure that it acts in accordance with the foundation's By-Laws. To this end, we propose to include the appointment of a guardian as part of the governance controls that are being proposed. A guardian must be a fit and

proper person, in accordance with the criteria that the Registrar will prescribe.

19. Whilst a founder will usually appoint the first councillors (who are often professional service providers), a guardian provides a measure of reassurance that the administrative actions of the council are subject to review. This is of particular importance upon the founder's death, and is the basis of our proposed approach, namely that the appointment of a guardian be at the founder's discretion during the founder's lifetime and mandatory upon the founder's death.
20. The role of a guardian and the supervision that it offers exists in most foundations models, including both Jersey and Guernsey.

## ISSUES FOR CONSIDERATION

Q2: DO YOU AGREE WITH THE APPROACH OF APPOINTING A GUARDIAN TO SUPERVISE THE FOUNDATION COUNCIL?

### *Annual Accounts*

21. The key considerations in relation to a foundation's annual accounts are whether these should be mandatory, audited and whether they ought to be filed with the Registrar.
22. Currently, Restricted Scope Companies can be used by Single Family Offices and are not required to file or audit their accounts unless requested by the Registrar.
23. We are proposing that, consistent with this regime, a foundation be required to maintain accounts, but not be required to audit or file those accounts with the Registrar on an annual basis. Instead, the accounts are simply required to be made available on the Registrar's request. We recognise that this may be the preferred option for those seeking confidentiality around family financial dealings.

### *Statutory Duties*

24. The proposed Foundations Regulations follow international best practice and set a legislative standard for the foundation council. This standard includes, among other things, a number of statutory duties, including a duty to act in good faith, maintain books and records, perform their role with due care and skill, and provide information to the guardian, and a statutory liability for negligence.

#### ISSUES FOR CONSIDERATION

Q3: ARE THE PROPOSED STATUTORY DUTIES FOR FOUNDATION COUNCIL APPROPRIATE? ARE FURTHER SAFEGUARDS WARRANTED?

#### *Involvement of ADGM Courts*

25. Many jurisdictions, including Guernsey and Jersey, have explicitly given their courts jurisdiction over foundations and broad powers. These powers include the power to intervene to compel compliance by the council, enforce the rights of the guardian, enforce beneficiaries' rights and give directions, where requested by the council or the guardian.
26. We propose that ADGM Courts are given similar powers and discretions.

#### *Beneficiaries' Rights to Information*

27. It is important for ADGM's regime to strike a balance between the beneficiaries' right to information (in respect of their interests) and other beneficiaries' rights to confidentiality.
28. We propose that ADGM's foundation regime provide the beneficiaries the right to some information – for example, copies of the constitution, disclosure of records and accounts and the right to make an application to the ADGM Court. These rights are similarly reflected in Guernsey foundations regime.
29. We propose to clearly set out the extent of beneficiaries' rights and differentiate between what is accessible and what is restricted.

## ISSUES FOR CONSIDERATION

Q4: DOES BENEFICIARY ACCESS TO CERTAIN INFORMATION RAISE ANY CONCERNS? WHAT INFORMATION SHOULD BE ACCESSIBLE OR RESTRICTED?

### *Local representation of foundations in ADGM*

30. All ADGM foundations are required to have a physical presence (through a registered office) in ADGM, either itself or through its registered agent.
31. Other jurisdictions that have established foundation regimes have adopted different approaches in respect of the requirement for a registered agent. For example, Guernsey requires that 'resident agent' (as they are known) must be appointed where neither a councillor nor a guardian are Guernsey-licensed fiduciaries; Jersey requires at least one member of the council to be licensed to conduct foundations business under the Jersey Financial Services Commission (Jersey) law; while Seychelles makes it a requirement for a registered agent to be appointed at all times.
32. We are proposing to leave it to the discretion of the founder whether to appoint a registered agent.

## ISSUES FOR CONSIDERATION

Q5: DO YOU AGREE WITH THE APPROACH OF MAKING THE APPOINTMENT OF A REGISTERED AGENT VOLUNTARY, OR DO YOU BELIEVE THAT A REGISTERED AGENT SHOULD BE MANDATORY?

### **Asset protection mechanisms**

33. An important function of a foundation is asset protection, including protection from bankruptcy claims, from personal claims in the event of divorce and from the effect of forced heirship rules.
34. Whilst the property of a foundation is separate from the property of the founder, in the same way as the assets of the company are separate from those of its shareholders, many jurisdictions have laws which purport to

retroactively set aside transactions which defeat the claims of creditors, former spouses or heirs.

35. Most common law jurisdictions have addressed this by incorporating what is known as 'firewall' provisions - which are a familiar feature in common law trust jurisdictions - into their foundations laws.
36. Firewall provisions encompass the following elements:
  - a) that all matters relating to the legal validity of a foundation and any dispositions of property are determined exclusively under the law of its jurisdiction of incorporation (in this case ADGM);
  - b) that foreign laws that do not recognize foundations will not affect the validity of a foundation;
  - c) that rights asserted under foreign heirship laws or other claims derived from a personal relationship to the founder will not affect the foundation; and
  - d) that foreign judgements purporting to give effect to heirship rights or claims arising from a personal relationship to the founder will not be recognized or enforced.
37. ADGM recognises the importance of protecting the rights of beneficiaries and preserving the foundation's assets, provided that this does not compromise ADGM Courts' ability to maintain its standing internationally. We therefore propose to include firewall provisions into ADGM's Foundations Regulations, notwithstanding the limitations to their effectiveness where the assets are located in a foreign jurisdiction. In doing so, we believe ADGM's foundations framework is comparable to and competitive with other leading jurisdictions.

## ANNEX A: PROPOSED FOUNDATIONS REGULATIONS