



Dubai  
International  
Financial  
Centre

CONSULTATION PAPER NO. 6  
OCTOBER 2017

**PROPOSED FOUNDATIONS LAW  
DIFC LAW NO 8. OF 2017**

**CONSULTATION PAPER NO. 6  
PROPOSALS RELATING TO A NEW FOUNDATIONS LAW**

**Why are we issuing this paper?**

1. The Dubai International Financial Centre Authority (“DIFCA”) proposes to introduce a new Foundations Law No. 8 of 2017 (the “Proposed Law”) which is in line with international best practice. In doing so, we have taken into account specific factors relating to the Dubai International Financial Centre (“DIFC”) and the need to provide an appropriate regulatory environment for Foundations to be established in or act from the DIFC. This Consultation Paper No. 6 (“Consultation Paper”) seeks public comments on the Proposed Law.
2. In addition to the provisions relating to establishing Foundations in the DIFC, the Proposed Law also contains provisions relating to the powers of the Registrar of Companies who will administer the Law on behalf of the DIFCA, very much in line with its administrative powers under the Companies Law.
3. The Proposed Law envisages Regulations to be enacted with the Proposed Law (the “Proposed Regulations”). The current legislative proposal does not include a draft of the Proposed Regulations. DIFCA proposes to seek public comment on the Proposed Regulations separately. However the Proposed Regulations will essentially be facultative and the bulk of the proposed initiative is to be found in the Proposed Law.

**Who should read this paper?**

4. This Consultation Paper would be of interest to persons involved in private wealth structuring, charitable activities, and companies involved in financial services who have an interest in establishing foundations in the DIFC. In particular:
  - (a) family businesses;
  - (b) Family Offices;
  - (c) charities and philanthropic institutions;
  - (d) Trust and corporate service providers;
  - (e) officers and employees of the aforementioned categories, such as directors, company secretaries, compliance officers, partners, senior executive officers of family businesses and charities;

- (f) legal advisors;
- (g) persons conducting commercial or wealth management activities in or from the DIFC.

### How to provide comments

- 5. DIFCA invites interested parties to provide their views and comments on the issues outlined in the Consultation Paper, using the table of comments provided in Annex B.
- 6. All comments should be provided to the person specified below:

**Jacques Visser**  
**Chief Legal Officer**  
**DIFC Authority**  
**Level 14, The Gate, P. O. Box 74777**  
**Dubai, United Arab Emirates**  
**or e-mailed to: [consultation@difc.ae](mailto:consultation@difc.ae)**

- 7. You may choose to identify the organisation you represent in your comments.
- 8. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

### What happens next?

- 9. The deadline for providing comments on the proposals in this Consultation Paper is 8 November 2017.
- 10. Once we receive your comments, we will consider if any further refinements are required to the Proposed Law annexed to this Consultation Paper at Annex A. Once DIFCA considers the Proposed Law to be in a suitable form, it will be enacted as a new DIFC law to come in to force on a date specified and published.
- 11. The Proposed Law is in draft form only. You should not act on it until the Proposed Law is formally enacted. We will issue a notice on our website when this happens.

### Defined terms

- 12. Defined terms are identified throughout this paper by the capitalisation of the initial letter of a word or of each word in a phrase and are defined in the Proposed Law. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

## Background

13. The proposal to introduce the Foundation Law stems from the report of the DIFC's Wealth Management Review Working Group (the "Working Group"), which conducted a comprehensive review of the international best practices and comparable models in other jurisdictions during 2016, focusing specifically on other international financial centres, on whose legislation the proposed regime is substantially based.
14. The final recommendations of the Working Group, inclusive of those relating to foundations, were approved by the DIFC Higher Board in December 2016.
15. The implementation of the Working Group's recommendations should place the DIFC at the forefront of jurisdictions which provide modern and flexible structures in the form of companies, trusts and foundations. Moreover, it should provide an effective framework to establish sound family governance structures and offer an attractive platform for local families, international families and family offices to structure their business and succession planning arrangements.
16. DIFCA also considered the standards set by international standard setting bodies, such as the Organisation for Economic Co-operation and Development ("OECD") and Financial Action Task Force on Money Laundering ("FATF"), so far as they are relevant to the DIFC or have an impact on the foundations in the DIFC. The Proposed Law attempts to balance the needs of the DIFC to provide flexibility and proportionate regulation that enable family enterprises, charities and businesses in the DIFC to thrive, while also safeguarding the integrity and reputation of the DIFC as a global financial centre.
17. The DIFCA has issued this Consultation Paper to invite the public to provide comments and suggestions to the DIFCA to support the enactment of the Proposed Law.
18. At the same time as civil law systems are increasingly moving to recognise trusts, the merits of civil law's foundation structures are being recognised by an increasing number of common law jurisdictions. Although foundations have traditionally been identified with jurisdictions such as Liechtenstein, where a foundation regime has been available since 1926, they are a form of legal entity which is known in most continental European jurisdictions. More recently, common law jurisdictions which have introduced, or are in the process of introducing, foundations regimes include Jersey, Guernsey, Gibraltar and Cyprus. Luxembourg has not yet introduced the foundation in its laws, but a regime very similar to the Netherlands foundation regime (that dates from 1954) is at present under parliamentary discussion.

19. One consequence of the Working' Group's review process has been that the introduction of foundations is proposed in the context of extensive review of DIFC legislation covering arrangements relating to the holding of private and family wealth and the succession and lifetime planning associated with it, as well as the DIFC's internal and administrative processes. As a result, the Proposed Law contains measures corresponding to similar measures in other arrangements not usually found in the legislation of other jurisdictions enabling the establishment of foundations. Amongst these are:
- (a) provision for resolution of disputes by arbitration<sup>1</sup>;
  - (b) provision for mergers and division of foundations;<sup>2</sup>
  - (c) provision for depository receipts<sup>3</sup>;
  - (d) provision for the Court to relieve Founders and Contributors from the consequences of mistakes<sup>4</sup>; and
  - (e) provision for recognition of Foreign Foundations in the DIFC<sup>5</sup>.

These unique provisions, coupled with a flexible approach to options more generally available in other jurisdictions, are intended to make a DIFC Foundation a particularly suitable instrument for private wealth management in the region and elsewhere.

### Key elements proposed

20. The Proposed Law contains certain features which improve the current legal environment in the DIFC by adding a complete new regime alongside the existing DIFC Companies Law and Trust Law that are already made available, to promote better succession planning and lifetime private wealth planning solutions for family businesses, creditor protection, whilst also providing greater certainty and flexibility for private wealth management and charitable institutions. The key aspects of the proposals include:
- (a) a new Foundation regime – see paragraphs 24 – 28;
  - (b) ensuring that matters in relation to Foundations established in the DIFC are resolved exclusively by reference to DIFC law - see paragraphs 29 –30;
  - (c) presence of Foundations in the DIFC - see paragraphs 30-32;

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<sup>1</sup> Proposed Law Articles 54 and 55, Schedule 2  
<sup>2</sup> Proposed Law Article 53  
<sup>3</sup> Proposed Law Article 30  
<sup>4</sup> Proposed Law Articles 50 and 51  
<sup>5</sup> Proposed Law Article 65

- (d) governance controls (and in particular the role of the Guardian) – see paragraphs 31 – 35;
- (e) provision for depositary receipts – see paragraphs 36 – 39;
- (f) accounting and audit requirements – see paragraphs 40-41;
- (g) powers of the Registrar – see paragraph 42;
- (h) powers of the Court to ensure proper operation of Foundations, to facilitate their reorganisation and merger, to correct mistakes associated with their establishment and, as an adjunct to Court proceedings, the possibility of private arbitration of Foundation disputes – see paragraphs 43 – 45.
- (i) disclosure of information in relation to foundations – see paragraphs 42 – 44;

### The proposed Foundations regime

21. Although there are differences amongst foundation laws across a multitude of jurisdictions, the essence of foundations is characterised by certain common features. As a general characteristic, a foundation is a legal entity which is created when a person (the “founder”), contributes property to a specific purpose observing certain formalities. During the lifetime of the foundation the founder as well as other contributors may contribute additional assets to the foundation. Thus a foundation is immediately distinguishable from a trust in that it has separate legal personality. This form of entity, however, is also fundamentally different from a company in that a foundation is not owned by shareholders or members but is instead “self-owned” (i.e. an 'orphan') and being administered in accordance with the principles laid out by the founder in the foundation’s constitution, also called its charter and by-laws.
22. The sole governing body of a foundation is its council, which can comprise individuals or companies. The powers of the council of a foundation will be governed by the constitutional documents of the foundation as well as the applicable law. As they act on behalf of the foundation, the members of the council do not assume any personal obligations (unlike trustees), and the liability of the foundation itself is limited to the value of its assets (i.e. its ring-fenced).

23. The members of the council owe duties to the foundation that are fiduciary duties in the common law sense of the word and may be held accountable for their stewardship of the foundation. The ultimate recipients of the assets of a foundation during its existence and upon its dissolution of a foundation (the "qualified recipients") are entitled to expect that the administration of the foundation will be properly conducted, but have no interest in its assets or income, and no right to compel a distribution of either.
24. The Proposed Law<sup>6</sup> provides for four types of foundations by categorisation of their objects:
- (a) objects which are exclusively charitable
  - (b) objects which are not charitable; or
  - (c) in order to provide benefits to persons identified in its Chapter or By-laws.
25. Depending on which of these is selected, and the activities of the Foundation, it is subject to different governance requirements in the Proposed Law and may in addition become subject to other regulatory requirements (if, for example, it engages in a regulated activity).

**Q1. Do you have any concerns about the proposed categories of foundations? If so, what are they, and how should they be addressed?**

#### Private international law issues

26. A number of provisions of the Proposed Law<sup>7</sup> address the interaction of DIFC law and the law of other jurisdictions in relation to the establishment and endowment of foundations. The suggested policy of the Proposed Law in the above regard, is that these issues should be governed exclusively by DIFC law, except in limited circumstances such as where the original endowed property is outside the DIFC and the Founder or Contributor does not, according to the law of the situs of the property, have power to dispose of it.
27. A number of jurisdictions with comparable legislative provisions have amended their legislation in the above regard so as to strengthen their policy in this context and the Proposed Law adopts these changes as part of DIFC law.

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<sup>6</sup> Proposed Law Article 12(2)  
<sup>7</sup> Proposed Law Articles 13 to 16

**Q2. Do you have any concerns about the proposed exclusions of foreign law? If so, what are they, and how should they be addressed?**

**Q3. In particular, do the contemplated provisions in the Proposed Law sufficiently address this issue?**

#### Local representation of Foundations in the DIFC

28. All Foundations to be established in the DIFC will be required to have a physical presence (through a registered office) in the DIFC, either itself, or through its Registered Agent.
29. 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 a so-called “resident agent” must be appointed where neither a council member 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. Certain jurisdictions, such as the Netherlands, do not require an external representative on the Council of a Foundation, which served as an example to the choice made by DIFCA in the above regard.
30. The Proposed Law leaves it to the discretion of the Founder whether to appoint a Registered Agent<sup>8</sup>, who must be a Qualified Person. The decision to not appoint a Registered Agent has consequences in terms of the disclosure required by a Foundation. If there is no Registered Agent, the By-laws and annual accounts must be filed with the Registrar.

**Q4. Do you have any concerns about the proposed arrangements in relation to the presence of a DIFC Foundation in the DIFC? If so, what are they, and how should they be addressed?**

#### Governance controls

31. The proposed duties of members of the Council of the Foundation<sup>9</sup>, include discrete aspects:

<sup>8</sup> Proposed Law Articles 17(2)(f), 17(3) and 24  
<sup>9</sup> Proposed Law Article 22

- (a) the duty to act within powers conferred by the Foundation's constituent documents (i.e. the Charter and By-laws);
  - (b) the duty to promote the purpose of the Foundation;
  - (c) the duty to exercise independent judgement;
  - (d) the duty to exercise reasonable care, skill and diligence;
  - (e) the duty to avoid conflicts of interests;
32. The above duties are owed by the members of the Council to the Foundation itself. The Foundation, its Founder(s), Contributor(s), beneficiaries or creditors, or the Registrar, can initiate court proceedings against any member of the Council breaching one or more of those duties, and the Court has wide power to make appropriate orders, including remedial, compensatory and punitive orders.
33. The proposed approach relating to enforcement of Council members' duties is the same as under the Companies Law, which is to leave it to the Court through private action, rather than the Registrar having to use its administrative powers to enforce those duties (note the Registrar itself in certain cases may apply to the Court for appropriate relief). This approach is adopted because it is consistent with the approach adopted in other leading jurisdictions, which recognises that given the complexity of issues that can arise, a court is better equipped to address such matters than a corporate regulator.
34. Most other jurisdictions that have a foundations regime make provision for the appointment of a guardian or protector. Again, the approach differs from jurisdiction to jurisdiction. The Proposed Law<sup>10</sup> leaves the choice to the Founder except in the case of a charitable and non-charitable purpose foundation, which is required to have a Guardian. A Guardian may not be a member of a Foundation's Council and has the responsibility to ensure its functions are carried out. The Guardian may have additional roles in terms of sanctioning decisions of the Council or disapproving Council decisions. In this regard the Guardian has a role not dissimilar to a unanimous decision of the body of shareholders of a company.

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<sup>10</sup>

See Article 23 of the Proposed Law

- Q5. Are there any concerns in relation to the proposed duties of members of the Council? If so, what are they, and how should they be addressed?**
- Q6. Are there any other aspects relating to duties of members of the Council which should also be included in the Proposed Law? What are they, and why should they be included?**
- Q7. Are the proposed arrangements in relation to the appointment and powers of the Guardian satisfactory? If not, why and what changes should be made?**

### Depository receipts

35. One feature of the Proposed Law not customarily found in the foundations legislation of common law jurisdictions is to allow for the foundation to issue securities, such as depository receipts or certificates to the Contributor upon a contribution, representing the value of the contributed assets<sup>11</sup>. This regime is based on the Dutch *Stichting Administratiekantoor* ("STAK") regime, and also contains elements which are included in the proposed foundations law in Luxembourg.
36. One of the key features of a STAK is the issuance of certificates in exchange for the contribution of assets into the foundation by the contributor. The STAK will issue certificates representing the economic entitlement to the assets only. Certificates are contracts/agreements issued by the foundation to the contributor (which is often the founder), representing the value of the underlying assets that it owns. This, effectively, results in a separation of the ownership of the relevant assets (often shares) from their economic value.
37. Although the STAK type certificates are economically equal to the underlying assets of the foundation, they are not the same, as they do not represent voting power or other aspects of ownership. The rights conferred on certificate holders are determined by the provisions under which the certificates are issued. In principle, the certificate holder has no rights vis-a-vis the underlying assets, but only vis-a-vis the STAK. Certificates are to be seen as the embodiment of a contractual relationship by and between the original owners of the assets and the STAK, containing their mutual rights and obligations. Certificates may be revocable against a repurchase of the certificate from the beneficiary at market value.

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<sup>11</sup>

38. By way of the STAK mechanism (i.e. splitting of legal/voting control from economic entitlement to the assets owned by the foundation), the following could be achieved as well:

- (a) businesses (especially family businesses) may protect themselves against hostile takeovers: shares in the holding company of the family business may be contributed into the foundation in exchange for certificates. Only the certificates may be transferable, whilst the control over the holding company shares remain with the shareholder of the business (i.e. the foundation, via the council, which may for example be exclusively open to family members); and
- (b) employees benefit program: performance bonuses in the form of certificates (rather than shares) in the company may be granted, allowing for economic benefits for employees, without any dilution of control over the business by owners and management.

By separation of the voting power from the economic entitlement, in inheritance situations, only certificates will be passed on to heirs. Hence, only an economic entitlement is transferred and heirs will have no control/ voting power over the assets. That still remains exclusively with the council of the foundation. The constitution of a foundation can be arranged via the by-laws rather than by heirship rules. It is possible to only allow direct family members to be members of the council, excluding spouses etc. from gaining power over family assets, whilst allowing for rights to economic entitlements to be dealt with differently.

**Q8. Do you have any concerns relating to the provisions relating to depository receipts for foundations? If so, what are they, and how should they be addressed?**

**Foundation's accounting and audit requirements**

39. The Proposed Law includes the regime relating to company accounts, reporting and audit requirements<sup>12</sup> substantially in the same form as applicable under the Proposed DIFC

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Companies Law as it applies to Private Companies<sup>13</sup>. All Foundations registered in the DIFC under the Proposed Law will to be subject to the requirements to:

- (a) prepare annual accounts in accordance with accepted international financial reporting standards prescribed or approved by the Registrar;
- (b) have such accounts approved by its Council within six months of the end of the company's financial year;
- (c) file a copy of the accounts with the Registrar or (if there is one) the registered agent; and
- (d) keep Accounting Records.

40. is not proposed to require an audit of the accounts, although this would be an option for those Foundations which wish to do so.

**Q9. Do you have any concerns relating to the requirements relating to accounting and reporting for all foundations? If so what are they, and how should they be addressed?**

**Q10. Do you agree with the proposed lack of requirement for audit and permitting lodgement of accounts with a Registered Agent where there is one? If not, what are your reasons?**

**DIFC Registrar's powers**

41. The Proposed Law<sup>14</sup> contains references to the Registrar's powers under the Proposed DIFC Companies Law. The objective is to align the administrative procedures applicable to both types of corporate administration, so that the Registrar's powers for the purposes of the Proposed Companies Law apply equally to his functions under the Proposed Law.

**Q11. Do you agree with the proposed alignment of the Registrar's position under the DIFC Companies Law to the Proposed Law? Are there other objectives that need to be added, or any proposed that need to be removed? What are your reasons?**

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<sup>13</sup> See Articles 129 to 131 of the Proposed Companies Law  
<sup>14</sup> Proposed Law Article 36

**Disclosure of relevant information in relation to Foundations**

42. While the need for DIFC Foundations to protect information relating to their beneficial ownership can be a significant issue, especially those setting up Single Family Offices and family wealth management business in the DIFC, there are also competing considerations which demand more accessibility relating to beneficial ownership information for regulatory purposes (for example, to address risks relating to money laundering, tax evasion, exchange of information for tax purposes (e.g. FATCA, Common Reporting Standard and under Double Tax Treaties concluded by the UAE) and terrorism financing (collectively referred to here as “AML Risks”). International standard setters, particularly OECD and FATF, require beneficial ownership of foundations to be made available for legitimate purposes, such as regulation or law enforcement needs.
43. To ensure the protection of information relating to beneficial ownership of private Foundations, whilst also achieving the desired outcome of mitigating AML Risks to meet international standards, the Proposed Law requires relevant information in relation to a Foundation to be provided to the Registrar or the Registered Agent who will be able, on the request of the Registrar, to provide it to him (and, where changes occur, updates of this information to be filed with the Registrar or Registered Agent as appropriate). However, such information will not be placed on *any* public register, and will not be accessible to the public<sup>15</sup>. Instead, the Registrar would *only* release such information to another body, such as a regulator, standard setter or law enforcement agency, for a legitimate purpose.
44. We believe this approach achieves the right balance relating to privacy of information needs of beneficiaries of DIFC Foundations, whilst also meeting international standards. This approach is consistent with the approach adopted in other foundation jurisdictions.

**Q12. Do you have concerns regarding the proposed approach relating to disclosure of information in respect of Foundations in the DIFC? If so, what are they, and how should they be addressed?**

**Role of the Court**

45. Many jurisdictions have explicitly given their courts jurisdiction over foundations and broad powers. These powers include the power to intervene to compel compliance by the council,

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<sup>15</sup>

enforce the rights of the guardian, enforce beneficiaries' rights and give directions, where requested by the council or the guardian.

46. Under the Proposed Law, the DIFC Courts will have similar powers and discretions.
47. It is important to strike a balance between the right to information of parties connected to the Foundation in some way (in respect of their interests) and other parties' rights to confidentiality.
48. The Proposed Law confers the right to some information upon an identified group of persons with sufficient interest (e.g. copies of the Charter, disclosure of records and accounts<sup>16</sup>). These rights are necessary in order that, should an application to the Court be appropriate, the proceedings are not frustrated by lack of information.
49. The Proposed Law intends to clearly set out the extent of beneficiaries' rights and differentiate between what is accessible and what is restricted.
50. A particularly vexed area of English law has been the power of the Courts, in the context of trusts, to relieve affected parties from the consequences of mistakes. The issues are discussed at some detail in paragraphs 23 to 30 of the Consultation Paper on the Proposed Trust Law. As there noted, there is some difference between the approach adopted in England on the one hand, and the United States on the other. Remedial action has been taken in some trust jurisdictions to provide relief from the currently strict approach adopted in England.
51. Not all of the considerations appropriate to trusts are applicable in the case of foundations because there are no beneficiaries to whom fiduciary duties are owed. But some clearly are, particularly where the issue relates to the manner in which property is transferred to a foundation. A modified version of the proposal in relation to the Proposed Trust Law is included in the Proposed Law<sup>17</sup>.
52. Another innovation in the context of foundation regimes is the proposal to provide for private arbitration of disputes in respect of DIFC Foundations, if there is provision to that effect in the Charter or By-laws of a Foundation<sup>18</sup>. Once again, this can be a matter of some complexity where minors and unborn persons are involved in the absence of statutory provision, as they cannot be parties to an agreement to arbitrate. The position is

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<sup>16</sup> Proposed Law Article 56

<sup>17</sup> Proposed Law Articles 50 and 51

<sup>18</sup> Proposed Law Articles 54 and 55 and Schedule 2

considered in greater detail in paragraphs 31 to 35 of the Consultation Paper on the Proposed Trust Law.

53. Power is conferred upon the Court to facilitate mergers and division of foundations, following the approach to schemes of arrangement available for companies<sup>19</sup>.

**Q13. Are the provisions of the Proposed Law relating to the role of the Courts appropriate? Are there other powers that need to be added, or any proposed that need to be removed? What are your reasons?**

**Q14. Are there any concerns relating to the proposed provisions relating to the consequences of mistakes? If so, what are they, and how should they be addressed?**

**Q15. Are the provisions of the Proposed Law adequate to ensure effective conduct of an arbitration? If not what are the deficiencies, and how should they be addressed?**

#### Miscellaneous

54. A number of other issues have also been addressed in the Proposed Law that may be of interest. These include:

- (a) Migration of Foundations, into the DIFC and from the DIFC;
- (b) Allowing DIFC companies to continue as Foundations; and
- (c) Dealing in detail with the mechanisms of distribution (i.e. by the discretion of the Council or depositary receipts).

**Q16. Are there any concerns relating to these proposed provisions? If so, what are they, and how should they be addressed?**

**Q17. Are there any other concerns that are not addressed relating to the Proposed Law? If so, what are they, and how should they be addressed?**

#### Legislative Proposal

55. This legislative proposal contains the following:

<sup>19</sup>

Proposed Law Article 53

- a. the Proposed Law (at Annex A); and
- b. a table of comments to provide your views and comments on the Consultation Paper (at Annex B).