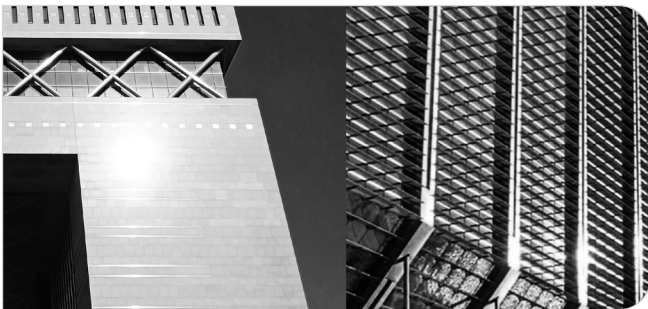


FUNDS AND FOUNDATIONS IN THE DIFC AND ADGM

Overview

There have been regimes for collective investment funds (“Funds”) in the Dubai International Financial Centre (“DIFC”) and the Abu Dhabi Global Market (“ADGM”) since the inception of these two financial free zones. More recently, both jurisdictions have introduced regimes for foundations (“Foundations”). Because Foundations are a new structuring tool in the region, and because they can in many respects be operated like Funds as a vehicle for pooled investment, this article provides an overview of these two types of vehicle and their uses.



FUNDS

A Fund is an arrangement where investors participate in assets on a pooled basis, which assets are managed by a separate management team – i.e., the investors do not have day to day control over the management of the assets. **This bifurcation of beneficial ownership** (to the investors); **discretionary investment management** (to the manager) and the **pooling of assets** is a **key feature of Funds**, and is consistent across all major fund jurisdictions including the DIFC and the ADGM. Foundations feature a similar model but typically for the **benefit of one family rather than a class of unrelated investors**. In practice the manager of a Fund (and/or its personnel) will make a financial commitment to (and hence own) a small piece of the Fund, to ensure they have skin in the game and therefore align their interests with those of the investors, so a Manager will have a small amount of beneficial ownership. And the manager’s ability to manage the Fund and its assets is subject to highly negotiated parameters which may include the right for investors to consent to certain matters and for an advisory board, which may include investors, to resolve conflict of interest among other issues, so the manager’s discretion is not unfettered. But subject to these nuances, **the key purpose of a Fund is to enable investors to acquire and own assets on a pooled basis that are managed by an experienced and, in most cases, regulated third party.**

In the DIFC and ADGM, as elsewhere, Funds may be structured in a number of ways. They may be purely contractual (including investment trust arrangements) or they may be structured as entities with separate legal personality including investment companies and limited partnerships (among others). Funds are invariably structured to limit the liability of investors, and “private funds” – those only offered to sophisticated investors on a private placement basis – will have documentation that is not publicly available. There is a broad spectrum of Funds, ranging from these private funds through to public funds (often listed, and marketed to retail investors) and investing in asset classes from shares, bonds,

currencies and commodities to alternative assets like private equity, debt, real estate and infrastructure. How any particular Fund is structured will depend on both the expected profile of its investors, and the investments it intends to make (what and where).

Investor Considerations

For investors, such an arrangement gives them access to investment opportunities that they may not have been able to identify themselves, or in which they may have been unable to participate in for lack of scale. **Aggregating resources with other investors not only permits participation in larger deals, but can also result in better investment terms due to the increased ticket size.** As well as doing larger deals, the pooled investment basis allows for **diversification of investments** (and therefore risk) for investors. Finally, the use of a third-party manager in the Fund context can give investors exposure to, and ability to manage, specialised asset classes that they do not have the experience to source and manage otherwise. An investor’s interest in a Fund is an asset, which may be transferred (subject to the Fund’s governing documents), pursued by creditors or transmitted to the investor’s heirs under the applicable rules of inheritance in the case of an investor’s death.

Manager Considerations

The third-party manager of a Fund is typically remunerated both by an ongoing management or advisory fee, and by a share of the profits generated by the Fund (the investors will receive the balance of the profits). **The fact that investors do not have day to day control over the Fund makes Funds an exceptionally useful capital raising tool for managers**, as it leaves them the flexibility to implement their predefined strategy without requiring ongoing approvals from investors (subject to the manager’s fiduciary duties towards its investors). A person who wishes to act as a fund manager generally has to be regulated (with the level of regulation varying depending on jurisdictions and other considerations), in line with the nature of their investment management role. Depending on the particular arrangements, the appropriate licence may range from advising and arranging on deals in investments, to managing assets or managing a collective investment fund. In both the DIFC and the ADGM, there are varying levels of fund regulation depending on the sophistication of the Fund’s investors. The licensing requirement increases compliance and establishment costs for the manager but is important for investor protection. That being said, if an organisation does not have the appropriate regulatory licenses, it is possible to enter into arrangements with another entity that does have the requisite permissions in order to co-manage a Fund, with the regulated entity undertaking the regulated functions.



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FOUNDATIONS

Like the majority of funds established in the DIFC and ADGM, a Foundation is an independent legal entity with a distinct personality, separate from the founder. It may enter into contracts or hold assets in its own name.

It is an 'orphan' structure as it has no shareholders or members. Foundations can have one or more founder(s) – individual(s) or body corporate(s). The two main requirements for the creation are the presence of initial capital and one or more specific object(s). Permitted objects vary depending on the jurisdiction but as a general rule, a foundation may not carry out any commercial activities as far as they are not incidental or ancillary to its objects. E.g. **a Foundation is ill-suited for undertaking fund raising on a commercial basis, a key difference with a fund.**

Creation

A Foundation must be registered with the relevant registrar and have its place of registration within the respective jurisdiction. The constitutional documents comprise the Charter and By-laws. The Charter is publicly available; it must contain certain mandatory items – e.g. Foundation's name, its object(s), a description of the initial capital and duration (if not perpetual). The By-laws – which may contain more sensitive information – are private. Much like a fund, a Foundation's internal structure and governance can be tailored via the constitutional documents, a Letter of Wishes, and subsequently Minutes of Council Members.

Parties and their roles

Foundations can be operated similarly to funds. They are managed by a Foundation Council and may be supervised by a guardian. Following the creation of a Foundation, the founder has no more rights towards the Foundation or its property unless he/she proactively reserves such specific rights. The founder may opt to retain (but not bequeath) significant control powers via the By-laws. The founder may notably reserve the right to change the Charter and By-laws or terminate the Foundation. He/she may also appoint him-/her-self as/amongst beneficiary/ies.

Conclusion

Whether a Fund or a Foundation is the appropriate structure for your venture will depend on your objectives. **Arrangements involving third party investors seeking profit participation will be suited to Fund structures; personal or family investments with a view to legacy planning will likely be better suited to Foundations.**

For further information on establishing and operating Funds in the DIFC or ADGM (and elsewhere) please contact one of the **Morgan Lewis attorneys** listed, and for further information on establishing and operating Foundations in these jurisdictions, please contact **M/HQ**.

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