

**Astana Financial Services Authority**

# **Consultation Paper**

**No. 17 of 2018**

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## **PROPOSED AIFC PREFERENTIAL CREDITOR RULES**

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**November 26, 2018**

## CONSULTATION PAPER NO. 17 PROPOSALS RELATING TO AIFC PREFERENTIAL CREDITOR RULES

### Why are we using this paper?

1. The draft of the *AIFC Preferential Creditor Rules 2018* (the “Proposed Rules”) was developed under section 181 (Power to adopt rules etc.) of the *AIFC Companies Regulations 2017* and section 66(2) of the *AIFC Insolvency Regulations 2017*.
2. The Consultation Paper presents the Proposed Rules to be adopted by the Board of Directors of the AFSA for regulation of all insolvency proceedings and protection of employees’ rights at the AIFC.
3. This Consultation Paper No. 17 (“Consultation Paper”) seeks public comments on the Proposed Rules.

### Who should read this paper?

4. This Consultation Paper may be of interest to the current and prospective AIFC Participants, as well as all the AIFC Bodies and their organisations, and generally, to all interested in providing their feedback to the Proposed Rules.

### How to provide comments

5. AIFC encourages 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. Comments to be addressed by post:  
  
Policy and Strategy Division  
Astana Financial Services Authority (AFSA)  
8 Kunayev Street, Building B, Astana, Kazakhstan or  
emailed to: [consultation@afsa.kz](mailto:consultation@afsa.kz)  
Tel: +8 7172 613781
7. You may as well identify your organisation in the provided comments.
8. By submitting your comments to the AIFC you expressly consent to the processing by the AIFC of the personal data pertaining to you, including, but not limited to the collection, recording, organisation, storage, adaptation or alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of thereof, as per the *AIFC Data Protection Regulations 2017*.

### What happens next?

9. The deadline for providing comments on the proposals in this Consultation Paper is 26 December 2018.
10. Once we receive your comments, we will consider if any further refinements are required to the Proposed Rules annexed to this Consultation Paper at Annex A. Once the task is complete, the draft of the Proposed Rules will be further processed in accordance with the requirements, stipulated in the *AIFC Regulations on AIFC Acts 2017*.

11. The Proposed Rules are in draft form only and are, therefore, subject to change following consultation as mentioned above. Consequently, you should not act on it until the Proposed Rules are formally enacted.

#### Defined terms

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

#### Part 1 of the Proposed Rules: GENERAL

13. The Proposed Rules commence upon approval by the Board of Directors of the AFSA.
14. The Proposed Rules are to be adopted by the Board of Directors of the AFSA under section 181 (Power to adopt rules etc.) of the *AIFC Companies Regulations 2017*.
15. The Proposed Rules are to apply within the jurisdiction of the AIFC.
16. The Proposed Rules are administered by the Registrar of Companies.

- Q1. Do you have any concerns about the commencement of the Proposed Rules? If so, what are they, and how should they be addressed?**
- Q2. Do you have any concerns about the Legislative Authority of the Proposed Rules? If so, what are they, and how should they be addressed?**
- Q3. Do you have any concerns about the application of the Proposed Rules? If so, what are they, and how should they be addressed?**
- Q4. Do you have any concerns on administration of the Proposed Rules? If so, what are they, and how should they be addressed?**

#### Part 2 of the Proposed Rules: PREFERENTIAL DEBTS GENERALLY

17. The Proposed Rules establish a regulatory framework under which Company's Preferential Debts must be paid in priority to all unsecured debts and all debts secured by a Security Interest over all or substantially all of the undertaking of the Company.
18. The Proposed Rules provide a framework, whereby a Company's Preferential Debts rank equally among themselves after the expenses of the winding up and must be paid in full unless the Company's assets are insufficient to meet them. If the Company's assets are insufficient, the Preferential Debts abate in equal proportions.
19. The Proposed Rules provide a framework, whereby the assets of the Company available for payment of general creditors are insufficient to meet the Company's Preferential Debts, the Preferential Debts have priority over the claims secured by a Security Interest over all or substantially all of the undertaking of the Company, and must be paid accordingly out of any property included in or subject to that Security Interest.

**Q5. Do you have any concerns about the payment priority and ranking of Preferential Debts?**

**Part 3 of the Proposed Rules: COMPANY WHERE THERE IS A SECURITY INTEREST OVER ALL OR SUBSTANTIALLY ALL OF ITS UNDERTAKING**

20. The Proposed Rules determine that if the Company is not at the time in the course of being wound up, its Preferential Debts must be paid out of the assets coming to the hands of the Administrative Receiver in priority to any claims for principal or interest in relation to the obligations of the Company secured by the Security Interest over all or substantially all of the undertaking of the Company.

**Q6. Do you have any concerns about the priority to any claims for principal or interest in relation to the obligations of the Company secured by the Security Interest over all or substantially all of the undertaking of the Company?**

**Part 4 of the Proposed Rules: CATEGORIES OF PREFERENTIAL DEBTS**

21. The Proposed Rules provide avenues via which an employee might seek payment of debts owed to him or her by an insolvent employer. The avenues fall into two broad categories.
22. First, Category 1: Contributions to pension schemes and end-of-service gratuities
23. An amount owed by a Company is a Preferential Debt of the Company if it is a contribution payable to a pension scheme for an individual who is or has been an employee of the Company, or it is an end-of-service gratuity payable on the termination of the employment of an individual who is or has been an employee of the Company.
24. Second, Category 2: Remuneration, payment in lieu of notice etc.
25. An amount owed by a Company is a Preferential Debt of the Company if it is payable by the Company to an individual who is or has been an employee of the Company, and it is payable by way of:
- (a) remuneration in relation to the whole or any part of the period of 4 months immediately before the Relevant Date; or
  - (b) payment in lieu of notice on the termination of the individual's employment, whether before, on or after the Relevant Date; or
  - (c) compensation in lieu of vacation leave accrued in relation to any period of employment before the Relevant Date that is payable on the termination of the individual's employment, whether before, on or after the Relevant Date; and
- does not exceed the amount (if any) prescribed by the Proposed Rules.
26. In addition, debts payable to employees are treated as preferential in relation to other debts covered by a security interest only if an Administrative Receiver is appointed on behalf of the Secured Parties under a Security Interest over all or substantially all of the undertaking of the Company. In other words, where there is specific security, the preference is ineffective; but where the security taken is in the nature of a "floating charge", as it is described in some

jurisdictions, the security gives way to the preferential debts

**Q7. Do you have any concerns about the categories of Preferential Debts?**

**Legislative Proposal**

27. This legislative proposal contains the following:
- (a) Proposed Rules (in Annex A);
  - (b) a table of comments to provide your views and comments on the Consultation Paper (at Annex B).



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**AIFC PREFERENTIAL CREDITOR RULES**

**(PCR)**

**AIFC RULES NO. \_ OF 2018**

**XXX\_, 2018**  
**Astana, Kazakhstan**

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## **PART 1: GENERAL**

### **1.1. Name**

These Rules are the *AIFC Preferential Creditor Rules 2018* (or PCR).

### **1.2. Commencement**

These Rules commence on \_\_XXX, 2018.

### **1.3. Legislative authority**

These Rules are adopted by the Board of Directors of the AFSA under section 181 (Power to adopt rules etc.) of the AIFC Companies Regulations.

Note: Section 66(2) of the AIFC Insolvency Regulations provides that those Rules may make provision for or in relation to designating certain types of claim on a Company as preferential debts and to prescribing any priorities for their payment and as to the ranking of other claims.

### **1.4. Application of these Rules**

These Rules apply within the jurisdiction of the AIFC.

### **1.5. These Rules apply to all Insolvency Proceedings**

These Rules apply to all Insolvency Proceedings in relation to a Company, whether they commenced before the commencement of these Rules or the Relevant Date for the Company is a date that occurred before the commencement of these Rules.

### **1.6. Definitions etc.**

1.6.1 Schedule 1 (Interpretation) contains definitions used in these Rules.

1.6.2 Terms used in these Rules (other than terms defined in Schedule 1) have the same meanings as they have, from time to time, in the AIFC Insolvency Regulations, or the relevant provisions of those Regulations, unless the contrary intention appears.

Note: For definitions in the AIFC Insolvency Regulations applying to these Rules, see Schedule 3 of those Regulations. The definitions in that Schedule relevant to these Rules include the following:

- Administrative Receiver
- Administrator
- AFSA
- AIFC
- Company
- Court
- Goes into Liquidation
- Insolvency
- Provisional Liquidator
- Receiver
- Registrar of Companies
- Resolution for Voluntary Winding Up
- Rules.

1.6.3 Subject to subrule 1.6.2, terms used in these Rules (other than terms defined in Schedule 1 or the AIFC Insolvency Regulations) have the same meanings as they have, from time to time, in the AIFC Companies Regulations, or the relevant provisions of those Regulations, unless the contrary intention appears.

Note: For definitions in the AIFC Companies Regulations applying to these Rules, see Schedule 1 of those Regulations. The definitions in that Schedule relevant to these Rules include the following:

- Director
- Secretary.

**1.7. Administration of these Rules**

These Rules are administered by the Registrar of Companies.

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## **PART 2: PREFERENTIAL DEBTS GENERALLY**

### **2.1 General provisions about Preferential Debts**

- 2.1.1 This rule applies in relation to the insolvency of a Company.
- 2.1.2 The Company's Preferential Debts must be paid in priority to:
- (a) all unsecured debts; and
  - (b) all debts secured by a Security Interest over all or substantially all of the undertaking of the Company.
- 2.1.3 The Company's Preferential Debts rank equally among themselves after the expenses of the Insolvency Proceedings and must be paid in full, unless the Company's assets are insufficient to meet them. If the Company's assets are insufficient, the Preferential Debts abate in equal proportions.
- 2.1.4 So far as the assets of the Company available for payment of general creditors are insufficient to meet the Company's Preferential Debts, the Preferential Debts have priority over the claims secured by a Security Interest over all or substantially all of the undertaking of the Company, and must be paid accordingly out of any property included in or subject to that Security Interest.

### **2.2 Payments to Directors and Officers**

- 2.2.1 Despite anything in these Rules, a Director or Officer of the Company is not entitled to receive an amount payable under these Rules if the Court so orders. The Court may make an order on the application of an Administrator of the Company or on its own initiative if there is an outstanding claim against the Director or Officer in relation to the Company's Insolvency.
- 2.2.2 An amount payable to a Director or Officer of the Company is not a *Preferential Debt* if and to the extent that the Court decides that the Director or Officer is fully or partially responsible for the Company's Insolvency.

**PART 3: COMPANY WHERE THERE IS A SECURITY INTEREST OVER ALL OR SUBSTANTIALLY ALL OF ITS UNDERTAKING**

**3.1. Application of Part 3**

This Part applies to a Company if an Administrative Receiver is appointed on behalf of the Secured Parties under a Security Interest over all or substantially all of the undertaking of the Company.

**3.2. Priority of payment of Preferential Debts**

3.2.1 If the Company is not at the time in the course of being wound up, its Preferential Debts must be paid out of the assets coming to the hands of the Administrative Receiver in priority to any claims for principal or interest in relation to the obligations of the Company secured by the Security Interest over all or substantially all of the undertaking of the Company.

3.2.2 Payments made under this rule must be recouped, as far as possible, out of the assets of the Company available for payment of general creditors.

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## **PART 4: CATEGORIES OF PREFERENTIAL DEBTS**

### **4.1 Category 1: Contributions to pension schemes and end-of-service gratuities**

An amount owed by a Company is a *Preferential Debt* of the Company if it is:

- (a) a contribution payable to a pension scheme for an individual who is or has been an employee of the Company; or
- (b) an end-of-service gratuity payable on the termination of the employment of an individual who is or has been an employee of the Company.

### **4.2 Category 2: Remuneration, payment in lieu of notice etc.**

4.2.1 An amount owed by a Company is a *Preferential Debt* of the Company if it:

- (a) is payable by the Company to an individual who is or has been an employee of the Company; and
- (b) is payable by way of:
  - (i) remuneration in relation to the whole or any part of the period of 4 months immediately before the Relevant Date; or
  - (ii) payment in lieu of notice on the termination of the individual's employment, whether before, on or after the Relevant Date; or
  - (iii) compensation in lieu of vacation leave accrued in relation to any period of employment before the Relevant Date that is payable on the termination of the individual's employment, whether before, on or after the Relevant Date; and
- (c) does not exceed the amount (if any) prescribed by the Rules.

4.2.2 An amount owed by a Company is a *Preferential Debt* of the Company if it is owed in relation to money advanced for the purpose of paying an amount that would have been a Preferential Debt under subrule 4.2.1 if it had not been paid.

4.2.3 An amount owed by a Company is a *Preferential Debt* of the Company if it:

- (a) is ordered (whether before or after the Relevant Date) to be paid by the Company under the AIFC Employment Regulations; and
- (b) is ordered to be paid in relation to a default made by the Company before the Relevant Date in the discharge of the Company's obligations under the AIFC Employment Regulations; and
- (c) does not exceed the amount (if any) prescribed by the Rules.

### **4.3 Interpretation for Category 2 Preferential Debts**

4.3.1 For rule 4.2.1(b)(i), an amount is payable by a Company by way of remuneration in relation to a period if:

- (a) it is paid as wages or salary (whether payable for time or for piece work or earned completely or partly by way of commission) in relation to work done or services provided to the Company in that period; or

- (b) it is an amount required to be paid by the Company under the AIFC Employment Regulations and it is payable by the Company in relation to that period.
- 4.3.2 Subrule 4.3.3 applies to an individual in relation to a Company if the individual's employment by the Company has been terminated by or in consequence of the Company Going into Liquidation or a Receiver being appointed for the Company under section 14 (Appointment and Functions of Receivers and Administrative Receivers) of AIFC Insolvency Regulations.
- 4.3.3 If this subrule applies, compensation in lieu of vacation leave is taken, for rule 4.2.1(b)(iii), to have accrued to the individual in relation to a period of employment if, because of the individual's contract of employment or any AIFC Act (including any instrument under an AIFC Act), that compensation would have accrued in relation to that period if the employment had continued until the individual became entitled to be allowed the vacation.
- 4.3.4 For this rule, any compensation paid or payable by a Company to an individual in relation to a period of vacation leave, or a period of absence from work due to sickness or other good cause, is taken to be wages or salary paid or payable by the Company to the individual in relation to work done or services provided to the Company in that period.
- 4.3.5 For this rule, a reference to compensation paid or payable by a Company to an individual in relation to a period of vacation leave includes a reference to any amount that, if it had been paid, would have been treated for the purposes of the acting law of the Republic of Kazakhstan relating to social expenditures as earnings (however described) in relation to that period.

Note: For subrule 4.3.5, the relevant Law of the Republic of Kazakhstan at the commencement of these Rules was the Law *On Compulsory Social Insurance* dated 25 April 2003.

## SCHEDULE 1: INTERPRETATION

Note: See rule 1.6.

### 1.1 Definitions for these Rules

In these Rules:

***Insolvency Proceedings*** means any proceedings, whether in the Court or otherwise, under AIFC Insolvency Regulations, the AIFC Insolvency Rules or these Rules.

***Officer***, of a Company, includes any of the following in relation to the Company:

- (a) a Secretary;
- (b) a senior manager.

***Preferential Debt***, of a Company, means an amount that is a Preferential Debt of the Company under these Rules.

***Relevant Date***, for a Company, means:

- (a) if the Company is being wound up by the Court and the Company had not already passed a Resolution for Voluntary Winding Up—the earliest of the following dates:
  - (i) if a Provisional Liquidator was appointed for the Company—the date the Provisional Liquidator was appointed (or, if more than 1 Provisional Liquidator has been appointed, the date the first Provisional Liquidator was appointed);
  - (ii) if a Provisional Liquidator was not appointed for the Company—the date the winding up order is made; or
- (b) in any other case where the Company is being wound up—the date the Company passed the Resolution for Voluntary Winding Up; or
- (c) if the Company is in receivership—the date the Receiver was appointed.

***Secured Party***, in relation to a Security Interest, has the meaning given by Schedule 1 (Interpretation) of the AIFC Security Regulations.

***Security Interest*** has the meaning given by Schedule 1 (Interpretation) of the AIFC Security Regulations.

## Annex B

Format for providing public comments to AIFC Authority on Consultation Paper No. 17 of 2018  
**PROPOSED AIFC PREFERENTIAL CREDITOR RULES**



Note 1: AIFC Authority reserves the right to publish, including on its website, any comments you provide. However, if you wish to remain anonymous, you must expressly request at the time of making comments that this should be the case.

Note 2: The column ‘comments on proposed policy’ relates to the policy explained in the Consultation Paper (“CP”). The column, ‘comments on proposed legislation’ refers to the draft legislation reflecting the proposed policy.

Note 3: It is possible that you may not have any comments, either on the proposed policy or legislation or may have comments on one and not the other. You may leave a blank column if you either agree to the proposed position, or you have no concerns relating it.

Note 4: If there are any ambiguities relating to the proposed policy or legislation, you may raise those in your comments.

Name of individual/entity providing comments		
No.	Comments on proposed policy	Comments on proposed legislation
<b>Q1. Do you have any concerns about the commencement of the Proposed Rules? If so, what are they, and how should they be addressed?</b>		
<b>Q2. Do you have any concerns about the Legislative Authority of the Proposed Rules? If so, what are they, and how should they be addressed?</b>		
<b>Q3. Do you have any concerns about the application of the Proposed Rules? If so, what are they, and how should they be addressed?</b>		
<b>Q4. Do you have any concerns on administration of the Proposed Rules? If so, what are they, and how should they be addressed?</b>		
<b>Q5. Do you have any concerns about the payment priority and ranking of Preferential Debts?</b>		

No.	Comments on proposed policy	Comments on proposed legislation
<b>Q6. Do you have any concerns about the priority to any claims for principal or interest in relation to the obligations of the Company secured by the Security Interest over all or substantially all of the undertaking of the Company?</b>		
<b>Q7. Do you have any concerns about the information required for re-registration, changes in registered details and/or reorganisation of the AIFC Bodies, their organisations and AIFC Participants stipulated in Schedule 3 of the Proposed Rules? If so, what are they, and how should they be addressed?</b>		