

Foundations

The Foundations (Jersey) Law 2009 (the "Law") came into force on 17th July 2009. This briefing is designed to introduce some of the key features of a Foundation, and how clients might benefit from their use. This briefing does not constitute professional advice, and clients should seek guidance specific to their circumstances.

What is a Jersey Foundation and what can it do?

A Jersey Foundation will be an incorporated body, able to transact, and to sue and be sued, in its own name. It will act through its council, which will be the body charged with the administration of the Foundation's assets and the attainment of its objects.

A Jersey Foundation will be capable of exercising all the functions of an incorporated body, save that it will not directly be able to acquire or hold Jersey immovable property, nor engage in commercial trading activities unless such activities are incidental to the attainment of its objects. No concept of ultra vires will apply, so that the constitutional documents will not limit the capacity of a Foundation, although they may limit the powers of the council to carry out certain actions.

It should be noted that the Jersey Foundation will not be an exact equivalent or copy of a Foundation established in any other jurisdiction. Just as there are many models for limited liability companies, the legislation allowing the creation of Jersey Foundations has been drafted as a stand-alone exercise with no desire or intention to replicate what may be the position in other jurisdictions. Jersey Foundations should therefore be considered on their own merits, and it should not be assumed that, for example, they will give rise to the same rights and duties, nor that they will be interpreted in the same way as Foundations established in a different jurisdiction.

Features of Jersey Foundations

The council of every Jersey Foundation will be required to have a 'qualified member', which must be a person licensed to act as a council member of Foundations under the relevant provisions applying to trust company business pursuant to the Financial Services (Jersey) Law 1998 (the "Financial Services Law"). The business address in Jersey of this qualified member will become the business address of the Foundation in the Island.

Additionally, every Foundation will be required to have a guardian to oversee the carrying out of the functions of the council. This provision is being introduced to ensure that there will always be a person who can call the council to account, which may be particularly pertinent given the relatively limited rights that are conferred upon the beneficiaries of a Foundation, and the fact that many Foundations may have no beneficiaries, but be established purely to pursue purposive objects. The guardian will not be required to be a licensed person.

Incorporation of a Foundation

The incorporation of a Jersey Foundation will be an activity regulated under the Financial Services Law, so that only a person who is appropriately licensed under that law will be able to apply for the incorporation of a Foundation.

The application for incorporation will be accompanied by a copy of the proposed charter of the Foundation (but not of the regulations), including an English translation of any part of the charter which is not in English, together with a certificate signed by the applicant, which will identify the initial qualified member of the council, give the business address in Jersey of that person, and confirm that the guardian has been selected for the Foundation (although the guardian's identity does not need to be disclosed).

In many cases, the first qualified member of the council is likely to be the same person as the applicant for incorporation, or an affiliated company of the applicant. Upon incorporation, the name of the Foundation and the name and Jersey business address of the qualified member on its council will be entered in a register maintained by the registrar of companies (the 'Registrar') and the Foundation will be given a registration number. Registration of these details will constitute conclusive evidence of the incorporation of the Foundation and of compliance with the requirements for incorporation.

The Founder

The founder will be defined as the person who instructs the qualified person to apply for the incorporation of a Foundation, together with any person who subsequently becomes a founder under Article 19 of the Law. That article provides that the endowment of a Foundation by a person will not make that person a founder or confer founder's rights upon that person unless the regulations provide otherwise. Consequently, the founder will not be required to provide any endowment or financial contribution to a Foundation, and the regulations will need to provide for a person who does make such a contribution to be treated as a founder.

The founder can be given such rights (if any) as are provided by the charter and regulations and, if permitted by the charter or regulations, those rights can be assigned to other persons. Where the current holder of such rights (including the founder) dies or ceases to exist, the rights will vest in the guardian unless the charter or regulations provide otherwise.

The Charter

The charter will be filed with the Registrar and available for public inspection at the Registry. Certain details must be included in the charter, as follows:

- The name of the Foundation must be specified. This must not be misleading or undesirable and must end with the word 'Foundation', or its equivalent in a foreign language.
- The objects of the Foundation must be specified. These must be lawful, and can be charitable or non-charitable or both. Moreover, the objects can be to benefit a person or class of persons or to carry out any specified purpose, or a combination. If the objects are to benefit a person or class of persons, it will be sufficient for the charter to provide that such person or class is to be determined in accordance with provisions found in the regulations. By this means, the identity of the beneficiaries can be kept private.
- If there is any initial endowment, this must be specified in the charter, which must also specify whether further endowments can be made.
- The charter must detail what is to happen to any assets of the Foundation remaining following its winding up, although this can be achieved by reference to provisions in the regulations.
- If the Foundation will terminate automatically upon a fixed date or upon the occurrence of a particular event, details must be included in the charter.
- If a right is conferred upon any person to wind up and dissolve the Foundation, this must be specified in the charter.

Although not required by the Law, it will be possible to include the names and addresses of the first council members in the charter. It is thought that this option may be attractive to Foundations established for charitable objects, which may wish to adopt an open profile towards the public.

It will also be possible for the charter to provide for any other matter, including the procedure required for its amendment and any provisions that can or must be contained in the regulations. There will therefore be considerable flexibility as to the contents of both the charter and regulations.

The Regulations

Every Foundation must have regulations, unless all of its governing provisions are contained in its charter. The regulations will not be filed with the Registrar, and accordingly will not be available for public inspection. Only those defined as "persons appointed under the regulations of the Foundation (essentially, the members of the council, the guardian and any other person accorded a particular function under the regulations) will be entitled to copies of the regulations, unless the regulations themselves provide rights to other persons, such as beneficiaries.

The regulations will be required to provide for the establishment of the council to administer its assets and carry out its objects. In particular, the regulations must provide for the appointment, retirement, removal and remuneration (if any) of the council members, set out the decision making process of the council, state whether any decisions require the approval of a third party, and state the functions of the council and the extent to which these can be delegated or must be exercised in conjunction with any third party.

Additionally, the regulations will be required to provide for the appointment of a new qualified member of the council if the existing qualified member ceases to act for any reason.

The regulations will also identify the initial guardian, and provide for the replacement and remuneration (if any) of the guardian. They may also provide for the reimbursement of expenses of any other person appointed to carry out functions in relation to the Foundation. As with the charter, the regulations will be able to contain any other matters beyond those which are prescribed by the Law.

The Council

The establishment, powers and functions of the council must be provided for in the regulations, and there must at all times be a nominated qualified member of the council. The council will be charged with administering the assets of the Foundation and carrying out its objects. The council may consist of one or more members, and will be required to act in accordance with both the charter and the regulations. The council members will be required to act honestly and in good faith with a view to the best interests of the Foundation, and to exercise the care, diligence and skill of reasonably prudent persons in similar circumstances.

It will not be possible for the charter or regulations to relieve the members of the council (or others performing functions to which they have been appointed under the charter or regulations) from liability for fraud, wilful misconduct or gross negligence, and the Foundation will not be able to purchase insurance in respect of such liability.

The Guardian

All Jersey Foundations will be required to have a guardian, and the initial guardian will be identified in the regulations, which will also provide for matters of succession and remuneration (if any). The guardian will not be able to be a member of the council unless he is also a founder or the qualified member of the council.

The guardian's duty will be to take such steps as are reasonable in all the circumstances to ensure that the council carries out its functions and, to that end, the guardian will be able to require the council to account for the way in which it has acted. It is suggested that this provision must confer upon the guardian such rights as he may reasonably require to have sight of accounting and management documentation relating to the Foundation and the activities of the council. Additionally, the regulations will be able to

confer upon the guardian the right to approve or disapprove any specified actions of the council.

Furthermore, unless the regulations provide otherwise, the guardian will be able to sanction any action of the council which would not otherwise be permitted by the charter or regulations. In doing this, however, the guardian will have to be satisfied that it is in the best interests of the Foundation and that the council is acting in good faith. If the guardian's sanction is forthcoming, this will cause the actions of the council to be deemed to be in accordance with the charter and regulations. This provision may provide a useful means of enabling actions to be taken which would not otherwise be possible, although it will be interesting to see whether, in practice, guardians are comfortable to provide such sanction.

The Qualified Member

An application for the incorporation of a Foundation in Jersey may only be made by a 'qualified person', being a person registered under the Financial Services (Jersey) Law 1998 to conduct financial services business of this type e.g. Minerva.

It is a regulatory requirement that a qualified person will become a member of the council on incorporation that the qualified person making the application is in possession of regulations approved by both the founder and the qualified person who is to become a member of the council, and that a person has been selected to act as the guardian.

The objective behind the requirement that only a qualified person may incorporate a Foundation and that the council of members must always include a qualified person, is to ensure that Jersey's regulatory requirements are observed at the outset and on a continuing basis.

Beneficiaries and provision of information

A Foundation will not need to have beneficiaries, and may be established solely for a particular purpose. Where there are beneficiaries, they will have no interest in the assets of the Foundation and will not be owed any fiduciary or analogous duty by the Foundation or by the members of the council, the guardian or any other person appointed under the regulations.

However, if a beneficiary becomes entitled to receive a benefit from the Foundation but does not receive the same, he will be able to apply to the Royal Court for the Foundation to be ordered to provide the benefit.

Unless required by the charter or regulations, a Foundation will not be obliged to provide any beneficiary with information relating to the administration, assets or the carrying out of the objects of the Foundation.

Migration, merger and dissolution

It is expected that clients will not only be interested to establish new Foundations in Jersey, but will also wish to migrate existing foreign-law Foundations and similar entities to the Island so that they can thereafter continue as Jersey Foundations. Draft regulations allowing for this have been lodged for debate by the States of Jersey on 14 July 2009 in order that these provisions can be brought into force at the same time as the Law.

The regulations (the draft Foundations (Continuance) (Jersey) Regulations) will allow for Jersey companies and 'recognised entities' to continue as Jersey Foundations, and also for Jersey Foundations to continue as "recognised entities" in other jurisdictions.

The 'recognised entities' which will be able to move to the Island and continue as Jersey Foundations will be designated classes of bodies or entities incorporated or established outside Jersey whether by registration, endowment or otherwise and whether or not having legal personality.

It is envisaged that the following entities will be so designated: Panama Private Interest Foundations, Bahamas Foundations, Liechtenstein Stiftungs, Liechtenstein Anstalts, St Kitts Foundations and Nevis Multiform Foundations.

Separate regulations will also, in due course, provide for the merger of Foundations and for their dissolution.

Administrative matters and record keeping

Foundations will be required to include in all written communications, including electronic communications, their name and business address. Documents may be served on a Foundation by leaving them at or posting them to the business address.

Amendments to the Law which are intended to be made by regulations to take effect contemporaneously with the Law will also provide that the business address of a Foundation in Jersey, unless its charter provides otherwise, will be the place of administration of its assets and activities. These amendments are designed to address concerns that the concept of a "business address" in Jersey may not be sufficient, if a Foundation's affairs were to be scrutinised by courts in certain civil law jurisdictions, to result in such courts finding the Foundation to be based in Jersey.

The Foundation will be required to keep certain records at its business address, namely:

- A copy of the current charter and regulations.
- A register of the names and addresses of the members of its council.
- Records sufficient to show and explain its transactions.
- Records to disclose with reasonable accuracy its financial position.
- A record of the appointment of the guardian showing his name, address and the effective
- Date of his appointment.

MINERVA

- A register of the names and addresses of all the persons who have endowed the
- Foundation.

It is clearly the intention of these provisions to impose responsibility upon the qualified member of the council (whose premises will be the business address of a Foundation) to ensure that these records are maintained. The Codes of Practice for Trust Company Business published by the Jersey Financial Services Commission will then apply to the retention of such records. It is worth noting that the Law does not contain any requirement for formal accounts of a Foundation to be prepared at any given interval, although as a matter of good practice it is anticipated that the qualified member will arrange for most Foundations to prepare annual accounts.

There will be an annual administration fee payable to the Registrar in respect of every Foundation before the end of February.

The register maintained by the Registrar, including a copy of the Foundation's charter, will be available for public inspection (upon payment of a fee), and the Registrar will also supply (upon payment of a fee) a certificate of the incorporation and status of a Foundation and a certified copy of its charter.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.

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