

JERSEY FOUNDATIONS

The Foundations (Jersey) Law 2009 was registered by the Royal Court of Jersey on 19 June 2009 and came into force on 17 July 2009.

What is a Jersey foundation?

A Jersey foundation is designed to blend the highly attractive features of both Jersey corporations and Jersey trusts. It provides Jersey with an alternative financial planning vehicle to companies and trusts for wealth management and charitable purposes.

The Jersey foundation is an entirely new type of Jersey legal entity and will not be an exact equivalent or copy of any foundation established in any other jurisdiction, as it has been modelled on the best features present in the laws of other jurisdictions, while also including unique Jersey features. Jersey foundations allow the founder the maximum possible freedom of choice whilst at the same time ensuring that the structure is not susceptible to abuse for money laundering or terrorist financing purposes.

The nature of a foundation is that it has separate legal personality, it is able to contract with third parties, sue and be sued in its own name and holds its own assets. It does not, however, have shareholders; the assets are held for the benefit of beneficiaries or for a specified purpose.

Incorporation of a Jersey foundation

As the incorporation of a Jersey foundation is regulated under the Financial Services (Jersey) Law 1998, only a person who is appropriately licensed under that law will be able to apply for the incorporation of a foundation (a "Qualified Person"). The application for incorporation of a foundation must be accompanied by:

1. a copy of the proposed charter of the foundation (but not the regulations), including an English translation of any sections if necessary; and
2. a certificate signed by the applicant, identifying the initial Qualified Person of the council and the business address in Jersey of that person and confirming (i) that the regulations for the foundation are held by the applicant and have been approved by both the founder and by the initial Qualified Person of the council and (ii) that a guardian has been selected for the foundation (although his identity does not need to be disclosed).

The Founder

The founder of a foundation is the person who instructs the Qualified Person to apply for the incorporation of a foundation. The founder may be an individual or body corporate and can be both the guardian and a member of the council. A person who donates assets to the foundation after it has been incorporated will neither be regarded as a founder nor receive founder's rights unless the regulations provide otherwise.



The Foundation's Objects

The objects of a foundation may be to benefit a person or a class of persons or to carry out a specified charitable or non-charitable purpose. The foundation will hold assets in its own name. It will use these assets in accordance with its constitutional documents (the charter and the regulations), either to benefit specified persons or for a specified purpose. The foundation shall invest these assets and either distribute them to beneficiaries or use them for the stated purposes.

The Charter

The charter is a public document, which will be filed with the Jersey Registrar of Companies (the "Registrar") and available for public inspection at the Registry. It must include certain specified details about the foundation, including:

1. The name of the foundation. This is not to be misleading or undesirable and is to end with the word "Foundation" or its equivalent in a foreign language;
2. The objects for which the foundation is established;
3. If there is any initial endowment, this must be specified in the charter;
4. If the foundation is to terminate automatically upon a fixed date or upon the occurrence of a particular event, details of this must be included in the charter; and
5. If a right is conferred upon any person to wind up and dissolve the foundation, this must be specified in the charter.

The Registrar must be advised of any amendments to the charter. The detailed provisions applicable to the foundation can be included in either the public charter or in the regulations, which will be a private document. There will, therefore, be considerable flexibility as to the contents of both the charter and regulations. It is expected that the majority of foundations will have both a publicly registered charter and a set of private regulations, though there may be cases, such as foundations established for wholly charitable purposes, which may wish to adopt an open profile towards the public and publicly disclose both the charter and the regulations of the foundation. The charter does not need to specify or identify the founder, the council members or any people who will benefit from the foundation.

The Regulations

Unless all of its governing provisions are contained in its charter, it is a requirement for every foundation to have regulations. The regulations are not filed with the Registrar and thus may be viewed by only those defined as "persons appointed under the regulations of the foundation". The regulations are required to establish a council to administer the foundation's assets and to carry out its objects. In particular the regulations must provide for the appointment, retirement, removal and remuneration (if any) of the council members and set out the decision making process of the council. The regulations must also provide for the appointment of a guardian to ensure the accountability of the council and to provide for the reimbursement of the expenses of persons appointed under the regulations. They may also contain other provisions, particularly concerning how the charter or regulations of the foundation may be amended or for the appointment of other persons (such as an auditor) to carry out functions for the foundation.

The Council

The council exercises the power of the foundation. Council members only have duties towards the foundation itself; they have no fiduciary duty to individuals who may benefit from the foundation. The council may consist of one or more members, and must include one Jersey-based finance professional, the Qualified Person, who will be regulated under the Financial Services (Jersey) Law 1998. The council has the role of administering the foundation's assets and carrying out the foundation's objects.

The Guardian

The principal role of the guardian is to ensure that the council carries out its functions in order to achieve the objects of the foundation. The requirement for a guardian ensures the proper administration of foundations and the protection of the beneficiaries of the foundation. No member of the council, with the exceptions of the Qualified Person and the founder, may become the guardian. The guardian may retain various executive powers, such as a veto over certain decisions of the council. Where the founder is the guardian he can, therefore, continue to exert considerable influence over the management of the foundation.

Beneficiaries

A foundation does not need to have beneficiaries, and may be established solely for a particular purpose. In cases where there are beneficiaries, they will have no interest in the foundation's assets nor will they be owed a fiduciary or similar duty by the foundation or by a person appointed under the regulations of the foundation. However, if a beneficiary under a foundation becomes entitled to a benefit under the foundation in accordance with the charter or the regulations of the foundation and the benefit is not provided, the beneficiary may seek an order of the Royal Court ordering the foundation to provide the benefit. Nevertheless, the fact that the regulations can restrict the information that is provided to people who may benefit from the foundation allows the founder a high level of control and confidentiality. For instance, founders will be able to prevent their children from becoming aware of the existence of the foundation until they reach a certain age or even until the founder's death if the founder deems this appropriate.

Merger, migration and dissolution

Provisions regarding the migration of Jersey foundations are to be found in the Foundations (Continuance) (Jersey) Regulations 2009 (the "Continuance Regulations") which come into force contemporaneously with the Foundations (Jersey) Law 2009.

The Continuance Regulations provide for the migration to Jersey of foundations and other "recognized entities", which can convert to become a Jersey foundation as part of the migration process. The procedure for migration is straightforward and it is expected to prove a popular method of transferring assets where it is recognised that the benefits of Jersey and its well-regulated regime outweigh those of the jurisdiction where assets may be currently situated. Foundations may also be migrated out of Jersey.

The merger of Jersey foundations is dealt with the Foundations (Merger) (Jersey) Regulations 2009 (the "Merger Regulations") which also come into force on 17 July 2009.

In general, the Merger Regulations require a merger agreement to be entered into between the bodies intending to merge (whether foundations or "recognized entities"), which must include the proposed charter if the merged entity will be a foundation. Notice of any such agreement will be required to be published. An application to the Registrar will also be required, identifying the qualified member of the council if the merged entity will be a Foundation. Upon approval and completion of the merger (by registration of the relevant details by the Registrar), all of the property, rights and obligations of the merging entities will become property, rights and obligations of the newly incorporated merged entity.

In addition the Foundations (Winding Up) (Jersey) Regulations 2009 deal with the dissolution of foundations.

Use of Foundations

Common reasons for the establishment of a foundation could include:

1. Carrying out charitable or philanthropic purposes;
2. Retaining and preserving specific assets, including the holding of wasting assets;
3. Holding assets for estate planning purposes; and
4. To hold assets off balance sheet in connection with the securitisation of mortgages etc.

Foundations provide Jersey with an alternative financial planning vehicle to companies and trusts for wealth management and charitable giving. Many civil law jurisdictions do not recognise the concept of a trust, but are happy with the foundation. It is expected that Jersey foundations will be used by those who require transparency, wish to control assets (rather than transferring the assets outright to the trustee of a trust), or who prefer a structure with which they are familiar. The flexibility available and the mixture of company and trust aspects will for many avoid the problems of understanding trusts and indeed, in some instances, may avoid the need to have both a company and a trust, thus producing simplicity and cost savings.

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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.

FURTHER INFORMATION

For information on administration please contact Mark Healey or Alicia Lewis of Volaw.

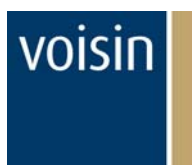
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