

# Guernsey - The Uses of Guernsey Foundations

## Introduction

The purpose of this briefing note is to set out some of the benefits of Guernsey foundations. A Guernsey foundation is designed to blend the highly attractive features of both Guernsey companies and Guernsey trusts. They therefore provide Guernsey with an additional vehicle for financial planning, wealth management and charitable purposes.

## What is a Guernsey foundation?

The Foundations (Guernsey) Law 2012 (the "**Foundations Law**") which came into force on 8 January 2013 permits foundations to be created under the laws of Guernsey. Foundations are highly flexible vehicles and can be used for a variety of purposes.

The nature of a foundation is that it has separate legal personality that is, it exists in the same way that a person or company exists. A foundation can therefore contract with third parties, can sue and be sued in its own name and can hold assets in its own name. In that sense it is like a company but differs from a trust, which does not have separate legal personality. At the same time, a Guernsey foundation does not have any shareholders; assets are held for the benefit of beneficiaries (either enfranchised or disenfranchised) or for a specified purpose. Where created for purposes, the purposes can be charitable, non-charitable or a mixture of both. A foundation might be created, for example, for benefitting a particular person or class of persons, for carrying out a specific purpose or holding a particular asset. Simply put, therefore, a foundation is similar to a company, but with no shareholders.

## Constitutional documents

In Guernsey every foundation comes into being upon the founder endowing the foundation with its initial capital, subscribing his name to the constitution of the foundation and registering the foundation with the Guernsey Register of Foundations.

### The charter

Every foundation must have a charter which must contain the name and purpose of the foundation, a description of its initial endowment (there is no minimum) and, if it is a foundation with limited duration, its duration. The name of the foundation must contain the word "Foundation" (or the abbreviation "Fdn."). Every foundation must have a registered office in Guernsey at all times and the name and address of the registered office must be included in all correspondence sent on behalf of the foundation, together with its registration number.

The charter may contain anything else that the founder may wish to include. However, crucially, it does not need to set out its objects in any great detail or name beneficiaries individually, and if the nature of the substantive assets of the foundation needs to be kept private, then it is possible to establish a foundation with no initial endowment or only a nominal initial endowment, with the substantive assets being transferred into the foundation shortly after its incorporation.

### The rules

In addition, every foundation must have rules which set out the operative provisions of the foundation. They will establish a council to administer the foundation's assets and to carry out its objects and must set out the procedures for the appointment, retirement, removal and remuneration (if any) of the council members and set out the decision-making processes of the council (for example, requirements for quorum, the conduct of meetings via telephone, etc.).

In circumstances where a foundation must have a guardian (as to which see further below) the rules must detail the procedures for the appointment, resignation and removal of a guardian. In the absence of a constitutional provision for the appointment of a new guardian, or if such a provision has failed, or if the person who has the power to appoint

is incapacitated, then the appointment can be made by the founder (his agent or personal representative), the Guernsey Registrar or the Royal Court.

The rules may, and in practice often do, specify other matters such as how the assets of the foundation should be applied and how beneficiaries may be added or excluded. They may also impose obligations on a beneficiary such as a condition of benefitting or contain protective measures to terminate a beneficiary's interest, for example if he becomes insolvent. The rules may also contain other provisions, particularly concerning how the charter or rules of the foundation may be amended or for the appointment of other persons (such as an auditor) to carry out functions for the foundation.

### Letter of wishes

Although not compulsory, where the founder is not going to be directly involved in the running of the foundation (because he is not a council member or the guardian - see below) then it may be useful for the founder to provide the foundation with a letter of wishes. Although not legally binding (unless the foundation provides otherwise), letters of wishes can be useful to the council members and can be updated by the founder as and when circumstances change. Letters of wishes are private documents.

### Publicly available information

The Guernsey Register of Foundations is in two sections - Part A and Part B. Part A of the Register is public and contains the name and registered number of the foundation, the name and address of the councillors and any guardian and the details of the registered office. Part B of the Register provides a statement of the purpose of the foundation and all declarations and other documents filed with the Registrar. Part B of the Register is not public, save for the disclosure of information with consent or in the circumstances prescribed in the Law, such as by court order.

## Offices and roles

### The founder

The founder is the person at whose behest the foundation has been established and who must endow it with its initial endowment. The founder does not automatically have any official role or powers in the running of the foundation once it has been established. This can be drafted into the rules if required.

It is the founder's role to appoint the initial councillors and any guardian and to seek to have the foundation registered. The founder can either be a councillor or a guardian (but not both simultaneously) in addition to being a beneficiary.

A founder can reserve certain powers (such as a power to amend, revoke or vary the terms of the foundations' constitution or its purpose and reserve the power to terminate the foundation but only if these powers are fully detailed in the foundation's charter. Such powers can only be reserved by the founder for the duration of the founder's life (if he is a natural person) or for a period not exceeding 50 years from the date the foundation is established if the founder is a legal person and the reserved powers will thereafter automatically lapse.

### The council and the council members

Guernsey foundations are run by a 'council'. The council is the principal decision-making body in relation to the foundation and exercises the powers of the foundation in much the same way as do directors of a company. Council members only have duties towards the foundation itself. They have no fiduciary duty to individuals who may benefit from the foundation. The council is comprised of at least two councillors unless the constitution permits a single councillor.

### The resident agent

The Foundations Law requires a resident agent to be appointed to every foundation. The resident agent must either be an individual resident in Guernsey and be a foundation official (councillor or guardian) or be a corporate services provider. The principal responsibility of the resident agent is to hold the foundation's records within the jurisdiction and any other information necessary to comply with its duties as a licensed fiduciary.

## The guardian

A Guernsey foundation must have a guardian where there are either disenfranchised beneficiaries or where the foundation is not established for the benefit of individual beneficiaries but for some other purpose. 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 guardian has a fiduciary duty (analogous to Guernsey's trust legislation) to the founder and the beneficiaries of the foundation to act in good faith and *en bon père de famille* to enforce the constitution of the foundation and its purposes and in the exercise of his functions. To this end, in the exercise of his duty, a guardian may bring an action against the council unless the foundation's constitution provides otherwise. The guardian will be named in the public register and must keep and maintain accurate accounts and records of his guardianship for its duration and for six years thereafter.

## Beneficiaries

The Foundations Law permits a foundation to be created with 'enfranchised beneficiaries', 'disenfranchised beneficiaries', or both or neither (it being possible for a foundation to be established solely or partially for a particular purpose). In cases where there are beneficiaries (whether enfranchised, disenfranchised or not), they do not specifically have any interest in the foundation's assets nor will they be owed a fiduciary duty by the foundation or by a person appointed under the rules of the foundation. In that sense, they are different from beneficiaries of a trust, to whom the trustees do owe a direct fiduciary duty. An enfranchised beneficiary is entitled to a copy of the foundation's constitution, the records and accounts of the foundation and to apply to the Royal Court to change the foundation's purposes or to revoke or dissolve a foundation. A disenfranchised beneficiary is not, subject to the terms of the foundation's constitution, entitled to any information about the foundation. This distinction allows the founder a high level of control and confidentiality. The foundation's constitution may state whether, and if so in what manner, a disenfranchised beneficiary may become an enfranchised beneficiary.

## Uses of foundations

In a private wealth context foundations are, as with trusts, most commonly incorporated for charitable, dynastic or legitimate tax planning purposes in other jurisdictions. Foundations can also be used for the purposes of acting as trustee of a trust or trusts set up for the benefit of a particular family. Whereas most professional trust companies will not allow individual family members to act as directors of the trustee (because the trustee provides services to a range of other clients as well), the principal advantage of a foundation is that this is indeed possible. The foundation acts as trustee only for that family's set of trusts and so it is possible to have family members sitting on the council of the foundation. Similarly, a foundation can be established with the sole object of holding the shares in a PTC. As a foundation is incorporated on the instruction of a founder but is neither owned by the founder or by anyone else ownership issues will not arise in that context.

For a settlor, the attraction is often the additional element of control that a foundation can provide. Control is often an issue where the settlor is from a jurisdiction unfamiliar with the trust concept; settlors are, understandably, often unwilling to give away control of the assets to strangers in another jurisdiction. With a foundation, the founder and/or his or her family could serve as councillors and/or be the guardian of the foundation or otherwise be provided with a mechanism for being able to appoint and dismiss the councillors to the foundation.

Some of the uses we have seen so far include:

1. carrying out charitable or philanthropic purposes;
2. providing an asset-holding vehicle where using a trust would give rise to difficulties in civil law jurisdictions that do not recognise the concept of a trust (or at least, struggle to deal with them on a practical level);
3. acting as an alternative to a traditional private trust company, or as an alternative to the purpose trust that would otherwise be used to hold the shares in a private trust company;
4. holding the shares in an off-balance sheet commercial business;
5. retaining and preserving specific assets, including the holding of wasting assets;

6. holding assets for estate planning purposes generally; and
7. acting as a corporate protector where numerous family members wish to come together and have a say in the running of the trusts of which they are beneficiaries.

The formation, management or administration of foundations is subject to regulation and licensing by the Guernsey Financial Services Commission under the Regulation of Fiduciaries, Administrative Business and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000, as amended.

## Conclusion

Guernsey foundations provide a flexible vehicle for many different purposes and this continues to evolve over time. It is generally expected that Guernsey foundations will be used by those who require transparency, who wish to continue to control certain assets without retaining a legal or equitable interest in those assets, or who simply prefer a structure with which they are familiar.

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For further information please refer to your usual contact or:

Guernsey - **Rupert Morris**, Partner | [rupert.morris@walkersglobal.com](mailto:rupert.morris@walkersglobal.com) | +44 (0) 1481 748 936

Guernsey - **Rajah Abusrewil**, Group Partner | [rajah.abusrewil@walkersglobal.com](mailto:rajah.abusrewil@walkersglobal.com) | +44 (0) 1481 748 945

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