

Guernsey foundations

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Introduction

The Foundations (Guernsey) Law, 2012 (the “Law”) came into effect on 8 January 2013 providing for the establishment of Guernsey foundations from that date. This note is a summary of the Law.

Creation

A 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 Registrar of Foundations.

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, address of the registered office must be included in all correspondence sent on behalf of the foundation, together with its registration number. With effect from 15 August 2017 a Guernsey foundation must also have a resident agent who is either an individual resident agent in Guernsey who is a foundation official or a Guernsey regulated corporate services provider.

The foundation’s Constitution is comprised of two core documents; the Charter and the Rules of the foundation. The Charter must contain the name and purpose of the foundation, a description of its initial capital or endowment (there is no minimum) and, if it is a foundation with limited duration, the duration must be stated. It may contain anything else that the founder wants to include. The Rules set out the operative provisions of the foundation and detail the functions of the councillors, the procedures for the appointment, retirement and remuneration of councillors and any guardian, and also

identify the default recipient. The Rules may, and in practice 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.

A Guernsey foundation must have a purpose, the only restriction being that it cannot have as its purpose the carrying out of any commercial activities. It can, however, carry out commercial activities that are ancillary or incidental to its purpose. Consequently, a Guernsey foundation can be established for a wide array of purposes including to hold or administer assets for its beneficiaries or to act as trustee of a trust or trusts (“PTF”) or established as a charity with purely charitable purposes or for other philanthropic purposes. The purpose of a foundation may only be amended by the exercise of an express power to amend in the Charter or by order of the Royal Court.

The Law includes a “firewall provision” providing that all questions arising in relation to a Guernsey foundation are to be determined in accordance with Guernsey law. No judgment or order of a Court outside of Guernsey shall be recognised or enforced in respect of a Guernsey foundation where it is inconsistent with the Law or the Royal Court, for the purposes of safeguarding the purpose of the foundation or the interests of the beneficiaries or in the interest of the proper administration of the foundation, so orders.

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Legal personality and duration

A Guernsey foundation has legal personality, separate from its founder, foundation officials and beneficiaries. A foundation may sue and be sued in its own name. The assets of a foundation belong to the foundation and it may exercise all the functions of a legal person, including the power to hold land.

Unless otherwise limited in the Constitution, a foundation has a continuous existence until its removal from the Register.

Founder

The founder of a Guernsey foundation may determine the purpose of the foundation, craft the foundation's Constitution and must endow it with its initial capital. The founder (or his agent) must also subscribe his name, as the founder, to the Charter of the foundation by signing it. It is also the founder's role to appoint the initial councillors and any guardian and to seek to have the foundation registered.

A founder does not have any interest in a foundation by virtue only of endowing it with its initial capital or further property. However, the founder can either be a councillor or a guardian (but not both simultaneously) in addition to being a beneficiary.

A founder can reserve the power to amend, revoke or vary the terms of the foundation's 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. These reserved powers will thereafter automatically lapse.

Guardian

A Guernsey foundation needs to have a guardian only 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 Rules of the foundation 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.

Subject to the terms of the foundation's Constitution, a guardian may resign his office by delivering a written notice of his resignation to the Council. The Constitution can expressly provide that a guardian is removed from or ceases to hold office on the coming into effect of a particular circumstance (for example, becoming resident in a certain jurisdiction) or upon the exercise of a power of removal. The Council can apply to the Royal Court for the removal of a guardian where

it has reason to believe that the guardian is unwilling or is refusing to act, is bankrupt or otherwise unfit to act, or is incapacitated.

The guardian has a duty to the founder and the beneficiaries to act in good faith and *en bon pere de famille* to enforce the Constitution and the purpose 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 is entitled to inspect the records and accounts of the foundation upon 2 working days' notice in writing to the Council.

A guardian is entitled to be paid and reimbursed by the Council from the foundation's property for all expenses and liabilities properly incurred in connection with the guardianship of the foundation. A guardian is not liable for any loss to the foundation provided he has not acted in breach of duty.

Subject to the foundation's Constitution and the Law, a guardian who commits or connives in a breach of his duty is liable for any loss or depreciation in value of the foundation property resulting from the breach. The terms of the Constitution cannot relieve a guardian of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence and neither can the Constitution grant a guardian any indemnity against the foundation's property in respect of any such liability.

The founder or any person (including a body corporate), but not a councillor, may be the guardian of a foundation. The guardian will be named in the public register and he must keep and maintain accurate accounts and records of his guardianship for its duration and for six years thereafter.

Beneficiaries

A beneficiary of a foundation is someone who is entitled to benefit from the foundation and is either identified in the foundation's Constitution by name, or whose identity is ascertainable as a member of a class or by their relationship to another person.

There are two types of beneficiary; an enfranchised beneficiary or a disenfranchised beneficiary. 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 entitled to any information about the foundation, subject to the terms of the foundation's Constitution. The foundation's Constitution may state whether, and if so in what manner, a disenfranchised beneficiary may become an enfranchised beneficiary. For example, a founder who wishes to protect younger members of his family from the potentially corrosive knowledge of substantial wealth endowed upon a foundation may expressly provide in the Constitution that any beneficiary under a certain age is disenfranchised but will become an enfranchised beneficiary on attaining a specified age.

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Council and councillors

A Guernsey foundation is managed by a Council comprised of at least two councillors unless the Constitution permits a single councillor. The founder or any person (including a body corporate) may be appointed as a councillor but a councillor may not also be a guardian of the foundation.

The Rules of the foundation must detail the procedures for the appointment, resignation and removal of councillors. In the absence of a Constitutional provision for the appointment of a new or additional councillor, 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 Council, the last remaining councillor (or his personal representative/ liquidator), the Guernsey Registrar or the Royal Court.

Subject to the terms of the foundation's Constitution, a councillor may resign his office by delivering a written notice of his resignation to the Council. The Constitution can expressly provide that a councillor is removed from or ceases to hold office on the coming into effect of a particular circumstance (for example, becoming resident in a certain jurisdiction) or upon the exercise of a power of removal. The Council can apply to the Royal Court for the removal of a councillor where it has reason to believe that the councillor is unwilling or is refusing to act, is bankrupt or otherwise unfit to act, or is incapacitated.

If, at any time, none of the councillors nor the guardian of the foundation is a Guernsey licensed fiduciary, then the foundation will require a Guernsey resident agent to hold the foundation's records within the jurisdiction, but it is not required that a licensed fiduciary sits on the Council (although most licensed fiduciaries will insist on the same for governance and regulatory purposes).

The councillors have a duty to the foundation to act in good faith in the exercise of their functions. The councillors of the foundation must execute and administer the foundation only in accordance with the Law, and the terms of the foundation's Constitution and only in advancement of its purpose.

Councillors must act unanimously unless the Constitution provides otherwise. Subject to the terms of the Constitution, where a foundation has more than one beneficiary or purpose the councillors must act impartially, although this does not prejudice their exercise of a discretion conferred on the Council by the terms of the Constitution.

The Council is responsible for ensuring that the foundation keeps records and accounts that are sufficient to show and explain the foundation's transactions, the financial position of the foundation and also detail the day to day entries of receipts and expenditure, together with the assets and liabilities of the foundation. These records must be kept or be accessible in Guernsey.

The Council has a duty, at all reasonable times, to provide full and accurate information as to the state and amount of the foundation property within 3 months of receiving a written request from a guardian, any enfranchised beneficiary or,

subject to the terms of the Constitution, the founder. Even if the terms of the Constitution restrict the provision of information, the founder may apply to the Royal Court for disclosure.

However, unless the foundation's Constitution provides otherwise or the Royal Court so orders, a councillor is not obliged to disclose documents which reveal the deliberations of a councillor as to the exercise of his functions, the reasons for any decision he has made or the material upon which such decision was or might have been based.

A councillor must not profit or cause any other person to profit from his appointment unless expressly authorised to do so by the terms of the Constitution, or as permitted under the Law or with the approval of the Royal Court.

Unless prohibited by the Law or the terms of the Constitution, the Council may delegate the management of foundation property, appoint competent and qualified managers and professional persons to act in relation to the foundation's affairs or hold foundation property (and may also authorise the retention of commission for services rendered). A councillor who makes or permits such delegation or appointment is not liable to any loss to the foundation which may arise provided he has not acted in breach of duty.

Subject to the foundation's Constitution and the Law a councillor who commits or connives in a breach of his duty is liable for any loss or depreciation in value of the foundation property resulting from the breach. The terms of the Constitution cannot relieve a councillor of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence and neither can the Constitution grant a councillor any indemnity against the foundation's property in respect of any such liability.

The Law seeks to protect a person who deals with the foundation in good faith in that he is not bound to enquire as to any limitation on the powers of the councillors to bind the foundation and is presumed to have acted in good faith unless the contrary is proved (it does not constitute bad faith if the person knew the councillors were acting beyond the powers conferred upon them by the foundation's Constitution).

If the validity of a transaction is questioned on the basis of the power of the councillors to bind the foundation, the transaction is voidable by the foundation unless the restitution of the subject matter of the transaction is no longer possible, or the foundation has been accordingly indemnified, or rights acquired bona fide for value and without notice by a non-party to the transaction would be affected, or the foundation affirms the transaction, or the councillor in question discloses the issue to his co-officials and the transaction is not avoided within 3 months.

Whether or not the transaction is avoided the councillor in question, together with any other councillor who authorised the transaction, is liable to account to the foundation for any gain and to indemnify the foundation for any loss or damage resulting from the transaction.

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The register of foundations

The 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.

Resident Agent

Before an application is made for the registration of a foundation, the proposed first resident agent must take reasonable steps to ascertain the identity of the beneficial owners in relation to the foundation applying the tests set out in the Beneficial Ownership (Definition) Regulations 2017, as amended. The resident agent must:

- provide a statement of the required particulars of the beneficial owners of the foundation to the Registrar of Beneficial Ownership;
- take reasonable steps to verify the information provided in the statement and confirm that he has done so; and
- serve copies of the statement and his confirmation on the foundation, and upon request, on the proposed first foundation officials.

Information held by the Registrar of Beneficial Ownership is not available to the public and can only be accessed by a small number of designated persons at the Guernsey Registry, the Guernsey Financial Services Commission and Guernsey's Disclosure of Beneficial Ownership Financial Intelligence Unit.

Disclosure of Beneficial Ownership

The resident agent is obliged by law to disclose the information he holds in respect of the beneficial owners of the foundation to law enforcement or similar agencies for certain permitted purposes relating to investigation or regulatory oversight, whether in Guernsey or elsewhere, but is otherwise not disclosable. Such information is not accessible to and cannot be viewed by the public.

Confidentiality and disclosure

As already noted the Council has a duty to disclose information and enfranchised beneficiaries, the guardian (if any) and, potentially, the founder are entitled to request information and have sight of the foundation's records and accounts.

The foundation is subject to reporting obligations pursuant to The Disclosure (Bailiwick of Guernsey) Law, 2007, as amended, and, also, subject to the positive obligations created by the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended, and other applicable legislation, agreements or conventions.

Regulation of foundations

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, 2020, as amended. A PTF (a foundation established to act as a trustee) will also need to apply for an exemption from licensing where it is to receive fees, whether directly or indirectly, for acting as trustee.

The Guernsey Financial Services Commission has also issued a code of practice for Foundation service providers.

Tax position

A foundation is regarded as a company under the Income Tax (Guernsey) Law, 1975, as amended. This means that for tax purposes foundations are treated like companies in Guernsey. Accordingly, a foundation will be regarded as tax resident in Guernsey if it is established in Guernsey or is controlled or is centrally managed and controlled in Guernsey. However, assuming the foundation's income does not come from a source that attracts a higher rate, such as from a regulated business or from Guernsey land and buildings, the foundation's income would be taxed at the company standard rate of tax of 0%.

Tax Filings of a Foundation

The corporate tax filing obligation of companies that are resident in Guernsey for tax purposes apply to foundations that are tax resident in Guernsey on the basis that a foundation is treated as if it is a company for tax purposes.

CRS, FATCA and Foundations

A foundation which is tax resident in Guernsey and meets the criteria to be classified as a financial institution for the purposes of the OECD's Common Reporting Standard (the "CRS") as implemented in Guernsey will have certain reporting obligations under the CRS in respect of natural persons who hold, or are controlling persons of entities that hold, interests in the foundation and are resident in a jurisdiction that has also adopted the CRS, unless a relevant exemption applies. The foundation will also be obliged to gather due diligence materials in respect of those individuals. The foundation will be required each year to report certain information in relation to those individuals to Guernsey's Revenue Service in the prescribed format, and that information may then be transferred to the tax authorities of other CRS participating jurisdictions in accordance with applicable international exchange arrangements.

If the foundation does not meet the criteria to be classified as a financial institution for CRS purposes, then the foundation will be classified as a non-financial entity, and as such will not in itself be required to comply with CRS reporting and due diligence obligations, but may be required to provide a self-certification of its status, including details of, and due diligence materials relating to, any controlling person holding interests in the foundation, together with supporting due diligence, to a

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financial institution at which the foundation holds a financial account.

The US version of the CRS, FATCA, follows the same approach as the CRS, although the terminology used is different. Under FATCA, a foundation will be either a foreign financial institution or a non-financial foreign entity. Essentially, the classification, due diligence gathering obligations and the reporting obligations are the same as under the CRS, where reportable persons are either residents or citizens of the US for the purposes of tax reporting under FATCA.

Economic Substance and Foundations

Guernsey's economic substance requirements are set out in the Income Tax (Substance Requirements) (Implementation) Regulations, 2021. These regulations expressly exclude the application of economic substance rules to foundations, whether established in Guernsey or elsewhere.



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