



IOM Foundations

Isle of Man Foundations are increasingly being used as an attractive alternative to trusts and other SPV's because of their flexibility in comparison to other vehicles.

The Isle of Man has for many years been a jurisdiction of choice for the structuring, administration and preservation of private wealth. As a common law jurisdiction, companies and trusts have become the traditional vehicles through which wealth is passed in the Isle of Man. This offering was expanded with the passing of the Foundations Act 2011 which came into force on 1 January 2012 and introduced Foundations into Isle of Man law for the first time. The Isle of Man Foundation has a variety of applications, and appeals in particular to individuals and families from civil law jurisdictions where trusts may not be recognised in law.

A foundation is a registered, self-owning legal entity, which although has much in common with limited companies and trusts, possesses its own unique features. They are regarded as one of the most certain and robust vehicles for holding assets and eventually delivering them to their exact intended destination.

The Isle of Man Foundation is an entirely new type of Isle of Man legal entity and is not 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, tailored to suit the Isle of Man. Isle of Man foundations allow the founder the maximum possible freedom of choice while at the same time ensuring that the structure is not susceptible to abuse for money laundering or terrorist financing purposes.

What are the benefits?

Some of the many benefits include:

- Excludes forced heirship
- Full legal capacity and title – removes trust-related concept of 'dual ownership' by the legal owners and the equitable owners
- Limited public filing requirements – the Foundation Instrument will be recorded on public record
- Beneficiaries can be named on establishment or at a later date
- No initial assets required on establishment
- Limitation on liability – a foundation is a separate legal person, meaning that all liabilities remain liabilities of the foundation and do not attach to foundation members
- Flexibility and control – the founder can be a member of the Foundation council and reserve powers to himself, be a beneficiary or an enforcer of the Foundation
- No perpetuity period – allowing a perpetual arrangement for the management of wealth
- Suitability for planning – ideal for controlled management of assets and careful provision for families

Taxation

A Foundation is treated on the same basis as a company for Isle of Man tax purposes. The current standard rate of corporate tax is 0% for all income other than income received from banking business or land and property in the Isle of Man, which income is taxed at 10%.

Setting up a Foundation

In order for a foundation to be established under the Act, an application, made in the form and manner required and must be submitted to the Registrar of Foundations ('the Registrar').

The application must be made by a Class 4 licenceholder.

On approving the application, the Registrar must make the following entries in the Register of Foundations ('the Register'):

- name and address of the foundation;
- its objects;
- names and residential addresses of the council members;
- name and address of the registered agent;
- registration number
- The Registrar will then issue a Certificate of Establishment.

The Registrar must keep a Register that includes the foundation instrument of each foundation, which is available for public inspection.

Foundation instrument

The foundation instrument is the major constitutional document of a foundation (sometimes called, in other jurisdictions, the charter). It must comply with the terms of the Act and must be completed in English. The foundation instrument is a public document.

The name of a foundation must end with the word 'foundation'.

The objects for which the foundation is established must be set out in the foundation instrument. These must be certain, reasonable and possible, not unlawful or contrary to public policy or immoral. The foundation's objects may include 'mixed' objects that benefit a person or class of persons, carry out a specific purpose or do both.

The names of the persons that are beneficiaries under a foundation need not be named in the foundation instrument – they must however be determined in accordance with the foundation rules. Where a foundation has been established for a specified purpose, the foundation instrument need only provide that the foundation is to hold assets in accordance with the foundation rules for that purpose.

The foundation instrument must also specify the names and residential addresses of the members of the council of the foundation. Any subsequent changes to the council members or their details must be notified to the Registrar within one month of the change occurring.

A foundation may not engage in commercial trading which is not incidental to the attainment of its objects. It does however have the capacity to exercise all the rights, powers and privileges of an individual. The capacity of the foundation is not limited by anything in the rules or the act of any person appointed under the rules.

The details of the registered agent must also be included in the foundation instrument.

Foundation rules

The foundation rules ('the rules') may be written in a language other than English. Where this is the case, a translation of the rules must be provided to the registered agent. The rules are not publicly available.

Where the foundation is for the benefit of a person, or class of persons, the rules may provide how the persons, or class of persons, may be changed.

The rules must establish a council to administer the foundation's assets and carry out its objects. The details of administrative matters relating to the foundation council must be contained in the rules. Matters that must be considered include the appointment, retirement, etc. of council members, the manner in which decisions are to be made, including decisions those decisions (if any) that require the approval of any other person. The rules must identify any person empowered to approve a decision.

The Registered Agent

The registered agent is an essential element. No foundation may exist without a registered agent. The rules must make provision for the appointment, retirement, removal and remuneration of the registered agent. The High Court has the power to appoint a registered agent should this prove necessary.

The Enforcer

The appointment of an enforcer is optional, unless the foundation has been established to carry out a specified non-charitable purpose. This is similar to the requirement for a purpose trust to have an enforcer. In cases where the object is to benefit a person, or class of persons, the appointment of an enforcer, while optional, as in the case of the protector of a discretionary trust, may be a prudent consideration. An enforcer must be appointed in accordance with the Act and must exercise the functions of the role in accordance with the terms of the Act and the rules. The duties of the enforcer require that reasonable steps are taken to ensure that the council of the foundation carries out its functions and acts in the best interests of the foundation.

Where an enforcer is appointed, the foundation rules must specify the enforcer's name and address. The rules must also make provision for the appointment, retirement, removal, replacement and remuneration of the enforcer.

Apart from the founder of the foundation and the registered agent no person may be both a member of the council and its enforcer.

The enforcer is empowered to hold the council to account for the way that it has administered the foundation assets and has acted to further the foundation objects. The foundation rules may make provision for the enforcer to approve or disapprove specified actions of the council. Provision can also be made in the rules for the enforcer to sanction or authorise any action to be taken by the council that would not otherwise be permitted by the foundation rules. Before consent is given, the enforcer must be satisfied that it is in the best interests of the foundation to do so and that the council, in taking the action, has acted, or will be acting, in good faith.

The enforcer cannot sanction or authorise any action which is inconsistent with the Act or any other enactment.

The assets

A foundation need not have an initial dedication of assets however, if it does, details of the dedication must be included in the rules. After establishment, further assets may be dedicated to the foundation unless the rules prohibit this. Details of any further dedications permitted under the rules, must be specified in the foundation rules which must be amended to include the details of additional dedications.

Supply of copies of the rules

Members of the council, the registered agent, the enforcer and the founder are all entitled to copies of the rules. No other person must be provided with a copy of the rules unless express provision is made for this in the rules. The exceptions to this rule are under an order of the High Court or where another enactment requires that a copy be provided to some specified person.

The council of a foundation

The council must have at least one member.

A council member must be at least 18 years old. A person cannot be a council member if they are:

- suffering from a mental disorder under the Mental Health Act 1998;
- disqualified from being a member of the council of a foundation; and
- disqualified from being a director of a company.

The registered agent or another class 4 licenceholder may be a member of the council.

Council members have a fiduciary duty to act honestly and in good faith in the best interests of the foundation. They must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

More generally the foundation council must act in accordance with the foundation instrument, the foundation rules and the Act. The Council members need not be resident in the Isle of Man and may be a body corporate.

Rights of persons under a foundation

The rights of founders are as provided for in the foundation rules. Rights of the founder may be assigned to another person if the rules allow for this. A copy of the document detailing the assignment of any rights must be provided to the registered agent.

Beneficiaries

A beneficiary has no automatic interest in foundation assets unless that beneficiary becomes entitled to a benefit under a foundation. If the benefit is not provided, the beneficiary, or person acting on his behalf, may obtain an order of the High Court ordering the foundation to provide the benefit.

Rights of information

A written request for information may be made to the foundation by a person 'with sufficient interest in the foundation'. The foundation must provide that person with information relating to the financial condition of the foundation and assets, the manner in which assets are being administered, the way in which it is carrying out its objects and the administration of the foundation. No information must be provided if this is prohibited by the rules.

A person may however apply to the High Court for an order requiring the provision of the information. The person making application to the High Court must be able to satisfy the High Court that the information requested is required in order to determine whether the foundation is carrying out its objects and that the council is managing the assets and generally administering the foundation as is required.

'Persons with sufficient interest'

The term 'person with sufficient interest' includes a foundation, the founder, a dedicator, a person to whom any rights are assigned, a member of the council, an enforcer, the registered agent, a person appointed under the foundation rules, a beneficiary and any charitable object, a person who, in the view of the High Court, can

reasonably claim to speak on behalf of an object or purpose of the foundation or a person who the High Court determines to be a person with sufficient interest.

Application of laws to a foundation

Isle of Man Law governs any question about Isle of Man foundations.

The transfer of assets to a foundation is not void, voidable or liable to be set aside simply because the law of a jurisdiction outside the Island:

- does not recognise foundations;
- prohibits the dedication of assets to a foundation;
- prohibits the establishment of a foundation and the transfer of assets to it avoids or defeats claims and rights imposed by law of another jurisdiction;
- the establishment of a foundation or the dedication of assets to it contravenes, or potentially contravenes, a rule of law or a judgment or order intended to recognise, protect or enforce any law outside of the Island.
- No enactment or judgment will be recognised, enforced or give rise to any rights in respect of the valid establishment a foundation or the dedication of assets to a foundation established under the Act.

For further information on any of the above services, please contact:

John Bateson
Director – Isle of Man

E-mail: jbateson@dcts-iom.com

Tel direct: +44 1624 649 735