PN24/2014

The Foundations Act 2011

Introduction

This Practice Note has been issued following the introduction of the Foundations Act 2011.

This practice note is intended as a guide to the documents required to be filed with Companies Registry:

- to establish a foundation;
- by a foundation during its period of establishment; and.
- on the dissolution of a foundation.

It is intended as a general guide only and must be read in conjunction with the relevant legislation. It should not be relied upon as a substitute for legal advice.

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1. Features of a Foundation
A foundation is an incorporated, self-owning, legal entity which, although having much in common with a trust, has a distinct legal personality, something that is more commonly associated with companies. There will also be a record of all foundations established under the Foundations Act in the Companies Registry.

2. Establishment
In order for a foundation to be established under the Act, an application, made in the form (MF01) and manner required and must be submitted to the Registrar of Foundations ("the Registrar").
The application must be made by a registered agent (the holder of a class 4 license issued under the Financial Services Act 2008 and permitted to be a registered agent of foundations). The application must be accompanied by the foundation instrument and the appropriate fee. The licenceholder must make a declaration confirming that:

- they will be the registered agent of the foundation on its establishment;
- their address will be the business address of the foundation in the Isle of Man; and
- the licenceholder is in possession of a copy of the foundation rules for the proposed foundation.

If the application meets the requirements of the Act, the Registrar must establish a foundation. Should the Registrar decline to register a foundation, application may be made to the High Court to appeal the decision of the Registrar.

3. Actions by the Registrar

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 must then issue a Certificate of Establishment (MFINC).

The Certificate of Establishment is evidence that the foundation has been established. On establishment, the foundation is a legal person and capable of suing and being sued in its own name, and may hold its assets for its objects.

The Registrar is appointed by the Department of Economic Development and must keep a Register that includes the foundation instrument of each foundation. The Register is available for public inspection.

The Registrar must, on payment of the prescribed fee, issue a certificate stating whether or not a named body is a foundation and include details of its address, registration number, members of the council and details of the registered agent.

A copy of the foundation instrument may be obtained for a fee. The certificate and a certified copy of the foundation instrument are admissible in legal proceedings.

4. 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 the foundation must comply with the “Guidance Notes – Choosing Your Company or Business Name” issued by the Registrar in respect of bodies corporate and unincorporate that are registered in the Isle of Man. 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.

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

5. **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 publically 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 functions of the council and the extent to which they may or must be delegated or exercised in conjunction with another person must be set out in the rules.

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.

6. **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.

7. 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.

Fees and expenses

Unless the rules provide to the contrary, a person who is appointed under the rules is entitled to payment for services rendered to the foundation or for the reimbursement of expenses.

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:

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

The registered agent or another class 4 licenceholder may be a member of the council but only one class 4 licenceholder may be the registered agent at any one time.

Acts of members of the foundation 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.
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.

Capacity of a foundation

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.

Application of laws to a foundation

Isle of Man Law governs any question about Isle of Man foundations. This also covers the dedication of assets to a foundation. This includes matters relating to the capacity of the foundation, its validity, the interpretation or effect of the foundation instrument, the rules relating to the administration or the existence and extent of powers in respect of a foundation such as powers of amendment, revocation etc.

The Act does not however validate the dedication of assets to a foundation where the assets are not owned by the founder or dedicator or that are subject to a power of disposition vested in the founder or dedicator. This means that any person who validly transfers assets to a foundation must have clear, undeniable title and right to transfer the assets to the foundation. This provision.
does not affect the recognition of the law of a jurisdiction outside the Island in determining whether the founder or dedicator is, or was, the owner of property.

Formalities of disposition must be observed when the rules relating to this are rules of another country and, if any such disposal to a foundation is invalid under the law of that jurisdiction, section 37 does not validate that provision.

However, 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.

**Administration of foundations**

Part 3 of the Act relates to the administration of foundations. This makes provision for the service of documents on a foundation.

The documents to be kept at the business address are listed. There is a requirement for reliable accounting records to be kept at the business address.

Every foundation must make an annual return to the Registrar.

**Power of the High Court**

**Regulations**

The Treasury has the power to make regulations on a wide range of matters affecting foundations. The Financial Supervision Commission also has the power to make regulations modifying the Company Officers (Disqualification) Act 2009 in its application to foundations.

Copies of regulations and statutory forms are available on the Companies Registry web site. The full text of the Foundations Act 2011 is also found on this website.

These notes are intended as a general guide only and must be read in conjunction with the relevant legislation. It has no legal status and should not be used as a substitute for legal advice.

5. **Fees payable**

5.1 ‘Standard establishment’ of a Foundation under section 4 of the Act £100

‘2 hour establishment’ of a Foundation under section 4 of the Act £250

‘While you wait establishment’ of a Foundation under section 4 of the Act £500
There is an annual filing fee of £380 payable on the annual statement. There is no fee payable on the Change in Particulars Form. If you fail to submit any of these forms within the one month filing period, a late fee is payable in addition to any other fee charged.

5.2 The late fee is calculated as follows:

<table>
<thead>
<tr>
<th>Time Period</th>
<th>Late Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 month and one day to 3 months</td>
<td>£100</td>
</tr>
<tr>
<td>More than 3 months</td>
<td>£250</td>
</tr>
</tbody>
</table>

5.3 Details about all fees payable in the Companies Registry are obtainable from our website www.companiesregistry.gov.im. Payment of fees can be made in cash or by cheque made payable to “Isle of Man Government”. We regret that we cannot accept cheques drawn on an account outside the U.K.

6. FURTHER INFORMATION

Our staff will willingly answer general queries by telephone or e-mail but cannot give legal advice. If you require such advice you should consult an Advocate. The telephone number for the Companies Registry is: 01624 689389 and the e-mail address is: companies@gov.im

Statutory forms and practice notes are available free of charge from the website: www.companiesregistry.gov.im.

Forms can also be obtained from legal stationers, accountants, advocates and Corporate Service Providers whose addresses can be found in the business section of the telephone book or at: www.manx-ads.com

A list of Licence holders is available on the web site of the Financial Supervision Commission at www.fsc.gov.im/Licenceholders.

Details of Isle of Man Advocates are available from the Isle of Man Law Society at:

Isle of Man Law Society
27 Hope Street
Douglas
Isle of Man, IM1 1AR
Telephone: +44 (0)1624 662910
Fax: +44 (0)1624 679232
E-mail: enquiries@iomlawsociety.co.im
Website: www.iomlawsociety.co.im

Documents may be submitted at any time during office hours (9.00am to 4.30pm Monday to Thursday and 9.15am to 4.30pm on Friday) ‘over the counter’ in the Companies Registry.

Submission may also be effected by post or after office hours by way of the letterbox to the left of the main staff entrance in Hill Street. Presenters requiring acknowledgement of receipt of a document should provide a stamped self-addressed envelope.

The Companies Registry will remain closed on the first Wednesday of each month until 11.00 hrs for staff training. Documents can still be left in the letterbox.

For the purpose of determining the date of submission of a document, documents submitted after 4.30 p.m. on any working day (Day 1) but before 9.00 a.m. on the following working day (Day 2), will be treated as having been submitted on Day 1. For the avoidance of doubt, documents submitted before 9.00 a.m. on the day immediately following a weekend or Bank Holiday will be treated as having been submitted on the last working day prior to the weekend or Bank Holiday.

It is the responsibility of presenters to ensure that documents arrive in the Companies Registry within the filing periods prescribed.

We are aware that post can on occasion be delayed. However presenters should be aware of that and post documents in plenty of time. The Companies Registry cannot operate a system
which allows for such delays as to do so would simply amount to an extension to the filing periods set down by law.

Please note: The Department does not currently accept statutory documents by fax or E-Mail.