

Introduction to Jersey Foundations

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In 2009 Jersey will unveil its draft **Foundations (Jersey) Law 200[]** (the “Draft Law”) and, although the introduction of the civil law concept of private foundations into a jurisdiction that has built its name and reputation around the common law trust will undoubtedly raise a few eyebrows, there is no doubt that Jersey’s finance industry relishes the prospect of adding the private foundation to its repertoire.

KEY FEATURES

A foundation incorporated under Jersey law will have some of the features of a body corporate and some of the features of a trust. Like a Jersey company, Article 30 of the Draft Law provides that a Jersey foundation will be a body corporate capable of exercising all the functions of a body corporate. In contrast to a company however it will have no directors, shareholders or shares but will instead act through a foundation council which will administer the assets of the foundation and carry out its objects. Once assets are settled by a founder into a foundation the assets will belong to the foundation and are to be applied for the

benefit of the beneficiaries and/or identified purposes.

STRIKING THE BALANCE BETWEEN TRANSPARENCY AND PRIVACY

When considering the provisions of the Draft Law, the attractions for high net worth individuals are immediately apparent. For some individuals attracted to Jersey by its expertise in matters of asset management, a perception of ‘secrecy’ associated with trusts has proved a deterrent. In relation to foundations, the Draft Law seeks to achieve a balance between transparency and privacy which will undoubtedly be attractive to many potential founders.

Foundations under Jersey law will be required to have both a charter and a set of regulations. Article 2 of the Draft Law provides that at the time of incorporation a copy of the foundation’s charter will need to be filed with the registrar and will be available to the public for inspection. The charter of a foundation must, inter alia, specify the name of the foundation, the objects for which the

foundation was established, the names and addresses of the first council members and details of the initial endowment, if any. In contrast to the charter the regulations of a foundation will be entirely private. The matters that need to be contained within the regulations are set out at Articles 11 to 17 of the Draft Law and include the establishment of a council to administer the foundation's assets and to carry out its objects, provision for the appointment and retirement of the council members and the mechanism for how the decisions of the council are to be made.

ROLE OF THE GUARDIAN

The appointment of a guardian is compulsory under the Draft Law. The nature of the guardian's role is set out in Article 15 of the Draft and is extremely important in ensuring that the foundation council is held to account given the absence of shareholders and the fact that a beneficiary under a foundation has no interest in the foundation's assets and is not owed any fiduciary duties. Amongst other functions the guardian must take such steps as are reasonable in all the circumstances to ensure that the council of the foundation carries out its functions.

SAFEGUARDING JERSEY'S REPUTATION

One question that has arisen in the process of debating foundations is what steps Jersey can take to safeguard its reputation from a regulatory perspective. This is an issue that was considered carefully and in order to overcome the concerns raised Article 21 of the Draft Law now provides that the foundation council must include at least one qualified person and that certain prescribed functions in respect of foundations will only be allowed to be carried out by qualified persons. A qualified person is defined as a person registered under the **Financial Services (Jersey) Law 1998** to carry out trust company business.

ROLE OF THE ROYAL COURT

One concern commonly raised in relation to the introduction of a foundations law is how the Royal Court will set about interpreting the Draft Law when called upon to do so. This is an important consideration given the broad powers that it has under the Draft Law. The answer lies, at least in part, in the fact that the private foundation is essentially comprised of a hybrid of commercial and trust law principles. Viewed like this there can be no doubt that the Royal Court already has before it the essential tools to enable it to decide the complex and varied questions that it may from time to time be asked to consider.

CONCLUSION

The Draft Law has been carefully developed to ensure both simplicity and flexibility. It has a number of appealing characteristics which when combined with the strength of Jersey's reputation for excellence in the private client arena will without doubt allow Jersey to develop into a leading jurisdiction for the incorporation and administration of foundations.

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