



Guide to  
Jersey  
Foundations

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## PREFACE

This guide provides an outline of the key features of a Jersey foundation as well as some of the many uses to which it can be put.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have. The Guide is intended to provide a sketch of the subject matter covered and is, therefore, designed as a starting-point for a more detailed and comprehensive discussion of the issues.

**Appleby**  
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## 1. INTRODUCTION

The long-awaited Foundations (Jersey) Law 2009 (the “Law”) was brought into force by the States of Jersey on 17 July 2009.

The existence of a new wealth management product along with the many structuring opportunities that accompany it is likely to be of considerable interest to a wide variety of clients. For this reason it is essential that all private client lawyers and wealth management advisers are familiar with the key features of a Jersey foundation as well as some of the many uses to which it can be put.

In addition, it is inevitable that the introduction of the Law, coupled with Jersey’s recent G20 “white” list status and its established wealth management industry, will lead clients to enquire about the possibility of migrating to Jersey existing foreign-law structures which they wish henceforth to be continued as Jersey foundations. The draft Foundations (Continuance) (Jersey) Regulations 200- (the “Regulations”), introduced simultaneously with the Law, provide a clear framework for migrating “recognized entities” to Jersey. Again, it is important to be aware of the scope of the Regulations and the mechanism for migration.

This briefing will provide you with the basic information needed to answer your clients’ questions about Jersey foundations and the migration of foreign-law structures to Jersey. For more detailed information the Appleby team will be happy to assist and contact details can be found at the end of the briefing.

## 2. WHAT ARE THE KEY FEATURES OF A JERSEY FOUNDATION?

In a nutshell, the Jersey foundation is an entirely new legal concept and wealth-management vehicle for Jersey. The Jersey foundation will be an incorporated body which, in contrast to a trust, will be able to transact in its own name. Once incorporated at the request of the founder, the foundation will act through its council which will govern the foundation in accordance with the terms of the foundation’s charter and regulations. It will be a legal requirement for every Jersey foundation to have a qualified member on its council as well as a duly-appointed guardian. There is no requirement for a foundation to have beneficiaries and if it does their interests are limited and their rights may be restricted.

It will be helpful to consider the process of incorporation, the principal documents and the key individuals relevant to a foundation in a little bit more detail.

**Incorporation** – The application for incorporation of a Jersey foundation is a regulated activity and must be undertaken by a qualified person, namely one which is registered under the Financial Services (Jersey) Law 1998 (the “Law”). In practice, this will usually be the same person as the qualified member. The application process is clearly set out in the Law. The application is made to the registrar of companies (the “Registrar”) and must be accompanied by the proposed charter (in English), the published fee and a certificate signed by the applicant (the “Certificate”). The Certificate will identify the initial qualified member and provide its business address in Jersey. It will confirm that the applicant is in possession of a set of regulations approved by the founder and the qualified member and confirm that the initial guardian of the foundation has been selected. Once incorporated, the name of the foundation and the details of the qualified member will be entered in the register maintained by the Registrar and the foundation will be given a registration number. An entry in the register is conclusive evidence of incorporation.

**Founder** – The founder of the foundation is defined by the Law as being the person who instructs the qualified person to apply for the incorporation of the foundation. The Law provides that the founder may enjoy specified rights and powers in relation to the foundation. It is important to be

aware that a person who makes an endowment to the foundation will not automatically be classed as a founder or endowed with the rights of the founder unless the regulations provide otherwise.

**Council** – Every foundation must have a council to administer its assets and to carry out its objects. The council may have one or more members but must include amongst its number a qualified person who will act as the qualified member. The members of the council must conduct the foundation’s affairs in accordance with its charter and regulations and the Law. The council must act honestly and in good faith with a view to the best interests of the foundation and must also exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances. Nothing in the charter or regulations of the foundation shall relieve the council members from fraud, wilful misconduct or gross negligence.

**Charter** – The charter is a publicly available document which must be filed with the Registrar at the time of incorporation of the foundation. The charter must comply with the requirements of the Law and in order to do so must contain the following features and information:

- The name of the foundation. This must not be misleading and must end with the word “Foundation” or its foreign language equivalent.
- The objects of the foundation must be specified. The objects must be lawful and may be charitable, non-charitable or both. They may be to benefit a person or class of persons, carry out a specified purpose or both. If the foundation is being established to benefit a person or class of persons, then the identity of the beneficiary or beneficiaries need not be disclosed in the charter but can instead be contained within the regulations.
- The charter may specify the names and addresses of the first members of the council.
- A foundation does not need an initial endowment but if it does have one details must be given in the charter which must also state if further endowments can be made.
- The charter must specify what is to happen to any assets of the foundation upon the winding up of the foundation.
- If a foundation is to be wound up upon the happening of a specific event or at the expiration of a fixed period of time, this should be stated in the charter.
- If any person has the right to wind up a foundation, this must be specified in the charter.

The charter may provide for any other matter in respect of the foundation. The extent of the information contained within the charter is likely to vary depending on the purposes for which the foundation is being established and the level of transparency that is deemed appropriate. Charitable foundations, for instance, will often be willing for more information to be publicly available than foundations established as wealth management vehicles for private families.

**Regulations** – The regulations of a foundation are a private document and only those defined as “persons appointed under the regulations of the foundations” will have access to them unless the regulations provide otherwise. Whilst the level of detail that can be contained within the regulations is limitless, their core requirements are to provide for the establishment of the council and the appointment, retirement, removal and remuneration of the council members, to set out the decision-making processes of the council and to state whether any third-party consents are required and what functions, if any, may be delegated by the council. In addition, the regulations must provide for the appointment of a new qualified member in the event that the existing qualified member ceases to act.

The regulations must also identify the initial guardian and provide for the replacement and remuneration of the guardian.

**Qualified Member** – In order to safeguard Jersey’s reputation from a regulatory perspective, it was deemed appropriate that every foundation council should include amongst its number a qualified member. The qualified member of the council will be identified in the certificate filed with the Registrar at the time of incorporation and must be a person registered under the Financial Services (Jersey) Law 1998 to carry on trust company business.

**Guardian** – The appointment of a guardian is compulsory under the Law. The guardian has an extremely important role in ensuring that the foundation council be held to account given the absence of shareholders and the limited rights of beneficiaries under a foundation. Among other things, 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.

**Beneficiaries** – To the extent that there are one or more beneficiaries of a foundation, then they will have no interest in the foundation’s assets and are not owed any fiduciary duties. Except as provided for by the law or by the charter or regulations of the foundation, beneficiaries of a foundation are not entitled to be provided with any information about the foundation including its administration, its assets or the way in which it is carrying out its objects. But if a beneficiary has become entitled to benefit under the foundation, then the beneficiary may seek an order of the Royal Court ordering the foundation to provide the benefit.

### 3. MIGRATION OF FOREIGN RECOGNISED ENTITIES

Many clients in countries with civil law roots have historically avoided common law trust jurisdictions, preferring instead to make their wealth management arrangements in jurisdictions such as Liechtenstein or Panama where they are able to make use of a foundation in much the same manner as they might of a company or of a trust, depending on their particular needs. In Jersey, the introduction of the Law will of course lead to the establishment of new foundations. In addition, however, it is anticipated that there will be persons who will wish to migrate existing foreign law foundations to Jersey in order to take advantage of all that Jersey has to offer in terms of its ‘white’ list regulatory standards, high quality legal and professional services, mature and sophisticated court system and proximity to London and Switzerland.

With this in mind, regulations have been prepared which set out the procedure not only for enabling Jersey companies to continue as foundations but also for migrating foreign recognized entities to Jersey. A ‘recognized entity’ will include any body corporate incorporated or established outside Jersey, whether by registration, endowment or otherwise and whether or not having legal personality, that has been designated as a recognized entity under the regulations. To begin with, it is intended that the following entities will be designated as recognized entities and therefore suitable for continuance namely Panama Private Interest Foundations, Bahamas Foundations, Liechtenstein Stiftungs, Liechtenstein Anstalts, St Kitts Foundations and Nevis Multiform Foundations.

Let us take a look at the process for migrating a foreign recognized entity to Jersey.

#### **Step 1 – A preliminary requirement**

As with an application to incorporate a foundation, an application to migrate a foreign recognized entity is a regulated activity and accordingly the application must be made by a qualified person. The application is made to the Jersey Financial Services Commission (the “Commission”) but before any such application can be made it must be preceded by the publication of a notice of intention to

migrate (the “Notice”) in the manner directed by the Registrar. A copy of the Notice must also be sent to each creditor with a claim against the recognized entity exceeding £5,000 and to the Registrar. The Notice must state that the recognized entity will be seeking incorporation as a foundation, the jurisdiction in which the recognized entity is currently established or incorporated and the type of recognized entity that it is. The Notice must also confirm that if the recognized entity were to be incorporated as a foundation it would on its incorporation be solvent. In the event that granting the application to migrate would give rise to a continuance of an insolvent foundation, then an Act of the Royal Court must be obtained stating that the incorporation of the recognized entity as a foundation would not be prejudicial to the interests of its creditors.

A twenty-eight day period exists in which objections to the proposed incorporation may be made to the Royal Court.

## **Step 2 – The application**

Having dealt with the preliminary requirements, the application for incorporation must be filed with the Commission. It will be accompanied by a copy of the charter (in English) which the foundation would have if it were to be incorporated under the Law and the published fee.

The application must also be accompanied by a certificate signed by a qualified person confirming:

- that a named qualified person will become the qualified member of the council of the foundation were the recognized entity to be incorporated as a foundation;
- that the qualified person signing the certificate is in possession of regulations approved by the recognized entity and the qualified person;
- the business address of the qualified person who will act as the qualified member;
- that a person has been selected to act as guardian of the prospective foundation;
- that the laws of the jurisdiction in which the recognized entity is established or incorporated do not prohibit the entity from making the application;
- that any authorization required by the laws of the jurisdiction in which the recognized entity was incorporated or established has been given;
- that if the recognized entity becomes incorporated as a foundation it will in due course cease to be an entity incorporated or established under the laws of the jurisdiction in which it was previously incorporated or established; and
- that if the recognized entity becomes incorporated as a foundation the interests of the creditors of the entity will not be unfairly prejudiced.

## **Step 3 – The ruling of the Commission**

Upon receipt of the application by the Commission, the accompanying documents will be forwarded to the Registrar. Before determining the application, the Commission may require security from the recognized entity for its reasonable expenses and may require further information to be provided in relation to the application.

An application to incorporate a recognized entity as a foundation can be refused by the Commission if it is satisfied that it is necessary to do so in order to protect the reputation and integrity of Jersey in financial and commercial matters, it is in the best economic interests of Jersey, or it necessary to protect the international standing of Jersey.

In the event, however, that the Registrar is satisfied that the law has been complied with, then he must proceed to incorporate the recognized entity as a foundation. To do this the Registrar must enter in the register the name of the foundation, the name and business address of the qualified

member, the name of the recognized entity to be incorporated as the foundation and the name of the jurisdiction in which it is established or incorporated.

The foundation will then be provided with a registration number and as well as notifying the qualified member of the incorporation the Registrar will also inform the appropriate official or public body in the jurisdiction where the foundation was originally established or incorporated.

From the date of incorporation of a recognized entity as a foundation under the Law, the recognized entity will continue to exist, but will do so as a Jersey foundation with the named specified in respect of it in the register.

#### **4. THE POTENTIAL USES OF A JERSEY FOUNDATION**

It is envisaged that for clients and authorities originating in civil law jurisdictions where the concept of a trust may be less familiar, a foundation may be a more acceptable vehicle for use in connection with wealth management. Foundations have a number of qualities and attributes that may appeal to affluent clients. For example, a foundation is a distinct legal entity which can exist for an unlimited duration. Foundations allow extensive rights to be reserved to the founder and the role of the beneficiaries of a foundation, if indeed there are any beneficiaries, is much more restricted than is the case with trusts. A foundation can be used to achieve the same ends as a discretionary trust but, for the reasons identified, the foundation context may be more attractive to some clients than a traditional and, arguably, more demanding trust relationship.

Foundations are the ideal vehicle to hold the shares in private trust companies (“PTCs”). Traditionally non-charitable purpose trusts have been used for this purpose. Following the introduction of the Law, however, foundations are likely to become the preferred vehicle for use in such a situation. The rationale for this is that foundations, unlike companies, do not have shareholders and may also be free of beneficiaries. In this sense foundations can truly achieve ‘orphan’ status.

The use of foundations in the field of charitable and philanthropic giving is well established. Given that Jersey foundations can be established for both charitable and non-charitable purposes, it is envisaged that Jersey will become a prime jurisdiction for the incorporation of charitable and non-charitable foundations. This is due not only to the flexibility of the Law but also to Jersey’s enviable regulatory reputation and the quality of the wealth management services that it is able provide.

As well as wealth management and estate planning, foundations may have applications in more specialist areas such as capital structuring arrangements where it is desirable that property be given to a legal entity and applied for specific purposes, such as to hold a specific asset which may or may not be a “wasting” asset. For trustees, because of their duty to diversify trust assets and to act in the best interests of the beneficiaries of a trust, such structuring may on occasion have posed difficulties; the council of a foundation will not necessarily be faced with the same considerations or concerns.

For more specific advice on Jersey Foundations, we invite you to contact one of the following:

James Gaudin  
Partner, Corporate & Commercial – Jersey  
+44 (0)1534 818 337  
[jgaudin@applebyglobal.com](mailto:jgaudin@applebyglobal.com)

Marc Guillaume  
Senior Associate, Private Client & Trusts – Jersey  
+44 (0)1534 818 280  
[mguillaume@applebyglobal.com](mailto:mguillaume@applebyglobal.com)

Naomi Rive  
Partner and Group Head, Private Client & Trusts – Jersey  
+44 (0)1534 818 367  
[nrive@applebyglobal.com](mailto:nrive@applebyglobal.com)

Jonathan Vanderkar  
Managing Partner, Corporate & Commercial – Zurich  
+41 44 214 6522  
[jvanderkar@applebyglobal.com](mailto:jvanderkar@applebyglobal.com)

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