



Isle of Man Foundations



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From 1 January 2012, international clients and advisors will be able to incorporate and use the new flexible yet sophisticated Isle of Man foundation following the introduction of the Foundations Act 2011.

A foundation is an incorporated, self-owning, legal entity which, although having much in common with limited companies and trusts, possesses its own unique features. Foundations have separate legal personality and are therefore capable of holding assets, suing and being sued. The main difference between limited companies and foundations is that the latter cannot directly engage in commercial trading that is not incidental to its objects. It can, however, easily get around this issue by holding a trading subsidiary.

As an incorporated entity, a foundation can transact in its own name but it has no 'owner' as such, so the person who establishes the foundation (known as the 'founder') cannot be liable for its debts.

The founder of a foundation can retain greater control over the objects and administration of the foundation compared with the settlor of a trust. Furthermore, foundations can exist in perpetuity, unlike trusts.

Potential uses of a foundation

- as a useful succession planning or wealth management vehicle (e.g. to hold the shares in a family business to protect it from competing wishes concerning its future);
- to hold the shares in a private trust company (PTC);
- charitable foundations;
- 'orphan' or off-balance sheet structures, for example securitisations or distressed ship refinancing which is becoming increasingly common through Isle of Man vehicles;
- holding wasting assets (e.g. superyachts and business jets);
- generally as an alternative to trusts for clients in non-common law jurisdictions (who may not be comfortable with using a common law trust structure).

Foundation terminology

Founder: This is the person who causes the foundation to be established (similar to the settlor of a trust). The founder may provide initial assets of the foundation, but this does not have to be the case.

Registered Agent: Every foundation must have a registered agent, who may be a natural person or a corporate service provider. It is the registered agent who must apply to the Companies Registrar (the "**Registrar**") in order for the foundation to be established. The registered agent must hold a Class 4 licence issued by the Isle of Man Financial Supervision Commission. The registered agent may be, but is not obliged to be, a member of the council.

Council: This is the body charged with the day-to-day administration of the foundation, similar to the board of directors of a company or the trustees of a trust. Council members must act honestly and in good faith and exercise the standard of care of a reasonably prudent person. The duty of council members to act in good faith is fiduciary in nature.

Enforcer: An enforcer is only required for foundations whose objects are to carry out a specified non-charitable object (similar to a purpose trust). However, if required, an enforcer may be appointed in any foundation. The enforcer (if any) is charged with policing the council to ensure that it acts in accordance with the foundation's objects. The role is comparable to that of the protector of a trust.

Beneficiaries: It may be the case that there are no beneficiaries, for example if the foundation's sole object is to hold assets. This is a matter entirely for the founder's discretion. Even if there are named beneficiaries, they have no right to receive distributions and no automatic right to information or documents about the foundation.

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Foundation documents

Similar to a limited company, a foundation need only have two official documents. These are the 'foundation instrument' and the 'foundation rules.' The foundation instrument is similar to a company's Memorandum of Association and must set out the name of the foundation, its objects and the members of its council. The instrument is a public document. The foundation rules, comparable to the Article of Association of a company, contain the substantive provisions concerning the management and running of the foundation. The rules are a private document and do not need to be filed with the Registrar.

Establishing a foundation

The registered agent will need to submit an application form to the Registrar accompanied by a copy of the foundation instrument and the applicable fee. The proposed name of the foundation must contain the word 'foundation' and must not be identical or too similar to the name of an existing Manx company or charity. The Registrar has discretion to approve or reject proposed names.

What should you consider including in the foundation rules?

In order to secure the good administration of the foundation, it is critical that the rules are drafted according to the founder's wishes. If the founder wishes to retain a high level of control over the running of the foundation, then the appointment of an enforcer is an important consideration. It is even possible for the founder to appoint him/herself as enforcer.

The rules should also make detailed provision in respect of:-

- the council, including the voting procedures it must adopt, its remuneration (if any), retirement, replacement and delegation of roles;
- distributions of foundation assets;
- the beneficiaries, and what rights (if any) they are to have;
- the identity of the registered agent, including provision for remuneration (if any), retirement and replacement;
- the procedure for the winding-up of the foundation and what should happen to any surplus assets upon winding-up;
- the procedure for amending the foundation rules; and
- whether the foundation can migrate to another jurisdiction.

Continuance and discontinuance of foundations in the Isle of Man

Subject to certain conditions, a foreign foundation may apply to be continued as a foundation established under the laws of the Isle of Man.

Conversely, a foundation established in the Isle of Man can apply to be continued as a foreign foundation under the laws of another jurisdiction, again subject to certain conditions.

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Powers of the Court

The Foundations Act 2011 gives certain powers to the Isle of Man High Court in relation to the supervision of foundations (similar in nature to its supervisory jurisdiction over trusts), including the power to:-

- order a person to comply with an obligation under the Foundations Act 2011 or under the instrument or rules of a foundation;
- order the amendment of the instrument or rules;
- give directions in respect of foundations;
- protect interests of certain persons under a foundation;
- dismiss or appoint the registered agent of a foundation;
- take action on behalf of others in respect of a foundation.

Advantages of the Isle of Man:

High regulatory standards

The Isle of Man is a sophisticated and well-regulated international finance centre. It is AAA rated and features consistently in International Awards rankings as a leading offshore jurisdiction.

Favourable tax regime

Isle of Man foundations (just like Isle of Man companies) benefit from a corporate tax rate of 0% (a tax strategy which is compliant with the EU Code of Conduct on Business Taxation). There are no capital or wealth taxes on the Isle of Man. The Island is treated as part of the European Union for VAT and customs duty purposes and Isle of Man companies can be part of United Kingdom VAT groups.

Geographical location

The Isle of Man offers a convenient European location as well as the benefit of being located within the British time zone.

Stable legal and political environment

The Island enjoys political stability and is self-regulating (having the world's oldest continuous legislature with over 1,000 years of democratic home rule). The Island also benefits from membership of the WTO, the IMF and the OECD (via its relationship with the UK).

Law

The Island has its own sophisticated legal system which is based upon the principles of English law shared by most commonwealth countries. Lawyers and businesses who are familiar with English law will therefore be reassured by their choice of the Isle of Man as a jurisdiction in which to conduct international business. Lawyers and clients who are familiar with civil law systems, and who establish foundations in the Isle of Man, can be reassured by the sophisticated legal system and the world class professional services offered on the Isle of Man.

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Our team

DQ is a leading full service law firm in the Isle of Man advising on Isle of Man and BVI law. Our lawyers are recommended in Chambers and Legal 500.

DQ's specialist trust & private client team provides a complete, integrated service to local and international trust clients. Our trust lawyers are widely regarded as being the Island's leading authorities on trust law, as evidenced by our recommendations in the independent global legal directories. Our lawyers are also regular speakers on the domestic and international trust conference circuit. They are also regular contributors to international trust law publications.

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