

GUIDE TO GUERNSEY FOUNDATIONS

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PREFACE

This Guide is intended to provide basic information needed to answer questions on Guernsey foundations and the migration of foreign law foundations to Guernsey.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. For more information the Appleby team will be happy to assist and [contact information](#) can be found at the end of the Guide.

Appleby

Guernsey

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1. GUERNSEY AS A FOUNDATION JURISDICTION

Guernsey is a premier international fiduciary centre with a long history in the provision of fiduciary services. It is perhaps best known for its trusts law and administration of trusts, having a wealth of experience in this area which continues to develop to meet the needs of its ever mobile international clients and also the developing international regulatory environment. Guernsey has some 190 licensed fiduciaries, ranging from large internationals to independent boutique operations.

As expected, Guernsey's fiduciary services industry is dynamic and innovative. This has led to the enactment of The Foundations (Guernsey) Law 2012 (the **Law**) providing for the creation and administration of Guernsey foundations. This additional or alternative wealth management vehicle, and the structuring opportunities that accompany it, is likely to be of considerable interest to a wide variety of clients, in particular for those from civil law countries less familiar with trusts. It will also be of interest to those with existing foundations who are attracted to Guernsey's G20 "white" list status and excellent wealth management reputation and who are looking to migrate their existing foundations from less well regulated or less convenient jurisdictions.

As a result of Guernsey's leading laws, and its accumulated wealth of expertise, Guernsey has an excellent reputation as a tried and tested jurisdiction. Guernsey is in the forefront of a group of jurisdictions committed to full compliance with the OECD's international standards in tax transparency and exchange of information.

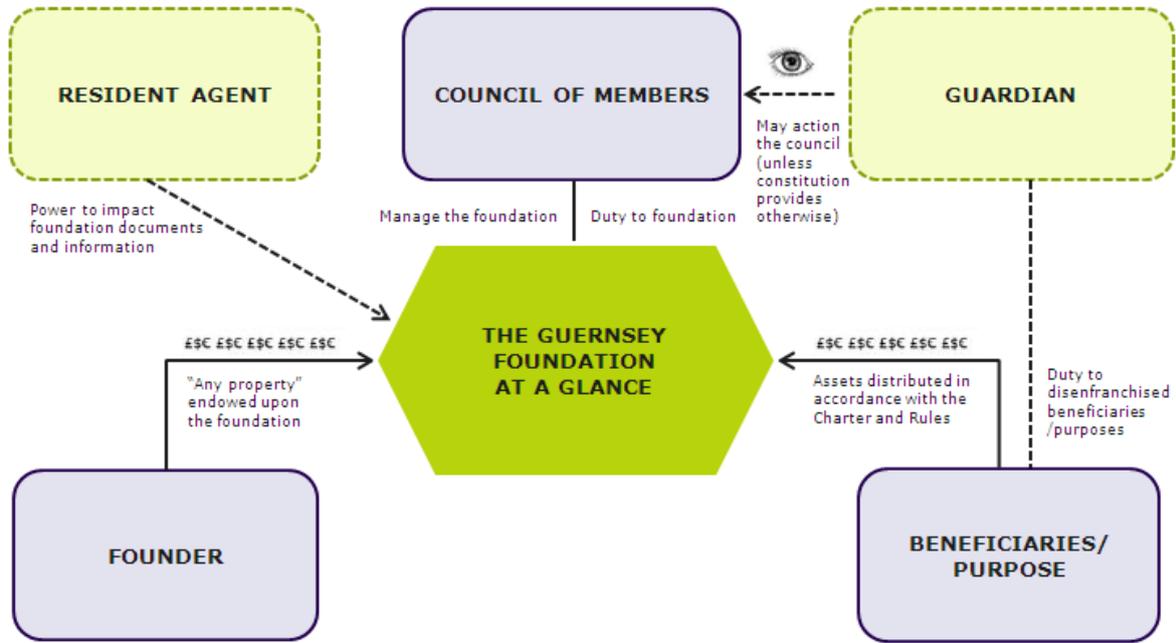
2. WHAT IS A GUERNSEY FOUNDATION?

A Guernsey foundation is an incorporated entity with separate legal personality but which, unlike a company, does not have shareholders. Instead, it holds assets in its own name on behalf of beneficiaries, or particular purposes, or both, and it operates in accordance with a constitution comprising of a charter and a set of rules. Unlike a company, it cannot carry out commercial activities except those necessary for, or ancillary or incidental to, its purpose. As such it is an entirely new legal entity for Guernsey; looking similar to a company but with an operation more akin to that of a trust.

Once incorporated at the request of the founder, a foundation will act through its council which will govern the foundation in accordance with the terms of the foundation's constitution. The council members perform much the same role as trustees or directors. Although not specifically expressed to have a fiduciary duty, the Law nonetheless specifies that the council has a duty to the foundation to act in good faith. If the terms of the constitution allow the beneficiaries access to foundation information, the beneficiaries may hold the councillors to account by protesting to the court if they do not abide by the constitution or breach their responsibilities. If the beneficiaries are barred from receiving such foundation information, they are termed **disenfranchised** and Section 10 of the Law dictates that the foundation must then appoint a guardian. A guardian must also be appointed if there are no beneficiaries or the foundation has purposes.

Unlike most other jurisdictions, the guardian has a duty to the founder and the beneficiaries to act in good faith and *en bon père de famille* to enforce the constitution and purpose of the foundation and also the exercise of their functions. However, provided the beneficiaries are **enfranchised** and there are no purposes, a guardian is not mandatory. There is also no requirement for either a council member or the guardian (if any) to be a Guernsey licensed fiduciary, although in such circumstances a **resident agent** must be appointed. The resident agent must be a Guernsey licensed fiduciary or **authorised person** (e.g. a director, manager or employee of a Guernsey licensed fiduciary), resident in Guernsey, and will have rights to view such foundation information as is necessary to ensure the foundation is complying with Guernsey Law.

A TYPICAL GUERNSEY FOUNDATION STRUCTURE



3. REGULATION OF GUERNSEY FIDUCIARIES

Guernsey is renowned for its robust yet pragmatic regulation of professional fiduciaries who have been actively and effectively regulated by the local regulator (the Guernsey Financial Services Commission) since April 2001.

4. FREQUENTLY ASKED QUESTIONS?

4.1 How are Guernsey foundations incorporated?

A key distinction from trusts, and for some clients a key benefit of the foundation, is that the Guernsey foundation can be formally incorporated and registered. The Guernsey Registrar of Foundations (the **Registrar**) manages incorporations.

Only a Guernsey licensed fiduciary may apply to register a foundation. To do so they must file with the Registrar: the Charter; a declaration signed by the founder (or their resident agent) approving the details set out in the Charter; the applicable registration fee (£100 for 24 hour registration and £350 for two hour registration); and other details set out in Section 7 of Schedule 1 of the Law - such as the names and addresses of the councillors and guardian (if any) and their written consent to taking up their position. In addition, the foundation must have an initial endowment of assets.

Upon receiving the required information, the Registrar will inscribe the foundation’s name on the register of foundations, allocate a registration number and issue a certificate of registration. The certificate will state the name and registered number of the foundation, its registered office, its date of establishment and its duration (which may be unlimited), and the signed copy will be conclusive evidence of compliance with the registration requirements.

4.2 What are the Charter and Rules?

The Charter must:

- state the name of the foundation. This must include either the word **foundation** or the abbreviation **Fdn**. It cannot include any word such as "Imperial", "Royal", "Queen" or "Crown" which implies, or might be taken to imply, royal or government connection, support or patronage, unless Her Majesty's Procureur has given written permission for use of that word. It also cannot have the same name as an existing foundation or be named so as to induce the public to confuse the foundation with some other person or body previously established in Guernsey or elsewhere;
- state the purpose of the foundation. A foundation may be established for any purpose, whether charitable or non-charitable and may be for the benefit of a named person, class of persons or simply a general purpose. However it cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose, and its purposes cannot be illegal under Guernsey law. That said it can carry out commercial activities via an underlying company;
- describe the initial capital of the foundation;
- state the duration of the foundation (which may be unlimited); and
- contain a declaration from the founder that he wishes the councillors to comply with the terms of the Charter. If the founder does not wish to sign the Charter, his resident agent may do so instead.

In addition, the Charter may contain any other matter that the founder thinks fit, or that would otherwise be required or permitted to be in the Rules.

The Rules must:

- prescribe the functions of the Council;
- detail the procedures for the appointment, resignation and removal of the councillors and any guardian. Unless otherwise stipulated in the Charter or Rules there must be a minimum of two councillors;
- detail how the councillors or guardian are to be remunerated. Unless expressly so authorised in the Rules, they will not be entitled to any profit from their office.

In addition, the Rules may:

- prescribe the manner in which the property of the foundation may be distributed, accumulated or applied;
- detail whether, and if so, how, further property may be endowed upon the foundation;
- provide for the addition or removal from benefit of persons or beneficiaries – either revocably or irrevocably;
- detail any person's (including the founder's) powers in relation to the foundation (such as the power to make investment decisions, remove a councillor or approve the use of the foundation's assets);
- impose obligations upon beneficiaries as a condition of benefit;
- make the interest of a beneficiary liable to termination or subject to certain restrictions;
- give the details of a default beneficiary. If none is given, the assets will fall to the Crown;
- add any other matter the founder thinks fit.

Only if the Charter and Rules specifically provide, or otherwise by Royal Court Order (or the Registrar in respect of the Charter), can the terms of either document be amended.

4.3 What powers can the founder retain?

A founder may be granted various administrative powers under the Law including, for example the power to appoint foundation officials or make investment decisions.

A founder may reserve the power to amend, revoke or vary the terms of the constitution, or purpose of the foundation, and the power to terminate the foundation. However, these powers may only be reserved for a period not exceeding the duration of the founder's life (if he is a natural person), or for a period not exceeding 50 years from the date of establishment (if the founder is a legal person). This restriction is intended to prevent the reservation powers being so generous that civil law jurisdiction questions the foundation's independence.

4.4 What information will be publicly available?

As part of the registration process the charter must also be filed with the registrar but, unlike many other jurisdictions, it may only be disclosed in certain circumstances (e.g. as part of criminal investigations).

The only information publicly available is that in **Part A** of the register which includes the name and registered number of the foundation, the name and address of the councillors and the guardian (if any) and the details of the registered office.

4.5 What are the on-going regulatory requirements?

Every foundation must have a registered office in Guernsey, at which all records of the foundation must be kept. The Registrar must be notified of any change to: the registered office, the names and addresses of the council members, guardian and resident agent, and enfranchised status of the beneficiaries. The name and address of the registered office must also be included on all correspondence sent by either the councillors or by the guardian (if any) on behalf of the foundation.

In addition, standard on-going anti-money laundering regulations apply to the Council Members.

Foundations will also have to file an annual validation, the fee for which is £500 (not chargeable until the annual renewals process is introduced).

4.6 What duties do the various parties have?

The Council is responsible for administering the assets of the foundation and carrying out its objects in accordance with the Charter, the Rules and the Law. They owe their responsibilities to the foundation (not to the beneficiaries) and must act in good faith in the exercise of their functions. Nothing in the Charter or the Rules may relieve council members from liability for fraud, wilful misconduct or gross negligence.

The Guardian is only required where there are **disenfranchised beneficiaries** (i.e. beneficiaries barred from accessing foundation information and thereby holding the council to account) or where the foundation has purposes. Their function is to hold the councillors to account given the absence of stakeholders and the limited rights of disenfranchised beneficiaries, and they have a duty to both the founder and to the beneficiaries to perform these functions acting in good faith and *en bon père de famille* (i.e. as a prudent administrator of family wealth). Like council members, they also cannot be relieved from liability for fraud, wilful misconduct or gross negligence.

Where the Royal Court considers a person is not a **fit and proper** person for the management of a foundation, and they consider it is in the public interests to do so, they may issue a disqualification order prohibiting them from being a council member or guardian.

The Resident Agent is only required where neither a council member nor a guardian are Guernsey licensed fiduciaries or authorised persons. The resident agent must be a Guernsey licensed fiduciary or

authorised person resident in Guernsey, and has the power to inspect foundation documents and information.

5. MIGRATION OF FOREIGN FOUNDATIONS

Many individuals, in particular those 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 make use of a foundation in much the same manner as they might a company or a trust, depending on their particular needs. In Guernsey, 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 Guernsey in order to take advantage of all that Guernsey 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, the Law allows foundations with legal personality currently established under the law of any place outside Guernsey to apply to the Registrar to be registered as a Guernsey Foundation. This contrasts with the more restricted provisions of other jurisdictions.

As a preliminary requirement to migration the foundation must:

- be able to migrate under the law of the place in which it is currently established (e.g. the constitution of the foundation must not forbid migration). The foundation must also comply with the requirements of the relevant foreign law in relation to its registration as a Guernsey foundation; and
- not be under any insolvency process, or be subject to an application in any court for the same.
- a Guernsey licensed fiduciary must then make the application to the Registrar and include:
- a copy of the current Charter and (if different) a copy of the intended Charter to be binding once Guernsey registered;
- evidence that: i) the foundation is authorised by the relevant foreign law to migrate and is not bankrupt; ii) on the date of registration, the foundation will cease to be established and registered under the law of any place outside Guernsey; and iii) the foundation has legal personality in the place in which it is established and registered;
- a **declaration of compliance**. This is a declaration signed by the Guernsey licensed fiduciary making the application that all the requirements of Part 1 of Schedule 2 of the Law have been fulfilled; and
- further standard **migration details**, as set out in Section 5 of Schedule 2 of the Law, such as the names and addresses of councillors and a statement of the address of the foundation's registered office (both current and the proposed address in Guernsey). The Registrar may also request such other documents and verification as it shall require.

Once the application is accepted, the foundation's name will be allocated a registration number, its name will be put on the register and it will be issued a certificate of registration. The certificate shall include, amongst the standard details provided for new foundations, the details of the place in which the foundation was previously registered, and any of its previous names.

6. USES OF A GUERNSEY FOUNDATION

As with trusts, foundations can have multiple uses including in respect of private, charitable and corporate purposes, and they can be incorporated into a variety of potential structures tailored to best suit a particular client's needs.

6.1 Private

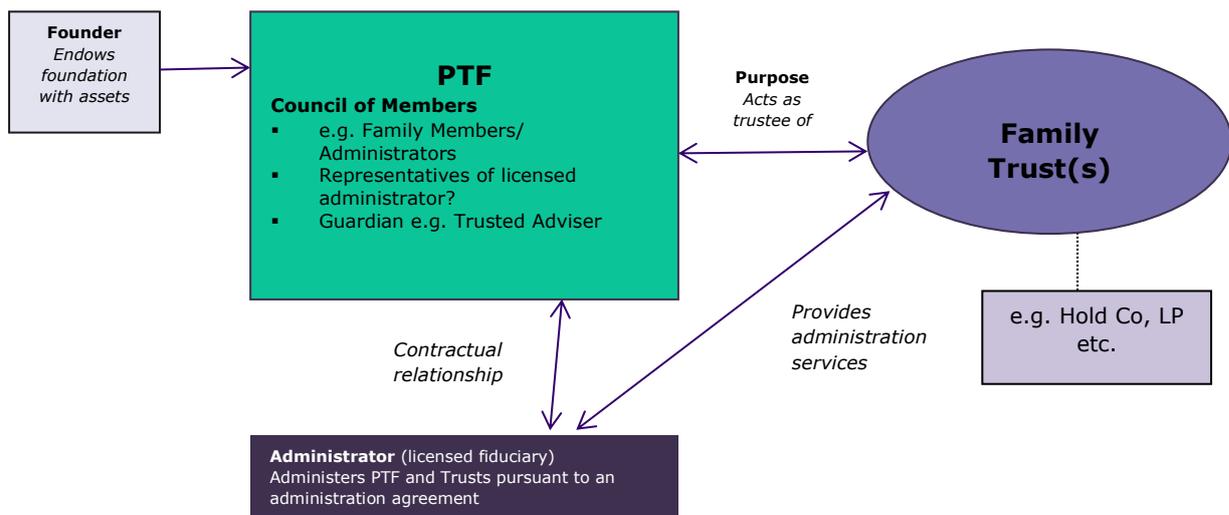
Foundations may be particularly attractive as a simple alternative to trusts for private clients especially those from civil law jurisdictions for whom the concept of a trust may be unfamiliar or who would like a wealth management entity which would be easily recognised by third parties in their home jurisdiction.

In these circumstances a foundation can be used to divorce ownership of the assets from the founder, the benefits including confidentiality, succession planning, avoiding probate and asset protection. A foundation is highly flexible in respect of how long it lasts, how the founder may remain involved in the administration and how much information the beneficiaries are entitled to. It can also be used as part of a larger wealth management structure: it can act as a trustee (in place of a private trust company – see 6.2 below) of a trust, hold the shares of a PTC, act as an umbrella entity holding various companies or assets, or can be drafted to hold more high risk, less income producing assets which may not be appropriate to be held by all trusts.

6.2 Private Trust Foundation (PTF) Structures

A PTF structure is an alternative to the Private Trust Company (PTC) structure which has seen increasing popularity of late.

The following is a typical PTF structure, although there are no standard structures as they are very flexible and can be modified in a variety of ways to accommodate the particular needs of a client.



A PTF is an orphan vehicle (ownerless) incorporated specifically to act as trustee of one or more family trusts. Like any other foundation, a PTF is run by its council of members, who in the case of a PTF make the trustee decisions. Whilst run by the council of members, PTFs (and the underlying trust(s) for which they act as trustee) are usually administered by a professional fiduciary who is experienced at carrying out foundation, trust and corporate administration.

The benefits of using PTF structures include:

- **Family control:** PTFs provide a means by which the client, or their family, can retain a greater degree of control over the trust affairs without compromising the validity of the family trust. The client can compose the council of members with themselves, family members and trusted advisers who have a heightened knowledge of the family's business and financial affairs and are empathetic to the needs of the beneficiaries. Careful thought needs to be given to the

composition of the council of the PTF and also who is to have power to appoint and remove its council of members.

- **Avoiding future changes in trusteeship:** Having a PTF as trustee of family trusts will avoid the need for future changes of trusteeship. Instead, only the management/administration agreement between the PTF and the licensed administrator would need to be terminated and a new agreement would need to be entered into between the PTF and the new licensed administrator, with the old licensed administrator's PTF directors (if any) ceasing to be on the council of the PTF.
- **Confidentiality:** Ownership of the structure can remain confidential.
- **Trustee liability:** Professional trustees are always aware of their liability and the risk of being sued, not only by beneficiaries but also third parties. As a result, professional trustees may be reluctant to take ownership of assets or participate in ventures where substantial risks may be present. PTFs (due to the composition of the board) can provide for riskier investments to be included in the structure.
- **Philanthropy:** PTFs can make confidential philanthropic payments whilst ensuring the person managing the structure understands their thought process in providing for such causes.
- **Flexibility:** A PTF may be more flexible and quicker in dealing with trust assets.

6.3 Charitable

Philanthropic founders may be particularly attracted to the foundation as an alternative to the trust simply for the positive connotations already associated with charitable **foundations** (for example the **Bill and Melinda Gates Foundation**). There is also the added benefit that the foundation's purposes do not have to be exclusively charitable and therefore the vehicle can be more flexible than the traditional **charitable** trust – for example, it may not be necessary to set up a separate corporate entity for profit-focused aspects of the operation.

6.4 Corporate

Since foundations, unlike companies, do not have shareholders and may also be free from beneficiaries, they are ideal **orphan** vehicles. As such, in addition to being a suitable alternative to non-charitable purpose trusts for holding shares in PTCs, they are also suitable for off-balance sheet financing, subordinated debt and private equity structuring.

7. TAXATION IN GUERNSEY

Guernsey foundations are treated as tax neutral in Guernsey. However, when considering a Guernsey foundation, clients should consider taking tax advice in the jurisdiction of residence of the founder and beneficiaries and possibly that of council members too, especially those resident in the UK, where HMRC's treatment of foundations for tax purposes is not yet clear

8. CONCLUSION

Guernsey is, for many reasons, an agreeable and accommodating place for the establishment and administration of foundations. There are a significant number of different foundations, each of which might be suitable for use in a different set of circumstances. Of course every client's particular circumstances will be specific to that client and anyone considering setting up a foundation should obtain expert advice as to what type of foundation (if any) best meets their needs.

For more specific advice on foundations in Guernsey, we invite you to contact:

Guernsey

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).

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