

STATES OF JERSEY



DRAFT FOUNDATIONS (AMENDMENT OF LAW) (JERSEY) REGULATIONS 201-

Lodged au Greffe on 24th February 2015
by the Chief Minister

STATES GREFFE



Jersey

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REPORT

Overview

The Draft Foundations (Amendment of Law) (Jersey) Regulations 201- (the “**draft Regulations**”) amend the Foundations (Jersey) Law (the “**Foundations Law**”) for two primary purposes –

- (i) To introduce obligations in respect of record-keeping requirements for the council members of a foundation which relate to the evolving Recommendations of the Financial Action Task Force (“FATF”) on Anti-Money Laundering and Countering the Financing of Terrorism.
- (ii) Make a number of miscellaneous amendments to the Foundations Law in relation to its operation for industry practitioners.

(i) Record-keeping amendment

Draft Regulation 3 introduces a new Article 24A into the Foundations Law, being an obligation on each member of the council of a foundation to ensure that the foundation is keeping proper accounting records. It also specifies what those records should contain and the notice that should be provided to the qualified member if a council member wishes to inspect the records. It states that accounting records should be kept by the foundation for a period of 10 years.

Draft Regulation 4 introduces a new Article 24B into the Foundations Law, making it a criminal offence for a member of the council of a foundation, officers of other bodies having separate legal personality, or any other person purporting to act in such capacity, if the offence is proven to have been committed with the consent or connivance of that person or attributable to any neglect on behalf of that person. If the offence is proven, the person will be liable to the same penalty as the foundation.

(ii) Miscellaneous amendments

Definition of Qualified Person

“Qualified person” means a person registered under the Financial Services (Jersey) Law 1998 (the “**Financial Services Law**”) to carry on trust company business that permits the provision by the person of the services mentioned in Article 2(4)(a) and (d) of that Law.

In addition, the Foundations Law states that the business address of a foundation is the business address of the qualified member of its council or, if there is no such qualified member, its last qualified member.

On a strict interpretation of the Foundations Law as it currently stands, this results in a requirement for the qualified member (and therefore the qualified person) to also be registered under Article 2(4)(f) of the Financial Services Law.

The Jersey Financial Services Commission recognises that the manner in which the Foundations Law is currently drafted does not reflect the position that was agreed during consultation and creates an additional cost burden for the trust company business industry. In practice, many registered persons will, and have, sought to register a separate entity to fulfil the function of a member of the council of a foundation, most already having a separate entity within the affiliation registered under Article 2(4)(a) of the Law to act as a company formation agent, a partnership formation agent or a foundation formation agent.

Draft Regulation 2 remedies this issue by setting out in the Foundations Law the required categories of licence necessary for the qualified person under the Foundations Law depending on the role carried out.

Objects Clause

Draft Regulation 2 introduces a new Article 5(4A) which provides that, in terms of specifying the objects of a foundation, it is sufficient for the charter to provide that the specified purpose may be determined in accordance with the charter or regulations of the foundation.

This allows greater flexibility for the industry to change the objects clause of the foundation without need to amend the charter that will be of particular benefit for long-running foundations. The necessity for transparency as to objects is maintained as the objects are still stated in the regulations of the foundation.

Amendment of the Regulations of a Foundation

Finally, there was some concern in industry as to the interplay between Article 5 and Article 10 of the Foundations Law relating to how the regulations of a foundation can be amended. It may appear that the two Articles provide alternatives for amendment, which could be considered confusing.

Draft Regulation 3(b)(ii) and (iii) clarifies the position by making it clear that either Article does not prejudice the operation of the other.

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of these draft Regulations.

Explanatory Note

These Regulations make miscellaneous amendments to the Foundations (Jersey) Law 2009 (“the principal Law”).

Regulation 2 substitutes a new definition for “qualified person” so that –

- (a) in case where such a person is to apply to the Registrar for the incorporation of a foundation, it means a person registered under the Financial Services (Jersey) Law 1998 to carry on trust company business that permits the provision by the person of the services mentioned in Article 2(4)(a) of that Law (services of acting as a company formation agent or a foundation formation agent); and
- (b) in the case where such a person is to act as a qualified member, it means a person registered under the Financial Services (Jersey) Law 1998 to carry on trust company business that permits the provision by the person of the services mentioned in Article 2(4)(d) of that Law (services of acting or fulfilling the function of or arranging for another person to act as or fulfil the function of a member of the council of a foundation).

Regulation 3 amends Part 2 of the principal Law regarding the keeping of records by a foundation.

Article 5 of the principal Law is amended by *Regulation 3* to clarify that it is sufficient, for the purposes of Article 5(3)(b) (which requires that the objects of a foundation must be for a specified purpose), for the charter to specify that the manner in which the purpose is carried out may be determined in accordance with the charter or regulations of the foundation. Article 5(6) is amended to clarify that Article 5(5) (which describes how the charter or regulations of a foundation may be amended) is without prejudice to both Articles 10 (which also makes provision for their amendment) and 38 (which sets out procedural requirements when the charter is amended).

Regulation 3 inserts Article 24A into the principal Law to impose an obligation on each member of the council of a foundation to take reasonable steps to ensure that the foundation’s accounting records are prepared and kept properly and accurately.

Under Article 24A(1), each member of the council of a foundation must take reasonable steps to ensure that the accounting records contain entries of all sums of money received and expended by the foundation, the matters in respect of which the receipt and expenditure takes place and a record of the assets and liabilities of the foundation, including shares, interests and units held by the foundation in any other legal person or arrangement. Under Article 24A(2), the records kept under Article 36(c) and (e) of the principal Law must be such as to enable a member of the council of a foundation to comply with the requirements under Article 24A(1).

Provision is made under Article 24A(3) for a member of the council of a foundation to be entitled to inspect the records kept under Article 36(c) and (e) upon giving 2 working days’ notice in writing to the qualified member of the foundation.

Article 24A(4) provides for the preservation of records of a foundation for at least 10 years from the date on which they are made, subject to any provision under the principal Law or the Regulations made under the principal Law for disposal on the winding up of a foundation.

Regulation 3 also inserts Article 24B into the principal Law to make provision for the criminal liability of a member of the council of a foundation, officers of other bodies having separate legal personality or any other person purporting to act in such capacity, if the offence is proved to have been committed with the consent or connivance of that person or attributable to any neglect on the part of that person.

Regulation 4 provides for the title of these Regulations and provides for them to come into force 7 days after the day they are made.



Jersey

DRAFT FOUNDATIONS (AMENDMENT OF LAW) (JERSEY) REGULATIONS 201-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES, in pursuance of Article 52 of the Foundations (Jersey) Law 2009¹, have made the following Regulations –

1 Interpretation

In these Regulations “principal Law” means the Foundations (Jersey) Law 2009².

2 Amendment of Part 1

Article 1 of the principal Law is amended by deleting the definition “qualified person” and substituting the following definition –

“ ‘qualified person’ means –

- (a) in the case where such a person is to apply to the Registrar for the incorporation of a foundation, a person registered under the Financial Services (Jersey) Law 1998³ to carry on trust company business that permits the provision by the person of the services mentioned in Article 2(4)(a) of that Law; or
- (b) in the case where such a person is to act as a qualified member, a person registered under the Financial Services (Jersey) Law 1998 to carry on trust company business that permits the provision by the person of the services mentioned in Article 2(4)(d) of that Law;”.

3 Amendment of Part 2

In Part 2 of the principal Law –

- (a) for the heading “INCORPORATION OF FOUNDATIONS” there shall be substituted the following heading –

“INCORPORATION AND OBLIGATIONS OF FOUNDATIONS”;

- (b) in Article 5 –
- (i) after paragraph (4) there shall be inserted the following paragraph –
- “(4A) It is sufficient, for the purposes of paragraph (3)(b), for the charter to provide that the specified purpose may be determined in accordance with the charter or regulations of the foundation.”,
- (ii) in paragraph (5) after the words “may be amended” there shall be inserted the word “, including”,
- (iii) in paragraph (6) for the words “Article 38” there shall be substituted the words “Articles 10 and 38”;
- (c) after Article 23 there shall be inserted the following cross-heading –
- “The obligations and liabilities of members of the council and others”;*
- (d) after Article 24 there shall be inserted the following Articles –

“24A Obligation to ensure proper and accurate accounting records

- (1) Each member of the council of a foundation shall take reasonable steps to ensure that the foundation’s records are prepared and kept properly and accurately and that, in particular, they contain entries of all sums of money received and expended by the foundation, the matters in respect of which the receipt and expenditure takes place and a record of the assets and liabilities of the foundation, including shares, interests and units held by the foundation in any other legal person or arrangement.
- (2) The records required to be kept under Article 36(c) and (e) must be such as to enable a member of the council of a foundation to comply with paragraph (1).
- (3) A member of the council of a foundation shall be entitled to inspect the accounting records required to be kept under Article 36(c) and (e) upon giving 2 working days’ notice in writing to the qualified member of the foundation.
- (4) Subject to any provision for the disposal of records on the winding up of a foundation pursuant to this Law or the Regulations made under Article 53, the accounting records that a foundation is required to keep under Article 36(c) and (e) must be preserved by the foundation for at least 10 years from the date on which they are made.

24B Criminal liability of members of council and other officers

- (1) This Article applies where an offence under this Law or any Regulations made under this Law committed by a foundation or other body corporate, a limited liability partnership or any other partnership with separate legal personality is proved –

- (a) to have been committed with the consent or connivance of a person mentioned in paragraph (2); or
 - (b) to be attributable to any neglect on the part of a person mentioned in paragraph (2).
- (2) The persons to whom paragraph (1) refers are –
- (a) in the case of a foundation, a member of the council of the foundation;
 - (b) in the case of an incorporated limited partnership, a general partner or a limited partner who is participating in the management of the partnership;
 - (c) in the case of any other body corporate, a director, manager or other similar officer of the body corporate;
 - (d) in the case of a limited liability partnership, a partner;
 - (e) in the case of a separate limited partnership or any partnership with a separate legal personality, except a limited liability partnership, a general partner or a limited partner who is participating in the management of the partnership; or
 - (f) in any case, any other person purporting to act in a capacity described in any of sub-paragraphs (a), (b), (c), (d) and (e).
- (3) Where this Article applies, the person shall also be guilty of the offence and liable to the penalty provided for that offence in the same manner as the foundation, incorporated limited partnership, other body corporate, limited liability partnership, separate limited partnership or other partnership with separate legal personality.
- (4) Where the affairs of a body corporate are managed by its members, paragraphs (1) and (3) shall apply in relation to acts and defaults of a member in connection with that member's functions of management as if the member were a director of the body corporate.”.

4 Citation and commencement

These Regulations may be cited as the Foundations (Amendment of Law) (Jersey) Regulations 201- and shall come into force 7 days after the day they are made.

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- ¹ *chapter 13.265*
² *chapter 13.265*
³ *chapter 13.225*