Establishing and Administering an Isle of Man Foundation (2 of 3)

Introduction to Foundations for Wealth Management. Foundations have been used frequently as part of intermediaries' offshore wealth planning.

By **Paul Harvey**, 28th May 2021

Isle of Man Foundations

Since Foundations have been written into Manx law, they have been used frequently as part of intermediaries' offshore wealth planning for any number of purposes, but all must conform to the same constitutional principles.

This is the second in a three-part series we have produced on Foundations, building up to a webinar hosted by experts who can help you to meet your clients' needs. If you would like to read the other articles in this series, please see:

- **Isle of Man Foundations for Offshore Planning – An Introduction (1 of 3)**
- **When to use an Isle of Man Foundation (3 of 3)**

In this article we'll be discussing the nuts and bolts of an **Isle of Man Foundation** (**IOM Foundation**), to further or refresh your understanding:

- **What do I need to establish an Isle of Man Foundation?**
- **The Isle of Man Foundation Instrument document**

- **The Isle of Man Foundation Rules document**

- **Isle of Man Foundation legal challenges**

What do I need to establish an Isle of Man Foundation?

As required by the **Isle of Man Registrar of Foundations** (**Registrar**), and under the Foundations Act 2011 (**the Act**), the application must be made by an **Isle of Man Registered Agent** (**IOM RA**) holding a class 4 license from the Isle of Man Financial Services Authority. The IOM RA will generally also be the Nominated Officer, as defined within the Beneficial Ownership Act 2017.

The IOM RA, typically a Corporate Service Provider like Dixcart, must also make a declaration that:

- They will act as Registered Agent on establishment;

- The Isle of Man address provided is the business address of the IOM RA;

- That the IOM RA is in possession of the Foundation Rules, which have been approved by both the IOM RA and the Founder.

There are several options with regards to the application and its turnaround time, currently: a standard fee of £100 for establishment within 48 hours, £250 within 2 hours if received before 14:30 on a business day, or £500 for a 'while you wait' service if received before 16:00 on a business day.

On approval, the Registrar will make note of the names and addresses of the foundation, Council Members and IOM RA, its Objects and provide a Certificate of Establishment and registration number. Once established, the IOM Foundation gains legal personality and, for example, now has the ability to enter into contracts, sue and be sued.

There are several constitutional elements of an IOM Foundation that must be present for an application to be acceptable; this includes a completed application form, correct

fee as detailed above and the Foundation Instrument (**Instrument**), and a redacted copy of the Foundation Rules (**Rules**) – in fact it is an offence for a Foundation to not possess these documents. We will examine the noteworthy facets of the Instrument and Rules in more detail within the following sections.

Isle of Man Foundation Instrument

By law, all IOM Foundations must have an Instrument (also known as the Charter) written in English that complies with the Act. A copy of this document is incorporated into the application proforma and supplied to the Registrar on application.

IOM Foundation Instrument – Name

Among other things, the Instrument will detail the name of the IOM Foundation; which must also comply with The Company and Business Names etc. Act 2012, which provides direction and limitations on the name of an IOM Foundation. The Registrar has produced a Guidance Note to assist with 'Choosing Your Company or Business Name'.

The IOM Foundation's name can be altered if permissible under the Instrument and Rules, but notice of this must be given to the Registrar and supplied to the IOM RA. Alternatively, the Instrument and Rules can prohibit any changes to the name, if desirable.

IOM Foundation Instrument – Objects

The Instrument will also note the IOM Foundation's Objects, providing broad information; the Instrument does not need to detail the specific purposes or classes of beneficiaries etc., it simply needs to ensure that the Objects are 'certain, reasonable, possible, lawful and not contrary to public policy or immoral'. The Instrument should also detail whether the Objects are to be Charitable, Non-Charitable or Both, and that these are to be administered in accordance with the Rules.

IOM Foundation Instrument – Council Members and Registered Agent

Finally, the Instrument must detail the names and addresses of all Council Members and the IOM RA. These parties can be altered in line with the Rules in the future, but again, notification must be provided to the Registrar and IOM RA where appropriate.

There can be a minimum of one Council Member. An individual acting as a member must be aged at least 18 years, of sound mind and not disqualified. The Founder can be a Council member. Council Members can be appointed or removed in line with the Rules throughout the lifetime of the IOM Foundation.

As previously stated, whilst the IOM RA can be altered, this role is mandatory from establishment and throughout.

In many ways the Instrument is like the Foundation's incorporating document, giving notice of certain key persons and their regulatory roles and the IOM Foundation's Objects. It is similar to a memorandum, giving the Registrar the headline information.

Isle of Man Foundation Rules

If the Instrument is the memorandum, the Rules are, as their name suggests, the rulebook on how the Foundation should be administered. This document is specific to the individual Objects, functions and purpose of the IOM Foundation.

The Rules are a legal requirement under the Act and can be written in any language, but an English copy must be supplied to and retained by the IOM RA.

IOM Foundation Rules – Objects

The Rules must stipulate the manner and form of amends to the IOM Foundation's Objects. Where the Foundation is established for specific purpose, or to benefit any person or class of persons, this will include how these details can be amended. For example, how beneficiaries can be added, removed or the classes extended.

Where Charitable Objects have been exclusively specified within the Instrument, the Rules cannot contain any provision for the alteration of these Objects to non-charitable pursuits.

IOM Foundation Rules – Council Members

The Rules must also establish a Council to administer the IOM Foundation's assets and oversee its Objects. The proceedings of the Council are detailed within the Rules. In doing so, the Rules must also detail how Council Members can be appointed or removed

and where appropriate, remunerated.

IOM Foundation Rules – Registered Agent

An IOM RA is a perpetual requirement for an IOM Foundation, and must be accounted for within the Rules. This will include the procedure for appointment and removal, to ensure an IOM RA is always appointed. The Rules will also cover the remuneration of the IOM RA as appropriate.

The removal of an IOM RA does not take effect until another appropriately licensed IOM RA has been appointed.

IOM Foundation Rules – Enforcer

An Enforcer can be appointed to ensure that the Council carries out its duties to further the IOM Foundation's Objects and in compliance with the Rules.

Where an Object of the IOM Foundation is a specified non-charitable purpose, an Enforcer must be appointed. However, where the Object is simply to benefit a person or class of persons, it is an optional appointment and not a requirement.

Where an Enforcer is present, the Rules must provide the Enforcer's name and address along with their remit and procedure for appointment, removal and remuneration – the remit can include the ability to approve or veto Council actions. Apart from the Founder and the IOM RA, a person may not be both a member of the Council and its Enforcer.

IOM Foundation Rules – Dedication of Assets

An IOM Foundation does not need to hold any assets at the time of establishment, but where a dedication is made from outset, details must be provided within the Rules. Additional assets can be dedicated at any time, and by persons other than the Founder, unless prohibited by the Rules.

If further dedications are contributed, the Rules must be amended to reflect the details of the dedication. It is important to note that Dedicators do not gain the same rights as the Founder after providing assets to the IOM Foundation.

The Rules may stipulate the length of the IOM Foundation's lifetime and the procedure for winding-up the vehicle. The term, unless otherwise stated, is perpetual. The Rules can detail certain events or a lifespan that determines when the IOM Foundation is dissolved. Where desirable, full details must be included within the Rules.

Beneficiaries do not have an automatic legal right to the IOM Foundation's assets. However, if a person becomes entitled to benefit in accordance with the Instrument and Rules, they may seek a Court Order from the High Court enforcing that benefit.

Legal Challenges to an Isle of Man Foundation

The Act provides that any legal challenge to the IOM Foundation, or the dedication of its assets, will be the jurisdiction of the Isle of Man Courts and subject to Manx law only:

"…must be determined in accordance with the law of the Island without reference to the law of a jurisdiction outside the Island."

Therefore, the establishment or dedication of assets cannot be deemed void, voidable, set aside or invalidated by a foreign jurisdiction because:

- It does not recognise the structure;
- The structure defeats or potentially avoids a right, claim or interest imposed on a person by the law of a jurisdiction outside the Isle of Man; or
- Of the existence of forced heirship rights; or
- It contravenes the rule of law within that jurisdiction.

It is important to note that, due to the relatively recent introduction of this structure into Manx law, the IOM Foundation has not yet been legally tested on these matters. It is also worth noting that the exclusion of foreign law is only in respect of otherwise compliant IOM Foundations or dedicated assets – for example, the Founder or Dedicator must have legal title to the assets being contributed.

Record Keeping

The Act sets out various documents and records that must be maintained at the registered address of the IOM Foundation or such other Isle of Man address as the Council determines. This includes various registers and also accounting records.

The IOM Foundation must also submit an annual return to the Registry, due each year on the anniversary of establishment. Failure to submit an annual return is an offence.

Supporting the Establishment and Administration of Foundations

At Dixcart, we offer a full suite of offshore services to advisers and their clients when considering the establishment of an IOM Foundation. Our in-house experts are professionally qualified, with a wealth of experience; this means we are well placed to support and take responsibility for different roles, including acting as Council Member or Enforcer as well as to provide specialist advice when required.

From pre-application planning and advice, to the day-to-day administration of the Foundation, we can support your goals at every stage.

Get in touch

If you require further information regarding Isle of Man Foundations, their establishment or management, please feel free to get in touch with Paul Harvey: advice.iom@dixcart.com.

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