

STATES OF JERSEY



DRAFT FOUNDATIONS (WINDING UP) (JERSEY) REGULATIONS 200-

Lodged au Greffe on 6th October 2009
by the Minister for Economic Development

STATES GREFFE



Jersey

DRAFT FOUNDATIONS (WINDING UP) (JERSEY) REGULATIONS 200-

REPORT

The Foundations (Jersey) Law 2009 (“**the Law**”) was adopted by the States on 22nd October 2008 and came into force on 17th July 2009.

The Law introduced a new type of wealth-management vehicle, known as a “foundation”. A foundation is a distinct legal entity like a company, but, unlike a company, it does not have shareholders. It has easily recognised liabilities and accountabilities, and the entity is openly recorded on a public registry in the same way as a company. It holds assets in its own name for the purposes set out in its constitutive documents. For clients and authorities originating in jurisdictions not familiar with the concept of trust, a foundation may be a more attractive offering.

As well as being used for wealth management and estate planning, foundations may also have applications in more specialized areas, such as long-term charitable aims or securitizations, where it is desirable that property be given to a legal entity and applied for specific purposes. As with companies and trusts, the use of foundations will be subject to compliance with the Commission’s policy on sensitive activities.

Article 56(1) of the Law provides that:

The States may, by Regulations, provide –

- (a) for the dissolution of foundations;
- (b) for the continuance in Jersey as foundations of bodies corporate, whether or not incorporated in Jersey;
- (c) for foundations incorporated in Jersey to be permitted to seek continuance outside Jersey; and
- (d) for the merger of foundations, including the merger of foundations with any bodies corporate, whether or not incorporated in Jersey.

These regulations are the regulations envisaged in sub-paragraph (a) of this paragraph.

The foundation structure allows the founder to specify the circumstances in which the foundation will be wound up (Article 9 of the Law): on the happening of an event, the end of a period of time or the application of a specified person. Once these circumstances occur, there are different procedures depending on whether the foundation is solvent at the time.

Part 2 of the Regulations deals with winding up in the following circumstances. Chapter 1 sets out the general procedure, requiring the registrar to be notified. The qualified member may certify that the foundation is solvent; if he or she does not, the foundation will be treated as insolvent. Chapter 2 deals with solvent foundations and Chapter 3 deals with insolvent foundations.

In a solvent winding up under Chapter 2, the foundation council can choose whether or not to appoint a liquidator. If they do not appoint a liquidator, they will wind up the affairs of the foundation themselves. In either case, once the foundation's liabilities have been met and any remaining assets distributed in accordance with the charter, the registrar must be notified, and the foundation will be dissolved.

If, in the course of a solvent winding up under Chapter 2, it becomes apparent that the foundation is not in fact solvent, then there is provision (in Regulation 9) for the winding up to be converted to an insolvent winding up.

Chapter 3 deals with insolvent winding ups. In these circumstances it is the foundation's creditors who have the principal interest in it, since they are entitled to be paid as much of their debts as the foundation's assets will allow. Therefore a creditors' meeting must be held (Regulation 12) at which the creditors will appoint a liquidator (Regulation 13). Once the liquidator has wound up the affairs of the foundation, a final meeting must be called (Regulation 16) and the registrar notified, at which point the foundation will be dissolved.

A liquidator under Chapter 3 has similar powers to a liquidator under Chapter 4 of Part 21 of the Companies Law, i.e. general powers (Regulation 18), power to disclaim onerous property (Regulation 19), power to apply to have transactions at an undervalue set aside (Regulation 23), power to apply to have unfair preferences set aside (Regulation 24), power to apply to make foundation council members personally liable (Regulation 25), power to apply to apply to remedy fraudulent acts (Regulation 26) and power to apply to set aside extortionate credit transactions (Regulation 27). Those responsible for the foundation must co-operate with the liquidator (Regulation 29) and he or she must report any possible misconduct to the Attorney General (Regulation 30).

Part 3 of the regulations allows the registrar to strike off a foundation for non-payment of its annual fee or of the additional amount prescribed by the States.

Part 4 of the regulations allows for a foundation to be wound up on the direction of the Royal Court either on the basis that it is just and equitable to do so, or in the public interest.

Part 5 deals with some matters of general application: references to the Royal Court, the disposal of any remaining assets and the treatment of the foundation's records.

Part 6 allows the Royal Court to declare a dissolution void.

Financial and manpower implications

There are no manpower or resource implications for the States of Jersey as a result of these Regulations as issues will be handled outside the States for example by the Jersey Financial Services Commission, the costs incurred will be met by levies on the interested parties, or both.

Explanatory Note

These Regulations specify how a foundation may be wound up –

- (a) if its charter provides that it is to be wound up upon the happening of any event, the expiration of any period of time or on the application of any person;
- (b) if it fails to pay any annual fee or amount it is required to pay to the registrar; or
- (c) if the Royal Court is satisfied that it is just and equitable or in the public interest that the foundation should be wound up.

Where a foundation is to be wound up in the circumstances mentioned in subparagraph (a), the Regulations provide for what is to happen whether the foundation is solvent or insolvent at the time.

If the foundation is solvent, the council of the foundation may wind up the foundation or may appoint a liquidator to do so.

If the foundation is insolvent, the creditors of the foundation must appoint a liquidator to wind it up.

If, otherwise than in the circumstances mentioned in paragraphs (a), (b) and (c), a foundation becomes insolvent, a creditor of the foundation may apply for a declaration to be made by the Royal Court in respect of the foundation under the Bankruptcy (Désastre) (Jersey) Law 1990.



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Made [date to be inserted]

Coming into force [date to be inserted]

THE STATES, in pursuance of Article 56 of the Foundations (Jersey) Law 2009¹, have made the following Regulations –

PART 1

INTERPRETATION

1 Interpretation

(1) In these Regulations –

“creditors’ meeting”, in respect of a foundation, means a meeting of the creditors of the foundation held in the course of a creditors’ winding up of the foundation;

“creditors’ winding up”, in respect of a foundation, means a winding up of the foundation under Chapter 3 of Part 2;

“Law” means the Foundations (Jersey) Law 2009².

(2) If a penalty is specified after a paragraph of these Regulations, it indicates that a contravention of the provision of the paragraph is an offence that is punishable by a penalty not exceeding the penalty so specified.

PART 2

WINDING UP OF FOUNDATIONS ON HAPPENING OF AN EVENT, THE END OF A PERIOD OF TIME OR ON THE APPLICATION OF A SPECIFIED PERSON

Chapter 1 - Application

2 Application of Part

This Part applies where, under Article 9 of the Law, the charter of a foundation specifies that the foundation is to be wound up and dissolved –

- (a) upon the happening of some event;
- (b) on the expiration of a fixed period of time; or
- (c) on the application of any person,

and the event happens, the period expires or the application is made.

3 Registrar to be notified

- (1) The qualified member of the council of the foundation must, within 28 days, deliver to the registrar a notice that states, as the case may be, that –
 - (a) the event has happened;
 - (b) the period has expired; or
 - (c) the application has been made,and the date when the event happened, the period expired or the application was made
- (2) The notice may be accompanied by a certificate signed by the qualified member certifying that the member, having made a full enquiry into the affairs of the foundation, is of the opinion that the foundation is solvent.
- (3) If the qualified member is also satisfied that the foundation has no assets and no liabilities, the qualified member may include a statement to that effect in the certificate.
- (4) The registrar must, on receipt of the notice and any certificate, enter in the register in respect of the foundation –
 - (a) a note stating that the foundation is in the course of being wound up; or
 - (b) under Regulation 7(2), a note stating that the foundation has been dissolved.
- (5) The note must also state –
 - (a) the date when the event happened, the period expired or the application was made; and
 - (b) in the case of a note mentioned in paragraph (4)(a), if the qualified member of the council of the foundation has provided the registrar with a certificate of solvency under paragraph (2).

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- (6) Paragraph (7) is to be applied to determine if, when the qualified member signs a certificate for the purpose of paragraph (2) (“the relevant time”), the foundation is solvent.
- (7) The foundation is solvent at the relevant time if –
- (a) it has no liabilities;
 - (b) it has liabilities that have already fallen due or that will fall due within 6 months after the relevant time that it will be able to discharge in full within 6 months;
 - (c) it has liabilities that will arise more than 6 months after the relevant time that it will be able to discharge in full as they fall due; or
 - (d) it has a combination of the liabilities mentioned in subparagraph (b) and (c).
- (8) A qualified member of the council of a foundation must not sign and deliver to the registrar –
- (a) a notice under paragraph (1); or
 - (b) a certificate under paragraph (2),
- without having reasonable grounds for believing it to be correct.
- Penalty:** Imprisonment for 2 years and a fine.

Chapter 2 - Winding up a solvent foundation

4 Application of Chapter

This Chapter applies where a note has been entered in the register in respect of a foundation under Regulation 3(4).

5 Effect on status of foundation

- (1) The foundation’s corporate state and capacity continue until it is dissolved.
- (2) However, the foundation must include in its written communications, including those transmitted by electronic means, a statement that the foundation is being wound up under this Chapter.

Penalty: A fine.

6 Appointment of liquidator

- (1) The council of the foundation may appoint a person to be the liquidator of the foundation.
- (2) The Minister may, in respect of all foundations or any class of foundations, publish details of the qualifications a person must possess to be appointed to be the liquidator of a foundation or a foundation of that class that is being wound up under this Chapter.
- (3) If the Minister does so –

- (a) a person may not be appointed to be the liquidator of a foundation or a foundation of that class that is being wound up under this Chapter unless the person possesses those qualifications; and
 - (b) a person appointed under paragraph (1) ceases to be the liquidator of the foundation if the person ceases to possess those qualifications.
- (4) The liquidator –
- (a) may be given by the council of the foundation; and
 - (b) may exercise,
- such of the powers and duties of the members of the council as the council may determine.
- (5) The liquidator –
- (a) may also be given by the guardian of the foundation; and
 - (b) may exercise,
- such of the powers and duties of the guardian in respect of the foundation as the guardian may determine.
- (6) Except as provided by paragraph (3), the provisions of this Regulation apply in respect of a foundation subject to any provision to the contrary in the charter or regulations of the foundation.

7 Dissolution of foundation with no assets and no liabilities

- (1) This Regulation applies where the certificate delivered to the registrar under Regulation 3(2) in respect of a foundation includes a statement that the foundation has no assets and no liabilities.
- (2) The note mentioned in Regulation 3(4) must state that the foundation has been dissolved.
- (3) The foundation is dissolved on the date the note is entered in the register.

8 Dissolution of solvent foundation with existing liabilities or assets

- (1) This Regulation applies where –
 - (a) a certificate in respect of a foundation is delivered to the registrar under Regulation 3(2); but
 - (b) the certificate does not include a statement under Regulation 3(3) that the foundation has no assets and no liabilities.
- (2) If subsequently –
 - (a) the qualified member of the council of the foundation; or
 - (b) a liquidator appointed under Regulation 6,signs and delivers to the registrar a certificate certifying that the member or liquidator, having made a full enquiry into the affairs of the foundation, is of the opinion that the foundation has no assets and no liabilities, the registrar must enter a note in the register, in respect of the

foundation, stating that the foundation has been dissolved under this Chapter.

- (3) The foundation is dissolved on the date the note is entered in the register.
- (4) A qualified member of the council of a foundation or its liquidator must not sign and deliver to the registrar a certificate under paragraph (2) without having reasonable grounds for certifying that the foundation has no assets and no liabilities.

Penalty: Imprisonment for 2 years and a fine.

9 Effect of insolvency

- (1) This Regulation applies if, while a foundation is being wound up under this Chapter –
 - (a) the liquidator appointed under Regulation 6; or
 - (b) if no liquidator has been appointed, the qualified member of its council,

forms the opinion that the foundation is not solvent as determined under Regulation 3(7).

- (2) The member or liquidator must within 28 days, give each creditor of the foundation notice by post calling a meeting of the creditors to be held in Jersey between 14 and 28 days after the notice is given.
- (3) The notice must recommend a person to be the liquidator of the foundation for the purposes of a creditors' winding up.
- (4) The member or liquidator must deliver a copy of the notice to the registrar.
- (5) The registrar must record the notice in the register in respect of the foundation.
- (6) The member or liquidator must also give notice of the meeting of the creditors of the foundation by advertisement in the Jersey Gazette not less than 10 days before the proposed meeting.
- (7) Before the meeting the member or liquidator must provide any creditor free of charge with such information concerning the financial affairs of the foundation as the creditor may reasonably request.
- (8) With effect from the start of the meeting –
 - (a) the winding up becomes a creditors' winding up of the foundation; and
 - (b) the meeting has effect as if it were the creditors' meeting mentioned in Regulation 12.
- (9) Accordingly, at the meeting the member or liquidator must provide a statement as to the financial affairs of the foundation.
- (10) The member or liquidator must not, without reasonable excuse, fail to comply with any of the obligations imposed on the member or liquidator by this Regulation.

Penalty: A fine.

- (11) It is a defence for a member or liquidator, charged with the offence of failing to give a creditor notice required to be given under this Regulation, for the member or liquidator to show –
 - (a) that the member or liquidator undertook reasonable enquiries to ascertain the names and addresses of the foundation's creditors; and
 - (b) the name and address of the creditor were not ascertained as a result of the enquiries.
- (12) The member or liquidator must not provide information or a statement under this Regulation without having reasonable grounds for believing the information or statement to be correct.

Penalty: Imprisonment for 2 years and a fine.

Chapter 3 – Winding up an insolvent foundation

10 Application of Chapter

- (1) This Chapter applies where –
 - (a) a note has been entered in the register in respect of the foundation under Regulation 3(4); but
 - (b) no certificate was delivered to the registrar under Regulation 3(2).
- (2) It also applies where the winding up of a foundation under Chapter 2 of this Part becomes a creditors' winding up by virtue of Regulation 9(8)(a).

11 Effect of winding up under this Chapter

- (1) The foundation's corporate state and capacity continue until it is dissolved.
- (2) However –
 - (a) the ability of any person to exercise any right or power the person may possess under the charter or regulations of the foundation ceases; and
 - (b) the obligation to carry out any duty imposed on any person by the charter or regulations of the foundation also ceases.
- (3) Furthermore, no action may be taken or proceeded with against the foundation except by leave of the Royal Court and subject to such terms as the Court may impose.
- (4) Also, the foundation must include in its written communications, including those transmitted by electronic means, a statement that the foundation is being wound up under this Chapter.

Penalty: A fine.

- (5) Despite paragraph (2), a person who possesses a right or power under the charter or regulations of the foundation may, before the appointment of a liquidator of the foundation, exercise that right or power –

- (a) with the sanction of the Royal Court;
- (b) to protect the foundation's assets; or
- (c) in the case of the qualified member of the council of the foundation, to comply with Regulation 12.

12 Meeting of creditors in creditors' winding up

- (1) The qualified member of the council of the foundation must, within 14 days of delivering the notice to the registrar under Regulation 3(1), give each creditor of the foundation notice by post calling a meeting of the creditors to be held in Jersey between 14 and 28 days after the notice is given.
- (2) The notice must recommend a person, who possesses the qualification (if any) mentioned in Regulation 13(1), to be the liquidator of the foundation.
- (3) Before the meeting the qualified member must provide any creditor free of charge with such information concerning the financial affairs of the foundation as the creditor may reasonably request.
- (4) At the meeting the qualified member must provide a statement as to the financial affairs of the foundation.
- (5) The qualified member shall preside at the meeting.
- (6) At the meeting the creditors may appoint a liquidator of the foundation.
- (7) If they fail to do so, the person recommended by the qualified member under paragraph (2) shall become the liquidator of the foundation.
- (8) A resolution passed at an adjourned meeting is to be treated for all purposes as having been passed on the date on which it was in fact passed, and not as having been passed on any earlier date.
- (9) The qualified member must not, without reasonable excuse, fail to comply with any of the obligations imposed on the member by this Regulation.

Penalty: A fine.

- (10) It is a defence for a qualified member, charged with the offence of failing to give a creditor notice required to be given under paragraph (1), for the member to show –
 - (a) that the member undertook reasonable enquiries to ascertain the names and addresses of the foundation's creditors; and
 - (b) the name and address of the creditor were not ascertained as a result of the enquiries.
- (11) The qualified member must not provide information or a statement under this Regulation without having reasonable grounds for believing the information or statement to be correct.

Penalty: Imprisonment for 2 years and a fine.

13 Provisions in respect of a liquidator appointed under this Chapter

- (1) The Minister may publish details of the qualifications a person must possess to be appointed to be the liquidator of a foundation that is being wound up under this Chapter.
- (2) A person may not be appointed to be the liquidator of a foundation that is being wound up under this Chapter unless the person possesses those qualifications (if any).
- (3) It is the duty of a liquidator of a foundation that is being wound up under this Chapter to gather in and distribute the assets of the foundation in a timely manner.
- (4) The creditors of a foundation that is being wound up under this Chapter may, at any time, replace the liquidator of the foundation, including a liquidator appointed by the Royal Court.
- (5) A person ceases to be the liquidator of a foundation that is being wound up under this Chapter if the person ceases to possess any qualification mentioned in paragraph (1).
- (6) The Royal Court may, on reason being given, remove the liquidator of a foundation that is being wound up under this Chapter and appoint another liquidator of the foundation.
- (7) If, for any reason, a foundation that is being wound up under this Chapter has no liquidator, the Royal Court may appoint a liquidator to wind up the foundation.
- (8) A person appointed under this Chapter to be the liquidator of a foundation must give each creditor of the foundation notice of the appointment within the 14 days of being appointed.

Penalty: A fine of level 3 on the standard scale.

- (9) It is a defence for a liquidator, charged with the offence of failing to give a creditor notice required to be given under paragraph (8), for the liquidator to show –
 - (a) that the liquidator undertook reasonable enquiries to ascertain the names and addresses of the foundation's creditors; and
 - (b) the name and address of the creditor were not ascertained as a result of the enquiries.
- (10) If the winding up of a foundation under this Chapter continues for more than 12 months, its liquidator must –
 - (a) by notice by post, call a meeting of its creditors to be held in Jersey within 3 months after the end of the first 12 months from the commencement of the winding up, and of each succeeding 12 months, the meeting to be held between 14 and 28 days after the notice is given; and
 - (b) at any such meeting, lay before the meetings an account of the liquidator's acts and dealings and of the conduct of the winding up during those preceding 12 months.

Penalty: A fine of level 3 on the standard scale.

- (11) The liquidator of a foundation that is being wound up under this Chapter is entitled to receive such remuneration –
- (a) as is agreed between the liquidator and the creditors of the foundation; or
 - (b) failing any such agreement, as is fixed by the Royal Court.

14 Costs of winding up

Despite any other provision of these Regulations, all costs, charges and expenses properly incurred in the winding up of a foundation under this Chapter, including the remuneration of its liquidator, are payable out of the foundation's assets in priority to all other claims.

15 Application of the law relating to *désastre*

- (1) In the winding up of a foundation under this Chapter, the rules in force in relation to persons against whom a declaration has been made under the Bankruptcy (*Désastre*) (Jersey) Law 1990³ shall apply with respect –
- (a) to the respective rights of secured and unsecured creditors of the foundation;
 - (b) to debts provable;
 - (c) to the time and manner of proving debts;
 - (d) to the admission and rejection of proofs of debts;
 - (e) to the order of payment of debts; and
 - (f) to setting off debts.
- (2) In their application –
- (a) for references to the *désastre* there shall be substituted references to the winding up; and
 - (b) for references to the Viscount there shall be substituted references to the liquidator.

16 Final meeting and dissolution

- (1) The liquidator of a foundation being wound up under this Chapter must prepare an account of the winding up of the foundation as soon as its affairs have been fully wound up.
- (2) The account must show –
- (a) how the winding up was conducted; and
 - (b) how the foundation's property was disposed of.
- (3) The liquidator must then call a meeting of the creditors of the foundation to be held in Jersey.
- (4) The meeting must be called by not less than 21 days' notice sent by post to each creditor.
- (5) The notice must be accompanied by a copy of the liquidator's account.

- (6) Within the 7 days after the date of the meeting the liquidator must make a return to the registrar of the holding of the meeting and of its date.
- (7) If a quorum was not present at the meeting, the liquidator must, in lieu of the return required by paragraph (6), deliver a return that the meeting was duly called and that no quorum was present.
- (8) In either case, the return must be accompanied by a copy of the account.
- (9) On receiving the return and the account, the registrar must put a note in the register in respect of the foundation stating that the foundation was dissolved under this Chapter.
- (10) The foundation is dissolved on the date the note is entered in the register.
- (11) The liquidator of a foundation must not, without reasonable excuse, fail to comply with any of the liquidator's obligations under this Regulation.

Penalty: A fine of level 3 on the standard scale.

- (12) It is a defence for a liquidator, charged with the offence of failing to give a creditor notice required to be given under this Regulation, for the liquidator to show –
 - (a) that the liquidator undertook reasonable enquiries to ascertain the names and addresses of the foundation's creditors; and
 - (b) the name and address of the creditor were not ascertained as a result of the enquiries.

17 Procedure at creditors' meeting

- (1) This Regulation applies at a creditors' meeting of a foundation.
- (2) A creditor who has been given notice of the meeting is entitled to vote at –
 - (a) the meeting; and
 - (b) any adjournment of it,either in person or by proxy.
- (3) The value of a creditor's vote shall be calculated according to the amount of the creditor's debt at the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3.
- (4) Despite paragraph (2), a debt –
 - (a) for an unliquidated amount; or
 - (b) the value of which has not been ascertained,does not give a creditor the right to vote but the chairman of the meeting may put upon the debt an estimated minimum value that entitles the creditor to do so.
- (5) For a resolution to pass it must be supported by creditors the total value of whose votes are at least half the total value of the votes of the creditors who vote on the resolution.
- (6) The meeting is not competent to act unless –
 - (a) 3 creditors or their proxies are present; or

- (b) if there are less than 3 creditors, all of the creditors or their proxies are present,
being creditors entitled to vote.

18 Powers of a liquidator

- (1) Despite Regulation 11(2), the liquidator may –
 - (a) exercise any right or power a person has under the charter or regulations of the foundation; and
 - (b) carry out any duty imposed on any person by the charter or regulations of the foundation.
- (2) The liquidator may, with the sanction of the Royal Court or with approval given at a meeting of the creditors of the foundation –
 - (a) pay a class of creditors in full; or
 - (b) compromise any claim by or against the foundation.

19 Power to disclaim onerous property

- (1) In this Regulation “onerous property” means –
 - (a) movable property;
 - (b) a contract lease;
 - (c) other immovable property if it is situated outside Jersey,
that is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act, and includes an unprofitable contract.
- (2) The liquidator may, on behalf of the foundation, disclaim onerous property of the foundation.
- (3) The liquidator may do so by notice given to each person who is interested in or under any liability in respect of the property.
- (4) The notice must –
 - (a) be given within the 6 months after the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3;
 - (b) be signed by the liquidator; and
 - (c) refer to this Regulation and Regulation 21.
- (5) A disclaimer under this Regulation –
 - (a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the foundation in or in respect of the property disclaimed; but
 - (b) does not, except so far as is necessary for the purpose of releasing the foundation from liability, affect the rights or liabilities of any other person.

- (6) A person sustaining loss or damage in consequence of the operation of a disclaimer under this Regulation is to be taken to be a creditor of the foundation to the extent of the loss or damage and accordingly may prove for the loss or damage in the winding up.

20 Disclaimer of contract leases

- (1) The disclaimer of a contract lease does not take effect unless a copy of the disclaimer is served (so far as the liquidator is aware of their addresses) on each person claiming under the foundation as a hypothecary creditor or under-lessee and either –
- (a) no application under Regulation 21 is made with respect to the contract lease before the end of the period of 14 days beginning with the day on which the last notice under this paragraph was served; or
 - (b) if such an application has been made, the Royal Court directs that the disclaimer is to have effect.
- (2) If the Royal Court gives a direction under paragraph (1)(b) it may also, instead of or in addition to any order it makes under Regulation 21, make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit.

21 Powers of Royal Court in respect of disclaimed property

- (1) This Regulation applies where the liquidator of a foundation has disclaimed property under Regulation 19.
- (2) An application may be made to the Royal Court under this Regulation by –
- (a) any person who claims an interest in the disclaimed property (which term shall be taken to include, in the case of the disclaimer of a contract lease, a person claiming under the foundation as a hypothecary creditor or an under-lessee); or
 - (b) any person who is under any liability in respect of the disclaimed property (which term shall be taken to include a guarantor), not being a liability discharged by the disclaimer.
- (3) Subject to paragraph (4), the Royal Court may, on an application under this Regulation, make an order on such terms as it thinks fit for the vesting of the disclaimed property in, or for its delivery to –
- (a) a person entitled to it or a trustee for such a person; or
 - (b) a person subject to a liability mentioned in paragraph (2)(b) or a trustee for such a person.
- (4) The Court must not make an order by virtue of paragraph (3)(b) except where it appears to the Court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.

- (5) The effect of an order under this Regulation must be taken into account in assessing for the purpose of Regulation 19(5) the extent of loss or damage sustained by a person in consequence of the disclaimer.

22 Unenforceability of liens on records

- (1) Except as provided by paragraph (2), in the winding up a lien or other right to retain possession of a record of the foundation is unenforceable to the extent that its enforcement would deny possession of the record to the liquidator.
- (2) Paragraph (1) does not apply to a lien on a document that gives a title to property and is held as such.

23 Transactions at an undervalue

- (1) If the foundation has at a relevant time entered into a transaction with a person at an undervalue the Royal Court may, on the application of the liquidator, make such an order as the Court thinks fit to restore the position to what it would have been if the foundation had not entered into the transaction.
- (2) The Court must not make an order under paragraph (1) if it is satisfied that the foundation entered into the transaction in good faith for the purpose of carrying out its object.
- (3) Without prejudice to the generality of paragraph (1) but subject to paragraph (5), an order made under paragraph (1) may do all or any of the following things, namely –
- (a) require property transferred as part of the transaction to be vested in the foundation;
 - (b) require property to be so vested if it represents in a person's hands the application either of the proceeds of sale of property so transferred or of money so transferred;
 - (c) release or discharge (in whole or in part) security given by the foundation;
 - (d) require a person to pay in respect of a benefit received by the person from the foundation such sum to the foundation as the Court directs;
 - (e) provide for a surety or guarantor whose obligation to a person was released or discharged (in whole or in part) under the transaction to be under such new or revived obligation to that person as the Court thinks appropriate;
 - (f) provide –
 - (i) for security to be provided for the discharge of an obligation imposed by or arising under the order,
 - (ii) for the obligation to be secured on any property, and
 - (iii) for the security to have the same priority as the security released or discharged (in whole or in part) under the transaction;

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- (g) provide for the extent to which a person –
- (i) whose property is vested in the foundation by the order, or
 - (ii) on whom an obligation is imposed by the order,
- is to be able to prove in the winding up of the foundation for debts or other liabilities that arose from, or were released or discharged (in whole or in part) under or by, the transaction.
- (4) Except to the extent provided by paragraph (5), an order made under paragraph (1) may affect the property of or impose an obligation on any person, whether or not the person is the person with whom the foundation entered into the transaction.
- (5) An order made under paragraph (1) –
- (a) does not prejudice an interest in property that was acquired from a person other than the foundation and was acquired in good faith and for value, or prejudice any interest deriving from such an interest; and
 - (b) shall not require a person who in good faith and for value received a benefit from the transaction to pay a sum to the foundation, except where the person was a party to the transaction.
- (6) In considering for the purposes of this Regulation whether a person has acted in good faith, the Court may take into consideration whether the person was aware –
- (a) that the foundation had entered into a transaction at an undervalue; and
 - (b) that the foundation was insolvent or would as a likely result of entering into the transaction become insolvent.
- (7) For the purposes of this Regulation, a foundation enters into a transaction with a person at an undervalue if –
- (a) it makes a gift to that person;
 - (b) it enters into a transaction with that person –
 - (i) on terms for which there is no *cause*, or
 - (ii) for a *cause* the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the *cause* provided by the foundation.
- (8) Subject to paragraph (9), the time at which a foundation entered into a transaction at an undervalue is a relevant time for the purpose of paragraph (1) if the transaction was entered into during the period of 5 years immediately preceding the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3.
- (9) The time to which paragraph (8) refers is not a relevant time unless –
- (a) the foundation was insolvent when it entered into the transaction; or
 - (b) the foundation became insolvent as a result of the transaction.

24 Giving of preferences

- (1) If the foundation has at a relevant time given a preference to a person the Royal Court may, on the application of the liquidator, make such an order as the Court thinks fit for restoring the position to what it would have been if the preference had not been given.
- (2) Without prejudice to the generality of paragraph (1) but subject to paragraph (4), an order made under paragraph (1) may do all or any of the following things, namely –
 - (a) require property transferred in connection with the giving of the preference to be vested in the foundation;
 - (b) require property to be vested in the foundation if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred;
 - (c) release or discharge (in whole or in part) security given by the foundation;
 - (d) require a person to pay in respect of a benefit received by the person from the foundation such sum to the foundation as the Court directs;
 - (e) provide for a surety or guarantor whose obligation to a person was released or discharged (in whole or in part) by the giving of the preference to be under such new or revived obligation to that person as the Court thinks appropriate;
 - (f) provide –
 - (i) for security to be provided for the discharge of any obligation imposed by or arising under the order,
 - (ii) for such an obligation to be secured on any property, and
 - (iii) for the security to have the same priority as the security released or discharged (in whole or in part) by the giving of the preference;
 - (g) provide for the extent to which a person –
 - (i) whose property is vested by the order in the foundation, or
 - (ii) on whom obligations are imposed by the order,is to be able to prove in the winding up of the foundation for debts or other liabilities that arose from, or were released or discharged (in whole or in part) under or by the giving of the preference.
- (3) Except as provided by paragraph (4), an order made under paragraph (1) may affect the property of, or impose an obligation on, any person whether or not the person is the person to whom the preference was given.
- (4) An order made under paragraph (1) shall not –
 - (a) prejudice an interest in property that was acquired from a person other than the foundation and was acquired in good faith and for value, or prejudice any interest deriving from such an interest; or
 - (b) require a person who in good faith and for value received a benefit from the preference to pay a sum to the foundation, except where

the payment is in respect of a preference given to that person at a time when the person was a creditor of the foundation.

- (5) In considering for the purpose of this Regulation whether a person has acted in good faith, the Court may take into consideration whether the person had notice –
 - (a) of the circumstances that amounted to the giving of the preference by the foundation; and
 - (b) of the fact that the foundation was insolvent or would as a likely result of giving the preference become insolvent.
- (6) For the purposes of this Regulation, a foundation gives a preference to a person if –
 - (a) the person is a creditor of the foundation or a surety or guarantor for a debt or other liability of the foundation; and
 - (b) the foundation –
 - (i) does anything, or
 - (ii) suffers anything to be done,that has the effect of putting the person into a position which, in the event of the winding up of the foundation, will be better than the position the person would have been in if that thing had not been done.
- (7) The Court shall not make an order under this Regulation in respect of a preference given to a person unless the foundation, when giving the preference, was influenced in deciding to give the preference by a desire to put the person into a position which, in the event of the winding up of the foundation, would be better than the position in which the person would be if the preference had not been given.
- (8) Subject to paragraph (9), the time at which a foundation gives a preference is a relevant time for the purpose of paragraph (1) if the preference was given during the period of 12 months immediately preceding the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3.
- (9) The time to which paragraph (8) refers is not a relevant time unless –
 - (a) the foundation was insolvent at the time the preference was given; or
 - (b) the foundation became insolvent as a result of giving the preference.

25 Personal responsibility of council members

- (1) If it appears that paragraph (2) applies in relation to a person who is or has been a member of the council of the foundation, the Royal Court on the application of the liquidator may, if it thinks it proper to do so, order that the person be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the foundation arising after the time referred to in paragraph (2).

- (2) This paragraph applies in relation to a person if at a time before the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3, the person as a member of the council of the foundation –
 - (a) knew that there was no reasonable prospect that the foundation would avoid a creditors' winding up or the making of a declaration under the Bankruptcy (Désastre) (Jersey) Law 1990; or
 - (b) on the facts known to the person, was reckless as to whether the foundation would avoid such a winding up or the making of such a declaration.
- (3) The Court must not make an order under paragraph (1) with respect to a person if it is satisfied that after either condition specified in paragraph (2) was first satisfied in relation to the person the person took reasonable steps with a view to minimizing the potential loss to the foundation's creditors.
- (4) On the hearing of an application under this Regulation, the liquidator may give evidence and call witnesses.
- (5) If the Court makes an order under this Regulation, it may give such further directions as it thinks proper for giving effect to the order.
- (6) If the Court makes an order under this Regulation in relation to a person who is a creditor of the foundation, the Court may direct that the whole or part of a debt owed by the foundation to the person and any interest on the debt shall rank in priority after all other debts owed by the foundation and after any interest on those debts.
- (7) This Regulation has effect despite the fact that the person concerned may be criminally liable in respect of matters on the ground of which the order under paragraph (1) is to be made.

26 Responsibility for fraudulent acts

- (1) If it appears that the foundation has carried on an activity –
 - (a) with intent to defraud creditors of the foundation or creditors of another person; or
 - (b) for a fraudulent purpose,the Royal Court may, on the application of the liquidator, order that persons who were knowingly parties to the carrying on of the activity in that manner are to be liable to make such contributions to the foundation's assets as the Court thinks proper.
- (2) On the hearing of the application the liquidator may give evidence and call witnesses.
- (3) If the Court makes an order under this Regulation, it may give such further directions as it thinks proper for giving effect to the order.
- (4) If the Court makes an order under this Regulation in relation to a person who is a creditor of the foundation, the Court may direct that the whole or part of a debt owed by the foundation to the person and any interest on

the debt shall rank in priority after all other debts owed by the foundation and after any interest on those debts.

- (5) This Regulation has effect despite the fact that the person concerned may be criminally liable in respect of matters on the ground of which the order under paragraph (1) is to be made.

27 Extortionate credit transactions

- (1) This Regulation applies if the foundation is, or has been, a party to a transaction for, or involving, the provision of credit to the foundation.
- (2) The Royal Court may, on the application of the liquidator, make an order with respect to the transaction if the transaction –
 - (a) is or was extortionate; and
 - (b) was entered into during the 3 years before the notice in respect of the foundation was delivered to the registrar under Regulation 3.
- (3) For the purposes of this Regulation, a transaction is extortionate if, having regard to the risk accepted by the person providing the credit –
 - (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit; or
 - (b) it otherwise grossly contravened ordinary principles of fair dealing.
- (4) It shall be presumed, unless the contrary is proved, that a transaction with respect to which an application is made under this Regulation is or, as the case may be, was extortionate.
- (5) An order under this Regulation with respect to a transaction may contain one or more of the following as the Court thinks fit –
 - (a) provision setting aside the whole or part of an obligation created by the transaction;
 - (b) provision otherwise varying the terms of the transaction or varying the terms on which a security for the purposes of the transaction is held;
 - (c) provision requiring a person who is or was a party to the transaction to pay to the liquidator sums paid to that person, by virtue of the transaction, by the foundation;
 - (d) provision requiring a person to surrender to the liquidator property held by the person as security for the purposes of the transaction;
 - (e) provision directing accounts to be taken between any persons.

28 Delivery and seizure of property

- (1) Paragraph (2) applies if a person has possession or control of property or records to which the foundation appears to be entitled.
- (2) The Royal Court may require the person, either forthwith or within a period of time that the Court may direct, to pay, deliver, convey, surrender or transfer the property or records to the liquidator.

- (3) Paragraph (4) applies if –
 - (a) the liquidator seizes or disposes of property that is not property of the foundation; and
 - (b) at the time of seizure or disposal the liquidator believed, and had reasonable grounds for believing, to be entitled, either in pursuance of an order of the Court or otherwise, to seize or dispose of the property.
- (4) The liquidator –
 - (a) is not liable to any person in respect of loss or damage resulting from the seizure or disposal except in so far as the loss or damage is caused by the negligence of the liquidator; and
 - (b) has a lien on the property, or the proceeds of its sale, for expenses incurred in connection with the seizure or disposal.

29 Duty to co-operate with liquidator

- (1) Each of the persons mentioned in paragraph (2) must –
 - (a) give the liquidator information concerning the foundation and its formation, dealings, affairs or property that the liquidator may reasonably require;
 - (b) attend on the liquidator at reasonable times and on reasonable notice when requested to do so; and
 - (c) notify the liquidator in writing of any change of the person's address, employment, or name.
- (2) The persons referred to in paragraph (1) are –
 - (a) persons appointed under the charter or regulations of the foundation or persons that have held such appointments at any time within 12 months before the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3;
 - (b) persons who are in the employment of the foundation, or that have been in its employment within 12 months before the time when the notice in respect of the foundation was delivered to the registrar under Regulation 3.
- (3) For the purposes of paragraph (2) “employment” includes employment under a contract for services (*contrat de louage d'ouvrage*).
- (4) A person must not, without reasonable excuse, fail to comply with an obligation imposed on the person by this Regulation.

Penalty: Imprisonment for 6 months and a fine.

30 Liquidator to report possible misconduct

- (1) The liquidator must take the action specified in paragraph (2) if it appears to the liquidator in the course of the winding up –
 - (a) that the foundation has committed a criminal offence;

- (b) that a person has committed a criminal offence in relation to the foundation; or
 - (c) in the case of a person appointed under the charter or regulations of the foundation, that for any reason the person's conduct has been such that an order should be sought against the person under Article 78 of the Companies (Jersey) Law 1991⁴.
- (2) The liquidator must forthwith report the matter to the Attorney General.
- Penalty:** A fine of level 4 on the standard scale.
- (3) The Attorney General may refer the matter to the Commission and the Commission shall thereupon investigate the matter.
- (4) If requested to do so by the Attorney General or the Commission, the liquidator must –
- (a) provide the Attorney General or the Commission with information;
 - (b) give the Attorney General or the Commission access to, and facilities for inspecting and copying, a document in the possession or under the control of the liquidator; and
 - (c) otherwise provide such assistance to the Attorney General or the Commission as the liquidator is reasonably able to give,
- that relates to the matter in question.
- Penalty:** A fine of level 4 on the standard scale.
- (5) If it appears to the Royal Court –
- (a) that the foundation has committed a criminal offence;
 - (b) that a person has committed a criminal offence in relation to the foundation; or
 - (c) in the case of a person appointed under the regulations of the foundation, that for any reason the person's conduct has been such as to raise a question whether an order should be sought against the person under Article 78 of the Companies (Jersey) Law 1991,
- and that no report with respect to the matter has been made by the liquidator to the Attorney General under paragraph (2), the Court may, on the application of a person interested in the winding up or of its own motion, direct the liquidator to make such a report.

31 Bar against other proceedings in bankruptcy

The winding up of the foundation under this Chapter bars the right of any other person to take any other proceedings in bankruptcy in respect of the foundation.

PART 3

DISSOLUTION FOR NON-PAYMENT OF ANNUAL FEE OR AMOUNT

32 Dissolution for non-payment of annual fee or additional amount

- (1) This Part applies where –

- (a) the published annual administration fee; or
 - (b) any additional amount,
- mentioned in Article 37 of the Law, has not been paid before 30th June in the year in which it is due.
- (2) The registrar may publish a notice in the Jersey Gazette and send a copy of it to the foundation.
 - (3) The notice must –
 - (a) contain details of the outstanding fee or amount; and
 - (b) state that if the fee or amount is not paid within the 3 months following the date of the notice, the name of the foundation will be removed from the register and, accordingly, the foundation will be dissolved.
 - (4) The registrar may remove the name of the foundation from the register if the fee or amount is not paid as provided by the notice,
 - (5) If the register does so, the foundation is thereupon dissolved.
 - (6) The register must publish in the Jersey Gazette the name of any foundation dissolved under this Part.

PART 4

WINDING UP ON JUST AND EQUITABLE GROUNDS

33 Application of Part - winding up by Royal Court

This Part applies where the Royal Court is of the opinion that it is –

- (a) just and equitable; or
- (b) in the public interest,

that a foundation should be wound up by the Court.

34 Application to the Royal Court to wind up a foundation

An application to the Royal Court to wind up a foundation under this Part may be made –

- (a) on the grounds mentioned in Regulation 33(a), by a person with standing in respect of the foundation; or
- (b) on the ground mentioned in Regulation 33(b), by the Attorney General or by the Commission.

35 Winding up by Royal Court

- (1) If the Court orders a foundation to be wound up under this Part, the Court –
 - (a) must appoint a person to be the liquidator of the foundation; and

- (b) may make such orders as it sees fit to ensure that the winding up is conducted in an orderly manner.
- (2) The liquidator must –
 - (a) within 14 days after the Act of the Royal Court ordering the winding up of the foundation under this Part is made, deliver the Act to the registrar; and
 - (b) within 14 days of completing the winding up deliver to the registrar a notice stating that the winding up of the foundation has been completed.

Penalty: A fine of level 3 on the standard scale.

- (3) When the Act of the Royal Court ordering the winding up of the foundation under this Part is delivered to the registrar under paragraph (2)(a), the registrar must enter a note in the register, in respect of the foundation, stating that the foundation is being wound up under this Part.
- (4) When a notice stating that the winding up of the foundation has been completed is delivered to the registrar under paragraph (2)(b), the registrar must enter a note in the register, in respect of the foundation, stating that the foundation has been wound up under this Part.
- (5) The foundation is dissolved on the date the note is entered in the register under paragraph (4).

PART 5

PROVISIONS OF GENERAL APPLICATION ON WINDING UP OF A FOUNDATION

36 References to the Royal Court

- (1) This Regulation applies where a foundation is being wound up under these Regulations.
- (2) A person with standing in respect of the foundation or any liquidator of the foundation may, under Part 5 of the Law, apply to the Royal Court –
 - (a) for the determination of a question arising in the winding up; or
 - (b) for the Court to exercise any of its powers under Part 5 of the Law in relation to the winding up.

37 Disposal of remaining assets of a foundation

- (1) This Regulation applies where the Royal Court is satisfied –
 - (a) that a foundation is being wound up under these Regulations; and
 - (b) that any remaining property of the foundation cannot be disposed of in the manner specified in the charter of the foundation.
- (2) A person with standing in respect of the foundation or any liquidator of the foundation may apply to the Royal Court for an order as to the disposal of the property.

- (3) The Court may make an order providing for the disposal of the property for any purpose that, in the opinion of the Court, most resembles the object of the foundation.

38 Disposal of records

- (1) This Regulation applies when a foundation has been dissolved under these Regulations.
- (2) Its records and those of any liquidator may be disposed of –
 - (a) if the foundation was wound up under Chapter 2 of Part 2, in such manner as the former council of the foundation may direct;
 - (b) if the foundation was wound up under Chapter 3 Part 2, in such manner as the foundation’s creditors may direct;
 - (c) if the foundation was wound up under Part 3, in such manner as the registrar may direct;
 - (d) if the foundation was wound up under Part 4, in such manner as the Royal Court may direct.
- (3) After 10 years from the foundation’s dissolution no responsibility rests on a person –
 - (a) who was a member of the council of the foundation;
 - (b) who was a liquidator of the foundation; or
 - (c) to whom the custody of the records of the foundation has been committed,by reason of any record not being forthcoming to a person claiming to be interested in it.
- (4) The Commission may direct that for such period as it thinks proper (but not exceeding 10 years from the foundation’s dissolution), the records of the foundation shall not be destroyed.
- (5) A person must not act in contravention of a direction under paragraph (4).

Penalty: A fine of level 4 on the standard scale.

PART 6

POWER OF ROYAL COURT TO DECLARE DISSOLUTION OF A FOUNDATION VOID

39 Royal Court may declare dissolution of a foundation void

- (1) The Royal Court may make an order declaring the dissolution of a foundation under these Regulations to have been void.
- (2) The order may be made on the application of any person who would have been a person with standing in respect of the foundation had it not been dissolved.

- (3) The application may only be made during the 10 years after the dissolution of the foundation.
- (4) The order may be made on such terms as the Royal Court thinks fit.
- (5) The Royal Court may, by the order, give directions and make provisions necessary to place the foundation and any other person (including the Crown) in the same position, as nearly as may be, as if the foundation had not been dissolved.
- (6) The person upon whose application the order was made must, within the 28 days after the order is made or within such longer period as the Royal Court may allow, deliver the Act of the Royal Court to the registrar.

Penalty: A fine of level 3 on the standard scale.

- (7) The registrar must amend the register accordingly.

PART 7

CITATION AND COMMENCEMENT

40 Citation and commencement

These Regulations may be cited as the Foundations (Winding up) (Jersey) Regulations 200- and shall come into force forthwith.

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- ¹ *L.23/2009*
 - ² *L.23/2009*
 - ³ *chapter 04.160*
 - ⁴ *chapter 13.125*