



New Hampshire Introduces Foundation Act

By Todd D. Mayo

New Hampshire has introduced a bill that would allow the formation, registration, and domestication of foundations. The bill (SB 225), which has already received a favorable vote in the state senate, would establish the New Hampshire Foundation Act. With the enactment of the Foundation Act, New Hampshire would become the first U.S. jurisdiction to permit the establishment of civil-law foundations. If the bill passes, the Foundation Act will be effective October 1, 2017. By recognizing foundations, New Hampshire would enable families from countries in which foundations are preferable to trusts as wealth management vehicles to avail themselves of a U.S.-based structure.

Nature of a Foundation

Under the Foundation Act, a foundation is a legal entity that holds and manages its assets for the benefit of its beneficiaries or in furtherance of its purposes. The Foundation Act marries elements of the New Hampshire Trust Code, the New Hampshire Business Corporations Act, and the New Hampshire Revised Limited Liability Company Act. The Foundation draws on the trust laws for purposes of defining the rights and duties of the founders, beneficiaries, directors, and protectors, instituting the processes and parameters for modifying or reforming a foundation's governing instruments, and establishing the probate court's jurisdiction over foundations and their internal affairs. The Foundation Act draws on the company laws for the procedural rules governing the formation, registration, domestication, and dissolution of a foundation.

Roles

In a foundation, the cast of characters includes an organizer, founder, and director, and it may include a beneficiary and protector.

Organizer

An organizer is a person who signs and files the foundation's certificate of formation. Under the Foundation Act, a founder or any other person may act as an organizer. An organizer may be an individual or an entity.

Founder

A founder is a person who contributes money or other property to a foundation. If more than one person contributes property to a foundation, then each person is a founder of the portion of the property attributable to that person's contribution, except to the extent that another foundation person has the power to revoke or withdraw that portion. A founder may reserve any power, right, or interest in a foundation. By default, a founder has the power to amend the foundation's certificate of formation, the power to amend or revoke the bylaws, the power to direct the directors to make distributions, and the power to dissolve the foundation. The certificate of formation or the bylaws, however, may modify or waive those powers.

Beneficiaries

A beneficiary is a person who may receive a distribution of property from a foundation and is identifiable by name, as a member of an ascertainable class of persons, or by relationship to another person. A beneficiary does not have any property right in a foundation or its property. The certificate of formation or the bylaws may grant to a beneficiary any rights, powers, and interests.

Directors

A foundation's board of directors is vested with the power to manage the foundation and its affairs. An individual or an entity may serve as a director. There is no residency requirement applicable to directors; thus, a director is not required to be a New Hampshire resident. A foundation may have one or more classes of directors. A foundation's governing documents would define each class's powers and duties.

Protectors

A foundation may have one or more protectors, whose powers and duties are defined by the certificate of formation and the bylaws. A protector may be an individual or an entity. A foundation is not required to have a New Hampshire-resident protector. A foundation may have one or more classes of protectors. A foundation's governing documents would define each class's powers and duties.

Purposes

A foundation must have one or more purposes, which may be set forth in either the certificate of formation or the bylaws. Each purpose must be lawful, not contrary to public policy, and possible to achieve. The purposes may be charitable and non-charitable purposes. For example, a foundation's purpose may be the conservation, protection, and management of the foundation's property for the benefit of one or more beneficiaries.

Formation

An organizer forms a foundation by filing a certificate of formation with the New Hampshire secretary of state. The certificate of formation must include the foundation's name, the name of the foundation's initial registered agent, and the address of the foundation's initial registered office. The certificate of formation may include a statement of the foundation's purposes, as well as any other matter that the organizer deems necessary or advisable so long as it is consistent with the Foundation Act and any other applicable law.

The Foundation Act contemplates that the bylaws will generally contain all of the substantive provisions governing the powers, duties, rights, and interests of the founder, beneficiaries, directors, and protectors. The bylaws must include the foundation's purposes. The bylaws may include the dispositive provisions governing the distribution of the foundation property to the beneficiaries or in furtherance of the foundation's purposes. The bylaws may contain a no-contest provision (i.e., a forfeiture provision) or a provision requiring the nonjudicial resolution of disputes among the founders, directors, protectors, and beneficiaries.

Under the bylaws, the founder may reserve any rights, powers, and interest in a foundation. For example, the founder may reserve the power to appoint and remove a director or protector, the power to direct distributions, or the power to dissolve the foundation. Unless the certificate of formation or the bylaws provide otherwise, either the founder or the directors may amend or revoke the bylaws.

Foundation Property

The directors must manage the foundation property for the benefit of the beneficiaries or in furtherance of the foundation's purposes. From each founder, a foundation will receive a contribution of money or other property. The Foundation does not impose any minimum capital requirement. A founder does not acquire any right, power, or interest in a foundation solely by reason of contributing property to the foundation.

Dispute Resolution

The probate court has exclusive jurisdiction over the modification, reformation, or termination of a foundation and any claim by a beneficiary against a director or protector for a breach of a duty. The certificate of formation or the bylaws, however, generally may require any dispute concerning the foundation to be resolved in accordance with a nonjudicial dispute resolution procedures. The dispute resolution procedures must be reasonable. Also, only the probate court can decide whether a foundation's formation was valid, whether a contribution by a founder to the foundation was valid, or whether any particular purpose is a material purpose of the foundation.

Private Trust Companies

A foundation may act as a private trust company. Under the New Hampshire Family Trust Company Act, a private trust company may provide trust, investment, and related services to a family. A foundation may be well-suited to serve as a private trust company, because it does not have any shareholders so it can fully encapsulate its own governance structure.

Registration of Foreign Foundations

A foreign foundation may register by filing with the secretary of state a certificate of registration. A foreign foundation is a foundation formed under the laws of a jurisdiction other than New Hampshire and thus would include foundations formed in civil-law jurisdictions such as Liechtenstein, the Netherlands, and the Netherland Antilles and common-law jurisdictions such as the Bahamas, Jersey, and Guernsey (and potentially the Caymans, which is on the verge of enacting its Foundation Companies Bill). A foreign foundation must register before commencing any judicial proceeding in New Hampshire.

Taxation

A foundation formed under the Foundation Act likely would be classified as a trust for U.S. tax purposes. For U.S. tax purposes, a foundation's classification is determined on a case-by-case basis. Under Treas. Reg. § 301.7701-4(a), "trust" generally means "an arrangement created by ... an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts." The regulations further provide that "an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit."

The Foundation Act vests a foundation's directors with the power and duty to manage the foundation's property for the benefit of the foundation's beneficiaries or in furtherance of the trust's purposes. Under the Foundation Act, the probate court has exclusive jurisdiction over the modification, reformation, or termination of a foundation and any claim by a beneficiary against a director or protector for a breach of a duty. The directors are responsible for the protection and conservation of property for the beneficiaries' benefit. Under the Foundation Act, a director is subject to a non-waivable duty to manage the foundation and its property in good faith, in accordance with the terms of the governing documents, and in accordance with the Foundation Act. A foundation's director also has the following duties:

- Duty of loyalty
- Duty of impartiality
- Duty of prudent management
- Duty to control and protect the foundation property
- Duty to maintain records

- Duty to inform the beneficiaries

Under the Foundation Act, the beneficiaries do not have any power to participate or otherwise share in the management of the foundation's property. Since the rights, powers, and duties of a foundation's directors and beneficiaries mirror the rights, powers, and duties of a trust's trustees and beneficiaries, a foundation formed under the Foundation Act generally should be classified as a trust for U.S. tax purposes.

For New Hampshire tax purposes, a foundation will be taxable in the same manner as a trust and thus generally will be exempt from tax. The bill amends the state's tax laws so that a foundation will be treated in the same manner as a trust. A foundation, however, will not be exempt from tax if it has transferrable interests that are functionally equivalent to company shares or if it directly engages in business activities.

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