

Building a Foundation – The New Hampshire Foundation Act

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Non-charitable private foundations have long been used in civil law jurisdictions as an alternative to the common law ‘trust’ to hold wealth for the benefit of a family. The separation of legal and beneficial ownership which is the premise of the trust can create difficulties for those clients benefitting from a trust while living in certain civil law countries. With the enactment of the New Hampshire Foundation Act, individuals and families living in these countries are now able to establish a foundation and yet attain the full benefit of a trust in the U.S., for both U.S. tax and legal purposes.

In October 2017, New Hampshire became the first U.S. jurisdiction to allow the formation and registration of foundations. For New Hampshire foundation law purposes, a foreign foundation is a foundation formed under the laws of a jurisdiction other than New Hampshire and includes foundations formed in jurisdictions such as Liechtenstein, the Netherlands, the Bahamas, Jersey, and Guernsey. Under the New Hampshire Foundation Act, a foreign foundation is not required to form or establish a new foundation; rather, the existing foundation simply needs to register in New Hampshire.

The New Hampshire Foundation Act draws on the New Hampshire Trust Code for rules defining the rights and duties of the founders, beneficiaries, directors, and protectors and establishing the appropriate New Hampshire court’s jurisdiction over the foundation. By design, directors and beneficiaries of a foundation have similar rights, powers, and duties to which trustees and beneficiaries of a trust are subject to under the New Hampshire Trust Code, and the appropriate New Hampshire court has exclusive jurisdiction over matters involving the foundation’s internal affairs. As such, if structured and drafted properly, a foundation formed or registered under the New Hampshire Foundation Act generally should be treated as a trust for U.S. federal tax purposes; the foundation can be drafted very flexibly so that it can be treated as a grantor trust or a non-grantor trust and a U.S. trust or a non-U.S. trust depending on its structure and the terms of the governing documents.


The New Hampshire Foundation Act affords broad flexibility in designing and managing foundations which can be tailored to the needs of the founders and beneficiaries depending on the circumstances and purposes (e.g., the citizenship/residency of the founder and beneficiaries, the assets to be held and administered, tax implications and benefits, etc.). With such flexibility, a foundation registered under the New Hampshire Foundation Act and treated as a trust may be an optimal structure that delivers the best of both worlds. For example, an individual or family living in a civil law country the laws of which may not recognize trusts may consider establishing a foundation and registering it under the New Hampshire Foundation Act for purposes of investing in U.S. real property.

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