

# Coronavirus Information Hub: FAQ Foundations

**Möchten** Sie als Stiftung bestimmte, von der Corona-Krise betroffenen Personen oder Organisationen unterstützen oder hierzu gar eine neue Stiftung errichten? Sind Sie unsicher, in welcher Form Sie aufgrund des gegenwärtig geltenden Veranstaltungsverbots Stiftungsratssitzungen abhalten können?

Unsere Experten unterstützen Sie gerne in diesen und weiteren Fragen im Zusammenhang mit dem Stiftungsrecht. Walder Wyss betreut schweizweit zahlreiche namhafte gemeinnützige Stiftungen und verfügt über grosses Know-How in diesem Bereich.

**Do** you as a foundation want to support certain persons or organizations affected by the Corona crisis or even set up a new foundation for this purpose? Are you unsure in what form you can hold foundation board meetings due to the current ban on events?

Our experts will be happy to support you in these and other questions related to foundation law. Walder Wyss advises numerous well-known charitable foundations throughout Switzerland and has extensive know-how in this area.

**En** tant que fondation, souhaitez-vous soutenir certaines personnes ou organisations touchées par la crise de Corona ou même créer une nouvelle fondation à cette fin? Vous ne savez pas sous quelle forme vous pouvez tenir les réunions du conseil de fondation en raison de l'interdiction actuelle des manifestations?

Nos experts seront heureux de vous aider dans ces domaines et dans d'autres questions liées au droit des fondations. Walder Wyss conseille de nombreuses fondations d'utilité publique de renom dans toute la Suisse et dispose d'un savoir-faire étendu dans ce domaine.

## **1. May I provide support from the foundation's assets if I currently lack sufficient foundation income due to the COVID pandemic?**

That depends primarily on the foundation charter. There is the possibility to design a foundation as a so-called non-perpetual foundation (Verbrauchsstiftung), which carries out its support activities not or not only from its income, but also from its assets. This will be recorded in the foundation charter by means of a corresponding order.

## **2. When does it make sense to establish a non-perpetual foundation (Verbrauchsstiftung)?**

The establishment of such a new non-perpetual foundation can make sense if a rather short or medium-term foundation goal is to be achieved and/or if there is limited foundation capital whose income is too low to fulfil the announced foundation goal.

A non-perpetual foundation can also be tax-exempt if the purpose of the foundation is charitable.

## **3. Can I provide support from my foundation assets if I am not a non-perpetual foundation (Verbrauchsstiftung) or if the foundation charter does not provide for this?**

If the foundation charter does not stipulate that the Board of trustees must preserve assets, but at the same time does not authorise it to consume assets, it is not entirely clear whether the Board of trustees has an obligation to preserve assets.

In principle, the fulfilment of the foundation's purpose has top priority. It can be concluded from this that the Board of Trustees may decide at its own discretion whether and to what extent the assets of the foundation should be used to achieve the purpose of the foundation. The consumption of assets is to be assumed to be admissible if without it the realization of the foundation's purpose is not (no longer) possible. Such an impossibility of the realization of the purpose might be affirmed in the current context, if a foundation, as a result of the COVID pandemic, is no longer able to generate any or hardly any income in the medium or long term.

If the Board of Trustees wishes to remove the uncertainty of the permissibility of a consumption of assets, an application for a minor amendment of the foundation charter by the supervisory authority or an adaptation of the organisational regulations could be an option.

## **4. As founder, can I change or extend the foundation's purpose?**

At the founder's request an amendment of the objects of the foundation is possible, provided that the charter reserves the right to amend the objects and that at least ten years have elapsed since the foundation was established or since the last amendment requested by the founder.

The right to amend a foundations objects is not heritable and must therefore be made by the founder himself. It may also be requested by the founder by a testamentary disposition (see also our [FAQ Private Clients](#)).

If the founder is a legal entity the right to request the amendment expires at the latest 20 years after the establishment of the foundation.

### 5. How can I set up a foundation?

By means of a foundation charter, assets are designated for a particular purpose. A foundation may be created by public deed or by testamentary disposition (see also our [FAQs Private Clients](#)).

The foundation charter itself also sets out the further organisation of the foundation. In addition, the foundation board may - even without an explicit order in the foundation charter - issue additional organizational regulations.

Walder Wyss is happy to assist you in setting up a foundation and clarifying all related issues.

### 6. Is a foundation automatically tax exempt?

No. The tax exemption of a foundation must be applied for by means of a so-called tax exemption application to the competent tax authorities.

A tax exemption is granted if the foundation pursues charitable purposes and the profit and capital of the foundation is exclusively and irrevocably dedicated to this purpose. In order for a charitable purpose to be affirmed, the circle of beneficiaries must be relatively open and must not be limited to a small group of persons.

If it is uncertain whether the tax exemption will be affirmed, it is advisable to clarify the question in advance with the tax authorities in a so-called "tax ruling".

### 7. To what extent are the provisions in the COVID-19 Ordinance 3 applicable to meetings of the Board of trustees?

In accordance with the preceding provision in the ordinance on measures to combat the Coronavirus (COVID-19 Ordinance 2), the new ordinance on measures to combat the Coronavirus (COVID-19 Ordinance 3) contains a special regime which allows companies to order participants to exercise their rights exclusively in writing, online or through an independent proxy and to preclude participants from in-person attendance.

Even though the wording of the respective provision in the COVID-19 Ordinance does *stricto sensu* apply neither to meetings of the management or administrative organ of a company, nor to meetings of the Board of trustees, the Swiss Federal Supervisory Authority for Foundations is of the opinion, that boards of trustees may nevertheless hold their meetings by telephone, video conference or circular resolution even if this is not provided for in the Articles of Association. However, it is recommended that this possibility be included in the Articles of Association as part of a future amendment to the Articles of Association or when establishing the foundation in the first place.

### 8. Are virtual meetings or circular resolutions of the Board of trustees allowed regardless of the pandemic?

The legitimacy of virtual meetings or circular resolutions of the Board of trustees depend primarily on the foundation charter and the organizational regulations. If neither of these documents provide for a regulation, the law of associations applies. The latter equates the written consent of all members to an application to a resolution in a meeting. However, a virtual decision-making is not provided for in the law on associations.

If the foundation charter and the organizational regulations do not allow virtual meetings, an adaption of the organizational regulations that explicitly allow such virtual meetings should be considered in order to be prepared for future extraordinary situations as the COVID-Pandemic.

### 9. What impact does the COVID-19 pandemic have on Investment Agreements if milestones are not achieved in time?

Due to the COVID-19 pandemic, milestones which are often defined as conditions for the payment in Investment Agreements, may not be achieved at all or may not be achieved within the set deadline.

In order to know the legal consequences of such delays or omissions which are caused by the COVID-19 pandemic, a consultation of the provisions of the respective Investment Agreement is required. Some Investment Agreements contain a so called "force majeure clause" which governs the consequences of unpredictable events such as pandemics, wars and the like.

If the Investment Agreements do not contain a force majeure or similar clause, the Swiss law provides for various legal remedies, such as the creditor's (in our case the Foundation's) option

to set an appropriate time limit for subsequent performance, to sue for damages or to withdraw from the contract. The applicable rules depend primarily on whether the performance which is due in order to meet the milestone has become objectively impossible and whether this impossibility is only temporary or permanent. The answers to these questions vary from contract to contract and must be answered especially by taking into account the specific circumstances of each case and the question, how and to what extent the obligor is affected by the COVID-Pandemic and the prohibitions issued.

Depending on the specific circumstances of the Investment Agreements which are affected, a party of a long-term Investment Agreement may even have the possibility to terminate it extraordinarily for a valid reason or claim an adaption due to completely changed circumstances according to the so called "clausula rebus sic stantibus".

We refer with this regard to the [FAQs Commercial Contracts](#).

Notwithstanding the above, the parties are of course free to amend their investment agreement by mutual consent and to adapt it to circumstances and needs

#### **10. How can Investment Agreements be amended?**

In order to amend an Investment Agreement, the parties should take into account the provisions of the Agreement with respect to its amendment. As with most other contracts, Investment Agreements normally provide for amendments to be made in writing and thus must be signed by all parties to be valid.

#### **11. What applies with regard to the deadlines for submitting the annual report?**

The deadline for submission of the 2019 annual report, which for most foundations expired on 30 June 2020, had been extended by the Swiss Federal Supervisory Authority for Foundations to 30 September 2020.

For the 2020 annual report, no such extension has been granted by the Swiss Federal Supervisory Authority. However, the Swiss Federal Supervisory Authority is aware that the foundations may also face difficulties in meeting deadlines and has declared to be willing to take this into account with sufficient extensions of the deadlines.

For further information we refer to the homepage of SwissFoundations: <https://www.swissfoundations.ch/>

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#### [Coronavirus Information Hub](#)

Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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