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BULLETIN

# The Purpose and Legal Standing of a Letter of Wishes in Relation to a Foreign Pension or a Discretionary Trust

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## Overview

A letter of wishes (LOW) is a private written document prepared by the Member of a Foreign Pension or the Settlor of a Discretionary Trust to provide guidance to Trustees on how they may exercise their powers.

While not legally binding, it is a valuable interpretive tool, offering Trustees insight into the Member or Settlor's intentions, values, and priorities regarding the management of the Foreign Pension or the Discretionary trust.

By their nature, Foreign Pensions - and particularly Discretionary Trusts - grant Trustees significant latitude in deciding how and when to distribute income or capital among Beneficiaries. This flexibility can sometimes be a source of concern for the Member or Settlor, and it is here that a LOW plays a crucial role.

## The Purpose of a LOW

A LOW serves several important functions:

- **Clarifying the Member or Settlor's intentions:** While the deed and rules establish the overarching framework, a LOW allows the Member or Settlor to provide additional context - such as identifying preferred Beneficiaries, outlining desired distribution patterns, or explaining particular family circumstances. In the context of pensions, this often accompanies the Nomination of Beneficiaries Form.
- **Providing guidance without restriction:** As Trustees must retain their discretion, the LOW cannot compel them. Instead, it provides a reference point that Trustees can weigh when making decisions, ensuring the Foreign Pension or Discretionary Trust is managed consistently with the Member's financial objectives in retirement or the Settlor's philosophy on their passing.
- **Addressing sensitive or changing circumstances:** The deed is a formal legal instrument that is costly and complex to amend. A LOW, by contrast, can be easily updated, allowing the Member or Settlor to reflect changes in family relationships, financial needs, or tax considerations.
- **Maintaining confidentiality:** A LOW is not a public document and does not form part of the pension rules or the trust deed. This means the Member or Settlor can express personal opinions, preferences, or concerns without these being disclosed to current or future Beneficiaries or third parties.

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## The Legal Standing of a LOW

From a legal perspective, a LOW has the following characteristics:

- **Non-binding:** Trustees are not legally required to follow its contents. Their paramount duty is to act in accordance with the deed, the applicable pension rules, or the statutory law. If the LOW seeks to restrict or limit their discretion, it may be disregarded.
- **Persuasive:** Courts in many common law jurisdictions recognise that a well-drafted LOW can be an important aid in interpreting the Member or Settlor's intent. Trustees will often take it into account and follow it, unless there is a good reason not to, such as changed circumstances or a conflict with the pension or fiduciary rules.
- **May be disclosable in certain situations:** While it is generally private, a LOW can be subject to disclosure in litigation, especially in disputes between Beneficiaries and Trustees. The extent of disclosure depends on jurisdiction-specific law and case precedents.
- **Supports Trustees against challenges:** If Trustees act in accordance with a reasonable interpretation of a LOW, it can help demonstrate that they exercised their discretion properly, in good faith, and with due consideration to the Member or Settlor's wishes.

## Best Practice in Drafting a LOW

For a LOW to be effective and respected, it is important that it is:

- **Expressly non-binding:** The LOW must clearly state that its purpose is to guide the Trustees, not to impose obligations.
- **Clear and specific:** Using precise, unambiguous language helps to set out priorities without undermining the Trustees' discretion.
- **Regularly updated:** It is recommended to review and amend the LOW as family, financial, or legal circumstances evolve.
- **Consistent with the trust deed:** There should be no contradictions between the LOW and the governing instrument or legislation.
- **Signed and dated:** While it is not legally required, including a signature and a date reinforces the authenticity of a LOW and establishes a clear timeline.

## Conclusion

A LOW is a powerful complement to a Foreign Pension or a Discretionary Trust.

While it does not carry binding legal force, it serves as the crucial bridge between the formal framework of the deed and the personal intentions of the Member or Settlor.

When thoughtfully drafted and kept up to date, it provides Trustees with clear guidance, carries significant persuasive authority, and can shape the administration of the pension or trust in a way that truly reflects the values and priorities of the Member or Settlor.

## Contact Us

Every client has unique intentions for how their wealth should be managed and passed on. While a LOW provides valuable guidance to Trustees, the varied tax treatment of death benefit payments across jurisdictions means careful planning is essential to avoid unintended outcomes.

Therefore, contact us on +44 (0) 3333 078888 or +27 (0) 21 851 5584 or via email at [advisers@trustandpension.com](mailto:advisers@trustandpension.com) today to ensure your client's legacy is protected and carried out as intended. Alternatively, you can speak to your FEIFA representative.

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## In Case You Missed it

Please click [HERE](#) to read our article on **Taxation of Foreign Pension Income in Portugal - Avoiding the Pitfalls of Non-Compliance with Category H.**

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