

Guidance Note

Limited Liability Companies

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Introduction

This The Limited Liability Companies Law, 2016 (the “Law”) permits the formation of a new type of vehicle in the Cayman Islands – a Cayman Islands limited liability company (an “LLC”). An LLC is similar in many respects to a Delaware limited liability company. It is an entity with separate legal personality (like a Cayman Islands exempted company), but with certain features akin to a Cayman Islands exempted limited partnership (in the sense that an LLC is not limited by shares nor by guarantee but rather by reference to members' capital accounts and capital commitments, with substantial freedom of contract amongst the members as to determining the internal workings of the LLC).

Some potential advantages of an LLC in the funds context would be to allow for simplified and more flexible fund administration (e.g. easier tracking or calculation of the value of a member's investment in the LLC), more flexible corporate governance concepts, and possibly a closer matching of the legal framework applicable between the "onshore" and "offshore" investors (e.g. where there is a parallel "onshore" Delaware limited liability company as a feeder or master fund and an "offshore" Cayman fund in the structure). Where a closed ended fund requires separate legal personality (i.e. as opposed to being structured as an exempted limited partnership), a Cayman Islands exempted company can be cumbersome in the operation of capital call and default mechanisms – an LLC may be ideally suited to such a scenario.

Fund promoters often prefer to have a Delaware limited liability company registered as a foreign company in Cayman, in order for the Delaware limited liability company to be able to act as the sole general partner of a Cayman Islands exempted limited partnership. Offering a Cayman LLC solution might better suit promoters' needs in this respect (and might also enable the Cayman LLC to provide an alternative solution for promoters and their onshore counsel to consider, for the general partner role to their onshore partnerships).

The following is a summary of the Law and the LLC structure.

Key Features

The Law includes the following salient features:

- an LLC is a body corporate with limited liability;
- an LLC may be formed for any lawful business, purpose or activity, provided that the LLC does not undertake business with the public in the Cayman Islands other than so far as may be necessary for the carrying on of the business of that LLC outside the Cayman Islands;
- an LLC requires at least one member;
- registration is effected by the filing of a registration statement and payment of a fee, and upon the registration, the Registrar of Limited Liability Companies will issue a certificate of formation;
- an LLC must have a registered office in the Cayman Islands;
- an LLC has the ability to be member managed or managed by a manager or managers;
- members are free to agree amongst themselves the internal workings of the LLC, with appropriate minimum safeguards;
- the Law seeks to take into account existing Cayman Islands laws and



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- considerations, including preserving the rules of equity and common law and addressing minimum statutory duties in the context of members and managers; and
- exempted companies may merge into LLCs, and foreign LLCs may merge or migrate into Cayman.

Name

An LLC may (but is not required to) use one of the following in its name: "Limited Liability Company", "LLC" or "L.L.C."

No other company or entity registered under the Companies Law may use these words in its name, unless it is or will be an entity registered under Part IX (Overseas Companies) of the Companies Law or it is an existing entity that is currently using one of these words in its name.

In the case of an LLC carrying on special economic zone business, that LLC shall include the words "special economic zone" or the letters "SEZ".

The name may be preceded by or followed with a dual foreign name.

Formation

The registration of an LLC is effected by payment to the Registrar of a registration fee and by filing with the Registrar a registration statement which shall contain:

- a) the name of the LLC and, if applicable, its dual foreign name together with its translated name;
- b) the address in the Cayman Islands of the registered office of the LLC;
- c) if the LLC has not been formed for an unlimited duration, the term, if any, for which an LLC is formed; and
- d) a declaration that the LLC shall not undertake business with the public in the Cayman Islands other than so far as may be necessary for the carrying on of the business of the LLC outside the Cayman Islands.

LLC Agreement

An LLC agreement may be entered into at any time before, after or at the time of the filing of a registration statement and, if entered into before such filing, shall be deemed effective as of the date of registration of the LLC.

Notwithstanding anything to the contrary that might be expressed in an LLC agreement, the Law provides that an LLC agreement shall be governed by Cayman Islands law.

An LLC agreement may, among other things:

- a) provide for classes of LLC interests or groups of members having such relative rights, powers and duties as the LLC agreement may provide, and may make provision for the future creation in the manner provided in the LLC agreement of classes of LLC interests or groups of members having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes of LLC interests and groups of members;



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- b) provide for the taking of an action, including the amendment of the LLC agreement, without the vote or approval of any member or class of LLC interest or group of members, including an action to create, under the provisions of the LLC agreement, a class of LLC interest or group of members that was not previously outstanding and an LLC agreement may provide that any such member or class of LLC interests or group of members shall have no voting rights;
- c) grant to all or certain identified members or a specified class of LLC interest or group of the members the right to vote separately or with all or any class of LLC interest or group of the members or managers, on any matter and voting by members may be on a per capita, number, financial interest, class, group or any other basis; or
- d) specify provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any members, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any, such right to vote.

VOTING

Unless otherwise provided in an LLC agreement, on any matter that is to be voted on, consented to or approved by members, the matter may be dealt by consent in writing, signed by the members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were present and voted.

Unless otherwise provided in an LLC agreement or the Law, any vote of members shall be passed if passed by a simple majority in number of the members entitled to vote on the matter.

NEGATIVE CONSENT

An LLC agreement may provide that the vote, consent or approval of a member shall be deemed to have been obtained or given to a matter where:

- a) the member is given notice, in accordance with the provisions of the LLC agreement, of the matter in respect of which the member's vote, consent or approval is sought;
- b) the notice sets out in sufficient detail the matter in respect of which the member's vote or consent is sought;
- c) the LLC agreement requires that, should the member not wish to vote in favour of or otherwise not consent to or approve the matter, the member give notice to the LLC of such within a particular period of time; and
- d) the member does not give notice, in accordance with the provisions of the LLC agreement, to the LLC that it does not wish to vote in favour of or otherwise not consent to or approve the matter within the particular period of time.

Any vote, consent or approval of a member deemed to have been obtained or given to a matter pursuant to an LLC agreement and in accordance with the Law shall be as effective as if the member had otherwise voted in favour of or expressly consented to or approved such matter in accordance with the provisions of the LLC agreement and the Law.

Notwithstanding any other provision of the Law, consent or approval of members may be either expressed or inferred from a course of dealing.



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Liabilities To Third Parties and Contributions

Subject to a member or manager agreeing to be personally liable for any or all of the debts, obligations and liabilities of the LLC, the debts, obligations and liabilities of an LLC, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the LLC, and no member or manager of an LLC shall be obligated personally for any such debt, obligation or liability of the LLC solely by reason of being a member or acting as a manager of the LLC.

The liability of a member to contribute to the assets of an LLC shall be limited:

- a) to the amount that the member has undertaken to contribute to the assets of the LLC, whether in the LLC agreement or otherwise;
- b) to making such other payments or performing such services as are expressly set out in the LLC agreement or as have otherwise been agreed between the member and the LLC; and
- c) to such other amounts as may be required to be paid or property required to be returned by the member to the LLC pursuant to the LLC agreement or the Law.

Subject to the provisions of the LLC agreement, the contribution of a member to an LLC may be in cash, property, other assets, services rendered or an obligation to contribute cash or property or assets or to perform services.

A contribution (other than cash in the functional currency of the LLC) may be deemed to have such value in the functional currency of the LLC as may be agreed between the member making the contribution and the LLC, subject to any provisions in this regard in the LLC agreement and such value shall be recorded in the books and records of the LLC.

Allocations And Distributions

ALLOCATIONS

The profits and losses of an LLC shall be allocated among the members, and among classes of LLC interests or groups of members, in the manner provided in its LLC agreement.

If the LLC agreement does not so provide, profits and losses shall be allocated on the basis of the agreed value (as stated in the records of the LLC) of the contributions made by each member to the extent they have been received by the LLC and have not been returned.

DISTRIBUTIONS

Distributions of cash or distributions in kind by an LLC shall be made or paid among the members, and among classes of LLC interests or groups of members, in the manner provided in its LLC agreement.

If the LLC agreement does not so provide, distributions shall be made or paid on the basis of the agreed value (as stated in the records of the LLC) of the contributions made by each member to the extent they have been received by the LLC and have not been returned.



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The LLC agreement may provide for the payment of distributions in such manner, time and form as provided therein, including distributions in cash and in kind.

Remedies For Breach of an LLC Agreement

An LLC agreement may provide that upon the happening of an event specified in the LLC agreement, a member or manager shall be subject to specified remedies, sanctions or consequences. The Law provides that the specified remedies, sanctions or consequences referred to below (which is not an exhaustive list) shall not be unenforceable solely on the basis that they are in the nature of a penalty or forfeiture:

- a) reducing, eliminating or forfeiting the member's LLC interest or any rights of the member under the LLC agreement;
- b) subordinating the member's LLC interest to the LLC interests of non-defaulting members;
- c) effecting a forced sale or forfeiture of the member's LLC interest;
- d) arranging for the lending by other members or other persons to that member of the amount necessary to meet the member's remaining contribution;
- e) providing for the fixing of the value of the member's LLC interest by appraisal or by a formula or otherwise and the redemption or sale of the member's LLC interest at such value;
- f) providing for the payment of default interest; or
- g) exercising any other remedy or consequence specified in the LLC agreement or available under applicable laws.

MANAGEMENT

Unless otherwise provided in an LLC agreement, the management of an LLC shall be vested in its members acting by a majority in number; provided however that if an LLC agreement provides for the management, in whole or in part, of an LLC by one or more managers, the management of the LLC to the extent so provided, shall be vested in the managers.

Unless otherwise provided in an LLC agreement, the members acting by a majority in number or a appointed manager has the authority to bind the LLC.

Subject to the following two paragraphs the rights and duties of the members and managers in an LLC shall, as between themselves, be determined by the LLC agreement.



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DUTIES

Subject to any express provisions of an LLC agreement to the contrary, a manager shall not owe any duty (fiduciary or otherwise) to the LLC or any member or other person in respect of the LLC other than a duty to act in good faith in respect of the rights, authorities or obligations which are exercised or performed or to which such manager is subject in connection with the management of the LLC provided that such duty of good faith may be expanded or restricted by the express provisions of the LLC agreement. This is different to a Cayman Islands exempted company where the directors of that company owe fiduciary duties to the company.

Subject to any express provisions of an LLC agreement to the contrary and the preceding paragraph, a member shall not owe any duty (fiduciary or otherwise) to the LLC or any member:

- a) in exercising any of its rights or authorities in respect of the LLC; or
- b) in performing any of its obligations under the LLC agreement to the LLC or to any member.

The manager of an LLC shall have the rights and powers and responsibilities afforded to, and whether or not the manager is a party to the LLC agreement, be subject to the obligations of, such manager specified in, or pursuant to, the LLC agreement.

A manager shall cease to be a manager in the manner provided in an LLC agreement whether or not the manager is a party to the LLC agreement.

An LLC may have more than one manager and any difference among two or more managers arising as to matters connected with the business or affairs of the LLC shall be decided by the manager or managers (or majority thereof) as is provided in the LLC agreement.

A manager of an LLC may, if permitted by the LLC agreement, also be a member.

An LLC agreement may provide that voting by managers shall be on a per capita, number, financial interest, class, group or any other basis.

Reliance on Reports and Information by Manager

A manager shall be fully protected in relying in good faith upon the records of the LLC and upon such opinions, reports, statements or other information prepared or supplied and presented to the LLC by any of its other managers, members, officers, employees or committees of the LLC, professional advisers or by any other person, as to matters the manager reasonably believes are within such other person's knowledge or professional or expert competence and who has been selected with reasonable care by or on behalf of the LLC, including opinions, reports, statements or other information as to the value and amount of the assets, liabilities, profits or losses of the limited liability company or any other facts pertinent to the existence and amount of assets from which distributions to members might properly be paid.



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Access to Confidential Information

Unless otherwise provided in an LLC agreement, each member of an LLC has the right to inspect from time to time for any purpose reasonably related to the **member's interest** as a member of the LLC and within a reasonable period of time from demand made of the LLC:

- a) true and full information regarding the state of the business and financial condition of the LLC;
- b) the name and last known business, residence or mailing address of each manager;
- c) a copy of the LLC agreement, registration statement, certificate of registration and all amendments thereto; and
- d) true and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by such member and which such member has agreed to contribute in the future, and the date on which such member became a member.

Registers

An LLC shall maintain at its registered office or at any other place within or outside the Cayman Islands, a register of its members which shall contain the name and address of each person who is a member of the LLC, the date on which such person became a member and the date on which such person ceased to be a member, the time and date of receipt of any notices in relation of security interests served in accordance with section 11(5) of the Law, and such register shall be updated within twenty-one days of any change in the particulars therein.

The manager shall maintain or cause to be maintained at the registered office of the LLC a record of the address at which the register of members is maintained, which record shall be updated within twenty-one days of the date of any change in the particulars therein.

Accounts and Records

Every LLC shall cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to:

- a) all sums of money received and expended by the LLC and matters in respect of which the receipt and expenditure takes place;
- b) all sales and purchases of goods by the LLC; and
- c) the assets and liabilities of the LLC.



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Contact

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information, please contact:

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