

Cayman Islands Introduces Foundation Companies

The Cayman Islands' Foundation Companies Law, 2017 is now in force.

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On 19 October 2017 the Cayman Islands' Foundation Companies Law, 2017 (the "**Law**") came into force. The Law introduces a new type of company which bolsters the jurisdiction's offering of versatile special purpose vehicles which has potential application in a wide range of structures and scenarios. The new foundation company and the Law sits within the framework of the Companies Law (as revised) (the "**Companies Law**") and whilst a foundation company bears many of the characteristics of a traditional limited liability company, it also blends in certain attributes of a trust or civil law foundation. This note gives an overview of the key characteristics of a foundation company.

Separate legal personality

Foundation companies, unlike trusts or partnerships, have separate legal personality. Accordingly, like traditional companies they can hold assets, assume obligations, sue and be sued in their own right. There is the inherent advantage of the "corporate veil" and the ability to act in their own capacity. However, a key distinction of a foundation company is that it may not pay dividends or distributions to members.

Incorporation

A new company may be incorporated as a foundation company under the Companies Law and it is also possible for an existing company (incorporated under the Companies Law) to be converted to a foundation company. Once satisfied that the conditions of a foundation company have been met, the Registrar of Companies will issue a certificate of incorporation with a declaration that the company is a foundation company. In order to be eligible to be incorporated as a foundation company a company must meet certain requirements in respect of its constitution.

Constitution

The constitution of a foundation company will be comprised of its memorandum and articles of association and the Law provides (at schedule 2) a model memorandum and articles of association (the "**Model Constitution**") which a company may adopt. The Law and the Model Constitution also provides that a foundation company may create bylaws which, though not forming part of its constitution (and thus not falling within the ambit of the Companies Law when it comes to prescriptive measures and requirements relating to a company's constitution), may operate to set out guidance and procedures for the operation of the foundation company and the role of its directors, for example.



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Revised Exempted Limited Partnership Act

In order to be a foundation company a company must:

- be limited by shares or by guarantee, with or without share capital;
- have a memorandum that:
 - states that it is a foundation company;
 - generally or specifically describes its objects (which may, but need not, include beneficiaries);
 - provides, directly or by reference to its articles, for the disposal of any surplus assets the company may have on a winding up; and
 - prohibits dividends or other distributions of profits or assets to its members or proposed members as such;
- have adopted articles; and
- have appointed a secretary who is a “qualified person” – meaning a
- person that holds a license to be permitted under the Companies Management Law (2003 revision) to provide company management services in the Cayman
- Islands.

Key stakeholders and corporate governance

Members and supervisors: a foundation company’s constitution may grant, or authorise the grant, to any person or persons or description of persons, whether or not ascertained or in existence, the right to become a member or “supervisor” of the foundation company and such right is enforceable by action against the foundation company, whether or not enforceable as a matter of contract. The company may cease to have members if its memorandum so permits and it continues to have at least one supervisor; ceasing to have any members will not affect the foundation company’s existence, capacity or powers. A foundation company’s supervisors have the right to attend and vote at general meetings.

Management and accountability: the management of a foundation company will be carried out by its directors (however called) and its constitution may give rights, powers and duties of any type to members, directors, officers, supervisors, founders or others. The rights, powers and duties may provide for or relate to any or all of the following for the foundation company:

- admitting, appointing or removing its members, supervisors, directors or officers;
- making and altering bylaws;
- the supervision of the management and operations of the foundation company;
- the enforcement, on behalf of the foundation company, of duties and liabilities under the constitution;
- the calling of, and attendance at, its general meetings;
- voting on its ordinary or special resolutions;
- altering the constitution; and
- winding-up the foundation company and disposing of its surplus assets.

Powers given by the constitution may be given for the benefit of the foundation company, for the benefit of the donee, or for any other purpose, and may be subject to any condition.



Revised Exempted Limited Partnership Act

Except as otherwise expressly provided by the constitution:

- duties are owed to the foundation company only and rights are enforceable against the foundation company only;
- a beneficiary, as such, has no powers or rights relating to the foundation company, its management or its assets; and
- the directors shall give the foundation company's "interested persons" the reports, accounts, information and explanations concerning the foundation company's business and affairs, and it is the interested persons who may bring actions, in the name of or on behalf of the foundation company, for the enforcement of the duties or liabilities of directors in the same circumstances and manner as may a member of a company that is not a foundation company.

An "interested person" means any of a foundation company's members, supervisors - and those who have the right to be a member or supervisor - and all such persons declared under the foundation company's constitution to be interested persons.

Secretary: a foundation company must at all times have a secretary who is a qualified person (as discussed above) and the foundation company must have its registered office at the secretary's registered office, where its statutory registers and records must be properly maintained.

Potential uses

A foundation company may be formed for any lawful object which may, but need not, benefit other persons. As such, and as further set out in this note, a foundation company is a very flexible vehicle which may prove useful in a number of contexts; it has clear application in the charity and philanthropy space and may also be an attractive alternative to traditional trusts for private clients (particularly those from civil law jurisdictions); it will also have a wide range of uses in commercial transactions where, for example, "orphan" companies may be desirable. The foundation company is likely to be an attractive option for use as: a special purpose vehicle in finance transactions and in the rapidly growing sphere of cryptocurrencies and the initial coin/token offering ("ICO") as a method of fundraising (where the foundation company may be used as the ownerless vehicle which makes the ICO); a holding vehicle for shares in a private trust company or, perhaps for higher risk assets; a protector or enforcer of trusts; or a management shareholder in investment fund structures. The introduction of the Cayman Islands foundation company enhances the jurisdiction's product offering and provides an additional flexible and modern vehicle to the jurisdiction's suite of structuring options and it is expected that the foundation company will become a valuable option for clients and advisors in the private client, charity and financial services sectors.

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.

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