



Guidance Note

Foundation Companies in the
Cayman Islands

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Introduction

In 2017 the Cayman Islands' Foundation Companies Act (as Revised) (the "Act") came into force. The Act introduced what was then 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 foundation company (the "Foundation Company") and the Act sits within the framework of the Companies Act (as revised) (the "Companies Act") 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 Foundation Companies, their key features, how they are created and operated.

What is a Foundation Company?

The Act allows for a Foundation Company for any lawful purpose. This includes commercial, charitable or philanthropic, private purposes, or any combination of these. The legal nature of a Foundation Company in the Cayman Islands is an entity which is a body corporate, with limited liability, which has a separate legal personality from its members and directors and other offices. It can sue and be sued and hold property in its own name. A main point of difference that Foundation Companies have compared to other entities available in the Cayman Islands includes that a Foundation Company does not have to have any members following its formation, it is not allowed to pay dividends to its members, and amending the memorandum and articles of association can only be made if expressly stated.

Whilst Foundation Companies are formed under the Act, the Companies Act (as Revised) (the "Companies Act") also is applicable to Foundation Companies, except to the extent it is inconsistent with the Act, subject to certain conditions. This means that, even though the Act is relatively new, the applicability of the Companies Act brings in, where relevant, a considerable amount of relevant case law on corporate vehicles generally and their operations.

Forming a Foundation Company

A Foundation Company can be formed either by the directors and members of an existing company, or a company that is in the process of being formed, applying to the Registrar of Companies (the "Registrar") for the company to be a Foundation Company. The standard fee payable to the Registrar for a Foundation Company, or convert an existing company into a Foundation Company is, CI\$500 (US\$600). In the case of a Foundation Company incorporating also as an exempted Foundation Company, the fee to incorporate an exempted company (as per the Companies Act) is also payable.

The Registrar will incorporate the company as a foundation company if satisfied that the following requirements have been met:

- The company is limited by shares or by guarantee, with or without share capital;
- The company's secretary is a qualified person (holds a Company Management Licence);
- The company has a memorandum of association that:



Foundation Companies in the Cayman Islands



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- States that the company is a foundation company;
- Generally or specifically describes its objects (which may, but need not, be beneficial to other persons);
- Provides, directly or by reference to its articles of association, for the disposal of any surplus assets the company may have on winding-up;
- Prohibits dividends or other distributions of profits or assets to its members or proposed members as such; and
- The company has adopted articles of association.

If an existing or new company meets these requirements and the fee is paid, the Registrar will issue a new certificate of incorporation that will contain a declaration that the company is a Foundation Company.

There is no minimum capital requirement for a Foundation Company. Any person, including the Foundation Company's founder (being the person named as the founder in the constitutional documents), can transfer assets to it, although the Secretary must give notice that there appear to be no objections under regulatory laws to the foundation company accepting it.

Unless the Articles provide otherwise, there are no restrictions on what the Foundation Company can invest in.

The Memorandum and Articles of Association

In addition to providing for its management, as noted above, the memorandum of association (the **"Memorandum"**) and the articles of association (the **"Articles"**) of a Foundation Company set out the rights, powers and duties of any type of members, directors, supervisors, founders or other officers in relation to the Foundation Company. The rights, powers or duties under a foundation company constitution may provide for (or relate to) any or all of the following:

- Admitting, appointing or removing its members, supervisors, directors or officers;
- Making and amending by-laws, which do not form part of the company's constitution but allow the Foundation Company further flexibility on how it is structured and managed;
- The supervision of the management and operations of the Foundation Company;
- The enforcement on behalf of the foundation company of duties and liabilities under its constitution;
- The calling of, and attendance at, its general meetings;
- Voting on its ordinary or special resolutions;
- Amending/altering the Foundation Company's constitution; and
- Winding-up the Foundation Company and disposing of its surplus assets.

Management of Foundation Companies

A Foundation Company's management will be carried out by its directors. In addition, the Act states that its constitution may give rights, powers and other duties to members, directors, supervisors, founders (the **"Founder"**) or others relating to:

- a) admitting, appointing or removing members, supervisors and directors;
- b) making and amending any bylaws;
- c) the supervision of the Foundation Company's management and operations;



Foundation Companies in the Cayman Islands

- d) enforcing duties;
- e) general meetings and voting on resolutions;
- f) altering the constitution; and
- g) winding up and disposing of surplus assets.

Directors

A foundation company is managed by a board of directors. There is no requirement for directors to be resident in the Cayman Islands and there are no other restrictions on who may act as a director of a foundation company, so any individual of full capacity and any company may be a director. The directors of a foundation company owe the same duties to the company as the directors of any other company owe to that company. The standard of care applicable to directors of a foundation company is also the same as that owed by the directors to any other company and so includes a duty of care, diligence, and skill.

Founders

Certain powers of the Founder are set out in the Articles and whilst these can be amended to suit the needs of the Foundation Company these are set out below.

The Articles will name the Founder and state that such person has the power to:

1. authorise the admission of the Members, or to restrict or prohibit the admission of Members;
2. appoint or remove Directors;
3. call for reports, accounts, information and explanations from the Directors;
4. appoint or remove supervisors, and settle their powers and duties;
5. designate beneficiaries, give directions as to their benefits, grant them enforceable rights, and to revoke or vary the same;
6. cause the Company to be wound up; and
7. adopt, revoke or vary bylaws.

The Articles also typically state that: The Founder will also have the right to receive notice of, and attend and vote at, general meetings of the Company.

Members and Supervisors

The Articles of a Foundation Company may grant any person the right to become a member or supervisor of a Foundation Company and that right is enforceable by action against the Foundation Company, whether or not enforceable as a matter of contract.

As previously noted, a Foundation Company may choose to not have members after its incorporation if its Memorandum and Articles permits it to do so, but in this case, the Foundation Company must continue to have a supervisor. If the Foundation Company decides to have members in the future, or issue shares for instance, its Memorandum and Articles must expressly authorise it to do so.

Beneficiaries

Beneficiaries of Foundation Companies are persons who will or may benefit from a Foundation Company carrying out its objectives. The Memorandum and Articles of a Foundation Company will typically provide for any type of beneficiary, if necessary, and their



Foundation Companies in the Cayman Islands

duties, powers, or rights to be vested to them, therefore allowing a beneficiary to be given direct and enforceable rights against the directors, officers, and interested persons of a Foundation Company.

Qualified person

A qualified person for a Foundation Company means a person who is licensed or permitted by the Companies Management Act (Revised) to provide company management services in the Cayman Islands. A foundation company must at all times have a qualified person as its secretary and the secretary must maintain a full and proper record of its activities.

Secretary

A Foundation Company must have a Secretary, licensed or permitted by the Companies Management Law (Revised) to provide company management services in the Cayman Islands. The Foundation Company's registered office must be at its Secretary's registered office and the Secretary must maintain a full and proper record of its activities.

Ongoing regulatory compliance for a Foundation Company

Similar to ordinary exempt companies in the Cayman Islands, a Foundation Company's registers and information must be kept at its registered office, including its register of directors and officers, register of mortgages and charges and beneficial ownership register (unless an exemption applies). A Foundation Company must also keep a register of supervisors at its registered office, setting out details of the company's supervisors and when they were appointed, which must be updated within 60 days of any change in the company's supervisors. The company must also maintain a register of members, although that may be kept somewhere other than at the registered office. A minute book should also be maintained. The registered office is also required to maintain copies of certain records for anti-money laundering purposes.

A Foundation Company must also not accept an asset contribution that is gratuitous or in consideration of a share issue unless the secretary has given the company notice that there appears to be no objection to the acceptance under those laws. If a foundation company breaches these obligations, the company, its directors and any manager of the company, and anyone else who was purporting to act as a director or manager when the offence was committed, commits an offence and is liable on conviction to a fine of CI\$15,000 (US\$18,293) and/or to imprisonment for five years.



Foundation Companies in the Cayman Islands

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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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