

A New Foundations Law for the Cayman Islands

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Already well known for its innovative approach to wealth planning, the Cayman Islands (“Cayman”) has taken another welcome step to expand its structuring options by introducing foundations into its comprehensive suite of succession and transaction planning vehicles. The *Foundation Companies Bill, 2016* (referred to below as “the Law”) was passed by the Legislative Assembly on Monday, 27 March 2017, and is expected to come into force later in 2017. A foundation company may be established as a new form of Cayman company and will share many of its features with regular exempted Cayman companies, save that it will be prohibited from paying dividends to its members. It is anticipated that it will fit seamlessly into Cayman’s legal regime, and offer up an attractive and flexible structuring tool for private clients with offshore interests, regardless of whether they are located in civil law countries or common law jurisdictions. It is also expected to be useful to commercial lawyers in securitization transactions, as an alternative to the traditional special purpose vehicle under a purpose trust.

Upon commencement, the Law will allow for the creation of a new form of company, incorporated in the same way as a standard Cayman exempted company, which will be known as a “foundation company” (referred to below simply as a “Cayman Foundation”). Importantly, the Law is not a new stand-alone statute: effectively, it operates as an addition to the *Companies Law (2016 Revision)*, which will apply to all Cayman Foundations with necessary modifications. This means that the structure of a Cayman Foundation will be a familiar one, and all jurisprudence on Cayman companies will, to the extent it is relevant, apply to a Cayman Foundation.

Creation of a Cayman Foundation

The Law is prescriptive as to the incorporation, administration and management of a Cayman Foundation. In establishing one, the drafter may choose to either convert a current Cayman exempted company to a Cayman Foundation, or to create an entirely new Cayman Foundation from scratch. In all cases, it will be a body corporate with separate legal personality and will have the capacity to sue and be sued and to hold property.

Pursuant to the Law, a Cayman Foundation:

- May be formed by any person (the “founder”) for any lawful object, which need not be beneficial to other persons. This could include acting as a holding company or an investment company or providing financial assistance to beneficiaries of the Cayman Foundation (if any).
- Must be limited by shares or by guarantee, but may be established with or without share capital. Despite there being

no minimum capital requirements, a Cayman Foundation may have assets added to it at any time.

- Is incorporated with one or more members, whose liability is limited. Subject to any restrictions specified at the time of incorporation, any person can be a member of a Cayman Foundation. Importantly, once formed, a Cayman Foundation can cease to have members at any time, and the cessation will not affect the Cayman Foundation's existence, capacity or powers, provided that it continues to have one or more "supervisors". A supervisor is defined by the Law as a person, other than a member, who, under the Foundation Company's "constitution", referred to below, has a right to attend and vote at general meetings.
- Must have a memorandum that states that the company is a Foundation Company, describes its objects, provides for the disposal of any surplus assets the company may have on winding up, and – most importantly – prohibits dividends or other distributions of profits or assets to its members or proposed members.
- Must also adopt articles of association. The memorandum and articles of association (together, "the Constitution") can be based on the "Model Constitution" contained in Schedule 2 to the Law and adopted by a Cayman Foundation in whole or in part. Amendments can only be made to the Constitution if expressly provided for in the Constitution itself.
- Must, at all times, have a secretary who is "a Qualified Person", being someone who is licensed or permitted by *Cayman's Companies Management Law (2003 Revision)* (as amended) to provide company management services in the Cayman Islands. The secretary's office will be the registered office of the Cayman Foundation, where the statutory records regarding the Cayman Foundation must be kept. Failure to keep such records is subject to criminal sanction on the Foundation Company and every director or manager who knowingly and wilfully authorised or permitted the contravention.
- Is managed by a board of directors. Any individual of full capacity may be a director of a Cayman Foundation; there are no residency requirements for directors or any other restrictions as to who may act as a director. The standard of care applicable to directors of a Cayman Foundation is the same as the directors of any other company, and directors will owe the same duties to a Cayman Foundation as the directors of any other Cayman company owe to that company.
- May have one or more beneficiaries who may benefit from the Cayman Foundation carrying out its objects – but may also have no beneficiaries at all. Importantly, a beneficiary of a Cayman Foundation has no statutory powers or rights relating to the Cayman Foundation, its management, or its assets, and is not otherwise an "interested person". Despite this, beneficiaries can be designated a role to play by the Constitution, and have specific duties, powers and rights vested in them by the Constitution.
- Is subject to the same requirements regarding documentation and filings as any other Cayman exempted company, and, in particular, must maintain certain registers and information at the Registrar of Companies, including a minute book and records for anti-money laundering purposes. In terms of the flow of information about a Cayman Foundation, directors are required to give reports, accounts, information and explanations concerning the Foundation Company's business and affairs, and the discharge of their duties or exercise of their powers, in response to any written request from an interested person.
- May be managed through financial difficulties or insolvency in the same way as any other company established pursuant to the *Companies Law*, and the provisions for winding up a company apply to Cayman Foundations with consequential amendments. Importantly, if a Cayman Foundation encounters financial difficulties, is insolvent or is of doubtful solvency, the directors must consider the creditors' interests as part of their duty to act in the interests of the foundation itself.
- Once incorporated, cannot be revoked. However, if a founder is so empowered pursuant to the Constitution, he or she can be given powers with a similar effect to revocation (for example, a power to appoint foundation property to himself or herself).

- Is subject to Sections 92 and 93 of the *Trusts Law (2011 Revision)* (“Trusts Law”), which operate to deny heirship rights to the property of a living person and will apply to property contributed to the Cayman Foundation.

Dispute Resolution

The Law prescribes a number of avenues for the resolution of different categories of disputes arising in relation to a Foundation Company. In terms of alternative dispute resolution, the Law states that the Constitution may provide for the resolution of disputes concerning the Cayman Foundation or its operations or affairs, with or among its directors, interested persons or beneficiaries (to the extent beneficiaries are given any rights under the Constitution) by arbitration or by any other lawful method. However, the Grand Court of the Cayman Islands (“Grand Court”) also has a very important role to play in resolving any constitutional difficulties encountered by a Cayman Foundation. In particular:

- If the objects of a Cayman Foundation become wholly or partly “impossible, impracticable, unlawful or obsolete” and there is no power under the Constitution to resolve this difficulty, then the secretary or any interested person including a liquidator of the Cayman Foundation may apply to the Grand Court for assistance to resolve the difficulty.
- If a Cayman Foundation ceases to have directors or supervisors, or sufficient of them to supervise the management of the Cayman Foundation in accordance with the Constitution, the Grand Court can also act on the application of one of the parties listed above. The Grand Court can appoint or remove directors or supervisors, alter the Constitution with regard to such appointment or removal, alter the powers, duties and other terms of their appointment and make orders for the winding up of a Cayman Foundation in the usual way.

Helpfully, the Law also includes provisions for a Cayman Foundation to apply to the Grand Court for an opinion or advice or for directions if it considers it necessary to do so, in which case Section 48 of the Trusts Law will apply with all necessary modifications.

Foundations in the future

The new Law reflects a careful fusion of the traditional characteristics of a common law foundation with functions of a modern and innovative company, and is designed to offer a flexible and user-friendly vehicle for those with Cayman interests. As a Cayman Foundation may not have shareholders and may also be free of beneficiaries, it can truly achieve “orphan” status and will likely have a number of uses, including as special purpose vehicles in finance transactions, to hold shares in a private trust company, as protectors or enforcers for other trusts or fiduciary structures, and as vehicles for philanthropic objects.

The end product is one that puts Cayman ahead of other offshore financial centres in terms of its structuring options, and it is anticipated that it will attract more business to the jurisdiction, encourage greater locally-conducted business activity associated with the “qualified person” requirement and contribute to government revenue. A further benefit is that its status as a Cayman company, means that there will be no need for the industry and its advisers to grapple with complex and bespoke foundations legislation. The Grand Court will already be well-versed in determining how to treat such a structure in accordance with company law authority, and clients from both civil law and common law jurisdictions will already understand the structure and legal standing of companies. There is, then, no “hard sell” for service providers in the Cayman – offering a Cayman Foundation to new or existing clients will be an easy pitch to make, and enrich the jurisdiction’s well-regarded collection of modern and flexible structuring vehicles.

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