

# CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with geometric patterns and a few stanchions.

## **Cayman Islands Foundation Companies**

## Preface

This publication has been prepared for the assistance of those who are considering the formation of foundation companies in the Cayman Islands (“**Cayman**”). It is not intended to be exhaustive nor a substitute for proper legal advice but provides a basic guide to foundation companies and an outline of company administration in Cayman.

Clients are advised that they should consider the implications in their home jurisdiction of establishing a Cayman foundation company and should consult with their own legal, financial and other professional advisers as appropriate.

We also recommend that our clients seek legal advice in Cayman on their specific proposals before taking steps to implement them.

For specific advice on Cayman foundation companies, please contact:

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## 1. INTRODUCTION – PLANNING USES FOR CAYMAN FOUNDATIONS

Pursuant to the Foundation Companies Act, 2017 (the “**Act**”), which came into full effect on 18 October 2017, a foundation company, which shares many of its features with regular exempted companies, may be established as a form of Cayman company. As explained further in this publication, this vehicle fits seamlessly into Cayman’s legal regime, and offers an attractive and flexible structuring tool for private clients with offshore interests, regardless of whether they are located in civil or common law jurisdictions.

Cayman Foundations may be established to achieve a variety of estate, personal, financial, tax or other business planning objectives, such as:

- family provision;
- protection of assets from future personal liability;
- avoiding forced heirship rules in civil law jurisdictions;
- preservation of family wealth and continuity of family businesses;
- efficient and timely distribution of assets upon death without the need to apply for probate;
- creating or making provision for charities; and
- ownership of particular assets or of investments generally.

## 2. THE FOUNDATION

### 2.1. Cayman Foundation Companies Act

The Act provides for the creation of a form of company, incorporated in the same way as a regular Cayman company, which is known as a “foundation company” (referred to throughout this publication as a “**Cayman Foundation**”).

The Cayman Companies Act applies to Cayman Foundations save to the extent excluded or modified by the Act or otherwise inconsistent with its provisions. This means that the structure of a Cayman Foundation will be a familiar one, and therefore avoids the need, as in other jurisdictions, for the establishment of an entirely new set of rules governing every aspect of the structure from creation to dissolution.

It also means that all jurisprudence on Cayman companies will, to the extent it is relevant, apply to a Cayman Foundation.

### 2.2. Features of the Foundation

The Act is prescriptive as to the incorporation, administration, and management of a Cayman Foundation. In setting up a Cayman Foundation, the drafter may choose to either convert an existing Cayman company to a Cayman Foundation, or to incorporate a new Cayman Foundation.

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.

A Cayman Foundation may be formed 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 (if any). Importantly, a Cayman Foundation will have a duty to carry out these objects only if the constitution, referred to below, expressly declares it must (and provides for the designation of persons with standing to enforce that duty by way of action against the Cayman Foundation).

A Cayman Foundation must be limited by shares or by guarantee, but may be established with or without share capital. While there are no minimum capital requirements, a Cayman Foundation may have assets added to it at any time. The assets may then be applied in furtherance of the Cayman Foundation's objects, in which case there will be no distinction between capital and income (unless the constitution provides otherwise). A Cayman Foundation cannot accept an asset contribution that is gratuitous or in consideration of a share issue unless its secretary has given the Cayman Foundation a notice that there appears to be no objection to the acceptance under the Proceeds of Crime Act, the Terrorism Act or the Anti-Money Laundering Regulations (a "notice of no-objection").

A Cayman Foundation is incorporated with one or more members in the same way as an exempted company under the Companies Act. 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. The cessation will not affect the Cayman Foundation's existence, capacity or powers, provided that it continues to have one or more "Supervisors". If a Cayman Foundation has ceased to have members, it may not subsequently admit members, or issue shares, unless expressly authorised to do so by its constitution.

### **2.3. Constitution**

A Cayman Foundation's constitution is comprised of its memorandum and articles of association. The memorandum should state that the company is a foundation company, describe its objects, provide for the disposal of any surplus assets the company may have on winding up, and – most importantly – prohibit dividends or other distributions of profits or assets to its members or proposed members.

The memorandum and articles of association can be based on the "Model Constitution" contained in Schedule 2 to the Act which can be adopted by a Cayman Foundation in whole or in part. This is similar to adopting the articles of association contained in Table A in Schedule 1 of the Companies Act. Amendments can only be made to the constitution of a Cayman Foundation if expressly provided for in the constitution itself.

The constitution may also provide mechanisms for admitting and appointing members, directors, officers and Supervisors; making and altering by-laws; supervision of the management and operations of the Cayman Foundation; enforcement of duties and liabilities under the constitution; calling of and attendance at general meetings, voting on ordinary or special resolutions and winding-up of the Cayman Foundation and disposal of surplus assets. Except as expressly provided by the constitution, any duties prescribed by the constitution are owed to the Cayman Foundation.

### **3. DUTIES AND ADMINISTRATION**

#### **3.1. The Founder**

The Act is drafted in such a manner that it does not formally establish or define the role of “founder”. A Cayman Foundation will simply be founded on the instructions of the person establishing it in the same way as any other company and the person who disposes of assets into a Cayman Foundation will therefore not have any automatic rights in relation to the Cayman Foundation. However, the Model Constitution included in the Act does provide for rights to be reserved to the founder if considered necessary in the particular circumstances in which a Cayman Foundation is to be established and these provisions of the Model Constitution can be adopted.

For example, if the “founder” does not wish for the constitution to be changed at any time; he or she can draft the constitution so that it contains no amendment powers at all. Similarly, the founder can reserve to himself or herself powers including the power to appoint and remove directors, to designate beneficiaries, and/or to call for reports, accounts, information and to cause the Cayman Foundation to be wound up.

Once incorporated, the Cayman Foundation cannot be revoked. However, if the founder is so empowered pursuant to the constitution of a Cayman Foundation, 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).

#### **3.2. The Beneficiaries**

A Cayman Foundation may have one or more beneficiaries who may benefit from the Cayman Foundation carrying out its objects, or none at all. Importantly, a beneficiary of the 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” (see 3.3 below). Despite this, beneficiaries can be designated a role to play by the constitution of the Cayman Foundation, and may have specific duties, powers and rights vested in them. These may include direct enforceable rights against the directors.

Beneficiaries can be, but do not need to be, identified from the outset. This feature may appeal to a founder who wishes to prevent the potential release of information about the beneficiaries.

#### **3.3. The Board**

A Cayman Foundation 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 nor 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. Directors are required to give interested persons reports or explanations of the business and affairs of the Cayman Foundation.

An “interested person” for the purposes of Act is a member, Supervisor or any other party having the right to bring an action in the name of, or on behalf of the Cayman Foundation.

### 3.4. The Supervisor

A Supervisor is defined by the Act as a person, other than a member, who under the Cayman Foundation's constitution has a right to attend and vote at general meetings (whether or not that person has supervisory powers or duties in relation to the Cayman Foundation). The constitution of a Cayman Foundation may allow a Supervisor to take on the role of a director of the Cayman Foundation.

A Supervisor would typically have the right to access the files, books and accounts of the Cayman Foundation upon notice to the directors as provided for under the model rules.

Foundation companies are required to keep a register of Supervisors at their registered office. Any changes to the register must be updated within sixty days.

### 3.5. The Secretary

A Cayman Foundation must have a secretary, licensed or permitted by the Companies Management Act (Revised) to provide company management services in the Cayman Islands. The secretary is required to keep a full and proper record of enquiries made and information provided in respect of asset contributions for which the secretary must provide a notice of no-objection.

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 Cayman Foundation and every director or manager who knowingly and wilfully authorised or permitted the contravention.

## 4. OPERATION OF THE CAYMAN FOUNDATION

### 4.1. Filing Requirements

A Cayman Foundation is subject to the same requirements regarding documentation and filings as other Cayman companies, and in particular must maintain certain registers and information at its registered office, including a minute book and records for anti-money laundering purposes.

A copy of any resolution or other document altering the memorandum of association must be filed with the Registrar of Companies within fifteen days, together with the prescribed fee.

There is no statutory requirement under the Act or the Companies Act for a Cayman Foundation to file or audit its company accounts. However, the directors are required to keep proper records of all funds received or distributed by the Cayman Foundation. Such books must be kept in a state that gives a true and fair view of the state of the Cayman Foundation's affairs and to explain its transactions.

### 4.2. Beneficial Ownership Register

A Cayman Foundation must maintain a register of its beneficial owners (the "Register") to be kept at its registered office, unless it is exempt by virtue of being a legal entity or subsidiary of such which is:

- (a) listed on the Cayman Islands Stock Exchange or another approved stock exchange;

- (b) registered or licensed under a Cayman Islands regulatory act, other than under section 5(4) of the Securities Investment Business Act (2020 Revision);
- (c) managed, arranged, administered, operated or promoted by an approved person as a special purpose vehicle, private equity fund, collective investment scheme or investment fund;
- (d) regulated in a jurisdiction included in the Anti-Money Laundering Steering Group list of countries;
- (e) a general partner of a vehicle, fund or scheme referred to in (c) which is regulated or licensed under a regulatory act or is managed, arranged, administered, operated or promoted by an approved person; or
- (f) holding directly a legal or beneficial interest in the shares of a legal entity which is licensed under the Banks and Trust Companies Act (2021 Revision), the Companies Management Act (2021 Revision), the Insurance Act, 2010 (as amended), Part III of the Mutual Funds Act (2021 Revision) (as amended) or the Securities Investment Business Act (2020 Revision).

Beneficial owner details are uploaded to the General Registry via its Corporate Administration Platform (“**CAP**”) system. The information is encrypted upon submission and further encrypted upon receipt. The data is then deleted from CAP and goes to a non-internet facing, offline server only accessible by a Government authorised competent authority.

If the directors become aware of a relevant change with respect to a registrable person whose required particulars are entered in its Register, they must give notice to the registrable person, as soon as reasonably practicable after they learn of the change or first have reasonable cause to believe that the change has occurred, requesting confirmation of the change. If the person to which the notice is sent confirms the change, the Cayman Foundation shall record the details of the change and instruct the registered office provider, to enter in its Register (a) the details of the relevant change confirmed by the Cayman Foundation; (b) the date on which the change was made; and (c) whether there are further alterations to the Register that should be made.

Significant penalties apply for non-compliance with the beneficial ownership legislation. Where a company or legal entity is guilty of an offence, and it is proved that the offence was committed with the consent or concurrence of, or was attributable to wilful default on the part of a director or other officer concerned in the management of the company or legal entity, the director or other officer is guilty of the same offence and liable to the same penalty as the company or legal entity.

The Registrar of Companies also has the power to impose fines for a number of breaches under the Monetary Authority (Administrative Fines) Regulations (2019 Revision) (as amended) (the “**Administrative Fines Regime**”), which apply to 'in-scope' entities who fail to take reasonable steps to identify beneficial owners and relevant legal entities, fail to ensure their beneficial ownership register remains up to date and/or fail to provide particulars of registrable persons to their corporate services providers or certain notices to their registrable persons. Entities exempted from the primary obligations of the beneficial ownership legislation may still be in breach if they fail to provide written confirmation of



their exemption and instructions to file such exemption, or if they incorrectly report that they are an exempted entity. Of particular note, Cayman Foundations whose beneficial ownership register indicates a status of 'Enquiries pending' for three uninterrupted months will be presumed to be in breach and liable to fines under the Administrative Fines Regime. There are a number of other technical breaches for which Cayman Foundations and/ or their corporate service providers may be fined.

#### **4.3. Insolvency**

A Cayman Foundation may be managed through financial difficulties or insolvency in the same way as any other company established pursuant to the Companies Act, and the provisions for winding up a company apply to Cayman Foundations with consequential amendments. In dealing with any issues of solvency, the directors of a Cayman Foundation must consider the creditors' interests as part of their duty to act in the interests of the Cayman Foundation itself.

#### **4.4. The Trusts Act**

The operation of Cayman Foundation is subject to the provisions of sections 92 and 93 of the Trusts Act (2021 Revision), which operates to deny heirship rights conferred by foreign law to the property of a living person and will apply to property contributed to the Cayman Foundation (see section 6.1 below).

Additionally, section 48 of the Trusts Act which allows trustees of Cayman Islands trusts to apply for the directions of the Grand Court applies to Cayman Foundations.

### **5. DISPUTE RESOLUTION AND THE POWERS OF THE GRAND COURT**

#### **5.1. Provisions of the Constitution**

The Act prescribes a number of different avenues for the resolution of various categories of disputes, with a focus on access to alternative dispute resolution. The Act 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; some flexibility is included. The drafters of the constitution may also include their own mechanisms for dealing with changes in circumstances as they consider necessary or appropriate for the particular Cayman Foundation.

#### **5.2. The Grand Court**

The Grand Court of the Cayman Islands ("**Grand Court**") nonetheless has a very important role to play in resolving any constitutional difficulties encountered by a Cayman Foundation. 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, any interested person including a liquidator of the Cayman Foundation, or any other person so authorised under the constitution may apply to the Grand Court for assistance to resolve the difficulty. Similarly, where a Cayman Foundation ceases to have directors or Supervisors, or a sufficient number of them to supervise the management of the Cayman Foundation in accordance with the constitution (or they are not doing so and there is no power in the constitution to resolve the difficulty or such power has not been exercised,) 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, and alter the powers, duties and other terms of their appointment. The Grand Court can also make orders for the winding up of a Cayman Foundation in the usual way, including on a just and equitable basis pursuant to section 95(3) of the Companies Act.

## **6. ECONOMIC SUBSTANCE**

### **6.1. Effect of Foreign Laws**

The International Tax Co-Operation (Economic Substance) Act (2021 Revision) (the “**ES Act**”) applies to a defined class of relevant entities including Cayman Foundations, exempted companies, foreign companies registered in Cayman, limited liability companies and limited liability partnerships that are required, subject to what is said below, to maintain economic substance in the Cayman Islands unless they are (i) tax resident outside the Cayman Islands; (ii) an investment fund (including entities through which any such fund invests or operates); or (iii) a not-for-profit company. Under the ES Act, a not-for-profit company is defined in accordance with the Companies Act which prescribes that it must be formed primarily for charitable, philanthropic or other social or fraternal purposes or objects and must intend to apply its profits or income primarily for the promotion of those purposes or objects.

The ES Act requires that all Cayman Islands entities notify the Cayman Tax Information Authority (“**TIA**”) of, amongst other things, whether or not it is carrying on a “relevant activity” (as defined in the ES Act and as discussed further below) and, if so, whether or not it is a “relevant entity”. The notification to the TIA is by way of an Annual Economic Substance Notification which must be filed prior to an entity filing its Annual Return with the General Registry’s Corporate Administration Portal.

A relevant entity is subject to the ES Act from the date on which it commences a relevant activity unless the entity was in existence prior to 1 January 2019 in which case it was required to comply with the ES Act by 1 July 2019. Non-compliance with the ES Act will result in significant financial penalties and continued non-compliance may result in an application by the TIA to the Grand Court for an order that the entity is defunct.

### **6.2. Relevant Activities**

Relevant entities will be required to meet the economic substance test in respect of their relevant activities in the Cayman Islands. The categories of relevant activities include the following which are further defined in the ES Act:

- (a) Banking business;
- (b) Distribution and service centre business;
- (c) Financing and leasing business;
- (d) Fund management business;
- (e) Headquarters business;
- (f) Holding company business;

- (g) Insurance business;
- (h) Intellectual property business; and
- (i) Shipping business.

### 6.3. Economic Substance Requirements

For relevant entities carrying on relevant activities, the ES Act requires that they:

- (a) conduct core income generating activities (“**CIGAs**”) (see further below) in relation to the relevant activity;
- (b) be directed and managed appropriately in the Cayman Islands in relation to the relevant activity; and
- (c) with regard to the level of relevant income from the relevant activity carried out in the Cayman Islands, have an adequate:
  - (i) amount of operating expenditure incurred in the Cayman Islands;
  - (ii) physical presence (including maintaining a place of business or plant, property and equipment) in the Cayman Islands; and
  - (iii) number of full-time employees or other personnel with appropriate qualifications in the Cayman Islands.

The TIA issued its most recent Guidance on Economic Substance for Geographically Mobile Activities on 13 July 2020 to assist relevant entities carrying on relevant activities to satisfy the ES Test and in interpreting the meaning of “adequate” and “appropriate” for the purposes of the ES Act. Industry-specific guidance is also outlined in relation to each of the relevant activities above.

Relevant entities carrying on the business of a pure equity holding company (one that only holds equity participations in other entities and only earns dividends and capital gains) will have reduced requirements such that they will need to comply with all filing requirements under the Companies Act (2021 Revision) and have adequate human resources and premises in the Cayman Islands for holding and managing equity participations in other entities.

A relevant entity that is carrying on a relevant activity and is required to satisfy the ES Test must prepare and submit to the TIA an ES return for the purpose of the TIA’s determination whether the ES Test has been satisfied in relation to that relevant activity. The ES return must be made within 12 months after the last day of the end of each relevant year of the relevant entity commencing on or after 1 January 2019.

### 6.4. Core Income Generating Activities

CIGAs are defined in the ES Act to mean activities that are of central importance to a relevant entity in terms of generating income and that are being carried out in the Cayman Islands. CIGAs may be outsourced provided that the relevant entity is able to monitor and control the carrying out of the CIGA.

The TIA will only accept the relevant entity's claim to have satisfied the ES Test by means of domestic outsourcing if the information is verified by the service provider. Such verification must be made within thirty days of the relevant entity providing the same information to the TIA.

Service providers undertaking outsourcing functions are required to register with the Cayman Islands Department of Information Tax Co-operation ("DITC") so that the DITC can independently verify the engagement and nature of the services provided.

## **7. GENERAL LEGAL CONSIDERATIONS**

### **7.1. Effect of Foreign Laws**

Subject to any express term to the contrary in the constitution, all questions arising in regard to a Cayman Foundation are to be determined according to the laws of Cayman, without reference to the laws of any other jurisdiction(s) with which the Cayman Foundation or disposition may be connected.

### **7.2. Conversion**

Existing Cayman companies may transition to become Cayman Foundations by application to, and a declaration by, the Registrar of Companies. Section 5(1) of the Act provides that if the Registrar of Companies is satisfied that the foundation company requirements set out in the Act will be met, it will issue a new certificate of incorporation to include a declaration that it is a Cayman Foundation.

## **8. TAXATION**

Cayman has no corporation tax, income tax, capital gains tax, inheritance tax, gift tax, wealth tax, or any other tax applicable to a company conducting off-shore business. Certain documents are subject to stamp duty which is generally nominal. A Cayman Foundation will be exempt from any Cayman Islands income tax or capital gains tax and is able to obtain a tax undertaking certificate from the Cayman Islands government guaranteeing no change to its tax status for a period of up to 50 years from the date of the undertaking.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

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