

# A Guide to Foundation Companies in the Cayman Islands

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The Cayman Islands Foundation Companies Act 2017 (the **Foundation Act**) came into force in 2017. This guide summarises the main legal requirements and principles applicable to foundation companies.

## | Introduction

By enacting the Foundation Act, the Cayman Islands introduced a novel form of vehicle into its legal system. A foundation company has features and flexibility that have been designed to allow a company, retaining separate legal personality and limited liability, to function like a civil law foundation or common law trust.

When looking at other jurisdictions, the approach taken by the Foundation Act is unique and the creative solution appeals to many clients. Its uses include acting as a holding vehicle for shares in a private trust company, as a protector or enforcer of a trust, as a special purpose vehicle in finance or commercial transactions (including in crypto-currency and other technology offerings), as well as a traditional succession planning vehicle.

For private clients, foundation companies may be an attractive alternative to trusts, particularly for those clients in civil law jurisdictions where there might generally be more familiarity with companies or there are concerns about the tax treatment of trusts. A foundation company offers many of the same features of a trust because it can be used as a structure for succession planning and asset protection. Clients from common law jurisdictions may also be attracted to a foundation company to hold higher-risk assets such as shares in family businesses because of the limitation of liability.

It is possible for foundation companies to act as "ownerless" vehicles which will make them effective solutions in the context of private trust companies, management shares of investment funds, or in wider commercial transactions.

## Corporate status

As a company incorporated under the Companies Act (Revised), a foundation company will be governed by that law except where it is inconsistent with the Foundation Act. It will therefore be a body corporate with a legal personality distinct from its members, directors and other connected persons.

## Incorporation

Any new or existing company incorporated under the Companies Act (Revised) may apply to the Registrar of Companies (the **Registrar**) to be declared to be a foundation company provided that the conditions for a foundation company have been met. If satisfied that all of the conditions have been met, the Registrar will issue a certificate of incorporation (or in the case of an existing company, a new certificate of incorporation) with a declaration that the company is a foundation company.

The conditions are that the foundation company:

- is limited by shares or by guarantee, with or without share capital
- has a memorandum that:
  - states that it is a foundation company
  - describes its objects (which may include beneficiaries)
  - provides, directly or by reference to its articles, for the disposal of surplus assets on winding up; and
  - prohibits dividends or other distributions to members
- has adopted articles; and
- has a secretary who is a person licensed to provide company management services in the Cayman Islands (the **Secretary**)

## Constitution

A foundation company's constitution may grant any person the right to become a member. It can cease to have members if (i) its memorandum permits, and (ii) it continues to have a supervisor, being a person other than a member who has a right to attend and vote at general meetings (the **Supervisor**). Ceasing to have members in these circumstances will not affect the foundation company's existence. Once it has no members, the foundation company will not be able to admit new members or issue shares unless its constitution permits it.

A foundation company's management will be carried out by its directors. In addition, however, its constitution may give rights, powers and other duties to members, directors, supervisors, founders or others. The rights, powers or duties may, amongst other things, relate to:

- admitting, appointing or removing members, supervisors and directors
- making and amending any bylaws
- the supervision of the foundation company's management and operations
- enforcing duties
- calling and attending at general meetings
- voting on resolutions
- altering the constitution; and
- winding up and disposing of surplus assets

The operation and management of the foundation company is flexible and allows for any powers to be given for the benefit of (i) the foundation company, (ii) power holder, or (iii) for any other purpose.

Unless varied by the constitution:

- duties are owed only to the foundation company itself
- rights are enforceable only against the foundation company (this can be considered to allow the foundation company to hold higher risk investments, such as shares in a family business, because beneficiaries will not have direct rights of action against "trustees", for example)
- rights to information, such as reports and accounts, are limited to "interested persons" who are defined under the Foundation Act as any of its members or supervisors, someone with the right to be a member or supervisor or someone declared under the foundation company's constitution to be an interested person (the **Interested Persons**)
- Interested Persons can bring actions in the name of or on behalf of the foundation company for the enforcement of directors' duties in the same way as members of traditional companies; and
- beneficiaries have no powers or rights in relation to the foundation company, its management or its assets

## **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.

## **Assets and investments**

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 constitution provides otherwise, there are no restrictions on what the foundation company can invest in.

The "firewall" feature of the Trusts Act (Revised) is extended to foundation companies, which gives protection against claims in foreign courts to the transfer of assets to the foundation company.

## **Direction from the Grand Court and dispute resolution**

The ability for trustees to apply to the Grand Court for opinions, advice or directions has been a hugely helpful and effective feature of Cayman Islands trust law. This function of the Grand Court has been extended to foundation companies.

A foundation company's constitution may require the resolution of issues in respect of the foundation company with or among its directors, Interested Persons or beneficiaries by arbitration or other lawful method. Any resolution to an issue in the manner prescribed by the constitution cannot be set aside unless a party has committed fraud or conducted itself in bad faith.

In addition, as a foundation company will be incorporated as a company under the Companies Act, foundation companies will benefit from the settled and substantial Cayman Islands case law applicable to Cayman Islands companies.

## **Tax treatment**

A foundation company whose objects are to be carried out mainly outside the Cayman Islands may be incorporated as an exempted company. Exempted companies are not subject to any income, withholding or capital gains taxes in the Cayman Islands. Shareholders will not be subject to any income, withholding or capital gains taxes in the Cayman Islands with respect to

their shares and dividends received on those shares, nor will they be subject to any estate or inheritance taxes in the Cayman Islands. There are no exchange controls in the Cayman Islands.

An exempted company is further entitled to apply under the Tax Concessions Act (Revised) for an undertaking that no law enacted in the Cayman Islands after the date of the undertaking imposing any tax to be levied on profits, income, gains or appreciations shall apply to the company or its operations, and that no tax to be levied on profits, income, gains or appreciations or which is in the nature of estate duty or inheritance tax shall be payable on or in respect of the shares, debentures or other obligations of the company or by way of withholding in whole or in part on any dividend payment or other distribution of income or capital by the company to its members or to a payment of principal or interest or other sums due under a debenture or other obligation of the company.

The undertaking may be for a period not exceeding 30 years from the date of approval of the application. In practice, the undertaking is normally given for 20 years.

## **Statutory Registers**

In addition to the usual registers of members, directors, and mortgages and charges, a foundation company must also maintain a Register of Supervisors.

## **Conclusion**

Through the combination of traditional and innovative features of a foundation company, the Cayman Islands has a flexible vehicle that is a valuable alternative that has appeal for all sectors of the financial services industry.

If you require further information, please speak to your usual Ogier contact or a member of our team listed here.

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