

# LEGAL UPDATE

## Foundation Companies can now be incorporated in the Cayman Islands

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### Introduction

With effect from 19 October 2017, it is possible to incorporate Foundation Companies in the Cayman Islands. The Foundation Companies Law, 2017 (the “**Law**”) allows for the formation and/or registration of a new Cayman Islands corporate vehicle: the Foundation Company. A Foundation Company will be governed by the Companies Law, 2016 except to the extent excluded or modified by Schedule 1 to the Law, or otherwise inconsistent with the provisions of the Law.

It is anticipated that the new Foundation Company structure will, among other things, (1) create a number of uses for private clients to hold family wealth and businesses other than through trusts, and (2) greatly enhance the flexibility for structuring finance transactions.

### Key Features of Foundation Companies

- *Conversion or Formation* - An existing company will be able to apply to the Companies Registry to convert into a Foundation Company or a new company will be able to apply to be formed as a Foundation Company.
- *Separate legal personality* - A Foundation Company is a body corporate with legal personality separate and distinct from that of its members, directors, officers, supervisors and founder. It has capacity to sue and be sued in its own name and to hold property. **There are no restrictions on the type of property or asset a Foundation Company may hold.**
- *Capital Structure* - A Foundation Company must be limited by shares or by guarantee, with or without share capital.
- *Constitution* - A Foundation Company is required to have a set of Articles of Association (“**Articles**”) and a Memorandum of Association (“**Memorandum**”). The Memorandum must (i) state that the company is a foundation company, (ii) generally or specifically describe its objects (which may, but need not, be beneficial to other persons), (iii) provide directly or by reference to its Articles, for the disposal of any surplus assets the Foundation Company may have on winding-up; and (iv) prohibit dividends or other distributions of profits or assets to its members or proposed members in their capacity as members.
- *Objects/Purpose* - A Foundation Company may be established for any lawful purpose, (i.e. commercial, charitable or philanthropic or any private purposes or a combination of such purposes.
- *Capital Requirements* - There is no minimum capital requirement for a Foundation Company and a founder or any other person may add assets to the Foundation Company subject to acceptance by the Foundation Company.

- **Secretary** - A Foundation Company is required to have a “qualified person” at all times as its secretary. A qualified person for the purposes of a Foundation Company means a person who is licensed or permitted by the Companies Management Law (2003 Revision) to provide company management services in the Cayman Islands to the Foundation Company. The secretary is required to maintain a full and proper record of its activities and enquiries made for giving notices.
- **Director** – A Foundation Company is managed by a board of directors. Any individual of full capacity and/or any company may be a director. The duties that the directors of a Foundation Company owe to the Foundation Company are the same duties as directors of any other company owe to that other company. The standard of care, diligence and skill applicable to directors of a Foundation Company is same as that owed by directors to any other company. The directors of a Foundation Company need not be resident in the Cayman Islands.
- **Tax Status** – A Foundation Company 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 their tax status for a period of up to 50 years from the date of the undertaking.
- **Dispute Resolution** - A Foundation Company’s constitution may provide for the resolution of disputes, differences or difficulties with or among its directors, officers, interested persons or beneficiaries (to the extent beneficiaries have any rights) concerning the Foundation Company or its operations or affairs, or the duties, powers or rights of persons under the constitution by arbitration or by any other lawful method.
- **Membership** - A Foundation Company's constitution may grant or authorise the grant to any person or description of persons, whether or not ascertained or in existence, the right to become a member of the Foundation Company and such right is enforceable by action against the Foundation Company. Additionally, a Foundation Company may cease to have members if its Memorandum so permits or requires and it continues to have one or more supervisors. Ceasing to have members will not affect the Foundation Company's existence, capacity or powers. If a Foundation Company has ceased to have members, it may not subsequently admit members, or issue shares, unless expressly authorised to do so by its constitution. The liability of members of a Foundation Company is limited.
- **Supervisor** - 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 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. **Supervisors** are persons, other than members, who, under the Foundation Company's constitution, have a right to attend and vote at general meetings, whether or not the person has supervisory powers or duties.
- **Register of Supervisors** - In addition to the register of directors, register of members, and register of mortgages and charges that Cayman Islands companies are required to keep, a Foundation Company must keep at its registered office an up to date register of supervisors (which contains the names and addresses of its supervisors, the date on which each of its supervisors was appointed, and any date on which a supervisor’s appointment ceased). Failure to do so is subject to criminal sanction on the Foundation Company and every director or

manager of the Foundation Company who knowingly and wilfully authorised or permitted the contravention.

### **Key Benefits of Foundation Companies**

It is anticipated that Foundation Companies will have a wide range of uses, e.g.

- i. as special purpose vehicles (SPVs) in finance transactions;
- ii. for ICOs, and other crypto-currency offerings;
- iii. as charities;
- iv. re-organisation of assets within family offices;
- v. as protectors or enforcers (in relation to other trusts or fiduciary structures);
- vi. as mechanisms within private trust company structures.

If desired, individuals in control of a Foundation Company can mirror the board(s) of existing family enterprises by appointing the same persons as Directors of the Foundation Company.

The ability for beneficiaries of a Foundation Company to have different entitlements as beneficiaries will also be very useful for asset protection purposes. Additionally, the Foundation Company will be ideal for holding higher-risk, less diversified assets, since “interested persons” will owe their duty to the Foundation Company, and not to any potential beneficiaries.

**For specific advice on Cayman Islands Foundation Companies, please contact:**

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