

An overview of Cayman Islands foundation companies

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Introduction

A foundation company is a vehicle unique to the Cayman Islands and has features and flexibility that allow a company to retain separate legal personality and limited liability while functioning in a way similar to a civil law foundation or common law trust. This can make foundation companies attractive for both private wealth structures and commercial enterprises.

Corporate status

A foundation company is a body corporate with a legal personality distinct from its members, directors and other connected persons. As foundation companies are governed by the Companies Act (Revised), except where it is inconsistent with the Foundation Company Act, 2017, they benefit from an extensive body of case law and are well recognised in other jurisdictions.

Typical uses

Foundation companies may be an attractive alternative to trusts, particularly for clients in civil law jurisdictions where a trust may be unfamiliar or the tax treatment uncertain, and offers many of the features of a trust that make them ideal succession planning and asset protection vehicles. Clients from common law jurisdictions frequently use foundation companies to hold higher-risk assets such as shares in family businesses and as part of family office and private trust company (PTC) type structures.

It is possible to use foundation companies to act as ownerless or orphan vehicles making them suitable solutions in the context of PTCs, investment funds or in wider commercial transactions.

By way of example, foundation companies may be suitable for use as:

- holding vehicles for shares in a PTC
- a protector or enforcer of a trust
- special purpose vehicles in financing or commercial transactions
- a vehicle for cryptocurrency related projects, from initial coin offerings (or ICOs) and trading operations
- a traditional succession planning and asset protection vehicle
- a vehicle for philanthropic uses.

Incorporation

Any new or existing company incorporated under the Companies Act (Revised) may apply to the Registrar of Companies (Registrar) to be a foundation company provided certain conditions have been met. The conditions are that the foundation company:

- is limited by shares or by guarantee, with or without share capital;
- has a memorandum that:

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- 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 (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. 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, its constitution may give rights, powers and other duties to members, directors, supervisors, founders or others relating 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;
- general meetings and voting on resolutions;
- altering the constitution; and
- winding up and disposing of surplus assets.

Bylaws

In addition to a foundation company's constitution, it is possible for a foundation company to adopt its own tailored bylaws in order to modify or expand upon its management and operation. Utilising bylaws has the advantage of being a private document separate from the constitution, which does not need to be filed with the Register (unlike the constitution), and can offer more flexibility through amendment over time.

Rights and duties

Unless varied by the constitution, duties are owed only to the foundation company itself and rights are enforceable only against the foundation company. This can make foundation companies well suited to holding higher risk investments because beneficiaries do not have direct rights of action against trustees as they would in a trust context.

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. 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.

Beneficiaries of a foundation company (if any) 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 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.

Court intervention and resolution of disputes

The firewall provisions of the Trusts Act apply to foundation companies providing protection against claims in foreign courts. Similarly, the ability of a trustee of a Cayman Islands trust to apply to the Grand Court has been extended to foundation companies, offering assistance in contentious and non-contentious situations.

A foundation company's constitution may require the resolution of disputes issues by arbitration and any resolution manner prescribed by the constitution cannot be set aside unless a party has committed fraud or conducted itself in bad faith.

Tax treatment

A foundation company is not subject to any income, withholding or capital gains taxes in the Cayman Islands. Members or beneficiaries of a foundation company will not be subject to any income, withholding or capital gains taxes in the Cayman Islands with respect to their interests, nor will they be subject to any estate or inheritance taxes in the Cayman Islands.

In addition, a foundation company, which is incorporated as an exempted company, may apply for an undertaking that any law change to introduce taxes in the Cayman Islands will not apply for a period not exceeding 30 years from the date of approval of the application.

Fees

Every foundation company is required to pay an annual companies registry fee to the Registrar in January of each year of CI\$700 (US\$ 854). The foundation company secretary is also likely to charge an annual fee.

In addition, there will be legal fees associated with the incorporation of a foundation company which will vary depending on whether the constitution needs to be tailored and whether bespoke bylaws are required.

Conclusion

Foundation companies can be used in a variety of ways drawing together features of company and trust law and are a useful tool in the planning toolbox. To discuss further please contact us.



FIND US

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000

E cayman@careyolsen.com



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Visit our trusts and private wealth team at [careyolsen.com](https://www.careyolsen.com)



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