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Foundation Companies in the Cayman Islands

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The Foundation Companies Bill, 2016 (**Bill**) seeks to introduce a new type of corporate vehicle in the Cayman Islands, the Foundation Company (**FC**). The Bill has been drafted to allow the FC to be rooted in Cayman Islands company law, but function like a civil law foundation. The Bill only applies to companies that have been declared by the Registrar of Companies (**Registrar**) to be an FC. This Guide sets out the key features of FCs and how they will be able to be formed, if the Bill is approved in its current form.

General

Nature of a Foundation Company

The Bill approaches the creation of an FC in such a way that an FC may consequently be established for any lawful purpose, be it commercial, charitable/philanthropic or private purposes, or any combination of these. An FC shares many of its features with other types of Cayman Islands companies and fits seamlessly into the Cayman Islands' legal regime. The FC will therefore have the benefit, where relevant, of a considerable body of case law on companies.

Taxation

FCs will be exempt from any Cayman Islands income or gains taxes and 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.

Uses of Foundation Companies

It is anticipated that FCs will have a wide range of uses, such as special purpose vehicles in finance transactions, as charities, protectors or enforcers (in relation to other trusts or fiduciary structures), as mechanisms within private trust company structures, as succession planning vehicles, and for any purpose for which a trust is currently used.

Private clients

For those clients particularly in civil law jurisdictions seeking an alternative to trusts, the FC will be more easily recognised in the

home jurisdiction of the client, and can be used to hold family wealth and businesses. If desired, individuals in control of an FC can mirror the board(s) of existing family enterprises. The ability for beneficiaries to have different entitlements will also be very useful for asset protection purposes. Additionally, the FC will be ideal for holding higher-risk, less diversified assets, since interested persons will owe their duty to the FC, and not to any potential beneficiaries.

Charitable

The flexibility of FCs makes them ideal for charitable and philanthropic endeavours. The purposes of an FC can also be hybrid and permit a non-charitable element. This avoids the need to set up a separate structure. Further, an FC has similar characteristics to the Islamic *waqf* structure, which could prove useful to Middle Eastern clients.

SPV/corporate

The 'orphan' nature of an FC, without ownership or beneficial interest constraints, makes it a useful SPV vehicle in corporate transactions. The FC is also an ideal vehicle to hold the shares of a private trust company or for use in Cayman [STAR trust structures](#).

Establishment of a Foundation Company

Application and declaration

The directors and members of an existing company or a company that is being formed will have to apply to the Registrar for the company to be an FC. The Registrar will then grant its approval if satisfied that the following requirements have been met:

1. the existing company or company being formed is limited by shares or by guarantee, with or without share capital
2. the company's secretary is a qualified person
3. the existing company or company being formed has a memorandum of association that:
 - states that the company is an FC
 - generally or specifically describes its objects (which may, but need not, be beneficial to other persons)
 - provides, directly or by reference to its articles of association, for the disposal of any surplus assets the company may have on winding-up
 - prohibits dividends or other distributions of profits or assets to its members or proposed members as such
4. the existing company or company being formed has adopted articles of association

If an existing or new company meets these requirements, the Registrar will issue a new certificate of incorporation that will contain a declaration that the company is an FC, as conclusive evidence that the company is an FC.

Foundation Company constitution

Rights, powers and duties

An FC's constitution may, as well as providing for its management by directors or their delegates, give rights, powers and duties of any type to members, directors, officers, supervisors, founders or others concerning the FC. The rights, powers or duties under an FC constitution may provide for (or relate to) any or all of the following:

- admitting, appointing or removing its members, supervisors, directors or officers
- making and amending by-laws
- the supervision of the management and operations of the FC
- the enforcement on behalf of the FC of duties and liabilities under the FC constitution
- the calling of, and attendance at, its general meetings
- voting on its ordinary or special resolutions
- amending the articles of association
- amending/altering the FC constitution
- winding-up the FC and disposing of its surplus assets

Powers given by the constitution are given for the benefit of the FC and may be subject to any condition. Unless otherwise expressly provided for by an FC's constitution, any duties under the FC's constitution are owed to the FC only and any rights under the FC's constitution are enforceable against the FC only.

Members and supervisors

An FC's constitution may grant to any person, whether or not ascertained or in existence, the right to become a member or supervisor of the FC and such right is enforceable by action against the FC, whether or not enforceable as a matter of contract.

An FC may cease to have members if its memorandum of association so permits or requires, and the FC continues to have a supervisor. The cessation of the FC's members will not affect the FC's existence, capacity or powers. Although an FC may cease to have members, it may not subsequently admit members, or issue shares, unless expressly authorised to do so by the FC's constitution.

An FC's constitution may appoint a member or supervisor to be a director of the FC. However, there is no requirement that an FC must have supervisors who are directors.

Dispute resolution

An FC's constitution may provide for the resolution of disputes, differences or difficulties among the FC's directors, officers, interested persons or beneficiaries, concerning the FC's operations or affairs, or the duties, powers or rights of persons under the constitution, by compromise, mediation, arbitration, or any other lawful method.

Assets and investment

As there is no minimum capital requirement for an FC, a founder or any other person may add assets to an FC, subject to the FC's acceptance. Assets of the FC may be applied in the furtherance of its objects. There are no regulations concerning the investments of FCs and no restrictions on the types of investments an FC may make, unless the constitution provides otherwise.

Roles, management and operation of Foundation Companies

Founder

An FC, unlike foundations in other offshore common law jurisdictions, does not require anyone to have a formal role as a founder as such. An FC is incorporated on the instructions of the person(s) promoting it in the same way as any other Cayman Islands company. A founder does not have any automatic rights in relation to the FC, but may reserve rights if he/she wishes. The founder may be given a power to amend any of the provisions of the FC's constitution but only if expressly provided in the constitution.

Beneficiary

A beneficiary of an FC is a person who will or may benefit from the FC carrying out its objects. The constitution of an FC may provide for any type of beneficiary and for any type of beneficial provision. It is possible for an FC's constitution to provide for any duties, powers or rights to be vested in beneficiaries. Therefore, a beneficiary can be given direct enforceable rights against the directors, officers and interested persons.

Interested person

An interested person is a person that is any of the FC's members or supervisors. An interested person is someone declared under an FC's constitution to be an interested person or someone who has the right to be a member or supervisor of the FC. Further, an interested person can bring an action in the name or on behalf of the FC for the enforcement of the duties or liabilities of directors in the same circumstances and manner as may a member of a company that is not an FC.

Director

An FC is managed by a board of directors. Any individual of full capacity and any company may be a director. The directors of an FC owe the same duties to the FC as the directors of any other company owe to that company. The standard of care applicable to directors of an FC is the same as that owed by the directors to any other company and so includes a duty of care, diligence, and skill. Please see our [Guide to directors duties and obligations under Cayman Islands law](#) for details of directors' duties generally. There is no residency requirement for directors and there are no other restrictions as to who may act as a director of an FC. An FC's

directors are required to give interested persons reports, accounts, and any information/explanations concerning the FC's business and affairs.

Qualified person

A qualified person for an FC means a person who is licensed or permitted by the Companies Management Law (Revised) to provide company management services in the Cayman Islands. An FC must at all times have a qualified person as its secretary and the secretary must maintain a full and proper record of its activities and enquiries made for giving notices.

Registered office

An FC's registered office can only be at its secretary's registered office as a qualified person. Certain registers and information must be kept by the FC at the registered office. A minute book should also be maintained. The registered office is also required to maintain copies of certain records for anti-money laundering purposes.

Compliance with regulatory laws

In complying with any relevant regulatory laws, an FC will ensure that it and its directors, officers, and interested persons give information concerning the FC, that its secretary may reasonably require, in order to comply with the regulatory laws. If an FC fails in its compliance with the relevant regulatory law, the FC, its directors and any manager of the FC, and anyone else who was purporting to act as a director or manager of the FC when the offence was committed, will have been deemed to have committed an offence. A person who commits an offence against the FC is liable on summary conviction to a fine of CI\$15,000 (US\$18,293) and to imprisonment for five years, or both.

Grand Court's function

The Grand Court may, if so provided in the FC's objects or constitution, have jurisdiction over the disposal of surplus assets of the FC on winding-up and in relation to the number or conduct of the directors of the FC. Importantly, section 48 of the Trusts Law (2011 Revision), which allows trustees of Cayman Islands trusts to apply for the directions of the Grand Court will apply to FCs. The "firewall" legislation contained in sections 92 and 93 of the Trusts Law will also apply to assets contributed to FCs.

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