

Cayman Islands Foundation Companies

The Foundation Companies Act, 2017 (the **Foundation Companies Act**) introduced the foundation company as a new type of corporate vehicle in the Cayman Islands. The Foundation Companies Act is drafted to allow the foundation company to be rooted in Cayman Islands company law, but function like a civil law foundation and only applies to companies that have been declared by the Registrar of Companies (**Registrar**) to be a foundation company. This guide sets out the key features of foundation companies and how they are formed and operated.

Nature of a foundation company

The Foundation Companies Act allows a foundation company to be established for any lawful purpose, whether commercial, charitable/philanthropic or private purposes, or any combination of them. A foundation company shares many of its features with other types of Cayman Islands companies and fits seamlessly into the Cayman Islands' legal regime. The Companies Act also applies to foundation companies, except to the extent that it is inconsistent with the Foundation Companies Act and subject to certain consequential changes. The foundation company therefore has the benefit, where relevant, of a considerable body of case law on companies.

A foundation company is a body corporate, with limited liability, separate legal personality from its members (if any) and directors and other officers. It can sue and be sued and hold property in its own name. Key features of foundation companies that distinguish them from other types of corporate vehicle available in the Cayman Islands include that the company does not have to have members following incorporation, amendments to its memorandum and articles of association can only be made if expressly stated and it is not allowed to pay dividends to its members.

Uses of foundation companies

Foundation companies 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 who are seeking an alternative to trusts, in civil law jurisdictions particularly, the foundation company 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 a foundation company 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 foundation company is ideal for holding higher-risk, less diversified assets, as interested persons will owe their duty to the foundation company, and not to any potential beneficiaries.

Charitable

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

SPV/corporate/digital assets

Because a foundation company can exist without members, it can be a useful special purpose vehicle in corporate transactions, securitisations and, as we have seen at Harneys, digital asset structures. Typically when we form foundation companies which don't have members, we form them as companies limited by guarantee.

The foundation company is also an ideal vehicle to hold the shares of a private trust company or for use in Cayman STAR trust structures.

General incorporation requirements and procedures for a foundation company

Application and declaration

A foundation company is formed in the same way as any other Cayman Islands company, with an application made to the Registrar. Where the company is to be incorporated as an exempted foundation company, for example to be able to apply for a tax undertaking certificate (see Taxation below), the fee to incorporate an exempted company is also payable.

The Registrar will incorporate the company as a foundation company if satisfied that the following requirements have been met:

- The company is limited by shares or by guarantee, with or without share capital
- The company's secretary is a qualified person (holds a Company Management Licence)
- The company has a memorandum of association that:
 - States that the company is a foundation company
 - 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
- The company has adopted articles of association

If an existing or new company meets these requirements and the fee is paid, the Registrar will issue a new certificate of incorporation that will contain a declaration that the company is a foundation company.

Foundation company constitution

Rights, powers and duties

As well as providing for its management by directors or their delegates, a foundation company's constitution (its memorandum and articles of association) may give rights, powers and duties of any person which can include members, directors, officers, supervisors, founders, or others. The rights, powers or duties under a foundation company 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, which do not form part of the company's constitution but allow the foundation company further flexibility on how it is structured and managed
- The supervision of the management and operations of the foundation company
- The enforcement on behalf of the foundation company of duties and liabilities under its constitution
- The calling of, and attendance at, its general meetings
- Voting on its ordinary or special resolutions

- Amending/altering the foundation company's constitution
- Winding-up the foundation company and disposing of its surplus assets

Powers given by the constitution are given for the benefit of the foundation company and may be subject to any condition. Unless otherwise expressly provided for by a foundation company's constitution, any duties under the constitution are owed to the foundation company only and any rights under the constitution are enforceable against the foundation company only. A model form of constitution is included in the Foundation Companies Act for use if preferred.

Members and supervisors

A foundation company's constitution may grant to any person, the right to become a member or supervisor of the foundation company and that right is enforceable by action against the foundation company, whether or not enforceable as a matter of contract.

A foundation company may cease to have members following incorporation if its memorandum of association permits or requires, and the company continues to have a supervisor. Ceasing to have members will not affect the company's existence, capacity or powers. Although a foundation company may cease to have members, it may not subsequently admit members, or issue shares, unless expressly authorised to do so by its constitution.

A foundation company's supervisor may be any person and there is no requirement that a foundation company must have supervisors who are directors.

Assets and investments

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

Roles, management and operation of foundation companies

Director

A foundation company is managed by a board of directors. There is no requirement for directors to be resident in the Cayman Islands and there are no other restrictions on who may act as a director of a foundation company, so any individual of full capacity and any company may be a director. The directors of a foundation company owe the same duties to the company as the directors of any other company owe to that company. The standard of care applicable to directors of a foundation company is also 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.

Subject to the constitution, a member or supervisor may also be a director and there is no requirement that a foundation company have supervisors who are not directors. The directors are required to give interested persons reports, accounts, and any information/explanations concerning the foundation company's business and affairs.

Founder

A foundation company, unlike foundations in other offshore common law jurisdictions, does not require anyone to have a formal role as a founder. A foundation company 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 foundation company, but may reserve rights if they wish. The founder may be given a power to amend any of the provisions of the company's constitution but only if expressly provided in the constitution.

Beneficiary

A beneficiary of a foundation company is a person who will or may benefit from the foundation company carrying out its objects. The constitution may provide for any type of beneficiary and for any type of beneficial provision. A foundation company's constitution may (but does not have to) provide for any duties, powers or rights to be vested in beneficiaries, allowing a beneficiary to be given direct enforceable rights against the directors, officers and interested persons.

Interested person

An interested person of a foundation company means any of the company's members or supervisors, someone who has the right to be a member or supervisor of the company and/or someone who is declared under the company's constitution to be an interested person. An interested person can bring an action in the name or on behalf of the foundation company for the enforcement of the duties or liabilities of directors in the same circumstances and manner as a member of a company that is not a foundation company. Subject to the terms of the company's constitution, an interested person also has certain rights to information, as detailed below.

Qualified person

A qualified person for a foundation company means a person who is licensed or permitted by the Companies Management Act to provide company management services in the Cayman Islands. A foundation company 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.

Ongoing requirements for a foundation company

Registered office and registers

A foundation company's registered office can only be at its secretary's registered office as a qualified person.

Various registers and information must be kept by the foundation company at the registered office, including its register of directors and officers, register of mortgages and charges and beneficial ownership register (unless an exemption applies, please see our Guide to the Cayman Islands beneficial ownership regime for details of exemptions available). Information contained in the beneficial ownership register will also be filed monthly by the company's registered office provider with the Cayman Islands competent authority, on a confidential basis.

A foundation company must also keep a register of supervisors at its registered office, setting out details of the company's supervisors and when they were appointed, which must be updated within 60 days of any change in the company's supervisors. The company must also maintain a register of members, although that may be kept somewhere other than 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

A foundation company must ensure that it and its directors, officers, and interested persons give information (including accounts, documents and records) concerning the company that its secretary may reasonably require in order to comply with certain anti-money laundering and counter terrorist financing laws. The company must also not accept an asset contribution that is gratuitous or in consideration of a share issue unless the secretary has given the company notice that there appears to be no objection to the acceptance under those laws. If a foundation company breaches these obligations, the company, its directors and any manager of the company, and anyone else who was purporting to act as a director or manager when the offence was committed, commits an offence and is liable on conviction to a fine of CI\$15,000 (US\$18,293) and/or to imprisonment for five years.

Accounts and auditors

The Companies Act requires every company to keep proper books of account, showing details of all receipts, expenditures, purchases, sales and assets and liabilities of the company, reflecting a true and fair view of the state of the company's affairs and explaining its transactions. A Cayman company may specify any date for its financial year end. Except as otherwise set out in the foundation company's constitution, the directors shall give an interested person the reports, accounts, information and explanations about the foundation company's business and affairs and the discharge of its directors' duties and exercise of their powers, as may be required by an ordinary resolution or by a written request from the interested person.

There is no statutory requirement under the Foundation Companies Act or the Companies Act for a foundation company to file or audit its company account, although audited accounts may be required if a foundation company is regulated in the Cayman Islands under other regulatory laws. Please contact your usual Harneys contact for further details.

Annual fee

Every foundation company is required to pay an annual Companies registry fee to the Registrar in January of each year, which will be dealt with by the company's registered office provider.

Distributions

A foundation company is not allowed to dispose (as defined in the Trusts Act (Revised)) of any of its assets if, immediately following the date on which the disposition is to be made, it will be unable to pay its debts in the ordinary course of business. If a director or manager of a foundation company knowingly and wilfully authorises or permits a prohibited distribution the company and director or manager commit an offence, punishable by a maximum fine of CI\$15,000 (US\$ 18,300) and/or imprisonment of 5 years.

The memorandum of association of a foundation company must also prohibit dividends or other distributions of profits or assets to the company's members.

Reorganisations and winding up

It is not currently possible for a foundation company to transfer in or out of the Cayman Islands by way of continuation or for a foundation company to merge or consolidate under the Companies Act. Further regulations may be introduced in the future to modify the Companies Act procedures so that they can apply to foundation companies.

The Companies Act provisions on winding up a company voluntarily or compulsorily by order of the court also apply to foundation companies, subject to certain modifications. Please contact your usual Harneys contact for further details.

Exchange control

The Cayman Islands have no exchange control laws. There is therefore no restriction on the movement of funds in or out of the Cayman Islands either by residents or non-residents of the Cayman Islands. Bank accounts may be kept in the Cayman Islands or any other jurisdiction in the world in any currency and a foundation company's capital may be expressed in any currency, as applicable.

Tax

The Cayman Islands has no corporation tax, income tax, capital gains tax, inheritance tax, gift tax, wealth tax or any other tax applicable to a foundation company. Stamp duty is payable on certain documents, generally at a nominal rate. Foundation companies that are carrying out their objects mainly outside the Cayman Islands can also apply to register as an exempted company and will then be 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 30 years from the date of the undertaking.

Dispute resolution

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

The Grand Court of the Cayman Islands may, if the foundation company's objects or constitution so provide, have jurisdiction over the disposal of surplus assets of the company on winding-up and in relation to the number or conduct of the directors of the company. Importantly, section 48 of the Trusts Act (Revised), which allows trustees of Cayman Islands trusts to apply for the directions of the Grand Court applies to foundation companies. The "firewall" legislation contained in sections 92 and 93 of the Trusts Act also applies to assets contributed to foundation companies, which may be useful for clients from countries with "forced heirship" laws.



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