



ADVISORY
Industry Information

The Foundation Companies Law

20 October 2017

Further to our previous client advisory, the Foundation Companies Law (the “Law”) has now come into force effective 18 October 2017. As previously noted, the Law has introduced a new type of company, the foundation company (the “Foundation”), which can function like a civil law foundation but in the form and with the benefits and familiarity of a company. As well as being utilised as a trust alternative for succession planning and charitable and philanthropic objects, it is expected that Foundations will also be used in place of traditional exempted companies for various purposes including private trust companies and protectors or enforcers (in relation to other trusts or fiduciary structures) and special purpose “orphan” vehicles in finance and other such transactions.

Forming a Foundation

The incorporation process for a Foundation is the same as that for a traditional exempted company under the Companies Law other than as to certain additional requirements (and existing companies can be converted if they satisfy these same requirements) being that the company:

1. is limited by shares or by guarantee, with or without a share capital;
2. has a memorandum that:
 - a. states that the company is a Foundation;
 - b. generally or specifically describes its objects (which may, but need not be, beneficial to other persons);
 - c. provides for to whom and how the surplus assets of the Foundation will be disposed of on its winding-up;
 - d. prohibits dividends or other distributions of profits to its members or proposed members;
3. has adopted articles; and
4. has a secretary who is a qualified person (i.e. a person licensed or permitted under the Companies Management Law (2003 Revision) to provide company management services).



The Registrar of Companies (the “Registrar”) will issue a special certificate of incorporation to a Foundation (replacing the previous certificate of incorporation in the case of a converted company) declaring that the company is a Foundation.

The fee payable on incorporation or conversion is US\$609.75.

Constitution

The constitution of a Foundation can be very flexible. It can provide for the way in which the Foundation will be managed, give rights, powers and duties to any type of members, directors, officers, supervisors, founders or others concerning the Foundation. The powers given therein can be required to be exercised for the benefit of the Foundation, for the benefit of the donee, or for any other purpose. They can also be subject to any conditions. The Law contains certain default positions that will apply if the constitution is silent on these points.

The Foundation will have a duty to carry on the objects set out in its memorandum but only if the memorandum declares that it does and designates, or provides for the designation of, persons with standing to enforce the duty by action against the Foundation.

If the constitution grants or authorises any person the right to become a member or supervisor of the Foundation, that person can enforce that right by action against the Foundation whether or not enforceable as a matter of contract.

A Foundation must have one or more members for the purposes of incorporation but, following incorporation, the Foundation can cease to have members as long as it has one or more supervisors. A supervisor is a person, other than a member of the Foundation, who under the constitution, has any voting rights at general meetings or rights of access to some of all of the accounts, records or information of the Foundation, whether or not that person has supervisory or other duties.

If a Foundation ceases to have any members, it cannot subsequently admit members or issue shares unless expressly authorised to do so in its constitution.

If the constitution provides a method by which it may be altered, it can be altered in accordance therewith. If it is silent in this regard, the Foundation, its secretary (unless stated to the contrary in the constitution), an interested person, a person authorised under the constitution or the Foundation’s liquidator, can apply to the Court for an order altering the constitution.

The constitution may also contain provisions regarding how disputes, difficulties or difference arising amongst its directors, officers, interested persons or beneficiaries concerning the Foundation, its operation or affairs or their duties, powers or rights under the constitution will be resolved. This may include arbitration or any other lawful method. It may also provide for the making and altering of bylaws for the Foundation, which will govern the Foundation’s management but will not form part of its constitution.

Operation and Management

Directors, officers and delegates of the Foundation must comply with applicable provisions of the bylaws, so far as they are consistent with the Foundation’s constitution and the Law.

The registered office of the Foundation must be at its secretary’s business address. The secretary may be changed by the appointment of another qualified person in its place and by giving notice to the Registrar (along with payment of the prescribed fee).

A Foundation is required to keep a register of supervisors (and must notify the Registrar within 60 days of any change of supervisors) at its registered office. This must contain:

1. the names and addresses of its supervisors;
2. the date on which each of its supervisors was appointed; and
3. any date on which a supervisor’s appointment ceased.



A Foundation is prohibited from disposing of any of its assets if it is unable to pay its debts as they fall due.

A Foundation will be subject to the regulatory laws of the Cayman Islands and its directors, officers and interested persons must cooperate with the Foundation's secretary for the purposes of ensuring compliance with these laws. This includes a requirement to provide information concerning the Foundation that the secretary may reasonably require for these purposes.

Excluded provisions of the Companies Law

Certain Companies Law provisions do not apply such that a Foundation:

1. may not change its registered office unless it changes its secretary;
2. does not have the option to adopt Table A articles (i.e. the model articles set out in the Companies Law) but does have the option to adopt any part of or all of the model forms in Schedule 2 of the Law or any other prescribed model form as its constitution;
3. cannot redeem or repurchase its shares;
4. cannot declare or pay dividends on its shares; and
5. cannot presently transfer by way of continuation into the Cayman Islands or out to another jurisdiction, and cannot merge or consolidate with another company (although regulations may permit this in future).

The above is intended to be a general summary only and is not a substitute for specific legal advice. Should you require further information regarding the Law or creating a Foundation, please contact:



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