



## Cayman Islands' Foundation Companies Bill, 2016 passes through the Legislative Assembly

The Foundation Companies Bill, 2016 (once enacted, the “**FC Law**”) was passed by the Legislative Assembly in its latest sitting and is expected to be gazetted and come into force as a law in the next few weeks.

This long awaited and much anticipated piece of legislation is a welcome addition to the existing structuring options currently on offer to clients keen on using the Cayman Islands as their jurisdiction of choice and has a wide variety of possible applications.

As discussed in our e-alert in December, the FC Law will allow certain companies to be registered as foundations, either at the time of their incorporation or at a later date. Except as otherwise set out in the FC Law, these companies would also be governed by the Cayman Islands' Companies Law (2016) Revision.

### The Foundation Company (“FC”)

The FC Law creates a form of non-profit corporate entity, rather than the more traditional foundation seen under the foundations' laws already in existence in the Crown Dependencies of Jersey, Guernsey and the Isle of Man, which establish more of a hybrid structure between a trust and a company akin to the civil law foundation.

Much like a company, an FC has a distinct legal personality from that of its members, directors, officers, supervisors and founder. An FC has the capacity to sue and be sued and to hold property in its own name. The model articles of association at Schedule 2 to the FC Law provide that the liability of its members is limited. The distinguishing feature from a Cayman company is that an FC is prohibited from paying dividends to its members.

Unless expressly provided for in the constitution documents (the memorandum and articles of association), the duties and rights under the constitution are owed to, and are enforceable against, the FC only. This distinguishes the FC from a trust, because a trust has no separate legal personality and is essentially a relationship between trustees and beneficiaries. In the case of a trust, beneficiaries' rights of recourse are against the trustees rather than the trust itself.

Another distinguishing feature of the FC as compared with a trust is that beneficiaries have no powers or rights relating to the FC, its management or its assets.

### Statutory Requirements

In order for a new company to qualify as an FC (or for an existing company to qualify as an FC) it will be required to register with the Registrar and:

- a) be limited by shares or by guarantee, with or without share capital;
- b) have a memorandum that states that it is an FC, (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 FC may have on a winding up; and (iv) prohibit dividends or other distributions of profits or assets to its members or proposed members as such;
- c) adopt articles; and

- d) have a qualified person as its secretary (a qualified person being 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 FC).

Whilst the FC will be required to have a memorandum and articles, it may also have bespoke bylaws. The bylaws do not form part of the FC's constitutional documents. We anticipate that this will provide the flexibility of a discretionary trust deed and enable founders to create a structure that exactly fits their individual objectives.

As mentioned above, Schedule 2 to the FC Law provides a model for objects of an FC. The objects need not be for the benefit of other persons. Therefore, an FC could act as a holding or investment company which provides benefits to its beneficiaries.

### **The Supervisor**

The duties of a supervisor will be owed to the FC only. The supervisor is a person, other than a member, who has the right to attend and vote at general meetings of the FC. The supervisor may have reserved to him or her other supervisory power or duties, in much the same way that a protector does under a trust deed.

### **Members of an FC**

The FC's constitution may grant the right to become a member to any person or class of persons whether or not ascertained or in existence. This right is enforceable by action against the FC. This mirrors the position of a discretionary trust whereby settlors settle the trust for the benefit of a wide class of beneficiaries some of whom may be minors or unborn.

Ceasing to have members will not affect the FC's existence, capacity or powers provided it continues to have one or more supervisors. If an FC ceases to have members, it may not subsequently admit members, or issue shares, unless expressly authorised to do so by its constitution.

### **Management of an FC**

An FC's constitution will provide for the mechanics of its management, and will likely give rights, powers and duties to the directors (councillors in more traditional foundations) and possibly the members, supervisors, founders or others. Powers given by the constitution may be given for the benefit of the FC, for the benefit of the donee, or for any other purpose, and may be subject to any condition.

### **Applications for Directions**

An FC with a duty to carry out its objects will have a right to apply to the Court for an opinion, advice or directions. Section 48 of the Cayman Islands' Trusts Law (2011 Revision) allowing for trustees and personal representatives to apply for the opinion or direction of the Court, will apply to FCs with appropriate modifications.

### **Uses of an FC**

The FC will have a myriad of uses including uses for commercial, charitable, non-charitable, philanthropic or private wealth structuring purposes.

The FC Law offering will likely be very attractive to those clients in civil law jurisdictions who are interested in establishing a vehicle for estate planning purposes, because the structure will feel much like a company whilst still retaining the flexibility that a trust provides.

An additional level of comfort that the FC Law will provide to clients from countries that have forced heirship laws, is that the "firewall provisions" contained at clauses 92 and 93 of the Trusts Law (2011 Revision) will also be of general application to property contributed to FCs.

What sets the FC apart from non-profit companies in the Cayman Islands is the fact that it does not need to have members, and amendments may only be made to the memorandum and articles of association if expressly stated.

For additional information or specific advice, we invite you to contact:

### Key Contacts



**Carlos de Serpa Pimentel**  
Partner  
Private Client & Trusts  
Cayman  
+1 345 814 2082  
[cpimentel@applebyglobal.com](mailto:cpimentel@applebyglobal.com)



**Esmond Brown**  
Associate  
Private Client & Trusts  
Cayman  
+1 345 814 2012  
[ebrown@applebyglobal.com](mailto:ebrown@applebyglobal.com)

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