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KEY POINTS

What is the issue?

Cayman Islands foundation companies are proving increasingly popular as a structuring vehicle for fintech organisations.

What does it mean for me?

The popularity of Cayman Islands foundation companies is driven by the flexibility of the structure.

What can I take away?

With organisations becoming increasingly mainstream, practitioners will need to familiarise themselves with the terminology used in the sector and consider suitable and bespoke structuring options.

A foundation for fintech



ROBERT LINDLEY AND WESLEY O'BRIEN DISCUSS THE USE OF CAYMAN ISLANDS FOUNDATION COMPANIES IN THE FINANCIAL TECHNOLOGY SECTOR

Cayman Islands foundation companies (Cayman Foundations) are increasingly being utilised as popular structuring vehicles in the sector. Although Cayman Foundations may initially have been intended to attract high-net-worth clients from civil-law jurisdictions (who may be more familiar with foundations, as opposed to trusts, for their wealth-planning structures), their unique features and flexibility have allowed for the creation of highly bespoke entities that are well suited to certain fintech structures, including decentralised autonomous organisations (DAOs). The Cayman Islands' position as a hub for fintech is also enhanced by the introduction of the *Virtual Asset (Service Providers) Act, 2020* (VASP Act), which provides invaluable regulatory oversight for innovative virtual asset business.

WHAT IS A DAO?

DAOs operate differently from many of today's traditional legal entities and business structures. The objective of a

DAO is to achieve a more democratic form of governance, whereby decisions are made by a defined community (for example, token-holders of a particular cryptocurrency). The legal status of a DAO is typically unclear, as they are often not incorporated and may seek to avoid legal formalities. However, as blockchain technology and its varied uses become increasingly mainstream, there is a growing need for many DAOs to take on a legal form, so that they have the capacity to act as a legal person in order to contract with stakeholders and perform more traditional functions that require legal personality.

WHAT IS A CAYMAN FOUNDATION?

Cayman Foundations were introduced in the Cayman Islands as a new structuring vehicle by the *Foundation Companies Law, 2017*. Foundations have a long history in civil-law jurisdictions and their introduction into offshore jurisdictions was initially intended to attract clients for whom a trust was not suitable, for example, due to the tax treatment in their home jurisdiction or because they were uncomfortable transferring legal ownership of assets to a trustee.



Robert Lindley
TEP is a Partner and Head of Cayman Islands and BVI Private Client & Trust, and
Wesley O'Brien
TEP is an Associate, at Conyers, Cayman Islands

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Whereas other offshore jurisdictions have sought to establish an entirely new set of rules for their respective foundation offerings, the approach in the Cayman Islands was to build upon the existing *Companies Act* framework. As such, the *Companies Act* applies to Cayman Foundations (save to the extent that it is excluded or modified by the *Foundation Companies Law* or otherwise inconsistent with its provisions). This means that the fundamental corporate structure of a Cayman Foundation is a tried and tested one, and legal jurisprudence in respect of Cayman Islands companies will, to the extent it is relevant, also apply to a Cayman Foundation, therefore achieving a high level of familiarity and certainty in its legal treatment.

WHY A CAYMAN FOUNDATION?

Although a Cayman Foundation is a company, a key feature that distinguishes it from an ordinary company is that it can cease to have members and ownership. This is an attractive feature for DAOs, which are not designed with 'ownership' and profit in mind.

Further, Cayman Foundations are often viewed as a hybrid between a trust and a company, and have therefore emerged as an attractive structuring option for non-profit organisations and as part of private wealth structures. Similar to non-profit organisations, DAOs have unique objectives that differ from commercial profit-maximising companies. As a result, questions pertaining to a DAO's legal structure and governing documents are often more complex than with ordinary companies.

The flexible nature of Cayman Foundations allows governing rules and constitutional documents to be drafted in a highly bespoke manner, with the organisation's objectives at the forefront. This means that the organisation's rules and decision-making process can be drafted to mirror those of a DAO, with such provisions contained either in the Cayman Foundation's constitutional documents or, more commonly, in its by-laws.

FEATURES OF A CAYMAN FOUNDATION Establishment

A Cayman Foundation may be formed for any lawful purpose. Indeed, a Cayman Foundation may have multiple purposes, including both charitable and non-charitable purposes. Although technically a company, there are aspects of a Cayman Foundation that more closely resemble a trust, and certain provisions of the Cayman Islands *Trusts Law* are extended to apply to Cayman Foundations.

Cayman Foundations may have bespoke governing documents tailored to the individual circumstances and requirements of the particular entity. Thus, although some of the key features of a Cayman

'For DAOs that seek to be governed from the bottom up, the founder would not normally retain any powers in respect of the Cayman Foundation and such role would therefore be nominal'

Foundation are described in this article, it should be borne in mind that there is significant scope to adapt the roles and responsibilities of the various offices, and the applicable rules, as may be appropriate to individual circumstances.

Key roles

Ordinarily, a Cayman Foundation will have the following roles:

- **Founder:** similar to the settlor of a trust, this will generally be the legal person responsible for establishing the structure by way of a contribution of assets. As the *Foundation Companies Act* does not formally define the role of a 'founder', the governing documents may specify what (if any) powers the founder will retain. For example, the founder may reserve the power to appoint the directors or amend the governing documents; or, alternatively, the founder may have no ongoing role in relation to the Cayman Foundation. For DAOs that seek to be governed from the bottom up, the founder would not normally retain any powers in respect of the Cayman Foundation and such role would therefore be nominal.
- **Director/s:** as with an ordinary company, a Cayman Foundation is managed by its board of directors. By default, the role and powers of the directors will be the same as for an ordinary Cayman Islands company. However, although central management by a board of directors may conflict with the objectives of many DAOs, there is scope to restrict the directors' exercise of their powers so that the Cayman Foundation's decision-making process is more aligned with the DAO's objectives such that the board is obliged to follow the directions of the DAO's governing community.
- **Member/s:** although a Cayman Foundation must initially be incorporated with one or more members (in the same way as an ordinary company), one of the key features of a Cayman Foundation is that it can cease to have

members at any time. The cessation or absence of a member will not affect the Cayman Foundation's existence, capacity or powers.

- **Supervisor/s:** Where a Cayman Foundation ceases to have members, it must have one or more supervisors, who may, but need not, be directors. As suggested by the title, such officeholder essentially fills the gap left by the lack of members in that they can enforce the rules of the Cayman Foundation as against the directors and would typically have the right to access the files, books and accounts of the company. The supervisors may therefore play a role in ensuring the directors comply with the DAO's democratic governance model.

By-laws

Another feature that is distinct from an ordinary company is that a Cayman Foundation may have by-laws that do not form part of the company's constitution and therefore do not need to be filed with the Cayman Islands Company Registry and can remain private. This affords a Cayman Foundation a degree of privacy in its operations coupled with further flexibility to set its own rules in relation to its structure and management. By-laws may relate to any aspect of the business or affairs of the Cayman Foundation or any of the duties or powers of the directors and other officeholders, including the manner in which to achieve the Cayman Foundation's objects.

For DAOs, it is typically the by-laws that will contain the substantive rules as to how the community will govern the DAO, and they may also restrict the powers of the directors in order to achieve a more democratic governance model.

WHAT IS A VASP?

Another development in the Cayman Islands is the facilitation of innovative virtual asset business. This is evident with the implementation of the VASP Act, which provides a regulatory framework based on internationally recognised standards for virtual asset service providers. Broadly, the VASP Act defines 'virtual assets' as digital representations of value that can be digitally traded or transferred and can be used for payment or investment purposes. It requires the licensing and/or registration of various entities engaging in virtual asset services with the Cayman Islands Monetary Authority. Although the legislation is still at an early stage of its implementation, it is expected that, in the long term, it will support the establishment of Cayman Islands entities to undertake fintech-related services and activities.

**#CAYMANISLANDS #COMPANIES
#FOUNDATIONS #TECHNOLOGY**