

Article

The Rise & Rise Of Cayman Foundation Companies

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Cayman Foundation Companies are booming in popularity. Statistics from the Register of Companies have shown a significant uptick in registrations in recent months.

2021 saw 281 per cent year-on-year growth in the registration of Foundation Companies. 2022 looks set to continue this trend, with more registrations in the first two months of the year than there had been for the entire calendar years of 2019 and 2020. Since their introduction in 2017, it appears that Cayman Foundations are now finding their feet and proving to be an increasingly popular structuring vehicle in a range of different commercial and private wealth contexts.

The growth in the popularity of Foundation Companies has been turbocharged by the parallel growth in Cayman's FinTech sector which has found that the unique features of a Foundation Company are well-suited to innovative new organisational structures such as decentralised autonomous organisations (DAO). This article will explore the features and uses of Cayman Foundation Companies.

What Is A Cayman Foundation?

Cayman Foundation Companies (Cayman Foundations) which act as a hybrid between a company and a trust, were introduced as a new structuring vehicle by legislation enacted in 2017. Foundations have a long history in civil law jurisdictions and their introduction offshore 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.

Whereas other offshore jurisdictions have sought to establish an entirely new set of rules for their respective foundation offerings, the approach in Cayman was to build off the existing Companies Act framework. As such, Cayman Foundations are technically companies (albeit with special features) and Cayman's Companies Act applies to Cayman Foundations, save to the extent that it is excluded or modified by the Foundation Companies Act 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 companies will, to the extent it is relevant, also apply to a Cayman Foundation.

Key Features of a Cayman Foundation

The key features of a Cayman Foundation which have proven particularly popular are the following:

- **Separate legal personality:** unlike a trust, a Cayman Foundation is itself a legal person which can allow for more simplified structuring.
- **Purposes:** Cayman Foundations may be formed for any lawful purpose, including both charitable and non-charitable purposes.
- **Beneficiaries:** Cayman Foundations may choose to have beneficiaries. Unless otherwise specified the beneficiaries will not have standing against the Cayman Foundation (such supervisory function being vested in a "Supervisor").
- **Members/shareholders (or the lack thereof):** Cayman Foundations can exist as an orphan entity without any members or shareholders.
- **Flexibility:** there is significant scope to adapt the governing rules, structure and roles of a Cayman Foundation to a range of bespoke needs. Further, the constitution of a Cayman Foundation can be supplemented by "Bylaws" which are not filed with the Register of Companies and can therefore remain private, affording the 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.

- **Trusts legislation applies:** certain provisions of the Cayman Islands' Trusts Act are extended to apply to Cayman Foundations, including section 48 of the Trusts Act which allows fiduciaries to apply for the directions of the Cayman Court (often referred to as a "blessing" application). This is a remedy which can be useful to protect fiduciaries when making significant decisions, for example when making a major distribution or undertaking.

Uses for a Cayman Foundation

Cayman Foundations are being put to a wide variety of uses, including:

1. Philanthropic organisations;
2. An alternative to a trust in both private wealth, charitable and commercial contexts;
3. Private Trust Companies (PTC);
4. General partners of a partnership in an investment fund structure; and
5. Decentralised Autonomous Organisations (DAO).

Private Wealth

In the private wealth context, a Cayman Foundation can serve a similar function to a trust with assets being held for the benefit of beneficiaries on terms specified in the Foundation's governing documents. The key difference from a trust is that the Cayman Foundation exists as a separate legal person so, rather than being administered by another person (i.e. the trustee) it is managed and administered by its board of directors. Alternatively, where a trust is still desirable, a Cayman Foundation may act as a PTC. Whereas PTCs are commonly held in purpose trust structures (where the shares of the PTC are held by a professional trustee of a purpose trust), because Cayman Foundations can cease to have members there is no need for the PTCs shares to be held in a purpose trust, resulting in a simplified structure.

Philanthropy

Traditionally, Not-For-Profits (NFPs) in common law jurisdictions are often established as either a charitable trust or a company limited by guarantee, with each legal structure offering distinct advantages and disadvantages. The key distinction between the two is that unlike a company, a trust does not have separate legal personality and so cannot sue or be sued, or hold property in its own name. As a hybrid between a trust and a company, Cayman Foundations have therefore emerged as an attractive structuring option for NFPs.

While Cayman Foundations have separate legal personality, their governing documents may often have features which are more familiar to trusts. For example, Cayman Foundations can be established with a "Founder" whose role is similar to that of the settlor of a trust, with the Founder able to retain certain powers in relation to the entity (such as the power to amend governing documents, approve distributions or appoint/remove directors).

A legal structure that has separate legal personality and limited liability but can cease to have members is an attractive option for NFPs. This is particularly apparent in light of *Lehtimäki and others (Respondents) v Cooper (Appellant)*,¹ a recent decision of the UK Supreme Court which analysed the role of members of a charitable company limited by guarantee. The UK Supreme Court unanimously agreed that the members owe a fiduciary duty to further the company's charitable purposes (which contrasts with the ordinary position where a company's members are free to exercise their voting rights as they so choose). While the result is not altogether surprising, it does raise complex and novel questions as to the scope of the members' duties and the practicalities for how they should be exercised. The use of a Cayman Foundation which can cease to have members overcomes this ambiguity.

FinTech

One of the most interesting (and increasingly popular) uses of a Cayman Foundation is as a Decentralised Autonomous Organisation (DAO). DAOs operate differently from many of today's traditional legal entities and business structures, the objective being to achieve a more democratic form of governance whereby decisions are made by a defined community (for example token-holders of a particular cryptocurrency). While the legal status of a DAO is typically unclear as they are often not incorporated and may seek to avoid legal formalities, as blockchain technology and its varied uses become increasingly mainstream, there is a growing need for many DAOs to take on 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 which require legal personality.

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 its democratic decision making process can be drafted to mirror that of a DAO with such provisions either contained in the Cayman Foundation's constitutional documents, or more commonly in its Bylaws.

¹ [2020] UKSC 33

Roles in a Cayman Foundation

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, amend its governing documents or alternatively the Founder may have no ongoing role in relation to the Cayman Foundation. For DAOs which 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 company. However, there is scope to restrict the directors’ exercise of their powers to better align with the specific entity’s objectives.
- **Member(s):** While 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 rise in the popularity of Cayman Foundations is testament to Cayman’s already well known innovative approach and reputation for wealth planning and corporate structures. The legislator’s foresight for Foundations to take the form of a Cayman company has allowed them to seamlessly fit into Cayman’s legal regime, offering up an attractive and flexible structuring tool for a diverse range of uses with an increased application for certain FinTech structures including DAOs and pioneering virtual asset businesses.

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