Continuing Requirements for Cayman companies under the Companies Act

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Preface

This publication has been prepared for the assistance of those who are considering the operation of companies in the Cayman Islands ("**Cayman**"). It provides in broad terms requirements under Cayman law and is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Cayman on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of a company in Cayman, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Persons considering establishing companies to carry on regulated activities such as insurance or fund business should request separate publications prepared by this Firm on these topics.

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1. INTRODUCTION

The Cayman Islands Companies Act (the "**Act**") imposes continuing obligations on all types of Cayman incorporated or registered companies. Companies that carry on certain regulated activities such as trust companies, banks, company managers, insurance companies, insurance managers, mutual fund administrators and most mutual and private funds are subject to additional regulations governing those activities, details of which are available upon request.

2. CORPORATE RECORDS

The Act prescribes certain documents and records that a company must maintain as follows:

2.1. Register of Members

Every company must keep in writing a register of members containing the names and addresses of the members of the company, the number and category of shares held by each member, the amount paid or agreed to be paid on the shares, whether each category of shares carries voting rights (including the right to vote at general meetings and/or the right to appoint or remove directors) under the articles of association and, if so, whether such voting rights are conditional, the date on which each person was entered on the register as a member and the date on which each member ceases to be a member.

The issuance of bearer shares was prohibited by virtue of the Companies (Amendment) (No. 3) Act, 2020 (the "**Amendment Act**") and any bearer shares issued prior to the commencement of the Amendment Act are deemed void.

A company in default of complying with the requirement to maintain a register of members shall incur a penalty. Any director or manager of the company who knowingly and wilfully authorises or permits such default shall also incur the same penalty.

An exempted company may, but is not required to, maintain one or more branch registers of such category or categories of members as the exempted company may determine. A branch register is deemed to be part of the exempted company's register of members and, as such, must be kept in the same manner in which a principal register is required to be kept. In addition, a copy of each branch register must be kept with the principal register.

An exempted company in default of the requirement to maintain a copy of the branch register or the requirement to make changes to the branch register will be liable to pay a CI$5,000 / US$6,098 penalty. Any director or manager of the company who knowingly and wilfully authorises or permits such default shall also incur the same penalty.

A company must make available, at its registered office, the register of members and any branch register as may be required by service of an order or notice by the Cayman Tax Information Authority ("**TIA**"). A failure to comply with an order or notice of the TIA without reasonable excuse will result in a penalty and a further penalty for every day during which the non-compliance continues.

2.2. Register of Directors and Officers

Every company must keep a register of directors and officers containing the names and addresses of its directors, including alternate directors, and officers. A copy of the register of directors and officers must be sent to the Registrar within sixty (60) days of the first appointment of any director or officer of the company.

Notification of any change to the register of directors and officers must be sent to the Registrar within thirty (30) days of the change taking place.

A company in default of complying with the above requirements shall incur a penalty. In addition, if the Registrar is satisfied that a breach has been knowingly and wilfully authorised or permitted, a company shall incur a penalty and every director and officer shall incur a penalty as well as a further penalty for every day during which the default continues.

The Registrar will make available the names of the current directors and, if applicable, alternate directors for inspection by any person upon payment of a fee.

2.3. Register or Mortgages and Charges

Every limited company must keep in writing a register of mortgages and charges at its registered office. The register of mortgages and charges must include a short description of the company's property mortgage or charged, the amount of the charge created and the names of the mortgagees or persons entitled to such charge.

Any director, manager or other office of the company who knowingly and wilfully authorises or permits the omission of such entry, shall incur a penalty.

The register of mortgages and charges must be open to inspection by any creditor or member of the company at all reasonable times. If such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorising or knowingly and wilfully permitting such refusal shall incur a penalty of CI$4 / US$5 for every day during which such refusal continues and a Judge sitting in chambers may compel an immediate inspection of the register.

2.4. Minute Book

A collection of the various documents and records, generally referred to as the "Minute Book", will normally contain, in addition to the registers noted above, the following items:

(a) certificate of incorporation;

(b) memorandum and articles of association;

(c) minutes of all directors' and members' meetings (including written resolutions, if any) and any documents tables and/or agreements approved at these meetings;

(d) annual returns;

(e) copies of share certificates;

(f) financial statements; and

(g) the tax exemption undertaking (if any).

2.5. Beneficial Ownership Register

Unless an alternative route to compliance is available by, for example, being listed or licensed under a Cayman regulatory law, each company has an obligation to create and maintain a register of its beneficial owners to be kept at its registered office, which obligation may be fulfilled by a company's Corporate Services Provider ("**CSP**"). Each company is required to take reasonable steps to identify any individual who is a beneficial owner of the company and all Cayman incorporated, formed or registered legal entities that would be beneficial owners if they were individuals ("**reportable legal entities").**

Beneficial owner details are uploaded to the General Registry via its Corporate Administration Platform ("**CAP**") system. The information is encrypted upon submission and further encrypted upon receipt. The data is then deleted from CAP and goes to a non-internet facing, offline server only accessible by a Government authorised competent authority.

There are significant financial penalties for failure to establish or maintain a beneficial ownership register. Administrative fines apply to 'in-scope' entities that fail to take reasonable steps to identify beneficial owners and reportable legal entities, fail to ensure their beneficial ownership register remains up to date and/or fail to provide particulars of registrable beneficial owners to their CSPs or certain notices to their registrable beneficial owners. Entities that rely upon an alternative route to compliance are not required to maintain a beneficial ownership register but may still be in breach if they fail to provide written confirmation of their alternative route to compliance and instructions to file the information required to satisfy the alternative route to compliance, or if they incorrectly seek to rely upon an alternative route to compliance that is not available to the entity. Of particular note, Cayman Islands companies whose beneficial ownership register indicates a status of 'pending' for three uninterrupted months will be presumed to be in breach and liable to administrative fines. There are a number of other technical breaches for which companies, and/ or their CSPs may be fined. The Registrar may strike the company from the register if a fine remains unpaid by a company as outlined in the applicable laws.

2.6. Required Particulars

The Registrar keeps a register of required particulars in respect of each company which includes, amongst other things, the company name, registered office, share capital, subscribers to the memorandum, date of the financial year end, and the nature of the company's business. The Registrar will make this register available for inspection by any person upon payment of a fee.

Further, the following entities may require information from the Registrar:

(a) the Financial Crimes Unit;

(b) the Financial Reporting Authority;

(c) the Customs and Border Control Service;

(d) the Cayman Islands Monetary Authority ("**CIMA**");

(e) the Anti-Corruption Commission; (f) the TIA; and

(f) a competent authority as defined under section 2(1) of the Proceeds of Crime Act (as amended).

3. ECONOMIC SUBSTANCE

The International Tax Co-Operation (Economic Substance) Act (as amended) (the "**ES Act**") applies to a defined class of relevant entities including exempted companies, exempted partnerships, foreign companies and foreign partnerships registered in Cayman, limited liability companies, general partnerships (other than local partnerships) and limited liability partnerships that are required, subject to what is said below, to maintain economic substance in the Cayman Islands unless they are:

(i) tax resident outside the Cayman Islands;

(ii) an investment fund (including entities through which any such fund invests or operates); or

(iii) a not-for-profit company.

The ES Act requires that all Cayman Islands entities notify the TIA of, amongst other things, whether or not it is carrying on a "relevant activity" (as defined in the ES Act and as discussed further below) and, if so, whether or not it is a "relevant entity". The notification to the TIA is by way of an Annual Economic Substance Notification ("**ESN**") which must be filed prior to an entity filing its Annual Return with the General Registry's CAP system. Reporting of compliance with the ES Act is then required for relevant entities carrying on one or more relevant activities on an annual basis thereafter. Reporting is due within 12 months of the relevant financial year end.

Relevant entities (corporate entities and limited liability partnerships) were subject to the ES Act from the date on which they commenced a relevant activity unless the entity was in existence prior to 1 January 2019 in which case they were required to comply with the ES Act by 1 July 2019. Separate commencement rules apply to exempted, foreign and general partnerships which were brought within the scope of the economic substance regime on 30 June 2021. Non-compliance with the ES Act will result in significant financial penalties and continued non-compliance may result in an application by the TIA to the Grand Court for an order that the entity is defunct.

3.2. Relevant Activities

Relevant entities are required to meet the economic substance test ("**ES Test**") in respect of their relevant activities in the Cayman Islands. The categories of relevant activities include the following which are further defined in the ES Act:

(a) banking business;

(b) distribution and service centre business;

(c) financing and leasing business;

(d) fund management business;

(e) headquarters business;

(f) holding company business;

(g) insurance business;

(h) intellectual property business; and

(i) shipping business.

3.3. Economic Substance Requirements

For relevant entities carrying on relevant activities, the ES Act requires that they:

(a) conduct core income generating activities ("**CIGAs**") (see further below) in relation to the relevant activity;

(b) be directed and managed appropriately in the Cayman Islands in relation to the relevant activity; and

(c) with regard to the level of relevant income from the relevant activity carried out in the Cayman Islands, have an adequate:

(i) amount of operating expenditure incurred in the Cayman Islands;

(ii) Physical presence (including maintaining a place of business or plant, property and equipment) in the Cayman Islands; and

(iii) Number of full-time employees or other personnel with appropriate qualifications in the Cayman Islands.

Relevant entities carrying on the business of a pure equity holding company (one that only holds equity participations in other entities and only earns dividends and capital gains) will have reduced requirements such that they will need to comply with all filing requirements under the Act and have adequate human resources and premises in the Cayman Islands for holding and managing equity participations in other entities.

Each relevant entity that is carrying on a relevant activity and is required to satisfy the ES Test will be required to file an annual return with the TIA in respect of their status under the ES Act.

3.4. Core Income Generating Activities

CIGAs are defined in the ES Act to mean activities that are of central importance to a relevant entity in terms of generating income and that are being carried out in the Cayman Islands. CIGAs may be outsourced provided that the relevant entity is able to monitor and control the carrying out of the CIGA. The TIA will only accept the relevant entity's claim to have satisfied the ES Test by means of domestic outsourcing if the information is verified by the service provider. Such verification must be made within thirty days of the relevant entity providing the same information to the TIA.

Service providers undertaking outsourcing functions are required to register with the DITC so that the DITC can independently verify the engagement and nature of the services provided.

4. BOOKS OF ACCOUNT

All companies must keep proper books of account. Subject to what is said below, they need not be kept at the Registered Office. The books of account must be such as are necessary to give a fair and true view of the state of the company's affairs and explain its transactions. Accounts need not be audited unless the company conducts a regulated activity (bank, trust company, insurance company, corporate manager, mutual fund administrator or regulated mutual or private fund).

A company that keeps its books of account outside of the Cayman Islands is required to provide its Registered Office with information regarding its books of account on an annual basis. Failure to do so without reasonable excuse will result in a penalty and a further penalty for every day during which such non-compliance continues. This requirement does not apply to Cayman regulated entities that are already required to file information regarding their accounts with CIMA.

5. NAME

The name of the company must be displayed outside the company's Registered Office and every other place of business maintained by it. An exempted company may have a dual foreign name in non-Roman script.

6. CHANGES IN DIRECTORS OR OFFICERS

The Articles of Association of a company will generally contain provisions relating to the removal, resignation and appointment of directors. Typically, members' resolutions are required to appoint or remove directors and officers. Copies of any such resolutions should be added to the Minute Book, the register of directors and officers should be updated and a filing of the same made with the Registrar.

7. SHARE TRANSACTIONS

New shares are usually issued by resolution of the directors. The Articles of Association typically contain restrictions on, and procedural requirements relating to, the issue of new shares. A copy of the minutes of the meeting at which the resolution is passed should be added to the Minute Book.

If existing shares are transferred, a share transfer form must be signed and a copy placed in the Minute Book. Any old share certificates (if issued) should be returned to the Registered Office for cancellation. Save in the case of a public company, the directors will normally be required to pass a resolution approving a share transfer and the issue of a new share certificate.

Companies with shares listed on appointed stock exchanges may provide, either in the Articles of Association or by special resolution of the members, for paperless transfers.

8. FILING REQUIREMENTS

On the occurrence of certain events a notice is required to be sent to the Registrar. There are statutory time constraints for such notifications to be filed. These are indicated in brackets below.

(a) change in directors or officers (30 days);

(b) increase in the authorised capital of the company (30 days);

(c) change to the name of the company (15 days);

(d) alteration of the Memorandum or Articles of Association (15 days);

(e) change of location of the Registered Office (30 days); and

(f) any special resolution passed by the members (15 days).

9. SEAL

A company may, but is not required to, have a common seal. If it has one it would usually be kept at its Registered Office. If there will be documents to be sealed outside Cayman the company's common seal may be sent overseas or, if authorised by its Articles of Association, maintain a duplicate seal or seals. The seal must bear the name of the company and may also contain the company's dual foreign or translated name.

10. COMPANY MEETINGS

Generally, meetings may be called by the board of directors or by requisition of a certain proportion of members. The Articles of Association will set out the procedure for the calling of general meetings.

Members may be represented at meetings by proxy. Forms of proxy should be delivered to (and will usually be organised by) the Registered Office of the company.

Notice of all meetings of members, directors or of any committee of the directors should be given to all those entitled to attend and vote at the meetings. The Articles of Association will set out the period of notice required.

An exempted company is not obliged to hold an annual general meeting. Ordinary companies, whether local or non-resident, must hold an annual general meeting of shareholders.

11. ANNUAL RETURN

An annual return must be submitted to the Cayman Government in January of every year together with the prescribed fee. A current listing of the annual government fees is available upon request.

For both exempted and ordinary companies, penalties for late filing are imposed if the annual return and annual fee are not paid before 1 April each year.

The Registrar will only issue a certificate of good standing for a company if all fees and penalties have been paid, all annual returns have been filed and the Registrar has no knowledge of any default.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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