Knowledge

The increasing popularity of Cayman Islands foundation companies for family offices and PTC structures

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Introduction

Family offices worldwide are evolving in sophistication, particularly in governance, succession planning and asset protection. In recent years, the Cayman Islands foundation company (FC) has emerged as a compelling hybrid vehicle, founded in company law, but with elements similar to trusts law, thereby meeting the needs of ultra-high-net-worth families and family office structures in particular.

This article explores the legal features of FCs and their applications in both private trust company (PTC) structuring and as standalone entities within the family office ecosystem.

Legal framework

The FC was introduced by the Foundation Companies Act, 2017 and operates within the broader framework of the Companies Act (Revised). It is a unique corporate form that blends the separate legal personality of a company with the purpose-driven governance of a trust.

An FC has a separate legal personality from its founder, members and supervisors, which distinguishes it from a trust and enables it to hold assets, enter into contracts and litigate in its own name. Unlike traditional limited by shares companies, an FC does not require shareholders, allowing it to be structured as an 'orphaned' entity. This feature enhances continuity and control, particularly in relation to succession planning and asset protection.

Directors manage the operation of an FC's business and are subject to director duties, as they will be well known to readers. In addition, where an FC ceases to have members (as is typically the case), it must have at least one supervisor, whose role is akin to that of a trust protector, providing oversight of the directors and safeguarding the FC's objects.

The constitution may give rights, powers and duties to members, directors, officers, supervisors, founder or others. There are no limits imposed on the scope of such rights, powers and duties and common examples include power to appoint and remove supervisors and directors, to make and alter byelaws and to make distributions.

The different roles in the governance structure can include fiduciary, advisory and supervisory functions. Families can therefore design corporate governance structures that meet their individual needs, including tailoring the governance of the family office with family charters or constitutions.

An FC's objects may be charitable or non-charitable and can include providing benefits to beneficiaries (howsoever described). The economic interests in an FC can therefore combine a family's philanthropic and other goals with providing benefits to family members in a manner that is much more familiar to the trusts world.

In addition to the constitution (memorandum and articles of association), an FC may adopt bylaws, which are binding on directors, officers and others with duties or powers under the constitution. The bylaws do not need to be filed with the registrar and commonly provide detailed rules in relation to the management and supervision of the FC's business, as well as the investment of the FC's property and the making of distributions.

Foundation companies as a family office hub

FCs are increasingly being deployed as the primary holding vehicle within family offices. Their versatility allows them to serve as philanthropic platforms, with charitable or mixed-purpose objects, while, at the same time, being the vehicle through which benefits are made available to the family itself.

The corporate governance structure of an FC enables multi-generational participation, blending professional management with family oversight. In other words, family members, family office employees, independent persons, such as legal counsel or investment advisers, as well as others, can play a role in the management of the family office.

There are no restrictions on the property that an FC may hold. They can therefore be used as a holding vehicle for operating businesses, marketable securities, investments in private markets, such as private equity, venture capital and private lending, real estate, both personal use and as an investment, and private assets, such as private jets and superyachts.

Foundation companies as private trust companies and other roles in family office structures

PTCs are widely used in private wealth planning to act as trustees of family trusts, offering great flexibility and control over the management of such trusts. An FC may be registered as a PTC, which benefits from light touch regulation, and this allows all of the flexibility of governance and ownership of an FC to be built into the management and operation of the trustee of a family trust.

As an 'orphan' structure, long-term control can be provided for without requiring shareholding by individuals or complex holding vehicles, such as STAR trusts (or other forms of purpose trust). This simplifies succession planning and avoids probate complications on the founder's death.

The flexible corporate governance of an FC can be particularly useful where a PTC acts as trustee of more than one family trust, potentially where those family trusts are established for different branches of the family. The constitution can, for example, make provision for only particular directors and/or supervisors to be responsible for exercising powers under a particular trust, rather than the board as a whole. In this way, members of one family branch (possibly along with independent directors or the principal) are primarily involved in the management of the trusts which are established for that particular family branch.

FCs are also commonly used in a more limited role, such as a corporate guardian of a foreign foundation, a protector of a trust, or an investment adviser or manager. In this role, the 'orphan' ownership and flexible governance can be blended into a more traditional structure.

Key considerations for implementation

The flexibility of FCs means that careful planning must be carried out when designing the constitution and bylaws. In addition, as an FC is typically ownerless, consideration must be given to the succession to the key roles of director and supervisor, among others.

While the Cayman Islands tax treatment of FCs is very simple in that the Cayman Islands imposes no direct taxes, the tax position elsewhere, including reporting, of the FC and its founder, directors, supervisors and beneficiaries should be considered.

The Cayman Islands is party to global transparency frameworks, such as the Common Reporting Standard and the establishment and maintenance of beneficial ownership registers. It also robustly regulates certain types of business, including securities investment business, trust business and company management business. Generally, where a company, including an FC, provides services only to a single-family office, exemptions from or a light touch approach to such regulations, are available. Care should be taken to understand the FC's obligations under such frameworks.

FCs also benefit from the Cayman Islands' asset protection legislation. Gratuitous transfers of property to an FC benefit from the protections of the Fraudulent Dispositions Act (Revised) such that, where a transfer is made with no intention to defraud creditors, it may be voidable at the instance of a prejudiced creditor under that Act. In any case, no action or proceeding may be commenced more than six years after the transfer. Further, the 'firewall' provisions of the Trusts Act (Revised), which, among other things, deny heirship rights to the property of a living person apply to property contributed to FCs.

Whereas it can be difficult to oblige parties to a trust to resolve disputes by arbitration (or other alternative dispute resolution mechanisms), an FC's constitution may provide for the resolution of disputes, differences or difficulties by arbitration or by any other lawful method. In other words, rather than litigating family disputes before the courts, in the case of FCs, such disputes may be kept private.

Conclusion

FCs are a modern, adaptable vehicle for family offices seeking continuity, flexibility and ease of administration. Whether used as a family office hub, a private trust company or as an office holder in another structure, the FC offers a compelling alternative and/or additional option to traditional trust and corporate structures.

The innovative mix of company and trust concepts make the FC particularly well-suited to international families that prioritise values-based governance and long-term legacy planning.

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