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FOREWORD

As a Common Law country, The Bahamas looked beyond its boundaries and traditions to be of greater relevance for estate planning by persons from civil law countries. Through the enactment of the Foundations Act 2004 The Bahamas has become the first leading Common Law jurisdiction to introduce Foundations legislation.

This progressive move complemented and enhanced the vibrant wealth management industry in The Bahamas. It was also consistent with The Bahamas’ long history of establishing legislation that is attractive to international clientele and which encourages the continued growth of the country’s financial sector.

In crafting its foundation legislation, The Bahamas took careful steps to bridge the common and civil law worlds, ensuring that civil law features had been properly incorporated for the jurisdiction’s Common Law environment. This environment includes a long history of political stability and democratic traditions; a well-respected judiciary; and a large pool of financial services professionals. Within this environment, the Foundations Act addresses all the key issues regarding the formalities, administration and juridical nature of Bahamian foundations. Further refinements to the Act followed with The Bahamas Foundations (Amendment) Act 2005 and 2007.

Further, The Bahamas led the way in implementing a strong anti-money laundering regime. The Bahamian Foundation is integrated into this regime through the requirement for the Foundation to have an entity licensed in the Bahamas to act as Secretary; the Secretary is responsible for conducting due diligence and providing a nexus to the jurisdiction.

We invite you to read the following pages which provide an introduction to foundations in The Bahamas. It reviews the legislation enabling the establishment of foundations in our jurisdiction and includes examples of their use in the provision of wealth management services by practitioners throughout the world.
THE BAHAMIAN FOUNDATION

The Bahamian Foundation – a civil approach to common problems

Trusts find their origins in equity; foundations in statute. Trusts date as far back as the Roman times while foundations have a more recent history.

A trust is fundamentally an agreement, created by deed, between a settler and trustee for the benefit of one or more beneficiaries. A foundation, on the other hand, has its own legal entity. Both, nonetheless, are fundamental tools in estate planning.

Trusts were initially established primarily for estate planning. Foundations were initially created for the purpose of providing protection for assets as well as preserving confidentiality at the time of the Second World War.

Foundations have been available in several civil law jurisdictions, starting in Liechtenstein in the late 1930s, moving to other European countries in subsequent years and more recently to non-European jurisdictions, where trusts are not as well known, frequently misunderstood and not always acceptable. The Bahamas was the first premier Common Law jurisdiction to introduce foundations.

There are, no doubt, many purposes for which trusts or companies are currently used and for which foundations may also be used. Foundations may be used for estate and tax planning, asset protection, preserving family wealth and confidentiality, segregation of assets and establishing charities. When there are purposes for which a company is better-qualified than a foundation, a company could be set up as a subsidiary of the foundation to meet that requirement.

While there are many similarities between foundations and trusts, there are characteristics which are unique to foundations. Many of the distinguishing features result from the fact that a foundation constitutes a hybrid between a trust and a company, having several aspects in common with one or the other. Similar to a trust, a foundation can be established by will or by charter, executed by a founder who may be a natural or legal person. By way of the charter, a founder may reserve powers to itself such as the ability to revoke the foundation, amend the charter itself or add or remove beneficiaries.

A foundation may have beneficiaries. Beneficiaries may be named at the time of the foundation’s establishment, or the charter may provide the procedures for naming them at a later date. Vested beneficiaries are entitled to be notified of their interests and to receive a copy of the charter and accounts.
A foundation can also have a protector. The protector can play an active or passive role depending on the foundation’s charter. For example, the protector may have the authority to appoint and remove foundation council members or his consent may be required before the foundation’s council moves forward with certain changes.

Under the Foundations Act, a foundation may be utilised to avoid forced heirship in other jurisdictions and is subject to well-established creditor protection provisions. In addition, the foundation’s charter may include in terrorem provisions and restrictions against alienation.

Like a company, a foundation is a distinct legal entity, enjoys limited liability and unlimited duration. It must be registered and have a registered office. A foundation may also re-domicile in another jurisdiction and a foundation established in another jurisdiction may re-domicile in The Bahamas.

THE ADVANTAGES OF A BAHAMIAN FOUNDATION

Foundations have several features which make them, in some cases, the preferred option as an estate and inheritance planning tool, including:

- A foundation is a distinct legal entity which is important for “proper law” questions and for providing easily recognisable liabilities and accountabilities.

- The founder may reserve powers as provided by the charter.

- There is broad recognition for foundations by civil law countries.

- Assets placed within the foundation are owned solely by the foundations.

- There are no perpetuity period rules applicable to foundations, which provides for continual, unending succession that is desired by the founder.

- A change in a foundation’s governing body does not change the legal ownership of the foundation’s assets.

- It is liable to sue and be sued in its own name.

- Arising from these advantages, the foundation’s council and its officers are less exposed to possible legal liability. Further, the reservation of powers to the founder is unlikely to lead a court to consider a foundation structure as a sham.

Other Bahamian advantages include:

- Usage for private, commercial and charitable purposes.

- Dispositions to the Bahamian Foundation benefit from the jurisdiction’s strong and balanced asset protection law.
- There is no statutory requirement for an external audit unless the foundation’s charter so provides.

- All officers, foundation council members and other supervisory personnel benefit from statutory indemnification from all liabilities, losses and expenses incurred by a foundation, provided they acted honestly and in good faith.

**USING FOUNDATIONS**

A foundation, is a hybrid between a trust and a company, and creates unique structuring opportunities. The additional features of a Bahamian Foundation, including the ability to use it across private, commercial and charitable structures, open the door for creative planning opportunities, some of which are noted below.

**To invest in family companies**

For example, a founder has a sentimental attachment to X Limited, which has been in his family for as long as he can remember, and has a beauty products business which employs many family members. He endows a foundation with the shares of X Limited for the purpose of retaining the shares to X Limited for the benefit of his family. By this means, the founder accomplishes his estate planning objectives and avoids the complications which would have ensured had he placed the shares of X Limited into an ordinary trust.

**To own a private trust company**

A founder creates a foundation to hold the shared of XPTC. The founder, members of his family and his advisors may be elected as directors of XPTC and they assume responsibility for the management of the XPTC. The directors of XPTC may assume a more aggressive investment strategy than an institutional trustee would be prepared to undertake and may save some trust administration expenses. The founder does not, however, own XPTC, the foundation does.

**To provide for philanthropic purposes**

Many individuals wish to support a philanthropic purpose which may not be exclusively charitable. For example, a founder may wish to endow a foundation whose purpose is to promote efforts to secure an animal from extinction or to benefit a specific or sporting or entertainment event. Of course, a foundation may be established for charitable purposes as well.

**To separate voting and economic benefits**

For example, a founder endows the foundation with non-voting shares of X Limited. The foundation will receive the economic benefits from the non-voting shares for the family of a founder while the voting shares continue to be held by the founder in his individual capacity,
To provide for an employee share option scheme

Foundations can be useful in the context of employee share option schemes.

For example, Employer A endows a discretionary foundation for the general benefit of the employees of Employer A, its affiliates and their dependants. The foundation is funded by contributions from Employer A and in addition, by substantial shareholders in Employer A and its affiliates. The foundation benefits employees and dependants generally but also performs vital functions with regard to share incentive or share option arrangements.

The foundation may use its assets to acquire shares by purchase or by subscription and either grant options over such shares or agree to sell them to employees, possibly extending valuable credit to the purchasing employee. When the employee wishes to realise his shareholding, the foundation can be a useful vehicle for repurchasing shares and making them available to other employees. This is particularly useful for a private company, where sales of shareholdings may be very difficult to arrange or legally restricted. The foundation can act as a purchaser of the first resort and the foundation can acquire any shares that are for sale, so that it can offer them to other employees. There may also be tax advantages for Employer A and the employees in certain jurisdictions.

To perpetuate a particular corporate governance philosophy

As an example, a founder endows a foundation with its shares which compromise a controlling interest in X Limited for the benefit of his family. The foundation council’s mandate is to evaluate policies of corporate conduct and governance.

To provide for subordinated debt

To provide certainty with regard to the ranking of priority amongst creditors involved in a loan transaction or on the issue of debt securities in case of insolvency.

For example, X Limited wishes to borrow from both Z Bank and A Bank. X Limited establishes a foundation of which both Z Bank and A Bank are beneficiaries. The charter of the foundation could clearly provide that the rights of Z Bank will be subordinated to those of A Bank.

To hold the benefit of warranties/collateral

In order to avoid novation issues, the foundation would hold the benefit of warranties for a wider and/or changing class of investors. For example, X Limited wishes to borrow funds from a consortium of lenders. It is anticipated that the members of the consortium will change from time to time. X Limited endows a foundation in which all lenders are beneficiaries in proportion
to the size of their loan. The foundation incorporates A Limited which becomes the borrower. A Limited enters into certain warranties and lodges collateral with the foundation for the benefit of the lenders; as lenders change, they are excluded or added as beneficiaries of the foundation.

To hold assets off balance sheet in connection with the securitisation of mortgages

A foundation provides a convenient means of packaging financial instruments into marketable securities.

For example, X Limited wishes to sell its mortgage portfolio to a number of investors. X Limited forms a foundation which incorporates A Limited. X Limited endows its mortgage portfolio to A Limited and the shares of A Limited are sold to the investors.

THE CHARTER

Drafting Provisions

The charter of a foundation establishes the basis for the structure as a legal entity and areas of accountability. As a result, careful consideration must be given to the objectives of the founder and the desired governance of the foundation.

Importantly, the foundation’s intent to manage its own assets must be set out in the charter. The charter must designate the beneficiary or identify the means by which the beneficiary is to be ascertained, or state that a foundation has been formed to benefit the public at large.

Many options are available to the founder. The mechanisms for the appointment, removal, period of office and representative authority of officers of the foundation, (including the number and description of such persons and the appointment, removal and period of office of the auditor, if any, to the foundation) are at the discretion of the founder. Unless the foundation is public in nature, the charter is likely to reserve the right to appoint or remove an auditor to the founder or to make such appointment optional.

Providing for the endowment of supplementary assets of the foundation in addition to the initial assets is a very important step in drafting the charter of a foundation. The absence of this provision may inhibit the ability to make further contributions to the foundation. The addition or removal of beneficiaries, the appointment of a foundation council or other supervisory persons such as a protector or committee of protectors and specifying the duties, functions, powers and rights to remuneration of a protector or committee of protectors and specifying circumstances in which the charter may be amended, if any, are useful planning tools.
A further consideration is the reservation of rights or powers to the founder. The founder may retain the power of appointment and removal of the foundation council; power to appoint and remove officers; to nominate, add and remove beneficiaries; to establish the dispositive provisions of the foundation; to retain powers, to give advice or directions with regard to investments; to appoint and remove a protector, protector committee or some similar body; and power to amend and revoke the charter. The founder may assign powers to any person.

The charter, importantly, may require or permit the making of articles. Where the charter provides that articles shall or may be made, such articles may without limitation include regulations:

- Concerning the distribution of assets made, or to be made, by the governing bodies of the foundation.
- Providing for the identification of any initial beneficiaries, or any beneficiaries to be designated at a later date, of the foundation.
- Providing for the identification of the remaining beneficiary upon a winding down of the foundation.
- Providing for the regulation of any governing bodies of the foundation.
- In the absence of articles, the Act will apply.

A sample Charter document appears as Appendix A in this document.
WHO TO CONTACT

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