

Bahamian Private Foundations

For more information

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The Foundations Act 2004 (the "Act") came into force on October 22, 2004 in The Bahamas. The Act provides for the creation of a private foundation in The Bahamas. Foundations have their origins in civil law countries, where the Church was a "Divine Foundation" and had the legal capacity to manage assets with which it was endowed. These public foundations were non-profit, charitable organizations created by individuals for the benefit of society as a whole.

The most recent amendment to the Act is the Foundations (Amendment) Act, 2007 (the "Amendment"), which came into force on May 1, 2007. The Amendment fleshes out the provisions of the Foundations Act, 2004 and also includes provisions relating to the appointment of a Foundation agent, the compulsory nature of the Foundation Council, and the rights of a beneficiary.

In 1926, Liechtenstein created the Family Foundation by the Law of Persons and Companies. Family Foundations, unlike public foundations, were designed for the personal benefit of members of one or more families. Based on the Family Foundation, in 1995 (Law No. 25 1995) the government of Panama developed the Panama Private Interest Foundation. The Panama Private Interest Foundation served as the model for the private foundation in The Bahamas.

What is a Foundation?

The Act defines a private foundation (the "Foundation") as an entity established by a foundation charter (the "Charter") and which is registered. It is a legal entity, is resident and domiciled in The Bahamas and is able to sue

and be sued in its own name (s. 3).

Once assets are transferred by the founder (the "Founder") to the Foundation by way of an endowment, they cease to belong to the Founder and do not become the property of any beneficiary until they are distributed. The Foundation manages the assets, investing them or otherwise, in accordance with the objects or purposes specified in the Charter by the Founder (s. 3).

Purpose of a Foundation

The Foundation can be used as a vehicle for the holding of private assets endowed on the Foundation for the benefit of purposes, identified persons or classes of persons. The Foundation may, if necessary for the proper management of the assets, buy and sell assets and engage in any other administrative activity not prohibited by law; however, business transactions must be secondary to the main purpose of the Foundation (s. 4).

Establishment

In order to establish a Foundation in The Bahamas there must be: (i) a foundation charter (or a duly executed will); (ii) registration; and (iii) the issuance of a Certificate of Registration. Once these requirements are fulfilled, the Foundation is formed.

The Charter

The Act requires the Charter document of the Foundation to include (s. 6):

1. the name of the Foundation with the word "Foundation" in English or in a foreign lan-

guage (at the discretion of the Registrar) as the last word of the name; the name of the Foundation is restricted by the Act; it cannot include certain terms such as "limited" (s. 17);

2. the name and address of the Founder or, if the Founder is a legal person, the number and place of registration of the legal person and the address in the Bahamas for service of documents on the Founder;
3. the purpose(s) and objects of the Foundation;
4. the endowment of the assets to be the initial assets of the Foundation upon registration and a statement of those assets;
5. the designation of the beneficiary or the identification of a body by which the beneficiary can be ascertained, or a statement that the foundation has been formed to benefit the public at large;
6. a statement as to whether the Foundation has been established for an indefinite period or for a definite period; and if for a definite period, a statement of the length of the period;
7. the name and address in The Bahamas of the Secretary (the "Secretary") (if appointed) or the Foundation agent (the "Agent") (if appointed) to the Foundation and the address of the registered office in The Bahamas of the Foundation which must be the same address as the Secretary or such other person performing the statutory duties hereinafter mentioned;
8. a statement that the Foundation's total assets are not less than US\$10,000 or the equivalent in another currency; and
9. the signature of the Founder in the presence of a notary public or the Secretary or, if the Founder is a legal person, the signature of the authorised person(s) in the presence of a notary public or the Secretary.

Articles

The Foundation Articles (the "Articles") also called Regulations or Byelaws are optional. If the Founder chooses to have Articles, they can provide for *inter alia*, for (s. 7):

1. the distribution of assets made, or to be made, by the governing bodies of the Foundation;

2. the identification of any initial beneficiaries or any to be designated at a later date of the Foundation;
3. the determination of the minimum level of assets of the Foundation in the absence of which no distribution to any beneficiary may be made;
4. the identification of the remaining beneficiary upon a winding up of the Foundation; and
5. the regulation of any governing bodies of the Foundation.

Registration

To register the Foundation, the following documents must be submitted to the Registrar with the application for registration and fees (s. 21):

1. a statement signed by the Agent (if appointed) or the Secretary (if appointed) or attorney that includes the following particulars:
 - the Foundation name;
 - the date of the Charter;
 - the Foundation purpose(s) and objects;
 - the date of the Foundation's articles (if any) and any amendment made prior to submission of the statement;
 - the name and address of the Secretary (if appointed) and/or the Agent (if appointed) to the Foundation;
 - the address of the registered office;
 - the period for which the Foundation is established;
 - the value of the Foundation's initial assets and a statement that the Foundation's assets are not less than US\$10,000 or the equivalent in any other currency; and
 - such other particulars as the Secretary or the attorney shall in his absolute discretion wish to include in the statement.
2. a list containing the names and addresses of the first officers (the "Officers") of the

Foundation; and

3. a statutory declaration of compliance with the Act by the Secretary (if appointed) or the Agent (if appointed) to the Foundation or the attorney.

It is important to note that the Charter and Articles do not need to be filed with the Registrar. Further, the Amendment permits the names and addresses of the Founder and members of the Foundation Council to be kept at the registered office of the Foundation and not be a matter of public record.

Officers

An Officer may be a natural or legal person. At least one Officer may be appointed before the registration of the Foundation. Those who cannot serve as Officers include an undischarged bankrupt, the mentally incapacitated and convicted criminals (s. 10).

The Officers, in the absence of the Council, are the governing body of the Foundation. Their duties are primarily administrative rather than fiduciary in nature. Officers must exercise reasonable care and skill in the conduct of the affairs of the Foundation, including exercising due care and skill in the management and investment of the Foundation assets, and must act in accordance with the Charter and Articles. Officers can be held personally liable for their gross negligence, willful default or misconduct, fraud or dishonesty.

Secretary

Under the Amendment, the appointment of a Secretary to the Foundation is no longer mandatory. The Secretary is an officer of the Foundation. In the event a Foundation does not appoint an Agent, the Secretary shall perform the duties of the Agent.

In the event, a Foundation has an Agent and a Secretary who does not perform any of the Agent's statutory duties prescribed by the Act, such Secretary shall carry out the usual secretarial duties and need not be a licensed financial and corporate service provider or trust company under the Amendment (s. 12).

Foundation Agent

The Amendment provides for the appointment of either a Foundation Agent (the "Agent") or a Secre-

tary. The Agent shall be a duly licensed financial and corporate service provider under the Financial and Corporate Services Providers Act or a licensed trust company under the Banks and Trust Companies Regulation Act, and shall not be precluded from being appointed as an Officer of the Foundation. The appointment of a person as Agent may not be assigned.

The Agent shall have the same duties and responsibilities as the Secretary of the Foundation relating to anti-money laundering and counterterrorism regulations and ensuring that the foundation complies with statutory requirements.

If a person ceases to act as Agent, any liability incurred by him while acting as Agent is still enforceable against him by the Foundation. An Agent can be excluded from all liability except for fraud (s.12).

Foundation Council

Under the Act, the appointment of a Council is optional. However, where there are no Officers appointed, the Amendment requires that the Charter provide for the appointment of a Council. The Council may consist of two or more natural persons, a legal person and one or more natural persons or a legal person by itself. The Council must ensure that the Foundation complies with the provisions of the Charter, the Articles and the Act. The Officers are required to follow the instructions of the Council. The Council has the power to access the books, records and accounts of the Foundation. It has the further right to (s.15):

1. be informed of all meetings of the Officers;
2. attend and be heard but not vote at meetings;
3. be included in the circulation of the Foundation's business documents when they are circulated to the Officers;
4. be informed of any delegation of powers to Officers; and
5. appoint an auditor.

In the event, there are no Officers of the Foundation other than the Agent, the Council shall perform the duties and may exercise the powers of the Officers. It should be noted that Council members need not be located in The Bahamas.

Registered Office

Prior to Registration, the Foundation must have a registered office in The Bahamas, which is to be the address of the Secretary (if appointed) or the Agent (if appointed) (s. 13).

Capacity

The validity of an act done by the Foundation cannot be challenged on the grounds that it is outside the ambit of the Charter. However, a member of the Council or other governing body or a beneficiary can bring proceedings to prevent acts which are beyond the capacity of the Foundation (s. 26).

Meetings

The Foundation is required to hold at least one meeting of the Officers each year (the "Annual Meeting") (s. 35(1)). The Founder(s), members of the Council and any other supervisory person are required to be notified of the annual meeting.

Beneficiary's right to information

The Amendment provides for a beneficiary of a Foundation who has a vested interest in the assets of the Foundation the right to request certain information. Such information includes the Charter, the Articles, and any audit report. In addition, the Amendment allows for information or documents relating to the vested interest of the beneficiary in which the terms of the foundation or any exercise of power or discretion are to be found and all financial statements of the Foundation as they relate to the said beneficiary's interest to be viewed.

Financial Records

The Amendment requires the Foundation to keep such financial statements, accounts and records as the Officers or Council deem necessary to reflect the financial position of the Foundation. Such records shall be kept at the registered office of the Foundation (s. 42).

Seal

A Foundation may, but is not required to, have a seal for use in The Bahamas (s. 29). If the Foundation has a seal, it must be affixed in the presence of an officer of the Foundation.

Confidentiality

The Amendment gives a beneficiary of the Foundation the right to confidentiality. All reasonable steps must be taken to secure the confidentiality of the identity of a beneficiary and his interest. Information cannot be disclosed to a third party without the express or implied consent of a beneficiary. If such beneficiary is a minor or incapacitated, the consent of a parent or legal guardian will be required. However, such information may be disclosed when required or permitted to do so under the laws of The Bahamas or by any court of competent jurisdiction within The Bahamas.

In the event a person in his capacity as:

1. an officer of the Foundation;
2. a protector of the Foundation;
3. a member of the Council;
4. a member of any other governing body of the Foundation;
5. any other supervisory person;
6. counsel or attorney for the Foundation; or
7. an auditor of the Foundation

reveals the information he has acquired, he shall be liable on summary conviction to a fine not exceeding fifty thousand dollars or imprisonment for a term not exceeding three years (s. 63).

Forced Heirship

The Act (s. 68) contains similar provisions to those in the Trusts (Choice of Governing Law) Act, with respect to the non-recognition and enforcement of forced heirship claims.

Life of Foundation

A Foundation may be established for an indefinite or definite period.

Indemnification

The Act provides for the indemnification of every Officer, Council Member, other supervisory person and protector of the Foundation who acts honestly and in good faith against all costs, charges, losses,

expenses and liabilities incurred by him in the performance of his duties; the amount required for the indemnification attaches as a lien on the property of the Foundation, which has priority over other claims of the Foundation (s. 65). The indemnity is not available where such person has been guilty of gross negligence, willful default or misconduct, fraud or dishonesty. However, such indemnification shall not apply to any act of fraud committed by the Agent.

In Terrorem Provisions

The Act permits the Charter or Articles of the Foundation to provide for a beneficiary to forfeit his benefit if he challenges the establishment of the Foundation, the endowment of the Foundation's assets, the Charter or Articles or any decision of the Council or other supervisory persons (s. 66).

The Act also provides for the administration of assets, redomiciliation, liquidation, restoration and the ability to allow for instruments of disposition to a beneficiary to include restrictions against alienation.

Certificate of Good Standing

A Certificate of Good Standing (the "Certificate") can be obtained from the Registrar to certify that the name of the Foundation is on the register and that the Foundation has paid all applicable fees. The Certificate would also indicate whether or not the Foundation is in the process of being liquidated, wound up, dissolved or removed from the register.

Removal and Restoration to the Register

If the Registrar has reason to believe that the Foundation registered under the Act no longer satisfies the requirements set out in s. 4(1) and s. 5, the Registrar must serve on the Foundation a notice that the name of the Foundation may be removed from the register. The Act then prescribes a procedure which allows the Foundation to respond to the notice. Failing a satisfactory reply, the Registrar will remove the name of the Foundation from the register (s. 54). There is also a process for restoration (s. 55).

Penalty

An Officer of a Foundation will be guilty of an offence punishable on conviction by a fine of \$10,000

or imprisonment for 2 years or both if he:

- i. falsely represents the financial position of the Foundation to anyone;
- ii. withholds financial information to which any person is entitled; and
- iii. falsifies any document to be delivered to the Registrar or required to be delivered to the Registrar or required to be prepared in respect of the Foundation (s. 71).

Uses

There is no doubt that private wealth advisers see many advantages to the use of foundations. These include:

To Hold Assets In A Vehicle Which Offers Succession Planning

A foundation offers perpetual life, asset and forced heirship protection.

For example, A Founder establishes a foundation of which he is the sole beneficiary initially. The charter provides that on A Founder's death the Protector can appoint beneficiaries. He transfers the shares of Y Limited a family operating company to the foundation. During A Founder's lifetime the intended beneficiaries need not know of the existence of the foundation and A Founder as a member of the foundation council directs the investment and distribution of the foundation's assets. On A Founder's death the Protector appoints A Founder's children as beneficiaries; they are informed about the existence of the foundation and become entitled to information regarding its financial affairs. The secretary of the foundation, XYZ trust company is happy with this arrangement because it does not have responsibility for the management of Y Limited and need not monitor its performance.

To Perpetuate a Particular Corporate Governance Philosophy

For example, a founder endows a foundation with shares which comprise a controlling interest in X Limited and for the benefit of his family. The foundation council's mandate is to evaluate the performance of the CEO, to set the CEO's remuneration and to adopt and evaluate policies of corporate conduct

and governance.

To Provide for Philanthropic Purposes

Many individuals wish to affect a philanthropic purpose which may not be exclusively charitable.

For example, Founder A may wish to endow a foundation whose purpose is to promote efforts to secure the Bahamian iguana from extinction or to benefit a specific political party or sporting and entertainment event or to seek to improve the quality of life in The Bahamas by fostering the highest standards of corporate governance in all enterprises.

Of course, it is possible, using a foundation to combine philanthropic and charitable purposes in one vehicle.

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 whilst the voting shares continue to be held by the founder in his individual capacity.

To Invest in Family Companies whose Economic Performance may be Poor

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 failing 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, A Founder accomplishes his estate planning objectives and avoids the complications which would have ensued 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 shares of XPTC. A Founder, members of his family and his advisors may be elected as directors of XPTC and they assume responsibility for the management of 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. A Founder does not however own XPTC, the foundation

does.

To Provide for an Employee Share Option Scheme

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

For example, A Employer endows a discretionary foundation for the general benefit of the employees of A Employer its affiliates and their dependants. The foundation is funded by contributions from A Employer and in addition, by substantial shareholders in A Employer 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 either 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 realize his shareholding, the foundation can be a useful vehicle for repurchasing shares and making them available to further 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 A Employer and the employees in certain jurisdictions.

Conclusion

The Act has positioned The Bahamas as one of the first common law jurisdictions to enable private foundation. Private foundations can be viewed as a hybrid of companies and trusts, combining the best asset protection elements of each. As foundations are already well known in Latin America, Europe and Asia, it is likely that the Bahamian foundation, given its flexibility and unique features will become an essential tool for international practitioners in the private wealth management field.