

## **FOUNDATION ROLES MEMO**

(August 2021)

For foundation companies where the roles/positions of Registered Office (RO), Secretary, Director and Supervisor may overlap, whether for a short interim period after incorporation or for a longer term, a number of potential conflicts may arise which justifies that the duties of Registered Office (RO), Secretary, Director and Supervisor be separately monitored and documented. It would also be recommended that a special version of an engagement agreement be prepared for each of the roles and adapted to these specifics.

### **Registered Office (RO)**

The obligations of the Registered Office (RO) are typically to ensure annual filings, economic substance filings, beneficial ownership filings, etc. on behalf of the foundation company, but these obligations are largely similar to those applicable to exempted companies generally. In addition to the Register of Directors and Officers and Directors of Members, if applicable, a Register of Supervisors is required to be maintained. The same requirements for filings of changes, etc. apply. In addition, the same obligations apply with respect to AML/KYC obligations imposed on the Registered Office (RO).

With respect to beneficial ownership filings, the determination should be made by the foundation company on a case by case basis. Due to the specifics of the foundation company potentially being an orphan structure, a review of the Memorandum and Articles of Association of the foundation company would be needed to determine if the Founder retains any control, or if any of the principals of the foundation company fall under the definition of beneficial owner under the Cayman Islands Companies Act.

## Secretary of the Foundation Company

The role of the Secretary is specific and detailed in the Foundation Companies Act:

16. (1) A foundation company shall at all times have a qualified person as its secretary.
- (2) The secretary shall continue to hold office until a qualified person has been appointed in the secretary's place and the Registrar has been given a notice of the change accompanied by the prescribed fee.
- (3) A person who is not a qualified person may be appointed as an assistant secretary.
- (4) Subject to any contrary provision in the constitution of the foundation company, the secretary is authorised to apply to the Court under Part 5.

(...)

17. (1) A foundation company -
  - (a) shall ensure the foundation company, and its directors, officers, and interested persons give information concerning the foundation company that its secretary may reasonably require to comply with the following Laws and Regulations -
    - (i) the Proceeds of Crime Law (2016 Revision);
    - (ii) the Terrorism Law (2015 Revision); and
    - (iii) the Money Laundering Regulations (2015 Revision); and
  - (b) shall not accept an asset contribution that is gratuitous or is in consideration of a share issue unless its secretary has given the foundation company a notice that there appears to be no objection under those Laws and Regulations to the acceptance.
- (2) If a foundation company contravenes subsection (1), the following commit an offence and are liable to a maximum fine of fifteen thousand dollars and to imprisonment for five years, or both –
  - (a) the foundation company;
  - (b) its directors and any manager of the foundation company; and
  - (c) anyone else who, when the offence was committed, was purporting to act as a director or manager of the foundation company.

- (3) However, it is a defence for an individual to prove the offence was committed without the individual's consent or connivance or that the individual exercised reasonable diligence to prevent the commission of the offence.
- (4) A foundation company's secretary shall maintain a full and proper record of the secretary's activities and enquiries made for giving notices under subsection (1)(b), including information given to the secretary for that purpose.
- (5) A secretary who contravenes subsection (4) commits an offence and is liable to a maximum fine of fifteen thousand dollars and to imprisonment for five years, or both.
- (6) In this section, "information" includes accounts, documents and records.

In addition to the Secretary potentially applying to the Court under certain circumstances, the duties of the Secretary are in essence to ensure the foundation company's compliance with the Proceeds of Crime Law, the Terrorism Law, and the Money Laundering Regulations (the "**AML Rules**"), as follows:

- a. The Secretary would need to confirm - via a notice given to the foundation company - that there appears to be no objection to a proposed asset contribution to the foundation company under the AML Rules. This implies that
  - (i) the Registered Office should not record, and
  - (ii) the Directors and/or Supervisors should not approve, any asset contribution without a no objections notice from the Secretary; and
  - (iii) if there is an overlap of functions between Director/Supervisor and Secretary, care should be taken that formalities are observed.
- b. The Secretary has an obligation to maintain "a full and proper record" of the Secretary's activities and enquiries made for giving the no objection notice, including information given to the Secretary for that purpose, which includes accounts, documents and records.

Under the circumstances, this implies a due diligence process being carried out and recorded for an asset contribution to a foundation company. Depending on the nature of the asset in question, source-of-funds investigations may be more or less complex. In the crypto/virtual assets industry,

additional care should be taken to ensure that the obligation to maintain records is properly carried out.

Due to the specifics of the foundation company structure, attention should be paid to the current practice of having the registered office resign in case of non-compliance or payment of fees, which

would trigger additional complications, depending on the provisions of the Memorandum and Articles of Association.

## **Directors**

Directors have the following fiduciary duties owed to the foundation company:

- acting loyally, honestly and in good faith in the best interests of the foundation company;
- exercising their powers only for the purpose for which they were conferred and not for any personal or collateral purpose;
- duty of confidentiality to the foundation company;
- avoiding a potential conflict of interest (if any, it needs to be disclosed, and no personal profits may be drawn from the position);
- acting in a manner likely to promote the success of the foundation company;
- exercising independent judgment (and not compromising or restricting their ability to exercise independent judgment);
- not retaining for their own benefit or passing to third parties property of the foundation company;
- not acting beyond the powers allocated to them; and
- acting in accordance with the Articles of Association and Bylaws if adopted.

A Director must act with the skill, care and diligence that might reasonably be expected of them based on the circumstances. This implies a certain level of competence, a sufficient knowledge and understanding of the business, as well as a proactive attitude.

On compliance issues, Directors are responsible for:

- adopting policies and procedures as required by the applicable laws and regulations;
- ensuring that contracts entered into with third parties are in line with the policies and procedures of the foundation company (the review and negotiation of such contracts can be of course delegated, but the Directors retain a supervisory role); and

- ensuring that the policies and procedures adopted are being implemented and supervising their application (regular reports from compliance officer, auditors, CFO, etc. as applicable).

The Directors manage and control the business and affairs of a foundation company subject to the Articles of Association and any bylaws of the foundation company, if applicable. The Directors may exercise all the powers of the foundation company other than those that are required by the Articles of the Association or the bylaws to be exercised by the Supervisors, subject to quorum and majority rules. The Directors are also required to give such reports, accounts, information and explanations concerning the business and affairs of the foundation company, and the discharge of the Directors' duties and the exercise of their powers, as may be required by the Supervisors.

### **Supervisors**

If it has no members, the foundation company is required at all times to have at least a supervisor able and willing to supervise the management of the foundation company. Supervisors owe a foundation company the same fiduciary duties as Directors, but subject to the resolution or notice appointing them, which may restrict, enlarge or exclude any or all of the voting and other rights or powers of Supervisors under the Articles of Association, or impose any supervisory or other duty or disability, grant a related exculpation, and waive conflicting interests or duties.

A Supervisor:

- may require access during normal working hours to the files, books, accounts and records of the foundation company, subject to reasonable advance notice;
- subject to reasonable advance notice, may call for such reports, accounts, information and explanations from the Directors as to the administration of the foundation company as are described in the notice;
- has the right to receive notice of, and attend and vote at, general meetings; and
- may apply to Court under certain circumstances.

The powers granted to a Supervisor may only be exercised in the interests of the foundation company and its objects.