

## Transfer by way of continuation into the Cayman Islands

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### 1. Introduction

This client briefing provides an overview of the procedures in the Cayman Islands for transferring a foreign entity into the Cayman Islands by way of continuation as an exempted company limited by shares (**Exempted Company**).

The Companies Act (Revised) (the **Companies Act**) provides that a body corporate incorporated, registered or existing with limited liability and a share capital under the laws of any jurisdiction outside the Cayman Islands may apply to the Registrar of Companies in the Cayman Islands (the **Registrar**) to be registered by way of continuation as an Exempted Company.

### 2. Initial considerations

In advance of carrying out a proposed transfer by way of continuation into the Cayman Islands as an Exempted Company, there are some initial considerations for the applicant:

- a. the applicant is in good standing with the registrar in the jurisdiction of formation, registration, incorporation, creation or otherwise of the applicant (the **Relevant Jurisdiction**)
- b. the constitutional documents of the applicant permit a transfer by way of continuation out of the Relevant Jurisdiction
- c. whether the Relevant Jurisdiction permits migrations to the Cayman Islands, and whether such jurisdiction requires any form of legal opinion from Cayman legal counsel and/or a form of pre-approval from the Registrar
- d. the proposed activities of the applicant company in the Cayman Islands and the

classification of such company under the International Tax-Co-operation (Economic Substance) Act (Revised) (the **Economic Substance Act**). Under the Economic Substance Act, in-scope entities (**Relevant Entities**) that carry on particular activities (**Relevant Activities**) are required to have demonstrable economic substance in the Cayman Islands. Relevant Entities will include most Cayman exempted companies except (a) investment funds or companies through which investment funds directly or indirectly invest or operate; (b) companies which are tax resident outside the Cayman Islands; and (c) companies which are authorised to carry on business locally in the Cayman Islands as a domestic company. All Cayman exempted companies will have to make an annual declaration as to whether they have conducted any Relevant Activities in the preceding financial period and whether or not they are Relevant Entities for the purpose of the Economic Substance Act

- e. if the applicant is undertaking a business activity that requires the applicant to be registered or licensed with the Cayman Islands Monetary Authority under the relevant regulatory laws in the Cayman Islands, then the applicant would need to undertake such registration or obtain such licence (as applicable) in advance

### 3. Straight-forward process

Subject to any prohibitions, restrictions and/or requirements under the laws of the Relevant Jurisdiction, the Cayman Island's statutory procedure is very straightforward.

The Registrar will register an applicant if:

- a. the Relevant Jurisdiction permits or does not prohibit the transfer of the applicant
- b. is constituted in a form or substantially in a form which could have been incorporated as an Exempted Company under the Companies Act
- c. the applicant has filed with the Registrar the required documents as set out in the below section titled "Documentation"
- d. the name of the applicant is acceptable to the Registrar
- e. no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up or liquidate the applicant in any jurisdiction
- f. no receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the applicant, its affairs or its property or any part thereof
- g. no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the applicant are and continue to be suspended or restricted

- h. the applicant is able to pay its debts as they fall due
- i. the application for registration is *bona fide* and not intended to defraud existing creditors of the applicant
- j. any consent or approval to the transfer required by any contract or undertaking entered into or given by the applicant has been obtained, released or waived, as the case may be
- k. the transfer is permitted by and has been approved in accordance with the charter documents of the applicant
- l. the laws of the Relevant Jurisdiction with respect to transfer have been or will be complied with
- m. the applicant will, upon registration as an Exempted Company, cease to be incorporated, registered or exist under the laws of the Relevant Jurisdiction
- n. the applicant, if it is (or will when registered by way of continuation be) prohibited from carrying on its business in or from within the Cayman Islands unless licensed under any law, has applied for and obtained the requisite licence
- o. the Registrar is not aware of any other reason why it would be against the public interest to register the applicant
- p. the applicant has paid to the Registrar a fee equal to the fee payable on the registration of an Exempted Company

## 4. Documentation

The following documents are required to be filed with the Registrar in respect of the application for continuation into the Cayman Islands as an Exempted Company:

- a. certified copies of the applicant's certificate of formation or incorporation, or the equivalent document issued by the relevant authority as evidence of its formation or incorporation as well as any charter, by-laws or memorandum or articles of association (or other constitutional document) of the applicant
- b. a certificate of good standing issued by the relevant authority (or a certified copy thereof), or, if the relevant authority does not issue such certificates of good standing, a declaration signed by a director of the applicant that the foreign company is in good standing with the relevant authority, in either case, dated no earlier than one month prior to the date of its delivery to the Registrar
- c. a list of its directors, containing such particulars with respect to the directors as are by the Companies Act required to be contained with respect to directors in the register of the directors of a company

- d. notice of the address of its proposed registered office in the Cayman Islands
- e. declarations or affidavits signed by a director of the applicant that the operations of the applicant will be conducted mainly outside the Cayman Islands as well confirming that no petition or other similar proceeding has been filed and remains outstanding; the applicant is able to pay its debts as they fall due; and the application for registration is bona fide and not intended to defraud existing creditors of the applicant. Further, such declaration or affidavit must include a statement of the assets and liabilities of the applicant made up to the latest practicable date before making the declaration or affidavit
- f. an undertaking signed by a director of the applicant that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the applicant

Further, copies of the director resolutions of the applicant approving the transfer by way of continuation into the Cayman Islands as an Exempted company should be filed as part of the application.

## **5. Registration as an Exempted Company**

If the Registrar is satisfied that the requirements for continuation have been complied with, the Registrar will issue a certificate that the applicant is registered by way of continuation as an Exempted Company and specify the date of such registration.

The Registrar will give notice in the Gazette of the registration of the applicant under the Companies Act, the jurisdiction under whose laws the applicant was previously incorporated, registered or existing and the previous name of the registrant if different from the current name.

## **6. Effect of registration as an Exempted Company**

From the date of registration of the applicant, it will continue as an Exempted Company for all purposes as if incorporated and registered under and subject to the Companies Act.

The applicant will have:

- a. the capacity to perform all the functions of an Exempted Company
- b. the capacity to sue and to be sued
- c. perpetual succession
- d. the power to acquire, hold and dispose of property
- e. the members of an applicant shall have such liability to contribute to the assets of the applicant in the event of its being wound up under the Companies Act as is provided in the

## Companies Act

However, the continuation shall not operate:

- a. to create a new legal entity
- b. to prejudice or affect the identity or continuity of the applicant as previously constituted
- c. to affect the property of the applicant
- d. to affect any appointment made, resolution passed or any other act or thing done in relation to the applicant pursuant to a power conferred by any of the charter documents of the applicant or by the laws of the jurisdiction under which the applicant was previously incorporated, registered or existing
- e. except to the extent provided by or pursuant to the Companies Act, to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant or any other person incurred prior to its continuation
- f. to render defective any legal proceedings by or against the applicant and any legal proceedings that could have been continued or commenced by or against the applicant before its registration pursuant to the Companies Act may, notwithstanding the registration, be continued or commenced by or against the applicant after registration.

An Exempted Company is prohibited from carrying on business in the Cayman Islands, except in furtherance of its business carried on outside the Cayman Islands, unless such company holds a licence to carry on business in the Cayman Islands under any applicable law. See our client briefing [Cayman Islands Exempted Companies](#) for more information on this type of entity.

## 7. Amendment of charter documents

An applicant applying to be registered as an Exempted Company is required, within 90 days of registration, to make such amendments, modifications and variations, if any, to its charter documents as are necessary to ensure that they comply with the requirements of the Companies Act as they relate to an Exempted Company.

## 8. Transfer in as a limited liability company or as an exempted limited partnership

A foreign entity with separate legal personality may apply to be registered in the Cayman Islands as a limited liability company by way of continuation pursuant to the Limited Liability Companies Act (Revised). The migration procedures and documentation are similar to that of the continuation of an Exempted Company.

A partnership established under the laws of any jurisdiction outside the Cayman Islands may apply to be registered as an exempted limited partnership by way of continuation pursuant to the Exempted Limited Partnership Act (Revised). The migration procedures and documentation differ for continuation as an exempted limited partnership but the effect is very similar.

See our client briefings [Cayman Islands Limited Liability Companies](#) and [Cayman Islands Exempted Limited Partnerships](#) for more information on these types of Cayman entities.

If you require further information, please speak to your usual Ogier contact or one of our corporate specialists as detailed on this page.

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## Meet the Author



[Bradley Kruger](#)

Partner

[Cayman Islands](#)

E: [bradley.kruger@ogier.com](mailto:bradley.kruger@ogier.com)

T: [+1 345 815 1877](tel:+13458151877)

## Key Contacts



Nathan Powell

Partner 〇〇〇

Hong Kong

E: [nathan.powell@ogier.com](mailto:nathan.powell@ogier.com)

T: [+852 3656 6054](tel:+85236566054)



Ridhiima Kapoor

Managing Associate

Dubai

E: [ridhiima.kapoor@ogier.com](mailto:ridhiima.kapoor@ogier.com)

T: [+1 345 815 1875](tel:+13458151875)



Carmen Leung

Senior Associate 〇〇〇〇

Hong Kong

E: carmen.leung@ogier.com

T: +852 3656 6033

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