

# Nevis: a foundation for privacy—the ownership and management of a private trust company by a multiform foundation

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## Abstract

The author identifies the main problem with today's trust structures in the fact that the settlors often seek to involve themselves in the administration of the trust. As such action can prove to be destructive, jurisdictions have encouraged the development of private trust companies (PTCs). The article hence explores the main differences between common law trusts and civil law foundations and introduces the reader to the advantages of the use of PTCs which are held by a Nevis multiform foundation in order to circumvent the common problem of settlor control.

## Key points

- PTCs allow clients to legally take an active role in the administration of their trusts and ensure a more efficient and cost-effective administration of the entity.
- The incorporation of a Nevis PTC is a speedy and easy process.
- The use of a Nevis PTC which is owned and managed by a Nevis multiform foundation is an ideal method for high net worth families to play an active role in the management and administration of their trust structures.

## Introduction

The *trust* has been and continues to be, the primary tool utilized by high net worth families for their estate planning needs and asset management options. A trust is administered by a *trustee* who has title to all of the assets and usually owns the shares of a privately held underlying company. The company owns a variety of assets from bank accounts to real property to chattels, or may have the right to receive income from a third party. In order to ensure proper management of the assets, the trustee usually acts as the director of the underlying company. The families or beneficial owners of the trust structure sometimes

seek to involve themselves in the administration of the trust, and depending on their level of involvement, such action can prove destructive to the structure and all interested parties. In recent years, jurisdictions have amended their laws to encourage the development of private trust companies (PTCs). These laws allow clients to legally take an active role in the day-to-day operations of their trust structures and ensure more efficient and cost-effective administration of the entity.

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## Trust

An agreement between two parties to benefit a third, a *trust* is initiated when a client or *settlor* transfers property to a trustee to be held for specified persons, known as *beneficiaries*. The separation of ownership of the assets is fundamental in the trust concept; the trustee is the legal owner and custodian of the assets, while beneficiaries have constructive ownership and are entitled to its use. Beneficiaries benefit from the trust by receiving *distributions* from its corpus, but are subject to the total and complete discretion of the trustee, who must approve such action. The trustee has plenary authority to manage the trust structure, but must follow the language of the trust deed and cannot use the funds for its own benefit.

## Letter of wishes

Depending on the language of the deed, the settlor may reserve certain powers and rights, but the trust would still be subject to the ultimate control of the trustee. In an attempt to provide guidance to the trustee, a settlor often executes a '*letter of wishes*' to provide suggestions on the management of the trust. A letter of wishes is unenforceable and provides false comfort to the settlor, since it need not be adhered to and cannot supersede the trustee's powers.

## Commercial trustee

The relationships between the settlor and the trustee, and between the trustee and the beneficiaries are

typically commercial arrangements, as they are entered into by trustees upon receipt of a fee. Many trustees are also corporate service providers and are companies which tend to be located in places such as Nevis, the British Virgin Islands, or several other offshore jurisdictions which have enacted legislation to encourage the establishment of trusts and other estate planning and financial service products.<sup>1</sup>

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## Reluctance of settlors

Despite the entity's popularity, convincing high net worth families to establish a trust structure which is registered in an offshore jurisdiction can be difficult proposition for many reasons. The concept of a trust itself and the twinned ownership of assets can be difficult for the average layperson to comprehend initially. Most settlors have worked hard for many years to acquire their fortunes, and are reluctant to grant legal ownership of these assets to another person. This proposition is made even more difficult when the trustee is a corporation located in a jurisdiction which is both faraway and foreign.

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## Interference with trustee's duties

Due to doubt and confusion, settlors sometimes seek to involve themselves in the daily administration of the trust and its assets, which can invalidate to the structure and can ruin the settlor. If it can be determined that the settlor actually exercises control over

1. Nevis International Exempt Trust Ordinance, 1994, as Amended; Trustee Act, 1961, as Amended; Virgin Islands Special Trusts Act, 2003.

the actions of the trustee, the trust would be considered to be a 'sham'.<sup>2</sup> If such a situation occurs, the dispositive provisions of the trust would be declared void, the trustee would be stripped of its power and the beneficiaries would lose their interest to the trust property. The trust's assets would be considered to have never left the control of the settlor, and the funds would be subject to the tax, bankruptcy, and debt collection laws of the settlor's domicile.

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## Integrity of trust

Despite the danger of creating a potential 'sham' trust with its attendant negative tax and legal consequences, settlors and their legal and accounting advisors still seek to involve themselves with the management and administration of trusts. In an effort to please their clients and maintain the integrity of the trust concept, many jurisdictions have enacted laws to allow for PTCs. Sometimes known as a 'family office', a PTC is an international business company which has been incorporated for the specific purpose of acting as the trustee of a single trust structure or a group of related trust structures.

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## Restrictions on PTCs

Several jurisdictions, including the British Virgin Islands, the Cayman Islands, and Nevis, allow the

incorporation of PTCs. Depending on the jurisdiction, there may be rather restrictive requirements regarding the establishment of PTCs. In the Cayman Islands, both the PTC and the person administering the company are required to be licensed.<sup>3</sup> Under the laws of the British Virgin Islands, PTCs are prevented from receiving any fees, and its name is required to contain a suffix that references its status.<sup>4</sup> In The Bahamas, the British Virgin Islands, Bermuda, and the Bailiwick of Jersey, PTCs are required to offer services only to a predetermined clientele.<sup>5</sup> No country which allows PTCs permits these entities to tender their services to the public-at-large, either in practice or in principle.

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## Nevis

The island of Nevis is part of the Federation of Saint Kitts-Nevis (the 'Federation'), a two-island nation and former British colony which received its independence in 1983. Under the Federation's Constitution, certain sovereign rights are granted to Nevis, including the right to enact its own legislation. Since 1984, thousands of companies, trusts, and foundations have been incorporated, settled, and established on-island. The legislation of Nevis is designed to make the incorporation of a Nevis PTC and any related entities, a speedy and easy process.

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2. *Rahman v Chase Bank (CI) Trust Company Limited* (1991) JLR 103.

3. Banks and Trust Companies Law (2007 Revision) s 6.

4. Financial Services (Exemptions) Regulations, 2007, Regulation 3, s2(1); 1.

5. The Banks and Trust Companies (Private Trust Companies) Regulations, 2007, s3 (1) (c); Financial Services (Exemptions) Regulations, 2007, Regulation 3, s4; Trusts (Regulation of Trust Business) Exemption Order, 2002 s3 (1) (a); Financial Services (Trust Company Business (Exemptions)) (Jersey) Order 2000, Art. 2 (1A).

## PTC

A PTC can be registered in an offshore jurisdiction, but the settlor, his family members, and their advisors who remain onshore can manage the trust structure and administer the assets themselves. With the knowledge that they will play an active role in the structure, the use of a PTC can overcome much of the fear and apprehension that most settlors have when a trust is established. It can also provide true comfort to the settlors and beneficiaries, since they are both owners and managers of the structure. Despite a higher initial cost, a trust structure owned by a PTC can have lower annual costs and much greater benefits over the long term.

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The trustee can provide a higher quality of service to the beneficiaries since there is both a business and personal relationship between the parties. The composition of the board of directors of a PTC or any entity which owns and manages a PTC can be altered periodically to appoint new family members from succeeding generations to maintain family control over family assets. The trustee will also have a greater familiarity with the business of the companies owned by the trust and can more readily make an informed decision. Since it is family owned, a PTC can ensure a quicker response to requests from beneficiaries for distributions.

A PTC can provide many benefits and services that a commercial trustee is either unable or unwilling to supply. Many commercial trustees do not want to hold certain types of assets, including yachts, airplanes, works of art, or similar luxury items with high insurance premiums, a PTC does not have

similar restrictions and can allow all of the family's assets to be held by the same trust or by the same trustee.

## Nevis PTCs

The Nevis trust law, the Nevis International Exempt Trust Ordinance, 1994, as amended (the 'NIETO') defines an '*international trust*' as a '*trust registered [thereunder]*' and one where at least one of the trustees is a trust company doing business on island or a

... corporation incorporated under the Nevis Business Corporation Ordinance [the NBCO].<sup>6</sup>

While commercial trustees must be licenced, there is no licensing requirement for PTCs incorporated under the NBCO and no prohibition on the receipt of fees by a PTC.<sup>7</sup> There is also no maximum number of trusts that a PTC is allowed to administer and there is no requirement that there be a relationship between the trusts which are administered.

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While there is no stated prohibition against offering services to the public-at-large, other benefits would make such action impossible. All Nevis trusts must be registered under the NIETO and are required to provide information to the Registrar, including the name of the trustee and its registered office.<sup>8</sup> While the Registrar does not have the power to refuse registration of a trust, if there is a suspicion that an attempt is being made to skirt the spirit of PTCs, the Registrar will inform the registered agent, who has a duty to take corrective action. An unregistered trust can prove detrimental to anyone with an interest in

6. Nevis International Exempt Trust Ordinance, 1994, as Amended, s2 'international trust'.

7. Ibid.

8. Nevis International Exempt Trust Ordinance, 1994, as Amended, s37 (6) (b).

the trust. Under the NIETO, any judgment obtained in a Court outside of the Federation will not be recognized against a trust, its property, or any person related to the trust, including a settlor, a trustee, a protector, or a beneficiary.<sup>9</sup> To be assured of protection under the NIETO against foreign judgment, the trust must be registered with the Registrar.<sup>10</sup>

## Direct ownership of a PTC

The shares of a PTC may be owned via many different ways. The most direct and transparent method places ownership of the structure in the name of the settlor. However, depending on the nature of the family relationship, having all of the power behind the structure in the hands of one person, upon the death of the settlor, the PTC, the trusts, and any underlying entities may collapse. Another ownership method would see ownership placed directly and jointly in the hands of the family members. Depending on fiscal issues and confidentiality concerns, direct ownership by the settlor or family members may not be the most beneficial method.

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## Ownership of a PTC by a purpose trust

A very popular ownership structure places the shares of a PTC in a non-charitable purpose trust. While this method provides for indirect ownership by the settlor or the family and allows for creditor protection, it can prove unduly complicated. A ‘*purpose trust*’ is one which is settled to achieve a goal, rather than to benefit persons. Since no person has an interest in ensuring that the trustee fulfils their duties, a ‘*protector*’ must be appointed to fulfil this role. Therefore, a

PTC owned by a purpose trust must appoint two additional persons; a purpose trust trustee and a protector to ensure that such trustee fulfils their obligations. The PTC must also be managed by a board of directors. This approach may prove problematic if confidentiality and simplification is an aim of the structure. The best ownership structure for a PTC is for its shares to be held by a foundation, an entity which is separate and distinct from all of the interested parties. A foundation can simultaneously act as the owner and manager of the PTC.

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## Ownership and management of a PTC by a foundation

A ‘*foundation*’ can best be described as a fund which has been endowed by its founder to be utilized for persons or purposes, as detailed in its statutes. It is a self-owned structure which has been endowed by its founder to be utilized for persons or purposes as detailed in its statutes. A foundation does not have owners, instead it is a legal person and can bring and defend legal actions. Foundation legislation now exists in several offshore jurisdictions throughout the World including; Anguilla, the Bahamas, the Bailiwick of Jersey, and Panama.<sup>11</sup> Foundations may be established in the Federation under separate legislation and may also be established in Nevis under the Multiform Foundations Ordinance, 2004 (the ‘MFO’).<sup>12</sup>

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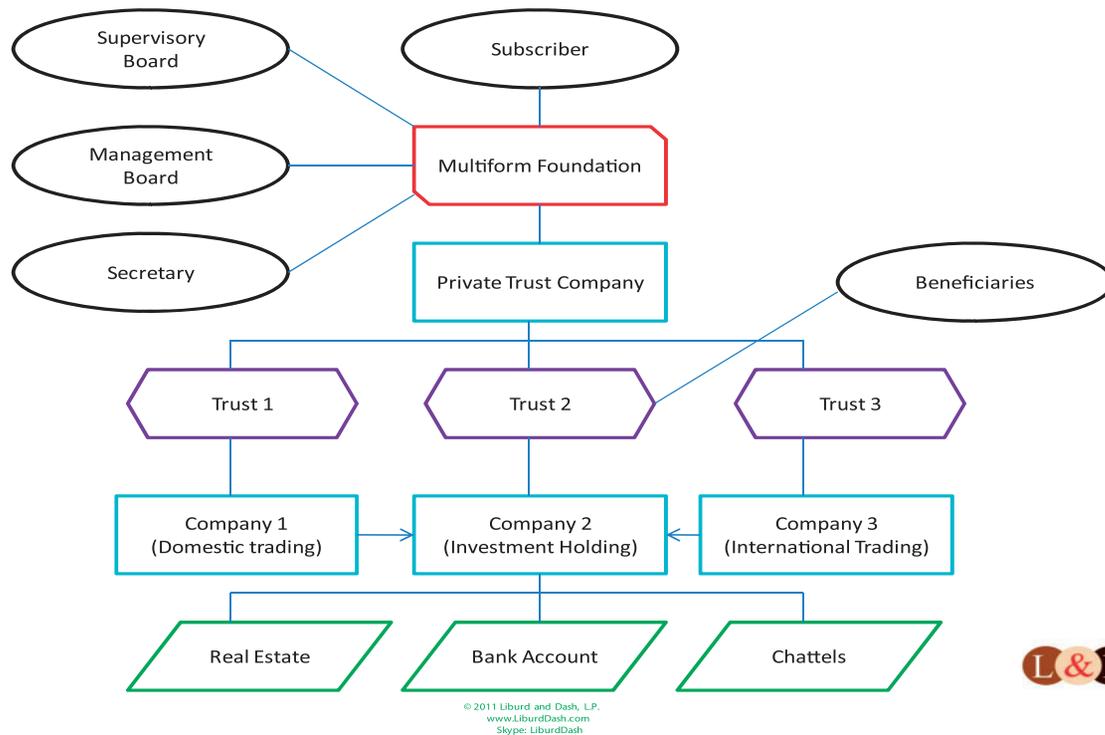
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9. Ibid s28.

10. Ibid s37(2).

11. Foundations (Jersey) Law, 2009; Foundations Act, 2004; Law No 25 of 12 June 1995.

12. Foundations Act, 2003.



**Figure I.** Private trust company owned and managed by a multiform foundation. Copyright Liburd and Dash 2011. [www.liburddash.com](http://www.liburddash.com)

### *Multiform Foundations Ordinance, 2004 (the 'MFO')*

## The Nevis multiform foundations ordinance

The MFO is innovative since foundations founded thereunder, which are known as '*multiform foundations*', may for management purposes, assume the form of a trust, a company, a limited liability company, a partnership, or that of a standard foundation.<sup>13</sup> The MFO allows the establishment of new entities and also enables pre-existing foreign foundations, foreign and domestic business structures to continue, transfer, consolidate, or merge into a multiform foundation.<sup>14</sup> Redomiciliation to Nevis will not extinguish an existing legal action; the former

overseas foundation will remain liable for any on-going litigation.<sup>15</sup>

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## Establishment

The governing documents of a multiform foundation or its '*by-laws*' allow the structure to have a level of flexibility, as it can choose a law other than the MFO to govern either all or a portion of the entity.<sup>16</sup> A multiform foundation may be formed to benefit persons; however there is no requirement for a registered

13. Nevis Multiform Foundations Ordinance, 2004 s10 (9).

14. *Ibid* s62(1).

15. *Ibid* s66.

16. *Ibid* s6(4).

entity to name a beneficiary. In order to establish a multiform foundation, a person who is referred to as a 'subscriber' must transfer assets of any amount held in their personal capacity to the foundation.<sup>17</sup>

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## Management

The business and affairs of a multiform foundation must be managed by the management board which must administer the entity's assets in accordance with its by-laws.<sup>18</sup> The management board will have different titles if it assumes a form other than that of a standard foundation. In a trust foundation, the trustees will act as the management board.<sup>19</sup> In a company foundation, the management board will be the company's directors or the limited liability company's managers.<sup>20</sup> In a partnership foundation, the managing partners will be appointed to the management board.<sup>21</sup>

## Secretary and supervisory board

The management board is assisted in its administration of a multiform foundation by a secretary and may be supervised by a supervisory board.<sup>22</sup> The secretary may be natural or legal person but shall not be the sole member of the management board.<sup>23</sup> The supervisory board engages in duties which are similar to the protector of a trust since it may exercise limited authority over the management board of a multiform foundation as detailed in the by-laws.

## Taxes

The MFO exempts the multiform foundation, any associated persons, and any possible beneficiaries from the payment of taxes in Nevis; however, the multiform foundation may advise the Registrar that it intends to become tax resident and will pay taxes at a maximum rate of 1 per cent.<sup>24</sup>

## Legal action

Similar to any legal action against a Nevis trust, a lawsuit which is brought against a multiform foundation must be brought in the High Court of the Federation.<sup>25</sup> The MFO provides that all proceedings, other than criminal matters will be conducted in the Judge's chambers and any details will not be published without the consent of the Judge.<sup>26</sup>

## Creditor protection

The MFO provides an attractive statute of limitations provision for debtors. Under the MFO, any amounts 'subscribed' to the multiform foundation will not be fraudulent, if the subscription occurred after one year from the date that the creditor's cause of action accrued or the subscription occurred before the creditor's cause of action accrued.<sup>27</sup> If the subscription occurred before the expiration of one year before the creditor's cause of action accrued and creditor failed to bring action before the expiration of six months since the subscription took place, the subscription will also not be considered fraudulent.<sup>28</sup>

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17. *Ibid* s3(1).

18. *Ibid* s23(2).

19. *Ibid* s10(9)(a).

20. *Ibid* s10(9)(b).

21. *Ibid* s10 (9) (c).

22. *Ibid* s18; 21.

23. *Ibid* s18(2).

24. *Ibid* s93.

25. *Ibid* s46(1).

26. *Ibid* s113(2).

27. Multiform Foundations Ordinance, 2004, s108(3)(a) and (4).

28. *Ibid* s108(3)(b).

## Conclusion

A PTC incorporated as a Nevis business company which is owned and managed by a Nevis multiform foundation provides many benefits to all interested parties. There is no licensing requirement for PTCs and the entity may charge fees to its clients, if it wishes to do so. There is also no limit to the number of trusts for which a Nevis PTC can act as trustee and no requirement that there be a relationship between any trusts which are administered. As a general rule, PTCs must limit their services to a specific clientele, however Nevis PTCs are not statutorily prevented from providing services to the public, but the burden is on the registered agent to ensure that there is no abuse of the spirit of the concept of PTCs.

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A PTC enjoys a high level of confidentiality when it is owned and managed by a foundation. A foundation is a self-owned structure and a legal person which can

bring and defend legal actions. A multiform foundation established under the laws of Nevis can assume the form of a standard foundation or may be structured as a more recognized entity for management and administration purposes.

The laws of Nevis do not recognize foreign judgments against an international trust, a multiform foundation, or any person with an interest therein, all legal action must be brought in the High Court of the Federation. Nevis' law provides an attractive statute of limitations for debtors who have any relationship with a multiform foundation. Depending on the situation, any amount subscribed will not be considered fraudulent if, the subscription occurred for up to one year from the date that the creditor's cause of action accrued.

The use of a PTC is the best method for high net worth families to play an active role in the management and administration of their trust structures. A PTC which is owned by a multiform foundation allows families to have to become involved in the legal and constructive ownership of their trust structures while engaging in the management of the entity and enjoying the benefits of creditor protection and privacy.