

The Multiform Foundations Ordinance of Nevis

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Abstract

This article revisits the foundation jurisdiction of Nevis after 4 years. The authors provide the reader with an encompassing tour d'horizon on the Nevis Foundation Law which is enshrined in the Multiform Foundations Ordinance 2004. Not only the main characteristics and the management of a Nevis Foundation are revisited but the article also covers questions of taxation, litigation and foreign judgments, the statute of limitations as well as continuance of foreign entities in Nevis in the form of a Multiform Foundation.

Key points

- A foundation is a self-owned structure without shareholders or equity holders.
- The malleability of a multiform foundation allows founders a broad scope in which to establish their structure.
- A Multiform Foundation can choose a law other than the Ordinance to govern either all or a portion of the entity.
- 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.
- Forced heirship is not recognized under the laws of Nevis, a statute of limitations is in place.

Foundations

The legal structure known as a 'foundation' was originally founded as an asset holding entity in continental Europe during medieval times. In those days, foundations were used solely for charitable, scientific and humanitarian objectives. In some jurisdictions, this limitation continues to this day to some degree. In several other countries, foundations have evolved from the charitable vehicles of the Middle Ages to become the all-purpose asset protection and wealth-preservation vehicles of today. Foundations

can now be formed for other purposes, for the benefit of individuals and institutions and may be utilized to fulfill both charitable and non-charitable goals. In France, Hungary and Sweden, the creation of foundations are limited to those objectives which are cultural, scientific or to other purposes which are beneficial to the community. In other European countries, like for example the Netherlands, the use of a foundation has

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evolved beyond mere charitable purposes and now has full commercial applications.

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Characteristics of a foundation

A foundation can best be described as a fund that has been endowed by its founder to be utilized for persons or purposes, as detailed in its statutes. A foundation is a self-owned structure which does not have shareholders or equity holders. In some ways, foundations are similar to trusts, but their use and benefits extend far beyond a civil law version of a common law concept. A trust is not a separate legal entity and can only act via its trustee, while a foundation is a legal person and can bring and defend legal actions. The founder of a foundation may also exercise direct control over the structure, while such action by the settlor would invalidate the trust. Since the 1990s, foundation legislation has moved beyond civil law countries and now may be formed in the Isle of Man and the Bailiwick of Jersey, they may also be established on the shores of the several territories in the Caribbean, namely Anguilla, the Bahamas, Panama and Nevis.

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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 elect its own Premier and Parliament and to enact its own legislation. Since 1984, thousands of companies, trusts and mutual funds have been settled, incorporated and registered on-island. While foundations may be formed in the federation under separate legislation, they may also be established in Nevis under the Multiform Foundations Ordinance, 2004 (the ‘Ordinance’).

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Multiform foundations

The Ordinance is innovative since foundations founded hereunder may assume the form of a trust, a company, a limited liability company or a partnership. Regardless of the form that it assumes, all registered entities must end in the word ‘Foundation’ or the abbreviation ‘FDN’. This malleability allows founders a broad scope in which to establish their structure and hence the foundation can be tailored to suit the needs and desires of individual clients. The Ordinance allows the establishment of new entities and also enables pre-existing foreign foundations, and foreign and domestic business structures to continue, transfer, consolidate or merge into a multiform foundation.

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Bylaws

The governing documents of a Multiform Foundation or its 'bylaws' allow the structure to have a level of flexibility, as it can choose a law other than the Ordinance to govern either all or a portion of the entity. The Ordinance allows a multiform foundation to be formed for more than one purpose or object, provided that such purpose or object is not offensive to existing Nevisian law. A Multiform Foundation may be formed to benefit persons; however, there is no requirement for a registered entity to name a beneficiary.

Establishment

In order to establish a Multiform Foundation, a person who is referred to as a 'subscriber' must transfer assets held in his personal capacity to the foundation. The transfer of assets is known as a 'subscription', and such action will be irrevocable unless otherwise stated in the bylaws. There is no minimum amount required for the initial or future subscriptions. The Ordinance has a unique feature that allows a Multiform Foundation to be established by a person's Last Will and Testament and provides that the Testator will be deemed the subscriber.

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Certificate of establishment

In order to establish a Multiform Foundation, the subscriber must attain the services of a financial services provider licensed by the Government of Nevis to act as Registered Agent of the structure. A Multiform Foundation will only acquire legal personality when a Certificate of Establishment and a registration number have been issued. As a prerequisite to the issue of these documents, the Registered Agent must

provide the Registrar of Foundations (the 'Registrar') with the name of the Multiform Foundation, its registered address, its initial multiform, the names and addresses of the management board and secretary and an English language copy of the entity's bylaws. An overseas foundation, company, trust or partnership may continue in Nevis as a Multiform Foundation and will be issued a registered number and a Certificate of Continuance. While the bylaws of a Multiform Foundation must be filed, they will be kept confidential unless the Registrar is informed otherwise.

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Management board

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 bylaws. Unless otherwise provided for, a Multiform Foundation's bylaws may be amended by an ordinary resolution of its management board or by a unanimous resolution of its beneficial class, if such persons exist. The management board will have differing titles depending on the form that the multiform foundation assumes. If the form of the foundation is a trust, it will be known as a 'trust foundation' and the trustees will act as the management board. Likewise, if the multiform is that of a company or a limited liability company, it will be known as a 'company foundation'. The management board will be comprised of the company's directors or the limited liability company's managers. Where the foundation assumes the form of a partnership, it is referred to as a 'partnership foundation', and the managing partner will be appointed to the management board.

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Secretary and supervisory board

The management board is assisted in its administration of the foundation by a secretary and may be supervised by a supervisory board. The secretary may be natural or legal person but shall not be the sole member of the management board. The Ordinance takes a page from trust law by allowing a Multiform Foundation to have a supervisory board, in addition to the management board. 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 bylaws.

Taxation

The Ordinance exempts the Multiform Foundation, any associated persons and any possible beneficiaries from the payment of taxes, however, the multiform foundation may advise the Registrar that it intends to become tax-resident and will pay taxes at a maximum rate of one per cent. Upon the issuance of a tax-residency certificate, a tax return must be filed annually and the multiform foundation will make payments based on the entity's stated net retained earnings.

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Foreign judgments

Any lawsuit which is brought against a multiform foundation must be brought in the High Court of the Federation. The Ordinance prohibits the enforcement of any foreign judgment which is obtained against any multiform foundation, its beneficiaries or any persons associated with an interest therein. Before beginning a legal action, the Claimant must post a bond of US\$50,000 with the Minister of Finance. The Ordinance 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.

Litigation

An overseas foundation may leave its home jurisdiction and may 'continue' in Nevis as a Multiform Foundation, but will remain liable for any obligations in its former territory in any ongoing legal action. Forced heirship, a legal concept which limits the discretion of a testator in drafting a will, requiring them to provide for their spouse, children, and dependents is not recognized under the laws of Nevis.

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Statute of limitations

Any amounts contributed to a Multiform Foundation will not be considered fraudulent if the addition occurred either before or 1 year after the creditor's cause of action arose. If the subscription occurred before the expiration of 1 year before the creditor's cause of action accrued and the creditor failed to bring the action before the expiration of 6 months since the subscription took place, the subscription will also not be considered fraudulent.

Conclusion

A foundation created under the Multiform Foundations Ordinance 2004 provides many advantages and should be very attractive to clients and professional intermediaries from civil law countries since they are familiar with the well-established concept. A Multiform Foundation can also meet the needs of persons from common law jurisdictions because it provides users with a comfort level of control and privacy that does not exist in trust law.

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An entity created under the Ordinance is a valuable tool in the field of estate administration, tax planning and commercial transactions. A Nevis Multiform Foundation can be used to ensure corporate stability, maintain family control of a business or provide security for a lender. In drafting its foundation legislation, Nevis combines the principles found in common law with concepts originating to civil law jurisdictions. The Ordinance is clearly geared towards providing a shield for international clients concerned with maintaining some privacy against the invasive attacks in the face of the pressure which has been placed on offshore financial structures in recent years. In addition, The Multiform Foundations Ordinance of Nevis is a valuable tool for individuals and institutions as it enhances its existing vibrant financial services legislation with a new structural