

TRANSFER BY WAY OF CONTINUATION INTO THE CAYMAN ISLANDS AS A LIMITED LIABILITY COMPANY

Section 54 of the Limited Liability Companies Act of the Cayman Islands (the “**LLC Act**”) allows a foreign entity to be registered by way of continuation as a limited liability company in the Cayman Islands. A “foreign entity” means a foreign company or a body corporate or corporation of any kind with legal personality, statutory trust, common law trust, any unincorporated business (including a partnership, whether general or limited and whether or not with legal personality) formed, incorporated, created or that otherwise came into being under the laws of any foreign jurisdiction.

A foreign entity is capable of being registered by way of continuation as a limited liability company under the LLC Act if:

- It is formed, registered, incorporated or existing in a jurisdiction which permits such transfer;
- It has paid the requisite fees to the Registrar of Limited Liability Companies (the **Registrar**);
- the name of the foreign entity is acceptable to the Registrar;
- the relevant documents are submitted to the Registrar; and
- the Registrar is not aware of any reason why it would be against the public interest to register the foreign entity.

The steps to effect registration by way of continuation include:

1. Checking the name of the foreign entity with the Registrar to ensure its availability. If the name is unacceptable, it will not be registered. Reasons for a name being unacceptable are set out in Section 6 of the LLC Act and include:
 - (a) being identical with an existing limited liability company or an exempted company (except where the limited liability company or exempted company in existence is in the course of being dissolved and has signified its consent in such manner as the Registrar requires) or, in the opinion of the Registrar, so nearly resembles that name as to be likely to mislead;
 - (b) containing any word or words that a company incorporated under the Companies Act (as amended) of the Cayman Islands would not be permitted to use in its name; or
 - (c) in the opinion of the Registrar, suggests that the limited liability company is licensed whether in the Islands or elsewhere to carry on any type or class of business subject to the regulatory laws of the Islands when it is not so licensed or, because of any other reason, is likely to mislead.

If the name of the foreign entity is available, it can be reserved with the Registrar upon payment of the applicable fees.

2. Performing the necessary corporate actions required by the constitutional documents of the foreign entity, such as shareholder, member and/or board resolutions;
3. Submitting the relevant documentation to the Registrar, including:
 - an application for the continuation of the foreign company as a limited liability company executed by one or more authorized persons;
 - a registration statement signed by or on behalf of one or more authorized persons;
 - a voluntary declaration or affidavit by an authorized person;
 - an undertaking signed by an authorized person that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the foreign entity;
 - a certified copy of the certificate of formation or incorporation (or equivalent document) from the jurisdiction of origin;
 - a certificate of good standing from the jurisdiction of origin;
 - a certified copy of the limited liability agreement;
 - a statement of assets and liabilities made up to the latest practicable date before the declaration or affidavit; and
 - notice of the proposed address of the registered office provider in the Cayman Islands;
4. Paying the requisite fees to the Registrar; and
5. If the foreign entity requires a licence or registration under any other laws of the Cayman Islands to carry on its business, such as the Mutual Funds Act or Private Funds Act, the foreign company will also need to apply for and obtain such licence or registration with the Cayman Islands Monetary Authority.

If any of the matters included in the voluntary declaration or affidavit are false, the person who made the voluntary declaration or affidavit without reasonable grounds therefor, commits an offence and will be liable on summary conviction to a fine of CI\$15,000 (US\$19,293) or to imprisonment for a term of five years, or both.

The Registrar will grant the registration as of the date the documents are filed, provided the application is in order. If the application was made on an expedited basis, the Registrar will issue the certificate of registration by way of continuation with the same date the application was made. If the application was submitted on a regular basis, the Registrar would return proof of registration around 3-5 business days, albeit, the certificate would still reflect the date of submission of the application.

From the date of registration, the foreign entity continues as a limited liability company for all purposes as if incorporated and registered as a limited liability company under and subject to the LLC Act. The foreign entity shall have, but without limitation to the generality of the foregoing:

- (i) the capacity to perform all the functions of a limited liability company;
- (ii) the capacity to sue and to be sued to defend legal proceedings in its name;
- (iii) perpetual succession; and
- (iv) the power to acquire, hold and dispose of property.

For the avoidance of doubt, the transfer by way of continuation of a foreign entity does not: (a) create a new legal entity; (b) prejudice or affect its identity or continuity as previously constituted; (c) affect its property; (d) affect any appointment made, resolution passed, vote cast, consent granted or any other act or thing done in relation to the foreign entity pursuant to a power conferred by its charter documents or by the laws of the jurisdiction under which it was previously formed, registered, incorporated or existing; (e) affect any rights or obligations it had prior to its continuation as a limited liability company into the Cayman Islands; or (f) render defective any legal proceedings by or against the foreign entity and any legal proceedings that could have been continued or commenced by or against the foreign entity prior to its registration in the Cayman Islands.

Within ninety (90) days of registration, the foreign entity is required to make such amendments, alterations, modifications, variations, deletions and additions, if any, to its charter documents as are necessary to ensure that they comply with the requirements of the LLC Act as they relate to a limited liability company.

The Registrar will give notice in the Cayman Islands Gazette of the registration and will indicate the jurisdiction of origin, as well as the previous name of the foreign entity if this has changed.

A foreign entity can also apply for a tax exemption certificate under the Tax Concessions Act (as amended) of the Cayman Islands. This is optional. A tax exemption certificate would allow the foreign entity to obtain an undertaking that for a period not exceeding fifty years from the date of approval of the application (a) no law enacted in the Cayman Islands which imposes any tax to be levied on profits, income, gains or appreciation will apply to the foreign entity or to any member thereof in respect of the operations or assets of the foreign entity or membership interest of any member; and (b) such tax or any tax in the nature of estate duty or inheritance tax will not be payable in respect of the obligations of the foreign entity or the interests of its members.

The foregoing is for information purposes only and does not purport to be comprehensive or represent legal advice.

For more details on how our experienced and dedicated team can help you, please contact Sharon Nelson at email: snelson@mcgrathtonner.com.