

Cayman Islands Foundation Companies Law Now in Force 开曼群岛基金会公司法现已生效

The Foundation Companies Law (the “Law”) was passed by the Legislative Assembly in March 2017, and has now been brought fully into effect from 18 October 2017.

As confirmed in our previous update, a foundation company may be established as a new form of Cayman company and will share many of its features with regular exempted Cayman companies, save that it will be prohibited from paying dividends to its members. Foundations will fit seamlessly into Cayman’s legal regime, and offer up an attractive and flexible structuring tool for private clients with offshore interests, regardless of whether they are located in civil law countries or common law jurisdictions. Foundations are also expected to be useful to commercial lawyers in securitization transactions, as an alternative to the traditional special purpose vehicle under a purpose trust.

The Law will allow for the creation of a new form of company, incorporated in the same way as a standard Cayman exempted company, which will be known as a “foundation company” (referred to below simply as a “Cayman Foundation”). Importantly, the Law is not a new stand-alone statute: effectively, it operates as an addition to the Companies Law (2016 Revision), which will apply to all Cayman Foundations with necessary modifications. This means that the structure of a Cayman Foundation will be a familiar one, and all jurisprudence on Cayman companies will, to the extent it is relevant, apply to a Cayman Foundation. The fee payable to the Cayman Registrar of Companies on incorporation (or conversion from an existing company) is CI\$500.00 (US\$609.75).

《基金会公司法》（下称“该法律”）已于2017年3月获开曼群岛议会批准通过，并自2017年10月18日起全面生效。

我们早前发布的资讯中已提到，基金会公司可能成为开曼群岛增设的一种公司形式，其与普通的开曼群岛豁免公司有许多共同之处，惟其不得向股东派发股息。基金会公司将全面纳入开曼群岛法律体系，为拥有离岸权益的私人客户（不论身处民法法系国家或普通法法系司法管辖区）提供吸引且灵活的结构化工具。商业律师有望在证券化交易中运用基金会公司，作为替代目的信托下传统特殊目的公司的另一选择。

该法律规定可设立一种新的公司形式，注册成立步骤与开曼群岛标准豁免公司相似，被称为“基金会公司”（下称“开曼群岛基金会公司”）。值得注意的是，该法律并非新增的独立法规，而是作为《公司法》（2016年修订）的补充，适用于所有开曼群岛基金会公司，必要时可进行修订。这表示，开曼群岛基金会公司的架构并非全然一新，有关开曼群岛公司的所有法律制度在相关范围内均适用于开曼群岛基金会公司。注册成立（或将现有公司变更为）基金会公司须向开曼群岛注册处支付500.00开曼群岛元（609.75美元）注册费。

Creation of a Cayman Foundation

The Law is prescriptive as to the incorporation, administration and management of a Cayman Foundation. In establishing one, the drafter may choose to either convert a current Cayman exempted company to a Cayman Foundation, or to create an entirely new Cayman Foundation from scratch. In all cases, it will be a body corporate with separate legal personality and will have the capacity to sue and be sued and to hold property.

Pursuant to the Law, a Cayman Foundation:

- May be formed by any person (the “founder”) for any lawful object, which need not be beneficial to other persons. This could include acting as a holding company or an investment company or providing financial assistance to beneficiaries of the Cayman Foundation (if any).
- Must be limited by shares or by guarantee, but may be established with or without share capital. Despite there being no minimum capital requirements, a Cayman Foundation may have assets added to it at any time.
- Is incorporated with one or more members, whose liability is limited. Subject to any restrictions specified at the time of incorporation, any person can be a member of a Cayman Foundation. Importantly, once formed, a Cayman Foundation can cease to have members at any time, and the cessation will not affect the Cayman Foundation’s existence, capacity or powers, provided that it continues to have one or more “supervisors”. A supervisor is defined by the Law as a person, other than a member, who, under the Foundation Company’s “constitution”, referred to below, has a right to attend and vote at general meetings.
- Must have a memorandum that states that the company is a Foundation Company, describes its objects, provides for the disposal of any surplus assets the company may have on winding up, and – most importantly – prohibits dividends or other distributions of profits or assets to its members or proposed members.
- Must also adopt articles of association. The memorandum and articles of association (together, “the Constitution”) can be based on the “Model Constitution” contained in Schedule 2 to the Law and adopted by a Cayman Foundation in whole or in part. Amendments can only be made

设立开曼群岛基金会公司

该法律载有关于开曼群岛基金会公司成立、运营及管理的规定。就成立一间开曼群岛基金会公司而言，发起人可选择将现有的开曼群岛豁免公司变更为开曼群岛基金会公司，亦可选择成立新的基金会公司。不论以何种方式成立，基金会公司都将成为具有独立法人资格的法人团体，可提出或接受诉讼及持有财产。

根据该法律，开曼群岛基金会公司：

- 可由任何人士（“创建人”）因任何合法目的而成立，毋须以任何其他人士作为受益人。成立目的包括作为控股公司或投资公司行事，或向开曼群岛基金会公司受益人（如有）提供财务援助。
- 必须为股份有限公司或担保有限公司，但可以或不必拥有股本。虽然并无最低资本要求，但开曼群岛基金会公司可随时增加资产。
- 成立时可拥有一名或多名股东，各自承担有限责任。在不违反公司成立时订明之任何限制的情况下，任何人士均可成为开曼群岛基金会公司的股东。重要的是，开曼群岛基金会公司一经成立，可随时终止拥有股东，在仍然保留至少一名监事的情况下，公司的存续、能力或权力不会受到影响。该法律将监事定义为根据下文所述基金会公司“章程”有权出席股东大会并在会上投票的人士（不包括股东）。
- 必须制定一份章程大纲，列明公司性质为基金会公司、载明公司的宗旨、订明公司在清盘时可能拥有的任何盈余资产的处置方式以及（更为重要的是）禁止向其股东或拟定股东派发股息或分派其他利润或资产。
- 必须订立章程细则。章程大纲及细则（统称“章程”）可基于该法律附表2所载的“示范章程”而订立，由开曼群岛基金会公司全部或部分采纳。仅在章程中有明确规定的情况下方可对其进行修订。

to the Constitution if expressly provided for in the Constitution itself.

- Must, at all times, have a secretary who is “a Qualified Person”, being someone who is licensed or permitted by Cayman’s Companies Management Law (2003 Revision) (as amended) to provide company management services in the Cayman Islands. The secretary’s office will be the registered office of the Cayman Foundation, where the statutory records regarding the Cayman Foundation must be kept. Failure to keep such records is subject to criminal sanction on the Foundation Company and every director or manager who knowingly and wilfully authorised or permitted the contravention.
- Is managed by a board of directors. Any individual of full capacity may be a director of a Cayman Foundation; there are no residency requirements for directors or any other restrictions as to who may act as a director. The standard of care applicable to directors of a Cayman Foundation is the same as the directors of any other company, and directors will owe the same duties to a Cayman Foundation as the directors of any other Cayman company owe to that company.
- May have one or more beneficiaries who may benefit from the Cayman Foundation carrying out its objects – but may also have no beneficiaries at all. Importantly, a beneficiary of a Cayman Foundation has no statutory powers or rights relating to the Cayman Foundation, its management, or its assets, and is not otherwise an “interested person”. Despite this, beneficiaries can be designated a role to play by the Constitution, and have specific duties, powers and rights vested in them by the Constitution.
- Is subject to the same requirements regarding documentation and filings as any other Cayman exempted company, and, in particular, must maintain certain registers and information at the Registrar of Companies, including a minute book and records for anti-money laundering purposes. In terms of the flow of information about a Cayman Foundation, directors are required to give reports, accounts, information and explanations concerning the Foundation Company’s business and affairs, and the discharge of their duties or exercise of their powers, in response to any written request from an interested person.
- May be managed through financial difficulties or insolvency in the same way as any other company established pursuant to the Companies Law, and
- 在存续期间必须一直拥有一名秘书，而该秘书须为“合格人士”，即开曼群岛《2003年公司管理法》（经修订）许可或获准在开曼群岛提供公司管理服务的人士。秘书的办事处即为开曼群岛基金会公司的注册办事处，有关公司的法定记录必须在此存置。倘未能存置相关记录，则基金会公司及所有明知而故意授权或允许违规行为的董事或经理均会受到刑事制裁。
- 由董事会管理。任何拥有完全行为能力的人士均可担任开曼群岛基金会公司的董事。对董事不设居留要求，亦无身份限制。开曼群岛基金会公司董事所适用的谨慎标准及所须履行的职责与任何其他公司董事相同。
- 可能拥有一名或多名受益人，因执行公司宗旨而受益，但亦可没有受益人。另外，开曼群岛基金会公司的受益人不享有与开曼群岛基金会公司、其管理或资产相关的法定权力或权利，因此并非“利害关系人士”。即便如此，受益人仍可根据章程担任指定的职位，并享有章程赋予的特定义务、权力与权利。
- 与任何其他开曼群岛豁免公司一样须遵守相关的资料记录及存档规定，特别是必须于公司注册处存置若干登记册及资料，包括以反洗钱为目的而须存置的会议纪要及档案。就开曼群岛基金会公司的资讯传递而言，董事须因应有利害关系人士的书面要求提供与基金会公司业务和事务以及彼等职责和权利履行有关的报告、账目、资料及解释。
- 可采取与根据公司法成立之任何其他公司相同的方式应对财务困难或破产。公司清盘条文在进行相应修订后将适用于开曼群岛基金会公司。需要留意的

the provisions for winding up a company apply to Cayman Foundations with consequential amendments. Importantly, if a Cayman Foundation encounters financial difficulties, is insolvent or is of doubtful solvency, the directors must consider the creditors' interests as part of their duty to act in the interests of the foundation itself.

- Once incorporated, cannot be revoked. However, if a founder is so empowered pursuant to the Constitution, he or she can be given powers with a similar effect to revocation (for example, a power to appoint foundation property to himself or herself).
- Is subject to Sections 92 and 93 of the Trusts Law (2011 Revision) ("Trusts Law"), which operate to deny heirship rights to the property of a living person and will apply to property contributed to the Cayman Foundation.

Dispute Resolution

The Law prescribes a number of avenues for the resolution of different categories of disputes arising in relation to a Foundation Company. In terms of alternative dispute resolution, the Law states that the Constitution may provide for the resolution of disputes concerning the Cayman Foundation or its operations or affairs, with or among its directors, interested persons or beneficiaries (to the extent beneficiaries are given any rights under the Constitution) by arbitration or by any other lawful method. However, the Grand Court of the Cayman Islands ("Grand Court") also has a very important role to play in resolving any constitutional difficulties encountered by a Cayman Foundation. In particular:

- If the objects of a Cayman Foundation become wholly or partly "impossible, impracticable, unlawful or obsolete" and there is no power under the Constitution to resolve this difficulty, then the secretary or any interested person including a liquidator of the Cayman Foundation may apply to the Grand Court for assistance to resolve the difficulty.
- If a Cayman Foundation ceases to have directors or supervisors, or sufficient of them to supervise the management of the Cayman Foundation in accordance with the Constitution, the Grand Court can also act on the application of one of the parties listed above. The Grand Court can appoint or remove directors or supervisors, alter the Constitution with regard to such appointment or

是，倘开曼群岛基金会公司陷入财务困难、资不抵债或偿债能力难以预测，则董事在以基金会公司的利益行事时亦必须考虑债权人的权益。

- 一经成立，不得撤销。但倘创建人根据章程获得相关授权，则其可享有与撤销效力相若的权力（例如可指定其本人作为基金会公司财产受益人的权力）。
- 须受《信托法》（2011年修订）（“信托法”）第92条及93条的规限。该等条文否定对在生人士财产的继承权，适用于开曼群岛基金会公司获捐赠的财产。

争议解决

该法律规定了解决与基金会公司有关的各类争议的若干途径。就替代争议解决方式而言，该法律列明，章程可规定透过仲裁或任何其他合法途径解决有关开曼群岛基金会公司或其运营或事务，或其董事、利害关系人士或受益人（倘章程赋予受益人任何权利）之间的争议。然而，开曼群岛大法院（“大法院”）在解决开曼群岛基金会公司的章程问题方面亦发挥十分重要的作用。特别是：

- 倘开曼群岛基金会公司的宗旨完全或部分“不真实、不可行、不合法或已过时”，而根据章程并无任何权力可解决该等问题，则秘书或任何利害关系人士（包括开曼群岛基金会公司的清盘人）可向大法院寻求协助解决有关问题。
- 倘开曼群岛基金会公司不再拥有董事或监事，或者董事或监事根据章程不足以监督开曼群岛基金会公司的管理，则大法院亦可在上述任何一方提交申请后采取行动。大法院可任命或罢免董事或监事、变更章程中有关董事或监事任命或罢免条款、变更彼等的权力、职责和有关任命的其他条款，以及下令以惯常方式将开曼群岛基金会公司清盘。

removal, alter the powers, duties and other terms of their appointment and make orders for the winding up of a Cayman Foundation in the usual way.

Helpfully, the Law also includes provisions for a Cayman Foundation to apply to the Grand Court for an opinion or advice or for directions if it considers it necessary to do so, in which case Section 48 of the Trusts Law will apply with all necessary modifications.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

此外，该法律亦载有相关条文，有助开曼群岛基金会公司可在其认为必要时向大法院申请获取意见、建议或指示。在该等情况下，《信托法》第48条在经所有必要修订后将会适用。

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅！

FOR FURTHER INFORMATION, PLEASE CONTACT:

Conyers Dill & Pearman
29th Floor
One Exchange Square
8 Connaught Place
Central
Hong Kong
Tel: +852 2524 7106
Fax: +852 2845 9268
Email: hongkong@conyersdill.com
Web: www.conyersdill.com

若需要更多资讯，请联络：

康德明律师事务所
香港中区康乐广场 8 号
交易广场第一座 29 楼
电话: +852 2524 7106
传真: +852 2845 9268
电邮: hongkong@conyersdill.com
网址: www.conyersdill.com

ABOUT CONYERS DILL & PEARMAN

Conyers Dill & Pearman is a leading international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. Conyers has over 130 lawyers in eight offices worldwide and is affiliated with the Conyers Client Services group of companies which provide corporate administration, secretarial, trust and management services.

关于康德明律师事务所

康德明律师事务所是一间具有领导地位的国际律师事务所，就百慕大、英属维尔京群岛、开曼群岛和毛里求斯之法律提供意见。康德明拥有分布于世界各地八间办事处内的逾130位律师，并与康德明客户服务公司集团有联属关系，而康德明客户服务公司集团提供公司管理、秘书、信托和管理服务。