



PANAMANIAN FOUNDATIONS: A KEY TO PRIVACY AND PROTECTION

Those interested in Panamanian foundations have many questions, but I have found that what most people first want to know is: What's the difference between a trust and a Panamanian foundation? Very little, is the simple reply, and although this article is only a general outline of the subject and is not intended to substitute for a detailed analysis of the Private Interest Foundation legislation created under Law Number 25 of 1995 in Panama, it will give the reader a broad picture which will provide an overall view of this useful addition to Panama's slate of offshore financial services products.

The definition of the Panamanian foundation can be elusive and it has been viewed as an incorporated company but without shareholders, so it can be argued that it acts like a trust with parties having certain beneficial rights but operates like a company. A foundation, like a company, owns its assets whereas a trust does not, and a trustee only manages the assets on other parties' behalf. In the strict sense of the word foundations do not have beneficiaries, only parties with rights. This classification can be very important in the legal sense. The foundation can be created by one or more individuals and it can also be formed by a company or other legal entity. Although the foundation must have a name, it is not necessary for the party or parties creating it to be recorded in the foundation charter as the founder or founders because a nominee can be used. In this way complete confidentiality can be achieved. The confidentiality provisions of the local law require both professionals and public servants not to divulge information to unauthorised third parties and disclosure can result in a fine and imprisonment. Disclosure, however, will be sanctioned in the case of defined crimes.

Foundations in Europe have been used for well over 100 years and it is fair to say that the law governing Panamanian foundations is based on Liechtenstein law so the nature of the Panamanian foundation is understood and appreciated by many Europeans. Foundations in Panama, as in Europe, are ideal succession tools, and they can either be inter vivos (active during the client's lifetime) or testamentary (upon death) but they may not engage in general commercial activities, unlike a trust. Although the Panamanian foundation cannot be established for purposes of commercial profit, it can own assets (such as active companies) which do generate profits. It is best to regard it both as a receptacle for the assets of the offshore structure and the means by which beneficial ownership of those assets is determined. The foundation can serve as a substitute for a will which avoids probate and can effectively isolate a portion of one's estate, dictating the management and succession of specific assets.



The fundamental difference between a Panamanian foundation and a trust is that one has its roots in the common law and the other is a product of civil (Napoleonic) law. Whilst a trust is wedded to equity, the foundation is the owner of its own assets and functions in a codified legal system. Also, unlike the trust (with some exceptions), it is necessary to have the Panamanian foundation charter notarised and recorded in the Public Registry in order to validate its terms. Rather than trustees, the foundation is managed by a council which acts more like a board of directors. Although the foundation appears – and is – similar to a trust, it is, in fact, as I mentioned earlier, more like a company in its style of operation. Its component parts comprise the Foundation Charter, Foundation Council (minimum of 3 persons if not a corporate body), Protector or Adviser/s (optional) and Regulations (a private document which does not need to be registered and can contain the details of those to benefit and other ancillary matters which the client wishes to record but wants kept confidential). And, like a company, the Panamanian foundation must have a local Registered Agent (lawyer or law firm) in order to establish a legal address in Panama. It can also usually be transferred into and out of Panama in a similar way to companies that are able to change domiciles.

The terms of the foundation charter can be made as fluid or rigid as one wishes and, equally, the regulations can be written in such a way that their provisions can be altered to meet contingencies. Unlike the trust, there is an initial minimum corpus which is US\$10,000 cash (or equivalent value in another currency). The assets of the foundation are not subject to local taxes (with some exceptions) unless the income is earned within Panama. One important – and attractive – local tax exemption extends to money placed on interest-bearing deposit with any banking institutions by the foundation in Panama.

But before you proceed with establishing a foundation you should satisfy yourself in a number of areas. Due to the introduction of the Common Reporting Standard across the globe, it is important for tax payers to understand that classifying the Panamanian Private Foundation for tax purposes can be complex, but the tax classification is important so that tax returns are filed correctly and tax can be limited or, in certain special instances, avoided.

Panamanian foundations certainly add scope to the options available in offshore estate planning and they should not be overlooked as potential and vital elements in the implementation of an overall offshore plan. Often they serve as a viable alternative to the ubiquitous foreign asset protection trust. They have a lower profile, being less popular, and less vulnerable to hostile interpretation (especially as the sham trust principle is not recognized) by the courts. Assets properly gifted cannot be seized or attached and they



cannot be used to satisfy the obligations of either the founder or the parties to benefit. The only exception is that creditors have a right to challenge a Panamanian foundation within a period of 3 years from the date the assets being claimed are given to the foundation. The period runs from the date that the assets went into the foundation and so the fact that the foundation has been in existence for, say, 5 years already will have no bearing on the case whatsoever.

The only cautionary note which I would add is that because there are many drafting and tax issues to be taken into consideration, you should ensure that you choose the right professionals to advise you. The tax and legal implications onshore should be clarified and in the case of practitioners offshore, you should make sure that they are properly licensed. Ask also about their qualifications and experience; you must, needless to say, visit the offshore practitioner: there is no substitute for making personal contact.

Finally, on the question of professional costs, don't be guided solely by this factor alone. I have found that often what is cheap has turned out to be costly in other ways and no more so than when it concerns offshore financial services.

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