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Trusts & Foundations in times of Automatic Exchange of Information – How can they help to Master Challenges of Your Family Wealth?

Answers to Your 5 most frequent questions

In times of Automatic Exchange of Information ("AEOI") Trusts and Foundations receive increasing media coverage. Wealth owning families are eager to learn about trusts and foundations and their use in succession planning and asset protection as well as on their treatment under AEOI-Rules or national CFC-legislation. For the smart wealth owner, it is more and not less the case that trusts and foundations have to be considered as key instruments in your wealth planning tool box.

1. What Can Trusts and Foundations Achieve that Others Cannot?

Both trusts in common law countries and their sibling, the foundations, in civil law countries have a long history. They were developed under the King of England in the 12th century when noble man went off as crusaders to Jerusalem not knowing whether they would return or not. When a landowner left to fight in the Crusades, he conveyed ownership of his lands to a friend in his absence to manage the estate and pay and receive feudal dues, on the understanding that the ownership would be conveyed back on his return. The legal owner would hold the land for the benefit of the original owner, and would be compelled to convey it back to him when requested. The Crusader was the "beneficiary" and the acquaintance the "trustee". With OECD-regulation and Automatic Exchange of Information legislation international recognition of trusts and foundations has significantly increased. Both offer the ability to families to set out how they would like assets to be held and distributed in the long-term. Structures can allow oversight over family assets, with appropriate "checks and balances" over trustee or foundation board members who take on the responsibility to look after things in a way that meets the needs of the family involved.

2. Revocable or Irrevocable – that's the Question?

In simple terms, there are four characteristics of trusts and foundations that are important to understand: revocable or irrevocable, fixed or discretionary. The settlor of a trust or the founder of a foundation is able to choose, when establishing the structure, whether to retain a right to "revoke" or cancel the structure. Being irrevocable does not mean that the founder or settlor cannot be a potential beneficiary, but it does mean that a clear right to cancel the structure and get the assets back does not exist. While it may be tempting to think that it is always better to have a structure be revocable, this is not necessarily the case. If I am a founder or settlor, and am concerned about future lawsuits I may face, will the assets held in a trust or foundation be safer against claimants if I have a legal right to get the assets back as opposed to an irrevocable structure where I do not? For a structure to receive recognition by tax authorities irrevocability is generally required.

3. Why Fixed or Discretionary?

And is it better in the context of the wealth owner's objectives for the trust or foundation to be fixed or discretionary? There is no single right answer. If the structure is required to distribute to my child when he reaches the age of 25, my child is a beneficiary with a "fixed" interest. If the trustee or foundation does not make the distribution, my son can sue to enforce the rights. The opposite is where the structure is "discretionary" – meaning that the trustee or foundation board does not have to distribute to my son when he reaches 25. I, as the settlor or founder, may have provided "letter of wishes" expressing my hope that the trustee or foundation board would consider a distribution when my son reaches 25, but by leaving this in the discretion of the trustee or foundation board, my son does not have a legal right to force a distribution. Is this good or bad you may ask? Well, if my son is subject to a marital or other dispute, the assets may be significantly safer if my son does not have a legal right to the assets.



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Good governance in trusts and foundations requires careful attention to oversight of the trustee or foundation board, and this is often achieved through the inclusion of a protector or guardian. A good trustee or foundation provider will provide wealth owning families with clarity on the choices families have and help guide them through “what-ifs” that families should be asking themselves on an ongoing basis. And, the trustee or foundation board will not have any reason to not follow your request whenever you would ask for disbursements or distributions.

4. How can Trusts and Foundations be used for Succession Planning?

In case of death of an account holder it can take years to get the right documents in shape good enough and sometimes it can last very long to know the applicable law allowing to divide the estate as well as to let a bank accept any or all the heirs to dispose of the assets on a bank account. For all assets that were owned by the deceased or his corporation there will start the question who is entitled to get access, what law is applicable, are there competing heirs who might have a better right to it etc. And even worse in case the account holder loses his capacity to act – imagine how long time it would take to appoint an official guardian at your place of residence? As the foundation continues to stay alive whilst its settlor/founder might pass away it continues to be the owner of the assets and due to it the assets cannot fall into the estate of the deceased. This way inheritance laws are not applicable to those assets unlike it is for the assets kept in the name or in an account of the deceased.

5. Russian CFC-Legislation? What about Tax and Automatic Reporting?

The good news for wealth owners is that in many countries, including Russia and CIS-countries, trusts and foundations are becoming increasingly understood. The development of tax and reporting rules by OECD and subsequently by national Automatic Exchange Lawmakers have helped to clarify the legal and tax treatment of these structures and when and how interests in trusts & foundations need to be reported. This is a good thing, as tax planning, which can still be achieved in legal and accepted ways using trusts and foundations, is only one of many needs of wealth owning families. Even under Russian Controlled Foreign Corporation legislation (short “CFC-legislation”) trusts and foundations have explicitly been acknowledged as tax compliant structures if certain conditions, inter alia irrevocability and discretionarity, are met.

Do you have any questions? – We're happy to help!