

# Fact Sheet

## Cook Islands Foundations

*By incorporating our asset protection features, the Cook Islands Foundation enhances wealth planning options for wealthy and ultra-wealthy clients.*

### ● Background

The Cook Islands has provided foundations as a wealth management tool since the enactment of the Foundations Act 2012 (the Act). Well known for its trust and corporate laws and structures that enhance the protection of an individual's wealth, the Cook Islands has combined some of the technical and practical features of both its international trusts and international companies resulting in the Cook Islands Foundation (CIF), a wealth planning vehicle that is recognised internationally, in both civil and common law jurisdictions, for its flexibility and ease of administration.

### ● What is a Foundation?

A foundation is a body corporate, traditionally viewed as being a hybrid of a trust and a company. A foundation has a separate legal personality, meaning it can hold and own assets and take court proceedings in its own name in the same way that a company or individual may. In this respect a foundation differs from a trust where it is the trustees of the trust who own assets, enter into contracts and take court proceedings. A foundation's powers will be exercised by its council, which is similar to a company's board of directors. Unlike a company, a foundation does not have shareholders and is in effect ownerless.

### ● General Features of a Cook Islands Foundation

The CIF includes the following features:

**Founder:** The Founder is the person who instructs the Cook Islands Licensed Trustee Company (LTC) to apply for the establishment of the CIF.

**Endowment:** Assets are contributed to the CIF by way of endowment. A person who contributes assets is not necessarily the Founder.

**Foundation Instrument:** Every CIF must have a Foundation Instrument that specifies the name of the CIF, its registered agent and the objects for which it is established. The objects must be lawful, moral and not against public policy.

**Objects:** A CIF may be established for charitable or non-charitable purposes, for the benefit of specified persons or a class of persons, for a specified purpose or any combination of the same. It is not required to have named beneficiaries.

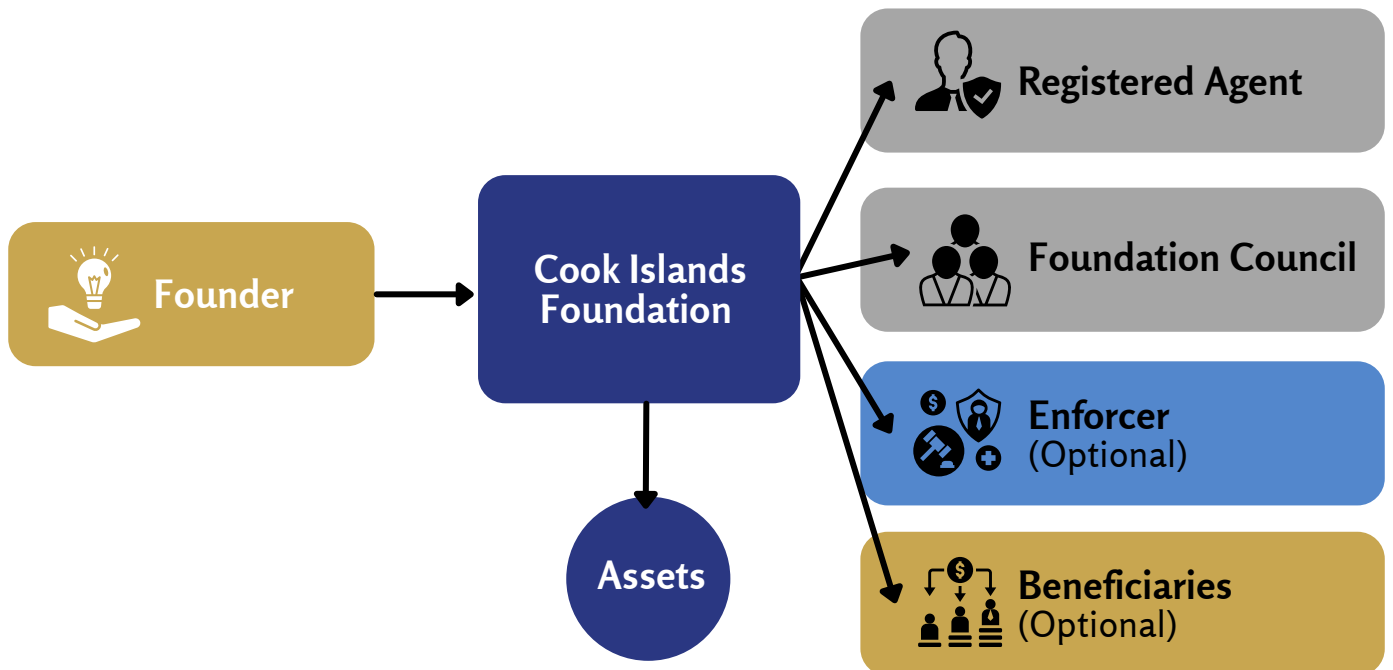
**Foundation Rules:** A CIF must have Foundation Rules, a copy of which is kept with the Foundation's registered agent. The Foundation Rules establish the Foundation Council and provide for the appointment, removal and retirement of the CIF's registered agent and enforcer. The Foundation Rules will usually provide details of how the CIF will operate and any rights or powers over the CIF and its assets that are reserved to the Founder or third parties.

**Foundation Council:** A CIF must have a council that will consist of at least one member who can be a corporate. The CIF’s registered agent can be a council member. The Foundation Council administers the CIF’s assets and carries out its objects.

**Enforcer:** A CIF may have an enforcer. The enforcer is to take reasonable steps to ensure the Foundation Council carries out its functions. The powers of the enforcer shall be set out in the Foundations Rules.

**Duration:** A CIF may be perpetual or be terminated upon the happening of a specified date or event.

**Financial Records:** A CIF is required to keep reliable records which enable the financial position of the CIF to be determined with reasonable accuracy at any time and allow financial statements to be prepared. The financial records are to be kept at the registered office for a minimum of 6 years.



*Structure Diagram: Cook Islands Foundation*

## Asset Protection Focus

The Act incorporates a number of the asset protection features also contained in the Cook Islands’ international trust laws, including:

- Any foreign judgement or court order concerning a CIF, or asset transfer to a CIF, shall not be recognised, enforced or given effect to where the foreign court has not taken the provisions of the Act into account.
- Foreign laws (i.e. laws other than those of the Cook Islands), including forced heirship rights, shall not apply to invalidate the establishment of the CIF or any disposition of assets to the CIF.

- A CIF, or any disposition to a CIF, shall not be fraudulent against a creditor of the Founder if the disposition occurs either prior to the creditor's cause of action arising, or more than two years after it arose. If, however, the cause of action arises within two years of the disposition taking place, the creditor must bring an action in a court of competent jurisdiction within one year of the disposition. In addition, any action to set aside a CIF or any disposition to a CIF, must be commenced in the High Court of the Cook Islands within 2 years of the establishment of the CIF or the disposition in question.
- Where the creditor is able to bring an action within the time limits prescribed he/she must prove beyond reasonable doubt that the CIF was established, or particular disposition made, with the intention to defraud that creditor and once made rendered the Founder insolvent.
- The only remedy available to a successful creditor is an award of damages from the assets of the CIF. Punitive damages cannot be recovered from a CIF.

## Registration

An application to register a CIF must be made by a LTC. Every CIF must appoint a LTC residing in the Cook Islands as its registered agent with the LTC also providing the registered office and business address for the CIF. The LTC must provide to the Registrar a copy of the Foundation Instrument and a signed declaration confirming that the LTC holds a valid copy of the Foundation Rules. Upon establishment of the CIF the Registrar will enter on the Foundations register the name and business address of the Foundation and its Cook Islands registered agent together with its objects. A CIF will not come into effect until it is endowed with its initial capital. No details of the Founder, asset contributors, enforcer or beneficiaries (if any) of a CIF are lodged with the Registrar.

## Uses of a Cook Islands Foundation

A CIF can be used in many ways and for a variety of purposes in private wealth management planning and commercial and charitable activities. CIFs may be preferable to a trust in structuring for succession planning where a Founder wishes to retain greater control of CIF assets as a council member and given that the Foundation Council has no fiduciary obligations to beneficiaries who therefore have no right to enforce the CIF and no rights to information.

Foundations can be particularly useful in holding assets that a trustee might be reluctant to hold given a trustee's duty to diversify and to act prudently and in the best interests of beneficiaries. Such assets might include those with volatile values and single high value assets such as aeroplanes, artwork and boats. In this scenario, the Foundation Council's duty will simply be to ensure the object of the CIF (namely the holding and preservation of the asset) is achieved.

A CIF can provide a long term holding structure for a family business to help ensure the business is not fragmented on the passing of the Founder. A traditional trust structure can be problematic in this context due to the trustee's duty to diversify investments. The CIF can be established for the purpose of holding the company for the benefit of the family with the Foundation Council's duty being to retain the company for the benefit of the family.

In the commercial context, a CIF can be used as a special purpose vehicle established for a specific business purpose. A CIF is an ownerless incorporated vehicle so is ideal where ownership needs to be separate from the rest of the structure and in particular off balance sheet transactions.

Some more practical uses of CIFs include the CIF holding shares in a private trust company (PTC) used by individuals or families to retain a high level of control over a trust's assets. Family members can sit on the board of the PTC and or be a member of the Foundation Council to have direct involvement in trustee decisions. CIFs can also be used as the protector or enforcer of a trust as well as own shares of any corporate protector or enforcer involved in a trust structure.

Any special purpose entity can be placed underneath a CIF and take advantage of the wealth protection features offered by the Act.

## Summary

The flexibility offered by a CIF through carefully drafted Foundation Rules and the active involvement available to the Founder and his/her family and associates in the operation of the CIF, makes it an attractive option when implementing a wealth management plan to hold, invest and transfer assets to the next generation. A CIF is functional, practical and easy to administer whether used as an alternative to or in conjunction with a trust, for succession, philanthropic or business objectives. The CIF provides another important tool in the Cook Islands' wealth management tool box.

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