

Series on the most confidential structure in the world

Article I	.....	Polar Bear Custodian has unrivalled, incomparable confidentiality, not subject to exchange of information for any tax treaty.
Article II	.....	Polar Bear Structure not subject to Common Reporting Standard (CRS).
Article III	.....	Polar Bear Structure not subject to Foreign Account Tax Compliance Act (FATCA).
Article IV	.....	Polar Bear Structure not subject to Crypto Asset Reporting Framework (CARF).
Article V	.....	Decant the Polar Bear Custodian to any trust, maintaining confidentiality of settlor.

Article IV – Polar Bear Structure not subject to CARF

Mark Morris. Is the designer and provider of the arrangements described in this series. He has been exclusively involved with automatic exchange of information since 2003. He consulted the OECD on AEOI flaws. Advised EU Commission, EU Parliament and Tax Justice Network. Testified to German Parliament on the flawed Swiss German EU Savings Tax Directive proposal.



Legal opinions, where utilized in this series of articles was provided by Paul Millen of Millen Tax & Legal GmbH, Zurich, Switzerland. Paul is a qualified US attorney and a member of the New York State bar in good standing since 2007. He is not, however, licensed or qualified to practice law in Norway (including the territory of Svalbard) or the United Kingdom and, thus, any views expressed on legal implications in those jurisdictions are not within his professional expertise.

Paul Millen was engaged by Mark Morris in January 2024 to provide a preliminary analysis of CARF classification possibilities for the above structure and again in April to deepen the CRS analysis. (“Preliminary Analysis”).

This Preliminary Analysis solely addresses compliance matters under the incoming OECD CARF regime; no other rules, regulations or tax or legal implications are contemplated and therefore this Preliminary Analysis may not be relied upon for any such topics.

Article IV – Polar Bear Structure not subject to CARF

A narrative of the world’s most confidential arrangement

Article I – Unrivalled incomparable confidentiality:

The Polar Bear arrangement is a UK governing trust with a Svalbard resident trustee, holding a professionally managed investment entity or a non-financial nominee entity or a Private Placement Life Insurance Policy. Describes why Svalbard is explicitly excluded from Norway’s 89 double tax treaties, multilateral competent authority agreements¹, and bilateral agreements². Thus, it’s not subject to automatic exchange of information, nor exchange upon request. The trust is not recorded on any beneficial owner register, nor registered with tax authorities. The arrangement is not subject to the OECD³, EU⁴ and UK⁵ Mandatory Disclosure Rules (MDR)⁶. The registered Person of Significant Control of the UC is only the Trustee.

Article II – Legitimately exempted from CRS:

Chronicles why the described arrangement is explicitly excluded from the OECD’s Common Reporting Standard (CRS)⁷. This unique exception is not based on CRS misinterpretations / omissions, as are commonly used loopholes.

Article III – Legitimately out of FATCA’s scope:

The arrangement is not subject to the obligations of the Foreign Account Tax Compliance Act (FATCA)⁸. Penalties and recalcitrant reports for non-compliance are not applicable. It has none of the downsides of hiding assets in the US.

Article IV – Legitimately exempt from CARF:

The arrangement is not subject to the OECD’s Crypto Asset Reporting Framework (CARF)⁹

Article V – Distributing to another trust maintains the confidentiality of the settlor:

The Trust can resettle to any trust worldwide. The confidentiality of the economic settlor is maintained if the Trust decants to another named beneficiary trust.

¹ Reservations and Declarations for Treaty No.127 - Convention on Mutual Administrative Assistance in Tax Matters
<https://www.coe.int/en/web/conventions/full-List?module=declarations-by-treaty&numSte=127&codeNature=4&codePays=NOR>

² Limited scope treaties such as aviation earnings with Uruguay and Uzbekistan.

³ “MDR” refers to the OECD Base Erosion and Profit Shifting Project Mandatory Disclosure Rules.

⁴ “EU MDR” refers to Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

⁵ “UK MDR” refers to HMRC’s mandatory disclosure rules where an arrangement will be reportable if it involves the use of opaque offshore structures or if it circumvents reporting under the Common Reporting Standard (CRS).

⁶ MCAA-MDR the term “Jurisdiction” means a country or a territory in respect of which the Convention is in force and is in effect, either through signature and ratification in accordance with Article 28, or through territorial extension in accordance with Article 29, and which is a signatory to this Agreement.

⁷ “CRS” refers to OECD, “Standard for Automatic Exchange of Financial Account Information in Tax Matters”.

⁸ <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca>

⁹ “CARF” refers to OECD, “Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard”.

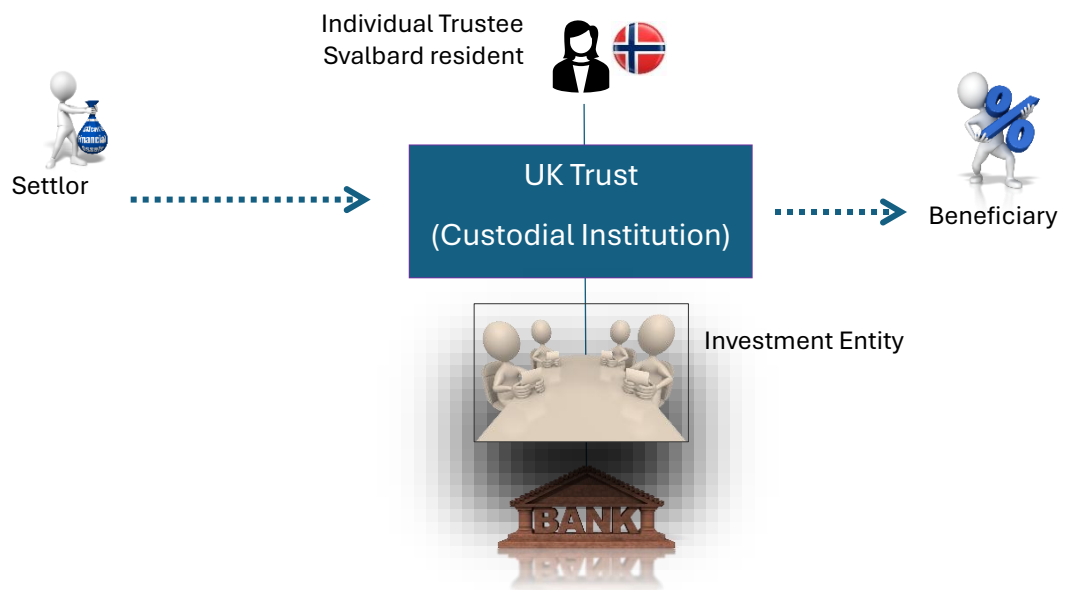
Article IV – Polar Bear Structure not subject to CARF

Backbone of the world’s most confidential structure

MCAA, IGAs and tax treaties¹⁰ oblige Financial Institutions to automatic exchange of information and exchange on demand regarding financial assets. OECD extends this to crypto transactions. Structures using offshore jurisdictions no longer provide previously assured confidentiality and asset protection. Remarkably, the strongest confidential and asset protection structure in the world is onshore, formed in the respected jurisdictions of the UK and Norway.

In the 1920 Treaty of Spitsbergen, 14 countries recognized Norway’s sovereignty over the Arctic Archipelago. Additionally, 34 more nations acceded to the treaty after it was ratified in 1925. The archipelago was incorporated as a part of Norway and renamed Svalbard. It is the only visa free jurisdiction in the world and has autonomy in 31 areas including immigration and tax. Hence is not part of the EU, EEA, Nordic association of countries, Schengen or NATO. Consequently, the OECD’s Multilateral Competent Authority Agreements and all of Norway’s bilateral tax treaties explicitly exclude the territory of Svalbard. It thus does not participate in CRS, FATCA, and CARF. Neither does exchange of information on request apply. Svalbard does not participate in any other OECD BEPS¹¹ project requiring an MCAA, such as Mandatory Disclosure Rules.

The UK-Svalbard Polar Bear Custodian



The structure results in minimal AEOI due diligence and no reporting duties

¹⁰ Multilateral Competent Authority Agreements (MCAA) and tax treaties are the legal basis for exchange of information.

¹¹ Domestic tax base erosion and profit shifting (BEPS) relates to tax planning strategies that multinational enterprises use to exploit loopholes in tax rules to artificially shift profits to low or no-tax locations as a way to avoid paying tax. The OECD/G20 BEPS Project equips governments with rules and instruments to address tax avoidance, ensuring that profits are taxed where economic activities generating them take place and where value is created. <https://www.oecd.org/en/topics/policy-issues/base-erosion-and-profit-shifting-beps.html>

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Proposition

Under the present text for the OECD's Crypto-Asset Reporting Framework (CARF), the treatment of a company underlying a trust and engaging in Relevant Transactions pivots on the classification of the company under the OECD's common reporting standard (CRS) and its operational role in the specific structure. Where the company qualifies as a Financial Institution (FI) for purposes of CRS, then it will likewise qualify as a Crypto-Asset User (CAU) for CARF, akin to an account holder under CRS.

Where, however, the company specifically qualifies as a professionally managed Investment Entity (PMIE) FI, it will not qualify as an Excluded Person for purposes of CARF. Accordingly, any Reporting Crypto-Asset Service Provider (RCASP) with which the company conducts a Relevant Transaction would need to document it for purposes of CARF by looking through to the company's Controlling Persons and reporting any who are resident in a Reportable Jurisdiction. If, however, the company qualifies as a Non-Financial Entity (NFE) for purposes of CRS and operates in an agent-like capacity, then it may be ignored for purposes of CAU identification. If so, the RCASP with which the company conducts a Relevant Transaction would need to document the trust as the CAU and report accordingly.

1. Current structure

Consistent with an existing template, the wealth management structure envisioned for holding crypto assets through an offshore trust (the "Svalbard Structure") consists of the following

A trust administered in the Svalbard territory of Norway and governed by UK law (the "Trust"):

- Owning one hundred percent of the shares of a non-domiciliary UK company, which is not professionally managed at the company level (the "UC")
- Which directly holds crypto assets qualifying as Financial Assets¹²
- Which may be subject to professional management by other FIs, such as banks or external asset managers

¹² A Financial Asset for purposes of CARF "includes a security (for example, a share of stock in a corporation; partnership or beneficial ownership interest in a widely held or publicly traded partnership or trust; note, bond, debenture, or other evidence of indebtedness), partnership interest, commodity, swap (for example, interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity index swaps, and similar agreements), Insurance Contract or Annuity Contract, or any interest (including a futures or forward contract or option) in a security, Relevant Crypto-Asset, partnership interest, commodity, swap, Insurance Contract, or Annuity Contract." (OECD CARF Standard, Section IV.E10).

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Classification analysis of the structure if the UC is an FI

In many circumstances following the onset of CARF in 2026, the Svalbard Structure will interface with an RCASP whenever it engages in crypto-asset transactions. Because it will be the party conducting Relevant Transactions¹³ with an RCASP, the UC will be assumed to be the CAU and therefore be subject to CARF-mandated due diligence by the RCASP. Following the due diligence rules set forth in Section III(B), the RCASP will request a self-certification form from the UC. By means of that self-certification form, the RCASP will determine that the UC is not an Excluded Person for purposes of CARF because this definition explicitly excludes PMIE FIs¹⁴. As such, the RCASP will need to obtain self-certification forms for the Controlling Persons of the UC and report them accordingly.

As the first rank of Controlling Persons of a company consists of its shareholders (with an equity interest greater than or equal to 10% or 25%, depending on the applicable rules), the Trust, as the sole shareholder of the UC, must be addressed. The Trust, as a probably Custodial Institution FI under CRS (see next section for analysis), would qualify as an Excluded Person under CARF.¹⁵

Thus, for example, if the Trust were itself the CAU, the RCASP would not need to look through the Trust to document its Controlling Persons¹⁶. However, there is no indication so far that the inclusion of an Excluded Person in the chain of ownership functions as a blocker to the identification of Controlling Persons under CARF. Accordingly, the healthiest interpretation of the current rules suggests the RCASP will be obliged to identify the natural persons exercising indirect control over the UC and thus will need to look through the Trust to its Controlling Persons. To the extent that the UC¹⁷ and/or any of the Controlling Persons of the Trust¹⁸ is resident in a Reportable Jurisdiction for the RCASP, it will need to report them.

¹³ The term “Relevant Transactions” refers to any crypto-to-crypto and crypto-fiat exchanges, as well as qualifying retail transactions and certain account transfers (OECD CARF Standard, Section III.C).

¹⁴ OECD CARF Standard, Section IV.E1 (excluding any entities from the definition of Excluded Person that are defined in Section IV.E5(B)).

¹⁵ OECD CARF Standard, Section IV.E1.

¹⁶ OECD CARF Standard, Section III.B.

¹⁷ OECD CARF Standard, Section IV.D7.

¹⁸ For a list of the parties to a trust structure who may qualify as Controlling Persons of the trust, please refer to Section IV.D10 of the OECD CARF Standard.

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Alternate classification analysis of structure, if the UC is an NFE

The above analysis shifts dramatically if the UC meets two conditions: (1) the UC is not an FI per CRS and (2) the UC functions in an agent-like capacity on behalf of another party¹⁹ In the case where both conditions are fulfilled, an exception to the standard for the identification of the CAU applies. This exception (borrowed from CRS) instructs the relevant RCASP to disregard the nominal party to the transaction (i.e. the UC) and, instead, to document the party on whose behalf the nominal party is entering into the Relevant Transaction (i.e. the Trust)²⁰. The instruction only applies where the nominal CAU is operating “as [an] agent, custodian, nominee, signatory, investment advisor, or intermediary.”²¹ The full scope of this exception will likely depend on local legislation and guidance, but a claim that such a company is operating as a sub-custodian for a Custodial Institution FI seems prospectively plausible.

Assuming that the UC does meet the two conditions for being disregarded, then any RCASPs conducting a Relevant Transaction with the UC will ignore it for CARF due diligence purposes. Instead, the RCASPs should look to the Trust as the CAU and document it by requesting a self-certification form from the Trust, the completion of which requires a CRS classification for the Trust.

The threshold inquiry for any entity classification process under CRS is whether the entity is governed by the CRS rules in force in any jurisdiction implementing CRS and, if so, which one(s). The criteria for identifying a jurisdictional nexus with any particular jurisdiction tend to mirror that jurisdiction’s concept of “tax residence” for purposes of its income tax regime.²² Accordingly, corporations tend to be resident where incorporated and partnerships tend to be resident where managed and controlled. Trusts, however, are subject to a special rule because few of them are resident for income tax purposes in any jurisdiction. For purposes of CRS, therefore, trusts are deemed to be resident in any jurisdiction where one or more of the trustees of the trust is resident. In the current structure, all trustees will be resident²³ in the Norwegian territory of Svalbard.

¹⁹ Note: A third condition, that the CAU not itself qualify as an RCASP is both straightforward and unstable. As currently set, the activities underlying the definition of an RCASP is limited enough to squarely exclude any component entities within the Svalbard Structure 1. However, the equivalent definitions under other analogous rule sets is broader. If the RCASP definition is expanded in the course of local law implementation, that determination may be subject to change.

²⁰ According to the OECD CARF Commentary to Section IV, the RCASP may make the determination to disregard the nominal CAU based on information in its possession, including information collected for AML/KYC purposes so long as certain conditions are met (para. 37).

²¹ OECD CARF Standard, Section IV.D2.

²² See OECD CRS Commentary to Section VIII, para. 4.

²³ See OECD CRS Commentary to Section VIII, para. 4.

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As Norway is a Participating Jurisdiction, the Norwegian CRS laws and regulations would seem the intuitive rule set to apply to a trust administered by one or more trustees in Svalbard. Consistently though, Svalbard is omitted from tax treaties entered into by Norway.²⁴ More specifically, it is expressly excluded under the “Norwegian Declaration” section of the country’s CRS accession instrument.²⁵ Accordingly, Svalbard is not a participant in CRS (or CARF) as part of Norway. Moreover, Svalbard has neither independently entered into a CRS or CARF exchange agreement nor joined either regime as part of another grouping. As such, entities resident in Svalbard (more precisely, those not deemed to be resident in any Participating Jurisdiction for purposes of CRS or CARF) are not directly subject to the reporting regimes and thus are not obliged to classify themselves and fulfil the compliance duties corresponding to their classification.

Accordingly, this classification analysis must next query whether any other jurisdiction that implemented CRS can claim governance over the Trust. As the Trust is governed by UK laws, the intuitive alternative to Norway is the United Kingdom. However, the United Kingdom disclaims jurisdiction over any trusts not administered by one or more UK trustees.²⁶ In the absence of further viable alternatives, evidently no jurisdiction’s CRS rules govern the Trust’s classification or assign any compliance duties to the Trust.

If an entity in a non-CRS jurisdiction needs a CRS classification to be documented as an Account Holder, the entity applies the rules governing the Participating Jurisdiction FI maintaining that particular account.²⁷ CARF mandates the same approach.²⁸ So, the CRS classification rules for the trust will depend on the jurisdiction of the RCASP conducting the Relevant Transaction and thus may vary. Mostly, though, the CRS classification analyses for trusts retain common characteristics across jurisdictions.

²⁴ See e.g. United States-Norway Income and Property Tax Convention (i.e. the Double Tax Treaty between the US and Norway), explicitly excluding Svalbard from the definition of the Kingdom of Norway in Article 2. See also, Norwegian Model 1 FATCA IGA, Art. 1.1d).

²⁵ Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters - Declaration by Norway; (Note: The authority for signatories to define the territorial scope relevant to such multilateral OECD tax treaties is set out in Article 29 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters).

²⁶ UK CRS Guidance Notes, IEIM400620.

²⁷ OECD CRS FAQs to Sections II-VII, Q17.

²⁸ OECD CARF Commentary to Section IX, para. 2.

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A typical approach for trusts under CRS analyses them initially as potential PMIE FIs. An entity qualifies as a PMIE if it (a) is managed by a Financial Institution (other than a PMIE) and (b) earns at least 50 percent of its gross income from Financial Assets.²⁹ Provided that a discretionary trust holds Financial Assets (e.g. a portfolio of securities or the shares of an underlying company), many jurisdictions automatically categorize them as PMIEs based on the assumption that the trustee of a discretionary trust conducts sufficiently management-like activities.³⁰ However, that applies only where one or more of the trustees is also an entity, which is not the case here. Thus, the Trust cannot qualify as a PMIE due to the management authority vested in its trustee because that trustee is an individual. There is, however, another FI category for which it may be eligible.

The definition of a Custodial Institution type FI is any entity that a) “holds...Financial Assets for the account of others” and b) earns 20% or more of its gross income from providing such services.³¹ The text of the first criterion seems to squarely apply to the classic purpose of a trust scenario:³² To hold legal title in a fiduciary capacity over assets at the behest of the settlor. The United Kingdom’s CRS guidance concurs, contemplating that FI trusts may be either Custodial Institutions or PMIEs and, furthermore, providing guidance on how to comply with CRS where the trust is classified as Custodial Institution FI.³³ Thus, it is impossible to state that the Trust does not satisfy the first criterion of the test for a Custodial Institution FI.

As for the gross income criterion that 20% or more of the entity’s gross income derives from providing such services³⁴ - the United Kingdom provides a useful list of which types of fees would qualify as compensation for “holding financial assets and providing related financial services”.³⁵ These include, but are not limited to, financial advisory, custody and account maintenance fees. Such fees, irrespective of their label, are the lifeblood of fiduciary service providers. That conclusion settles the analysis, if and only

²⁹ OECD CRS Standard, Section VIII.A6.

³⁰ E.g. Swiss CRS Guidance Notes, para. 2.2.3.4.

³¹ OECD CRS Standard, Section VIII.A4; UK CRS Guidance Notes, IEIM400650, listing the following types of income attributable to holding financial assets and providing related financial services:

- Custody, account maintenance and transfer fees
- Commissions and fees earned from executing and pricing securities transactions
- Income earned from extending credit to customers
- Income earned from contracts for differences and as the bid-ask spread of financial assets
- Fees for providing financial advice
- Fees for providing clearance and settlement services.

³² Outside of CRS, holding assets for a client (i.e. the settlor) is perhaps best understood as the classic role of the trustee and the trust is the custodial account, but CRS unusually defines trusts as entities (OECD CRS Standard, Section VIII. E3), thereby pushing down the custodianship to the trust itself. Accordingly, CRS needed to invent a set of Financial Accounts in trusts for purposes of due diligence and reporting (OECD CRS Standard, Section VIII.C4) C4).

³³ UK CRS Guidance Notes, IEIM400700IEIM400700, IEIM400800IEIM400800.

³⁴ The amount of gross income is tested over the preceding three years, or, if the entity was not in business for that long, during its existence or, if a brand-new entity, based on the income it intends to earn.

³⁵ UK CRS Guidance Notes, IEIM400700IEIM400700.

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if those fees are paid to the custodian for such services and they amount to 20 percent or more of the entity's income.

One early controversy under CRS was whether the fee income relevant to the gross income test had to be paid directly to the entity providing the services. Or, alternatively, could the custodian's fees be bundled together with associated fees and paid to another party? The OECD resolved that uncertainty by stating that "all remuneration for the relevant activities independent of whether that remuneration is paid directly" counts towards the gross income thresholds of the entity in question.³⁶ The UK CRS guidance notes adopted a similar approach, contending that where fees from multiple service providers are bundled together, a portion of the aggregate fee must be attributed to each entity providing a service and thus "consideration should be given to what would have been paid by an arm's length customer when applying the 20% test [i.e. the gross test income]."³⁷

Based on the aforementioned reasons, the fees paid by the settlor for the services provided through the Svalbard Trust Structure must be apportioned in part to the Trust. To the extent that the Trust does not earn substantially greater amounts of other income, it meets the gross income test for a Custodial Institution. Accordingly, the Trust may assume a CRS classification as a Custodial Institution type FI in all likelihood (but contingent upon the specific CARF rules in the jurisdiction of the particular RCASP).

Therefore, by means of a self-certification form, the Trust will communicate its CRS status as a Custodial Institution FI to the RCASP. A Custodial Institution FI qualifies as an Excluded Person under CARF³⁸ and thus the RCASP will not need to report the Trust nor to look through the Trust to its Controlling Persons for documentation and potential reporting.³⁹

CARF reporting duties of the Trust

FIs resident in a non-Participating Jurisdiction for purposes of CRS do not incur reporting obligations under the CRS regime. While the CARF jurisdictional nexuses differ from CRS⁴⁰, the principle remains intact. Accordingly, if the Trust is resident in a non-Participating Jurisdiction for purposes of CARF, then the Trust does not itself have any CARF reporting obligations, irrespective of its status as a Custodial Institution FI.

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³⁶ OECD CRS FAQs to Section VIIIA, Q9 (expressly applying this indirect remuneration standard to Custodial Institutions holding SPVs, such as in the structure under review).

³⁷ UK CRS Guidance Notes, IEIM400650.

³⁸ OECD CARF Standard, Section IV.E1.

³⁹ OECD CARF Standard, Section III.B.

⁴⁰ Compare OECD CRS Commentary to Section VIII, para. 4 with OECD CARF Commentary to Section IV, para 2.