

## Issue highlights

A parent company holding subsidiaries that do business or trade may qualify as an investment entity if its purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes.

Should a trust holding subsidiaries that do business or trade qualify to be an Active NFE, considering a holding company is different to a trust.

What TIN should account holder provide to bank for an untaxed Active NFE?

Why did the OECD update the FAQ to clarify that a reporting FI must look through non-reportable FIs holding a Passive NFE.

Is the asset test for an Active NFE prorated over the year or intended purpose of the assets.



**Invariably, a holding company that owns subsidiaries that do business or trade is an Active**

**NFE. However, there is an**

**obscure clause in the definition of Active NFE that a holding company can rather be categorized as an Investment Entity despite the definition of Investment Entities categorically excluding Holding Company Active NFEs**

CRS page 45 definition of the term “Investment Entity” specifically excludes an Entity that is an Active NFE because it meets any of the criteria in page 58 subparagraphs D(9)(d) through (g).

**“A holding company which mostly holds subsidiaries that do business or trade which acts as an investment vehicle may instead of being an Active NFE, can qualify as an Investment Entity”**

CRS Page 58 D(9)(d) **substantially all** (at least 80%) of the activities of the NFE consist of holding (in whole or in part) the outstanding

## this issue

A holding company is not necessarily an Active NFE if it holds subsidiaries doing business or trade **P.1**

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stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution, except that an Entity does not qualify for this status if the Entity functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes. In such case, the entity will be a Passive NFE. Note that the Mandatory Disclosure Rules exempts companies held by a fund from being an opaque structure.



## Typical question the author receives by email daily.

I am a tax- resident in a country that has not yet committed to the CRS, such as Thailand. I own and am director of, say, a Belize untaxed entity which is indeed an Active NFE, such as a trading company. My bank in, say, Singapore is asking me to provide the TIN of the company or it will close my account.

**Q. Must I, as a non-reporting jurisdiction person, complete the self-certification?**

If the jurisdiction where the bank is located has adopted d the wider approach, they will have all clients complete the self-certification, whether the client's country has joined CRS or not.

**Q. What TIN can I provide if Belize issues no TIN. Or can I just state TIN not available in Belize?**

Complete the tax residency is Philippines (if tax residency is based on place of management). No TIN because Philippines does not issue TIN to foreign entity managed in Philippines, else provide own individual TIN



CRS page 58 par 9(d) - The term "Active NFE" means any NFE that substantially all the activities of the NFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution.

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This article will describe why a trust should not be treated the same as a holding company. Although holding companies and trust companies have some similarities, they are separate types of businesses. The distinction is clear when viewing the definitions for each company, as well as looking at the three major points of differentiation: assets, control and setup.

**Holding Company Definition:** A holding company is a business or firm that owns the outstanding voting stock of other companies. The amount of voting stock the holding company owns is significant enough to let the holding company have a notable say in what the stock-issuing companies do. Because they are able to dictate the stock-issuing companies' operations in this way, holding companies also are known as parent companies. Generally, these companies don't produce any goods or services on their own, but the companies whose stock they own often producers and service providers.

**Trust Company Definition:** A trust company is a business or firm that has a fiduciary, agent or trustee relationship with another individual or business. The trust company oversees the management of whatever assets a settlor encompasses in the trust arrangement. These companies often are used when a settlor feels the trust company can do an equal or better job managing the assets than an individual person, or if the settlor does not know of anyone else who can act as trustee.

**Assets:** Holding companies can own their own tangible and intangible assets, such as land, buildings and copyrights. However, they also own the stock of the stock-issuing company, which means they also own a percentage of the tangible and intangible assets of that company. If the stock-issuing company has profit, the holding company is entitled to some of that profit based on the amount of stock owned. Trust companies also have their own tangible and intangible assets. Instead of additional stock, however, these companies own whatever assets the settlor has placed within the trust.

**Control:** As a partial owner of the stock-issuing company, the holding company usually is entitled to vote on issues within the stock-issuing company. They can directly control the stock-issuing company in this way and do not give up this right until they sell their stock. A trust company, by contrast, has the right to manage the trust assets, but only within the

**Should a trust qualify as a holding NFE? It should not but the CRS allows this loophole**

confines of the trust deed terms. In a revocable trust in which the terms can change, even though assets are titled over to the trust company, the settlor retains control of the trust and therefore still controls the assets. If the settlor dissolves the trust, the trust company's right to manage the assets disappears. With an irrevocable trust in which the terms cannot change, the settlor does not retain control of the assets in this way. However, the trust company must act under the fiduciary duties of loyalty and care on behalf of the beneficiaries at all times and therefore control still is limited.

**Setup:** Holding companies generally are started by entrepreneurs who understand the relationship between stock, company ownership, profit potential and voting rights. Their sole purpose is to manage the operations of other companies to make money. A trust company usually is started to provide specific goods or services, and the settlor selects the trust company based on how those specific goods or services relate to the trust assets. For example, an investment management company might become the trustee for a settlor's stocks, bonds or individual retirement account, while a bank may act as the trust company for savings, checking and certificate of deposit accounts the settlor has. Trust companies, therefore, generally have employees who are experts in the assets within the trust.

## Why must reporting FI look-through non-reportable FIs that own Passive NFEs?



CRS FAQ page 5 Q(5). Identification of Controlling Persons of Passive NFEs with Financial Institutions in the chain of legal ownership for purposes of determining the Controlling Persons of a Passive NFE, does the CRS allow a Reporting Financial Institution to not determine/report such Controlling Person on the basis that there is a Reporting Financial Institution in the ownership chain between the Passive NFE and the Controlling Person?

**No. The CRS status of intermediate Entities in the ownership chain is irrelevant for these purposes.**

So, for example a Trust owns a company which has a bank account. The bank must look through the passive NFE trust to the beneficiaries of the trust. Treating the trust as a FI, the bank must identify the settlor, beneficiaries that distributed to, protectors. No need to identify equity interest or . The Trust will duplicate report

So why does the OECD want the bank to duplicate report on the FI?

The CRS implementation handbook 2<sup>nd</sup> edition page 67 states the Reportable Jurisdiction Person will then be a Reportable Person unless specifically excluded such as a Financial Institution (which will itself be subject to the rules and obligations contained in the Standard).

So, the implementation handbook avoids duplicate reporting, yet the OECD CRS FAQ overrides this principle and demands duplicate reporting

I find no logical reason or purpose or advantage for the OECD mandating a reporting FI to look-through Financial Institutions which own passive NFEs, because the FI will report on the beneficial owners in any event. We await with bated breath for explanation or comment from OECD

### Consequences of irrational policy to look-through to Controlling Persons of entities held by Financial institutions

1. How does bank look-through Depository Institution, Insurance Company or Custodian Institution?
2. How does reporting FI look-through non-participating Financial Institutions such as Depository or Custodian institutions





## Type [A] Active NFE Asset test ?

The asset test for Active NFE is obscure, not detailing purpose of holding cash, or over what period holding cash makes it fail the asset test to be Active NFE

An Entity is an Active Non-Financial Entity if less than 50% of its income is passive income **and less than 50% of its assets produce or are held for the production of passive income**. What if the assets could produce passive income but do not actually produce any income in the period concerned?

The test of whether an asset is held for the production of passive income (Section VIII, D, (9), a) and the associated Commentary) does not require that passive income is actually produced in the period concerned. Instead, the asset must be of the type that produces or could produce passive income. For example, cash should be viewed as producing or being held for the production of passive income (interest) even if it does not actually produce such income.

The question at issue concerns, say a trading company which holds most of its assets in cash for much of the year. The FAQ clarifies cash may produce passive income, even it doesn't. The question is, is the company holding cash for the purpose of production of income, even though a trader requires the cash to buy stock? Does this even matter?

The second issue on the asset test, is should the asset be on average for the year, or at the end of the year picture? If so, could the entity merely avoid this by ensuring it has little cash on hand at year end.

## How a restaurant can change from an Active NFE to a Passive NFE ?

### A bad year could turn a business into a Passive NFE

A restaurant is usually a Type [A] Active NFE as its assets do not produce passive income and its revenue is not passive income. However, assuming a bad year where the restaurant makes an operational loss but earns some interest on its bank deposits. Theoretically, the restaurant will fail the income test where less than 50% of its income comes from operational activities.

In that case, the restaurant is a passive NFE





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## Upcoming publications

### next issue 06

What is 80% of activities of a holding  
company mean

When is holding company an Active  
NFE if it holds passive NFEs

What minimum threshold for FI  
managing assets to be an Investment  
Entity

Self-Certification – bank demanding  
TIN of untaxed Active NFEs

### a sprinkling of topics in future issues...

FATCA reciprocal Democrats progress

Is it possible to look through a non-  
participating Custodial institution, using  
only AML

Treating non-participating funds as a  
passive NFE - How is bank supposed  
identify multiple shareholders?

Can we ignore FAQ update until it is  
legislated?

Why an Active NFE is not a CRS  
solution