

**Trustee admin or custodial fees can be paid to unrelated 3rd parties, despite erroneous nexus requirements by some countries' CRS/FATCA legislation.**



My overall conclusion is that the few countries mandating an attribution-connection of fees paid the third parties is not a CRS requirement. It's origin is in domestic tax laws, not CRS or FATCA.

CRS Trustees and Custodial Institutions: Is there an attribution-connection test as promulgated by several CRS countries, or is this bullshit?

A Google search of the terms "CRS Custodial Institution attributed income connected" returns the CRS legislation of a handful of commonwealth countries, such jurisdictions as Cyprus, Hong Kong, Ghana, New Zealand, Australia, Saudia Arabia, Canada, and Mauritius.

Can unrelated third parties be paid for corporate trustees and Custodial Institution fees and the trusts and custodian entities still qualify as Reporting FIs for the Common Reporting Standard?

If a trustee or Custodial Institution is an SPV, then no attribution-connection need exist with the third parties collecting fees?


Must the third party be a related-connected entity or can they be unrelated/independent?

While CRS itself does not directly specify a related aspect, some jurisdictions, mainly Commonwealth such as New Zealand, have CRS regulations that promulgate that third parties must be related to the trustee/ custodial institution, .

Another confusing issue: Can payments made to independent parties only occur if the trustee/Custodial Institution is an SPV, as mentioned in the OECD CRS FAQ.

Without doubt, the OECD CRS-related FAQ clearly specifies that fees for Custodial fees can be paid to another entity. No word on the related-connected aspect.

The OECD CRS-related FAQ gives an example where a law firm sets up a trust and appoints a corporate trustee and client pays all fees to the lawyers. The lawyers are not doing the trustee services.



**CRS-related Frequently Asked Questions**  
(February 2019)

**9. Treatment of corporate trustees and SPV custodians**

**In certain instances, a professional accounting or law firm sets up a trust for a client and, as part of that process, appoints a corporate trustee. The client then pays the accounting or law firm for all services rendered in relation to the set-up of the trust, including the appointment of the corporate trustee and other trustee services. As such, the corporate trustee itself does not receive a direct remuneration for its services as these are paid to the accounting or law firm as part of the overall package.**

**In that light, for purposes of the gross income tests to be applied in the context of the definitions of Investment Entity and Custodial Institution, is it required that the remuneration for the relevant activities carried out is paid to the Entity to which the test is applied?**

No. For the purposes of the gross income tests to be applied in the context of the definitions of Investment Entity and Custodial Institution all remuneration for the relevant activities of an Entity is to be taken into account, independent of whether that remuneration is paid directly to the Entity to which the test is applied or to another Entity. This issue can also arise in the context of Entities that provide custodial services if the fees for such services are paid to another Entity.

**Let's review both views**

**Connected with third-party required view The application of the CRS to corporate trustees within a professional group, and to the trusts that such companies provide services to**

1. The CRS requires that reporting Financial Institutions carry out Due Diligence to review their financial accounts to identify accounts held (and/or, in certain circumstances, controlled) by foreign tax residents.

The FIs collect prescribed identity and financial account information about such persons, and if Reportable Persons, then report this information to the local Revenue Department for further exchange with the jurisdiction of tax residence of the account holder (or controlling person).

There are queries regarding the application of the CRS to corporate trustees who operate within a professional group (largely law and accounting firms) to provide trustee and managerial services to trusts that are clients of those professional firms. The queries have focused on what, if any, CRS due diligence and reporting obligations exist for the corporate trustee.

This sets out one view of when such corporate trustees and trusts will be Financial Institutions for CRS purposes but fees paid to lawyers or accountants within a professional group.

I disagree with this view as the OECD FAQ example does not state the lawyers / accountants are in the same professional group. I see no nexus between trustees and lawyers.

**HMRC on the definition of Custodial Institution for CRS**

**HMRC on Custodial Institutions**

There may be circumstances where an entity holds financial assets for a customer where the income attributable to holding the financial assets or providing related financial services either belongs or is otherwise paid to a connected party such as another company in the same group of companies. This may be because the entity holds assets for a customer of a connected party, or simply that any

consideration is paid to a connected party, either as an identifiable payment or as one element of a consolidated payment. In that case the attributable income should be taken account of when applying the 20% test.

Where an entity holds financial assets that are the property of a connected person, for example a company may hold the financial assets of some or all members of the group to which it belongs, and no or nominal fees are paid for that service, that is fees less

than would apply on a commercial basis, consideration should be given to what would have been paid by an arm's length customer when applying the 20% test.

Wow, so even if no fees charged because connected client, then consideration should be given to what would have been paid if customer were at arm's length

A Google search of the terms "CRS Custodial Institution attributed income connected" returns the CRS legislation of a handful of commonwealth countries, such jurisdictions as Cyprus, Hong Kong, Ghana, New Zealand, Australia, Saudi Arabia, Canada, and Mauritius. New Zealand Revenue Authorities in their CRS guidance claims CRS Section VIII(A)(6) definition of an Investment Entity includes an attribution test, which considers the nexus between such income and who performs such specified investment activities. New Zealand notes "This paragraph shall be interpreted in a manner consistent with similar language set forth in the definition of Financial Institutions in the Financial Action Task Force Recommendations, now updated recently as of November 2023, New Zealand claims the FATF recommendations underpin countries' Anti-Money Laundering regimes, and also contain a similar "activity-based" focus, i.e. looking at what entity performs the relevant specified activities.

## **Structure**

The arrangement is a trust whose gross income is 50% or more due to investing, reinvesting, or trading in Financial Assets.

The trust was set up on the advice of a professional firm (for example a law firm or accounting firm) to their client and that firm's own corporate trustee is the trustee of the trust.

The corporate trustee acts for the firm's client without charging any fees to the client directly for the trustee's services. However, its related entity (the firm) charges the client for the corporate trustee's services of managing and administering the trust (i.e. providing trustee services).

## **Corporate trustee does not charge fees**

Even though the corporate trustee does not charge, it is a Financial Institution by virtue of being a managing Investment Entity. Its related entity (the firm) is charging the clients for the corporate trustee's services of managing the trust's assets. The fees are attributable to prescribed activities (services) performed by the corporate trustee for or on behalf of the customer (the trust).

The corporate trustee therefore primarily conducts as a business, for or on behalf of a customer, the prescribed activities. This in turn means the trust is also an investment entity.

The analysis above is limited to a corporate trustee of a firm that derives most 50% or more of its gross income from investing, administering, or managing Financial Assets (as opposed to non-debt direct interests or real property)

### **Background Context**

This approach is consistent with the “attribution” reference in the CRS definition of investment entity (i.e. where there is connectivity – attribution between the fees and the prescribed investment activities).

This is because the fees are paid for the corporate trustee’s services. This “attribution” (connection) remains even though the firm charges for these services for the purposes of billing.

This same principle also applies to the definition of custodial institution

See page 160, paragraph 108 of the CRS commentary, which refers to the circumstances when income will be “attributable to” custodial services in terms of the definition of the custodial institution i.e. where the income results from and has a causal connection to those services.

This approach to the interpretation of these definitions is also in line with the interpretation that other Participating Jurisdictions (i.e. jurisdictions that have implemented the CRS) have adopted when considering this issue in the context of both the definition of Investment Entity and the definition of Custodial Institution.

Corporate trustees of a firm that derive most of their income from investing, administering, or managing direct interests in real property would not be “in business” financial institutions.

This point is also reinforced by paragraph 11 of the CRS commentary, which refers to the issue of whether or not an entity is a Custodial Institution as being driven by whether the entity performs the requisite custodial services (i.e. the safekeeping of financial assets for the account of others).

Notably, these overseas jurisdictions have explicitly based their approach to this issue on the “attribution” interpretation outlined above.

Furthermore, as noted above, the definition of Investment Entity specifically refers to this attribution test (as, indeed, does the definition of Custodial Institution).

2. The counter-argument – Entity unrelated/unconnected but earns the Trustee / Custodial Institution fees.

There is no attribution clause in the OECD CRS or the OECD CRS Commentaries or the Implementation Handbook or the CRS-related FAQ.

The OECD CRS FAQ page 14 Q. 9 - Treatment of corporate trustees and SPV custodians  
In certain instances, a professional accounting or law firm (note not related or connected) sets up a trust for a client and, as part of that process, appoints a corporate trustee. The client then pays the accounting or law firm for all services rendered in relation to the set-up of the trust, including the appointment of the corporate trustee and other trustee services. As such, the corporate trustee itself does not receive direct remuneration for its services as these are paid to the accounting or law firm as part of the overall package.

In that light, for purposes of the gross income tests to be applied in the context of the definitions of Investment Entity and Custodial Institution, is it required that the remuneration for the relevant activities carried out is paid to the Entity to which the test is applied?

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There is no attribution clause concerning payments made to related or connected parties

### **Attribution test of CRS Section VIII(A)(6).**

I smell bullshit about the CRS attribution clause of income for Custodians and Corporate

New Zealand Revenue Authorities in their CRS guidance claim that the definition of an Investment Entity in CRS Section VIII(A)(6) includes an attribution test, which considers the nexus between such income and who performs such specified investment activities. (Well, I do not see that)

Here is the entire CRS Section VIII Defined Terms - Paragraph A Reporting Financial Institutions - Subparagraph (6) Investment Entity:

I do not see where the CRS definition of an Investment entity includes an attribution test, or nexus feature, I sit indirectly in the FATF reference

Mmmh, maybe it's contained indirectly in "this paragraph shall be interpreted in a manner consistent with similar language outlined in the definition of Financial Institutions in the Financial Action Task Force Recommendations, now updated recently as of November 2023,

New Zealand stated proudly that the FATF recommendations underpin countries' Anti-Money Laundering regimes, and also contain a similar "activity-based" focus, i.e. looking at what entity performs the relevant specified activities does not prove that an attribution clause exists.

Again, I find no reference in the FATF Recommendations concerning Financial Institutions to "attribution of income to connected/related parties

I have to be honest here. I think the attribution test of income paid to connected entities or FIs is a bunch of horse pucky.

Claiming support by FATF of such a view, and throwing in terms of "similar activity-based focus, i.e. looking at what entity performs the relevant specified activities" is bingo bullshit promulgated by New Zealand and a few other Commonwealth countries.

Certainly, CRS regulation and its commentaries and implementation handbook and CRS FAQ do not contain attribution tests for the income of FIs.

So why do some countries deem (fictional reality) an attribution test for Custodial Institutions and Trustee services?

Domestic tax laws can contain attribution tests to attribute income to the correct party. Institutions in CRS do not have to follow domestic financial laws

**For those schmucks with an opinion that FIs, such as Investment Entities or Custodial Institutions, need to be supervised by a country's domestic financial regulations to qualify as an FI for CRS (except bizarro Canada).**

Page 159-160 on the OECD CRS Commentary

Commentary on CRS section VIII Financial Institutions

The term “Financial Institution” means a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company, as defined in subparagraph A(3) - (8).

Whether an Entity is subject to financial laws and regulations of a Participating Jurisdiction or is subject to supervision and examination by agencies having regulatory oversight of Financial Institutions, is relevant to, but not necessarily determinative of, whether that Entity qualifies as a Financial Institution under subparagraph A(3) - (8)

**Summary**

My overall conclusion is that the few countries mandating an attribution-connection of fees paid the third parties is not a CRS requirement. Its origin is in domestic tax laws, not CRS or FATCA.

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