

Where's my money, man? There are over two dozen significant loopholes which circumvent the CRS. This is a big task for the OECD to tackle. So it's best to eat an elephant one bite at a time. Let's focus for now on six loopholes easy for the OECD to smack down. 1.Trust as an Active NFE holding entity Trusts holding operational companies should never have been allowed categorisation as Active NFEs. Thereby, the CRS exempts holding trusts from reporting on their controlling persons. Page 45 paragraph (6)(b) The term

"Investment Entity" does not include an Entity that is an Active NFE because it meets any of the criteria in subparagraphs (9)(d), which is where substantially all of the activities of the NFE consist of holding subsidiaries that engage in trade or business. I won't go into the stupidity of categorising an entity receiving dividends as an Active NFE, when the CRS says a dividend from property companies is financial asset income. Duh. But what I do blame the naive OECD for is to allow trusts to qualify as Active NFE if it holds companies that engage in business. Trusts have completely different purposes to holding companies. Trusts collect income from financial investments in operational companies and distribute profits to settlor / beneficiaries. Why on earth then are these types trusts allowed to qualify their entity categorisation as Active NFEs ??

2. Identify controlling persons of listed entities that are not regularly traded No alt text provided for this image CRS misquotes FATF on identifying beneficial owner of listed entities. It is an unforgivable, incompetent screw-up by the OECD to garble the FATF recommendation on a company's controlling interest.

FATF recommendations page 61: Where the customer or the owner of the controlling interest is a company listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means) which impose requirements to ensure adequate transparency of beneficial ownership, or is a majority-owned subsidiary of such a company, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such companies. The relevant identification data may be obtained from a public register, from the customer or from other reliable source.

Now along comes the inept, inexperienced apprentice at the OECD and amateurishly opines an FI cannot determine the controlling person. Sheesh!

CRS Implementation Handbook page 70 paragraph(148). Recommendations do not require the determination of beneficial ownership if an Entity is a company that is listed on a stock exchange and is subject to market regulation and to disclosure requirements, either by stock exchange rules or through law or enforceable mean, to ensure adequate transparency of beneficial ownership. Further, FATF Recommendations do not require determination of beneficial ownership of a controlling interest that is held by an Entity described in the preceding sentence. Thus, in such cases, it is accepted that a Reporting Financial Institution will not be able to determine the Controlling Persons for CRS purposes.

FFS, what a balls-up to curtail the FATF paragraph on this issueand replace it with

an inane opinion. The OECD vocational student omitted the only crucial sentence from FATF recommendation 10 regarding listed entities that "The relevant identification data may be obtained from a public register or from the customer or from other reliable sources. FATF recommendations do not require immediate identification of controlling interest beneficial owners of listed entities because this information can be obtained from the exchange. Jeez, this is so simple to understand. Therefore, it's absolutely unacceptable for the OECD to express their opinion in the implementation handbook that FIs will be unable to determine Controlling Persons of listed entities. If the CRS can create beneficial owners such as protectors or debt interest in investment entities, then the OECD can mandate that controlling interest owners of listed entities can be obtained from the exchange. Just follow the FATF guidelines. However by omitting the FATF sentence on obtaining this information from the exchange, a loophole has been created. Note that using listings to avoid the CRS invariably do not meet the requirements of Active NFE regularly traded entitities because they don't sell 10% of their shares to unrelated parties every year, nor trade 60 days a year.

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Banks help client list on a small alternate exchange such as Curacao or Malta, and then in meetings with their client, and guffaw that according to the OECD it is accepted that the bank is unable to identify the client.

3. Reporting nil value for zero cash value policies

No alt text provided for this image Insurers created a Zero Cash Value (ZCV) policy to be out of scope of the CRS by interpreting the cash value (the amount that the policyholder is entitled to receive upon surrender) is zero and hence is not a cash value policy. The OECD came down hard on this con with a CRS FAQ update reminding the charlatons that if a policyholder surrenders his rights to access the cash value, the cash value does not wondrously disappear, and that the account holder remains the policyholder.

CRS FAQ update: Account Holders with respect to Cash Value

Insurance Contracts. With respect to a Cash Value Insurance Contract, are persons that have the right to access the Cash Value and the right to change the beneficiaries of the contract still to be treated as Account Holders for CRS purposes if they have renounced such rights? Such persons are to be considered Account Holders with respect to the Cash Value Insurance Contract in all instances, unless they have finally, fully and irrevocably renounced both the right to access the Cash Value and the right to change the beneficiaries of the Cash Value Insurance Contract. In cases where, taking into account the above paragraph, no person can access the Cash Value or change the beneficiaries, the Account Holder is any person named as the owner of the contract and any person with a vested entitlement to payment under the terms of the contract.

But wait, insurers think circumventing CRS is No alt text provided for this image

an ongoing board game to be won by the craftiest player. Insurers relunctantly agreeing a ZCV policy was deemed a cash value policy, retorted by reporting the "surrender value" as nil, i.e. the surrender charges is 100% of the policy. Insurers then assuaged clients that if there was a query by tax authorities on a nil value insurance policy, to respond that the policy was never funded, plausible because authorities have no clue there is such a product as ZCV policy. This is an in-yourfaceb nil report despite the OECD highlighting the cash value of a policy is the amount entitled to upon surrender or termination, even if policyholder voluntarily renounces that right. Surrender charges should only be the commission fees yet to be recouped. For the final checkmate move, the OECD should state the reportable value is the Cash Value or cash value less surrender charges relating to outstanding liabilities such as commissions. Cash value being the amount entitled to ignoring renouncement of the right to access the cash value.

No alt text provided for this image This is the easiest loophole in the CRS because the OECD clowns provided a ludicrous simple condition to meet the qualifying criteria. It's a fund established to provide retirement, disability, or death benefits, or any combination thereof, provided that the fund: a) does not have a single beneficiary with a right to more than 5% of the fund's assets (this loophole was tackled against Hong Kong ORSOs); and b) is subject to government regulation and provides information reporting to the tax authorities; and c) Satisfies at least <u>one</u> of the following requirements:

4. Broad Participation Retirement Funds as non-reporting Fls

of its total contributions from the sponsoring employers; iii) distributions are allowed only upon the occurrence retirement, disability, or death else penalties apply iv) contributions may not exceed USD 50,000 annually.

Let's break apart the inane conditions for a Broad Participation Retirement Fund

i) the fund is tax favoured; ii) the fund receives at least 50%

as a non-reporting FI is used to avoid the CRS. The muppet condition of Broad Participation Retirement Fund is that it only needs ONE of the four optional condition to be met... Only one for frigging sake... and some of these are embarrassingly meaningless simpleton conditions to meet. Tax favoured is not clearly defined. Some providers interpret this as being untaxed in thecountry of the provider, not the country of residence of the pension member. In any event, this condition is usually one of the ignored options to

withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, or penalties apply to distributions or withdrawals made before such specified events. Wow, the draftee who concocted this bit of brilliance.... The OECD elsewhere defines retirement as withdrawal of labour services from the market. here, there is no age requirement orcheck if retirement claim is plausible. The evading member merely has to claim, without proof at age 33 he is retiring. The international pension provider in say Guernsey is sure as heck not going to validate if the Colombian member has permanently withdrawn his labour from the market. And the clause about a penalty. Yep, provider will substract five quid if member withdraws before retirement. This is the one condition that evading providers will claim satisfies the condition of a Broad Particiaption Retirement Fund. What a frigging joke.

The most useless condition and one used to avoid the CRS is distributions or

The one of four optional conditions for Broad Participation Retirement fund needs to be expanded to several simultaneous conditions. Introduce a mandatory tax favoured condition in the members jurisdiction of residence. Ensure there is an annual \$50,000 cap with a lifetime limit. The condition about withdrawals for retirement is a joke and should be deleted. Loans must be prohibited.

5. Reporting nil value for settlors of irrevocable investment entity trusts No alt text provided for this image The purpose of automatic exchange of

financial information is that your home tax authorities can find the loot you're secretly hoarding in another country. Simple? Well seems it's not so cut and dried in Singapore. Squirrel your swag in an irrevocable investment entity trust there and they'll report you are stone-broke. Darned attractive to cross-border tax evaders. Your authorities want to know the value of undeclared cash placed in a trust

Your home country wants to know precisely how much assets you've concealed in a foreign trust. Even if its CFC rules do not apply to irrevocable trusts, the tax authorities still want to know if the assets used to settle a trust were declared. E.g., Spain doesn't recognise trusts so they continue taxing Settlors on wealth as if the trust didn't exist. Germany would want to impose a 50% gift tax when a Settlor sets up an irrevocable trust. For CRS purposes, this obviously implies the report for the Settlor should be the trust value, regardless whether itsrevocable or irrevocable. Irrevocable Passive NFE trusts - no problem

<u>irrevocable</u>. It enumerates the worth to be reported for the Settlor is the total account balance or value. Spain, Germany, et. al. satisfied. Irrevocable Investment Entity trusts - oops, big problem

of an NFE trust is reported regardless of whether the trust is a revocable or

The OECD CRS Implementation handbook paragraph 268 is clear that the Settlor

No alt text provided for this image The wheels come off regarding the worth reported for Settlors of Singapore irrevocable Investment Entity trusts. Sure, CRS implementation handbook paragraph 261 says The financial information to be reported will depend on the nature of the interest held by each Account Holder. Otherwise report the total property value. I will describe why this this refers to beneficiaries of the trust, not the Settlor. Singapore CRS FAQ: Pg. 33 F9

of the trust be different, depending on whether the trust is revocable or irrevocable, whether the Settlor is a beneficiary or not, and whether the trust is discretionary or not? Yes. Where the value or balance attributable to each Account Holder is individually derived based on the nature or arrangement of the trust, such value or balance can be reported. For example, where the Settlor is not a beneficiary of an irrevocable trust, the account balance attributable to him can be reported as nil.

Where the trust is an Investment Entity, can the account

balance information to be reported for each Account Holder

Gosh, no, wrong! Sweet words to tax evaders. As a side note, the Singapore FAQ clause regarding a Settlor not being a beneficiary of an irrevocable trust is a moot (stupid) clause which causes all the problems. Singapore is befuddling Settlors and beneficiaries. Settlors and beneficiaries are discrete data elements using the CRS Extensible Markup Language schema terminology. Virtually every jurisdiction, including UK and its territories, applies the separation of Settlor and beneficiary principle in CRS reporting.

It is important to note that beneficiary as well as a settlor of a

trust that is an FI (qualifying as an Account Holder in both

instances) would be treated as having two accounts with that trust. These will need to be assessed and reported on separately. However, Singapore conjures up a misguided odd rule that a Settlor is to be

treated as a discretionary beneficiary when he has renounced his equitable interest to access the trust assets. The trustee then allocates a zero reporting value to this mythical combined Settlor-beneficiary. The mind boggles at this perversion of logic. The Settlor electing to surrender their equitable interest does not mean the value of the assets used to settle the trust is zero. Sheesh, simples. Follow the OECD logic So the expected retort from Singapore is that indeed it is I that misinterprets an

irrevocable FI trust must report the the total property value for the Settlor. Err, excuse me, it's not interpretation. The OECD has opined that irrevocable trusts are the same as irrevocable insurance. Study carefully how the OECD tackled abuse of irrevocable insurance to avoid reporting on the policyholder. Insurers tried a similar bogus tactic to value a 'settlement' of an irrevocable insurance policy as zero to escape the definition of cash value insurance. The OECD FAQ update knocked this misinterpretation on its head by stating that if a policyholder elects to renounce their rights to access the policy value, then the reportable person remains the policholder. The cash value does not magically get wiped out by renouncing your rights to access the cash value. Simarlarly, the settlement value of a trust does not get wiped out by the Settlor surrendering their equitable Interest. Secondly, and this is the strongest case your honour, the CRS states that for Passive NFE trusts, the total account value or balance is reported for the Settlor regardless whether the trust is revocable or irrevocable. Bear in mind the difference between FI and Passive NFE trusts is either (a) the trustee being an individual, or (b) trust does not predominantly earn investment income. Not much of a difference, eh? Certainly no difference in the purpose of the trust. So why would the OECD instruct Settlors have the account value reported for irrevocable Passive NFE trusts and yet accept a zero value for FI trusts. Nope, sorry, not buying that. Sure, trustees know more than banks on what beneficiaries of FI trusts are

6. CRS jurisdiction wealth manager managing assets in nonparticipating jurisdictions (hint: USA) No alt text provided for this image

according to reports calculated. Failing that report account value.

entitled to due to complex conditions. So trustees can report value reported

CRS Commentary page 208 on Effective Implementation - Anti avoidance rules. It is expected that an anti-avoidance rule would apply to the situation of Shifting Maintenance of an Account:

A Reporting Financial Institution advises a customer to maintain an account with a Related Entity in a non-Participating Jurisdiction that enables the Reporting Financial Institution to avoid reporting while offering to provide services and retain customer relations as if the account was maintained by the Reporting Financial Institution itself. In such a case, the Reporting Financial Institution should be considered to maintain the account and have the resulting reporting and due diligence requirements.

Mr. Shift meet Mr. Deem We know irrefutably from CRS, that an FI, or related

entity, who wink, wink persuades a client to open an account in the USA and then

retains servicing the client is deemed to maintain the client's account. Talk about a terrible, horrible, no good, very bad fictional world for the FI. You don't maintain the account but yet you do. C'est la vie, no use arguing with that logic. The FI is thus a reporting FI. Ahhh, but what type of FI? Well that is located deep in the CRS. It's just that everyone has missed it. 'Potentially' to be held in... Five bracketed words buried in the CRS commentary, but so important and missed

by everyone. ...Potentially to be held in.... The CRS Commentary page 160

paragraph (10)

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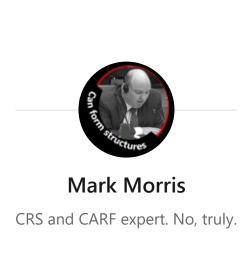
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For a Custodial Institution the Income attributable to holding Financial Assets and related financial service means fees for providing financial advice with respect to Financial Assets held in (or potentially to be held in) custody by the entity.

The CRS deems the FI who "shifted" accounts to hold assets for the account of the

client. This then is certainly a potential to hold assets. Furthermore the fees for providing advise is custody-like fees. Quod Erat Demonstrandum, the FI who shifted clients' accounts to the USA and services them, is a reporting Custodial Institution.

An FI advising clients to move accounts to a non-participating jurisdiction and continuing to service the account as if the assets were never moved makes the FI a reporting Custodial Institution.



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