

This article first looks at the difference between a Nominee and

a Custodial Institution. It then notes the impact of the CRS FAQ

Custodian Institution if they fail the investment entity income

• What's the difference between a nominee and a Custodial? When I pose this question to

my seminar audiences. I get the South Park student treatment. I have yet to see another

update on the income test which could qualify trusts as a

Google gives an unsatisfactor explanation of teh difference between a Nominee and Custodial Institution. Unfortunately, thiscis not how CRS looks at the two.

A custodian to safeguard and administer the assets of the 'fund'; and. a nominee, a non-trading subsidiary of the custodian, holding the legal title to the shares in the investee companies on behalf of the investor.

Let's look at it from a CRS point of view: A nominee is either a Financial Institution or it is not.

A nominee holds assets for someone else. A custodial institution holds assets for the benefit or account of someone else. Spot the difference? Err, no, you'll need more info.

• A Custodial Institution is a nominee that (i) is an entity, and (ii) earns at least 20% of its income from custody-like fees.

• A nominee is not a financial institution if either (i) it is an individual, or (ii) an entity that earns less than 20% of its income from custody-like fees. In that case, the financial institution maintaining the financial accounts will not treat the nominee as the account holder but will treat the persons for whom the nominee is holding the account, as the

account holder. • CRS muddies the water by saying a Custodial Account is where an institution acts as

custodian, broker, nominee, or otherwise as an agent for the Account Holder. • Ok, to stop going crazy with this terminology mix, just bear in mind a Custodian Institution is an FI and a nominee is not an FI. Simples.

Look-through of non-FI nominees

CRS page 60. The term Account Holder: A person, other than a Financial Institution, holding a Financial Account for the benefit or account of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for purposes of the Common Reporting Standard, and such other person is treated as holding the account.

Custodial Account

CRS page 51: The term 'Financial Account' means an account maintained by a Financial Institution, and includes a Custodial Account. The term "Custodial Account" means an account (other than an Insurance Contract or Annuity Contract) that holds one or more Financial Assets for the benefit of another person.

Reporting on Custodial Account

CRS page 30 Custodial Account: the total gross proceeds from the sale or redemption of Financial Assets paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the Account Holder.

Who maintains a Custodial Account?

Implementation handbook page 62: Custodial Institution is the Financial Institution that holds custody over the assets in the account.

So putting all the pieces together the only institution that maintains a custodial account is a custodial institution.

CRS page 44 paragraph (4): The term "Custodial Institution" means any Entity that holds, as a substantial portion of its business, Financial Assets for the account of others. An Entity holds Financial Assets for the account of others as a substantial portion of its business if the Entity's gross income attributable to the holding of Financial Assets and related financial services equals or exceeds 20% of the Entity's gross income during the shorter of: (i) the three-year period that ends on 31 December (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or (ii) the period during which the Entity has been in existence.

Treatment of SPV Custodians

• Note, that the custodian need not earn the custody-like fees directly. The OECD used the term Special Purpose Vehicle Custodian for the first time in its February 2019 CRS FAQ update.

For purposes of the gross income tests to be applied in the context of the definitions of 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 definition 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.

So what's the critical difference I keep harping on?

• If a nominee holds an account then the financial institution will look through the nominee and treat the beneficial owner as the account holder. If a financial institution acts as a nominee it will report on reportable account holders of the custodial account. The difference is the 20% fee.

Non-participating Custodial Institutions

being a Custodial Institution.

 Note that if a Custodial Institution is subject to a non-participating jurisdiction, and it holds an account with a CRS jurisdiction FI, there will be no CRS reporting. But what if the Custodial Institution is also an Investment Entity, and is thus treated as a Passive NFE? An FI looking through a Custodial Institution to the controlling persons will only reveal the board of the custodian, not the beneficial owners.

Are all Custodial Institutions also investment entities because they earn investment income from the assets they hold on behalf of other persons?

• An investment entity is managed or administered by an FI and earns most of its income as a Custodial Institution. So is a Custodial Institution also an Investment entity, because the assets it holds earn investment income. No, the income a custodian earns is not for its account but for the person the assets are being held for and is not recorded as income in its books. Well, at least not a net income.

What about trusts that are Custodial Institutions? HMRC is the only fiscal authority that describes trusts being Custodial Institutions for

Custodial Institution: Trusts: Trusts are treated as entities by all of the agreements for automatic exchange of information. A trust can be either a financial institution or a Non-Financial Entity. Where a trust meets one of the definitions for being a Financial Institution it is most likely to be an Investment Entity but it may, alternatively, meet the requirements for

What about trusts which hold assets for someone else and those trusts can earn income from the assets it holds? So is a trust a Custodial Institution?

It could be if 20% of its income is attributable to holding Financial Assets and related financial services. Such as:

 custody, account maintenance, and transfer fees commissions and fees earned from executing and pricing securities transactions concerning Financial Assets held in custody; income earned from extending credit to customers concerning Financial Assets held in custody (or acquired through such

extension of credit) income earned on the bid-ask spread of Financial Assets held in custody • fees for providing financial advice concerning Financial Assets held in (or potentially to be held in) custody by the entity ?

Read "The weirdest clause in the 400 pages of the CRS screws up the OECD attack on the investment entity loophole." for clearance and settlement services.

• But trusts are investment entities if administered by a corporate trustee and earn investment income. But we just clarified that Custodial Institutions do not earn investment income for themselves. So why then, do trusts earn investment income for themselves but not custodial institutions? It's because trusts earn income and then distribute that income according to trust conditions. Custodian institutions do not

• Wait, this is confusing. Trusts that are custodial institutions if they more than 20% income

trust custodial institutions do not earn income for their account. Gosh, this is confusing.

are custody fees, but also earn investment income on behalf of themselves... but non-

What if a trust does not earn investment income? Is it a **Custodial Institution?**

"distribute income", they earn income directly on behalf of their client.

 Many industry players opine if a trust does not earn investment income, then it is a Passive NFE. Be very careful here, because if a trust does not earn any investment income, for instance, no dividend declared by its subsidiaries, then it will be a Custodial Institution if it earns at least 20% of its fees as custody-like fees. A trust not earning any investment income will likely exceed the 20% threshold for custody-like fees.

• But it's the trustee that charges the fees, not the trust. Ah ha.. note the OECD CRS FAQ February 2019 update that says if a 3rd party earns the fees for the custodian's services, then this counts toward the custodian's income test. Wow, the trust earns no income whatsoever, trustee charges custody-like fees. Bingo, the trust is a Custodial institution.

More questions to follow 1. Who is account holder of a Custodial Institution trust (its not the equity and debt interests)

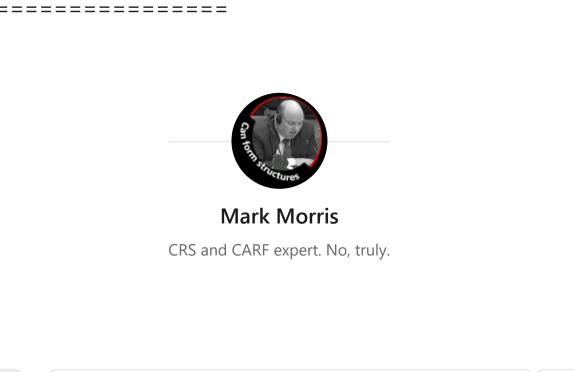
equity interest as an Investment entity trust or the same as the controlling persons of a Passive NFE trust? What if the Custodial Institution is managed in a non-participating jurisdiction?

• If a trust is a custodial institution, who are the reportable account holders? Is it the same

• See "Why table 7 in the OECD CRS Implementation Handbook is wrong when an FI trust in not an Investment Entity."

2. Can custodial fees be paid to unrelated third parties with no nexus to the Custodial institution. Yes.

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



SEC Announces 2017 Exam Priorities Trust Commentary: Today, Tomorrow and the Day After Chris Myers Bob Fletcher, CTFA, CISP, CFMP--Bank Trust Consult.. Mark Morris

How the f*ck can a private trust be a Custodial Institution for CRS? Well, it's because CRS is a fictitious world. **2**

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