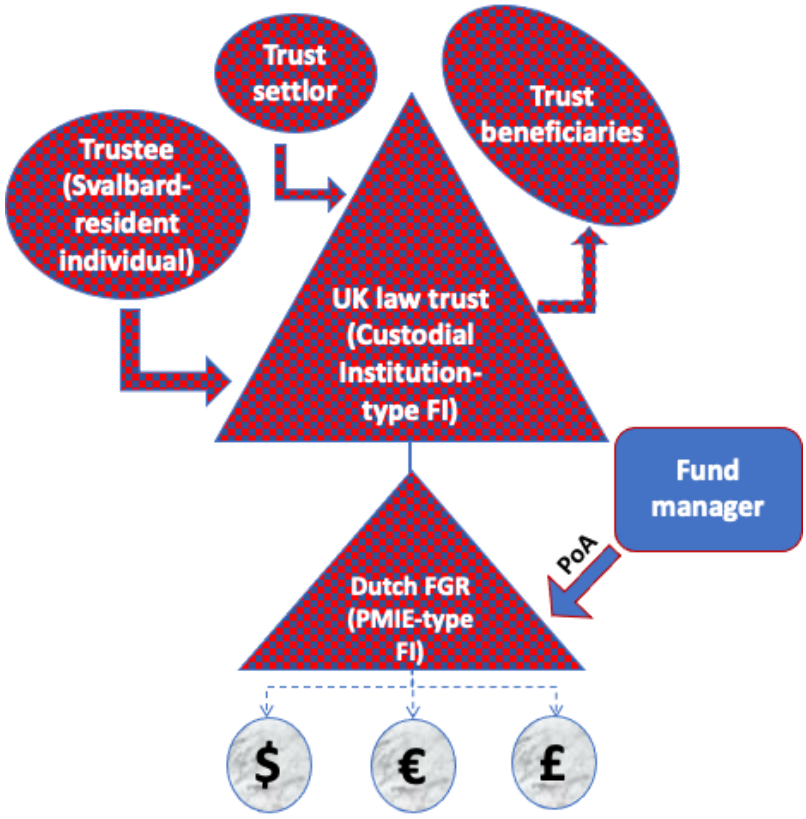
MILLEN TAX & LEGAL

To:	**East West Management GmbH**
From:	**Millen Tax & Legal GmbH**
Date:	**27 May 2024**
Re:	**CRS Classification and Compliance Analysis: The Svalbard Trust-FGR Structure**

1. Summary

Under the OECD's common reporting standard (CRS[1]), the classifications of (a) a trust and (b) the entity underlying the trust and holding Financial Assets[2] depends on several factors, namely the CRS jurisdictions of the two entities and their operations with respect to those Financial Assets. Moreover, those CRS classifications determine the CRS due diligence and reporting obligations of the two entities and any third-party Financial Institutions (FIs) where the assets are held. The structure, as shown below, results in minimal CRS due diligence and no account reporting obligations–



[1] As used in this analysis, "CRS" refers to OECD, "Standard for Automatic Exchange of Financial Account Information in Tax Matters" (July 21, 2014; second edition published Mar. 27, 2017).

[2] A Financial Asset for purposes of CRS "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 CRS Standard, Section VIII.A7).

The reasons for the minimal CRS compliance duties are set forth in the following document, entitled *CRS Classification and Compliance Analysis: The Svalbard Trust-FGR Structure* (hereafter referred to as the or this "Opinion"). In sum, where the underlying entity holding the Financial Account with the third-party FI qualifies as a professionally-managed Investment Entity-type (PMIE-type) FI in a Participating Jurisdiction, the bank or other FI maintaining the account will neither look through the PMIE to document its owners nor report on the entity. Likewise, the PMIE underlying entity will neither look through the trust to document its owners nor report on the trust because the trust will adopt the classification of a Custodial Institution-type FI. Finally, the trust, as an entity not resident in a jurisdiction participating in CRS, incurs no CRS compliance duties directly.

2. Planned structure

The wealth management structure envisioned for holding Financial Assets through an off-shore trust (the "Svalbard Trust-FGR Structure") consists of the following–

- A trust administered in the Svalbard territory of Norway by an individual trustee and governed by United Kingdom ("UK") law (the "Trust");
- The Trust owns one-hundred percent of the interests in a closed-end Dutch fund[3] (the "FGR");
- The FGR directly holds securities or other assets qualifying as Financial Assets; and
- These Financial Assets are subject to professional management by another FI, the Fund Manager.[4]

Millen Tax & Legal GmbH ("MTL") was engaged by Mark Morris on behalf of East West Management GmbH (hereafter, the "Client") in March 2024 to provide a CRS classification analysis for a template structure with the above components and characteristics.

3. CRS classification analysis of the structure

CRS classification analysis of 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.[5] 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 so few of them are resident for income tax purposes in any jurisdiction. Accordingly, for purposes of CRS, trusts are deemed to be resident in any jurisdiction where one or more of the trustees of the trust is

[3] The fund will be established under the law of the Kingdom of the Netherlands under the provision for a *Fondsen door gemeine Rekening* (hereafter in this footnote, abbreviated to "FGR"). The FGR statute allows for two distinctive versions – open and closed – with materially different characteristics and corresponding tax consequences, To qualify for treatment as a closed fund, the interests in an FGR must either be transferrable only back to the fund itself or only with the permission of all the other interest holders in the FGR. If an FGR fails either criterion, it would be an open FGR and subject to different tax treatments. This Opinion applies solely to closed FGRs.

[4] The Fund Manager may be located in any CRS Participating Jurisdiction where the local competent authority has entered into an information sharing Memorandum of Understanding under the EU's Alternative Investment Fund Managers Directive with their Dutch counterparts, the "*Autoriteit Financiële Markten*".

[5] *See* OECD CRS Commentary to Section VIII, para. 4.

resident.[6] In the current structure, all trustees will be resident in the Norwegian territory of Svalbard.

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.[7] More specifically, it is expressly excluded under the "Norwegian Declaration" section of the country's CRS accession instrument.[8] Accordingly, Svalbard is not a participant in CRS as part of Norway. Moreover, Svalbard has neither independently entered into a CRS exchange agreement nor joined CRS as part of another grouping. As such, entities resident in Svalbard (or, more precisely, those not deemed to be resident in any Participating Jurisdiction for purposes of CRS) are not directly subject to CRS and thus are not obliged to classify themselves and fulfil the compliance duties corresponding to that 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.[9] In the absence of further viable alternatives, evidently no jurisdiction's CRS rules evidently govern the Trust's CRS classification or assign any compliance duties to the Trust. That does not end the Trust's CRS entity classification process though.

In addition to needing a CRS classification as a standalone entity with its own potential Account Holders to document and report *if resident in a CRS Participating Jurisdiction*, an entity may also need a CRS classification for where it is itself the Account Holder of a Participating Jurisdiction FI. Usually, these are one and the same classification. However, in the circumstance of an entity not resident in a CRS jurisdiction but with accounts held with an FI, the entity – *as an Account Holder* – applies the rules governing the Participating Jurisdiction FI to determine its CRS status for that particular account.[10]

As the FGR is likely to qualify as a PMIE (per the analysis in the below section) and the Trust holds the entirety of its equity interests, the Trust is an Account Holder of the FGR. As the FGR is resident in the jurisdiction of the Fund Manager, where it is managed and controlled,[11] the Trust must therefore classify itself under that particular jurisdiction's CRS rules.[12] Pursuant to these rules, the Trust may be classified as a Custodial Institution-type FI with respect to the Financial Account held in the FGR according to the reasoning set forth in the following paragraphs.

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[6] *See* OECD CRS Commentary to Section VIII, para. 4.

[7] *See e.g.* United States-Norway Income and Property Tax Conception (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).

[8] 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).

[9] UK CRS Guidance Notes, IEIM400620.

[10] OECD CRS FAQs to Sections II-VII, Q17.

[11] *See* OECD CRS Commentary to Section V, para. 10.

[12] In the absence of certainty around the jurisdiction of the administrator entity, this Opinion relies on generic CRS rules and interpretations that must be re-tested against the actual CRS rules in force in the particular jurisdiction of the administrator entity.

A common approach for trusts under CRS analyzes them initially as potential PMIE-type 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.[13] 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.[14] However, that applies only where the trustee is also an entity, which is not the case here, where the trustees consist solely of individuals. Thus, the Trust cannot qualify as a PMIE due to the management authority vested in its trustees because they all are individuals.[15] 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 percent or more of its gross income from providing such services.[16] The text of the first criterion seems to squarely apply to the classic purpose of a trust scenario:[17] To hold legal title in a fiduciary capacity over assets at the behest of the settlor. Several jurisdictions expressly concurred with this position, contemplating in their guidance that FI trusts may be either Custodial (or even Depository) Institutions or PMIEs and, furthermore, providing guidance on how to comply with CRS where the trust is classified as Custodial Institution-type FI.[18] Thus, it is impossible to state that the Trust does not satisfy the first criterion of the test for a Custodial Institution-type FI.

As for the gross income criterion – that 20 percent or more of the entity's gross income derives from providing such services[19] – the OECD CRS Commentary provides a useful list of which types of fees would qualify as compensation for "holding financial assets and providing related financial services".[20] These include, but are not limited to, financial advisory, custody and account maintenance fees.[21] Such fees, irrespective of their label, are the lifeblood of fiduciary service

[13] OECD CRS Standard, Section VIII.A6.
[14] E.g. Swiss CRS Guidance Notes, para. 2.2.3.4.
[15] *See* OECD CRS Commentary to Section VIII, para 22. Ex. 5; It should be noted that a trust with an individual trustee could still qualify as a PMIE-type FI if the assets were managed by a qualifying FI (e.g. an external asset manager.
[16] OECD CRS Standard, Section VIII.A4.
[17] 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. To that end, CRS needed to invent a set of Financial Accounts in trusts for purposes of due diligence and reporting (OECD CRS Standard, Section VIII.C4).
[18] E.g. UK CRS Guidance Notes, IEIM400700, IEIM400800; Swiss CRS Guidance Notes, para. 2.2.3.4.
[19] 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.
[20] OECD CRS Commentary to Section VIII, para. 10.
[21] OECD CRS Standard, Section VIII.A4, 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 with respect to Financial Assets held in custody;
- Income earned from extending credit to customers with respect to Financial Assets held in custody (or acquired through such extension of credit);
- Income earned from contracts for differences and as the bid-ask spread of financial assets held in custody;
- Fees for providing financial advice with respect to Financial Assets held in (or potentially to be held in) custody;
- Fees for providing clearance and settlement services.

providers. That conclusion settles the inquiry though, if and only if those fees are paid to the custodian for such services and they amount to 20 percent or more of the entity's income.[22]

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.[23] Accordingly, the fees paid by the settlor for the services provided through the Svalbard Trust-FGR Structure must be apportioned in part to the Trust. To the extent that the Trust does not earn substantially greater amount 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 with respect to its equity interests in the FGR.

CRS classification analysis of the FGR

As an entity holding solely Financial Assets and with no purpose or capacity other than as an investment vehicle, the FGR's options for CRS classification narrow down instantly to a PMIE-type FI or a Passive NFE. The precise determination pivots on whether the FGR is subject to professional management (as defined for CRS) by another FI.[24] For FATCA, the Netherlands, for example, defines such professional management broadly, insisting that an investment entity with more than one equity stakeholder can qualify as a PMIE "whether it makes the investments itself or arranges for a professional third party to make the investments."[25] Accordingly, where a third-party FI has the authority to determine the investment decisions of the entity – either as part of the entity's management team or through a Power of Attorney (including a discretionary portfolio agreement with the custodial bank where the assets are held) – the entity will be a PMIE. As the FGR will engage such a third-party FI to make binding investment decisions over its assets, the FGR will qualify as a PMIE-type FI.[26]

[22] In calculating the fees earned by a prospective Custodial-type FI, it is critical to note that income earned through the assets held in custody on behalf of customers is not relevant to the calculation of gross income for purposes of CRS entity classification. Conceptually, this approach is consistent with non-CRS treatment of such assets and income, which tend not to be included in the gross income of a custodian because they are held in an intermediary capacity. A custodian is not, for example, subject to tax due on the income generated by such assets and typically does not include such assets on its own accounting balance sheet.

[23] OECD CRS FAQs to Section VIIIA, Q9.

[24] OECD CRS Standard, Section VIII.A6; UK CRS Guidance Notes, IEIM400770 (As noted above, 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. Based on the absence of non-Financial Assets in its portfolio and the incapacity to earn income from providing services, this Opinion assumes with confidence that the FGR will satisfy the gross income element of the PMIE qualification. As a timing matter, this element necessitates that the entry in question have earned 50 percent or more of its income through Financial Assets as 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).

[25] *See* The Netherlands FATCA Guidance to Article 1.1.j of the IGA; cf. The Netherlands CRS Guidelines (2021), para.1.36.

[26] As an historical note: Originally, the Netherlands included an exemption to the qualification as a PMIE for certain closely-held investment vehicles, including funds. Pursuant to this exemption, an entity that satisfied both the gross income and professional-management prongs of the PMIE test were nonetheless classified as Passive NFEs if all their interests were held by members of a single family or a small group of closely-connected parties. However, this exception was eliminated at the behest of the OECD in August 2021 (The Netherlands CRS Guidelines (2021), para.1.38).

4. Compliance consequences due to the CRS classifications

The compliance consequences for each of the parties in the chain of entities holding the assets consist of the following CRS due diligence and reporting obligations–

The custodial bank or other FI maintaining the Financial Account containing the Trust's assets

- For due diligence, it will need to request a self-certification from the FGR as the Account Holder of the Financial Account it maintains and validate the status of PMIE claimed by the FGR, but not need to look though the FGR to identify, document and potentially report its Controlling Persons.[27]
- For reporting, it will not need to report on the Financial Account because the Account Holder is an FI and FIs are not Reportable Persons for CRS.[28]
- Nil reports may be required, depending on the jurisdiction.

The FGR

- For due diligence, it will need to request a self-certification from the Trust as the Account Holder of the Financial Account in the form of its equity interests owned by the Trust. The FGR will need to validate the status of Custodial Institution-type FI claimed by the Trust on the self-certification form, but not need to look though the Trust to identify, document and potentially report its Controlling Persons.[29]
- For reporting, it will not need to report on the Financial Account because the Account Holder is an FI and FIs are not Reportable Persons for CRS.[30] Even more specifically, where the equity interests in a PMIE are held through a Custodial Institution-type FI, the PMIE is not regarded as responsible for reporting on them.[31]
- Nil reports may be required, depending on the jurisdiction.[32]

The Fund Manager

- Generally, external fund and asset managers are exempt from treating their equity and debt interest holders as Account Holders for CRS and, thus, the Fund Manager is relieved of CRS documentation and reporting obligations.[33]

The Trust

- As the Trust is not resident for CRS purposes in a jurisdiction that has implemented CRS, the Trust or, more specifically, the trustees on behalf the Trust, have no due diligence or reporting obligations under the regime.

In sum, the Svalbard Trust-FGR Structure, as analyzed throughout this document, results in minimal CRS due diligence and no account reporting duties for any of the parties involved in the chain of entities holding the assets.

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[27] Presently, the Netherlands is treated as a Participating Jurisdiction by every other jurisdiction that implemented CRS and thus the FGR will not be treated as a PMIE in a **non**-Participating Jurisdiction and will not be subject to the look-through treatment meted out to Passive NFEs (OECD CRS Standard, Section VIII.D8).

[28] OECD CRS Standard, Section VIII.D2.

[29] OECD CRS Standard, Section VIII.D8.

[30] OECD CRS Standard, Section VIII.D2.

[31] OECD CRS Commentary to Section VIII, para. 71.

[32] The Netherlands, for example, requires nil reporting for such FIs (The Netherlands CRS Guidelines (2021), para.1.38).

[33] OECD CRS Standard, Section VIII.C1a); The Netherlands CRS Guidelines (2021), para.1.40.

5. Caveats

- Paul F. Millen 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 the Netherlands, 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.
- This Opinion solely addresses compliance matters under the OECD CRS regime; no other rules, regulations or tax or legal implications are contemplated and therefore this Opinion may not be relied upon for any such topics.
- Any tax advice provided in the Opinion will be based upon the law, regulations, cases, rulings, and other taxing authority in effect at the time the specific tax advice is provided.
- The contents, analyses and advice provided in this Opinion related to any matter other than CRS, namely the proper treatment and analysis of FGRs under The Netherlands' CRS and other laws and regulations, will be based solely upon the representations, information, documents and other facts provided to Millen Tax & Legal GmbH by the Client.
- Unless otherwise explicitly specified, no financial statements or other related documents were reviewed or examined as part of this analysis.
- The Opinion, its contents and analyses and any other supplemental or incidental advice should not be distributed to, used for the benefit of, or otherwise provided for use by any third party.