

This article is based on Zurich-based US lawyer Paul Millen's publication "Old Tricks for New Dogs Part II", one of the best Crypto lawyers Ithis side of hades.

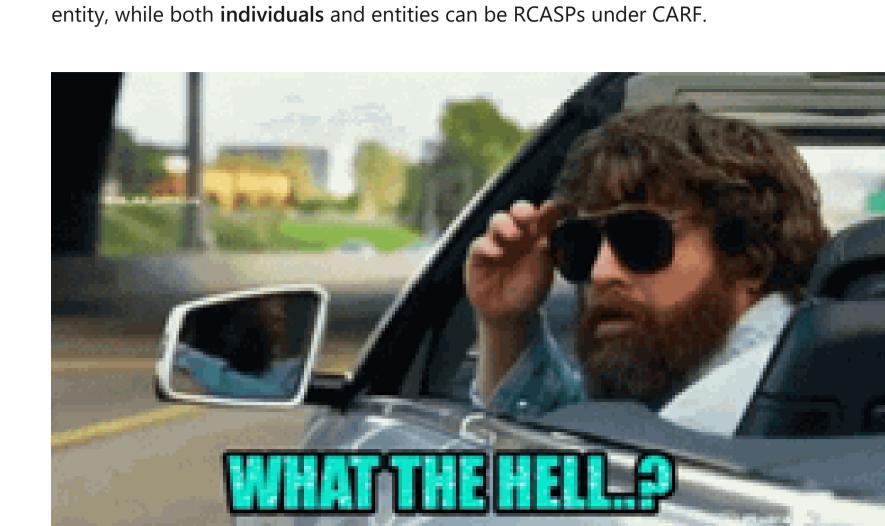
The definition of Reporting Crypto Asset Service Provider (RCASP) is broad

Capturing any individual or entity that, "as a business, provides a service

effectuating Exchange Transactions for or on behalf of customers, including by

acting as a counterparty, or as an intermediary, to such Exchange Transactions, or by making available a trading platform." • This is very different from the definition of Financial Institutions (FI) under Common Reporting Standard (CRS), which comprises Depository Institutions, Custodial Institutions, Investment Entities, and specified Insurance companies, each of which has its own separate definition.

• One obvious difference between an RCASP and a CRS FI is that the latter must be an



Individuals as reporting providers??

## **Effectuate transactions**

• Another major difference is that RCASPs are entities and individuals that effectuate transactions, while CRS FIs hold accounts and may or may not be involved in effectuating transactions regarding the assets in the accounts they hold. • This difference is likely because of the decentralization of the blockchain and the fact that

beneficial owners of digital assets such as crypto holdings can remain hidden until they

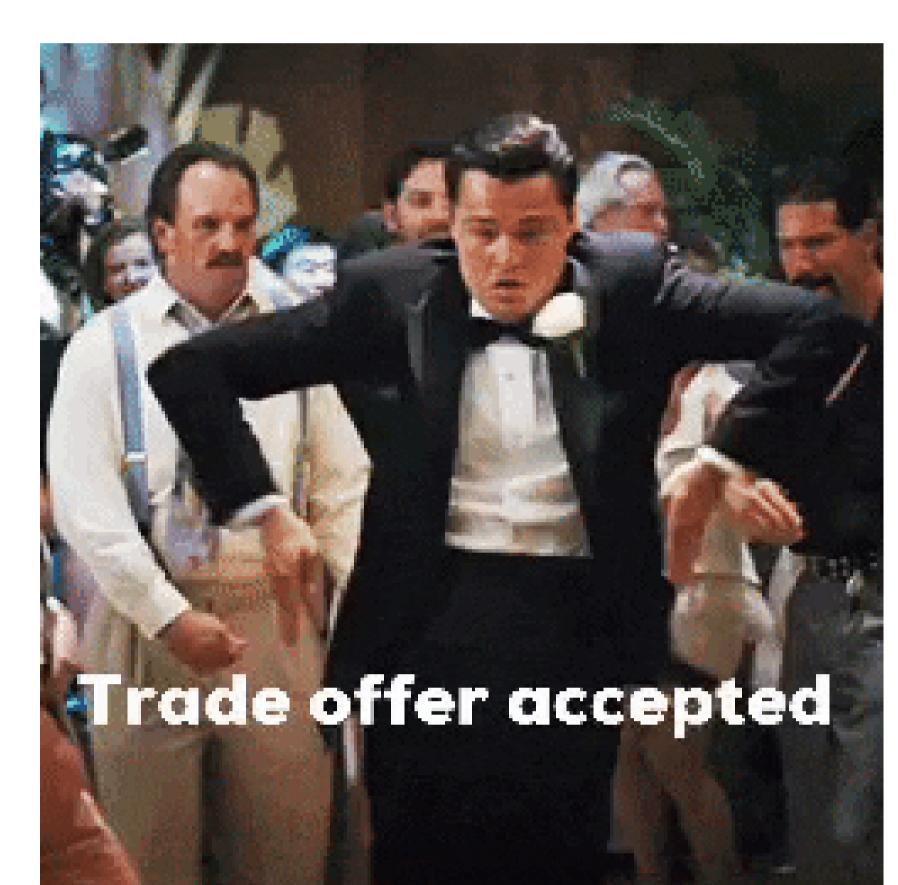


Crypto miners do not report as they work for themselves, not on behalf of clients



• Further, CARF requires that the relevant services be provided 'as a business,' which "excludes individuals and Entities who carry out a service on a very infrequent basis for non-commercial reasons." • In addition, the requirement that the services be provided for or on behalf of customers means that "an individual or Entity that is solely engaged in validating distributed ledger transactions in Relevant Crypto-Assets is not a Reporting Crypto-Asset Service Provider, even where such validation is remunerated" because crypto miners work for themselves, not on behalf of clients.

#### The prospective RCASP, operating as a business on behalf of one or more customers - must "effectuate" an "Exchange Transaction"



 Exchange transactions are exchanges of relevant cryptoassets and fiat currencies and exchanges of different forms of relevant cryptoassets. • So far, so good, but what does it mean to effectuate one of those? Surprisingly, CARF doesn't define effectuate as such. Instead, it gives guidance on who can be said to effectuate exchange transactions. Thus, for any set of crypto-related activities, we must reason by analogy from the examples of those that can effectuate exchange transactions as to whether the activities in a particular case amount to "effectuating" a transaction. • CARF's commentary on the definition of an RCASP gives the following examples of which individuals and entities may be said to effectuate exchange transactions "by acting as a

counterparty or intermediary to the Exchange Transactions":

to buy or sell an interest in relevant cryptoassets.

1. Dealers acting for their own account to buy and sell relevant cryptoassets to customers. 2. Operators of cryptoasset ATMs, permitting the exchange of relevant cryptoassets for fiat currencies or other relevant cryptoassets through those ATMs. 3. Cryptoasset exchanges that act as market makers and take a bid-ask spread as a transaction commission for their services. 4. Brokers in relevant cryptoassets in which they act on behalf of clients to complete orders

#### Individuals or entities subscribing to one or more relevant cryptoassets

a service effectuating exchange transactions as a counterparty or intermediary, the direct purchase of relevant cryptoassets from an issuer, for resale or distribution to customers, would be considered effectuating an exchange transaction. • The individuals and entities described in these examples go well beyond the types of parties one would normally think of as actually effectuating transactions based on the plain meaning and common usage of the term. • For example, the online Cambridge Dictionary defines effectuate as "to do something or make something happen." The Merriam-Webster online dictionary defines effectuate as "to cause or bring about (something): to put (something) into effect or operation." Finally, while Black's Law Dictionary does not define effectuate, it does define its shorter variant (the verb "effect") as follows: "to bring about; to make happen."

• While the sole creation and issuance of a relevant cryptoasset would **NOT be considered** 

# Making available a trading platform

• CARF's definition of RCASP also expressly includes "making available a trading platform." A "trading platform" includes any software program or application that allows users to effectuate (either partially or in their entirety) Exchange Transactions. However, the commentary helpfully clarifies that merely providing a bulletin board for posting buy, sell, or conversion prices of cryptoassets does not make one an RCASP because it would not provide a service allowing users to effectuate exchange transactions. • Similarly, the mere creation or sale of cryptoasset trading software and apps does not

make one an RCASP as long as the individual or entity in question is not using the software or app itself to effectuate exchange transactions.

### One more condition must be satisfied for a trading platform to qualify as an RCASP

• Control, or at a minimum, influence. • The commentary clarifies that a trading platform is not an RCASP unless the individual or entity exercises "control or sufficient influence" over the platform to comply with CARF's due diligence and reporting obligations regarding the transactions concluded on the • This assessment is to be made consistent with the 2012 Financial Action Task Force (FATF)

recommendations, as amended in June 2019 on virtual assets, virtual asset service

# Where the New Dogs Are Kennelled

providers, and related FATF guidance.

 Not all RCASPs are bound by CARF, only those that have a sufficient nexus to a jurisdiction that has adopted CARF. • With CRS, the nexus determinations were relatively straightforward and static. Fls tended to be governed under CRS where they were established under law or had employees and buildings and, moreover, these key features tended to remain unchanged. In addition to being commonsensical, this setup provided leverage to the local authorities to compel compliance by domestic financial institutions.

### These jurisdictional nexuses for CARF provoke multiple reactions

The first reaction is, good luck to whichever local dogcatchers are charged with policing their domestic new dogs.

 With no physical infrastructure needed, licensing requirements in only some jurisdictions for only some parties, no natural gatekeepers like banks to serve as deputy sheriffs, and, above all, the minimal fingerprints crypto transactions leave behind, it will be challenging to identify the parties qualifying as RCASPs and practically impossible to determine which ones may be domestic parties unless resident or incorporated in the jurisdiction.

### The 2nd reaction is that this will squeeze the grey out of the market

• Increasingly, jurisdictions are enacting securities laws (or reinterpreting existing security laws) to require registration of, for example, crypto brokers and dealers. • As such, unlicensed brokers and dealers will be violating securities laws and, presumably, concealing their place of operations in the jurisdiction for CARF purposes. • Therefore, the legion of licensed and CARF-compliant crypto exchanges will be segregated from and have no operational overlap with the legion of unlicensed and CARF-noncompliant crypto exchanges. • A crypto user with qualms about being reported will have few doubts about where to go.

### Further, CARF itself has no provisions to prevent its own abuse

• Cleverly, CRS introduced a look-through treatment for Managed Investment Entities established in a non-participating jurisdiction. However, that enforcement check relies upon reputable banks being located overwhelmingly in CRS-compliant jurisdictions. CARF has no leverage for such provisions or hasn't figured it out yet. • In CARF, nothing prevents a single user from choosing between compliant and noncompliant exchanges depending on the user's wish for his or her home tax authorities to be made aware of the particular transaction.

• Without a concept akin to the expanded affiliate group for FATCA, a single company could operate a CARF-compliant and regulated exchange in, say, Switzerland, and a CARF-non-compliant and unregulated exchange someplace misbegotten, thereby providing a halo to the unregulated exchange through its regulated business.

# CRS major loophole regading PMIEs closed for CARF

• The biggest loophole in CRS is the Shell Bank loophole, as revealed by the US Senate Committee where it was revealed that billionaire Robert Brockman established multiple Professionally Managed Investment Entities (PMIE) (PMIEs) mostly in Nevis and a bit in Bermuda. The accounts were with two Swiss private banks.

Click to read the 21-page Senate House Committe report on the FATCA loophole • For CRS, the bank does not report or look-through PMIEs that are Financial Institution, it was up to Brockman to report his own FI Investment Entities. He did not and saved a billion in taxes.

 However, CARF now disregards managed Investment Entities as excluded reportable persons and looks through these investment entities to the Controlling Persons, irrespective of any Financial Institutions in the chain of legal ownership. Worse, the Managed Investment Entity is still a FI for CARF, just not excluded as reportable. • This means the Managed Investment Entity must double report on its equity and debt

**Mark Morris** CRS and CARF expert. No, truly.

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