

Q1: How is it possible to apply an income test on a new Custodial Institution or Investment Entity before the entity starts earning any income?

Warning, you'll struggle to find answers in the CRS/FATCA

Entity that differs from the CRS/FATCA rules

Answer: if it expects to meet the gross income threshold based on its business



- The threshold for Custodial Institutions is 20%, and for Investment Entities is 50% The two time periods the income test applies to are:
 - 1. Three years before the current year, or 2. Since commencement, if shorter

greater than the income test thresholds 😎

income test?

- How does a new entity that opens an account at a Depositary Institution prove it is a FI? • What if an existing Passive NFE claims it is becoming a Custodial Institution / Investment
- Entity before it starts earning income? • How does the bank validate the Account Holder is a Financial Institution without the
- Two ways due diligence finagle their way out of this quagmire: 1. Zero fees divided by Zero gross income equals infinity for the income test, which is

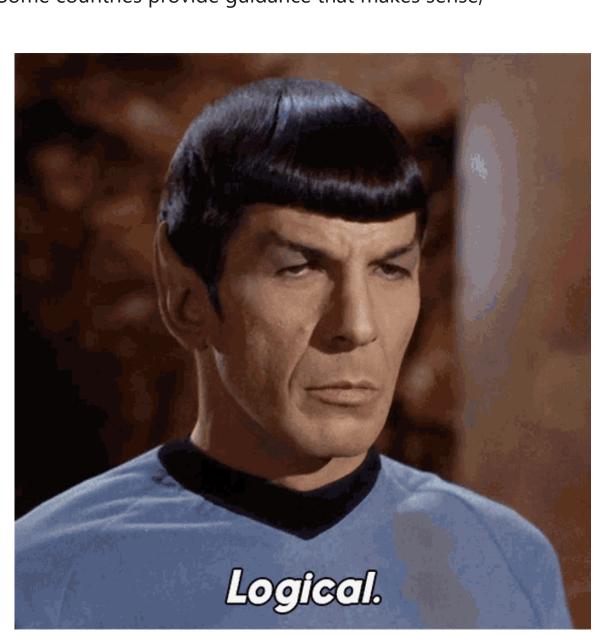


2. If the new entity provides a GIIN from their FATCA IRS application, then they are a Financial Institution.



• This is a classic chicken and egg issue. How can an entity register for a GIIN if it can't pass the FATCA income test? That is cheating

Answer: Some countries provide guidance that makes sense,



• Where an entity has no operating history at the time its status as a Custodial Institution or Investment Entity is being assessed, it will be regarded as a Financial Institution if it expects to meet the gross income threshold based on its business plans (such as the anticipated deployment of its assets and the functions of its employees). • Consideration can also be given to any purpose or function for which the entity is

Q2. Can a Custodial Institution or Investment Entity pass the income test if fees were paid to an unrelated third party?

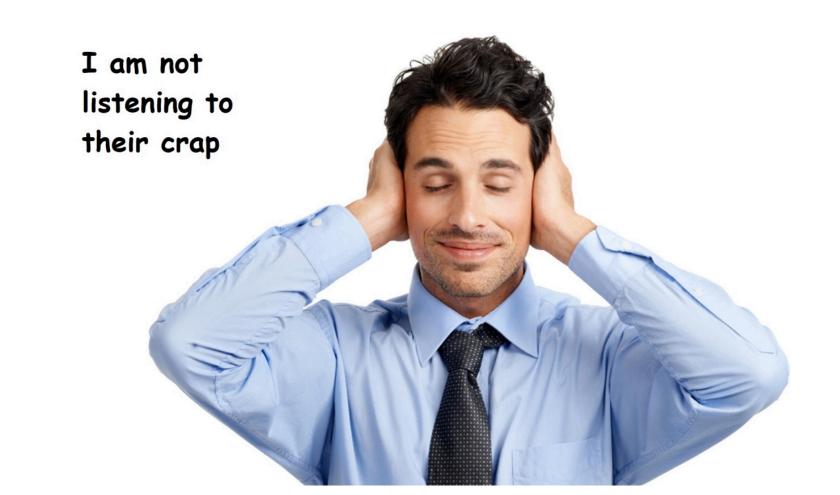
Answer: OECD CRS FAQ answers this unambiguously • Some countries like Canada (see 3.12), Australia, India, Malta, Ireland, New Zealand, etc.

holds a substantial ownership interest, directly or indirectly.

licensed or regulated.

state in their CRS guidance that payments to third parties can only be made to related parties if it is to count toward the income test for being an Fl. • Related Entity means any parent, subsidiary, and any business, corporation, partnership,

limited liability company, or other entity in which the Company, a parent, or a subsidiary



Answer: OECD Guidance CRS FAQ - page 14 Q. 9. Never mind, what a few countries' domestic law CRS laws are, I would opine the OECD on this issue takes precedence over countries´ crappy interpretations based on their

 What's important to us, is that the OECD when describing payments made by SPV Custodians to third parties, that may undertake the services of the FI need not be related.

These other firms are being paid the Custodial fees on behalf of the Custodial institution

as independent accounting or law firms, which clearly are unrelated.

What SPV little company is part of a group that has law/accounting firms

Q3: Which countries have their definition of an Investment Entity that differs from the CRS/FATCA rules

Answer: Canada and Luxembourg (and until recently, the Netherlands)

210 i. Canada

domestic tax laws.

Canada restricts the FI definition to regulated entities. Under Canada's Income Tax Act, an FI must fall within one of thirteen types of "listed financial institutions", which are different categories of regulated entities.

• The Canadian guidance on this issue states that a trust that is not represented or

promoted to the public is a Passive NFE because it is not a "listed financial institution" and thus cannot be classified as an Fl. • Similarly, unregulated private entities that are not represented or promoted to the public are not included in the list and therefore cannot be classified as FIs under Canadian law.

• FATCA already includes several definitions requiring the relevant entities to be regulated in the countries where they are organized or registered. One of the FI definition categories is a "specified insurance company," which must be "regulated as an insurance business under the laws, regulations, or practices of any jurisdiction in which the company does business." • The definitions of several types of Registered Deemed Compliant Fls, which are exempt

from FATCA obligations, include similar requirements. For example, a "local bank" must

incorporation or organization." • However, as discussed in Part I, unregulated entities could fall within the "investment entity" category of the FI definition in the FATCA regulations. Following the Canadian approach, it is possible to provide that only entities subject to government regulation would be classified as Fls.

be "licensed and regulated as a financial institution under the laws of its country of

iii. Luxembourg Under the rules in Luxembourg, "managed" investment entities qualify as FIs for CRS purposes only if they meet the FI definition under the FATF Recommendations.

under CRS and the FATF Recommendations. This also excludes "shell banks" from the FI • The FATF Recommendations state: financial institutions means any natural or legal person who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

• This ensures consistency between the interpretation of the "investment entity" definition

1. Acceptance of deposits and other repayable funds from the public.

2. Lending.

3. Financial leasing. 4. Money or value transfer services.

5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveler's cheques, money orders and bankers' drafts, electronic money).

6. Financial guarantees and commitments. 7. Trading in (a) money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); (b) foreign exchange; (c) exchange, interest rate, and index

instruments; (d) transferable securities; (e) commodity futures trading. 8. Participation in securities issues and the provision of financial services related to such issues.

9. Individual and collective portfolio management.

10. Safekeeping and administration of cash or liquid securities on behalf of other 11. Otherwise investing, administering or managing funds or money on behalf of other persons.

12. Underwriting and placement of life insurance and other investment-related insurance. 13. Money and currency changing.

iii. The Netherlands

• The Netherlands previously excluded non-commercial, closely held entities from the FI definition. Before an amendment in 2020, the Dutch definition of a Passive NFE included private investment entities that (i) are owned by a small group of shareholders or by participants that are all from one family; (ii) do not represent themselves on the market as an investment fund; and (iii) have not raised and will not raise capital from the market. • This definition of a Passive NFE covered many private investment entities that may have been classified as FIs otherwise.

• The U.S. tax system implements special rules for closely held entities in other contexts. For example, specific tax rules address tax avoidance by a "personal holding company" where five or fewer individuals own more than 50% of a company directly or indirectly. However, today an entity can be classified as an FI even if it is closely held.

Summary I bet you I did not have to eat my hat and belt.



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