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OECD CRS PERTAINING TO CORPORATE DIRECTORS

THIS BRIEF WILL ANALYZE WHY A CORPORATE DIRECTOR IS NOT AN MANAGER INVESTMENT ENTITY

A CORPORATE DIRECTOR FAILS THE “ADMINISTRATES ON BEHALF OF OTHERS” CONDITION FOR A MANAGER INVESTMENT ENTITY. IN CONTRAST TO TRUSTEES, IT’S THE COMPANY ON WHOSE BOARD THEY SIT THAT DOES THE ADMINISTRATION UPON THE INSTRUCTION OF THE DIRECTORS

This brief explains why corporate directors are not manager investment entities.

Some lawyers incorrectly opine that a corporate director is an investment entity. Subsequently, the inaccurately surmise the underlying company is therefore an investment entity if it also passes the income test.

A. CRS definition of investment entities

The CRS defines two types of investment entities (i) Manager, and (ii) Managed. This paper will analyze if corporate directors of underlying companies of trusts meet the conditions of a managed type investment entity.

(i) Manager investment entity¹

The manager type investment entity means:

1. any Entity
2. ...that primarily conducts as a business
3. ...for or on behalf of a customer
4. ...investing, administering, or managing Financial Assets or money
5. ...on behalf of other persons.

¹ Page 44 of the CRS

(ii) Managed investment entity

For an entity to be a managed investment entity it must pass both an income test and a managed by test.

a) Income test: The Entity's gross income of which is **primarily** attributable to investing, reinvesting, or trading in Financial Assets, is at least 50% of gross income during the shorter of:

- (i) the three-year period ending on 31 December of the year preceding the year in which the determination is made; or
- (ii) the period during which the Entity has been in existence

and

b) Managed by test: If the Entity is (i) itself, or (ii) its assets are managed by another Entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or a manager Investment Entity.

B. Corporate trustee is a manager investment entity

A corporate trustee is a manager investment entity as the trustee actually undertakes the administration for others on behalf of other persons.

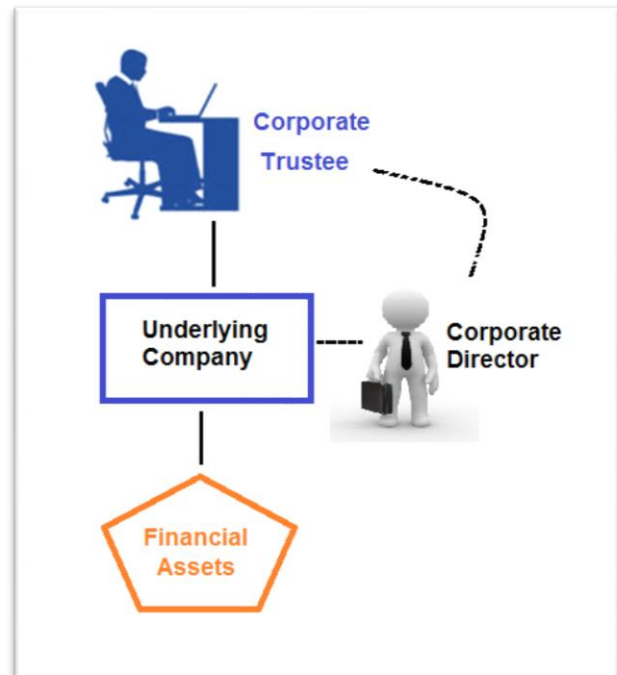
Is a corporate trustee a manager type investment entity?		
1	Is a Corporate trustee an entity	Yes
2	Do they primarily conduct administration activities as a business	Yes, they charge fees
3	... on behalf of a customer	Yes, customer is the trust
4	Do they administer Financial Assets	Yes
5	... on behalf of others	Yes, for beneficiaries of trust.
<p>Conclusion:</p> <p>Corporate passes all CRS five conditions for manager investment entity.</p>		

C. Underlying companies managed by corporate directors

Background of trusts using corporate director for underlying companies

FATCA regulations did not mention underlying companies because in the USA trusts do not use underlying companies because trusts are recognized and have limited liability. Outside the USA, trusts are used in jurisdictions which may not recognize trusts and trustees may have unlimited liability. Therefore, trusts outside USA without exception, utilise companies they own to hold assets and investments. These underlying companies are recognized as entities with limited liability wherever they are utilized.

Corporate Trustees will supply subsidiary corporate directors to manage these underlying companies. Corporate trustees invariably pass the conditions to be manager investment entities.



D. Is a corporate director a manager investment entity?

Is a corporate director, which is a subsidiary of a trustee corporation, a manager investment entity? Let us see if a corporate director satisfies all the conditions to be a manager investment entity.



Corporate Director

BVI IGA guidelines² on corporate directors

Management of the entity

“...the provision of a corporate director by a company services provider does not usually (on its own) constitute the company being “managed by” the corporate services provider as such directors would not usually conduct as a business, any of the IGA Definition Activities. A typical corporate director, in its capacity as director of a company, does not usually invest, administer or manage funds or money (as a business) on behalf of other persons in its capacity as corporate director; it is the company itself which is doing this, acting by its corporate director.

Management of the entity’s assets

In this capacity, such directors are to be distinguished from a third party investment manager, broker or advisor, engaged by a company to provide professional investment business services to the company inclusive of investing, administering or managing funds or money on behalf of the company.

² BVI Automatic exchange of info guidelines page 24 http://www.bvi.gov.vg/sites/default/files/guidance_notes_20-3-15_-_final_2.pdf

Which entity does the administering of financial assets

The two main issues to discern are (i) does the corporate director administer financial assets (ii) on behalf of other persons.

i) Administer

The managed investment entity is aimed at trustees and wealth managers. It is clear that trustee entities administer financial assets directly, such as make distributions, receive assets, open bank accounts. It is the trustee entity that does undertake the administration (on behalf of others). However corporate directors do not do the actual administration of financial assets such as opening bank accounts, make payments, receive and deposit assets, pay dividends, etc. It is the underlying company that does those activities acting upon the instructions of its corporate directors.

ii) On behalf of other persons

Trustees administer on behalf of others (the trust). Wealth managers administer on behalf of others (the fund owners). However, a corporate director does not administer on behalf of others. The company that administers financial assets upon the instruction of corporate directors do so on behalf of the company itself, not on behalf of others.

Furthermore, the company is not administered on behalf of the trustee owners of the company because if there were a conflict of interest, and the corporate directors followed the instructions of their owners or the owners of the underlying company they would be in breach of fiduciary duties. The company would then be a sham and offer no limited liability, etc.

Additional support by FATCA regulations

The FATCA regulations, whilst listing the types of deemed compliant sponsors, specifically list corporate directors as an entity, but omit to mention that corporate directors are financial institutions.

Registered deemed Compliant Sponsor		Certified deemed compliant sponsor	
Type: Entity	<u>Examples:</u> Corporate directors , Fund managers, trustees, managing partners	Type: Foreign Financial Institutions, reporting model 1 FFI, or US FI	<u>Examples:</u> Professional managers*, trustees, managing partners * wealth and, portfolio managers

Analysis of OECD entity classification of corporate directors

Do corporate directors meet the conditions of manager investment entity?		
1	Is a corporate director an entity	Yes
2	Do they conduct administration (or investing or managing) of Financial Assets primarily as a business	Yes, they charge director fees as a business
3	... for on behalf of a customer	Yes, customer is the underlying company
4	Do they administer Financial Assets	No, the company administers upon instruction of directors
5 on behalf of others?	No, the administration is done by the company on behalf of itself.
<p>Conclusion:</p> <p>Corporate directors are not manager investment entities. They do not administer financial assets It is the company that does that acting instructions by corporate director. Nor do they administer on behalf of others..</p>		

E. Is a corporate director a managed investment entity

A corporate director is not a managed investment entity. It will likely be a passive NFE.

Is a corporate director a managed investment entity?		
1	Is a Corporate director an entity	Yes
2	Managed by a FI	No
3	Assets managed by another FI	Perhaps
4	Income test – primarily from financial assets	No
Conclusion: No. Besides the management test, they do not pass the income test		

F. Is an underlying company a manager investment entity

An underlying company will not be a manager investment entity because it does not administer financial assets on behalf of others. It could be a managed investment entity if it passes the management of assets tests.

Is an underlying company a manager investment entity?		
1	Is a underlying company an entity	Yes
2	Do they conduct activities as a business	No., underlying companies do not charge for administrating or managing financial assets
3	... for on behalf of a customer	Yes. Customer is the trust
4	Do they administer Financial Assets	Yes, the company does upon instruction of directors
5 on behalf of others?	No, the administration is done by the company upon instruction of directors.
<p>Conclusion:</p> <p>No. The underlying company is not in the business of administrating, i.e. it does not charge admin or investing fees.</p>		

G. Is an underlying company a managed investment entity

Is an underlying company a managed investment entity?		
1	Is an underlying company an entity	Yes
2	Managed by another FI	No (unless director is a trustee corporation)
3	Assets managed by another FI	Perhaps
4	Income test	Yes
<p>Conclusion:</p> <ul style="list-style-type: none"> • Depends if its assets are managed by a FI. • In rare cases, the Entity itself may be managed by a FI, such as when a corporate trustee is the director. 		

Summary

A corporate director is not a manager investment entity as it does not administer, invest or manage financial assets. The company on whose boards they sit do the administration on behalf of itself.

A corporate director is not a managed investment entity as it will not pass the managed by test.

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Mark Morris

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