Issue 02

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Regular journal of exploiting Common Reporting Standard weaknesses

# CRS TIMES

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## This issue highlights

USA to introduce beneficial owner register accessible on request by authorities on behalf of foreign countries. Combined with EU Commission to blacklist USA if it does not join CRS by May 2019, and existing exchange on demand treaties, those who switched to USA trusts, banks, brokers, custodians and insurers to avoid CRS have an anxious but not long wait.

OECD to tackle UAE assisting its entities and incorporators of free trade zone companies to be synthetic tax resident

Singapore guidance that its investment entity trusts should report a zero value for irrevocable settlors is a dream for tax evaders

The OECD FAQ kills off irrevocable insurance wrapper loophole but remains silent on the pre-existing insurance effectively prohibited from being sold loophole

## this issue



# Shifted accounts to USA a CRS solution? Congress introducing a national b.o. directory accessible by foreign authorities

**Update news 12 June 2018**

**Act submitted to Congress but right wing forced removal of beneficial owner requirements**

**FATCA Reciprocal Reporting is bet** issues (1) No information available at Feder level)

FA

FinCE identify beneficial owners are inep lies only to new entities and does not cover insurers. Worse, beneficiaries of trusts are not identified. There are further loopholes, e.g. institutions are not required to look through a pooled investment vehicle to identify and verify the identity of any individuals who own 25% or more of its equity interests.

**Counter Terrorism and Illicit Finance Act (CTIFA)** With respect to Bob Dylan, *the times are-a-changin*. Republicans have drafted the CTIFA and it is well supported by Republicans, who have been against FATCA. The most notable change to the Bank Secrecy Act proposed by the CTIFA in the creation of the United States' first national beneficial ownership directory.

**tries:** The directory uest by a federal of law enforcement of a gn country.

**Beneficiaties of entities and trusts:** The Act will follow FATF in identifying beneficiaries of entities and **trusts**.

**Existing entities:** For corporations already in existence, the bill requires (1) an update of beneficial owner information 60 days after any changes, (2) submission of an annual filing to FinCEN containing beneficial owners and their name, address, and passport number.

**Foreign owned entities**: If beneficial owner is foreign, the applicant certifies (i) it has a verified photo identity, (ii) the name, address, and identity of the foreign beneficial owner, (iii) retain this information for 5 years after the entity has ceased to exist.

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## Growl I of this issue

Active NFE vs Active businesses

**Banks are complicit in categorizing entities as Active NFE is the entity undertakes any form of business or trading**

I restate the OECD CRS page 58 par 9(a) definition of Active NFE with respect to businesses or trade

*The term "Active NFE" means any NFE that has less than 50% of the NFE's gross income for the preceding calendar year or other appropriate reporting period is passive income* ***and*** *less than 50% of the assets held by the NFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income*.

So, banks are guilty of not looking at the assets, namely cash of these trading companies.

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# Forget Malta, St. Kitts or Cyprus. Dubai is a sunny place for... procuring a sham tax-residence by merely setting up a UAE company for the price of a decent pair of shoes

## UAE has no income tax, yet its CRS guidance states anyone with a residence visa is a tax-resident, even if they are not taxed nor physically present

**UAE investor residence:** Countries like Bahamas, Turks & Caicos, Cayman, etc. which do not levy income tax, honestly state on the OECD tax residency website that they do not have a definition of an individual tax resident.

Yet the UAE does its utmost to assist users of their "investment scheme" to be defined as tax-resident, even though it is almost sure that the user is tax resident elsewhere.

**Sham UAE "investor residence" visa**
Anyone, with a minimal background check, can incorporate a company in one of the 50 Free Trade Zones and manage it from overseas. An owner is required to lease an office in the FTZ to qualify for the residence visa

**Deathly quiet:** Visiting many of the fast growing FTZ office parks, one notices a virtual presence of tumble weeds and crickets, much like the apartments rented to foreigners in Monaco for tax residency. So much for "investing".

### Assisting FTZ entities to be tax resident in UAE

The UAE assists its untaxed entities to be falsely tax-resident in the UAE by three practices ensure no account is correctly reported for CRS (A) Fake tax residency (B) Fake TIN (C) Categorizing Passive NFEs as Active NFEs

A. Defining any entity incorporated in the UAE as being tax resident in the UAE. All other tax havens do not consider entities incorporated in their jurisdiction as being tax resident. It is only the tax haven of UAE that implements this fake tax-residency for entities.

B. To further enhance the sham tax-residency of untaxed entities, the UAE assists untaxed entities to be tax-resident in the UAE by providing VAT Tax Registration Numbers, deceitfully referred to as a Tax Identification Numbers (TIN), despite the FTZ not being liable on VAT. This TRN / TIN is provided to banks throughout the world to as false evidence that the UAE Free Trade Zone company is tax-resident in UAE.

C. Banks in UAE, on purpose, incorrectly categorize any company whose income is not passive income as an Active NFE, despite the company holding mostly cash as an asset. This purporting or incorrectly allowing entities to be categorized as Active NFE circumvents the reporting of controlling persons.

**Facilitates offshore structures & arrangements aimed at attracting profits without real economic substance**

To top it all, the principle of Free Trade Zone companies is to encourage the foreign management of these companies, without any actual operation in the UAE, beside the fake rental of an office. The UAE facilitates companies to establish in the UAE without any tax liabilities, and likely not to be reported for CRS. However, the most egregious characteristic of UAE Free Trade Zone companies is it allows companies without any substantial activity or presence to book their profits untaxed through these companies.

**A busy FTZ office**

# Singapore obstinately guides its trustees to report a nil value for a settlor of an irrevocable investment entity trust


**Assists tax evaders** because a nil value is reported for the settlor. Many countries do not realize Singapore is the only country reporting nil, so the country receiving the information will assume the trust no longer has any assets.

## Why this is so egregious

Many countries like Spain, France, etc. do not recognize trusts and will continue taxing the settlor on income and wealth, as if the trust was never settled. Furthermore, countries such as Germany and Italy tax a settlor of an irrevocable trust at a 50% gift tax rate. With nil report, it is likely that these countries will not apply taxes with respect to the irrevocable trust.

## Proof that Singapore is illogical, and likely just to assist tax evaders

The CRS implementation Handbook mandates for passive NFE trusts, that the entire account value be reported for the settlor, whether irrevocable or not. So why does Singapore guide a nil report if the trust is categorized as an investment entity? What is the difference in principle?

## OECD usually wants relevant information

The BEPS Action Plan recognises that one of the key challenges faced by tax authorities is a lack of timely, comprehensive and relevant information. There is no argument that a nil value is such.

### IRAS Response

On the reporting of settlors of irrevocable trusts for CRS purposes, there is no difference in the reporting requirements of Singapore and that of the OECD CRS Standard.

We presume your query arose from reading section F.9 of IRAS FAQs on the CRS. In that FAQ where we provided guidance to allow nil reporting on settlors of irrevocable trusts for CRS purposes, it is premised on the fact that in an irrevocable trust, the settlor would have disposed of all his interest in the trust property and would not, in his capacity as the settlor, be a beneficiary to such a trust. You would therefore appreciate that the settlor of an irrevocable trust would not be entitled to any of the trust assets, resulting in a nil account balance as far as the settlor is concerned, for CRS purposes.

Please however note that treatment in the IRAS FAQs is specifically limited to where the account value of the irrevocable trust held by individual account holders is calculated or derived. Where the account value of the irrevocable trust is not calculated or derived, the settlor would still have to report the total value of all property held in the trust. In this regard, IRAS' guidance is consistent with the guidance in the OECD CRS Implementation Handbook. More specifically, referring to paragraph 222 of the Handbook, the reporting of financial information of trusts will depend on the nature of the interest held by each Account Holder. In the case where the account value of an irrevocable trust held by individual account holders is calculated or derived, given that the settlor would have no interest in the trust property after disposing it upon establishment of the irrevocable trust, the account balance for CRS purposes in respect of the settlor would be nil

### OECD response

"If that is how the trust reports the situation to the settlor then this treatment is **acceptable**. Please note, though, that there would still be a CRS report to the jurisdiction of residence of the settlor, allowing them to identify the settlor. It is just that the account balance would be shown as zero."

"The CRS is a blunt instrument rather than a one-stop shop and would mean people in France / Spain etc. would have to then get the information under the existing information request parameters. As the trust has all the necessary information and names the relevant authorities would be able to investigate".


# June 2018 CRS FAQ update quashed the irrevocable insurance loophole but prohibited pre-existing insurance loophole continues

Several Singapore subsidiary and British crown dependency life insurers, to avoid CRS, creatively added confidential riders to existing insurance wrappers whereby the policyholder irrevocably surrendered all rights to access the policy assets until death. The OECD has now clarified that the policyholder of such policies is to be regarded as the reportable account holders.

*The FAQ page 19 states policyholders are to be considered Account Holders with respect to the Cash Value Insurance Contract in all instances, unless they have finally, fully and irrevocably renounced both the right to access the Cash Value and the right to change the beneficiaries of the Cash Value Insurance Contract.* ***In cases where, taking into account the above paragraph, no person can access the Cash Value or change the beneficiaries, the Account Holder is any person named as the owner of the contract***

**"Ironically, the policyholders have locked themselves irrevocably into these policies to escape CRS and now it is reportable, he cannot surrender or loan to pay taxes. Nice long-term business for insurer and brokers"**

## Why this is a disaster for the policyholder?

**Q: Will be forced to declare these assets but cannot access policy to pay taxes?**

By definition, assets in these policies have not been declared. As they will be reportable, the policyholder will be liable to pay taxes, penalties and interest.

Under normal circumstance, a person declaring previously undeclared assets would use those undeclared assets to pay the penalties, etc. However, in this circumstance of an irrevocable policy, the policyholder cannot access the assets via loan, pledge, surrender or withdrawal. This means the policyholder will have to finance the penalties himself and could go bankrupt.

## Growl II of this issue

The dumbest loophole the OECD permits is exempting insurance contracts which are not allowed to be sold, but nevertheless are sold likely through a 3rd country, or when policyholder visited insurer jurisdiction.

Accounts not required to be reviewed, identified or Paragraph A exempts from review all Preexisting Individual Accounts that are Cash Value Insurance Contracts and Annuity Contracts, provided that the Reporting Financial Institution is effectively prevented by law from selling such contracts to residents of a Reportable Jurisdiction.

Reporting Financial Institution is "effectively prevented by law" from selling Cash Value Insurance Contracts or Annuity Contracts to residents of a Reportable Jurisdiction if:

a) the law of the Reporting Financial Institution's jurisdiction prohibits or otherwise effectively prevents the sale of such contracts to residents in another jurisdiction; or

b) the law of a Reportable Jurisdiction prohibits or otherwise effectively prevents the Reporting Financial Institution from selling such contracts to residents of such Reportable Jurisdiction.

Where the applicable law does not prohibit Reporting Financial Institutions from selling insurance or annuity contracts outright, but requires them to fulfil certain conditions prior to being able to sell such contracts to residents of the Reportable Jurisdiction (such as obtaining a license and registering the contracts), a Reporting Financial Institution that has not fulfilled the required conditions under the applicable law will be considered to be "effectively prevented by law" from selling such contracts to residents of such Reportable Jurisdiction.

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# Upcoming publications

## next issue 03

Single owned investment entity loophole **P.1**

Difference between location of FI vs. entity account holder **P.2**

Listed vs. regularly traded **P.2**

Beneficiaries and founders of foreign protector US trusts will likely be accessible by foreign authorities through the proposed USA national directory **P.3**

## following issue 04

FATCA reciprocal reporting mostly does not exist despite IGA 1A

Stuffing a Active NFE with intangible assets

CRS jurisdiction advisor managing account held in USA

Can an entity with intangible assets qualify as an Active NFE

Why a trust is different from a holding

## a sprinkling of topics in future issues…

What is 80% of activities of a holding company mean

When is holding company an Active NFE if it holds passive NFEs

Why look through non reportable Financial institutions that own passive NFE

What is the asset test for an Active NFE

What minimum threshold for FI managing assets to be an Investment Entity

Is it possible to look through a non participating Custodial, Depsoitary or Insurance institution

How is bank supposed to look through a non participating collective investment

When is disability insurance in scope



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