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## Issue highlights

- Taiwan
- Tax residencies of tax transparent entities
- What is reported or not reported if jurisdiction aligns beneficiaries of NFE trusts with investment entity
- Wound up investment entity, who reports
- Fake high-volume trading to make listed entity a regularly traded
- What is difference between a non-reportable person and an Active NFE that are central banks, Government entities international organisations, regularly traded entities
- Can you fake an Active NFE charity?
- Active NFE reorganization other than emerging from bankruptcy

## When will Taiwan join CRS?

Many Chinese tax advisors incorrectly opine Taiwan cannot join CRS because China won't allow it to act as an independent jurisdiction. Taiwan cannot sign the CRS Multilateral Competent Authority Agreements otherwise it will be viewed by China as a jurisdiction.

However, EU has placed Taiwan on grey list of uncooperative tax haven because it hasn't implement AEOI with EU.

Therefore, Taiwan amended Articles 5-1 and 46-1 of the Tax Collection Act whereby the Ministry of Finance MOF has the authority, on a reciprocal basis, to affect the automatic exchange of tax and bank account information with other jurisdictions for tax matters.

Importantly, in November 2017 Taiwan issued regulations for AEOI based on the CRS and has informed its Financial institution that data will be collected under the wider approach for AEOI as from January 2019.



**Who reports on liquidated investment entities? Reportable Accounts remain reportable until the date it ceases to be a Reportable Account (e.g. due to the closure of the account).**

If a Reportable Account is closed due to the liquidation or winding up of the Reporting Financial Institution, information with respect to such account remains annually reportable until the date of closure of the Financial Account by the Reporting Financial Institution in the framework of the liquidation or the winding-up.

In this respect, jurisdictions may provide further guidance to their Reporting Financial Institutions on how to fulfil their due diligence and reporting obligation during the liquidation or winding up process, taking into account relevant domestic legal provisions, in the areas of corporate and insolvency law.

In this respect, an option could be to allow reliance on a third-party service provider to ensure that all due diligence and reporting obligations of the Reporting Financial Institution are adequately carried out.

Central banks, Government entities, International organisations and regularly traded entities - difference of non-reportable person and an Active NFE

**Non-Reportable Person:** CRS pg. 57 states a Reportable Person does not include (i) Regularly traded corporation or its related entity, (ii) Governmental Entity (iii) International Organisation or (iv) Central Bank.

**Active NFE:** CRS page 58 states an Active NFE is an NFE that is a Governmental Entity, an International Organisation, a Central Bank, or an Entity wholly owned by one or more of the foregoing.

*(Note the incongruity of an Active NFE being a subsidiary of said list but only applies to related entity of regularly traded)*

The dual categorization of non-reportable FI and Active NFE means no reporting on the entity, nor on its controlling persons.

**Question:** What if any in above list holds a Passive NFE? Look-through to controlling persons (yes according to FAQ)



Fake trading to make listed entity an Active NFE regularly traded entity.



An individual lists their own private investment company on stock exchange and then arranges for a money market maker to generate frequent trades, between two entities they own.

This is an outright fraudulent strategy to avoid CRS because regularly traded means 10% shares are sold to unrelated parties each year. This is also reportable arrangement under MDR. There are cheaper simpler structures outside the scope of CRS.

### Growl of the issue

It is difficult to fathom why most banks in the CRS jurisdiction agree that an entity is an Active NFE Type [A] just because the entity engages in business or trades, even though the entity has > 50% cash as assets.

I suspect that this mis categorization originates from three sources:

1. Bank wants to assist non-reporting on Controlling Persons
2. Some lawyers incorrectly opining that cash is not a Financial Asset
3. Active NFE holding company has subsidiaries that engage in business or trades even if subsidiaries are not Active NFEs.



## If jurisdiction aligns beneficiaries of NFE trusts with investment entity trusts

If Jurisdiction aligns NFE trust beneficiaries with investment entities but do not report on beneficiaries unless distribution made that year but then added report on debt interest.

However, the information reported is per the implementation handbook below

Trust is a Financial Institution		
<u>Account Holder</u>	<u>Account Balance or Value</u>	<u>Gross payments</u>
<b>Settlor</b>	Total value of all trust property	Value of payments made to the settlor in reporting period (if any)
<b>Beneficiary mandatory</b>	Total value of all trust property	Value of distributions made to the beneficiary in reporting period
<b>Beneficiary discretionary (in a year in which a distribution is received)</b>	Nil	Value of distributions made to the beneficiary in reporting period
<b>Any other person exercising ultimate effective control</b>	Total value of all trust property	Value of distributions made to such person in reporting period (if any)
<b>Debt interest holder</b>	Principal amount of the debt	Value of payments made in reporting period
<b>Any of the above, if account was closed</b>	--- The fact of closure --- (No values reported)	

Trust is a Non Financial Entity (NFE)		
<u>Account Holder</u>	<u>Account Balance or Value</u>	<u>Gross payments</u>
<b>Settlor</b>	Total account balance or value	Gross payments made or credited
<b>Trustee</b>	Total account balance or value	Gross payments made or credited
<b>Unnamed class of beneficiaries</b> <small>(2012 FATF Recommendations - see Interpretive Note to Recommendation 10, at footnote 31)</small>	Total account balance or value  (when distribution made or exercises vested rights)	Gross payments made or credited
<b>Beneficiary mandatory</b>	Total account balance or value	Gross payments made or credited
<b>Beneficiary discretionary</b> <small>(Regardless if distribution made. Different to I.E. trusts!)</small>	Nil	Gross payments made or credited
<b>Protector (if any)</b>	Total account balance or value	Gross payments made or credited
<b>Any of the above, if account was closed</b>	--- The fact of closure --- (No values reported)	

## CRS conflict in residency of tax transparent entities

CRS page 145 par(8) The following illustrate how an Entity's residence for tax purposes may be determined: **Example 4:** A company is incorporated in Jurisdiction A and has its place of effective management in Jurisdiction B. except that, under the laws of Jurisdiction A, residence for tax purposes is determined by reference to place of effective management and, under the laws of Jurisdiction B, residence for tax purposes is determined by reference to place of incorporation. **Thus, the company is not resident in either Jurisdiction A or B.**

Yet, in conflict, CRS Commentary pg. 137 par (10) Information indicating that the Account Holder is resident in a Reportable Jurisdiction includes an address in a Reportable Jurisdiction (for example, this would be likely to apply for Entities treated as fiscally transparent and could reflect the registered address, principal office, or place of effective management);

CRS Commentary pg. 196 par (106) As a **general** rule, an individual or Entity is a "Reportable Jurisdiction Person" if it is resident in a Reportable Jurisdiction under the tax laws of such jurisdiction. As an exception to this rule, an Entity that has no residence for tax purposes (e.g. because it is treated as fiscally transparent) is considered to be resident in the jurisdiction in which its place of effective management is situated.

CRS Commentary pg. 191 par (109) An Entity may have more than one place of management, but it can have only one place of effective management at any one time.

The conflict is according to Example 4, an entity may not have a tax residence, yet other CRS clauses state tax residence for tax transparent entities are place of management or even registered address or principle office, which is ridiculous e.g. BVI companies.



**"We need to reorganize. Harris, switch seats with Miss Olsen."**

## Can Active NFE be other forms of reorganization, other than emerging from bankruptcy

CRS pg. 57 par (9)(f) the NFE was not a Financial Institution in the past five years and is in the process of **liquidating** its assets or is **reorganising** with the intent to **continue or recommence operations** in a business other than that of a Financial Institution. So, does this include mergers, consolidations, acquisitions, spinoffs, split offs, recapitalization, identity change or bankruptcy?

CRS Commentary pg. 162 par (19) and pg. 195 par (124) both state an Active NFE is an NFE that are **liquidating** or **emerging from bankruptcy**. No other reorganization is mentioned.

## Can you fake an Active NFE charity?

CRS pg. 59 Par (9)(h) obliges five conditions for an NFE to be an Active NFE Charity:

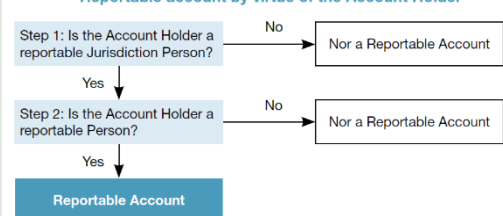
- i. it is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organisation, business league, chamber of commerce, labour organisation, agricultural or horticultural organisation, civic league or an organisation operated exclusively for the promotion of social welfare;
- ii. it is exempt from income tax in its jurisdiction of residence;
- iii. it has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
- iv. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents do not permit any income or assets of the NFE to be distributed to, or applied for the benefit of, a private person or noncharitable Entity other than pursuant to the conduct of the NFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFE has purchased; and
- v. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents require that, upon the NFE's liquidation or dissolution, all its assets be distributed to a Governmental Entity or other non-profit organisation, or escheat to the government of the NFE's jurisdiction of residence or any political subdivision thereof.

The way CRS avoiders use Charities is to establish a Charity meeting an Active NFE criteria, but then amend the wind-up conditions too receive the assets without informing the FI maintaining the Charity's assets.

## What is CRS reporting when a Non-Participating Jurisdiction Custodial Institution holds a Participating Jurisdiction Investment Entity?

An individual or Passive NFE with its account maintained by a Non-Participating Financial Institution is outside the scope of CRS. This explains why the USA is the most favoured method to circumvent CRS, i.e. switch bank account to US bank, US insurer or US trust.

### Reportable account by virtue of the Account Holder



An Investment Entity that has its Equity Interest held by a Non-Participating Jurisdiction is also outside the scope of reporting because the Account Holder is the Custodian Institution, which is a Financial Institution. CRS pg. 57 par(D)(2) The term "Reportable Person" means a Reportable Jurisdiction Person **other** than: A Financial Institution. CRS 193 par (116) Financial Institutions are excluded from the term "Reportable Person" as they will do their own reporting or are otherwise considered to present a low risk of being used to evade tax. They are thus excluded from reporting, except for managed Investment Entities that are not Participating Jurisdiction Financial Institutions, which are treated as Passive NFEs and thus reported.

However, an MDR Reportable Arrangement for avoiding CRS rule 1.1(b) the transfer of a Financial Account, or the monies and/or Financial Assets held in a Financial Account to a Financial Institution that is not a Reporting Financial Institution or to a jurisdiction that does not exchange CRS information with all jurisdictions of tax residence of a Reportable Taxpayer.

## Difference between Reportable Jurisdiction and Participating Jurisdiction?

Difference clarified in CRS Commentary pg. 93 par (117)

"Reportable Jurisdiction" means a jurisdiction (i) with which an agreement is in place pursuant to which there is an obligation in place to provide CRS information, and (ii) which is identified in a published list.

"Participating Jurisdiction" means a jurisdiction (i) with which an agreement is in place pursuant to which it will provide CRS information, and (ii) which is identified in a published list.

Participating Jurisdiction is generally used when referring to a reporting FI. Non-Participating Investment Entities are regarded as Passive NFEs.

Reporting Jurisdiction is generally when referring to where information will be sent.

## Difference between non-reporting FI and non-reportable accounts

CRS pg. 45 "Non-reporting Financial Institutions" are specifically excluded from being required to report information due to posing a low risk of being used to evade tax. Loopholes originate in domestic defined low risk FIS such as Hong Kong's Occupational Retirement Schemes or Gibraltar trustee retirement plans.

CRS pg. 53 – 56 "Non-reportable" accounts or "Excluded Accounts" are financial accounts maintained by a reporting FI but do not have to be reviewed or reported for CRS due to low risk of tax evasion. Some loopholes originate in domestic defined low-risk accounts.



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