



## Peter Cotorceanu

### The regulators are at it again

*An update and recent news on CRS and FATCA. An in-depth review of recent years and some future casting around what may come next. Doing nothing is not an option.*

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From 14.25 to 15.05

*Further details in the agenda.*

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## AEOI Update

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A portrait of your speaker as a young lawyer



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## FATCA Updates

- Missing TINs for Pre-Existing Accounts in Model 1 FATCA IGA countries—further relief provided in IRS Notice 2023-11 and IRS FATCA Reporting FAQ 6
- Switzerland moving to Model 1 IGA

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## CRS Updates

- Enforcement:
  - Nil reporting
  - Compliance Forms, e.g., Cayman (compare BVI Filing Summaries)
  - Audits
  - Checking IRS GIIN registration list
  - Imposing fines, e.g., Cayman schedule

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## Tax Information Authority



CAYMAN ISLANDS

# ENFORCEMENT GUIDELINES: COMMON REPORTING STANDARD (CRS)

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Reg.	Description of Offence	Administrative penalty (Indicative)	
		Reg.22(1)(a): Entities and certain individuals	Reg.22(1)(b): individuals
7(1)(a)	Failure to establish and maintain written policies and procedures to comply with Part 2 of the CRS Regulations.	\$7,500	\$3,000
7(1)(b)	Failure to implement and comply with written policies and procedures.	\$7,500	\$3,000
7(2)(a)	Failure to establish and maintain written policies and procedures to enable the identification of the jurisdiction of tax residency of Account Holders or Controlling Persons.	\$7,500	\$3,000
7(2)(b)	Failure to establish and maintain written policies and procedures that apply the due diligence procedures set out in the CRS.	\$7,500	\$3,000
7(2)(c)	Failure to retain information obtained in accordance with the Regulations or a record of the steps taken to comply with Regulations for six years from the end of the year to which the information relates or steps were taken.	\$10,000	\$4,000
7(3)	FI relies on self-certification that it knows or has reason to believe is inaccurate and makes a return based on this self-certification.	\$20,000	\$8,000
8(1)(a)(ii)	Failure to register on the DITC Portal by the notification deadline.	\$37,500	\$15,000
8(1)(b)	Failure to update the Authority of any changes to their notification on the DITC Portal.	\$10,000	\$4,000

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# TAX ANNUAL SUMMIT

Reg.	Description of Offence	Administrative penalty (Indicative)	
		Reg.22(1)(a): Entities and certain individuals	Reg.22(1)(b): individuals
8(2)	Failure to provide an update via the DITC Portal to inform the Authority of changes to reporting obligations, Entity classification, or authorised users.	\$10,000	\$4,000
8(4)	Failure to provide required information (except in the case of 8(4)(b) noted below)	\$10,000	\$4,000
8(4)(b)	Failure to correctly classify itself as Reporting	\$20,000	\$8,000
8(4)(e)(i)	Failure to provide details of the PPoC	\$10,000	\$4,000
8(4)(e)(ii)	Failure to provide details of the authorised person	\$10,000	\$4,000
9(1)	Failure to submit a CRS return (penalty per reportable account)	\$5,000	\$2,000
	Failure to submit a nil return or provide any further information (e.g CRS Filing Declaration and CRS Compliance Form)	\$10,000	\$4,000
11(2)	FI does not retain records and documentary evidence to supports the returns submitted by an agent.	\$10,000	\$4,000
12(1)	FI fails to provide required information to the Authority	\$10,000	\$4,000
12(2)	FI fails to comply with Authority's requirement to bring to the Islands information located outside the Islands	\$10,000	\$4,000
12(3)	FI fails to retain for six years a book, document or other record, including any information stored by electronic means, that relates to the information required to be reported to the Authority under Part 2	\$10,000	\$4,000
14	Person provides a self-certification to a FI that is false in a material particular to the CRS. For this purpose, it does not matter that - (a) the self-certification was made outside the Islands; (b) the person did not know, or had no reason to know, that the self-certification was false; or (c) the self-certification was given to the FI by someone else.	\$20,000	\$8,000
16	Person provides information that is materially inaccurate	\$20,000	\$8,000



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## TAX ANNUAL SUMMIT

Reg.	Description of Offence	Administrative penalty (Indicative)	
		Reg.22(1)(a): Entities and certain individuals	Reg.22(1)(b): individuals
17	Person discloses confidential information	\$25,000	\$10,000
18(a)	Person alters, destroys, mutilates, defaces, hides or removes information in a way that causes the person or anyone else to contravene Part 2 in relation to the information.	\$25,000	\$10,000
18(b)	Person authorises, advises or counsels someone else to contravene Reg.18 paragraph (a).	\$25,000	\$10,000
19	Person hinders the Authority in performing its function under the Regulations or under section 5 of the Act.	\$25,000	\$10,000

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# Crypto-Asset Reporting Framework (CARF) and CRS Amendments

Originally published by the  
OECD on 10 Oct. 2022

**NOT YET IN EFFECT**



**International Standards for  
Automatic Exchange of  
Information in Tax Matters**

CRYPTO-ASSET REPORTING  
FRAMEWORK AND 2023 UPDATE  
TO THE COMMON REPORTING  
STANDARD



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# Crypto-Asset Reporting Framework (CARF) and CRS Amendments

48 jurisdictions agreed to implement **beginning in 2026, with first reporting in 2027:**

All 27 EU countries plus the following 21 jurisdictions:

Armenia, Australia, Barbados, Belize, Brazil, Canada, Cayman Islands, Chile, Gibraltar, Guernsey, Japan, Jersey, Isle of Man, Korea, Liechtenstein, Mexico, Norway, Singapore, South Africa, U.K., U.S.A.



**International Standards for Automatic Exchange of Information in Tax Matters**

CRYPTO-ASSET REPORTING  
FRAMEWORK AND 2023 UPDATE  
TO THE COMMON REPORTING  
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## CRS Amendments

- CARF-related amendments:
  - Now covers “Specified Electronic Money Products” and “Central Bank Digital Currencies”
  - Definitions of “Financial Assets” and “Investment Entity” amended accordingly
- Most **charitable entities** will be Non-Reporting FIs (currently may be FIs or Active NFEs)

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## CRS Amendments

- **Specific roles of “equity interest” “Account Holders” in Investment Entity FIs and of “Controlling Persons” in Passive NFEs will be reportable, e.g., as senior managing official, trustee, settlor, beneficiary, protector, or “other natural person exercising ultimate effective control” over a trust—some jurisdictions already requiring this specificity (e.g., BVI for Controlling Persons of Passive NFEs)**

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## CRS Amendments

- Whether an account is a “**New**” or “**Pre-Existing**” Account—means, for example, that missing TINs for New Accounts can no longer go undetected
- Whether the account is a **joint account**, as well as the number of joint Account Holders—good because full account value is reported for all joint account holders

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## CRS Amendments

- The type of Financial Account, e.g., Depository, Custodial, Equity and Debt Interests, and Cash Value Insurance Contracts
- Residents of more than one jurisdiction will have to be treated as resident in both (or all) relevant jurisdictions, i.e., they will no longer be able to claim residence in a single country under a treaty tiebreaker provision

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## CRS Amendments

- Citizenship by Investment (CBI) and Residence by Investment (RBI) “Schemes”:
  - FI must question self-certs claiming residence in potentially high-risk CBI and RBI countries,\* e.g., ask whether the person
    - has obtained residence rights under a CBI/RBI programme
    - holds residence rights in any other jurisdiction(s)
    - has spent more than 90 days in any other jurisdiction(s) during the previous year,
    - and also in which jurisdictions he or she (or “they”?) filed personal income tax returns during the previous year
  - \* No list provided



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## CRS Amendments: Some FAQs moved to CRS Commentary

- What is the effect of moving an FAQ to the CRS Commentary?

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## FAQs moved to CRS Commentary

- **Income attribution:**
  - All remuneration for relevant activities is to be taken into account, regardless of whether that remuneration is paid directly to the entity providing the service or to another entity. For example, fees paid directly to a service provider rather than to a corporate trustee (e.g., PTC) must be attributed to the entity providing the service (in this case, to the PTC) even though not paid to that entity

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## FAQs moved to CRS Commentary

- The following are to be treated as **indirect distributions** by trusts:
  - **payments** made by the trust to a third party for the **benefit of a beneficiary**, e.g., where a trust pays the tuition fees or repays a loan taken up by a beneficiary
  - grants of loans by trusts that are **interest free** or at **below-market interest rate** or at **other non-arm's length** conditions
  - **write-offs of loans** granted by a trust to its beneficiary

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## FAQs moved to CRS Commentary

- Which country's rules determines if an entity in a *non-CRS* country is an FI or NFE?
  - the country in which the account is maintained (duh!)
    - implication—and this makes sense—if an entity is in a CRS country, its country's rules, not the rules of the country where the account is maintained, determines if an entity is an FI or NFE
- Which country's rules determines if an entity is an Active or Passive NFE?
  - the country in which the account is maintained. However, the country in which the account is maintained may permit the determination to be made by the rules of the CRS country in which the entity is resident

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## FAQs moved to CRS Commentary

- An asset is held for the production of passive income even if it does not produce any passive income in the period concerned.
  - Instead, the asset must be of the type that produces or *could produce* passive income. For example, cash should be viewed as producing or being held for the production of passive income (interest) even if it does not actually produce such income.

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## FAQs moved to CRS Commentary

- PTCs—a wierd FAQ:
  - A PTC that acts as a registered office or registered agent of a trust or performs administrative services unrelated to the Financial Assets, Relevant Crypto-Assets or money of the trust does not conduct the activities and operations of an “In Business” Investment Entity on behalf of the trust and thus the trust is not “managed by” the PTC

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## Key FAQ and part of CRS Implementation Handbook *not* moved to CRS Commentary

- What should we infer from the OECD's failure to incorporate other FAQs and parts of the CRS Implementation Handbook into CRS?
  - *"FAQs not explicitly incorporated into the Commentary still remain **valuable guidance** for interpreting the CRS."*
  - What does that mean as a practical matter?

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## CRS Amendments: Key FAQ and part of CRS Implementation Handbook *not* moved to CRS Commentary

- Two biggest omissions:
  - Protectors as “equity interest” holders in trusts that are FIs
  - Look-through of entities that are equity-interest holders in trusts



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## Protectors as “equity interest” holders in trusts that are FIs (FAQ)

FI Trust Equity-Interest Holders	Passive NFE Trust Controlling Persons
a settlor or  beneficiary of all or a portion of the trust, or  any other natural person exercising ultimate effective control over the trust	the settlor(s), the trustee(s), the protector (if any), the beneficiary(ies) or class(es) of beneficiaries, and  any other natural person(s) exercising ultimate effective control over the trust

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# Protectors as “equity interest” holders in trusts that are FIs (FAQ)

## FAQs—Protectors as Equity Interest Holders

### 6. Protectors of a trust that is a Reporting Financial Institution

**Are protectors of a trust that is a Reporting Financial Institution considered to be Account Holders of the trust in all instances or only in circumstances where their powers are such that they could be regarded as exercising control over the trust?**

The protector must be treated as an Account Holder irrespective of whether it has effective control over the trust.

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Seriously?!?

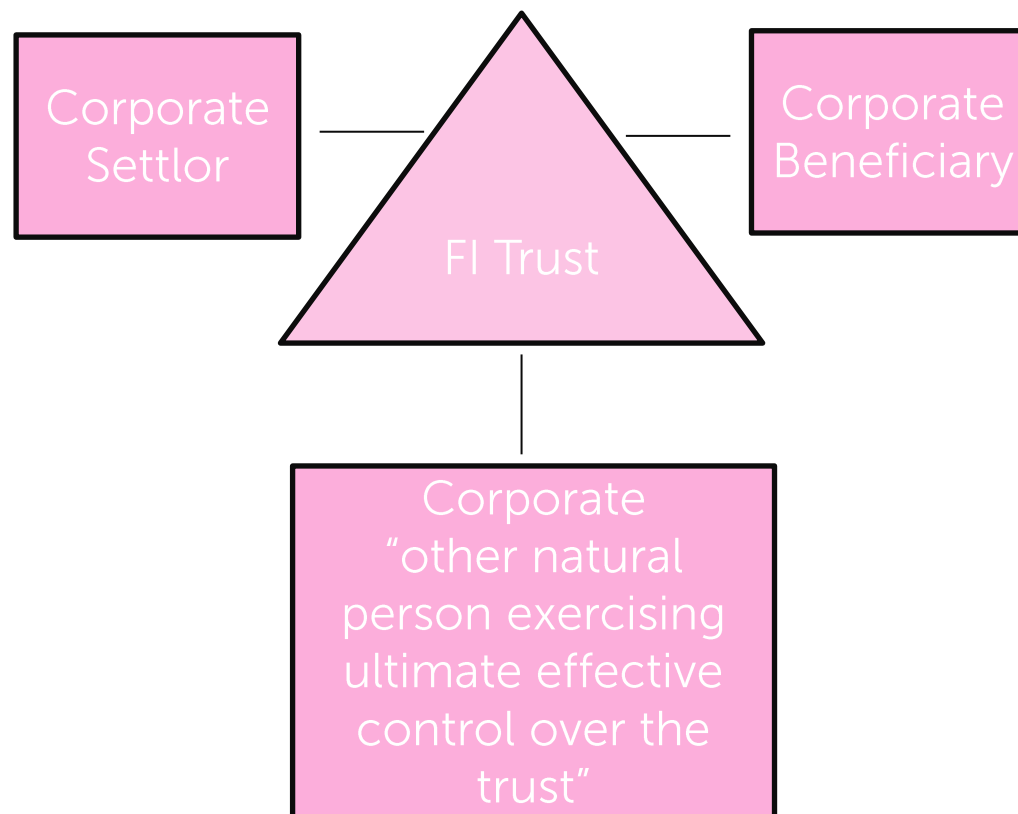


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# Look-through of entities that are equity-interest holders in trusts (Implementation Handbook, second. ed.)



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## Look-through of entities that are equity-interest holders in trusts (Implementation Handbook, second. ed.)

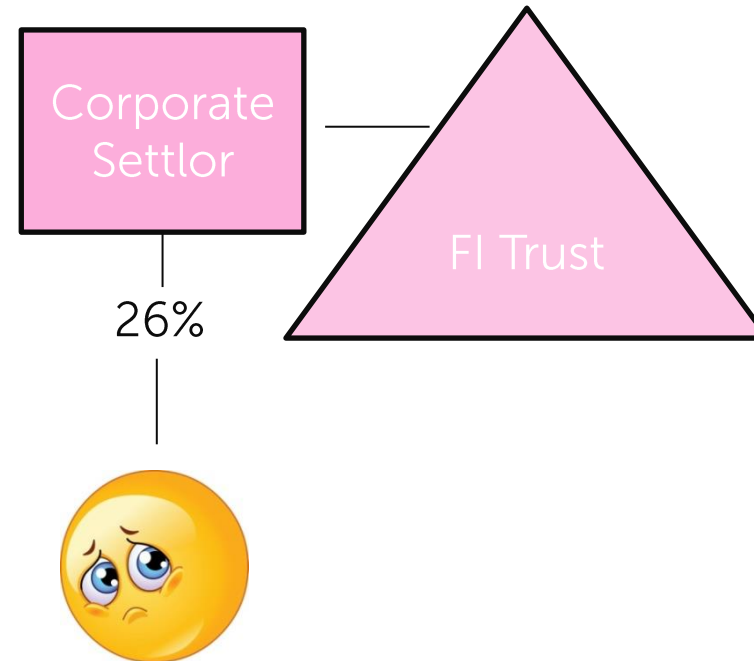
If a settlor, beneficiary or other person exercising ultimate effective control over the trust is itself an Entity, that Entity must be looked through (including any further intermediate Entities), and the ultimate natural controlling person(s) behind that Entity must be treated as the Equity Interest Holder. The term “Controlling Persons” as applies in the context of Passive NFEs will also apply here . . .

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## Look-through of entities that are equity-interest holders in trusts (Implementation Handbook, second. ed.)

Equity-interest holders do *not* need to be “natural persons”, i.e., humans



Controlling Persons must be “natural persons”, i.e., humans  
Controlling Persons of companies:

- (i) >25% (or 10%?) shareholders
- (ii) persons exercising control through other means
- (iii) Senior managing official

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Questions?



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