



THE 26 OECD COMMON REPORTING STANDARD LOOPHOLES

Suggested improvements and refinements



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Angel Gurría




















April 2016, Washington D.C. : The OECD Secretary-General updated the G20 Finance Ministers on tax transparency. “*The OECD should address potential loopholes, both **actual** and **perceived** and taking action whenever necessary.*”














The OECDs Common Reporting Standard requires significant amendments to be effective. It is the writer’s opinion that the use of secrecy to evade taxes will continue due to the loopholes and deficiencies in the Standard. In some offshore financial centres, virtually no reporting will occur due to implicit acquiescence by authorities in permitting the utilisation of the perceived or real loopholes. This will result in tax evasion being displaced rather than resolved. This report details the loopholes being used and suggests amendments to the Standard required to counter circumvention strategies.

SUMMARY


Tax evaders exploit 18 actual loopholes and 8 ambiguities in the Standard to retain secrecy on cross-border accounts. The most serious loopholes are

- (i) Financial Institutions assist clients to shift accounts to a related NPJ FI
- (ii) Residency-by-investment schemes, principally the Dubai FTZ residence certificate
- (iii) CRS investment manager advising on assets maintained with non-related non-participating jurisdiction Custodial Institution
- (iv) Untaxed Investment Entity with management & beneficiary in same jurisdiction
- (v) Non-cash value investment-linked insurance.

I.	Actual loophole	Description	Serious
A1	Residence-by-investment schemes	Non-fiscal residency certificate.	
A2	Untaxed foreign investment entity managed in same jurisdiction as Equity Interest maintaining offshore account	No reporting as FI and B.O. in same county	
B1	Passive NFE maintain account in Non-Participating Jurisdiction	No reporting by Passive NFE if account in USA or Taiwan	
B2	Investment manager on assets maintained in Non-Participating Jurisdiction	Investment manager manages account maintained with US Custodian Institution	
B3	FI shift client account to related FI in Non-Participating Jurisdiction	FIs advise clients to close accounts and set up account in related FI, invariably in USA	
C1	25% entity threshold for Controlling Person	Easy to split shareholding amongst four family members	
C2	No AML on pre-existing accounts	No identification required if pre-existing AML did not id beneficial owner	
D1	Non-cash value insurance	Investment linked policies payable only upon death are out of scope	
D2	Insurance policies prohibited from being sold	Existing policies that were not allowed to be sold are out of scope	
D3	Gold	Out of scope substitute for financial assets	
D4	Property (Real estate)	Out of scope substitute for financial assets	
D5	Distributions by trusts as non-reportable loans	Trustees make loans instead of distributions	
D6	\$250,000 de minimis	Allows tax evaders to withdraw from Non-Participating jurisdiction	
E1	Embed investments in untaxed Active NFE	Embed investments in untaxed Active NFE	
E2	New company	New company every 2 years out of scope	
E3	Trusts as holding NFE	A trust holding subsidiaries that also has investment portfolio is out of scope	
F1	Bilateral late adopter shopping	Switzerland, Bahamas, UAE starting AEOI with major countries in 2019 or later	
F2	Late adopter delay DD on low value account	Late adopters are abusing an extra year for due diligence on smaller accounts	
G1	Hong Kong Occupational Retirement Scheme	Sham pensions for non-residents	

II.	Perceived loophole caused by ambiguity	Description	Serious
C3	Converting Equity Interest into Debt Interest	Common plan involves donation of assets to fund, but can receive shares back with forward agreement or OTC	
C4	Nominees	Russians still using 90's style nominees to disguise ownership	 
D7	Private untaxed pensions as excluded account	Andorran FIs mistakenly believe untaxed pension plans are tax favoured plans	
D8	Credit cards	Credit cards allow tax evaders to spend money held in Non-Participating Jurisdictions	
E4	Settlors of irrevocable trusts	Many practioners mistakenly believe settlors of irrevocable trusts do not have Equity Interest because they do not have Equitable Interest	
F3	Confidentiality assessment by jurisdiction	Switzerland, Bahamas, Singapore, etc. continue to mistakenly believe that they can self-assess confidentiality and data security of partner jurisdictions.	  
F4	Unrelated Pre-conditions for a CAA	Switzerland believes it can demand amnesties or access to for its FIs to partner financial markets before agreeing to a CAA	  
G2	Govt and international entity accepting deposits	Dubai FIs believe they can get client to first deposit with govt entity who wil place deposit with the FI	

Legend

 Extremely serious- undermines AEoI



























 Very

Serious – involves tens of billions

CATEGORISATION OF LOOPHOLES

I. **Actual loopholes:** The two dozen flaws in the Standard, permitting widespread circumvention, can be categorised by **A** Residence planning **B** Non-Participating Jurisdiction **C** Beneficiary dodging **D** Excluded Accounts **E** Non-Reportable Persons **F** Late adopter shopping, and **G** Non-Reporting Financial Institutions.

II. **Perceived loopholes:** Ambiguities in the Standard allow interpretation for non-reporting.

	A Residence planning	B Non Participating Jurisdiction	C Beneficiary Dodging	D Excluded Financial Accounts	E Non Reportable Persons	F Late adopter shopping	G Non- Reporting Fis
Actual loopholes	 Residence- by- investment certificate  Untaxed foreign Investment Entity managed in same jurisdiction as Equity Interest maintaining offshore account	 Passive NFE maintains assets in Non- Participating Jurisdiction  Investment manager for assets maintained in Non- Participating Jurisdiction  Fis shift clients' accounts to related entities in Non- Participating Jurisdiction	 25% shareholding threshold  No AML for pre-existing accounts	 Non-cash value insurance  Insurance policies prohibited from being sold  Gold  Distributions by trusts as loans  250,000 de minimis	 Embed investments in Active NFE  New company  Trusts as holding NFE	 Bahamas, UAE, Switzerland, Hong Kong, Panama, Singapore  due Diligence on low value accounts for late adopters	 Hong Kong Occupational Retirement Schemes
Perceived loopholes			 Converting Equity Interest into Debt Interest  Nominee	 Private untaxed pensions  Credit Cards	 Settlers of irrevocable trusts	 Confidentiality assessment by jurisdiction  CAA pre- conditions such as amnesty or access to financial markets	 Govt and international orgs taking deposits

A. RESIDENCE PLANNING

The beneficial owner avoids the definition of Reportable Jurisdiction Person by either (i) Obtaining synthetic residence-by-investment certificates to emulate being a fiscal resident in the same jurisdiction as the reporting Financial Institution, or (ii) Structuring an untaxed Investment Entity to be managed in the same jurisdiction of the beneficial owner.

Loophole A1: Residence-by-investment certificate



A FI, usually a bank, fund or trustee, assists their clients to obtain residence-by-investment certificates in the same jurisdiction as the FI maintaining the account.

	Residence certificate	Not a resident	Residence certificate	Residence certificate	Residence certificate	Residence certificate
Actual loopholes	Investment manager to assist client in obtaining synthetic residence certificate	20% withholding tax	Provisional income provided to client in NFE	Entity incorporated in NFE	Residence certificate provided to client	Not a resident of NFE and not a resident of any other country
Permitted loopholes	Client is not a resident of the jurisdiction	Client is not a resident of the jurisdiction	Client is not a resident of the jurisdiction	Client is not a resident of the jurisdiction	Client is not a resident of the jurisdiction	Client is not a resident of the jurisdiction

Residence-by-investment scheme is a particularly egregious avoidance strategy because the Financial Institution :-

- is cognisant that the client is resident elsewhere but nevertheless accepts the synthetic residence documentation and not undertake AML / KYC to determine true fiscal residence
- ignores the CRS anti-avoidance guideline of not adopting procedures and practises to circumvent reporting, because legal opinion consensus is that anti-avoidance **before** the Standard is implemented is permitted.

The weakness in the Standard, page 60, states documentary evidence is “a certificate of residence issued by an authorised government body (for example, a government or agency thereof, or a municipality) of the jurisdiction in which the payee claims to be a resident. FIs interpret this **need not be a fiscal resident certificate, but merely a certificate of residence**. Furthermore, many FIs ignore that the residence test must have the current address on record such as utility bill, and simply rely on the certificate of residence, even if it is not a fiscal tax resident certificate.

Certain offshore jurisdictions, such as Dubai, will have virtually no reporting due to the ubiquitous assistance by FIs in assisting residence-by-investment schemes for their clients.

Residence planning continued...

Commonly used residence-by-investment schemes to circumvent the CRS are:

Dubai: Globally by far, the most prevalently used residence-by-investment scheme to circumvent reporting is the UAE through its Free Trade Zone residence certificates. Banks, Custodial Institutions and Trustees help their clients incorporate a Dubai company in the Free Trade Zone to get a certificate of residence, and then rent a flexi-desk (not even an office) and telephone-line to show they are physically resident in Dubai. As the Account Holder / Controlling Person is “resident” in the same jurisdiction as the Dubai FI, there is no reporting.



The Bahamas: FIs work in tandem with Bahamian property developers who will, for an annual fee, provide a property lease agreement and utility bill such as telephone land-line, thereby satisfying the documentary evidence for the residence test.



Andorra: Andorra FIs assist their clients to obtain a Passive Residence Certificate class A -- by staying in Andorra for less than 181 days but more than 90 days a year. It is emphasised there is no border controls to monitor movements out of the country. This passive residence certificate is not a fiscal residence, merely the right to stay short-term in the country without employment. Nevertheless, FIs accept the passive residence certificate for CRS purposes.

Panama: Clients of banks with three year deposits of at least USD 300,000 may avail of a non-fiscal residence permit.

A. Residence planning continued...

Physically move: An alternate residence planning strategy is to physically move or donate assets to family who move to a territorial tax jurisdiction. This usually done by individuals who retain dual residence status but provide the Financial Institution with residence of the new untaxed jurisdiction.

Loophole A1

Suggested amendment to tackle residence-by-investment schemes

Deeming all previous residences within the last **ten** years found during electronic, paper and relationship manager interrogation as the new 7th indicia of residence.

As with other contested indicia, deemed residency may be cured with documentary evidence proving the Account Holder no longer has tax liability in that jurisdiction, such as a tax clearance certificate.



A. Residence planning continued...

Loophole A2: Untaxed Foreign Investment Entity maintaining offshore account, managed in same jurisdiction as Equity Interest



A significant structural deficiency of the Standard is it does not cover foreign untaxed Investment Entities, structured so that management is resident in the same jurisdiction as the Equity Interest Account Holders.

This is also how individuals escape reporting for CFC rules.

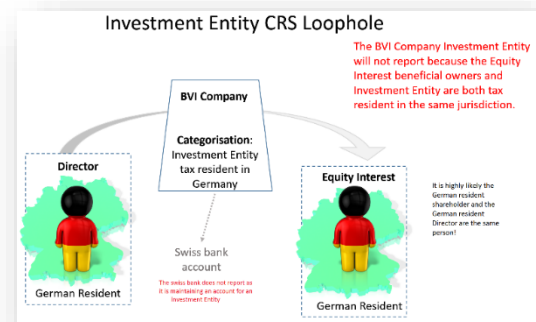
	Income	Residence	Excluded	Residence	Residence	Residence
Active	Passive NE Foreign Sovereign Investment Entity	Investment Entity managed in the same jurisdiction as the Equity Interest Holder	Investment Entity managed in the same jurisdiction as the Equity Interest Holder	Investment Entity managed in the same jurisdiction as the Equity Interest Holder	Investment Entity managed in the same jurisdiction as the Equity Interest Holder	Investment Entity managed in the same jurisdiction as the Equity Interest Holder
Passive	Controlled Foreign Company (CFC)	Controlled Foreign Company (CFC)	Controlled Foreign Company (CFC)	Controlled Foreign Company (CFC)	Controlled Foreign Company (CFC)	Controlled Foreign Company (CFC)



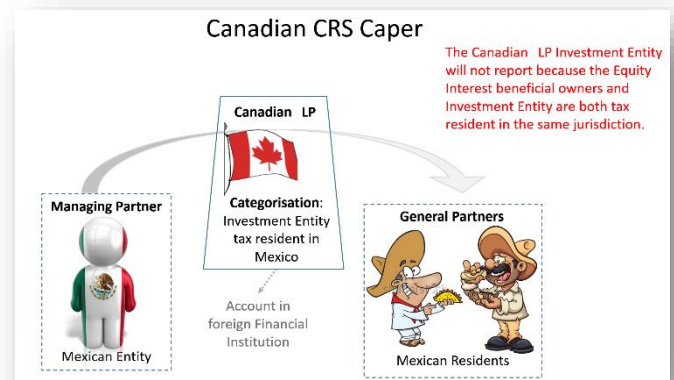
A fundamental flaw of the Standard is to omit covering this strategy because most tax evaders currently hold their undeclared offshore accounts in foreign Investment Entities they manage. The most common entity used to hold an undeclared account is an offshore company with the portfolios managed by the bank. This, as an Investment Entity is out of scope of the CRS because the manager does not report on himself, as he is in the same jurisdiction.

A. Residence planning continued...

For example, an individual German tax resident utilises a BVI company to hold an Swiss bank account whose investment portfolio is managed by the bank. The BVI company is categorised as an Investment Entity. (a) The Swiss bank legitimately does not report on the Investment Entity, and (b) The German individual is both the director and beneficial owner of the BVI company. The Investment Entity legitimately does not report on its own beneficial owner who is in the same jurisdiction.



Tax advisors in LATAM promote the use of another flow-through entity, the Canadian LP. For example, the managing partner and the limited partner (beneficial owner) are both resident in Mexico. Canada levies no tax on these structures and the Mexican managing partner will not need to report on its beneficial owners, no matter where in the world the assets are maintained.



A. Residence planning continued...



Loophole A2

Suggested amendment to tackle untaxed foreign Investment Entities managed in same jurisdiction as the Equity Interest Account Holders maintaining offshore account

An Entity cannot be an Investment Entity if :-

- i. it is established / incorporated in a jurisdiction different to the beneficial owner, and
- ii. is effectively untaxed, and
- iii. is not supervised (such as a trust)

The entity will likely be a passive Non Financial Entity (NFE), subject to look-through by the FI maintaining the account..

However, if the account is maintained in a non-Participating Jurisdiction, see loophole B1 – Passive NFE maintaining Account in Non-Participating Jurisdiction.

B. NON-PARTICIPATING JURISDICTION

The easiest method to avoid automatic exchange of information is to have a FI located in a Non-Participating Jurisdiction maintain the Financial Account in a Non-Participating Jurisdiction.

Loop-hole B1: Passive NFE maintains Account in a Non-Participating Jurisdiction



Tax evader uses a CRS jurisdiction Passive Non-Financial Entity to hold account in say USA.



Tax evaders are holding accounts in the USA in the name of a Passive NFEs. These are untaxed companies or trusts administered by individuals and investment management agreements are non-discretionary.

This is a problematic loophole to tackle because neither the NFE, nor the Non-Participating Jurisdiction (NPJ) Financial Institution reports.

The December 2016 Treasury administrative order obliging foreign owned US LLC to register for a tax number and reporting financial information is causing tax evaders to maintain accounts in the USA held by CRS

B. Non-Participating Jurisdictions continued...

Loophole B1

Suggested amendment to tackle untaxed Passive NFEs maintaining accounts in Non-Participating Jurisdictions

An Entity must be 'deemed' an Investment Entity if :-

- i. Entity is established in a jurisdiction different to the Equity Interest account holder, and
- ii. It is effectively untaxed, and
- iii. holds an account in a Non-Participating Jurisdiction

Furthermore, if the management of the deemed Investment Entity is located in the same jurisdiction as the Equity Interest Account Holders, then the registered agent of the entity must be the responsible reporting Financial Institution.



B Non-Participating Jurisdictions continued...

Loophole B2: CRS located managing Investment Entity manages a portfolio maintained in Non-Participating Jurisdiction



FI advises client to close account and open new account with an unrelated Custodial Institution in a Non-Participating Jurisdiction. The FI maintains a relationship directly or indirectly through a related wealth management entity.

	Non-reporting	Non-participating	Reporting	Reporting	Non-reporting	Non-reporting	Non-reporting
Actual loopholes	Systemic information deficiencies	Participating countries in Non-Participating Jurisdiction	Investment manager for assets in Non-Participating Jurisdiction	27% Reporting Period	Non-asset value information	Client relationship in Active NRE	Relationships with Non-Reporting Countries
Permitted loopholes	Client relationship in Active NRE	Non-asset value information	Client relationship in Active NRE	Non-asset value information	Client relationship in Active NRE	Non-asset value information	Client relationship in Active NRE



FIs try to dodge the anti-avoidance guideline of ‘maintaining a relationship with an account shifted to a Non-Reporting Jurisdiction’ by having a related Investment Entity in another CRS jurisdiction manage the portfolios of the shifted accounts. The FI ignores the CRS anti-avoidance guideline of not adopting procedures and practises to circumvent reporting, because legal opinion consensus is that anti-avoidance **before** the Standard is implemented is permitted.

For instance, an Andorra bank assists client to establish an account with Pershing LLC in USA, one of the largest retail Custodial Institutions in the USA accepting foreign owned accounts. The Andorra bank then has its Uruguay based wealth manager to manage the Pershing account portfolio.

B Non-Participating Jurisdictions continued...



Loophole B2

Suggested amendment to tackle FIs shifting accounts to Non-Participating Jurisdictions

An entity should be deemed Custodial Institution if it earns advisory fees on Non-Participating Jurisdiction assets.

The account in the Non-Participating Jurisdiction should be deemed the Custodial Account, and

- a. If the wealth manager is in a Participating Jurisdiction it is deemed a Custodial Institution, else
- b. If the wealth manager is in a Non-Participating Jurisdiction, the parent is deemed the Custodial Institution.

The Custodial Institution can appoint a 3rd party to do the reporting. The concept of deeming a Custodial Institution if having the "potential to hold assets, and not actually holding the assets" is derived from CRS Commentary Page 160 Par (10):

Income attributable to holding Financial Assets and related financial services by a Custodial Institution - *"fees for providing financial advice with respect to Financial Assets held in (or **potentially to be held in**) custody by the entity.)*

B Non-Participating Jurisdictions continued...

Loophole B3: FI encourage potential clients to shift account to related Non-Participating Jurisdiction FI.



FI, predominantly trust service providers, assist clients to close their accounts and open new account in a related FI in Non-Participating Jurisdiction.

	Residence	Asset	Beneficiary	Control	Non-Participating	Life Interest	Reporting
Actual loopholes	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction
	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents
Permitted loopholes	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction	Persons who are not in Non-Participating Jurisdiction
	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents	United States Citizens and Residents



The chief culprits FIs shifting clients to Non-Participating Jurisdictions are the global trust companies who have recently obtained trust licenses in the USA, with South Dakota being most popular location. The Financial Institution, in cahoots with the client, ignores the CRS anti-avoidance guideline of not adopting procedures and practises to

circumvent reporting, under the legal consensus that anti-avoidance is not effective before a CAA is implemented. Banks have covertly followed the same strategy as trust companies in getting clients to close their accounts and open an account with the bank's related US bank.

The implausible reason given by trust companies for recently setting up an office in the USA is ostensibly to cater for the sudden influx of new US clients. In reality, these trust companies either moved CRS clients to their new US trust companies or have aggressively poached clients from other trust companies which have not yet established trust company offices in the USA.

Many CRS trust companies have recently opened offices in South Dakota, USA and advise clients to close existing trusts and set up new trust in USA.

B. Non-Participating Jurisdictions continued...

Loophole B3

Suggested amendment to tackle FIs moving accounts to related Non-Participating Jurisdiction

If a FI has shifted client account to a related entity in a Non-Participating Jurisdiction, then the FI retains the Standard's reporting obligations. The FI can appoint the FI in the NPJ to do the reporting.



C. BENEFICIARY DODGING

Loophole C1: Skirting the 25% de minimis threshold for Controlling

Persons

It is easy to side-step the relatively high threshold definition of Controlling Person of a legal entity by arranging no individual has more than 25% shares and the senior manager is not a tax payer

The 25% threshold can be avoided by arranging four family members to be the shareholders, and the management or senior officers will be a nominee director.



Transfer pricing	Anti-corruption	Sanctions	Outsourcing	Anti-money laundering	Anti-bribery	Anti-trust	Anti-fraud	Anti-facilitation	Anti-facilitation	Anti-facilitation
Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips	Practical tips Practical tips Practical tips
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Neither CRS nor FATF state a particular threshold is compulsory. They use it as an example, so jurisdictions can choose different thresholds. CRS par commentary 133 - A 'control ownership interest' depends on the ownership structure of the legal person and is usually identified based on a threshold applying a risk-based approach (e.g., any person(s) owning more than a certain percentage of the legal person, **such as 25%**).

FATF - Controlling shareholders as referred to in, paragraph 5(b)(i) of the interpretive note to Recommendation 10 **may be based on a threshold**, e.g. any persons owning more than a certain percentage of the company (e.g. 25%).

In Argentina, for example, not for CRS purposes but for money laundering, beneficial owner is anyone with more than 20%. The US FATCA regulations state 10% is the threshold.

C. Beneficiary Dodging continued...



Loophole C1

Suggested amendment to tackle the weakness of the high 25% threshold

Reduce the threshold for beneficial ownership of legal entity to 10%.

The EU Commission unsuccessfully proposed in the 4th AML Directive to reduce the threshold for beneficial ownership of legal entities to 10%, because the existing relative high 25% threshold was easy to circumvent. FATCA regulations also set a 10% threshold.

C. Beneficiary Dodging continued...

Ambiguities in the Standard

Perceived loophole C32: Converting Equity Interest into Debt Interest

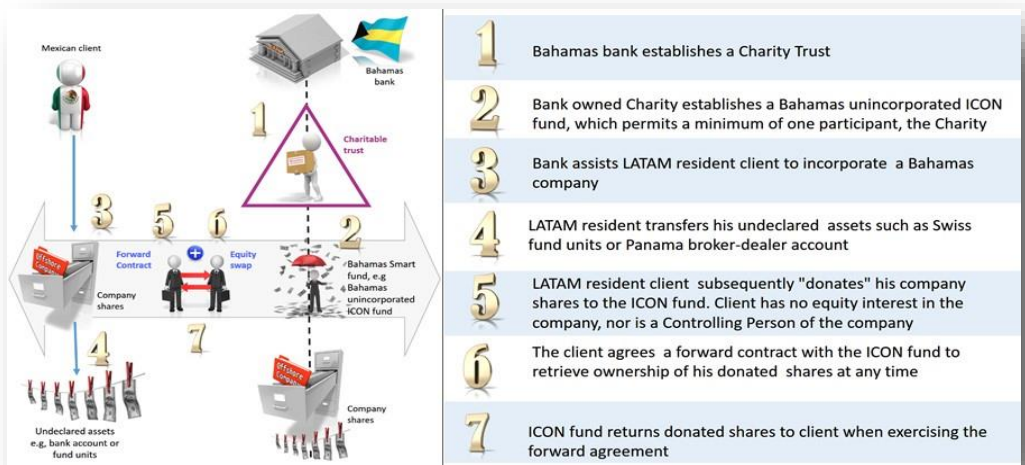


Convert Equity Interest into a type of unusual Debt Interest not clearly covered by the Standard

The Standard does not define what Debt Interest is, leaving it instead to local guidance. Consequently, tax planners exploit the weakness of the definition to convert Equity Interest into Debt Interest, not covered by the Standard.



For Example: Bahamas ICON Fund is established by the Bahamas bank through its charity, for the exclusive use of one client. The LATAM resident client donates his equity in an offshore entity to the Bahamas ICON fund. A forward agreement ensures the LATAM client can retrieve his shares from the ICON fund anytime.



C. Beneficiary Dodging continued...

Proponents of this structure wrongly advocate that the LATAM client is not a Reportable Person because he has no Equity Interest, nor is a Controlling Person of the entity, as the LATAM has donated all his shares. The LATAM client is also not reportable by the ICON Fund because he is not a participant in the fund.

The ICON Fund to which the shares were donated, will be categorised as an Investment Entity because all Collective Investments are categorised in the CRS as Investment Entities. The ICON Fund, even with one participant is a Collective Investment. There is no exemption *carve-out* in the CRS for Collective Investments from being an Investment Entity, even if it is owned by a Charity. The ICON Fund is an Investment Entity because:

- i. It is managed by another Financial Institution, such as a fund manager managing the assets or it is administrated by a Financial Institution; and
- ii. It earns income from financial assets, including dividends from the underlying company.

The LATAM client who has a forward agreement to retrieve his shares has a 'Debt Interest' in the ICON Fund to which his shares were given. All Reportable Persons with a 'Debt Interest' in the Investment Entity have Reportable Accounts. A 'Debt Interest' is be regarded *where a person holds a lien on an asset and is entitled to reportable payments upon release of the lien*. The forward agreement means the LATAM client has a lien on the shares for which he will receive a reportable payment (the shares) upon release of the lien. Hence the LATAM client has 'Debt Interest' in the Investment Entity and should be reportable.

The Bahamas bank providing this solution wrongly interprets that the LATAM client does not have a Debt Interest and is not a Reportable Person. Once the bank has been shown the error of their opinion, they will legally be obliged to report on the LATAM client as an Account Holder of the ICON Fund and the value of the Debt Interest, which is the value of the Bahamas company shares due back to him.

Loophole Ambiguity C3

Suggested amendment to the definition of Debt Interest

Commentary on the Standard should give an example of 'Debt Interest' to cover all types of unusual and hybrid Debt as follows:-

Debt interest is where a party holds a lien on an asset and is entitled to reportable payments either while having the lien or upon release of the lien.



C. Beneficiary Dodging continued...

Ambiguities in the Standard

Perceived loophole C4: Nominees



Although the Standard attempts to cover nominee and agents, some countries like Russia beneficiaries utilise nominee services to the extent that virtually no reporting will be done on Russian beneficiaries

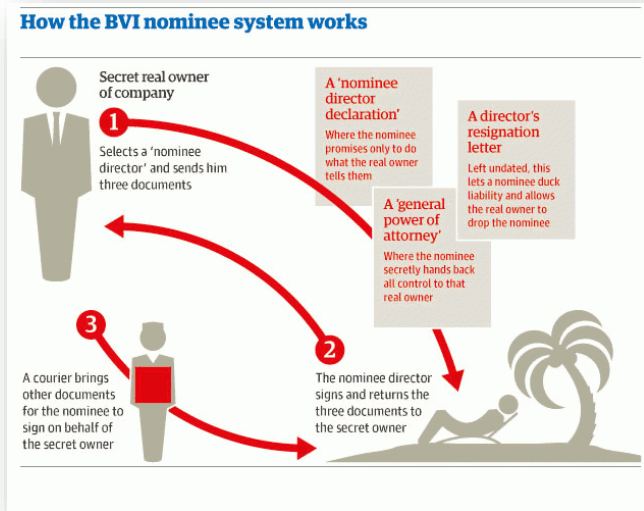
The Standard is not explicit enough on the use of nominees, especially nominee directors..



Three pieces of paper allow companies' real owners to hide behind 'nominee' directors.

1. A promise by a nominee director only to do what the real owner tells them.

I, xxx, Director xyz LIMITED, having agreed to the appointment as Director of a company duly incorporated under the laws of xx. . . . hereby declare that I shall only act upon instruction from the beneficial owners.



C. Beneficiary Dodging continued...

2. Under a “general power of attorney” the nominee secretly hands back all control to that real owner.

This typically allows them to *transact, manage and do all and every business matter. . . . To open any bank account and to operate the same. . . . To enter into all contracts. . . . To collect debts, rents and other money due. . . .*

Offshoring agencies assure their customers that the truth about such arrangements will never get out. Both the power of attorney and nominee director agreement are confidential documents designed to ensure our clients’ privacy.”

3. The third commonly-used document is a signed, but undated director’s resignation letter. This supposedly enables a nominee to duck liability in the event of any trouble.

Loophole Ambiguity C4

Suggested amendment to clarify how nominees should be reported

Commentary on the Standard should provide clearer examples of when nominees should be covered by the Standard.



D. EXCLUDED FINANCIAL ACCOUNTS

The Standard excludes certain Financial Accounts from review because ostensibly they possess low-risk characteristics for being used for tax evasion. Elsewhere the Standard does not cover certain assets or payments as reportable. These chinks in the armour are being exploited and thus have transformed from being low-risk to high risk products used for tax evasion.

Loophole D1: Non-cash value insurance



Insurers have recently created non-reportable non-cash value insurance wrappers. The policy holder is prohibited from monetizing the policy assets and the only benefit available is the mortality pay out.

	Residence property	Non-reportable	Reportable	Excluded Accounts	Reportable	Non-reportable	Life insurance property	Not reportable
Actual loopholes	Partnership interests in IRAs	Partnership interests in IRAs	Partnership interests in IRAs	Non-cash value insurance	Non-cash value insurance	Non-cash value insurance	Non-cash value insurance	Non-cash value insurance
Proposed loopholes	Partnership interests in IRAs	Partnership interests in IRAs	Partnership interests in IRAs	Non-cash value insurance	Non-cash value insurance	Non-cash value insurance	Non-cash value insurance	Non-cash value insurance



Several of the world’s largest insurance companies have recently created new non-cash value policies by stipulating the policy holder cannot monetize their policy disallowing surrenders, withdrawals, pledging or assignment.

In effect these policies emulate an irrevocable trust. A popular type of non cash value insurance policy being promoted as a means of avoiding the Standard is a Welfare Disability Long Term Care policy, whereby if there is no claim, the eventual pay-out will be linked to some investments, even though the insurer claims the benefit is ‘up to the insurer to determine’.

Loophole D1

Suggested amendment to tackle non-cash value insurance

All investment-linked insurance should be regarded as cash value insurance, irrespective if the policy holder can access the policy assets.



D. Excluded Accounts continued...

Loophole D2

Suggested amendment to tackle exclusion of pre-existing individual owned insurance contracts prohibited from being sold

Redact this exclusion



D. Excluded Accounts continued...

Loophole D6: \$250,000 de minimis threshold for pre-existing entity accounts

\$250,000 de minimis allows tax evaders to continue using the entity account to access assets maintained in a non participating jurisdiction.

	Business planning	Non participating	Secondary holding	Excluded accounts	Non participable Partners	Low value pre-existing	Non participable PEs
Actual loopholes	<ul style="list-style-type: none"> Private MFL vehicles Systemic insurance contracts Investment manager for assets 20% Banking threshold Non-participating jurisdiction Insurance policies 20% Banking threshold Non-participating jurisdiction Contributions to trusts in non-participating jurisdiction 	<ul style="list-style-type: none"> 20% Banking threshold Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	
Increased loopholes	<ul style="list-style-type: none"> Contributions to trusts in non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	<ul style="list-style-type: none"> Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction Non-participating jurisdiction 	



Tax evader keeps maintains investment account in a Non Participating Jurisdiction. Tax evader can wire profits to his low value pre-existing account to spend.

Loophole D6

Suggested amendment to tackle \$250,000 threshold for pre-existing entity accounts

Redact the option for jurisdictions to allow for a \$250,000 de minimis.



A savings scheme is usually considered as being taxed favourably when its tax treatment deviates from a regime that treats all sources of income equally from a fiscal standpoint (the so-called comprehensive income tax regime). In a pure comprehensive income tax system, savings are made out of taxed earnings and the accrual return on funds accumulated is also subject to an income tax. In return, the withdrawal of assets from such saving vehicles is fully exempted from taxation. Such arrangements are known as “taxed-taxed-exempt” (TTE) schemes. Using this as a benchmark, there are several ways in which tax incentives can be provided.

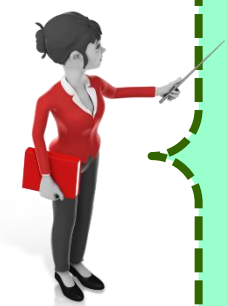
One is a regime which taxes the portion of income that is consumed, but that exempts the portion that is saved for future consumption (the so-called expenditure tax regime). In a pure expenditure tax regime, both the funds contributed and the accrual return on accumulated funds are thus exempted from taxation. In return, the benefits are treated as taxable income upon withdrawals. The pure expenditure tax system thus achieves fiscal neutrality between current and future consumption, since all savings are tax-exempt. Such arrangements are commonly referred to as “exempt-exempt-taxed” (EET) schemes. However, tax favour does not necessarily always entail tax deferral. Indeed, for a given tax rate, an equivalent incentive can be provided under a “taxed-exempt-exempt” (TEE) regime, commonly referred to as a “pre-paid” expenditure tax. In the case where the discount rate is equal to the rate of return, and contributions and withdrawals are subject to the same marginal income tax rate, these two regimes deliver the same net present value of revenues to the government. Conversely, tax-deferral is not necessarily synonymous with tax preference given that under similar conditions, an ETT regime is identical to the TTE regime in terms of the net present value of revenues to the government (Box 1). In addition, some tax support can be given also within the spirit of a comprehensive income tax regime. This is the case, for example, when the return on saving is taxed at flat rate that is lower than the marginal rate faced by most wage earners. Hence, a whole range of possible tax combinations going from EEE to TTT can be applied on specific savings vehicles and rates can be varied within each to alter the incentive.

Loophole Ambiguity D7

Suggested amendment to the definition of Private Untaxed Pensions

Commentary should expand on what favourably taxed means.

the account is **tax-favoured** i.e. contributions to the account that would otherwise be subject to tax are deductible or excluded from the gross income of the account holder or taxed at a reduced rate, or taxation of the investment income from the account is deferred or taxed at a reduced rate.



F. NON-REPORTABLE PERSONS

The Standard excludes certain entities from being reported.

Loophole E1: Embed investments in untaxed Active NFE



Camouflaging investments in certain untaxed Active Non Financial Entities

	Investment strategy	Asset	Structure	Entity	Reporting	Law	Other
Actual loopholes	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction
	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction
Perceived loopholes	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction
	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction	Persons not included in the participating jurisdiction



The CRS exempts reporting untaxed entities if they are Active NFEs. Owners of untaxed Active NFEs can therefore hide their private investments within their Active NFE, without being reported. The EU Saving Tax Directive covered any entity that was untaxed, irrespective it was an Active or passive entity.

As an example, Greek shippers use offshore jurisdictions such as the Marshall Islands. However, a substantial portion of their income is derived from investments.

Loophole E1

Suggested amendment to tackle embedding investments in untaxed Active NFEs

An entity that is effectively untaxed and unsupervised, cannot be an Active NFE.



E. Non-Reportable Persons continued...

Loophole E2: New company



New Company is regarded as an Active NFE if its intention is not to be an FI (usually an Investment Entity).

	Evidence obtained	Risk	Sanctions	Excluded persons	Excluded persons	Law enforcement	Non-reportable FI
Actual loopholes	Various M&A transactions in the Participating countries	****	****	****	****	****	****
	Various M&A transactions in the Participating countries	****	****	****	****	****	****
Perceived loopholes	Various M&A transactions in the Participating countries	****	****	****	****	****	****
	Various M&A transactions in the Participating countries	****	****	****	****	****	****



The new company is usually a passive NFE, but will be categorised as a non reportable Active NFE

Loophole E2

Suggested amendment to tackle

An entity that is effectively untaxed and unsupervised, cannot be an Active NFE



E. Non-Reportable Persons continued...

Loophole E3: Trust as holding company



Trusts exploiting the exclusion of Active NFE holding companies from being an Investment Entity.

	Trusts	Partnership	Trusts	Partnership	Trusts	Partnership	Trusts	Partnership	Trusts	Partnership
Actual loopholes	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction
Perceived loopholes	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction	Partnership trusts in Non-Participating Jurisdiction



A holding company has different purpose to a trust. Yet the Standard allows trusts which hold a holding company to be its self a on reporting holding company.

Background: The CRS excludes four types of Active NFEs from the definition of Investment Entity, namely (i) Holding Company, (ii) New Company, (iii) Reorganising entities, and (iv) Financing & hedging of related non-financial institutions.

Why trust whose sole owning is an Active holding NFE is itself an Active holding NFE: At least 80% of the trust's activities (by income or valuation) is indirectly, through the holding company it owns, holding stock in subsidiaries that engage in trades or businesses other than a Financial Institution. Therefore, the trust meets the definition of 9(d) Active Holding NFE.

Consequence: An Active Holding NFE company is specifically excluded from the definition of an Investment Entity. Therefore, even if the trust is administered by an Investment Entity corporate trustee, and the trust earns dividends from the holding company, it is exempt from the definition of an Investment Entity because it is one of the four Active NFEs which have an exclusion from the definition of Investment Entity.

E. Non-Reportable Persons continued...



Loophole E3

Suggested amendment to tackle trusts as holding Active NFEs

Trusts that earn income and are administrated by an FI should not be exempt from being an Investment Entity

The Standard specifically excludes collective investments from being a holding company. Logically, the Standard should also exclude trusts from being a holding company if it does the activities of an Investment Entity.

F. LATE ADOPTER SHOPPING

Tax evaders are flowing to jurisdictions that have indicated they will not be signing CAAs in the near term due to fabricated excuses such as confidentiality or other pre-conditions.

Loophole F1: Late bilateral



Many jurisdictions delay implementation of AEOI by a year or two, even though they signed CAAs in 2016.



Switzerland has for no justifiable reason decided CAAs will start with many countries in 2019 even though CAAs are signed in 2016. Furthermore, Switzerland has not indicated when it will sign CAAs with Russia, China, etc. Bahamas and UAE delays based on excuses of bilateral only or confidentiality concerns are of particular concern

Countries and jurisdictions should speed up their implementation efforts of the CRS to ensure they deliver in accordance with the timelines to which they committed and the Global Forum should report to the G20 in July 2016 on the state of the implementation, with a plan to address possible deficiencies.



F. Late adopter shopping continued...

Loophole F1

Suggested amendment to tackle late adoption

Through the mandatory election of the Wider Approach implementation of CRS by no later than 1 January 2017.

Furthermore, only the election of collecting info on non-residents and not countries with which there is a legal basis to exchange info.



F. Late adopter shopping continued...

Loophole F2: Late adopter delayed due diligence on low-value accounts



Several late adopters have worked in an additional year delay for low value accounts

	Transfer pricing	Anti-competitiveness	Secondary liability	Excluded Accounts	Non-resident Partners	Late-adopter shopping	Don't mention FTA
Actual loopholes	Parsons (UK) includes services in Non-Participating Jurisdiction	Systemic offshore investment certificates	Investment manager to invest in Non-Participating Jurisdiction	25% Shareholding Exemption	Insurance policies domiciled in Non-Participating Jurisdiction	Excluded members in ACHR / NRE	Excluded members in ACHR / NRE
Perceived loopholes	Company with no real substance	Company with no real substance	Company with no real substance	Company with no real substance	Company with no real substance	Company with no real substance	Company with no real substance



The OECD gave early adopters an extra year to do due diligence on low value accounts. Yet some late adopter countries have abused the extra year rule, to sneak in an extra year for due diligence on low value accounts. This is in effect a two-year delay or a late-late adopter for low value accounts

Late adopters were given an extra year to get their systems in place, yet Switzerland has disingenuously provided an extra year on top of the extra year to do due diligence on low value accounts. There is no justification for this. In fact with Switzerland being a late-late adopter with say LATAM, it is a late-late-late adopter for low value accounts. And if Switzerland delays signing CAAs with say Russia, then Switzerland will be a late-late-late-late adopter for low value accounts.

Loophole F2

Suggested amendment to tackle abuse of delayed low value due diligence.

Late adopters cannot provide a extra year to do Due Diligence on low value accounts.



F. Late adopter shopping continued...

Ambiguities in the Standard

Perceived loophole F3: Confidentiality



Tax havens abuse the bilateral option using subjective, fabricated and fallacious data security concerns, or impose irrelevant preconditions:

Perceived loopholes	Actual loopholes
Confidentiality	Participating jurisdiction
Privacy	20% withholding tax
Data security	FIC cash account



Switzerland, Bahamas, Singapore, Panama, undertake their own subjective confidentiality and data security assessment of potential partner jurisdictions.

Several jurisdictions are ignoring that the OECD is centralizing the data security and confidentiality assessments of each country so that this need not be done by each jurisdiction.

Loophole Ambiguity F3

Suggested amendment to assessing confidentiality

Commentary should clarify that each country must not undertake data security and confidentiality assessments. They should adopt the assessments undertaken by the Global Forum panel.



F. Late adopter shopping continued...

Ambiguities in the Standard

Perceived loophole F4: Unrelated preconditions for signing a CAA



Countries such as Switzerland impose unrelated conditions before agreeing to sign a CAA, such as market access for its FIs, amnesties, etc.

Switzerland is demanding potential partners agree to unrelated conditions before considering a CAA. The two most important demands are (i) the partner country grant access to Switzerland’s banks to local markets, and (ii) an amnesty be in place for residents with undeclared accounts.



Although the OECD encourages tax amnesties, this is not a pre-requisite requirement for CAAs.

Loophole Ambiguity F4

Suggested clarification to the Standard

Committed Participating Jurisdictions cannot impose any unrelated conditions in agreeing to a CAA



G. NON-REPORTING FINANCIAL INSTITUTIONS

Loophole G1: Hong Kong Occupational Retirement Scheme (ORSO)

The CRS allows jurisdictions to add Financial Institutions to their list of non-reporting Financial Institutions if it is low-risk for tax evasion and does not “frustrate the purpose of the CRS”. Hong Kong authorities have added occupational retirement schemes (ORSOs) to the list of their non-reporting Financial Institutions



ORSOs are the ideal savings vehicle for tax evaders around the world to avoid reporting by the CRS. These are clearly not low-risk plans used tax evasion and certainly frustrate the purpose of the CRS.

Anyone in the world can establish a Hong Kong company and employ the non-resident owner to be the director. The Hong Kong company then as sponsor, subscribes for an ORSO provider to establish an Occupational Retirement Scheme for the “employee”. Unlimited amounts and unrestricted assets may be contributed to the retirement scheme, irrespective if a salary is paid. A segregated account is established where employee can manage their own portfolio. The employee as pension member can retire whenever he wants and take his benefits over whatever period he chooses, even as a lump sum. Clearly this is not a tax favoured pension and frustrates the purpose of the CRS.

Loophole G1

Suggested amendment to Hong Kong ORSOs

Ensure ORSOs are removed by the Hong Kong Authorities from their official list of non-reporting Financial Institutions. Otherwise other jurisdictions may suspend and terminate competent authority agreements with Hong Kog.



G. Non Reporting Financial Institutions continued...

Ambiguities in the Standard

Perceived loophole G2: Govt and international orgs taking deposits and placing them with Depository Institutions



Bank arranges for clients to place deposits with international orgs and subsidiaries of central banks who will re-deposit with the bank.

Some banks in middle East have close personal ties with international orgs. The banks arrange for their clients to deposit with the international org, who redeposits with the bank



Loophole Ambiguity G2

Suggested amendment Govt and international orgs taking deposits from clients of banks with whom they have a relationship

Commentary should expand with examples on when non reporting FIs have reporting obligations. Also this should be covered in anti avoidance guidelines.

END OF REPORT

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