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**OECD COMMON REPORTING STANDARD STRATEGY FOR ACCOUNTS
MAINTAINED IN THE USA BUT MANAGED BY REPORTING JURISDICTION
FINANCIAL INSTITUTIONS**

- I. DEFINITION OF CUSTODIAL INSTITUTION
INCLUDES FINANCIAL INSTITUTIONS
THAT EARN ADVISORY FEES ON ASSETS
THAT THEY CAN POTENTIAL HOLD
- II. SUPPORT EU PARLIAMENT MINI FATCA
AGAINST USA WITH A 35% WITHHOLDING
TO KEEP TO ITS FATCA IGA PROMISES
OF EQUIVALENT RECIPROCAL
REPORTING
- III. CONDUCT A OECD PEER REVIEW USA ON
ITS AUTOMATIC EXCHANGE OF
INFORMATION

In a meeting held in Paris on 11 January 2016, the OECD emphasized that the CRS loopholes would be closed. Of primary concern is the migration of assets to the USA due to the lack of reciprocal reporting despite the such commitment in the FATCA IGAs.

The OECD will amend the Standard to include assets maintained in the USA but managed by Financial Institutions in reporting jurisdictions.

OECD also supports the EU parliament proposed mini FATCA against USA.

The OECD will also peer review the USA.

**A. REPORTING JURISDICTION FINANCIAL INSTITUTIONS EARNING
ADVISORY FEES ON ASSETS MAINTAINED IN THE USA WILL BE
DEEMED TO MAINTAIN ACCOUNTS**

**1. Custodial Institution if earn advisory fees and can potentially hold the assets
maintained by third parties in USA**

The current definition of Custodial Institution is an entity that substantially earns income attributable to related financial services, such as "fees for providing financial advice with respect to Financial Assets held in (or **potentially** to be held in) custody by the entity" ¹

The terminology **potentially to be held**, will be clarified that if the Financial Institution earns advisory fees on assets maintained in the USA (or other non-participating Jurisdiction), the Financial Institution will be deemed as a Custodial Institution if it has the potential or capability to hold the assets it advises on. The account in the USA will be deemed to be a Custodial Account.

¹ Commentary page 160 par(10)

The term **Custodial Institution** is any Entity that holds, as a **substantial portion** of its business, Financial Assets for the account of others² if the Entity's gross income attributable to the holding of Financial Assets and related financial services equals or exceeds 20% of the Entity's gross income. Income means:

- i. Custody
- ii. Account maintenance
- iii. Transfer fees
- iv. Commissions and fees earned from executing and pricing securities transactions with respect to Financial Assets held in custody
- v. Income earned from extending credit to customers with respect to Financial Assets held in custody (or acquired through such extension of credit)
- vi. Income earned on the bid-ask spread of Financial Assets held in custody
- vii. Fees for providing financial advice with respect to Financial Assets held in **(or potentially to be held in)** custody by the entity
- viii. Clearance and settlement services.

A depository or other Financial Institution, will therefore be deemed to be a Custodial Institution if the Financial Institution can **potentially** hold the assets they earn advisory fees. .

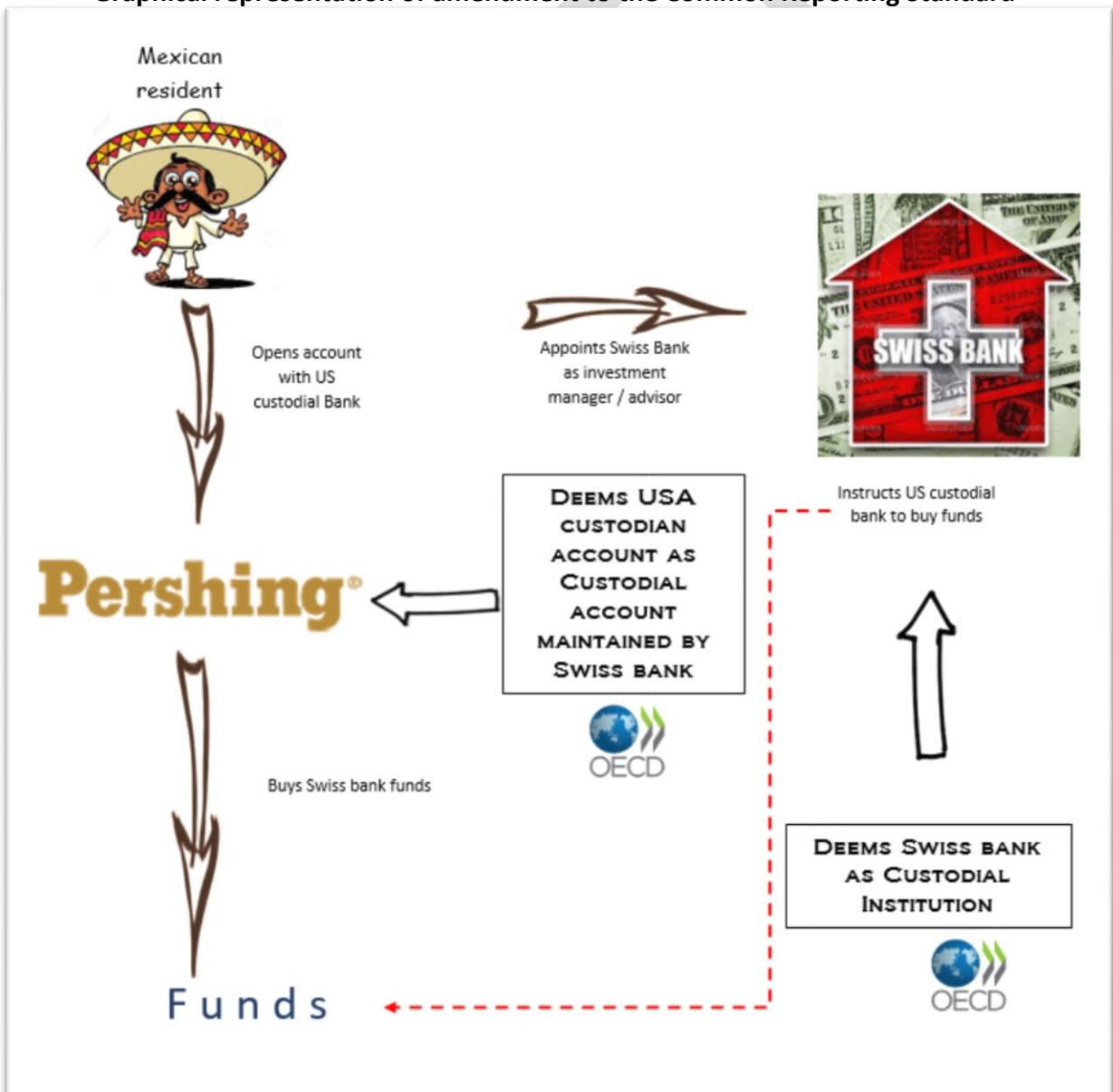
The account maintained by a third party in USA, or other non-participating jurisdiction account will be deemed to be a Custodial Account maintained by the deemed Custodial Institution.

² Page 44 Section VIII par(A)(4)

The reporting jurisdiction Financial Institution, as Custodial Institution will therefore have reporting obligations on the account maintained in the USA.

Jurisdictions have diverse legal, administrative and operational frameworks and different financial systems, and the meaning of “maintaining an account” may vary among jurisdictions depending on how a particular financial industry is structured³

Graphical representation of amendment to the Common Reporting Standard



³ Commentary page 176 par(63)

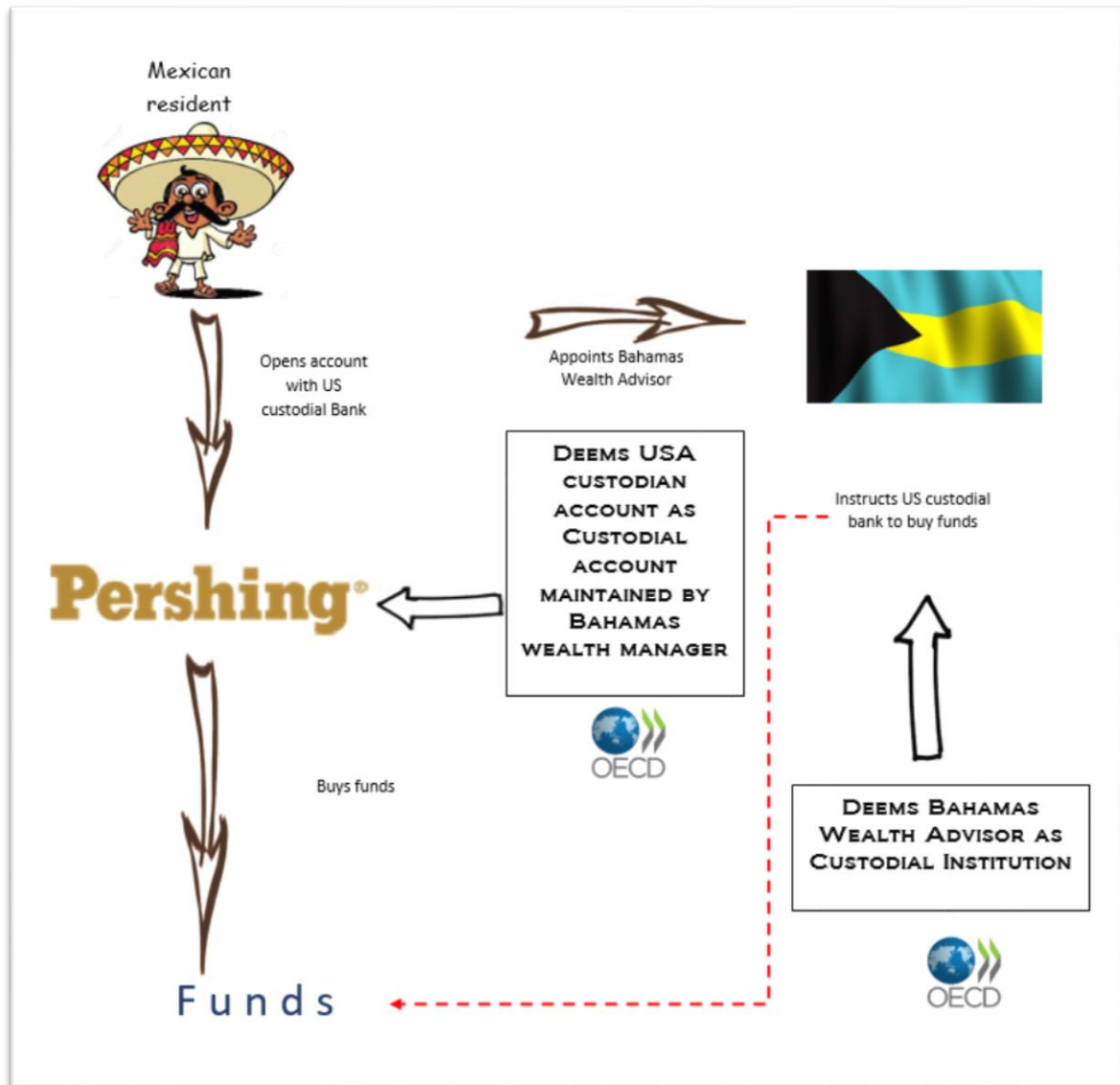
2. Investment Entities earning advisory fees on accounts maintained by third party in the USA will be Custodial Institutions

The deeming of maintaining accounts as Custodial Institutions will be extended to manager type investment entities receiving advisory fees for accounts maintained in the USA by third parties.

A manager type Investment Entity means any Entity that primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:

- i. Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- ii. Individual and collective portfolio management; or
- iii. Otherwise investing, administering, or managing Financial Assets or money on behalf of other persons

Graphical representation of amendment to the Common Reporting Standard



B. EU mini FATCA against USA

The OECD supports the EU proposal for a withholding tax for non-compliance being imposed by the EU on EU Source payments to USA Financial Institutions unless they agree to reciprocate exchange of information as promised in the FATCA IGAs.

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C. OECD Peer Review of USA on Automatic Exchange of Information

The OECD and EU Commission are working on establishing an OECD peer review on the USA for non-compliance of automatic exchange of information.

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D. Background on USA reciprocal Exchange of Information

**1. The USA signed the OECD Declaration on Automatic Exchange of Information
in Tax Matters May, 2014⁴**

- i. DECLARE we are determined to tackle cross-border tax fraud and tax evasion and to promote international tax compliance through mutual administrative assistance in tax matters and a level playing field;
- ii. CONFIRM that automatic exchange of financial account information will further these objectives particularly if the new single global standard, including full transparency on ownership interests, is implemented among all financial centres;
- iii. ARE DETERMINED to implement the new single global standard swiftly, on a reciprocal basis. We will translate the standard into domestic law, including to ensure that information on beneficial ownership of legal persons and arrangements is effectively collected and exchanged in accordance with the standard.

⁴ <http://www.oecd.org/mcm/MCM-2014-Declaration-Tax.pdf>

2. OECD regards FATCA reciprocal reporting equivalent to CRS

The OECD never intended for the USA to be a participating jurisdiction of the Common Reporting Standard due to the USA commitment of reciprocal reporting in the FATCA IGA agreements. In the joint statement by early adopters group in Berlin in October 2014, the OECD officially foot noted that although the USA was not a signatory to the CRS, FATCA reciprocal reporting was considered equivalent to the Standard.⁵

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⁵ The United States has indicated that it will be undertaking automatic information exchanges pursuant to FATCA from 2015 and has entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.

1 **3. Congress rejects Treasury request to automatically exchange information** 1

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4 Treasury is not a judicial branch of the USA Government. Therefore, when 4
5 Treasury negotiated reciprocal reporting in the FATCA IGAs it needed Congress authority to 5
6 collect this information. Therefore, in March 2013, Treasury submitted a proposal to 6
7 Congress to provide Treasury with authority to collect information with respect to non- 7
8 resident alien individuals, non-U.S. person entities, and U.S. entities held in substantial part 8
9 by non-U.S. owners, regarding account balances and payment made to these account. The 9
10 House of Representatives committee meeting rejected this proposal before it could be put to 10
11 the House floor for voting, citing⁶ 11

- 12 • Difficult to conceive of any circumstance that would justify imposing such an 12
13 expensive and counterproductive domestic mandate 13
 - 14 • Discourage investment into USA 14
 - 15 • Regulations would not bring one penny into the U.S. Treasury 15
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⁶ http://www.repealfatca.com/downloads/Posey_letter_to_Sec._Lew_July_1,_2013.pdf

4. IRS publishes that it is reciprocating information

The IRS falsely propagates⁷ that it reciprocates information making a level playing field. However, they omit to mention that the information is severely restricted to interest for individuals.

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⁷ <https://www.irs.gov/uac/Newsroom/IRS-Announces-Key-Milestone-in-FATCA-Implementation%3B-U.S.-Begins-Reciprocal-Automatic-Exchange-of-Tax-Information-under-Intergovernmental-Agreements>

5. Reciprocal information restricted to interest for individuals

US Congress authorizes the reciprocal automatic exchange of information only to to depository interest for non-resident alien individuals⁸.

Sections 1.6049-4(b)(5) and 1.6049 -8(a), as revised by TD 9584, require the reporting of certain deposit interest paid to nonresident alien individuals on or after January 1, 2013

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⁸ <https://www.irs.gov/pub/irs-drop/rp-14-64.pdf>

6. **FINCEN’s ineffective enhanced due diligence for legal entity customers**

Financial Crimes Enforcement Network (FINCEN) as department of Treasury has published an advance notice of rule-making for some Financial Institutions (excluding insurers) to identify beneficial owners of legal entity customers. This is purportedly to assist AEI if it ever is mandated. However, the proposed rule is useless as it exempts⁹

- All pre-existing legal entity customers.
 - *Pre-existing is defined as an account opened up until one year after this rule is effective. In effect every single legal entity customer in the past and near future will be exempt*
- All trusts exempt.

The OECD and EU Parliament recognizes that non reciprocal reporting by the USA is the greatest threat to global automatic exchange of information. NGOs note that “while rightly demanding greater transparency from others, the USA has established itself as the fastest-growing provider of tax haven secrecy – and only the EU has the power to act. Otherwise we risk seeing a world where only the richest and most powerful country can protect its tax system from offshore abuse, while EU countries pay the price.”

Subsequently, the OECD is undertaking multiple strategies to close this loophole.

⁹ https://www.fincen.gov/statutes_regs/files/CDD-NPRM-Final.pdf

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Dated this, the 25th day of January, 2016



Mark Morris

===== END OF BRIEF =====