
CRS Newsbrief

Global information reporting

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The Netherlands issued Dutch Guidance on the Common Reporting Standard

In brief

On January 20, 2016 the Dutch government published its official Guidance on the Common Reporting Standard (“Leidraad”). The Leidraad contains further clarification on the government’s approach with respect to both the Common Reporting Standard (“CRS”) and the interpretation of FATCA in the Netherlands. As such the FATCA Leidraad issued on January 12, 2015 is repealed and replaced by the combined FATCA / CRS Leidraad. Although the Leidraad has been issued on January 20, it has retroactive effect to January 1, 2016.

The guidance on CRS shows a great overlap with the guidance that was issued with respect to FATCA back in 2015, therefore the Ministry decided to combine the guidance where possible. The Leidraad is set up to provide combined guidance on CRS and FATCA in chapter one. Chapter two provides guidance specifically related to FATCA.

Observations Leidraad – CRS only

- **Residence Address Test**

The CRS-Model contains an additional due diligence identification procedure, that is not available under FATCA. The identification procedure applies to preexisting individual accounts that have an aggregated value of 1 million USD or less, the so-called residence address test (“RAT”). The RAT is only available if the local government allows Financial Institutions (“FI”) to apply the RAT. If the government does not allow the application of the RAT, or the RAT cannot be executed, then FIs need to use the electronic record search. The Netherlands allow FIs to apply the RAT. Furthermore, the RAT may be applied to the full preexisting low-value individual account population or a clearly defined group of accounts. FIs can opt to apply the RAT, or decide to only apply the electronic record search for CRS, which is similar to the indicia search under FATCA.

PwC Observation:

The Residence Address Test can provide a relief to FIs when performing pre-existing account review for CRS. FIs need to assess whether it is beneficial to apply the RAT to (a part of) their pre-existing account population, or to only apply the electronic record search for indicia of foreign tax residence.

- **Address statement - Penalty of Perjury**

The RAT requires that FIs have a current residence address of the customer that is supported by documentary evidence. Furthermore, documentary evidence is required in case of CRS-indicia that are conflicting with the self-certification of the customer.

CRS stipulates that documentary evidence should be either documents issued by a competent authority (e.g. a passport or certificate of residence). In addition certain documents that substantiate the address, such as a utility bill, are allowed. The Leidraad also allows a customer to draft a statement in which the address is confirmed. The Netherlands do not have a standardized “penalty of perjury” clause for these statements. Therefore, the Leidraad makes it explicit that the penalty provisions in the Dutch Penal Code (Wetboek van Strafrecht) apply to customers that provide false statements.

PwC Observation:

In addition to the documents issued by a competent authority, customers can also provide a free-format statement that states their address. By signing the statement the customer will accept any penalties imposed should they provide false information. This provides additional comfort for FIs that customers are certifying their correct address.

Observations Leidraad – CRS & FATCA combined items

- **FIs should provide customers the option to provide counter-evidence of having a foreign tax resident status**

In case of accounts with US- or CRS-indicia, the Netherlands Intergovernmental Agreement (“IGA”) and CRS prescribe that these accounts are reported unless a cure for the indicia is provided by the customer. The Leidraad indicates that Financial Institutions are required, based on article 11 of the Dutch data protection law (Wet bescherming persoonsgegevens), to always provide their account holders with the possibility of providing a cure in case of any CRS related or US indicia.

PwC Observation:

FIs should provide account holders the possibility to provide a cure in case US- and/or CRS-indicia are identified.

- **Additional guidance with respect to the Investment Entity definition**

The Leidraad aligns the CRS guidance with the existing FATCA guidance. Given the importance, we have provided the most important aspects of the guidance.

- **Customer-definition**

Investment entity - Sole Shareholder

In line with the Financial Action Task Force (“FATF”) recommendations, the Leidraad clarifies that there is no client relationship between an entity and the sole director/shareholder. In case of an entity that has more than one shareholder or if the investment activities of the entity are performed by a professional third party, a client relationship exists and the entity is regarded as Investment Entity.

Very limited group of family members

As an exception, the Leidraad clarifies that if an entity has assets that consist of cash or investments, it should not qualify as an Investment Entity Financial Institution if (i) the entity has a *very limited* group of shareholders or participants that are part of the same family and that (ii) do not present themselves as an investment fund on the market and (iii) have neither raised nor will raise capital in the market. Even if these entities are professionally managed by a Financial Institution they should still not qualify as an Investment Entity, but as a Passive Non-Financial (Foreign) Entity (“N(F)FE”).

PwC Observation: *The Leidraad contains a welcome clarification on the scope of the customer definition. By excluding sole shareholders and entities held by a very limited group of shareholders that are members of the same family, the Netherlands aligns with the FATF Recommendations as well as the approach that is taken by several other CRS and IGA countries.*

- **Holding companies as part of a private equity or similar investment structure**

Private equity funds and other similar investment funds qualify as a Financial Institution under CRS and FATCA. This also applies to a holding company that is part of a private equity (or similar investment) structure or that was set up as part of the acquisition structure. However, the Leidraad specifies that if *all* the shares are held by the private equity fund or a similar investment fund, the holding entity may opt to not qualify as a Financial Institution, but rather as a Passive N(F)FE since reporting is already being done at the level of the fund(s).

PwC Observation: *Generally, all holding companies in a private equity structure or similar investment structure would qualify as a Financial Institution. As this would create a large number of Financial Institutions in the Netherlands, while at the same time most of these holding companies would have no reportable accounts, the Dutch government already decided under FATCA to exclude these holding companies from the Financial Institution definition as long as the requirements in the Leidraad are met and all relevant accounts are reported by another entity. This interpretation is extended under CRS.*

- **Real estate fund**

Under CRS and the Treasury Regulations, it is clarified that the term financial asset does not include directly held real estate. As such, a real estate fund that solely directly holds real estate may therefore fall outside of the scope of Investment Entity. The Leidraad aligns with CRS and the Treasury Regulations. It specifies that real estate is not considered a financial asset. As such, real estate funds that directly hold real estate may also fall outside of the CRS scope of Investment Entity in the Netherlands.

***PwC Observation:** Also under CRS, investment entities that primarily invest directly in real estate, do not fall under the Investment Entity definition. Real estate investment funds should assess whether they meet the “primarily”-test for investing in direct real estate.*

- **Insurance companies**

The CRS model lacks a definition of an insurance company. The definition of insurance company is further clarified in the CRS Commentary. The Leidraad states that for the definition of an insurance company reference may be made to the CRS Commentary or the definition in the Treasury Regulations.

- **Treasury Center within a (non-) financial group**

Based on CRS and FATCA, a treasury center that operates a cash pool for the group it is part of, may qualify as Financial Institution. The Leidraad confirms that under circumstances treasury centers can apply for an exception to this general rule. Receiving cash from non-financial group companies does not qualify as ‘accepting deposits’. As such, a treasury center qualifies as Active NF(F)E. This exception only applies if the treasury center is part of a nonfinancial group as defined under the Treasury Regulations and CRS. In that case it may qualify as an Excepted NFFE under the Treasury Regulations, i.e. as an Active NF(F)E for purposes of CRS and the IGA.

***PwC Observation:** The Leidraad confirms that a treasury center that operates a cash pool may qualify as an Active NF(F)E. However, this only applies to the extent that the treasury center is part of a nonfinancial group. If this condition is not met, the treasury center qualifies as Financial Institution both under CRS and FATCA. It is noteworthy that in the CRS Model, there is only an exception to the Investment Entity for Active NFEs and not in the Depository Institution definition. Without the Leidraad, many treasury centers and cash pools would fall within the FI-definition. Treasury centers, group financing companies, bond issuance vehicles and cash pools should assess if they meet the non-financial group-test.*

- **SBI Codes**

Similar to FATCA a Financial Institution may opt to classify customers based on the publicly available information such as industry codes (e.g. Standaardbedrijfsindeling ‘SBI’ or the International Standard Industrial Classification ‘ISIC’). These codes can be used to classify corporate customers as Active, Passive NF(F)E or as Financial Institution.

***PwC Observation:** Similar to FATCA, FIs are allowed to classify their customers CRS status, based on SBI codes. However FIs cannot determine a customer’s tax residency based on the above information. As such, FIs would need to obtain the tax*

residency of most of its new customers. For preexisting entity accounts without foreign indicia, the SBI codes are a welcome relief to classify the account holder status.

- **Validity of documentation**

The Leidraad clarifies that the Dutch self-certification forms (both CRS and FATCA) and the forms W-8 and W-9 are valid indefinitely, provided that the forms contain a US TIN where required. Moreover, the forms are only valid to the extent that there are no changes in circumstances.

- **Self-certification – no valid self-certification obtained within 90 days**

The FI is in principle required to obtain a self-certification from new account holders. If no self-certification is obtained within 90 days, the account should be closed. This aligns with FATCA.

***PwC Observation:** CRS dictates that Financial Institutions must in principle always request a self-certification from a new account holder. If they do not obtain a self-certification within 90 days after the account opening, the account cannot be opened/remain open. FIs should decide whether they do want to apply the 90 day-period. If they apply this period, then they should have controls in place to monitor if the self-certification is obtained and in absence thereof after 90 days, close the account.*

- **Investment Advisors and (Investment) Managers**

Investment Advisors and Managers qualify as Investment Entities. Under FATCA, a Non-Reporting FI status is available for investment managers and advisors. CRS does not contain a specific provision for investment managers and advisors, nor are these included on the Netherlands Non-Reporting FI list. As such investment advisors and (investment) managers are considered FIs under CRS.

The Leidraad refers to the CRS-Commentary in which it is made clear that equity interests in the investment manager or advisor that are held by its parent company, are excluded financial accounts. As such, the investment manager and advisor should not have reportable accounts.

***PwC Observation:** Although CRS does not contain a specific Non-Reporting FI status for investment managers and advisors, the impact is limited. By excluding interests held by the parent company in the investment manager and advisor from the financial account-definition, the CRS impact on these parties is limited as the Netherlands does not require annual nil-reporting and these parties should not have financial accounts.*

- **Passive Income**

Under Dutch law there is no definition of passive income. The CRS Commentary to the model caters for a definition of passive income. As this definition has a great overlap with the definition used in the US Treasury Regulations, the Leidraad states that for the definition of passive income for both for CRS and FATCA, the definition in the CRS model should be applied.

***PwC Observation:** the Leidraad provides further guidance on what constitutes passive income. Parties that are basing their FATCA-classification on the income test, should revisit if that test is still met.*

- **Broader definition of pre-existing account**

Any financial account with an FI as of December 31, 2015 is treated as a preexisting account. Any financial account opened as of January 1, 2016 is in principle treated as a new account, thus requiring the FI to obtain a self-certification. In the Netherlands the option to apply the broader definition, which is incorporated in the EU Directive Administrative Cooperation, is allowed. This means that FIs are allowed to treat a new account of a preexisting account holder as a preexisting account, provided four criteria are met.

***PwC Observation:** Treating a new account of a preexisting account holder as a preexisting account can limit the impact of CRS on customers. It does require that FIs conduct a thorough product analysis, draft policies and procedures and potentially make IT-adjustments. FIs should assess if this provision is beneficial to apply.*

Stichting Administratie Kantoor (STAK)

For the purposes of CRS and FATCA, Stichting Administratie Kantoren (“STAK”) located in the Netherlands will be classified as a NFE. If the certificates of the STAK are regularly traded on a recognized stock exchange, the STAK will classify as Active NF(F)E. In case certificates of a STAK are not regularly traded, the STAK is classified as a Passive NF(F)E.

***PwC Observation:** The treatment of a STAK under CRS is aligned to the treatment under FATCA. The impact for non-exchange traded STAKs is that they will need to certify upon requests of other FIs the tax residency of its Controlling Persons.*

- **Interest**

The interest definition in CRS and the IGA is aligned with the definition of interest under Dutch tax law.

- **Double residency**

In the event that an FI is resident in two countries, the FI should report the CRS and FATCA information to the Tax Authorities of the country where the account is maintained.

Additional references

The Leidraad can be found at:

<https://zoek.officielebekendmakingen.nl/stert-2016-2236.pdf>

For more information about CRS and FATCA, please visit our web site at

<https://www.pwc.nl/nl/common-reporting-standard.html> and
<http://www.pwc.nl/fatca>

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