
CRS Newsbrief

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The Netherlands issues draft law on CRS and EU DAC

In brief

On 11 September 2015, the State Secretary of Finance published the draft law for implementation of the Common Reporting Standard ('CRS') which was sent to the Dutch parliament for review. The package contains the draft law including explanatory notes. The amended EU Directive on Administrative Cooperation ('EU DAC') will also be implemented in the Netherlands through this law.

The EU DAC has been amended to include CRS provisions and, as an EU Directive, must be implemented by all EU member states through local laws.

The EU DAC limits the scope of implementation decisions made by individual member state governments. Therefore, the proposed Dutch law does not include any substantive deviations from the EU DAC. Most country-specific rules are expected to be included in Dutch CRS guidance, which is expected to be published before year-end. It appears that, where possible, existing requirements under FATCA¹ have been combined with CRS/EU DAC² requirements to reduce both complexity and the overall implementation burden.

In case of non-compliance, penalties may apply to the FI and its employees that are involved with CRS. Clients that deliberately submit incorrect self-certifications may also be subject to penalties. In severe cases of non-compliance criminal charges may apply.

Additional key insights are available below.

¹ The US Foreign Account Tax Compliance Act and country specific legislation based on Intergovernmental agreements regarding FATCA.

² To improve readability, references to CRS in this paper mean both CRS and EU DAC, except when explicitly stated otherwise.

Dutch CRS Law Observations

- **Status of legislation and guidance**

The draft CRS law has been sent to Parliament and is expected to be effective as of 1 January 2016. The CRS guidance is expected to be published before year-end.

In various places, the draft CRS law refers to the EU DAC for further details on definitions. The CRS Commentary is recognized as being explanatory for both CRS and the EU DAC, and can be used to interpret the draft CRS law together with the explanatory notes to the draft CRS law.

The Ministry of Finance has conducted a Privacy Impact Assessment ('PIA') to assess whether CRS conflicts with existing Dutch privacy laws, which are based on the EU Data Protection Directive. The conclusion of the PIA and advice of the 'College Bescherming Persoonsgegevens' is that no conflict exists and, consequently, the CRS law can be implemented.

In the Netherlands CRS and the EU DAC are implemented in 'The International Assistance in the Levying of Taxes Act' (in Dutch: Wet op de internationale bijstandsverlening bij de heffing van belastingen). The Act already contains a number of obligations within the framework of international (spontaneous) exchange of information. Once the parliamentary approval process is completed, the Netherlands should have all necessary legal provisions in place to enact CRS in the Netherlands.

The procedures for identification and reporting applicable to Financial Institutions ('FIs') will be laid down in a Decree that does not require parliamentary approval. In addition, further written guidance will be provided in the so-called joint FATCA and CRS Leidraad (hereafter: Dutch guidance). The Dutch guidance will be published as a response to implementation issues and will also provide further technical explanations to the draft CRS law. It is expected that the Decree and the Dutch guidance will be made available before the end of the year.

PwC Observation: *Although the timing is tight, it seems that the relevant legislation will be in place before the first CRS deadline. FIs should take action to be CRS-compliant as from 1 January 2016.*

- **Wider approach**

The Netherlands has partially implemented the 'Wider Approach' in the draft CRS law. In short, the Wider Approach entails that FIs are allowed to request and record the tax residencies and Tax Identification Numbers of all clients instead of only the tax residencies of CRS partner jurisdictions of the Netherlands. Without the Wider Approach, FIs would have to go back to their clients each time the Netherlands enters into a new CRS Competent Authority Agreement with another country.

The draft CRS law prescribes that FIs must obtain, upon account opening and in case of changes of circumstances, all tax residencies and all Tax Identification Numbers of a client. For Preexisting Accounts, the FI only has to approach clients that have indicia of a CRS partner jurisdiction of the Netherlands.

PwC Observation: *Implementation of the Wider Approach for new account opening is a welcome relief for FIs as it reduces the impact to both FIs and their*

customers. FIs that would like to apply the Wider Approach to Preexisting Accounts, as well as New Accounts, should consult with a data privacy specialist.

- **Financial Institutions under CRS**

The draft CRS law contains less exemptions to the FI definition and provides for less deemed compliant statuses than FATCA. As such, some entities that were exempt under FATCA may now qualify as FI under CRS.

Although unrelated to the implementation of CRS under Dutch law, it is noted that CRS lacks approximately ten exemptions to the definition of FI compared to FATCA. Some examples are discussed below.

Under FATCA, it was possible to opt for a nonreporting member of a participating FFI group status. However, under CRS this status is not available. Consequently, these entities are likely to qualify as FI for CRS. Entities that opted under FATCA for this nonreporting member of a participating FFI group status may want to consider whether to align their FATCA status to the CRS status.

Another exemption that is available under FATCA but is not available in CRS is the non-financial group entity exclusion. CRS provides an equivalent exclusion which, however, only applies to certain Investment Entities. This means that non-financial groups may have entities that are Depository Institutions (i.e. treasury centers) which would be treated as FI whilst this is not the case under FATCA. Unless this is resolved in future law or (the Dutch) guidance, CRS will severely impact treasury centres and other entities performing financial activities within non-financial groups.

Lastly, FATCA contains an exemption for Investment Entities that are wholly owned by exempt beneficial owners. This status is primarily applied by mutual funds for joint account ('FGR') that only have pension funds as participants. Under CRS this status is not available, but other exemptions may apply. Consequently, entities that have opted for this FATCA status should carefully review their CRS status.

PwC Observation: *Investment entities that opted for a nonreporting FI status under FATCA and treasury centres, cash pools and group financing companies that opted for the non-financial group exclusion under FATCA should carefully review their CRS status.*

- **Exempt products**

The draft list of exempt products under CRS is comparable to the list of exempt products under FATCA. The draft list has been sent to the European Commission for review and approval.

It is expected that the impact will be limited, as the list is comparable with the exempt product list under FATCA. However, under FATCA any funeral insurance policy with a premium of € 1,000 per year or less is exempt. This provision is not included in CRS. The products '*nettolijfrente*' and '*nettopensioen*' that were introduced in 2014 have not been included in the list of exempt products. This means that Insurance companies that offer these products must fulfill the FATCA and CRS obligations for Financial Accounts. Pension funds that offer *nettolijfrente* and *nettopensioen* are likely to also have CRS obligations with respect to these products. Under Annex II of the Netherlands – US IGA pension funds enjoy a broad exemption

for purposes of FATCA. The introduction of the *nettolijfrente* and *nettopensioen* may raise questions as to whether this broad exemption is future-proof.

PwC Observation: *Insurance companies that offer funeral insurance policies and pension funds and insurance companies that offer nettopensioen and nettolijfrente policies should take action to implement CRS for these products. Pension funds should actively monitor any FATCA developments regarding nettolijfrente and nettopensioen.*

- **Reporting method and timelines**

Information about the reporting method and reporting timelines is not included in the draft CRS law and will be included in a manual issued by the Dutch tax authorities.

FIs need to report under CRS for the first time in 2017. The Dutch tax authorities will issue guidance on the timelines and provide for a reporting manual. For FATCA, the Dutch tax authorities have recently indicated that (most) FIs need to submit their report for the calendar year 2015 prior to 11 February 2016.

PwC Observation: *Even though reporting is only required in 2017, FIs should prepare in the coming months to capture the data required for reporting over the calendar year 2016. We anticipate the method and timelines of CRS reporting to be similar to those for FATCA reporting, however the volume of accounts reported is likely to be larger.*

- **Enforcement and penalties**

The 2016 Annual Budget provides information on the enforcement and penalty system to CRS.

Unlike FATCA, CRS does not contain a withholding tax sanction. Each country will have to take measures to ensure the effective implementation of CRS. The Netherlands introduces penalties for non-compliance with CRS in the 2016 Annual Budget. Penalties may apply for both the non-complying FI itself as well as for employees that are involved (managers and others), but also the person who is deliberately filing an incorrect self-certification. In case of deliberate non-compliance or gross negligence an administrative fine of (at most) € 20,250 may be imposed on any of these persons. Alternatively, criminal law proceedings may follow in more serious cases of non-compliance.

PwC Observation: *Penalties may be imposed on any person involved with non-compliance. Financial Institutions should consider informing their customers that filing an incorrect self-certification might lead to penalties and / or criminal charges. Also employees of an FI might be subject to criminal prosecution. If an employee acts on its own accord to evade reporting under CRS, then that could lead to prosecution. The management of the FI may be prosecuted if it was known that the policies and procedures installed were insufficient to prevent evasion of CRS-reporting and no adequate measures were taken.*

- **EU Savings Directive**

In line with earlier remarks in European Union publications, the State Secretary of Finance noted that the European Savings Directive is expected to be withdrawn.

The EU Savings Directive was introduced in 2003 and became effective as from 1 July 2005. Only cross-border ‘interest’-payments to individuals resident in EU Member States and a few other countries are reportable. In March 2014 a revision of the EU Savings Directive was adopted, which is to be implemented in local law as per 1 January 2016 and taking effect as from 1 January 2017.

***PwC Observation:** CRS has a wider scope than the EU Savings Directive, it includes not only interest payments but more elaborate financial account information, and is also applicable to entity customers of FIs. Furthermore, CRS imposes obligations on almost all investment entities instead of only UCITS that invest in fixed income, and includes insurance products. Withdrawal of the European Savings Directive is a welcome relief for market participants, and a logical approach given the introduction of EU DAC, which surpasses the European Savings Directive in scope. If the withdrawal doesn’t occur, then duplicative but different requirements will be applicable to FIs. FIs will need to monitor developments in this respect.*

Additional references

The CRS Law can be found at:

<https://www.rijksoverheid.nl/documenten/kamerstukken/2015/09/11/wettekst-crs>

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

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

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