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9 July 2020

FS Newsflash

FATCA/CRS: Key changes and take aways of the Netherlands updated guidance

Introduction

On 2 July 2020, the Dutch Ministry of Finance published its updated official FATCA/CRS guidance notes ("guidance"). The updated guidance introduces new technical guidance, incorporates the guidance of the 2018 'Question and Answer' Decree and revokes the previous issued guidance of 14 January 2016. This newsflash summarises the key technical changes and provides practical takeaways.

The Dutch guidance notes are amended and expanded on multiple topics, such as the relation between FATCA/CRS and other regulations, such as GDPR and the right on a basic payment account, that were introduced after FATCA and CRS became effective, the treatment of holding companies in a private equity structure, multiple guidance points on 'accidental Americans', the UBO of a STAK, and the certification requirements under the sponsoring entity regime.

General observation:
The guidance is primarily updated for developments since FATCA and CRS was introduced, and it is helpful to see that the FATCA/CRS guidance aligns with the various regulations. Most changes in the guidance are textual or a confirmation of positions that market parties developed over time.

1.6 - Gross profit on futures

- The guidance states that all positive settlements on futures should be reported as gross proceeds. Any negative settlements on futures should be ignored when reporting the gross proceeds amount.

- Futures are derivative financial contracts that obligate the parties to transact an asset at a predetermined future date and price. Here, the buyer must purchase, or the seller must sell the underlying asset at the set price, regardless of the current market price at the expiration date. Underlying assets include physical commodities or other financial instruments. Futures contracts detail the quantity of the underlying asset and are standardized to facilitate trading on a futures exchange.

- Generally, futures are settled on a daily basis. The gross proceeds from futures is calculated as the sum of all daily results from the sale or expiry of the underlying asset. In this context, the positive and negative results derived may be netted per day.

- In case the aggregated amount of the daily results is negative, there are no gross proceeds considered for FATCA and CRS purposes, consequently no reporting should be required. Hence, negative results on a future should not be included when determining the gross proceeds derived in a year. In case there are 3 settlements in a year of +/+300, -/-200, +/+200, then the gross proceeds amount in regard to settlements of futures in that year should be 300 + 200 = 500.

Take away:
The guidance states that all positive settlements on futures should be reported as gross proceeds. Any negative settlements on futures should be ignored when reporting the gross proceeds amount. This increases the amount of overreporting. Receiving tax authorities get the impression that the taxpayer made 500 on future settlements, where in reality the taxpayer made only 300 gains on the future settlements.

1.13 – GDPR requirement in relation to collecting and processing personal data from counter evidence

- In accordance with the General Data Protection Regulation ("GDPR", an EU Data protection regulation), an FI may only process personal details up to the extent, and the purpose for which it is collected and processed, is adequate, relevant and proportionate. Additionally, the FI must take the necessary measures to ensure the personal details are processed correctly and accurately in accordance with the purpose for which the details are collected or processed.

  Take away:
  FATCA and CRS became effective in 2014 respectively 2016 in the Netherlands. GDPR became effective as of 25 May 2018. The guidance clarifies that collecting personal data under CRS is a justified activity for FIs under the GDPR, as there is a legal basis (one of the GDPR justification grounds). Needless to say, FIs should adhere to the GDPR requirements in regard to collecting and processing of data.

  In practice, FIs apply a strict standard for collecting FATCA/CRS information, which may sometimes go beyond what is legally required in that situation (for example, gathering extra data for controlling persons beyond what is required). In that case, FIs should either obtain consent from the account holder to collect the data, or they should ensure one of the other six justification grounds under GDPR is applicable.

1.19 (Individuals) and 1.25 (Entities)- obtaining and validating the self-certification prior to opening a financial account

- Prior to opening a financial account an FI should receive and verify the validity of the self-certification. An FI is only allowed to open a new financial account prior to validation of the obtained self-certification if the validation is part of the 'day-two' procedure which should take place within 90 days. The guidance acknowledges that in a limited number of cases it is not possible to obtain a self-certification prior to opening a new financial account (e.g. with the transfer of an insurance contract or the acquisition of shares in an investment fund on the secondary market). In such cases, the self-certification should be obtained and validated as soon as possible and in any event within 90 days.

  Take away:
  This part of the guidance is based on FAQ 22 of the CRS Frequently Asked Questions published by the OECD.

  In limited circumstances, it may be allowed to open a financial account prior to obtaining a self-certification. Validation of the self-certification should take place within 90 days after opening the account. In case the valid self-certification is not obtained within 90 days, then the account should be made unusable, or should even be closed.

  In practice, FIs were already following this guidance. This now confirms the practice of many FIs.

1.20 - Tax residency on the self-certification form

- FIs cannot simply rely on the tax residency provided by the account holder in the self-certification. FIs should confirm the reasonableness of the tax residency provided in the self-certification based on information on file. Generally, when the address matches the tax residency the self-certification seems reasonable.

- The guidance states that when assessing the reasonableness of the (tax residency) information included in the self-certification FIs should - amongst others - take into account the specific situation of frontier workers, foreign students and asylum seekers.

Take away:
For the past six years, account holders that are diplomats, foreign students, frontier workers and asylum seekers have posed operational challenges to FIs. The guidance reiterates that FIs should do their FATCA/CRS due diligence and note that that is a more burdensome exercise for the abovementioned groups. Where an FI knows that the account holder is from one of the abovementioned groups, it should review its reasonableness tests to see what follow-up may be required in these cases.

An open question remains, why the Dutch government has chosen to emphasize the abovementioned groups but has remained silent with respect to the citizenship or residence by investment (CBI/RBI) schemes recommendations issued by the OECD. With respect to the tax residency, the OECD addressed the potential risk of citizen or resident by investment (CBI/RBI) schemes offered by jurisdictions being misused to escape CRS reporting. When assessing the reasonableness of a self-certification, the OECD recommends that FIs should take into account the list of jurisdictions published by the OECD that offer high-risk CBI/RBI schemes. However as these are recommendations it is generally expected that local tax authorities will offer explicit direction in this regard. As the Dutch government remains silent on this topic, FIs will need to assess their appetite to adopt the OECD recommendations.

1.24 - Classification of non-profit organisations as active NFE

- A non-profit organisation that meets all requirements of CRS Section VIII.D.9.h. is an active NFE and not an FI, regardless of whether its assets are managed by an FI. A professionally managed investment entity that does not meet these requirements is not an active NFE within the meaning of that section.

Take away:
Based on its activities, a non-profit organisation might classify as an investment entity FI. An investment entity FI that meets either of the active NFE criteria of CRS Sections VIII.D.9.d-g is classified as an active NFE instead of an FI based on CRS Section VIII.A.6.b. However, this exception does not include the non-profit organisations that classify as active NFE based on CRS Section VIII.D.9.h.

The guidance extends this exception of the investment entity FI definition to non-profit organisations.

Non-profit organisations should review their entity classification to see if they require any adjustments with this new guidance. Financial Institutions should be prepared to receive updated self-certifications for some non-profits changing from FI to active NFE classification using this guidance.

1.35 - Subsidiary of active N(F)FE

- An active NFE means, amongst others, an NFE whose activities substantially consist of holding (in whole or in part) the outstanding shares of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of an FI. In this context, a subsidiary means an entity of which the NFE holds, directly or indirectly, in whole or in part the outstanding shares.

Take away:
The guidance provides that no ownership threshold applies for the qualification as a subsidiary when determining whether an NFE qualifies as an active NFE. If an NFE has an interest of 2% in an entity, that entity could qualify as a subsidiary. This was already the approach followed in practice based on the Netherlands IGA, but this is now explicitly confirmed.

1.39 – Holding company as part of a private equity structure

- A holding company as part of a private equity or other investment structure is not considered an investment entity but a passive NFE if all the shares are held directly or indirectly by the private equity fund - or other type of investment fund - itself. After all, reporting is already performed at the level of the fund(s). However, no other foreign fund may be included within the investment structure, unless that other fund qualifies as an FI.

- The updated guidance clarifies that the shares in the holding company may be held directly or indirectly held by the investment fund(s). While the previous version of the guidance referred to the shares being held both directly and indirectly.

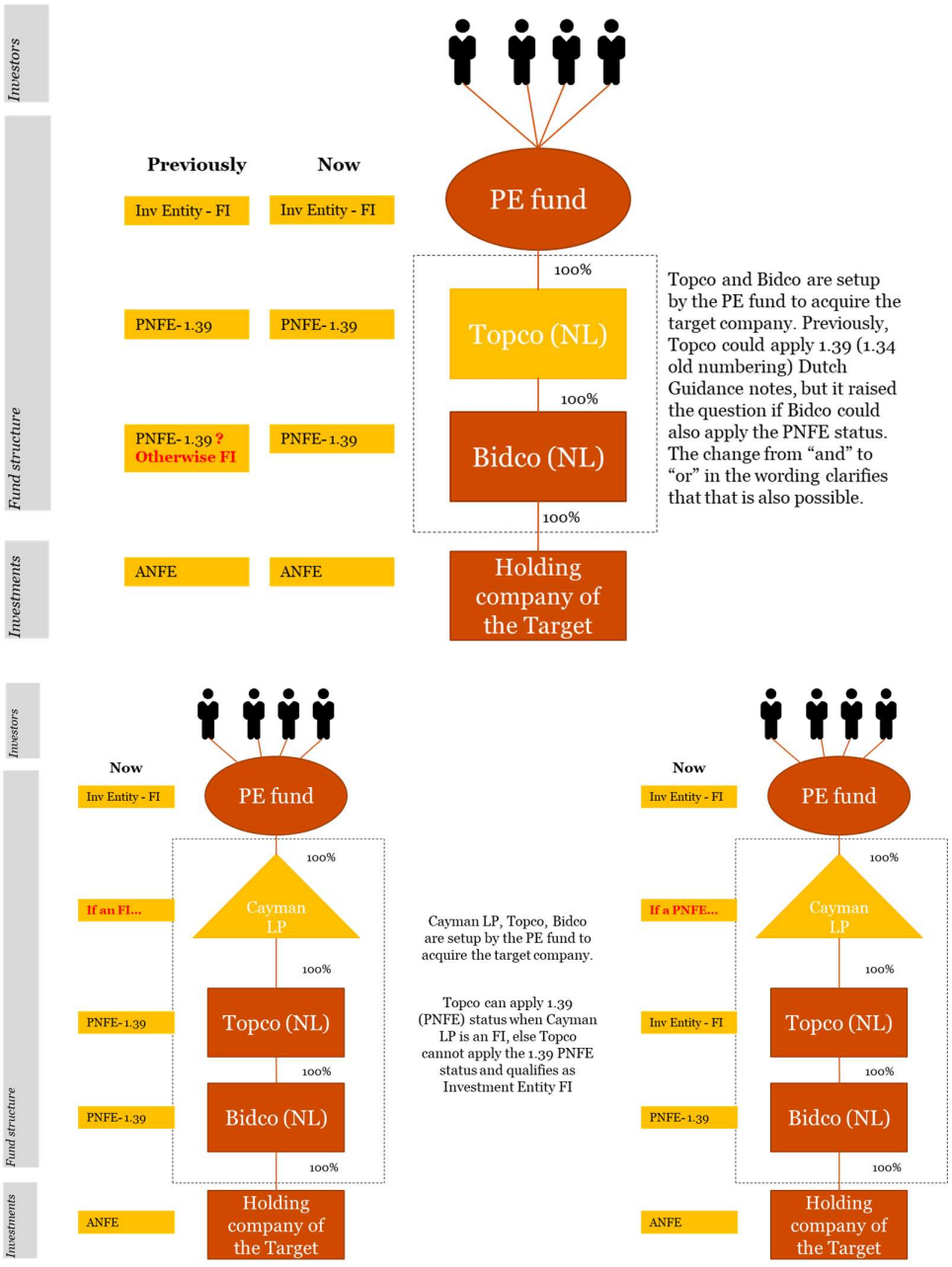
- In addition, the classification as a passive NFE can only be applied if any foreign intermediate funds are classified as FI.

Take away:
The clarification that shares in the holding company may be held directly or indirectly is a helpful confirmation that the passive NFE classification can also be applied on intermediate holding companies in a private equity structure.

However, when the shares are held indirectly, the classification can only be applied if the foreign intermediate entities are classified as FI. In other situations, the holding company setup by the private equity fund classifies as Investment Entity FI and will need to report the debt and equity interests held by foreign intermediate entities.

In practice, parties were applying the Leidraad guidance already in an "or" fashion instead of an "an"-fashion.

Here we have provided two examples of the application of this guidance.



1.48 – Deceased UBOs

- An ultimate beneficial owner ("UBO") within the framework of FATCA and CRS is a natural person who has the ultimate interest in a company or other legal entity. If the UBO of an entity is deceased, the interest held by that person will be transferred to another person, usually the heirs. A deceased person may not have voting rights, hold shares or exercise effective control over an entity. Therefore, a deceased UBO does not have to be reported for FATCA and CRS purposes.

Take away:
Although the deceased UBO no longer needs to be reported for FATCA and CRS purposes, the death of the UBO might trigger a change in UBO. The FI that is aware of the death of the UBO therefore has reason to know that the original self-certification is no longer complete or reliable and must obtain a new self-certification.

1.51 – STAK

- The 4th AML Directive has been implemented in Dutch law in 2018 (*Wwft: Wet ter voorkoming van witwassen en financieren van terrorisme*). As a result, the Dutch interpretation of an UBO under the Wwft in relation to a Stichting Administratiekantoor ("STAK") has been clarified. The guidance aligns with the Dutch UBO interpretation for STAKs under the Wwft.

- The Memorandum of Understanding to the Netherlands Intergovernmental Agreement in regard to FATCA states that a STAK established in the Netherlands will be treated as an NFE. Only if the certificates issued by the STAK are regularly traded on a recognised stock exchange is it an active NFE. In all other cases, the STAK is a passive NFE. The same default classification of a STAK as NFE applies for the application of CRS. The updated guidance reflects the following:

- In the event that a STAK is used and the client claims that this results in a change in UBOs, FIs must establish that this change also occurs in a material sense. In this way, it must be prevented that - by placing a STAK between BV/NV and shareholders - the ultimate interested party is not regarded as the beneficiary because, as the holder of, for example, 50% of the depositary receipts, he does not have 25% of the control in the STAK.

Take away:
The UBOs of a legal entity are both the natural persons who qualify as an UBO on the basis of the percentage of ownership ('possession UBO'), and the natural persons who directly or indirectly have more than 25% control in the board of the STAK that holds the legal entity ('controlling UBOs'). It is helpful for FIs that the FATCA/CRS guidance follows the Wwft guidance, as that should lead to less situations where the FI has conflicting information.

The FATCA/CRS guidance seems to only pertain to situations when FIs become aware of a UBO-change as a result of their clients interposing a STAK. We wonder why the guidance is not including situations where the client has a STAK in the existing structure.

Furthermore, we would expect that interposing a STAK to shield the UBO, would constitute a reportable arrangement under hallmark D2 of the Mandatory Disclosure rules of DAC6. For the avoidance of doubt, it is stipulated in the Dutch DAC6 guidance that banks should not have a DAC6 reportable arrangement under hallmark D2 as long as they fulfill their AML/KYC requirements. Consequently, the DAC6 reporting responsibilities would be solely with the other intermediaries that are involved in the arrangement or, in the absence thereof, with the tax payer itself.

2.3 – US TIN requirement

- As of 1 January 2020, every self-certification, Form W-8 and Form W-9 obtained by an FI from a US Person - including existing forms - must include a US TIN or these forms will no longer be considered valid.

- If the FI does not obtain a fully completed self-certification form (e.g. without US TIN in case of a US Person), the FI may not open a new account for the client until a fully completed self-certification form is received or, limit the new account to a basic payment account. The mere absence of a US TIN is not a ground for refusing a basic payment account within the meaning of Section 4:71f of the Wft. In general, an FI may refuse to open a basic payment account in an individual case, or it may close an existing basic payment account, if it can prove that there is deliberate money laundering and/or tax evasion. In the absence of a ground for refusal, an FI is therefore obliged - upon request - to open a basic payment account for a US Person who does not have a US TIN.

- Under the Netherlands IGA, for existing accounts, FIs are required to make reasonable efforts to obtain missing US TINs. FIs have until July 2023 to do so. If, despite the FIs continuing efforts, a US person does not provide a US TIN, the efforts made by the FI will be taken into account by the IRS as an important factor in determining if an FI can maintain a compliant FI status (and active GIIN).

- Furthermore, it should be noted that the IRS' Relief Procedure for Certain Former Citizens provides expatriated US persons with an option to become compliant with their US tax and filing obligations. Based on this procedure, US persons have the possibility to renounce their US nationality, given that certain conditions are met. If this procedure has been initiated, the client should inform the FI accordingly and the FI shall record this information in its administration because the lack of a US TIN may be justified in such a case.

Take away:
The first FATCA documentation took place in 2015 for the fiscal year 2014. It seems appropriate that FIs now have the possibility to choose not to open a new account for clients that are not able to provide their US TIN. For existing accounts, FIs shall have a policy in place that makes reasonable efforts to obtain missing US TINs.

FIs may not offer new financial accounts to US Persons without a US TIN, or may be obliged to close existing accounts of such persons. However, US Persons without a TIN are still entitled to open a basic payment account. In practice, some FIs are not actively closing accounts of US persons that can demonstrate that they are actively trying to obtain a US TIN. Obtaining a US TIN can take 9 or months under current processing times. An open question remains whether an FI that intends to close an account that is not a basic payment account is instead obligated to transfer that account to a "basic payment account". Consideration of the basic payment account obligations will need to be reviewed by FIs before closing accounts.

2.6 – Sponsoring entity regime

- Under the US Treasury Regulations sponsored entities are required to periodically certify their FATCA compliance towards the IRS. In IGA Model 1 countries, like the Netherlands, the supervision on FATCA compliance by FIs is a task of the IGA Model 1 (Dutch) government.

- Other countries have included language with regard to sponsored entities that clarify that sponsored entities that adhere to the IGA-requirements are FATCA compliant, also from a US perspective. The Netherlands and the United States are endeavouring to include similar language in the Netherlands IGA. The guidance makes it clear that the negotiations are still ongoing (and apparently quite tough to conclude).

Take away:
The Dutch government is endeavouring to ensure that Dutch FIs that use the sponsored entity regime, and that did not certify their FATCA compliance to the IRS, are still regarded as compliant (with retroactive effect, we assume) by amending the Netherlands IGA. The negotiations between the Netherlands and the United States are ongoing. We hope this gets resolved in a satisfactory manner soon for the approximately 130 Dutch entities (as identified by the guidance) that apply the sponsoring entity regime. We know that there are many hundreds, if not thousands, more Dutch entities that are applying the sponsoring entity regime. These would not be included in the 130 as they are not registered for a GIIN (and are not required to obtain one under IGA rules where there are no US reportable accounts) therefore the Dutch government would not otherwise know of their existence.

Our interpretation of the guidance is that the intention is to achieve sponsoring entity regime status with retroactivity. As such, FIs may not want to change their approach until further guidance is received but instead should operate on a best-efforts basis.

2.19 – Coordination between the Netherlands IGA and US Treasury Regulations definitions

- In determining whether an entity qualifies as an NFFE for FATCA purposes, an FI may use the definition used in the US Treasury Regulations instead of the corresponding definition used under the Netherlands IGA. This option is provided to FIs only and not to the account holders.

Take away:
The guidance now clarifies - to the extent that was even needed - that the right to opt to use the US Treasury Regulations definitions instead of the corresponding definitions in the Netherlands IGA, only applies to FIs and not to account holders.

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