
Global IRW Newsbrief

Information reporting and withholding (IRW)

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*The Dutch Ministry of Finance
publishes Draft Decree to implement
FATCA and opens internet consultation*

In brief

On July 1, 2014, the Dutch Ministry of Finance published a draft Decree amending existing Dutch legislation in order to implement FATCA in the Netherlands. In December 2013, the Netherlands signed an Intergovernmental Agreement with the US regarding FATCA. The draft Decree provides for the legal basis allowing Dutch financial institutions to report the information required under the IGA. The Ministry of Finance has clarified that it expects Dutch Financial Institutions to comply with the IGA as of July 1, 2014.

The Ministry of Finance has also opened internet consultation on the Decree. The aim of the internet consultation is twofold. It is intended to provide information to interested parties, as well as to enable interested parties to react on the Decree or to provide input. The internet consultation remains open until August 26, 2014. You can find more information on the consultation process (or submit your input) on <http://www.internetconsultatie.nl/fatca>. Please note that parties who want to provide input have the option to decide whether or not they want their input to be made public.

In addition, the Ministry of Finance will also publish a manual with guidance on a more detailed level. Further, please note that on July 2, 2014 the Dutch translation of the IGA has been published.

The draft Decree clarifies a number of issues that were left unspecified in the IGA. Below we have summarized the most important provisions and commented on them.

- **Amendment of the WIB**

The Dutch Ministry of Finance has decided to implement FATCA by amending the existing executive decree on WIB, “Uitvoeringsbesluit internationale bijstandsverlening bij de heffing van belastingen” as well as “Uitvoeringsbesluit Belastingwet BES”.

PwC Observation:

The amendment of the executive Decree on the WIB clarifies that the Ministry of Finance has decided to incorporate the IGA into existing legislation. The WIB deals with the international exchange of information and cooperating with foreign governments. As FATCA deals with the reporting of information and sharing this with the United States, this is in line with the WIB. The IGA which has been signed is not yet formally approved. It is expected that the IGA will be sent to the Dutch Parliament for ratification soon. The IGA voiced the intention to have the IGA and implementing legislation enter into force by September 30, 2015. This provides the government with over a year to finalize the approval.

The proposed amendment of the “Uitvoeringsbesluit Belastingwet BES” provides for the legal basis for Financial Institutions in Bonaire, Sint Eustatius and Saba to report to the tax authorities. This Newsflash will not further address the proposed amendments in the Uitvoeringsbesluit Belastingwet BES.

- **Expansion of WIB with Financial Institutions**

The IGA requires Financial Institutions to report information on reportable account holders and, in 2015 and 2016, on non-participating Financial Institutions (NPFIs) to the Dutch Tax Authorities. There is a detailed definition of Financial Institution in the IGA. The Ministry of Finance has incorporated articles in the draft Decree specifying that Dutch Financial Institutions as defined in Article 1, paragraph 1 (l) IGA are required to report the information required by the IGA to the Dutch Tax Authorities.

Non-reporting Financial Institutions are however not required to report. The reference to Article 1, paragraph 1 (q) IGA ensures that also Financial Institutions who opt for a deemed-compliant status or exempt beneficial owner status laid down in the U.S. Treasury Regulations (“Final Regulations”) are not required to report.

PwC Observation:

The amendment of the WIB ensures that only Financial Institutions as defined in the IGA are required to report for purposes of FATCA. As the WIB applies not only to Financial Institutions, this ensures that non-Financial Institutions are not required to report for purposes of FATCA.

In addition, the draft Decree confirms that non-reporting Financial Institutions are not required to report either. Article 1, paragraph 1 (q) IGA clarifies that a non-reporting Financial Institution includes all entities described as non-reporting Financial Institution in Annex II of the IGA, as well as all Financial Institutions that meet the requirements for a deemed-compliant status or exempt beneficial owner status in the Final Regulations and that opt to apply this status. The Final Regulations provide for more, and in some cases different, deemed-compliant statuses than the IGA. Article 1, paragraph 1 (q) IGA allows a Financial Institution to opt for one of those statuses provided that it meets the requirements. The draft Decree confirms that such deemed-compliant Financial Institution or Exempt Beneficial Owner is not required to report for purposes of FATCA.

- **More favourable definitions: Article 4, paragraph 7**

The Dutch IGA provides for a more favourable definitions provision in Article 4, paragraph 7. This provision indicates that the Netherlands may use and may permit Financial Institutions to use a definition in relevant Final Regulations instead of a corresponding definition in the IGA, provided that such application would not frustrate the purpose of the IGA.

The draft Decree indicates that Dutch Financial Institutions may, for purposes of exchanging information with the US, replace one or more definitions in article 1 of the IGA by the corresponding definition in the Final Regulations.

PwC Observation:

There are some differences between definitions in the IGA and the Final Regulations. The Decree indicates that Dutch Financial Institutions may, for purposes of exchanging information with the US, use definitions in the Final Regulations that are more favourable than the definitions contained in Article 1 of the Dutch IGA. This ensures a level-playing field for Dutch Financial Institutions compared to Financial Institutions in countries that have not signed an IGA.

The Decree does limit Article 4, paragraph 7 to definitions contained in Article 1 of the Dutch IGA. The Netherlands thereby excludes definitions contained in Annex I, Section VI, B such as the Active NFFE definition. Those definitions cannot be replaced by a corresponding definition contained in the Final Regulations.

- **Cherry picking**

The Dutch IGA contains a “cherry picking” provision in Annex I, Section I:C. This provision provides the Netherlands with the possibility to permit Dutch Financial Institutions under certain circumstances to cherry pick between the IGA and the Final Regulations. The Decree confirms that the Netherlands allows for cherry picking.

As such, Dutch Financial Institutions may choose to rely on the procedures described in the Final Regulations in order to determine whether an account is a US reportable account or an account held by a NPFI. A Financial Institution may choose *per section* of the IGA Annex I whether it will follow the requirements of the IGA laid down in that section or those from the FATCA Final Regulations that correspond to that particular section. A Financial Institution may make this choice *per section* for all relevant accounts or for a clearly identifiable group of accounts.

PwC Observation:

There are some differences in the due diligence procedures and documentation requirements laid down in the IGA and the Final Regulations. Annex I, Section I:C of the IGA was included to provide Financial Institutions, if allowed by the government, with the possibility to choose between those procedures in order to ensure a level-playing field. Financial Institutions may make this choice per

section as well as per clearly identifiable group of accounts. The following sections can be identified:

Section II:	Preexisting individual accounts
Section III:	New individual accounts
Section IV:	Preexisting entity accounts
Section V:	New entity accounts

The due diligence requirements for entity accounts appear to be more burdensome in the Final Regulations. It is expected that few Financial Institutions will consider opting for the Final Regulations procedure.

However, for new individual accounts, the Final Regulations allow Financial Institutions to rely on documentary evidence, i.e. a copy of a passport or I.D. card. Under the IGA, it is not possible to rely on documentary evidence, but Financial Institutions are required to obtain a self-certification form from each new account holder. As some Financial Institutions currently collect such documentation, it is expected that a number of Financial Institutions will consider applying the Final Regulations due diligence for new individual accounts until the Common Reporting Standard enters into force.

The Financial Institution may use the Final Regulations procedures for identifying reportable accounts and NPFIs. However, the reporting provisions cannot be replaced by the provisions in the Final Regulations.

- **Third party service providers**

Pursuant to the IGA, Financial Institutions are required to review and identify their account holders. However, Annex I, Section VI: F of the IGA provides the Netherlands with the possibility to allow Dutch Financial Institutions to rely on due diligence performed by third parties to the extent provided in relevant Final Regulations. The draft Decree confirms that Dutch Financial Institutions may rely on third parties who have performed due diligence. They may however only rely on the due diligence of third parties to the extent that the Final Regulations allow for it.

PwC Observation:

The draft Decree confirms that Dutch Financial Institutions may rely on third parties who have performed due diligence. As such, if a third party has already performed due diligence for a specific person or entity, the Dutch Financial Institution may rely on it and would not be required to perform due diligence as well. This could alleviate the burden for some Financial Institutions and could prevent that clients are not required to provide the same information multiple times.

Instead of referring to the Final Regulations, we would have expected the Ministry of Finance to also reference Article 5, paragraph 3 of the IGA. This Article indicates that the Netherlands may allow Dutch Financial Institutions to use third party service providers to fulfil the obligations laid down in the IGA. This may be addressed in the legislative proposal that is expected to be send to the Parliament soon.

- **Thresholds**

The IGA provides for several thresholds. If the account balance or value is below the threshold, the respective account is not required to be reviewed, identified or reported by the Financial Institution. However, the IGA specifies that a Financial Institution may decide not to apply the threshold and to simply identify, review and (if applicable) report all accounts if the Netherlands allows for this option.

The draft Decree indicates that a Financial Institution may decide not to apply the threshold laid down in (i) Annex I, Section II:A for pre-existing individual accounts, or (ii) Annex I, Section III:A for new individual accounts, or (iii) Annex I, Section IV:A for pre-existing entity accounts, or (iv) Annex I, Section V:A for new entity accounts.

A Financial Institution may make this choice per section for all relevant accounts or for a clearly identifiable group of accounts.

PwC Observation:

The draft Decree confirms that Dutch Financial Institutions may decide not to apply the thresholds. The thresholds may alleviate the burden for Financial Institutions since it excludes certain accounts. However, applying the thresholds does require the Financial Institution to periodically monitor the account balance or value and to review and identify the account when it exceeds the relevant threshold in a subsequent year.

The draft Decree allows Financial Institutions to determine for themselves whether or not applying the thresholds is desirable. A Financial Institution may make this choice per section for all relevant accounts or for a clearly identifiable group of accounts. There are four sections:

Annex I, Section II:A for pre-existing individual accounts

Annex I, Section III:A for new individual accounts

Annex I, Section IV:A for pre-existing entity accounts

Annex I, Section V:A for new entity accounts.

- **Most-favoured-nation principle**

Article 7 of the IGA provides for a Most-Favoured Nation clause. The Article indicates that the Netherlands shall be entitled to any more favourable terms under Article 4 or Annex I of the IGA included in another IGA. As such, if the United States concludes an IGA with another country in which Article 4 or Annex I contain more favourable provisions than the ones in the Dutch IGA, then the Netherlands is entitled to those more favourable terms.

The draft Decree specifies that if the United States concludes an IGA with another country in which Article 4 or Annex I contain more favourable provisions, the Dutch Minister of Finance will publicly announce these more favourable terms. Once announced, Dutch Financial Institutions should be able to apply these more favourable provisions.

PwC Observation:

The Most-Favoured nation clause incorporated in Article 7 of the IGA aims to ensure that Dutch Financial Institutions are entitled to the same treatment as

Financial Institutions in countries that have concluded an agreement prior or after the Netherlands. As such, even in case another IGA provides for different terms in Article 4 or Annex I, Dutch Financial Institutions should not be at a disadvantage as they should be entitled to such more favourable terms as well.

The draft Decree clarifies the uncertainty that remained after the publication of the IGA, namely when such terms could be applied, whether it had to be announced publicly by the Dutch Ministry of Finance or not. Financial Institutions now have the certainty that, if another IGA provides for more favourable terms in the relevant articles, the Dutch Minister will publicly announce which more favourable terms have been incorporated in another IGA and that the Financial Institution may apply those terms.

- **Date of reporting**

Pursuant to the IGA, Financial Institutions are required to report relevant information to the Dutch Tax Authorities. The date at which information had to be reported was left open by the IGA. The draft Decree provides for specific dates at which Financial Institutions should report by the latest:

- In case monthly reporting is prescribed, the Financial Institution must report by latest on the last day of the month following the month at which the information relates to. For example, information relating to the month April must be reported by latest May 31st.
- In case yearly reporting during the year is prescribed, the Financial Institution must report on April 30th. For example, if a Financial Institution must report over 2014 in 2014, then it must do so by April 30th 2014.
- If case yearly reporting in the year following the year to which the information relates is required, then Financial Institutions must report by latest January 31st. For example, if a Financial Institution must report over 2014 in 2015, then it must do so by January 31, 2015.

PwC Observation:

The draft Decree provides for more information on when reporting is required by Financial Institutions. This allows them to take into account those reporting deadlines and ensure that reporting is done in time. FATCA requires the first information to be reported in 2015 over the year 2014.

- **More Guidance to follow on e.g. reporting on payments to NPFIs**

Despite the draft Decree, the IGA still leaves some uncertainties, mainly as not all terms have been defined. The Ministry of Finance announces in the draft Decree that the Ministry of Finance will answer a variety of questions in a manual, which will receive the status of an executive Decree. Some of those questions will relate to terms that have not been defined in the IGA, such as the term payment.

Pursuant to the IGA, Financial Institutions are required to report on payments made in 2015 and 2016 to NPFIs. The term payment has not been defined by the IGA, which led to uncertainty as to which payments had to be reported to the

Dutch Tax Authorities. The manual will provide for more guidance on reporting to NPFIs.

PwC Observation:

A variety of terms is not clearly defined in the IGA. One example that is also mentioned by the Ministry of Finance in the Decree, is the term payment. Due to the lack of certain definitions in the IGA as well as due to the complex nature of Financial Institutions, there are a variety of questions. The Ministry of Finance will develop a manual in which it responds to those questions. The manual will be flexible and may be amended without parliamentary approval.

It is expected that among others the term payment will be addressed, as well as the term customer. The Ministry of Finance also indicated that it will provide guidance in the manual on how to report the balance or value of an account that is closed during the year.

- **Requirement to comply with FATCA as of July 1, 2014**

The Dutch Ministry of Finance indicates in the Decree that it expects Financial Institutions to comply with the IGA as of July 1, 2014. As such, Financial Institutions should ensure that they are able to report in 2015 - when the Decree is adopted - on information relating to 2014.

PwC Observation:

The Ministry of Finance clarifies that the changes proposed in the draft Decree cannot enter into force until the IGA has been ratified by the Parliament. While this has not yet been done, the start date of FATCA is still July 1, 2014.

The Netherlands has agreed with the US that it will start reporting on the year 2014. This information will only be reported to the US in 2015, at which point in time the Decree should have entered into force already. As such, Financial Institutions should report in 2015 on information relating to 2014 when the Decree was not yet in force.

Additional references

The Dutch announcement can be found at:

<http://www.rijksoverheid.nl/nieuws/2014/07/01/internetconsultatie-geopend-voor-implementatie-fatca-verdrag.html>

The reference for the internet consultations can be found at:

<http://www.internetconsultatie.nl/fatca>

The draft Decree can be found on the website of the internet consultations:

<http://www.internetconsultatie.nl/fatca>

The Dutch translation of the IGA can be found at:

<https://zoek.officielebekendmakingen.nl/trb-2014-128.html>

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

<http://www.pwc.nl/fatca> and <http://www.pwc.com/us/fatca>

IGA / Information reporting session

On 7 August 2014 PwC will organize a meeting on the IGA implementation guidance that was issued on July 1, 2014. The draft Decree will be discussed in further detail as well as current developments around the common reporting standard and the EU Savings Directive. More information will be provided shortly.

For more information, please contact:

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Solicitation.

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