

## The Netherlands and the United States have signed an intergovernmental FATCA agreement.

*On December 18, 2013, the Dutch State Secretary for Finance and the U.S. Chargé d’Affaires ad interim signed the Netherlands-US Intergovernmental Agreement (‘IGA’) under FATCA. The purpose of the agreement is to enable Dutch qualifying financial institutions to become FATCA compliant without having to conclude their own individual agreement with the US Internal Revenue Service (“IRS”). The headlines are summarized in this Tax News Bulletin.*

### 1. General

The objective of the Foreign Account Tax Compliance Act (‘FATCA’) is the reporting - by foreign financial institutions (‘FFI’s’)<sup>1</sup> and non-financial foreign entities (NFFE’s)<sup>2</sup> - of foreign ‘Financial Accounts’ held by US persons (individuals as well as legal entities) in order to curtail US tax evasion by US persons. It focuses on the reporting, by ‘qualifying’ FFI’s and NFFE’s (i.e. those FFI’s and NFFE’s which are not exempt from reporting under FATCA), of certain foreign Financial Accounts held by US persons or held by foreign entities in which US taxpayers hold a substantial interest. The IGA intends to facilitate the effective and efficient implementation of FATCA in the Netherlands. Although in the IGA the US commit to reciprocal exchange of information on Dutch persons holding Financial Accounts in the US, the obligations of the US vis-a-vis the Netherlands are not elaborated in the IGA.

The IGA entails that the Netherlands will require all qualifying FFI’s and NFFE’s located in the Netherlands (which are not otherwise exempt) to identify Financial Accounts and report information on these Financial Accounts. Based on the IGA, qualifying FFI’s and NFFE’s in the Netherlands are required to report the Financial Accounts to the Netherlands and subsequently, the Netherlands’ tax authorities automatically report such information to the IRS. An FFI or NFFE located in the Netherlands may be required to withhold and remit to the IRS 30% on certain gross payments to US beneficiaries if such US beneficiaries do not comply with FATCA.

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<sup>1</sup> An FFI is a custodial institution, a depository institution, an investment entity, or a specified insurance company.

<sup>2</sup> An NFFE is any non-US entity that is not an FFI or that is a religious, charitable, scientific, artistic, cultural, athletic, or educational entity

## 2. Headlines of the Netherlands-US IGA

- The IGA is generally in line with the standard Model 1A IGA of November 4, 2013. However, it includes specific exclusions for certain Dutch financial products and Dutch entities which are considered to have a low risk of US tax evasion.
- Based on the IGA, FFI's and NFFE's in the Netherlands are required to comply with (still to be drafted, proposed and implemented) Dutch law on FACTA. As a result of the IGA these FFI's and NFFE's are not required to each conclude their own agreement with the IRS directly.
- In short, the information to be reported under the IGA includes name, address, and US TIN of the US person, the account number, and the name and identifying number of the reporting financial institution.
- Exemptions from reporting may apply for "low value accounts" (balance of USD 50,000 or less, or USD 250,000 or less in case of an insurance or annuity contract).
- There are various degrees of reporting requirements depending on the value of accounts ("lower value accounts" ranging between USD 50,000 and USD 1,000,000, and "high value accounts" exceeding USD 1,000,000)
- Nothing in the IGA would obligate the Netherlands to permit an entity resident in the Netherlands to report directly to the IRS if in the future US regulations were to make that option possible where such reporting would be contrary to the Dutch law.
- The Netherlands plans to present the IGA to its parliament for its approval in 2014 and, to propose implementing legislation with the goal of having FATCA enter into force by September 30, 2015.
- As of the date of signing the IGA, the US intends to treat each FFI's and NFFE's located in the Netherlands as compliant with the FATCA and therefore not subject to 30% withholding.
- The IGA applies to the Kingdom of the Netherlands, including the islands of Bonaire, Sint Eustatius and Saba, and excluding Aruba, Curacao and Sint Maarten.

## 3. Exemptions and exceptions

- The following entities are exempt, and therefore not required to report:
  - Governmental entities;
  - The Central Bank;
  - International organizations;
  - Retirement funds;
  - An investment entity wholly owned by exempt beneficial owners.
- Certain financial institutions located in the Netherlands are "Deemed-compliant financial institutions", are not required to report. The following financial institutions have been identified:
  - Financial institutions with a local client base;
  - Non-profit organizations;
  - A fund that is exempt under the Dutch Corporate Income Tax Act 1969 and that was constituted by a Netherlands labor union and operated exclusively to administer or provide benefits to its members in case they are on strike and of which the payments are exempt under the Dutch Income Tax Act 2001;
  - Investment advisors and investment managers;

- Certain collective investment vehicles.
- The following categories of accounts and financial products established in the Netherlands and maintained by a financial institution located in the Netherlands shall not be treated as financial accounts, and therefore will not be subject to FATCA reporting:
  - Any account owned by an entity qualifying as exempt beneficial owner;
  - All financial products offering retirement benefits under the Wage Tax Act 1964 (Wet op de loonbelasting 1964) or the Wage Tax Act BES (Wet loonbelasting BES);
  - All financial products that are deductible in the contribution phase and taxable in the distribution phase that are covered by Articles 3.124, 3.125 and 3.126a of the Income Tax Act 2001 (Wet inkomstenbelasting 2001) or paragraphs 1(a) and 1(e) of Article 16 of the Income Tax Act BES (Wet inkomstenbelasting BES);
  - An account or financial product excluded from the definition of Financial Account under an agreement between the United States and another Partner Jurisdiction may, under certain conditions, also be excluded under the Netherlands-US IGA;
  - An endowment insurance connected with the mortgage on the owner-occupied home (Kapitaalverzekering Eigen Woning, as described in Article 3.116 Income Tax Act 2001), a Spaarrecht Eigen Woning, a Beleggingsrecht Eigen Woning (the bank and investment equivalent of the Kapitaalverzekering Eigen Woning, as described in Article 3.116a Income Tax Act 2001) and a bouwdepot (building account);
  - Stamrecht (tax-favored annuity for severance benefits, as described in paragraph 1(g) of Article 11 and Article 11a of the Wage Tax Act 1964);
  - A Course of life account (including a levenslooprekening, levensloopverzekering and a levenslooprecht van deelneming) concluded and maintained prior to January 1, 2012;
  - An alimony annuity, as provided by Article 6.5 and Article 6.6 of the Income Tax Act 2001 (Wet inkomstenbelasting 2001);
  - Any funeral insurance policy with a premium of € 1,000 per year or less.
- The memorandum of understanding mentions that a Fund for Mutual Account ('fonds voor gemene rekening') is a legal arrangement (i.e. an entity).
- A Stichting Administratiekantoor ('STAK') established in the Netherlands is treated as a passive Non-Financial Foreign Entity ("NFFE")<sup>3</sup>, unless the STAK interests are regularly traded on an established securities market, in which case the STAK is treated as an Active NFFE. It is understood that NYSE Euronext Amsterdam qualifies as an established securities market.
- A depository ('bewaarder') that holds the legal ownership of an investment portfolio of an investment fund ('beleggingsfonds') (e.g. a mutual fund for joint account) for and on behalf of the investors within the meaning of the Financial Supervision Act ('Wet op het financieel toezicht') is not regarded as the account holder or a Financial Institution, provided the investment fund itself is treated as the account holder. The same applies to a depository within the meaning of Article 21 of the AIFM Directive.

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<sup>3</sup> In short, a passive NFFE is an NFFE that is neither an "excepted" NFFE; e.g., a publicly traded entity or affiliate, an exempt beneficial owner, nor an active NFFE (i.e., less than 50 percent of its gross income or assets for the preceding calendar year are passive).

- A bewaarinstantie of bewaarbedrijf established by an investment firm as a depository to comply with asset segregation requirements of the Further Regulation on Conduct of Business Supervision of Financial Undertakings ('Nadere regeling gedragstoezicht financiële ondernemingen') is not regarded as the account holder or a Financial Institution, provided the investment fund itself is treated as the account holder.
- An account held by a foundation ('Stichting Derdengelden') is not reportable if the assets of the foundation serve solely as an escrow for a debt or purchase obligation of the transferor of the assets of the foundation.

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