

Guidance with technical explanatory notes to the Agreement between the Kingdom of the Netherlands and the United States of America to improve international tax compliance and to implement FATCA, concluded on 18 December 2013.

Ministry of Finance/Directorate-General for the Tax and Customs Administration, Tax Issues Division

Order of 12 January 2015, no. DGBel/2015/21M

The State Secretary for Finance has issued the following Order.

This Order contains technical explanatory notes to the Agreement between the Kingdom of the Netherlands and the United States of America to improve international tax compliance and to implement FATCA, concluded on 18 December 2013. The Order gives supplementary details on the application of the NL IGA and contains answers to questions that have arisen in practice.

Introduction

The Kingdom of the Netherlands and the United States of America (U.S.A.) concluded an agreement to improve international tax compliance and to implement FATCA on 18 December 2013.¹ This agreement is referred to as an Intergovernmental Agreement between the Netherlands and the U.S.A. (NL IGA) and was submitted to the Dutch Parliament for approval on 3 July 2014.² The ratification legislative proposal was approved by the House of Representatives of the States General on 18 December 2014, and is now under consideration by the Senate of the States General.

FATCA (Foreign Account Tax Compliance Act) is a U.S. Act that imposes the obligation on financial institutions (FIs) all over the world to submit annual reports to the U.S. tax authorities, the Internal Revenue Service (IRS), on accounts held outside the U.S.A. by persons who may be liable to pay tax in the U.S.A. The U.S. tax legislation imposes the obligation on 'U.S. Persons' to file tax returns in the U.S.A., irrespective of where they are domiciled in the world. The extraterritorial effect of FATCA gave cause to the Dutch government's decision to conclude the NL IGA with the U.S.A. so as to make this provision of information between financial institutions in the Netherlands and the U.S.A. both feasible and mandatory. The NL IGA also governs the (FIs on the) islands of Bonaire, Sint Eustatius and Saba ('the BES Islands').

In the NL IGA the Netherlands and the U.S.A. have agreed that the Dutch Tax and Customs Administration and the IRS shall, on a reciprocal basis, report data and information on U.S. and Dutch taxpayers respectively. The International Assistance (Levying of Taxes) Act ('WIB') and the Belastingwet BES (Taxes Act, BES Islands) lay down provisions governing issues including the implementation of conventions on mutual assistance in taxation. Both acts include a delegation principle that provides for the implementation of subservient regulations that designate persons obliged to keep records who to submit data and information to be specified at a later point in time to the Dutch Tax and Customs Administration. The *Uitvoeringsbesluit internationale bijstandsverlening bij de heffing van belastingen* (Decree implementing the International Assistance (Levying of Taxes) Act, 'UB WIB') and

¹ Treaty Series 2014, 22 and 128.

² Parliamentary Documents II 2013/14, No. 33 985.

the *Uitvoeringsbesluit Belastingwet BES* ('Decree implementing the Taxes Act, BES Islands', 'UB Belastingwet BES')³ designate the Dutch financial institutions specified in the NL IGA as persons obliged to keep records to provide for the feasibility of the exchange of information pursuant to the provisions of the NL IGA.

The NL IGA includes two annexes. Annex I includes the due diligence procedures to be adopted by the Netherlands FIs. Annex II specifies the Netherlands FIs and products that are exempted from the reporting obligations laid down in the NL IGA.

The first automatic exchange of information on the basis of the NL IGA shall take place in 2015, and will relate to the information for 2014.

Flanking regulations

The Netherlands and the U.S.A. have, in addition to the NL IGA, exchanged letters in which they have reached practical agreements on the interpretation of a number of convention provisions.⁴ The NL IGA refers to the U.S. Treasury Regulations §1.1471 – §1.1474 Incorporating Temporary & Final Regulations, published 06 March 2014 (hereinafter referred to as the 'Final Regulations'). These Final Regulations include definitions that may be more favourable than the definitions in the NL IGA. When the Netherlands implements the NL IGA it may adopt these definitions from the Final Regulations and permit the Netherlands FIs to make use of these definitions.⁵ Article 2a, third paragraph, of the *UB WIB* and Article 7b, third paragraph, of the *UB Belastingwet BES*, implement this option. The *UB WIB* and *UB Belastingwet BES* also designate the Netherlands FIs referred to in the NL IGA as persons obliged to keep records and designate the data and information that is to be exchanged as referred to in the NL IGA.

Global development

The OECD, in cooperation with the G20 countries, has since developed a global standard for the automatic exchange of financial accounts information that is highly resemblant of the standard laid down in the NL IGA. This global Common Reporting Standard (the 'CRS') is accompanied by comprehensive commentary (the 'CRS commentaries').⁶ A group of 48 countries has agreed that it will implement the CRS as soon as possible. This what is referred to as the 'early adopters group' signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information ('MCAA') in Berlin on 29 October 2014. This is a declaration in which the countries, including the Netherlands, state that they shall implement the CRS and begin the automatic exchange of financial accounts information in September 2017. This early adopters group will be expanded with countries that will sign the MCAA for the exchange of information from September 2018. The CRS has been adopted in EU regulations on the amendment of the Administrative Assistance Directive.⁷

Guidance

³ Decree of 15 December 2014, Bulletin of Acts, Orders and Decrees, 544.

⁴ Annex to Parliamentary Documents II 2013/14, 33 985, no. 3.

⁵ Article 4, seventh paragraph, of the NL IGA.

⁶ http://www.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters/commentaries-on-the-common-reporting-standard_9789264216525-7-en.

⁷ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359/1).

Questions have arisen about the interpretation of the NL IGA in practice. The following explanatory notes in this Guidance endeavour to answer these questions. References to the States General's discussions and the applicable flanking regulations are included when this is regarded as beneficial. When the NL IGA and Final Regulations do not provide the necessary clarity, or when a uniform interpretation provides added value for the relevant term and for the implementation of both FATCA and the CRS, then the CRS commentaries are followed. A check is then also made to determine whether other countries adopt the same interpretation. Adopting this approach creates the best possible level playing field for Netherlands FIs as compared to the FIs in the various FATCA partner countries. The numbers used in the Guidance refer to the relevant article of the NL IGA or section of one of the Annexes to the NL IGA. The term 'FI' refers to reporting financial institutions established in the Netherlands (including the BES Islands) unless otherwise stated. 'U.S. Person' as referred to in this Guidance is based on the definition laid down in Article 1, first paragraph, under ee, of the NL IGA. References to a 'self-certification' form in this Guidance also include the digital version.

List of abbreviations

BES Islands	Bonaire, Sint Eustatius and Saba
CRS	Common Reporting Standard
CRS commentaries	the commentaries on the Common Reporting Standard drawn up by the OECD
CSA	Credit Support Annex
CSD	Central Securities Depository
FATCA	Foreign Account Tax Compliance Act
Final Regulations	U.S. Treasury Regulations §1.1471 –§1.1474 Incorporating Temporary & Final Regulations published 06 March 2014
FI	a reporting financial institution established in the Netherlands (including the BES Islands)
GMSLA	Global Master Securities Lending Agreement
IRS	Internal Revenue Service (the U.S. tax authorities)
ISDA	International Swaps and Derivatives Association
MCAA	Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
NFFE	Non-Financial Foreign Entity
NL IGA	Intergovernmental Agreement between the Netherlands and the U.S.A.
QI	Qualified Intermediary
UB WIB	Decree implementing the International Assistance (Levying of Taxes) Act
UB Belastingwet BES	Decree implementing the Taxes Act, BES Islands
U.S. TIN	U.S. Tax Identification Number
U.S.A.	United States of America
Wbp	Personal Data Protection Act
WIB	The International Assistance (Levying of Taxes) Act
Wwft	The Money Laundering and Terrorism Financing (Prevention) Act

Article 1 NL IGA

1.1.g

▪ **Qualification of a holding company and treasury center as the (lead) FI instead of an NFFE**

§1.1471-5(e)(1)(v) of the Final Regulations states that an entity that is a holding company or a treasury center is deemed to be an FI when it is part of an expanded affiliated group that includes at least one FI or is formed in connection with or availed by specific investment vehicles. However, pursuant to Sections VI.B.4.e and h of Annex I to the NL IGA a holding company of this nature or a treasury center of this nature will, in principle, qualify as an active NFFE when it meets the criteria laid down in those sections and when it does not meet those criteria will be deemed to be a passive NFFE. Nevertheless, every holding company and every treasury center can adopt the definition of an FI in the Final Regulations and, as a result, opt for the status of FI instead of active or passive NFFE even though that holding company or that treasury center is not an FI according to the NL IGA. On its decision to opt for the application of the definition in the Final Regulations the holding company or treasury center will then need to register with the IRS registration portal and to report the relevant information to the Dutch Tax and Customs Administration.

1.1.i

▪ **Activity review for an institution that accepts deposits**

The NL IGA understands 'an institution that accepts deposits' as an entity that accepts deposits in the ordinary course of a banking or similar business. The assessment of whether an institution is an institution that accepts deposits in the ordinary course of a banking or similar business is based on the actual activities of the institution and not on its articles of association.

▪ **Accepts deposits**

An FI can, in view of Article 2a, third paragraph, of the *UB WIB*, opt to adopt the definition of the terms 'deposits'⁸ and 'banking or similar business'⁹ laid down in the Final Regulations and the exceptions included in the Final Regulations. This can offer benefits. For example, the Final Regulations include an exception for specific lessors with respect to the qualification of a 'banking or similar business'.¹⁰ This is the case when the entity solely accepts deposits from persons as collateral or security pursuant to a sale or lease of property or pursuant to a similar financing transaction between the entity and the person holding the deposit with the entity.

A number of examples can serve for the purposes of the assessment whether an entity does or does *not* accept deposits in the ordinary course of a banking or similar business and, consequently, is or is *not* an FI:

Examples

- A concern issues a bond loan via a Dutch private limited company. The funds are collected from outside the group and are then allocated to the issue of loans to affiliated bodies in a nonfinancial group. The issue of the bond loan is not regarded as 'the accepting of deposits'.

⁸ See §1.1471-5 (b)(1)(i) in conjunction with §1.1471-5 (b)(3)(i).

⁹ See §1.1471-5(e)(1)(i) and (2)(i).

¹⁰ See §1.1471-5(e)(2)(ii).

- All the excess liquid assets of the companies in a group are deposited at a treasury center (cash pool). 'The accepting of deposits' is then an issue and, as a result, the treasury center is an FI unless the treasury center is part of a nonfinancial group in the meaning of §1.1471-5(e)(5)(i)(B) of the Final Regulations. The treasury center is then deemed to be an excepted NFFE pursuant to §1.1472-1(c)(1)(v) of the Final Regulations and, as a result and pursuant to Section VI.B.4.i of Annex I, is an active NFFE for the application of the NL IGA.
- A lessor is engaged solely in leases to third parties. It receives a non-demand loan from a group company for its business operations. Receiving a (group) loan does not as such create a depository account, as a result of which the accepting of a deposit is not an issue. The lessor is not an institution that accepts deposits when it solely accepts deposits as collateral or security pursuant to a sale or lease of property or pursuant to a similar financing transaction between the entity and the person holding the deposit with the entity.
- An entity within a nonfinancial group receives a non-demand loan from an affiliated entity and a bank loan and then lends these amounts to other group companies (back-to-back loans within the group). Once again, non-demand loans are received and 'the accepting of deposits' is not an issue.
- A non-life insurance company or a custodian of a fund for mutual account receives cash collateral within the context of, for example, a GMSLA, an ISDA swap agreement, a CSA, a clearing agreement relating to the clearing of derivatives or a futures agreement. The funds are deposited in the bank account of an institution that accepts deposits and then forms a depository account at this institution that will need to be investigated, identified and, where relevant, reported. The non-life insurance company or the custodian of a fund for mutual account is not itself an institution that accepts deposits when the receipt of cash collateral is its sole deposit operation and it does not develop the regular accepting thereof within the ordinary course of a banking or similar business.

1.1.j

▪ Activities review for an investment entity

Article 1, first paragraph, under j, of the NL IGA states that an entity that conducts as a business one or more of the activities or operations also listed under j for or on behalf of a customer is regarded as an investment entity. When an investment private limited company with a director and major shareholder as its sole shareholder invests in shares there will be no client relationship between the private limited company and the director and major shareholder, as a result of which the company is not an investment entity. However, when the investment activities are carried out by a professional third party there will be a client relationship between that third party and the private limited company or the director and major shareholder. The professional third party will then be an investment entity and, pursuant to the systematics of the NL IGA, the investment private limited company is then also an investment entity.

A company that has more than one shareholder and conducts one or more of the activities or operations listed in Article 1, first paragraph, under j, of the NL IGA is an investment entity irrespective of whether it makes the investments itself or arranges for a professional third party to make the investments.

Within the context of 'conducts as a business', §1.1471-5(e)(4)(i)(A) of the Final Regulations states that an investment entity is an entity that primarily conducts as a business one or more of the activities or

operations also listed in Article 1, first paragraph, under j, of the NL IGA. This means that pursuant to §1.1471-5(e)(4)(iii)(A) of the Final Regulations an entity is an investment entity only when it meets the income criterion prescribing that the entity's gross income attributable to investment activities equals or exceeds 50% of the entity's gross income during the shorter of:

- the three-year period ending on 31 December of the year preceding the year in which the determination is made; or
- the period during which the entity has been in existence.

Pursuant to Article 4, seventh paragraph, of the NL IGA and Article 2a, third paragraph, of the *UB WIB* an FI can exercise its discretion in its decision whether to opt for the definition of 'investment entity' laid down in the Final Regulations. An FI that does so also opts for the integral application of the definition of 'investment entity' as specified in §1.1471-5(e)(4), so that pursuant to §1.1471-5(e)(4)(i)(B) of the definition it will be deemed to be an investment entity sooner when its activities are managed by another investment entity, an institution that accepts deposits, a custodial institution as referred to in Article 1, first paragraph, under h, of the NL IGA or an insurance company or a holding company as specified in §1.1471-5(e)(1)(iv) of the Final Regulations, and the managed investment entity meets the income criterion of §1.1471-5(e)(4)(iv)(A).

The definition of investment entity in the Final Regulations also extends to the term 'financial assets', a term which is not included in the NL IGA but is defined in §1.1471-5(e)(4)(ii) and which does not include real estate (immovable property). For this reason entities that hold real estate (immovable property) directly are investment entities pursuant to the Final Regulations only when they meet the income criterion in §1.1471-5(e)(4)(iii), for a self-managing entity, or §1.1471-5(e)(4)(iv)(A), for a managed entity. As a result, the gross income from investment activities (excluding the gross income from investments and reinvestments in and trade in real estate (immovable property)) must equal or exceed 50 percent of the entity's gross income during the shorter of:

- the three-year period ending on 31 December of the year preceding the year in which the determination is made; or
- the period during which the entity has been in existence.

Entities that have assets that consist of cash or investments – or a holding company thereof – with a (very) limited group of direct and indirect shareholders or participants who are members of one family, who do not present themselves as an investment entity and who have neither raised nor will raise capital in the market are not investment entities in the sense of Article 1, first paragraph, under j, of the NL IGA, including the situation in which the assets are managed by an FI. An entity of this nature – or a holding company thereof – is deemed to be a passive NFFE.

The scope of Article 1, first paragraph, under j, of the NL IGA extends to collective investment institutions, private equity funds, hedge funds, mutual funds, exchange traded funds, venture capital funds, leveraged buyout funds and comparable investment entities. This is also applicable to a special purpose vehicle in a collateral structure or in a Collateral Loan Obligations/Collateral Debt Obligations structure, to treasury centers within a group of FIs, to fiscal investment institutions (unless, pursuant to the Final Regulations they are not an FI because they hold real estate (immovable property)), exempted investment institutions, unit-linked funds and holding companies as part of a private equity structure.

However, a holding company as part of a private equity or other investment structure is not an investment entity but a passive NFFE when all the shares are held directly and indirectly by the private equity or other investment fund. This is because reports are then already submitted at the level of the fund or funds.

A holding company that can be deemed to be an active NFFE pursuant to Section VI.B.4 of Annex I to the NL IGA retains this qualification when the holding company is managed by (an employee of) a trust office that is an FI.

1.1.k

▪ Insurance company

Article 1, first paragraph, under k, of the NL IGA defines the term 'specified insurance company' as an entity that is an insurance company (or the holding company of an insurance company) that issues a cash value insurance contract or an annuity contract or is obliged to make payments with respect to a cash value insurance contract or an annuity contract. The further specification of the term 'insurance company' ties in with the definition given in the Final Regulations.¹¹ An insurance company is an entity or legal arrangement:

- that is regulated as an insurance business under the laws, regulations, or practices of any jurisdiction in which the company does business;
- the gross income of which (for example, gross premiums and gross investment income) arising from insurance, reinsurance, and annuity contracts for the immediately preceding calendar year exceeds 50% of the total gross income for such year; or
- the aggregate value of the assets of which associated with insurance, reinsurance, and annuity contracts at any time during the immediately preceding calendar year exceeds 50% of the total assets at any time during such year.

A life insurance company will in general be regarded as a specified insurance company. An entity that does not issue cash value insurance contracts or annuity contracts, or is not obliged to make payments with respect to a cash value insurance contract or an annuity contract, such as most non-life insurance companies, holding companies of insurance companies and intermediaries, will not be a specified insurance company.¹² The mere fact that an insurance company forms a provision does not result in the designation of that insurance company as an entity that accepts deposits, a custodial entity or an investment entity.¹³

An insurance company that is regulated by De Nederlandsche Bank N.V. and does not meet the qualification of a specified insurance company (a non-life insurance company) is an active NFFE.

1.1.l

▪ Dual residence of an FI

An FI can be a resident for tax purposes in a number of jurisdictions. The national legislation of a jurisdiction determines when residence for tax purposes is an issue. Pursuant to the Memorandum of Understanding for the NL IGA¹⁴, the assessment as to whether an FI is a resident of the Netherlands

¹¹ §1.1471-1 (b)(65) and §1.1471- 5(e)(1) (iv).

¹² See the CRS commentaries on Section VIII, paragraph A, 28.

¹³ §1.1471-5 (e)(6) and the CRS commentaries on Section VIII, paragraph A, 29.

¹⁴ Parliamentary Documents II 2013/14, 33 985, Annex to no. 3.

and, as a result, does or does not fall within the scope of the NL IGA is based on the criteria specified in Article 4 of the General Taxes Act. The fictive registered office of Article 2, fourth paragraph, of the Corporation Tax Act, 1969, is not then applicable. The Dutch branch of a foreign bank shall need to comply with the FATCA obligations in the Netherlands.

The location of the actual management of an FI will be determined pursuant to Article 4 of the General Taxes Act.

In general, significance will then be attached to circumstances including the following:

- the location in which the key decisions and commercial decisions required for the operation of the business are made;
- the location in which the management works and meets;
- the location in which the accounts are kept and the annual accounts are prepared;
- the country in which the FI is regulated or has been issued a banking licence;
- the locations in which the shareholders live and/or meet;
- the entry in the trade register;
- the law of incorporation of the body.

Other criteria than the location of the actual management may (also) be adopted in another jurisdiction, for example when an FI is incorporated under the law of that jurisdiction.¹⁵ This may result in the dual residential status of an FI: the question is then which IGA governs the FI and to which country's tax authorities the FI will need to report. An FI which is a dual resident shall need to report the FATCA information to the tax authorities of the country in which the FI keeps its financial accounts.¹⁶ This is the country in which the provision of the services is regulated.

1.1.s

▪ 'Regularly traded'

The term 'regularly traded' is defined in Article 1, first paragraph, under s, closing paragraph, of the NL IGA. Regular trading then refers to a meaningful volume of trading in interests on an established securities market.

An established securities market is understood as an exchange that is officially recognized and supervised by a recognized supervisory authority, such as the Netherlands Authority for the Financial Markets or another government authority in the jurisdiction in which the market is located and on which a meaningful annual value of shares is traded. An established securities market includes markets such as NYSE Euronext Amsterdam, but also the Euronext Fund Services platform that trades in shares or units in open-end funds even though those shares or units are not traded directly but rather via an open-end fund.

The Final Regulations specify that stock in an entity is regularly traded for a calendar year if one or more classes of stock of an entity represent more than 50% of the total combined voting power of all classes of stock entitled to vote and of the total value of the stock are listed on such market or markets during the prior calendar year. Each class of stock representing more than 50% of the total combined

¹⁵ See, for example, the British Guidance Notes from HM Revenue & Customs, August 2014, paragraph 2.2.

¹⁶ See also the CRS commentaries on Section VIII, paragraph A, 5.

voting power of all classes of stock entitled to vote and of the total value of the stock must then also comply with the requirement that:

1. trades in each such class are effected on one or more established securities markets on at least 60 days during the prior calendar year; and
2. the total number of shares in each such class that are traded during the prior calendar year are at least 10 percent of the average number of shares outstanding in that class during the prior calendar year.¹⁷

The aforementioned approach laid down in the Final Regulations may be adopted for the application of the NL IGA.

▪ **Swap agreements and securities lending agreements do not form a debt interest in an investment entity**

An ISDA swap agreement or a GMSLA does not form a financial account for an investment entity. Claims arising from these framework agreements do not constitute a debt interest in an investment entity as the claim does not relate to the invested capital or return on investment of the investment entity. Moreover, a debt interest needs to be issued by the fund, which is not the case in these instances.

▪ **Exceptions to the definition of 'Financial Account'**

The Netherlands may, pursuant to the provisions of Article 4, seventh paragraph, of the NL IGA, permit the use of a definition in the Final Regulations in place of the corresponding definition in the NL IGA provided that this is not detrimental to the objective of the NL IGA. This right has been exercised on the inclusion of a provision in the *UB WIB* that permits an FI to adopt a definition in the Final Regulations in place of the corresponding definition in the NL IGA.¹⁸

The NL IGA defines the term 'Financial Account' in Article 1, first paragraph, under s, of the NL IGA. However, a number of exceptions to the definition of the term 'Financial Account' given in §1.1471-5(b) of the Final Regulations as laid down in §1.1471-5(b)(2) of the Final Regulations are not included in the definition used in the NL IGA. FIs may, as a supplement to the definition of 'Financial Account' in the NL IGA and as a supplement to the excepted products included in Annex II, Section III, of the NL IGA invoke the exceptions specified for the term 'Financial Account' in the Final Regulations provided that the requirements listed thereby are met. An integral adoption of the definition in the Final Regulations is however not necessary in this specific case. Consequently, FIs are not under the review, identification and reporting obligations with respect to these products. This then relates to specific types of (tax efficient) savings accounts for retirement benefits or otherwise, specific life insurance contracts covering the period until the policyholder reaches the age of 90, accounts that are part of an estate, specific escrow accounts (including specific escrow accounts relating to lease), and specific annuity insurances for retirement benefits (see also Section III of Annex II, Exempt Products, insurance products and legal predecessors).

¹⁷ See §1.1472-1 (c) (1) (i) (A).

¹⁸ *UB WIB*, Article 2a, third paragraph.

1.1.u

▪ Collateral account

Article 1, first paragraph, under u, of the NL IGA defines the term 'Custodial Account'. This relates to an account for the benefit of another person that holds any financial instrument or contract relating to units, for example shares or an interest in a company, negotiable instruments, bonds or other debt instruments. The definition of 'Custodial Account' encompasses all accounts for the benefit of third parties, including holding collateral accounts for another unless they relate to cash collateral. This is because collateral in the form of cash forms a depository account (see Article 1, first paragraph, under t, of the NL IGA). The precise conditions of the agreement determine whether collateral is or is not an issue. When in its role as the lender party in a securities lending transaction the FI has acquired the legal title to the collateral then the collateral acquired does *not* form a custodial account at the FI, as on the acquisition of the legal title the account is not held for the benefit of another. This is also applicable to cash collateral received, for example, within the context of a GMSLA, an ISDA swap agreement, a CSA, a clearing agreement relating to the clearing of derivatives or a futures agreement.

1.1.ee

▪ The term 'U.S. Person' in relation to U.S. territory

Article 1, first paragraph, under ee, of the NL IGA defines the term 'U.S. Person'. A natural person who is born in a U.S. territory is a U.S. citizen and, consequently, a 'U.S. Person', with the exception of persons born on the Northern Mariana Islands before 4 November 1986 and persons born on American Samoa. The term 'U.S. Territory' is defined in Article 1, first paragraph, under b, of the NL IGA. A natural person who was not born in a U.S. territory but is a U.S. resident and has been issued a green card is also a U.S. Person. However, a natural person who was not born in a U.S. territory, is a U.S. resident but has not been issued a green card is not a U.S. Person. An entity is a U.S. Person when it is incorporated under the laws of the U.S.A. An entity that is incorporated under the laws of any U.S. territory is not a U.S. Person.

1.1.jj

▪ Further explanation of the term 'values'

Article 1, first paragraph, under jj, of the NL IGA explains the term 'Related Entity' in more detail. An entity is a 'Related Entity' of another entity if either entity controls the other entity, or if the two entities are under common control. For this purpose control includes direct or indirect ownership of more than 50% of the vote or value in an entity. When the capital of a body is divided into shares then 'value' is understood as the issued and paid-up share capital. The Final Regulations state that common control is an issue when one company ('corporation') with its capital divided into shares owns, directly or indirectly, more than 50% of the total voting power of the stock of the other company and more than 50% of the total value of the stock of the other company.¹⁹ FIs can also use this definition, as a result of which the size of the group of related entities will be reduced.

Article 2 NL IGA

¹⁹ See §1.1471-5 (i) (4) (i).

2.2.a.4

- **Balance of accounts closed during the year**

Article 2, second paragraph, part a, under 4, of the NL IGA prescribes that for an account closed during the calendar year the FI must state the balance immediately before closure in the regular annual reports. This balance must be set at the last balance that was not zero, unless the balance was zero in the previous year.

2.2.a.5 and 6

- **Clarification of the term 'interest'**

Pursuant to Article 2, second paragraph, part a, under 5 and 6, of the NL IGA an FI holding any Custodial Account and Depository Account must report the total gross amount of the interest that is paid or credited to the account during the calendar year or other appropriate reporting period. The term 'interest' is defined on the basis of Dutch tax law and not, consequently, on the basis of the definition of interest in the European Savings Tax Directive. For this reason no other definitions of interest are applicable to FATCA other than those the Dutch Tax and Customs Administration has specified in the reporting manuals.

2.2.a.5.B

- **Special explanation of the term 'gross proceeds' in relation to clearing organizations**

The Final Regulations include a special rule for clearing organizations that are engaged in sales and purchases on a net basis involving, for example, futures contracts. In that instance the 'total gross proceeds' from the sale, redemption or surrender of capital assets are limited to the net amount paid or credited to an account pursuant to the settlement procedures of clearing organizations.²⁰ Pursuant to the above, clearing organizations may adopt 'net amounts' for the term 'total gross proceeds'.

Article 3 NL IGA

3.4

- **Validity of the self certification form and the W-8 and W-9 forms**

The self-certification form developed for the Dutch market and the U.S. W-8 and W-9 forms are, for the purposes of the application of the FATCA identification of a preexisting customer or a person who wishes to become a customer, valid for an indefinite period, provided that these forms bear a U.S. Tax Identification Number (U.S. TIN) when this is required on the basis of the qualification of the account holder. Moreover, an FI must not have reason to know that the circumstances have changed. W-8 and W-9 forms that do not bear a U.S. TIN while this is required on the basis of the qualification of the account holder are valid until 1 January 2017.

When the account is a preexisting account and the FI does not have the U.S. TIN of the person in question then the self-certification form, provided that it bears the date of birth of the U.S. Person, is valid until 1 January 2017. After 1 January 2017, every self-certification form of a U.S. taxpayer must

²⁰ See §1.1473-1(a)(3)(i)C.

bear an U.S. TIN, even when the form – instead of a U.S. TIN – bore a date of birth. See Article 3, fourth paragraph, and Article 6, fourth paragraph, of the NL IGA.²¹

Article 4 NL IGA

4.1-b

▪ Detailing of the term 'payments'

Article 4, first paragraph, under b, of the NL IGA lays down the obligation on FIs to report the name of each Nonparticipating Financial Institution²² to which it has made payments, as well as the aggregate amount of the payments made to each Nonparticipating Financial Institution in each of 2015 and 2016. The term 'payments' encompasses, in principle, each payment of U.S. FDAP income (Fixed, Determinable, Annual, Periodical income). In view of the comprehensiveness of this term and the limited number of years for which reporting is required it has been discussed with the U.S.A. that for the purposes of the application of Article 4, first paragraph, under b, of the NL IGA the information to be reported about payments to Nonparticipating Financial Institutions shall be the same as the information referred to in Article 2, second paragraph, under a, under 4 to 7 inclusive, of the NL IGA.

As a result an FI, irrespective of the form of the services it provides, no longer needs to report payments to Nonparticipating Financial Institutions but only needs to report the information that an FI would normally need to report about a reportable account holder for the accounts a Nonparticipating Financial Institution holds with the FI. In the case of an insurance company, this does not result in a report on the payment to a beneficiary who holds an account with a Nonparticipating Financial Institution. The FI needs to report each year the total amount of the value and income for each Nonparticipating Financial Institution.

4.1.c

▪ (No) registration obligation on non-reporting financial institutions

Article 4, first paragraph, under c, of the NL IGA prescribes that FIs must register with the IRS registration portal. This obligation is not applicable to non-reporting FIs that do not need to submit reports pursuant to Article 1, first paragraph, under q, of the NL IGA unless the FI:

- opts for the status of Qualified Intermediary, Withholding Foreign Partnership or Withholding Foreign Trust, or
- acts as a sponsoring entity or a lead FI for one or more related entities, or
- is described as non-reporting in the NL IGA but does (at some point in time) have a U.S. Reportable Account as referred to in Article 1, first paragraph, under cc, of the NL IGA. This then relates to an FI with a local customer base as included in Section II.A.1 of Annex II to the NL IGA.

The 'sponsoring regime' referred to in the Final Regulations can also be applied in the Dutch situation.

4.1.d

▪ No statutory basis for withholding by Primary Withholding Qualified Intermediary (QI)

²¹ See also sections II.C.2, II.D.5.b, II.E.4 and 5, III.B.1, IV.D.1.b, IV.D.3.c.1, IV.D.4.b, and IV.D.4.c.2 of Annex I.

²² A Nonparticipating Financial Institution does not report and may also be established outside the Netherlands. This distinguishes an institution of this nature from an FI that is established in the Netherlands and does report information.

Article 4, first paragraph, under d, of the NL IGA prescribes that an FI that has decided to assume primary withholding responsibility ('Primary Withholding QI') pursuant to Chapter 3 of the Internal Revenue Code, or is a Withholding Foreign Partnership or Withholding Foreign Trust, shall withhold 30% of any U.S. Source Withholdable Payment to any Nonparticipating Financial Institution. The withholding prescribed in this Article arises from the amended QI agreement with the IRS, which is published on the IRS website.

4.1.e

▪ Obligations on FIs that are not a Primary Withholding Qualified Intermediary

Article 4, first paragraph, under e, of the NL IGA prescribes that an FI that makes a payment of, or acts as an intermediary with respect to, a U.S. Source Withholdable Payment to any Nonparticipating Financial Institution shall provide the information to the immediate payor of this payment (the 'withholding agent') required for withholding and reporting with respect to the payment to the Nonparticipating Financial Institution. This gave cause to the question as to the meaning of this provision, in combination with Article 5, third paragraph, of the NL IGA, for a Central Securities Depository (CSD). The question was also raised as to how withholding tax should be withheld when payments are made to an FI that does not act as a Primary Withholding QI.

Members of the CSD in the Netherlands – Euroclear Nederland – are, in principle, responsible for submitting reports to the Dutch Tax and Customs Administration on U.S. Persons for whom Euroclear Nederland holds certificates and securities. Consequently, as a CSD Euroclear Nederland does not need to report on these certificates and securities. However, pursuant to Article 5, third paragraph, of the NL IGA, Euroclear Nederland may, as a third-party service provider, report on behalf of the members or the FIs that have access to Euroclear Nederland. Nevertheless, the FIs retain the responsibility for the obligations arising from the agreement as laid down in Article 5, third paragraph, of the NL IGA. In principle, and pursuant to Article 4, first paragraph, under e, of the NL IGA, members of Euroclear Nederland which do not act as a Primary Withholding QI and for which Euroclear Nederland has assumed the obligation to submit reports to the Dutch Tax and customs Administration pursuant to Article 5, third paragraph, of the NL IGA, remain under the obligation to submit FATCA information to the withholding agent. However, Article 5, third paragraph, of the NL IGA offers the option for Euroclear Nederland to also assume the obligation to submit reports to the withholding agent. The ultimate responsibility for the reports referred to in Article 4, first paragraph, under e, of the NL IGA remains with the members or the FIs that have access to Euroclear Nederland and do not act as a Primary Withholding QI.

4.7

▪ Preexisting customer with a new account

Article 4, seventh paragraph, of the NL IGA provides for the option of adopting a more favourable definition in the Final Regulations. This can be applicable to the definition of 'preexisting account', whereby a new account opened by a preexisting customer may, subject to conditions, still be deemed to be a preexisting account.²³ It is conceivable that a change in circumstances may result in a preexisting account of a preexisting customer acquiring one of the U.S. indicia. The FI is then expected,

²³ See §1.1471-1(b)(104)(ii).

pursuant to the due diligence procedures, to issue a self-certification form to the customer. When the customer does not return the completed self-certification form and, consequently, does not make use of the opportunity to furnish evidence to the contrary, the account is regarded as a U.S. reportable account. When the preexisting customer subsequently opens a new account, it will not be necessary to issue a further self-certification form as the customer is not a new customer. The new account will then also be reported.

Article 5 NL IGA

5.3

▪ External service providers

Article 5, third paragraph, of the NL IGA states that FIs may be allowed to make use of third-party service providers to fulfil the obligations laid down in the NL IGA, but that the FIs retain the responsibility for these obligations.

Consequently, although insurance companies may rely on the customer identification carried out by intermediaries in accordance with the procedures referred to in Annex I of the NL IGA, they retain the responsibility for the identification.

▪ Consequences of an external service provider's failure to request self-certification

When an external service provider to whom the customer identification has been contracted out does not request a self-certification form whilst this is necessary, either because the FI has not issued the necessary instruction or because the external service provider has not carried out the instruction, then the FI is, in the event of a preexisting account, non-compliant, unless the self-certification form is then requested either by the service provider or the FI. In case of a new account the FI will be deemed to be non-compliant unless either the external service provider or the FI has nevertheless received the completed self-certification form within 90 days of the new account being opened or the new cash value insurance contract agreed upon, or has closed or cancelled the newly-opened account or new cash value insurance contract in the event that the self-certification form is not received within this period.

ANNEX I

Section I. General

I.A

▪ Customer identification in the event of several funds or sub-funds

An investment fund can consist of a number of sub-funds (independent FIs). Participants can take part in one or more sub-funds. Investment managers often make use of a specific third party, such as the transfer agent, for the identification of new customers. A third party of this nature needs to carry out the customer identification process just once for each customer that participates in a number of sub-funds managed by the same investment manager. Preexisting customers who participate in one sub-fund and then join another sub-fund do not then need to be subjected to the customer identification process again (completion of a self-certification form). The above is also applicable to funds with the

same investment manager and to situations in which the investment manager has contracted out the customer identification to the same third party.

I.B.3

▪ Valuation of insurance policies with a cash value

The value of insurance policies and non-facilitated annuity contracts must, with due regard for the exception included in Section II.A.3 of Annex I, be reported on the last day of a calendar year or other relevant reporting period. The economic value must then be taken into account, whereby the calculation must be based on the principles laid down in the prevailing version of the life insurance reporting manual of the Dutch Tax and Customs Administration.

▪ Date of threshold exemption

Section I.B.3 of Annex I prescribes that the balance or value of an account in connection with the threshold exemption is to be determined on 30 June 2014, or on the last day of the reporting period ending before 30 June 2014. In 2014 FIs may, instead of applying the value on 30 June 2014, also apply the value on the last day of the last financial year that ends before 30 June 2014. The date selected by the FI is then applicable to all accounts within the FI's business units.

I.C

▪ More favourable identification procedures in the Final Regulations

Section I.C of Annex I offers FIs the option of deciding to adopt the procedures in the Final Regulations for the identification of accounts. When the FI opts for the identification of new accounts of individual persons this means that the FI first requests documentary evidence that states the permanent address of the account holder/natural person or the country of which the account holder/natural person is a resident or citizen, or the country in which the account holder/entity is established or the law of the country under which the account holder/entity is established.²⁴ It is also necessary to meet the requirements of the 'reason to know test'²⁵, on the grounds of which the FI may possibly no longer be able to rely on the accuracy of the documentary evidence when one of the U.S. indicia referred to in Section II.B.1 of Annex I is an issue. In that case the FI should issue a self-certification form to the new account holder to determine the account holder's status. As a result of the application of the Final Regulations the FI may, within the context of the regular procedures pursuant to the Money Laundering and Terrorism Financing (Prevention) Act to be followed when opening an account, request the documentary evidence from the account holders and then request a self-certification form from the account holders should a U.S. indication be observed. When the self-certification form has not been returned to the FI within 90 days after a U.S. indication being observed then the account must nevertheless be reported.

Section II. Preexisting accounts of natural persons

II.A.3

²⁴ See §1.1471-4(c)(4)(i) in conjunction with §1.1471-3(c)(5)(i) in conjunction with §1.1471-3(c)(6)(ii) and -(ii)(C).

²⁵ See §1.1471-4(c)(4)(i) in conjunction with §1.1471-4(c)(2)(ii)(A) in conjunction with §1.1471-3 (e)(4)(iv)(A).

▪ **Explanation of the term 'reporting or withholding'**

Section II.A.3 of Annex I prescribes that an FI does not need to review, identify and report a cash value insurance contract or an annuity contract when the FI does not have the registration under U.S. law required to sell these insurance products to U.S. residents and the law of the Netherlands requires reporting or withholding with respect to insurance products when they are held by residents of the Netherlands. Life insurance contracts that are in scope of Box 3 of the Income Tax Act 2001 and, as such, must be disclosed to the Dutch Tax and Customs Administration, or comparable (banking) products from which wage tax must be withheld from a one-off payment or periodic payments, meet the reporting or withholding requirements referred to in Section II.A.3 of Annex I. There is no requirement that the products must consist of life insurance and (banking) products that fall in box 1, within the context of national disclosure, to meet the exceptions referred to in Section II.A.3 of Annex I.

II.B.3

▪ **Always offering the account holder an opportunity to submit evidence to the contrary**

Section II.B.3 of Annex I states that if an FI discovers any of the U.S. indicia during an electronic search of a preexisting account of a natural person, or if there is a change in circumstances that results in one or more U.S. indicia being associated with the account, then the FI must treat the account as a U.S. Reportable Account unless the FI decides to apply Section II.B.4 of Annex II and one of the exceptions listed there is applicable to that account. Pursuant to Article 11 of the Personal Data Protection Act personal data shall only be processed by the FI to the extent whereby they, given the purposes for which they are collected or subsequently processed, are adequate, relevant and not excessive. The FI must also implement the measures necessary to ensure that personal data, given the purposes for which they are collected or subsequently processed, are correct and accurate.

In view of the provisions of Article 11 of the Personal Data Protection Act the FI is expected – even though this is not required by Section II.B.3 of Annex I itself – to always apply the procedure in Section II.B.4 of Annex I and, in the event that one or more U.S. indicia are an issue, to at least offer the account holder an opportunity to submit the forms of evidence to the contrary [establishing the account holder's non-U.S. status] referred to in Section II.B.4 of Annex I. The above is also applicable for Section II.C.2 of Annex I, for lower value accounts, and Sections II.D.5.b and II.E.4 of Annex I, for high value accounts of natural persons, as well as to Section IV.D.1.b of Annex I for preexisting entity accounts for which a U.S. indication has been observed when an FI cannot reasonably establish that the account holder is not a Specified U.S. Person on the basis of the information that is in its possession or is publicly available.

The above is not applicable to dormant accounts as it will be certain, in advance, that the account holder will not respond. An account is a dormant account when:

- the account holder has not initiated a transaction with the account during the past three years;
- the account holder has not communicated with the FI maintaining the account or any other account in the past six years; and
- the account is not linked to a non-dormant account held by the same account holder.

II.C.3

▪ **Death of the account holder**

In the event of the death of an account holder it is not necessary to report the account in the year of the account holder's death when the account or insurance contract is part of an estate that has yet to be wound up. Nor is this necessary in the following years when the estate has still to be wound up. However, the FI must have a copy of the death certificate, a copy of the will or an attestation of admissibility to the estate. For the application of this provision the time of death is set at the time at which the FI first takes cognizance of the death of the account holder. The due diligence procedures will become applicable again only once the estate has been partitioned and the account has not been closed. This provides for the reassessment of the account to determine whether it is a reportable account.

II.D.3

▪ Empty field in electronic database

When the FI has an electronic system which includes all the information specified in Section II.D.3 of Annex I a paper record search will not be required. Consequently, the FI's electronic database will need to be equipped with fields that can contain the information referred to in Section II.D.3 of Annex I and can be searched by electronic means. When, as a result of the FI's policies and procedures, an empty field means that the FI does not have the information available in its electronic system or in the customer master file that the FI does have in its primary files on the account holder then the FI does not need to carry out a paper record search.²⁶ However, this exception to a paper record search is not applicable when a field is simply left blank.

II.D.4

▪ The term 'relationship manager'

On occasion insurance companies may make use of brokers with whom they conclude contracts or contracts of employment for the purpose of customer relationship management. These brokers do not work for the entity that manages the insurance contracts, but may work for a related entity. A broker of this nature is not deemed to be a relationship manager. The detailing of the term 'relationship manager' is in line with the CRS commentaries on Section III, sub-paragraph C(4), under 39 and 40.

Section III. New accounts of natural persons

III.B.1

▪ Request U.S. TIN on self-certification

Section III.B.1 of Annex I prescribes that when a new account is opened on or after 1 July 2014, the FI must obtain a self-certification form which includes a U.S. TIN. In this situation it will not be sufficient that until 1 January 2017 the self-certification form contains a date of birth rather than a U.S. TIN. When a new account is opened it is possible to enter a U.S. TIN. Article 3, fourth paragraph, of the NL IGA states that in the period until 1 January 2017 it will be sufficient to report the date of birth when the FI does not have the U.S. TIN in its file. However, the provisions of this Article are applicable solely to preexisting accounts dating from before 1 July 2014, and not to new accounts.

²⁶ See also the CRS commentaries on Section I, sub-paragraph C – F, under 26, in conjunction with Section III, sub-paragraph C(2) and (3), under 35.

- **Consequences of the FI's failure to obtain a completed self-certification form**

Section III.B.1 prescribes that when a new account of a natural person is opened the FI shall obtain a completed self-certification form from its account holder to determine whether the account holder is a U.S. citizen or a resident of the U.S.A. for tax purposes. When the FI has not received the completed self-certification form that can be used to determine whether the account or cash value insurance contract is to be reported within 90 days of the new account being opened or the new cash value insurance contract being taken out then the FI shall close or cancel the newly-opened account or new cash value insurance contract.

Section IV. Preexisting entity accounts

IV.D.1.a

- **Two indicators for the identification of a preexisting entity account as a Specified U.S. Person**

Section IV.D.1.a of Annex I prescribes that when answering the question whether an entity is a U.S. Person the FI must review whether the preexisting account holder that is an entity is established in or incorporated under the laws of the U.S.A, or has a U.S. address. The FI does not need to review other indicia as referred to in Section II.B.1 of Annex I.

IV.D.3

- **Take account of the Annex II status in the FATCA partner jurisdiction (identification of account holders with foreign exempt status)**

Pursuant to Section IV.D.3 of Annex I each FI must review the FATCA status of a preexisting account holder that is an entity. When an account holder of this nature is an FI that falls within the scope of an IGA of another FATCA partner jurisdiction (due to the location in which it is established, the law under which it is incorporated or its address) then the FI can identify this account holder as a FATCA partner FI. When the relevant FATCA partner FI is exempted pursuant to Annex II of that IGA then the FI follows that qualification.

However, when the account holder is established in another country in which an IGA is not applicable and the account holder, as an FI, is exempted pursuant to the Final Regulations (as an 'Exempt Beneficial Owner', 'Registered Deemed Compliant', or 'Certified Deemed Compliant') then the FI shall adopt this (exempted) qualification provided that the account holder can furnish the requisite documentary evidence.

IV.D.4

- **Direct Reporting NFFE**

Pursuant to the Final Regulations a Direct Reporting NFFE is an 'Excepted NFFE'.²⁷ After its registration a Direct Reporting NFFE is also assigned a GIIN. A passive NFFE established in the Netherlands that is also a Direct Reporting NFFE is, for the application of the NL IGA, not qualified as an active NFFE in the sense of Section VI.B.4.i of Annex I. For the application of Section IV.D.4 of Annex I the FI shall need to

²⁷ See §1.1472-1(c)(1)(vi) in conjunction with §1.1472-1(c)(3).

make use of the prescribed customer identification rules for a passive NFFE established in the Netherlands, even though it is also a Direct Reporting NFFE. When the account holder is a passive NFFE that is not established in the Netherlands and is also a Direct Reporting NFFE then the FI does not need to identify and report any information about the controlling persons. The Direct Reporting NFFE established abroad then reports its information directly to the IRS.

IV.D.3.a, 4.b and c.1

- **Identification of a passive NFFE (the 'presumption rule')**

When identifying an account holder the FI can first consult information that is publicly available to assess whether the account holder is an FI or an active NFFE. When this cannot be determined on the basis of the available information then the FI must send the account holder a self-certification form. When the account holder, subsequent to repeated requests, fails to return the self-certification form to the FI then the account holder is deemed to be a passive NFFE and the FI shall qualify the account holder accordingly, identify the controlling persons on the basis of the provisions of Section IV.D.4.c.1 of Annex I to the NL IGA and report the required information when the controlling person is a U.S. Person.

IV.D.4.c.2

- **Controlling person of a passive NFFE with an account balance or value that exceeds US \$ 1,000,000**

When an FI has an account holder that is an entity then the FI must determine whether the entity is an active or passive NFFE and whether the controlling persons are U.S. Persons. In the event of a preexisting account held by a passive NFFE with a balance or value in excess of US \$ 1,000,000 the FI may rely on a declaration from the account holder or the controlling person or persons of the account holder that states whether there are controlling persons who are U.S. citizens or residents. When the passive NFFE or controlling person, subsequent to repeated requests, fails to submit a declaration to the FI then the FI must, when a U.S. indication is identified, report the account as a U.S. reportable account. The FI shall inform the account holder accordingly before reporting the information to the Dutch Tax and Customs Administration.

Section V. New entity accounts

V.A

- **'Qualified credit card issuers'**

Pursuant to Section V.A of Annex I a credit card account or a revolving credit facility that is treated as a new entity account does not need to be reviewed, identified or reported provided that the reporting FI that maintains such an account implements policies and procedures to prevent an account balance owed to the account holder that exceeds US \$ 50,000. Pursuant to Article 1, first paragraph, under q, of the NL IGA, and alongside the effect of Section V.A of Annex I, specific credit card issuers can also qualify as a non-reporting FI as pursuant to §1.1471-5(f)(1)(i)(E) of the Final Regulations specific credit card issuers ('Qualified credit card issuers') can be qualified as 'Registered deemed-compliant FFI'.²⁸

²⁸ See §1.1471-5 (f)(1) for the definition of the term 'Registered deemed-compliant FFI'.

The Final Regulations, §1.1471-5(f)1(i)(E), prescribe two cumulative requirements to be met by an FI for the qualification of Qualified Credit Card Issuer. First, the FI must be deemed to be such solely because it offers credit cards (services) and accepts deposits only when a customer makes a payment in excess of a balance due with respect to the credit card account and the overpayment is not immediately returned to the customer.

The second requirement is met when the FI implements policies and procedures to either prevent a customer deposit in excess of US \$ 50,000 or to ensure that any customer deposit in excess of US \$ 50,000 is refunded to the customer within 60 days (after the time that the customer deposit exceeds US \$ 50,000). The second requirement is also met when solely the customer deposit in excess of US \$ 50,000 is refunded to the extent to which this excess in the customer deposit is still present after 60 days from the time that the customer deposit first exceeds US \$ 50,000.

V.B.3

▪ **Consequences in the event of the FI's failure to obtain a completed self-certification form**
Section V.B.3 of Annex I prescribes that when an entity opens a new entity account the FI shall obtain a completed self-certification form from the account holder so that the FI can establish the status of the entity and its controlling persons when the FI is unable to rely on publicly available information, a GIIN or information already in the possession of the FI.

If within 90 days of the new account being opened the FI has not received the completed self-certification form which is used to determine whether the account is to be reported, then the FI shall close the newly-opened account.

Section VI. Special Rules and definitions

VI.A

▪ **Explanation of the term 'reason to know'**

An FI may not rely on declarations or documentary evidence when the FI knows or has reason to know that the declarations or documentary evidence are or is incorrect or unreliable. The definition of the term 'reason to know' is based on the information enclosed in Section VII, paragraph A, under 2 to 9 inclusive, of the CRS commentaries on special due diligence rules. The information under Section VII, paragraph A, under 10 of the CRS commentaries is not applicable as the U.S.A. has also adopted the basis of U.S. citizenship. If one or more U.S. indicia are identified this may give cause to a reason to know that the declarations or documentary evidence received earlier are or is incorrect or unreliable. This will depend on the nature of the indication and the options available for rectification.

▪ **Reliance on the qualification of transferred accounts**

When accounts are transferred to an FI from another reporting FI established in the Netherlands or abroad following a merger, takeover or divestment then the acquiring FI may rely on the FATCA qualification the merged, acquired or divested institution assigned to the transferred accounts.

The above is permissible solely when the following conditions are met:

1. the acquired FI or the (to be) divested FI assigned the FATCA qualification to the transferred accounts on the basis of the prevailing customer identification rules;

2. the acquiring FI or divested FI has received all the relevant documentation from the acquired FI or the (to be) divested FI within the context of the merger, takeover or divestment;
3. the acquiring FI or divested FI re-identifies a customer when there is reason to know that the relevant declarations or documentary evidence are or is incorrect or unreliable; and
4. the due diligence procedures are repeated in the event of changed circumstances.

▪ **Shared account systems**

An FI may rely on the documentation that the account holder submitted to another branch of the same FI or a branch of a related entity within the same group when:

- the FI treats all accounts that share documentation as consolidated accounts; and
- the FI and the other branch of the FI or of a related entity within the group share an information system, electronic or otherwise, that meets the following conditions.

The information system must allow the FI to easily access data regarding the nature of the documentation, the information contained in the documentation (including a copy of the documentation itself), and the validity status of the documentation. The information system must also allow the FI to easily transmit data into the system regarding any facts of which it becomes aware that may affect the reliability of the documentation. The FI must also be able to establish the manner in which and when it has transmitted data regarding any facts of which it became aware that may affect the reliability of the documentation and must be able to establish that any data it has transmitted to the information system has been processed and appropriate due diligence has been exercised regarding the validity of the documentation.

An FI that opts to rely on the qualification of the account holder in the shared account system without obtaining and reviewing copies of the documentation supporting the status must be able to furnish all documentation (or a notation of the documentary evidence reviewed if the FI is not required to retain copies of the documentary evidence within the context of the AML regulations) to the Dutch Tax and Customs Administration when so requested by the Administration.

VI.B.4

▪ **NFFE with the intention to seek FI status**

Section VI.B.4 of Annex I states which entities can qualify as an active NFFE under which circumstances. It is possible that an entity complies with all the requirements attached to the qualification as active NFFE as prescribed in Section VI.B.4 of Annex I at the time that the self-certification form was completed, but at the same time is of the intention to seek FI status. The entity shall then need to be qualified as an active NFFE in the self-certification form. When the entity acquires FI status it must issue prompt notification thereof as a change in circumstances to the FI that maintains an account for the entity so that the FI can amend the qualification of the entity. An entity that acquires FI status is also under the obligation to review, identify and report U.S. Persons unless an exception is applicable.

VI.B.4.e

▪ **Explanation of the term 'substantially all of the activities'**

Section VI.B.4 of Annex I lists the criteria that an active non-U.S. entity that is not a foreign FI will need to meet to be deemed to be an active NFFE. One of these criteria – included under e – prescribes

that substantially all of the activities of the NFFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to (...). Within this context 'substantially all' means that 80% or more of the activities of the NFFE must consist of the activities of the NFFE specified under e. When the NFFE's holding company activities and/or providing financing and services to (sub) subsidiaries account for less than 80%, but the NFFE does earn active income from one or more other sources, then the NFFE can nevertheless be qualified as an active NFFE *provided* that the *total* of the activities meets the 'substantially all' criterion. In order to determine whether activities other than the NFFE's holding or financing and service activities can be deemed to be active, the test of Section VI.B.4.a of Annex needs to be applied. When, for example, a NFFE carries out holding company activities and/or provides financing and services for 60% and at the same serves as a group distribution centre for 40% and the income therefrom is active income pursuant to Section VI.B.4.a of Annex I, then the NFFE is an active NFFE even though the NFFE's holding company activities and/or providing financing and services to (sub) subsidiaries account for less than 80% of its activities.²⁹

VI.B.4.i

▪ Treasury center within a nonfinancial group

Section VI.B.4.i of Annex I qualifies an Excepted NFFE as described in the Final Regulations as an active NFFE. §1.1472-1(c)(1)(v) of the Final Regulations designates entities including holding companies and treasury centres within a nonfinancial group in the sense of §1.1471-5(e)(5)(i)(B) as Excepted NFFEs and, consequently, as active NFFEs for the application of the NL IGA.

VI.B.5

▪ Preexisting accounts

Investment-linked insurance contracts concluded before 30 June 2014 which have been adjusted after this date and terminated investment-linked insurance contracts on which payments have been made after this date continue to be qualified as preexisting accounts. Adjustments or subsequent payments are without prejudice to the exception pursuant Section II.A.3 of Annex I, unless the characteristic of the investment-linked insurance contract changes to an extent such that it no longer falls within the exception as the conditions are no longer met.

VI.C

▪ Application of aggregation rules

Section VI.C of Annex I lists the rules for the determination of the aggregate balance of accounts and the translation of currencies. The aggregation rules are then applied in a number of specific situations.

▪ VI.C.1. Different accounts with the same number

It is conceivable that an FI has different amounts outstanding in various types of account, such as a savings account and a custodial account, that have the same account number. The two amounts will then need to be aggregated, as Section VI.C.1 of Annex I does not make a distinction between types of financial accounts. When the balance of a savings account is US \$ 30,000 and the balance of a custodial

²⁹ See also the CRS commentaries on Section VIII, paragraph D, 130.

account with the same account number is US \$ 40,000 then both will need to be reported (via the product label).

▪ **VI.C.3. Special aggregation rule applicable to relationship managers**

Section II.D.4 of Annex I requires that in addition to the electronic and paper search (in files) for preexisting accounts of natural persons the relationship manager will also be consulted in case of a high value account of in excess of US \$ 1,000,000 (including any aggregated accounts). If the relationship manager has actual knowledge that the account manager is a U.S. person then the high value account (including the aggregated accounts) is a reportable account.

Pursuant to Section VI.C.3 of Annex I a special aggregation rule is applicable to relationship managers in determining whether a financial account is a high value account. Pursuant to this rule the FI must aggregate the balance of the financial accounts when the relationship manager knows, or has reason to know, that the accounts are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person.

As a result of the above, the rule laid down in Section VI.C.3 of Annex 1 must be applied before the rule laid down in Section II.D.4 of Annex I, as a result of which the relationship manager must be consulted when the relationship manager knows, or has reason to know, that an account holder holds a custodial account of US \$ 800,000 and a deposit account of US \$ 400,000 with an FI.³⁰

VI.C.4

▪ **Translation of currencies**

Pursuant to Section VI.C.4 of Annex I the translation of the balance of accounts denominated in a currency other than the U.S. dollar must be carried out using the exchange rate on 31 December of the previous calendar year. Section I.B.3 of Annex I prescribes that in the event of a financial year other than the calendar year the balance of the account will not be reported at the end of the calendar year, but rather the relevant balance as determined as of the last day of 'the other appropriate reporting period'. In the last case the exchange rate for the translation will also need to be the exchange rate on the last date of that other reporting period.

VI.D.2

▪ **A driving licence can also serve as documentary evidence**

Section VI.D of Annex I gives examples of acceptable documentary evidence for the application of the NL IGA. For natural persons acceptable documentary evidence includes valid identification such as a valid driving licence issued by a competent government body that includes the individual's name. A driving licence can serve as identification in the customer due diligence that FIs are required to perform pursuant to the Money Laundering and Terrorism Financing (Prevention) Act. This is subject to the condition that the driving licence is a valid Dutch driving licence, or a valid driving licence issued by the requisite competent authority in another EU Member State, which bears a passport photo and the name of the holder.³¹

³⁰ See also the CRS commentaries on Section III, sub-paragraph C(4), under 41 and 42 and on Section VII, paragraph C, under 16.

³¹ See Article 11 of the 'Wwft' in conjunction with Article 4 of the Regulations implementing the 'Wwft'.

The due diligence procedures in Annex I should be applied in line with these provisions. As a result, a valid driving licence of persons from the Netherlands and from other EU Member States which bears the photo and name of the holder suffices as documentary evidence. Accordingly, a driving licence of persons from countries outside the European Union is not valid identification. These persons shall need to identify themselves with a valid passport.

ANNEX II

I.E

▪ Exempt investment entity of which all interests and units are held by exempt beneficial owners

Section I.E of Annex II provides for an exemption from reporting when each direct holder of an equity interest in an investment entity is an exempt beneficial owner, and each direct holder of a debt interest in such entity is either a depository institution (with respect to a loan made to such entity) or an exempt beneficial owner. The application of this exemption is governed by the condition that each holder is established in the Netherlands and is an exempt beneficial owner pursuant to the NL IGA, or is established in another FATCA partner jurisdiction and is an exempt beneficial owner pursuant to the IGA of that FATCA partner jurisdiction, or is established in a jurisdiction other than a FATCA partner jurisdiction and is an exempt beneficial owner pursuant to the Final Regulations.

III.A

▪ Exempt group pension contracts

Article 4, seventh paragraph, of the NL IGA provides for the option of the application of a more favourable definition in the Final Regulations rather than the comparable definition in the NL IGA. Pursuant to §1.1471-4(c)(4)(iii) of the Final Regulations, group cash value insurance contracts and group annuity contracts may, subject to certain conditions, be excepted from the term 'financial account'. However, group pension contracts that are exempted in Section III.A of Annex II do not need to meet the conditions referred to in §1.1471-4(c)(4)(iii) of the Final Regulations as the group pension contracts are already exempted pursuant to Section III.A of Annex II.

III.B

▪ Exempted insurance products and legal predecessors

Section III of Annex II lists the categories of accounts and products opened in the Netherlands and managed by an FI that are not treated as financial accounts and, consequently, are not U.S. reportable accounts. The definitions of the insurance products are available in the prevailing version of the life insurance reporting manual of the Dutch Tax and Customs Administration.

Section III.B of Annex II lists a number of lapsed articles. The Explanatory Memorandum to the NL IGA includes a provision for the accounts and products in these articles that states that pursuant to transition rights these products continue to exist as such, as a result of which the exemption from U.S. reporting in Annex II continues to be necessary.

The insurance products that are the legal predecessors of the insurance products included in Sections III.A.3 and III.B.2 of Annex II also fall under this exemption. These are all products that are tax

deductible in the accrual phase and taxable in the payment phase as governed by the provisions of articles 3.124, 3.125 and 3.126a of the Income Tax Act, 2001.

This Order comes into effect on the day following the date of issue of the Government Gazette in which it is published and has retroactive effect from 1 January 2015.

This Order will be published in the Government Gazette.

The Hague, 12 January 2015

The State Secretary for Finance,
on whose behalf,

T.W.M. Poolen,
Member of the Tax and Customs Administration Management Team