

OFFICIAL GAZETTE

National Decree with general applicability of 24 September 2015 for the execution of articles 22, first paragraph, and 28, second paragraph, of the National ordinance on international assistance for collection of taxes (*Landsbesluit internationale bijstandsverlening bij de heffing van belastingen*)

In the name of the King!

The Governor of Curaçao,

Having deliberated the following:

That, for the execution of articles 22, first paragraph, and 28, second paragraph, of the National ordinance on international assistance for collection of taxes, it is desirable to establish regulations to designate persons having a duty to keep an administration and the data and information, which is required;

Has decided, after having heard the Council of Advice (*Raad van Advies*):

Article 1

In this national decree and the provisions based thereon, the following shall mean:

- a. The national ordinance: the National ordinance on international assistance for collection of taxes;
- b. FATCA-treaty: the treaty, which was concluded on 16 December 2014 in Willemstad between the Kingdom, on behalf of Curaçao, and the United States of America, to improve international compliance with tax laws and to carry out the Foreign Account Tax Compliance Act¹.
- c. CRS: the Common Reporting Standard, as well as the corresponding Comment, as adopted by the Organization for Economic Co-operation and Development on July 15, 2014, as amended from time to time, containing the identification and reporting requirements for automatic exchange of data;
- d. entity account: an account held by one or more entities;
- e. low-value account: an existing account of a natural person with a total balance or a total value as at 31 December 2016 of an amount that corresponds to no more than USD;
- f. high-value account: an existing account of a natural person with a total balance or a total value on 31 December 2016 or on 31 December of any subsequent year of an amount corresponding to more than USD 1,000,000.

¹ Published in Treaty compendium of the Kingdom of the Netherlands, year 2015, No. 11

Article 2

1. The financial institutions as meant in article 1, first paragraph, part I of the FATCA-treaty, with the exception of Curaçao financial institutions, who need not report, as meant in article 1, paragraph 1, sub q, of the FATCA-treaty, shall be considered to be persons having a duty to keep an administration as meant in article 22, first paragraph, who shall supply data and information, as meant in the second paragraph.
2. The data and information as meant in article 22, first paragraph, of the national ordinance shall be the data and information meant in article 2, second paragraph, sub a, of the FATCA-treaty, with respect to the American accounts to be reported as meant in article 1, first paragraph, sub cc, of the FATCA-treaty, with due observance of article 3 of the FATCA-treaty and the provisions in annexes I and II to the FATCA-treaty.
3. For the application of the first and second paragraph, with due observance of article 4, seventh paragraph, of the FATCA-treaty, a financial institution may satisfy, instead of the definitions of article 1 of the FATCA-treaty and annexes I and II to the FATCA-treaty, the comparable definitions in the regulations of the American Ministry of Finance, meant in article 4, seventh paragraph, of the FATCA treaty.
4. A person having a duty to keep an administration shall follow the procedures, which are listed in annex I to the FATCA-treaty, for the identification of the American accounts to be reported. With due observance of annex I, section VI, part F, of the FATCA-treaty, a person having a duty to keep an administration when carrying out the first sentence, may rely on procedures executed by third parties, provided same is allowed in the pertinent regulations of the American Ministry of Finance, meant in annex I, section VI, part F, of the FATCA-treaty.
5. In deviation of the stipulations of the fourth paragraph, first sentence, with due observance of annex I, section I, part C, of the FATCA-treaty, a person having a duty to keep an administration may apply procedures, which are contained in the pertinent provisions of the American Ministry of Finance, meant in annex I, section I, part C of the FATCA-treaty, when identifying the American accounts to be reported. The possibility described in the first sentence may be used either for each section of annex I separately, or for all relevant financial accounts, or for each clearly described group of such accounts separately. The fourth paragraph, second sentence, is similarly applicable.
6. A person having a duty to keep an administration may elect to use the options meant in annex I, section II, part A, section III, part A, section IV, part A, and section V, part A, of the FATCA-treaty. A person having a duty to keep an administration, who makes use of his faculty to elect as meant in the first sentence, with respect to the American accounts to be reported on as meant in article 1, first paragraph, sub cc, of the FATCA-treaty, depending on the choice made, shall be obliged to report data and information regarding:
 - a. the accounts meant in annex I, section II, part A, sub 1 through 4 of the FATCA-treaty, either for all these accounts, or for each clearly described group of such accounts separately;
 - b. the accounts meant in annex I, section III, part A, sub 1 and 2 of the FATCA-treaty, either for all these accounts, or for each clearly described group of such accounts separately;
 - c. the accounts meant in annex I, section IV, part A, of the FATCA-treaty, either for all these accounts, or for each clearly described group of such accounts separately;
 - d. the accounts meant in annex I, section V, part A, of the FATCA-treaty, either for all these accounts, or for each clearly described group of such accounts separately.

7. In case, based on article 7 of the FATCA-treaty, more favorable provisions are applicable than would be based on article 4 of the FATCA-treaty and annex I to the FATCA-treaty, a person having a duty to keep an administration may make use of these more favorable provisions.
8. Ministerial regulations with general applicability may establish more detailed rules for the execution of this article.

Article 2a

1. As a person having a duty to keep an administration as referred to in Article 22, first paragraph, of the national ordinance, for the provision of the data and information referred to in the second paragraph, the Curaçao financial institutions as referred to in Section VIII, section A (2) of the CRS are designated; with the exception of those institutions that are not reporting institutions as referred to in Section VIII, Part B, of the CRS.
2. As the data and information referred to in article 22, paragraph 1, of the National Ordinance are designated the data and information referred to in section I, part A of the CRS to report accounts in respect of the CRS as referred to in section VIII, part D (1).
3. Each person having a duty to keep an administration as referred to in the first paragraph follows the procedures that are included in Sections II to VII of the CRS in order to establish whether there are accounts to be reported. These procedures must be completed no later than the last day of each calendar year and relate to:
 - a. the procedures referred to in section C (6) of Section III of the CRS;
 - b. the procedures mentioned in Section D of Section III of the CRS;
 - c. the procedures specified in Section A of Section V of the CRS;
 - d. the procedures specified in Section B of Section V of the CRS;
 - e. the procedures mentioned in section D (1) of Section V of the CRS.
4. The person having the duty to keep an administration may use the procedures for determining whether there is an account to be reported for new accounts to existing accounts. In case this option is used, the rules applicable to the existing accounts will otherwise remain applicable.
5. The person having the duty to keep an administration may apply the procedures for determining whether there is an account to be reported for high-value accounts to low-value accounts.
6. A person having the duty to keep an administration may use the classification of an existing account in his administration as evidence, if this classification is based on an identification procedure for the relevant account holder, which has been carried out by the person having the duty to keep an administration in accordance with his normal business operations and with due regard for the procedures in force and already implemented before the date on which the account is classified as an existing account. However, the person having a duty to keep an administration may not rely on these evidence if he knows or has reasons to believe that the evidence are incorrect.
7. The person having the duty to keep an administration records the steps he has taken and the means of evidence he has relied upon in the execution of the identification and reporting requirements arising from the national ordinance and this national decree and keep these evidence.
8. For the application of:
 - a. the identification procedures in Sections II to VII of the CRS and this Article, Section D (4) of Section VIII of the CRS is read as follows:
 4. The term Reportable Jurisdiction concerns any jurisdiction outside the United States of America or Curaçao.
 - b. Section I of the CRS, Section D (4) of Section VIII of the CRS is read as follows:

4. The term Reportable Jurisdiction concerns a jurisdiction with which an agreement has been concluded that follows the obligation to exchange the information referred to in Section I of the CRS.
9. A person having the duty to keep an administration shall, when applying the procedures referred to in this article, determine from each holder of an account whether he is a tax resident of one or more of the jurisdictions to be designated by ministerial decree with general effect.

Article 3

The data and information as meant in article 2, second paragraph, shall include, for persons having a duty to keep an administration as meant in article 2, first paragraph, the name of each non-participating financial institution as meant in article 1, first paragraph, sub r, of the FATCA-treaty, to whom the person having a duty to keep an administration made one or more payments and the total amount of these payments, which is to be determined with due.

Article 4

1. Any person designated as a person having a duty to keep administration within the meaning of articles 2, first paragraph, and 2a, first paragraph, is obliged to include the following information in his records of each holder of an account as referred to in second paragraph of these articles:
 - a. the residential or business address;
 - b. the place of residence for tax purposes;
 - c. the tax identification number assigned by the country where the person has his tax residence;
 - d. the tax identification number assigned by the United States, if the account holder is a American US citizen.
2. The first paragraph is similarly applicable with respect to the individual who controls an entity as meant in article 1, first paragraph, sub mm, of the FATCA-treaty, unless this entity:
 - a. Is a financial institution as meant in article 1, first paragraph, sub g, of the FATCA-treaty; or
 - b. Satisfies one or more of the criteria of section VI, part B, sub 4, with the exception of letter c, of annex I to the FATCA-treaty.

Article 4a

1. For high-value accounts, no later than 31 December 2017, it will be established for the first time whether there is an account to be reported.
2. For low-value accounts, no later than 31 December 2018 it shall be established for the first time whether there is an account to be reported.
3. For existing entity accounts no later than 31 December 2018 it shall be established for the first time whether there is an account to be reported.

Article 5

1. The persons having a duty to keep an administration, as meant in articles 2, first paragraph, and 2a, first paragraph, shall provide the data and information in the manner and as frequently as prescribed by the minister. The data and information shall be remitted within three months from the end of the year following the year that the data and information are related to.
2. Persons having a duty to keep an administration as meant in the first paragraph, who manage one or more accounts as meant in article 1, first paragraph, sub cc, first sentence of the FATCA-treaty, but who, based on the second sentence of said provision need not supply any data or information and who also need not supply any data as meant in articles 11 and 12 of the national ordinance, shall report same by filing a nil return.
3. Insofar as necessary in deviation of the first paragraph, the data with respect to 2014 shall be remitted before 30 September 2015.

Article 6

Commented [RB1]: No longer valid.

Article 7

1. This national decree shall enter into force at the moment that the National ordinance for international assistance for the collection of taxes shall enter into force and shall be applicable for the first time with respect to data and information as meant in article 3, third paragraph, sub a, of the FATCA-treaty.
2. In deviation of the first paragraph, article 3 shall be cancelled on 1 January 2018.

Article 8

This national decree shall be referred to as: National Decree to implement international assistance.

Passed in Willemstad, 24 September 2015
N.C. RÖMER – KENEPA

The Minister of Finance,
J.M.N. JARDIM

Published the, 25th of September 2015
The Minister of General Affairs, a.i.
R.D. LARMONIE - CECILIA

Explanatory Note attached to the National decree on international assistance for collection of taxes**1. General**

This national decree implements Article 22, first paragraph, and Article 28, second paragraph, of the National Ordinance on international assistance for collection of taxes (hereinafter the national ordinance). Based on this national decree, financial institutions are designated which must comply with the obligations of the treaty signed with the United States on FATCA². This treaty was signed on 16 December 2014 and the obligation to exchange information resulting from this treaty must be met, for the first time, no later than 1 October 2015. Hence, having the decree enter into force and implementing the provisions of this national decision has been expedited. The obligations arising from the FATCA-treaty must be observed by the designated Curaçao institutions no later than 30 September 2015.

2. Financial impact

The financial implications that this national decree entail for the Ministry of Finance must be considered in conjunction with the financial implications of the national ordinance. The current national decree does not entail any financial consequences other than the consequences mentioned in paragraph 1.10 of the explanatory memorandum of the national ordinance.

3. Advice of Council of Advice (*Raad van Advies*)

On 22 September 2015, the Council of Advice (RvA) advised the government on this draft decree (RvA No. RA / 29-15-LB).

The advice of the RvA has led the government to partially change both the draft and the explanatory. The Government has adopted the advice of the RvA for the greater part. To the extent that the advice of the RvA has not been followed, the rationale for same is shown as fully as possible in what follows.

Under Chapter I General, the RvA recommends to cite *in extenso* the content of the provisions of the articles of the FATCA-treaty which are referred to in the draft.

The government decided not to follow the advice of the RvA, considering the need to have this decree enter into force promptly. Integral reporting of the content of the provisions of the FATCA-treaty from English in Dutch may result in a divergent interpretation. For the implementation of the correct translation of the FATCA treaty, more time is required. The government strives to come up with an amended proposal of the national decree containing a correct translation thereof, as soon as possible.

² Treaty compendium of the Kingdom of the Netherlands, year 2015, No.11.

4. Explanatory note per article

Article 1

The definition of the National Decree to implement international assistance is extended with terms relevant to the CRS.

The distinction between the different accounts mentioned is important now that different identification requirements apply to each category of accounts.

Article 2

First paragraph

For the designation of persons who have a duty to keep an administration, reference is made to article 1, paragraph 1, part I of the FATCA-treaty. The definition of Curacao financial institutions is included therein. These are financial institutions, which are legally established in Curaçao, with the exception of an establishment of such institution outside of Curaçao, as well as an establishment in Curacao of a financial institution, which is not legally established in Curaçao. For example, a financial institution established in Curaçao will not have to provide information based on this national decision on accounts held by third parties at a branch of this financial institution in Bonaire. Conversely, information will have to be provided regarding, for example, an account held by a third party at a Curaçao branch of a financial institution established in Aruba.

Financial institutions, which based on article 1, paragraph 1, sub q, are deemed to be non-reporting financial institution shall not be designated as persons having a duty to keep an administration. For a description of non-financial institutions, reference can be made to Annex II to the FATCA-treaty.

Second paragraph

The second paragraph indicates what information must be provided under FATCA. This is the information referred to in article 2, second paragraph, sub a, of the FATCA-treaty. It always concerns the reporting required for the so-called American accounts, as further defined in article 1, first paragraph, sub cc, of that treaty. In addition, the provisions of article 3, first, second and fourth paragraphs of that treaty, as well as the two annexes shall apply.

The application of article 3, third paragraph, of the treaty regulates the phased entry into force of the obligation to exchange information.

The information to be provided pursuant to article 2, second paragraph, of the treaty shall in any case include the name, address and American tax identification number, account number, name and registration number of the reporting financial institution and the balance of the account.

As there is reciprocity, the American tax authorities will also provide similar information to the Curaçao tax department with respect to bank accounts held in the United States by residents of Curacao.

Third paragraph

This provision allows the financial institution to use the definitions issued by the American Ministry of Finance instead of the definitions contained in the FATCA-treaty.

Fourth paragraph

In Annex I of the FATCA-treaty, a large number of guidelines and regulations are listed for the use of persons who have a duty to keep an administration to determine whether they can consider an

account as an American account for purposes of the obligation to report. This is generally the case if the account is held by a US person, which is defined as someone who has the American nationality or is considered to be a resident of the United States for tax purposes. Furthermore, an account requiring reporting may exist in case this account is held, for instance, by an entity, which is not established in the United States, which is controlled by one or more U.S. persons. For a full identification, reference is made to the aforementioned annex to the FATCA-treaty.

Fifth paragraph

As allowed in the third paragraph with regards to definitions, it is also permitted for the financial institution to identify an American account for purposes of reporting by using the provisions which were Issued by the American Ministry of Finance, instead of using the provisions of the FATCA-treaty.

Sixth paragraph

The sixth paragraph offers the person who has a duty to keep an administration a few choices. For example, in case of existing accounts (accounts that existed on 30 June 2014), an election may be made not to examine whether the account is one requiring reporting if the balance of the account is no more than USD 50,000 on June 30, 2014. New accounts (accounts opened after June 30, 2014) also do not require such examination if the account is a so-called "depository account" and the balance of the account at the end of the calendar year does not exceed USD 50,000. This option applies *mutatis mutandis* to an account of a legal entity existing on 30 June 2014 with a balance of no more than USD 250,000 at that time, unless the balance at any subsequent time exceeds the limit of USD 1,000,000.

Seventh paragraph

In the seventh paragraph, the financial institution is offered the possibility to use more favorable provisions than those stipulated in article 4 of the FATCA-treaty. This possibility, according to article 7 of the FATCA-treaty, depends on whether the United States enters into a more favorable treaty with a jurisdiction other than Curaçao. Should this occur, the United States will inform the Minister of this possibility. For the moment, however, this is not the case.

Eighth paragraph

The eighth paragraph allows the Minister to provide further rules or instructions for the purpose of implementing these provisions.

Article 2a

Article 2a prescribes which financial institutions are designated as accounting officers as referred to in Article 22, first paragraph of the national ordinance for the CRS. This article also stipulates which data the financial institutions mentioned must provide to the Inspectorate and imposes on them the obligation to follow the identification and reporting requirements of the CRS.

First Paragraph

For the appointment of the accounting officers reference is made to Section VIII, section A (2) of the CRS. The definition of a Curaçao (reporting) financial institution is included there.

Second Paragraph

The second paragraph indicates which information must be provided in the context of CRS. These are the data referred to in Section I, Part A, of the CRS. It always sees so-called accounts to be reported.

Sixth Paragraph

Under the sixth paragraph, an accounting officer can use an already existing classification record in his administration for the classification of an existing account. This refers to the situation where a taxpayer has already carried out identification procedures based on other (then CRS) reasons, such as on the basis of the 'Know Your Client' procedure. This can be used as proof, unless the accounting officer knows or has reasons to assume that the supporting documents are incorrect.

Seventh Paragraph

Pursuant to the seventh paragraph of Article 2a, the national accounting authorities must record the steps taken and the means of proof that they are familiar with when implementing the identification and reporting requirements arising from the LIBB, the UB LIBB and the CRS. As far as the evidence is concerned, one may think of own statements and additional supporting documents, but also a reasonable explanation that can confirm the correctness of a self-declaration. With regard to the means of proof, the aforementioned sixth paragraph also stipulates that a reporting financial institution shall keep these means of proof.

Eighth Paragraph

The so-called 'wider approach' is implemented in the eighth paragraph. This refers to the scope of the term 'reportable jurisdiction'.

Subsection (a) provides the definition of 'reportable jurisdiction' with regard to the application of the identification procedures. In that case the concept is broadly defined, namely all jurisdictions other than the United States and Curaçao. This ensures that financial institutions have a basis for applying the identification procedures to their entire customer base. This prevents financial institutions from having to select the 'CRS customers' before they can apply the identification procedure.

Subsection b provides for the definition of 'reportable jurisdiction' with regard to the reporting obligation of financial institutions. In that case, the concept is defined less broadly, namely every jurisdiction with which an agreement has been concluded on the basis of which there is an obligation to exchange CRS information. This means that financial institutions should only report the data of their 'CRS customers' to the Inspectorate and not also the data of customers, with a place of residence in a country that is not a member of the CRS.

Article 3

Article 4

In addition to the obligation to provide information for the exchange of information, Article 4 stipulates that once an entity has been designated as a person having a duty to keep an administration as meant in this national decree, the entity is obliged to include in his administration the address, the place of tax residence and the tax identification number, also known as Tax Identification Number or TIN, assigned to the person holding the account, of all persons holding accounts.

This will avoid that when the obligation to exchange such data shall apply to a new treaty state, the financial institutions must check which account holders reside in that State and, as a result, at that moment have to register their TINs. This is particularly important as it is expected that in 2017 the exchange of information will commence on the basis of the Common Reporting Standards of the

Organization for Economic Co-operation and Development (OECD) and the Multilateral Competent Authority Agreement On Automatic Exchange of Financial Account Information, also signed on behalf of Curacao on 29 October 2014. Without the provision of Article 4, it could be argued that the recording of this information for an account holder who is a resident of a State for whom no exchange of treaty exists would be contrary to Article 8 of the National ordinance on personal data protection³.

As per paragraph 2, this obligation is extended to the persons who control a passive non-financial entity (NFE). For the criterion of controlling person, reference is made to article 1, first paragraph, sub mm, of the FATCA-treaty. It is to be noted that the text is almost the same as that of the Common Reporting Standards, Section VIII, Part D, sub 6, as published⁴ by the OECD on July 15, 2014 (hereinafter referred to as CRS). Obviously, the entity should not be a financial institution as referred to in Article 1, first paragraph, sub g, of the FATCA-treaty. This description is the same as that of section VIII, part A, sub 3, of CRS. Finally, to determine whether the entity is a passive entity, reference is made to the criteria set out in Section VI, Part B, sub 3 of Annex I to the FATCA-treaty. In order to have these criteria match, as much as possible, those of section VIII, Part D, sub 9, CRS, sub c in Annex I to the FATCA-treaty regarding American entities, is excluded. Although, in this National Decree, no reference is made to the CRS, which has not yet entered into force, the criteria are broadly the same and the fact that the CRS will enter into force later should not require any adjustments from the persons having a duty to keep an administration.

Article 4

The application of Article 4 of the UB LIBB will be extended to those who are obliged to keep records on the basis of CRS, in addition to those who are obliged to keep records on the basis of FATCA. Article 4 of the UB LIBB stipulates that once an entity has been designated as a taxpayer within the meaning of this national decree, the entity is required of all account holders in the administration, the address, the tax residence and the tax identification number allocated to the account holder by that tax resident state, also called Tax Identification Number or TIN.

Article 5

Article 5 sets out the deadlines for remitting the data by Curaçao financial institutions. In general, this data must be delivered within three months from the end of the calendar year. In deviation thereof, for the year 2014, in accordance with the fourth paragraph, the information must be submitted before 30 September 2015, so that the government has the time to exchange this information with the United States, as in accordance with the FATCA-treaty the exchange must take place within 9 months from the end of the calendar year.

There is also a difference between the data to be delivered in 2015 and that which needs to be delivered in later years. In 2015, in any case the balance of the accounts for which a reporting duty exists must be reported. In later years, interest payments and other amounts credited to the account must also be reported to the tax authorities. For a detailed description of the information to be provided, reference is made to article 3, third paragraph, sub a and 2, sub a of the FATCA-treaty.

³ AB 2010, No. 84.

⁴ Standard for Automatic Exchange of Financial Account Information in Tax Matters, OECD Publishing (2014), ISBN 978-92-64-21651-8 (print)

This reference already follows from the reference to this article included in article 2, second paragraph, and therefore also to the aforementioned third paragraph.

Persons having a duty to keep an administration must register on the website of the tax department. This applies to both those who must provide information as per FATCA as well as those who need to do so on the basis of the European Savings Directive⁵ (hereafter: the Directive). The Directive will be replaced by CRS, so that the obligation to report bank accounts will continue to increase. A person having a duty to keep an administration as per the second paragraph must report annually. This obligation does not apply to persons having a duty to keep an administration who do not maintain any account for which a reporting obligation would exist as referred to in article 1, first paragraph, sub cc, of the FATCA-treaty and which also does not have to report on accounts as per the Directive. In short, it comes down to this.

A person having a duty to keep an administration, for instance, a bank, which has only local account holders, will not need to report on any account and therefore need not register on the portal. A person having a duty to keep an administration who must report one or more accounts based on FATCA or the Directive, or CRS after it has entered into effect, must register on the portal. A person having a duty to keep an administration will only be able to file a nil return if no accounts need to be reported as per the Directive or CRS after it has entered into effect and if, in addition, the accounts to be reported as per FATCA do not exceed the stipulated threshold-amounts.

Therefore, a nil return cannot be filed if a person having a duty to keep an administration has a US account, the amount of which remains below the threshold, but also maintains an account for an account holder, who is a resident of a European member state, which must be reported.

Article 5

The application of article 5, first paragraph, UB LIBB is extended to those who are obliged to keep records on the basis of CRS, in addition to the accounting authorities on the basis of the FATCA treaty. Article 5 of the UB LIBB stipulates which deadlines apply for the delivery of the data by the Curaçao financial institutions. The data must be submitted within three months after the end of the calendar year. CRS Administration Obligations must register in the Financial Data Exchange Portal (PFGU) (<https://eoi.belastingdienst.cw>). The data must be submitted to the Inspectorate via the PFGU.

Article 6

Commented [RB2]: No longer valid.

Article 7

The national decree will enter into force at the time when the National ordinance on international assistance for collection of taxes enters into force. On the basis of this national decree, the financial institutions are obliged to provide the minister with data and information by 30 September 2015, and then the minister has the time to exchange this information with the United States. This national decree shall apply for the first time with respect to data referred to in article 3, third paragraph, sub a of the FATCA-treaty, being the data to be provided to the American tax authorities by the end of September 2015 by the tax authorities.

⁵ Council Directive 2003/48 / EC of 3 June 2003

The obligation as set out in Article 3 is based on Article 4, first paragraph, of the Intergovernmental Agreement (IGA). The obligation applies only for the years 2015 and 2016. Since the 2016 information must be provided in 2017, the provision may therefore be cancelled from 1 January 2018.

The Minister of Finance,

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