

# ***Global IRW Newsbrief***

Information reporting and withholding (IRW)

**July 27, 2012**

## *Treasury releases model intergovernmental agreement for implementing FATCA*

Yesterday, the U.S. Department of Treasury (Treasury) as well as the Treasury Departments of France, Germany, Italy, Spain, and United Kingdom (the G5 countries) released a model intergovernmental agreement (the Model Agreement or Model IGA) for implementing the broad-ranging provisions of the Foreign Account Tax Compliance Act (FATCA). FATCA was enacted, as part of the Hiring Incentives to Restore Employment Act of 2010, with the goal of diminishing tax evasion by U.S. taxpayers with direct and indirect ownership in non-U.S. financial accounts.

The Model Agreement is part of the U.S. Treasury's continued efforts to implement FATCA, which requires foreign financial institutions (FFIs) to report foreign accounts owned either directly or indirectly by U.S. persons to the Internal Revenue Service (the IRS). To the extent an FFI does not comply with these provisions or an account holder does not provide the appropriate documentation, FATCA imposes a 30-percent withholding tax on payments made to either the FFI or account holder.

The Model Agreement was developed by Treasury in consultation with the G5 countries to combat tax evasion. It relies on automatic exchange of information and is intended to be a long-term solution for local law restrictions that would have prevented compliance with an FFI agreement. Consistent with the framework set forth in a joint statement released by the G5 countries and the U.S. in February 2012, the Model Agreement allows FFIs in each of the jurisdictions to report U.S.-owned account information directly to their local tax authority, rather than to the IRS. Under the



Model Agreement, the local taxing authorities would then automatically share that information with the IRS.

The Model Agreement was accompanied by a joint communiqué issued by the G5, and the U.S. endorsing the approach and calling for a speedy conclusion of bilateral agreements based on the model. The communiqué adds that the Model Agreement provides a basis for close cooperation among these six countries, the Organization for Economic Cooperation and Development (OECD), the European Commission, and other partner governments to work towards common tax information reporting and due diligence standards to more effectively combat tax evasion while minimizing compliance burdens.

There are two versions of the Model Agreement:

*Reciprocal version.* The reciprocal version provides for the U.S. to share information currently collected on accounts held in the U.S. by residents of partner countries, and includes a policy commitment to pursue regulations and support legislation that would provide for equivalent levels of exchange by the U.S. Prior to the U.S. sharing account information held by residents of a partner country, a determination will be made to ensure that the recipient government has in place robust protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes.

*Non-reciprocal version.* The non-reciprocal version will be available only to jurisdictions with which the U.S. has in effect an income tax treaty or tax information exchange agreement.

## *PwC Summary*

The Model Agreements have not been executed by any of the G5 countries that have endorsed them. However, the models provide a framework and significant detail about the approach to be followed. Each government will now work to conclude negotiations with the U.S. and sign the Intergovernmental Agreement as soon as possible. Once a bilateral agreement has been executed, it is expected that each country would need to either pass legislation or amend existing regulations for the provisions of the agreement to affect financial institutions in a country that is party to that agreement.

The Model IGAs provide a number of new definitions and concepts that are relevant to non-U.S. Financial Institutions that are implementing the provisions of FATCA. Seven noteworthy aspects of these agreements include:

1. The definition of investment entity as provided appears to be broader than the similar concept of a financial institution in the proposed regulations because it includes an entity that conducts as a business investing, administering, or managing funds or money on behalf of other persons.

2. Both versions of the Model IGA currently provide for reporting through countries that have entered into an Intergovernmental Agreement (FATCA Partner) that exchanges the information with the U.S. However, a Treasury official recently noted that a new model agreement reflecting a second alternative framework, outlined in June joint statements with Japan and Switzerland (the so-called Model II approach), also will be released.
3. The determination date of a pre-existing account and the dates by which a non-U.S. financial institution must complete a review of pre-existing accounts are generally extended six months.
4. The definition of Substantial U.S. Owner in the proposed regulations has been replaced by Controlling Persons, which is expected to be interpreted in a manner consistent with the recommendations of the Financial Action Task Force and better aligned to KYC procedures.
5. The Model IGAs also provide guidance regarding acceptable documentary evidence, but do not require expired documentation to be refreshed.
6. The Model Agreements do not require certifications from a responsible officer of a Financial Institution. The administrative provisions of the agreement rely on the competent authority of the country receiving the reporting to identify and notify the competent authority where the FFI is located of significant non-compliance. It would then be the responsibility of the competent authority where the FFI is located to manage the resolution of non-compliance. In the U.S., the component authority would be the Secretary of the Treasury or his designee.
7. The reciprocal version of the Model IGA also requires certain reporting by U.S. Financial Institutions. Although a significant portion of this information is currently reported through existing U.S. information reporting requirements, information such as the FATCA Partner TIN (or the date of birth of the account holder if the FATCA Partner does not issue TINs) will be a new requirement for U.S. Financial Institutions.

### *Impact on Scope and Governance*

Financial institutions resident in FATCA Partners will not be required to enter into FFI agreements with the IRS. Instead, they will be required to follow the registration guidelines in the Model Agreement.

Under the Model IGA, the FFI concept is based on the residency or location of the business, not the country of organization. Thus, a FATCA Partner financial institution includes FFIs that are resident of the FATCA Partner, but excludes branches of these FFIs located outside the FATCA Partner. Additionally, branches located within a FATCA Partner are considered FFIs in the FATCA Partner regardless of where the financial institution is organized.

**PwC Observation:** *The definition of FFI under the Model Agreement is broad and appears to include investment managers. In addition, the analysis of determining the FATCA classification of the legal entity analysis in a multinational FFI will need to include consideration of the impact of branches located outside FATCA Partners.*

### *Impact on Reporting*

Under the Model IGA, financial institutions located in a FATCA Partner must obtain and report account holder information annually in a manner similar to what was required in the proposed regulations. However, this reporting is done through local channels to FATCA Partner tax authorities, which then exchange the information with the IRS. The Model IGA shifts the first account reporting date from September 2014 to 2015. However, the information to be reported in 2015 must include information from both 2013 and 2014. Additionally, the annual due date for reporting was shifted from March 31 to September for all subsequent years.

**PwC Observation:** *Pending the expected release of a model agreement reflecting the Model II approach and the final regulations, a multinational FFI operating both within and outside FATCA Partners will seem to have multiple reporting dates and channels of reporting.*

### *Impact on Withholding*

Under the Model IGA, financial institutions resident in FATCA Partners will generally not be required to withhold 30-percent U.S. tax under FATCA. However, financial institutions that are qualified intermediaries who assume primary withholding responsibility (or withholding foreign partnerships or withholding foreign trusts), will be required to withhold 30-percent U.S. tax under FATCA on U.S.-source withholdable payments (as defined in the IGA, which excludes gross proceeds) paid to any non-participating FFI (NPFFI).

For FFIs other than those identified above, when making withholdable payments to NPFFIs, in lieu of withholding, they must provide information required for withholding and reporting purposes to any immediate payor of such payment. The Model IGA expresses the commitment of the governments to continue efforts to develop a practical approach to achieve the objectives of imposing withholding on foreign passthru payments and gross proceeds.

**PwC Observation:** *Under the Model Agreement, FFIs resident in FATCA Partners would not be required to withhold 30-percent U.S. tax under FATCA, even when payments are made to NPFFIs located outside FATCA Partners, unless those FFIs already are assuming withholding responsibility for other U.S. tax purposes.*

## *Impact on Identification Procedures*

Though included as an annex, a substantial portion of the Model IGA provides a framework for identifying account holders by defining four separate due diligence processes for pre-existing and new, individual, and entity accounts (similar to the FATCA proposed regulations). Although the identification requirements in the Model IGA remain conceptually similar to those in the proposed regulations, the Model IGA provides some relief by allowing for more reliance on previously collected documentation, current processes, and other identification procedures under local law to identify account holders.

The Model IGA provides thresholds for new depository and cash value insurance contract accounts before a FFI will need to review, identify, or report a new individual account as a U.S. Reportable Account. Moreover, a FFI must obtain a self-certification -- which may be part of the account opening documentation -- to determine whether the account holder is resident in the U.S. for tax purposes (for this purpose, a U.S. citizen is considered to be resident in the U.S. for tax purposes even if the account holder is also a tax resident of another country).

***PwC Observation:** Until the final regulations are issued and the final IGAs are negotiated, the "on-boarding" process will remain fluid even while FFIs begin to introduce the self-certification to their on-boarding process and decide how such certifications will be made (electronic or paper). Even with the shifts in deadline, FFIs and U.S. Financial Institutions may not have enough time to comply with these provisions.*

Overall, the Model IGA reflects a significant effort of the parties to work together and with the OECD as well as the European Union on adopting the terms of the Model Agreement to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions.

Included below are links to the Model Agreements as well as the accompanying releases.

Link to the [US Treasury release](#)

Link to the [UK Treasury release](#)

Link to the [joint communiqué](#)

Link to the [model reciprocal agreement](#)

Link to the [model nonreciprocal agreement](#)

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