

Global IRW Newsbrief

Information reporting and withholding (IRW)

November 21, 2012

Treasury releases second model agreement for implementing FATCA

In brief

On November 14, 2012, the US Department of the Treasury (Treasury) published the [second model intergovernmental agreement](#) (IGA) (Model 2) for implementing the broad-ranging provisions of the Foreign Account Tax Compliance Act (FATCA), which was enacted in 2010 with the goal of diminishing tax evasion by US taxpayers.

Treasury released the first model IGA for implementing FATCA in July 2012 (Model 1) to address non-US laws that prohibited foreign financial institutions (FFIs) from complying with the reporting and withholding provisions of FATCA. The US recently executed bilateral IGAs with Denmark and the United Kingdom, both of which are based substantially on the provisions of Model 1. In addition, Treasury recently announced that it is negotiating with more than 50 countries to finalize agreements to facilitate FATCA compliance. According to Treasury, it hopes to conclude negotiations with a number of major US trading partners by the end of 2012.

Model 1 generally relies on government-to-government exchange of information to address concerns that foreign laws prohibit many FFIs from reporting account holder information to the IRS. Model 2 provides an alternative solution to these restrictions, by providing another framework to allow reporting directly to the US under FATCA.

Some of the significant differences between Model 1 and Model 2 include the following:

- Model 2 requires partner country FFIs to comply with the requirements in the FFI Agreement, including the due diligence, reporting, and withholding



requirements. FFIs in countries that adopt Model 1 are not required to comply with such an agreement, but are required to comply with the registration requirements applicable in their respective partner jurisdictions.

- Model 2 introduces a new concept and related reporting requirements around 'non-consenting US accounts.' Model 1 does not include such a concept.
- Model 2 requires FFIs to report certain information directly to the IRS. Model 1 permits FFIs to report US account information to their taxing authorities for automatic exchange with the US.
- Both Model 1 and Model 2 provide that FFIs are generally not required to withhold on payments to recalcitrant account holders. However, Model 2 does require withholding where account holder information requested by the IRS is not exchanged by the partner country tax authorities within six months from the receipt of the request. Model 1 does not include such a requirement.
- Unlike Model 1, Model 2 does not have a reciprocal version which provides that the US government would share information currently collected on accounts held in the US by residents of partner countries. However, the Model 2 agreement does have a provision which acknowledges that the US is willing to negotiate for a reciprocal provision, subject to the parties having determined that the standards of confidentiality and other prerequisites for such cooperation are fulfilled.

PwC Observation: *With the introduction of Model 2, it is unclear whether there will be multiple versions of the FFI Agreement – for example, one for FFIs operating under Model 2 and another for those operating under the regulations. As there are provisions where the IGA is silent, such as the withholding on non-participating FFIs, it is unclear what the interplay will be between the final regulations, an FFI agreement, and the IGA.*

Detailed discussion

The relevant provisions of Model 2 are as follows:

Registration

FFIs resident in Model 2 partner countries will be required to both register with the IRS and comply with requirements of the FFI Agreement. Under Model 1, partner country FFIs will not be required to comply with the requirements of the FFI Agreement. Instead, they will only be required to follow specified registration guidelines and are deemed to be complying with and not subject to withholding under FATCA if they abide by the requirements under Model 1.

PwC Observation: *These split registration requirements could cause difficulties for FFIs with multiple branches in several jurisdictions, each of which could be treated as a separate FFI for IGA purposes.*

Non-consenting account holders

Model 2 introduces the concept of a 'non-consenting US account' which is an account that meets all of the following criteria:

- It is a pre-existing account (an account in existence as of December 31, 2013).
- The partner country FFI classifies it as a US account.
- The laws of the partner country prohibit reporting of information to the IRS absent consent by the account holder.
- The reporting FFI has requested, but has not received, the account holder's consent to report or its tax identification number (TIN).
- The partner country FFI has reported, or was required to report, aggregate account information pursuant to the Model 2 agreement.

Model 2 requires that partner country FFIs request from the US holders of pre-existing accounts, US TINs and consent to report certain information to the IRS. They are required to simultaneously inform such account holders in writing that, if US TINs and consent are not provided, aggregate information about these accounts will be reported to the IRS, information about the account may be included in a group request by the IRS for specific information about the account, the account information will be transmitted to the FATCA partner, and the FATCA partner may exchange this information with the IRS.

Model 2 also requires an FFI to make a similar request for consent to report and provide similar notice with respect to each pre-existing non-participating financial institution (NPFI) to which the FFI expects to make a payment of a foreign reportable amount in calendar years 2015 and/or 2016.

***PwC Observation:** Presumably the requirement to provide notice to the account holder and NPFI regarding the consequences of not providing a US TIN and/or consent is meant to encourage the account holder and NPFI to provide the information up front. Failure to provide their TIN and/or consent will not prevent the IRS from obtaining detailed information about the account or NPFI.*

Reporting

Model 1 provides that partner country FFIs will report information on US accounts to partner country tax authorities. Partner countries will then automatically share that information with the IRS. In contrast, Model 2 requires direct reporting by partner country FFIs to the IRS. This includes aggregate reporting of recalcitrant, or non-consenting, accounts (accounts whose owners did not waive local law restrictions on FATCA reporting). Where the IRS receives the aggregate information, Model 2 provides that it can request more specific account holder information from the partner country tax authorities. The partner country tax authorities must obtain this information from the partner country FFI and respond to the IRS request.

Withholding

Under Model 1, FFIs resident in FATCA partner countries will generally not be required to withhold tax under FATCA on recalcitrant account holders. An FFI located in a Model 2 partner country is similarly not required to withhold tax on non-consenting account holders provided (i) the FFI meets its general obligations under Model 2 (*i.e.*, enters into an FFI agreement, identifies and documents account holders, seeks waivers of local bank secrecy laws, etc.), and (ii) the Model 2 partner country tax authorities comply with requests for information on non-consenting account holders within six months of the request. If either of these conditions is not satisfied, non-consenting account holders will be treated as recalcitrant and will be subject to withholding.

Reciprocity

The reciprocal version of Model 1 requires that the IRS share information, with partner country tax authorities on an automatic basis, about partner country tax residents that maintain accounts at US financial institutions (USFIs).

Model 2 does not have a reciprocal provision. Notwithstanding, Model 2 provides for the continued exchange of information between the US and partner country tax authorities pursuant to existing tax treaties or tax information exchange agreements. It also provides that the US is willing to negotiate a reciprocal arrangement if a Model 2 partner country wishes to do so in the future.

***PwC Observation:** Prior to the US sharing account information about residents of a partner country, a determination will be made to ensure that the recipient government has robust protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes.*

New individual accounts

Model 2 partner country FFIs must obtain a self-certification from new account holders regarding their US or non-US status, and must also confirm the reasonableness of that self-certification based on other information obtained by the partner country FFI. If there is a change in circumstances with respect to a new account that causes the partner country FFI to know, or have reason to know, that the original self-certification is incorrect or unreliable, the partner country FFI cannot continue to rely on the original self-certification, and must obtain a new valid self-certification that establishes whether the account holder is US. If a new self-certification is not provided, the account will be treated as a non-consenting account, and will be subject to aggregate reporting.

Some actions to think about

Companies and stakeholders should proactively analyze how the Model 2 concepts may affect their preparation for FATCA compliance. The following is a non-exhaustive list of items to consider:

- Continue monitoring progress of IGA negotiations and agreements in various jurisdictions.

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- Incorporate the IGAs' specific requirements into project plans and solution designs for 2013. In particular, requirements should be tailored to specific businesses or jurisdictions impacted by IGAs.
 - Reprioritize and revise plans to manage local law restrictions (e.g., data privacy, ability to withhold).
 - Define an approach for identifying requirements and operational differences between IGAs and FATCA regulations in previously developed documentation.
 - Identify Centers of Excellence or shared service hubs that may support FFIs in IGA partner countries and other countries to identify operational processes and information technology systems that may be impacted.

Additional Background

For additional background, see these previous Global IRW Newsbriefs:

- [*Treasury releases model intergovernmental agreement for implementing FATCA*](#)
- [*Treasury issues separate joint statements with Japan and Switzerland to facilitate the implementation of FATCA*](#)
- [*United States and United Kingdom Sign First Bilateral FATCA Intergovernmental Agreement*](#)
- [*US Treasury expects finalization of more FATCA intergovernmental agreements by year-end*](#)

For more information, please contact:

Eric Crawford (876) 932-8323 eric.crawford@jm.pwc.om

Brian Denning (876) 932-8423 brian.denning@jm.pwc.com

Adrian Tait (876) 932-8429 adrian.tait@jm.pwc.com

Gordon Webster (876) 932-8443 gordon.s.webster@jm.pwc.com

Dominick Dell'Imperio (646) 471-2386 dominick.dellimperio@us.pwc.com

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