

Client Alert.

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Treasury Releases FATCA Intergovernmental Model Agreements

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On July 26, 2012, the U.S. Treasury Department (“Treasury”) released two model agreements that reflect the intergovernmental approach outlined in Treasury’s February joint statement with France, Germany, Italy, Spain, and the United Kingdom as an alternative to complying with the Foreign Account Tax Compliance Act (“FATCA”).¹

The model agreements would be entered into between the U.S. and other countries (“FATCA Partners”) and establish a framework for foreign financial institutions (“FFI”) to report certain account information (as required under FATCA) to the relevant tax authorities of the FATCA Partner.² Each model agreement contains an annex describing due diligence obligations for identifying and reporting on U.S. accounts and on payments to certain non-participating financial institutions. Once the necessary information is obtained, the FATCA Partner will transmit such information automatically to the Internal Revenue Service (“IRS”) under either existing bilateral tax treaties or tax information exchange agreements. Since, as provided under the model agreements, the FATCA Partners will require their financial institutions to participate and obtain information as required under FATCA, such financial institutions will generally be treated as participating FFIs and therefore not subject to FATCA withholding.

The model agreements were released in two versions: a reciprocal version and a non-reciprocal version. Under the reciprocal version, the IRS will collect and exchange information on certain accounts that are held with U.S. financial institutions by residents of the FATCA Partner. This version also includes a commitment by the U.S. government to pursue regulations and support legislation that would achieve the proper levels of automatic exchange. The IRS will not be obligated to transmit information to the FATCA Partner under the non-reciprocal version.

The model agreements modify certain FATCA rules, including the rules regarding recalcitrant account holders and the treatment of FFI affiliates. Whereas payments made by participating FFIs to recalcitrant account holders would be subject to withholding under FATCA; under the model agreements, the withholding obligations with respect to recalcitrant account holders will be suspended and therefore the FATCA Partner financial institution will not be required to withhold tax with respect to payments made to an account held by a recalcitrant account holder. With regard to the treatment of affiliated FFIs, the FATCA provisions generally require all members of a foreign financial group to be participating or deemed-compliant FFIs and the proposed regulations provide a two-year transition period if necessary pursuant to local law restrictions. However, under the model agreements, if a FATCA Partner financial institution has a related entity or branch that is a non-participating FFI operating in a jurisdiction that prevents such related entity/branch from becoming a participating FFI or deemed-compliant FFI, the FATCA Partner financial institution will continue to be treated as a

¹ For background on FATCA, please see our prior client alerts at <http://www.mofo.com/files/Uploads/Images/100910FACTA.pdf>, <http://www.mofo.com/files/Uploads/Images/110420-IRS-Guidance-FATCA.pdf>, <http://www.mofo.com/files/Uploads/Images/110719-IRS-Announces-Phased-Implementation-of-FATCA.pdf>, and our FATCA website at [KNOWFatca.com](http://www.KNOWFatca.com).

² Branches of an FFI located within a FATCA Partner are treated as FFIs of that FATCA Partner regardless of where the FFI is incorporated.

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participating FFI, regardless of the related entity/branch's non-compliance, subject to certain requirements that are intended to avoid abusive situations, including the identification by the related entity/branch of its U.S. accounts.³ Further, the model agreements do not require certification by a responsible officer of an FFI, as is otherwise required under FATCA.

Parties to the model agreement will be committed to enhancing the effectiveness of the information exchange process and transparency, which includes working together to develop a practical and effective alternative approach to "foreign passthru payments."⁴ Additionally, the parties will be committed to working with other partners, the Organization for Economic Cooperation and Development and the European Union, to adapt the model agreement to a common model for automatic information exchange.

For all FATCA updates, including both versions of the model agreement, see our FATCA website at KNOWFatca.com.

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³ Provided the identification of U.S. accounts is permissible under local law.

⁴ Although not yet defined, "foreign passthru payments" are payments made by a participating FFI to the extent that such payment is attributable to a withholdable payment (e.g., payments of U.S. source interest and dividends and gross proceeds from the sale or other disposition of any property of a type that can produce U.S. source interest or dividends).