



Advance pricing agreements

The why and the how of here and now



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I. Introduction

The Internal Revenue Service (IRS) established its Advance Pricing Agreement (APA) program in 1991 as a common-sense forum for resolving difficult transfer pricing issues through prospective negotiation. Certainty of transfer pricing outcome and reasonable compliance were the main goals of early participants in the process. The APA program was located in the IRS Office of Chief Counsel (International), was composed of three professionals and a director, and was governed by Rev. Proc. 91-22, 16 typewritten pages of straightforward procedural guidance.

Fast forward 26 years. In the post-base erosion and profit shifting (BEPS) transfer pricing world, APAs continue to resolve difficult transfer pricing issues through prospective negotiation, and the twin goals of transfer pricing certainty and reasonable compliance still underlie every APA. Yet more varied and complex goals have developed over the years, and the APA program and APA process have also changed. The APA program changed substantially in 2010 with its move from the IRS Office of Chief Counsel to the IRS Large Business and International division (LB&I), where it was merged with the competent authority function to create the Advance Pricing and Mutual Agreement (APMA) program. Staffing increased drastically, peaking at 55 team leaders and 22 economists in 2014. Probably the most significant recent changes to the APA process itself occurred under Rev. Proc. 2015-41 (over 80 pages of guidance), with changes to the information required, mandatory prefiling conferences, team structure, and the procedural breadth of issues.

Although APAs have changed a lot over the years, the need for the APA process as an alternative to the regular transfer pricing enforcement process has only intensified. This paper provides an overview of modern APAs, taxpayers' motivations for pursuing them, and the current process for negotiating one. Some historical context is also included to illustrate evolving taxpayer motivations and developments in the APA process itself.

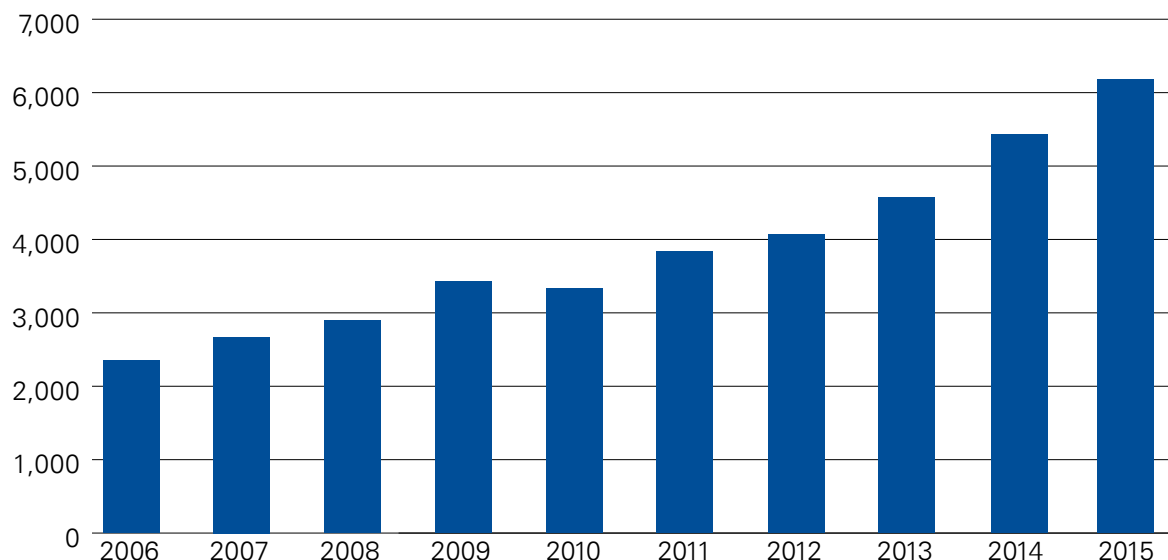
II. The why: Historical and current motivation to pursue an APA

A. Changes to the transfer pricing enforcement environment

The APA process is an alternative dispute resolution process, offering taxpayers an alternative to the regular transfer pricing enforcement process, which includes an examination, an administrative appeals process, the mutual agreement procedure (MAP), and litigation for resolving transfer pricing disputes. The desirability of an APA is an intrinsically relative determination, best evaluated in comparison to the desirability of the regular transfer pricing enforcement process. Accordingly, choosing whether to seek an APA requires careful consideration of recent changes in global transfer pricing enforcement, including the increase in the number of countries actively pursuing transfer pricing enforcement as well as anticipated changes from the Organisation for Economic Co-operation and Development's (OECD) BEPS project.

Each year, more countries actively enforce transfer pricing laws and regulations, greatly increasing taxpayer exposure to transfer pricing examinations. This increase in global transfer pricing enforcement has inevitably led to an increase in transfer pricing disputes. Global inventories of disputes between treaty partners, which are largely composed of transfer pricing issues, have increased from 2,352 cases in 2006 to 6,176 cases in 2015.¹

Global inventories of MAP cases





In 2015, the OECD released the Final BEPS Reports, detailing 15 action items covering a wide-ranging list of issues in international taxation, with a heavy emphasis on transfer pricing.² BEPS Actions 8, 9, and 10 encourage transfer pricing outcomes to reflect value creation—Action 8 focuses on intangibles, Action 9 on risks and capital, and Action 10 on high-risk transactions.³ Action 13 sets a minimum standard whereby companies with at least €750 million in revenues file a country-by-country (CbyC) report showing their revenues, profits, taxes, number of employees, assets, capital, and earnings by country. In addition, it recommends that countries require companies to prepare a “master file” providing narrative and financial information on the entire business of the multinational group.

The OECD has acknowledged that BEPS-related changes to transfer pricing, especially the CbyC reporting requirements, are likely to produce a large increase in the number of transfer pricing disputes between treaty countries.⁴ Both taxpayers and countries have expressed concern regarding the ability of governments to keep up with BEPS-created transfer pricing disputes. The measures developed under Action 14 are intended to strengthen the effectiveness and efficiency of the MAP process.⁵

The IRS has also become more active in pursuing transfer pricing issues in examination and beyond. A recent IRS memorandum stated that the International Business Compliance and Transfer Pricing units of its LB&I division had 1,060 cases under examination as of December 31, 2013, involving between \$90 billion and \$194 billion of estimated potential adjustments.⁶ The IRS also has a large number of transfer pricing cases under the jurisdiction of the U.S. Tax Court.⁷

B. Benefits sought through APAs

Historically, taxpayers approached the APA process looking for the twin goals of transfer pricing certainty and practical compliance. This section will discuss these basic goals and some of the refinements and additional goals that have developed over the lifetime of the APA process.

1. Certainty – No § 6662 penalty

Internal Revenue Code (IRC or Code) subsections 6662(e) and (h) set forth penalties of 20 and 40 percent for certain increases in U.S. income tax attributable to Code § 482 adjustments. Ordinarily, taxpayers are required to create contemporaneous documentation on an annual basis to support their transfer prices if they wish to avoid penalty exposure.⁸ However, taxpayers that have negotiated APAs with the IRS face less stringent documentation requirements and need only create documentation sufficient to support compliance with the APA in order to avoid the § 6662 penalties. In fact, taxpayers that were previously covered by an APA can rely for penalty purposes on the agreed APA methodology for a few years afterwards.⁹ An additional benefit of an APA is the elimination of the need to update annually the comparable company information used in preparing the taxpayer's transfer pricing documentation.

2. Certainty – No double tax

Taxpayers can, and often do, experience inconsistent interpretation and enforcement of transfer pricing rules from country to country, with the attendant risk of double taxation. While taxpayers can seek after-the-fact relief from double taxation among treaty partners through the competent authority process, this exposure to double tax can be eliminated prospectively by negotiating a bilateral APA. On the other hand, unilateral APAs may in some cases increase the incidence of double tax: the BEPS project requires countries that have provided a taxpayer with a unilateral APA initiate a compulsory spontaneous exchange with "affected countries," making the imposition of double tax more likely.¹⁰

3. Certainty – Characterization, transfer pricing methodology, and range

For most taxpayers, obtaining certainty regarding transfer price is the most important benefit sought via the APA process. Knowing the tax impact is important, but companies also benefit from the ability to make operational decisions without concerns about subsequent transfer pricing adjustments. As long as the taxpayer complies with the APA, the taxpayer's transfer pricing will be considered arm's length and thus free from adjustment under § 482 of the Code.¹¹ Further, any IRS examination of transactions covered by the APA is limited to establishing the taxpayer's compliance with the APA.¹²

The value of this particular benefit has been reduced somewhat by the change in Rev. Proc. 2015-41, which now requires that taxpayers agree to APMA requests regarding interrelated issues, rollback years, and statute extensions. The potential for APMA to expand the years or issues covered gives the taxpayer less certainty of the coverage and outcome in the APA process.¹³

4. Certainty – No uncertain tax position

Since 2009, corporations have been required to report uncertain tax positions, including transfer pricing determinations, on Schedule UTP if those positions would affect U.S. federal income tax liabilities.¹⁴ Taxpayers have a similar financial reporting requirement under ASC 740-10 (formerly known as FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes—An Interpretation of FASB Statement No. 109*). Taxpayers have been able to achieve total certainty and avoid these reporting requirements after the resolution of an APA and can achieve some level of certainty after simply filing an APA request.

5. Reasonable compliance – Time and cost savings

Transfer pricing examinations can be time consuming and expensive. Transfer pricing disputes involve complex factual and economic issues requiring subjective judgment, and the confrontational approach that may develop in an examination can produce an impasse between a tax authority and the taxpayer. During a transfer pricing examination, the tax authority will request extensive information about the taxpayer and the related parties involved in transactions with the taxpayer. The tax authority's information requests often require the taxpayer to expend significant time and money providing great quantities of information, only some of which may ultimately be relevant to the transfer pricing issues. In contrast, the APA process is generally expected to take less time to complete than a transfer pricing examination and all related administrative appeals efforts.

Historically, the transfer pricing examination avoided by the pursuit of an APA is often an IRS examination. With the significant increase over the last decade of countries that actively enforce transfer pricing and the further increased likelihood of examinations under BEPS, the likelihood of a foreign-initiated adjustment has greatly increased, thus increasing the value of pursuing a bilateral APA to avoid examinations and adjustments.

6. Certainty and reasonable compliance – Customs issues

U.S. Customs and Border Protection (CBP) also has an interest in making correct transfer pricing determinations in tangible transactions between related parties. Differences between the statutory rules and enforcement make coordination of transfer pricing and customs "valuation" issues difficult, and CBP has made it clear in rulings that a transfer pricing study or APA, without more, would be unlikely to satisfy CBP's standards. However, a small number of APAs has been informally coordinated with CBP to produce a CBP ruling that the relationship of the related parties did not influence the price between them, and taxpayers wishing to obtain certainty from a customs standpoint as well should consider pursuing this option.

7. Certainty and reasonable compliance – "Benchmark APAs"

Although the benefits of an APA are formally limited to the transactions covered by the APA document, a small group of very large multinational companies has for years found it useful to negotiate a bilateral APA between two experienced treaty partners in order to set a benchmark for the appropriate transfer price in similar transactions with related parties in other countries.¹⁵ If approached by a third country regarding a transfer pricing examination of the similar transactions, the company can share the bilateral APA and supporting information with the new examining country to demonstrate that the likely outcome of a principled negotiation would produce no adjustment. Geographic differences aside, the attraction of a transfer price agreed between two experienced treaty partners on similar transactions is hard to deny. This "benchmark" approach has become desirable because very large companies are exposed to divergent price determinations with regard to similar transactions in multiple countries that actively pursue transfer pricing enforcement.¹⁶

With the adoption of CbyC reporting by a number of countries, many more companies will find benchmark APAs to be a viable option. The anticipated increase in transfer pricing examinations and double tax following the adoption of CbyC reporting will subject many new companies to the same multijurisdictional transfer pricing scrutiny to which very large multinationals have already been subjected. In this environment, a "benchmark" APA to address similar transactions may make sense for many more companies.

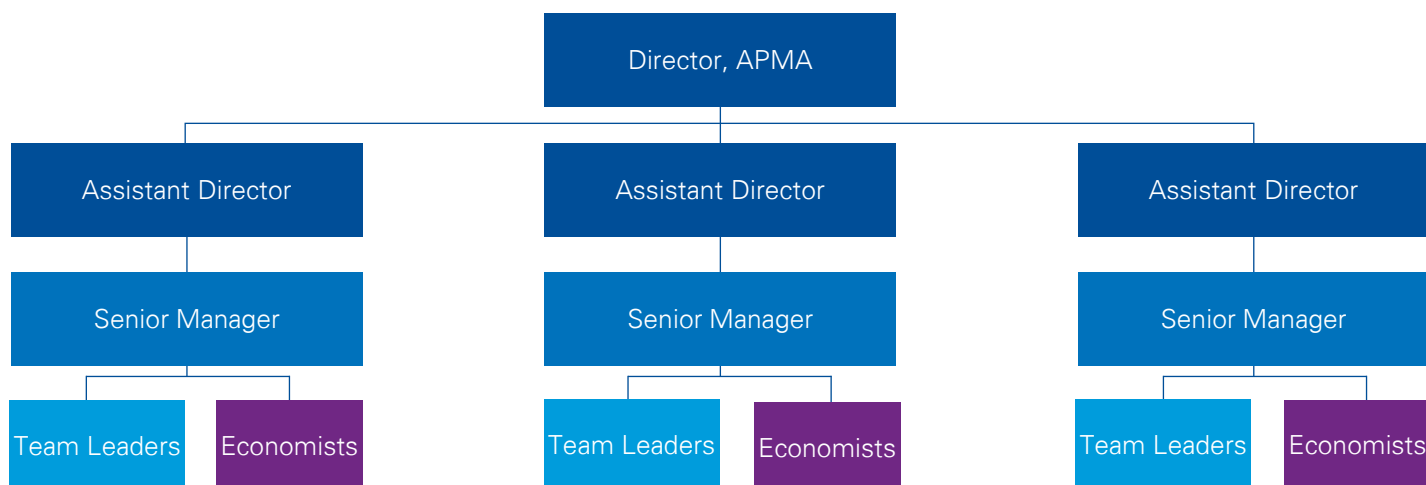
III. The how: Negotiating an APA

A. The APA program

In the 1980s, the IRS increased its transfer pricing enforcement efforts and anticipated a corresponding increase in disputes with taxpayers. Taxpayer groups encouraged the IRS to consider an alternate approach to transfer pricing compliance. In 1991, the IRS established the APA program, governed by Revenue Procedure 91-22.¹⁷ The APA program was located in the Office of Chief Counsel (International) and was composed of three professionals and a director.

The first major change to the structure of the APA program occurred in 2012. At that time, the APA program was still in the IRS Office of Chief Counsel, with 16 team leaders and eight economists.¹⁸ The program was moved to the IRS LB&I division, where it was merged with the competent authority function to create the APMA program.¹⁹ This move, coupled with substantial new hiring, increased staffing to 55 team leaders and 26 economists by the end of 2012.²⁰

The illustration below summarizes APMA's current organizational structure:



The revised APMA structure includes the following groups with a country focus:

Group	Countries
1	Vacant
2	Economists and Israel
3	Australia, Austria, Canada, Kazakhstan, Netherlands, and New Zealand
4	Indonesia, Japan, South Africa, and Thailand
5	Canada, India, Italy, and Luxembourg
6	Vacant
7	Denmark, India, Ireland, Norway, Sweden, Switzerland, and the United Kingdom
8	Argentina, Canada, Caribbean, China, Eastern Europe, Germany, Mexico, Portugal, Puerto Rico, Spain, and Venezuela
9	Belgium, Canada, France, Greece, Hungary, and India
10	Guam, Japan, Korea, Morocco, and Philippines
11	Economists
12	Economists

Following the reorganization, APMA pursued a focus on timeliness of resolution that produced a record number of APAs completed in 2012 and 2013, 140 and 145, respectively.²¹ However, staff turnover and issue complexity resulted in only 101 APAs resolved in 2014.²² The number of APAs completed by APMA in 2015 was consistent with 2014, as 110 APAs were concluded, and 86 were completed in 2016.²³

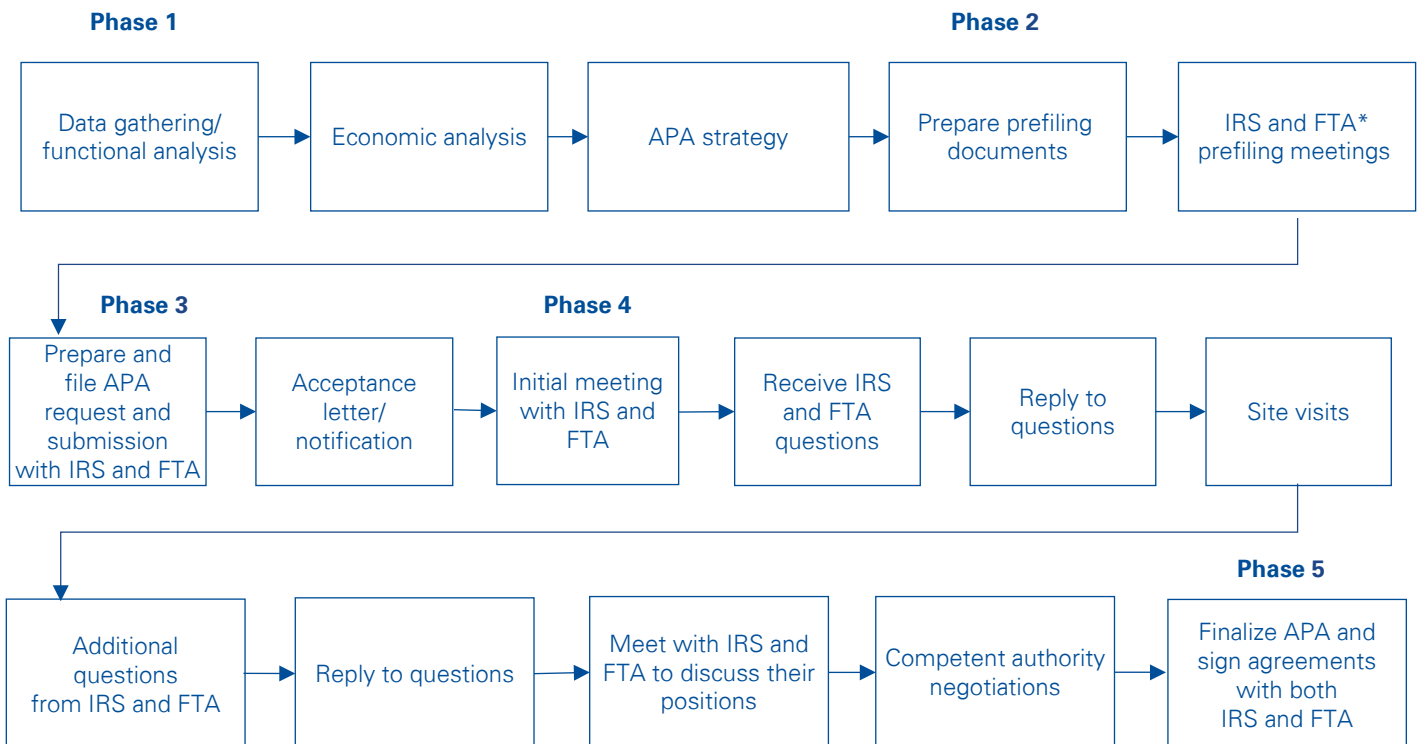
B. The APA negotiation process

1. In general

Revenue Procedure 2015-41 sets forth the current procedures the taxpayer must follow to negotiate an APA. In this process, taxpayers and the IRS reach a prospective agreement regarding transfer pricing issues through negotiation. The APA process employs cooperative and principled negotiations,²⁴ and both the IRS and taxpayer APA teams are expected to take reasonable positions consistent with objective standards.

The APA process can be seen as proceeding in five phases: (1) APA strategy and transfer pricing analysis, (2) prefilling conference, (3) formal APA request, (4) evaluation and negotiation of the APA, and (5) administration and renewal. As the process progresses, the interaction evolves from a general discussion of the taxpayer's industry and business to analysis of the specific transactions, and from negotiations regarding the appropriate pricing approach and selection of comparable companies to drafting and administering the agreement.

The illustration below provides a summary of the typical process of obtaining a bilateral APA.



* Foreign tax authority



2. Taxpayer's APA team

The APA process involves a series of negotiations between professionals trained in different disciplines: law, accounting, and economics. Most taxpayer APA teams include both in-house personnel and outside representatives.

Lead negotiator – The lead negotiator is the general spokesperson and coordinator for the taxpayer's APA team. The lead negotiator delegates responsibility for specific issues to other members of the team but bears overall responsibility for the taxpayer's negotiating position and procedural decisions. The lead negotiator should be authorized to practice before the IRS.

Tax lead – The tax lead is responsible for the substantive correctness of the taxpayer's positions. The lead negotiator may also function as the tax lead.

Economic lead – The economic lead is responsible for developing and defending the functional and risk analysis, the selection of the transfer pricing method (TPM), the selection of the comparables, and the adjustments to the comparables.

Factual lead – The factual lead is responsible for explaining the taxpayer's industry, organization, and transactions. The factual lead also obtains the internal information necessary to respond to government questions. The factual lead is often an in-house tax professional familiar with operations.

3. Taxpayer goals

As discussed above, taxpayers may enter the APA process with several goals. To achieve those goals, they should be identified and prioritized. A clear understanding and ranking of goals typically allows more effective preparation for the APA process.

4. Transfer pricing analysis

The transfer pricing analysis performed for an APA generally requires the same or a greater effort and level of detail and precision than is required to produce transfer pricing documentation. In fact, should the taxpayer and the IRS fail to conclude an APA, the transfer pricing analysis can, with minor adjustments, be used as a part of the taxpayer's contemporaneous documentation.²⁵

5. Prefiling conferences

The first step in pursuing an APA is to determine whether a prefiling conference (PFC) is needed. Rev. Proc. 2015-41 provides for two types of PFCs: mandatory or optional. A PFC is mandatory if any of the following occur:

- The taxpayer seeks a unilateral APA to cover an issue that could be covered under a bilateral or multilateral APA
- The taxpayer desires permission to file an abbreviated APA request
- The proposed covered issue(s) will, or could reasonably be expected to, involve a license or other transfer of intangibles in connection with the development of intangibles under an intangible development arrangement; a global trading arrangement; a business restructuring or the use of intangibles whose ownership changed as a result of a business restructuring; or unincorporated branches, pass-through entities, hybrid entities, or entities disregarded for U.S. tax purposes.²⁶

If a PFC is mandatory, the taxpayer must submit a prefiling memorandum that identifies the reason(s) the taxpayer is required to file a memorandum. The length and content of the memorandum must be appropriate to the size and complexity of the covered issue(s) proposed by the taxpayer. It must be primarily in memorandum form but may be accompanied by diagrams, slides, spreadsheets, and similar supporting materials.²⁷ An optional prefiling memorandum must likewise have a length and content appropriate to the substantive or procedural issues the taxpayer wishes to raise with APMA but may be in a format chosen by the taxpayer.²⁸ The prefiling memorandum must be provided to APMA prior to requesting a PFC.

Whether mandatory or optional, a prefiling memorandum must also:

- State the taxpayer's name and employee identification number (EIN), unless the taxpayer makes a valid request for an anonymous PFC
- State that the taxpayer seeks a PFC and the issues the taxpayer wishes to discuss
- Propose at least three possible dates for a PFC at least two weeks after the date that the prefiling memorandum is submitted

- Include covered issue diagrams if the prefiling memorandum is mandatory
- If the memorandum is mandatory and the taxpayer requests a unilateral APA to cover any issue that could be covered under a bilateral or multilateral APA under the applicable tax treaty(ies), explain why the taxpayer believes that a unilateral APA is appropriate to cover that issue
- If the memorandum is mandatory and is submitted pursuant to sections 3.02(4)(b) and 3.04(2)(a) to seek permission to file an abbreviated APA request, (i) specify any information, documents, or other materials the taxpayer proposes to omit from its APA request; (ii) present the taxpayer's arguments that the information, documents, or other materials the taxpayer proposes to omit from its APA request are not necessary for APMA's evaluation of the APA request, including if applicable the taxpayer's arguments that the applicable law, facts and circumstances, economic conditions, proposed covered issue(s) and method(s), and other factors relevant to the proposed APA years are substantially the same as those relevant to any current APA or competent authority resolution (see sections 5.01 and 8); and (iii) in the case of a proposed renewal APA, summarize in a table the results and adjustments under the current APA, in absolute and percentage terms (e.g., operating margin), with comparison to any arm's-length points or ranges specified in the APA, and also summarize any proposed changes in terms from the current APA
- List the name and contact information for the taxpayer's point of contact and, unless the prefiling memorandum is submitted on an anonymous basis, provide, as necessary, a Form 2848 authorizing the point of contact to represent the taxpayer in connection with the APA request or a Form 8821 authorizing the point of contact to inspect or receive confidential tax information about the taxpayer in connection with the APA request
- Identify all open back years of the taxpayer and which of such years, if any, are under examination by the IRS and the names of IRS employees involved in the examination.²⁹

APMA also requires the following information on the first page of the PFC request:

- Whether the taxpayer is considering a unilateral, bilateral, or multilateral APA request
- The foreign country or countries implicated by the APA request
- The names of (i) team leaders, (ii) economists, and (iii) managers who participated in an immediately prior APA request and in all ongoing APA requests
- The years involved
- The transaction amount(s)
- The taxpayer's city and state
- The meeting length requested.³⁰

APMA will notify the taxpayer whether it accepts or declines the taxpayer's request for a PFC. A copy of these procedures detailing how to file PFC requests is included as Exhibit 1.

Named versus anonymous PFC

Taxpayers may be hesitant to discuss a potential APA due to the concern that a failure to pursue an APA may trigger an examination. To accommodate such taxpayers, the IRS permits PFCs to be held with the taxpayer's representatives on an anonymous basis.³¹ If the taxpayer has been involved or is currently involved in a difficult transfer pricing examination, there may be some tactical advantage to pursuing the PFC anonymously, since no representative of the district examination office will attend.

Taxpayer and taxpayer representative role in PFC

In the PFC, the taxpayer or its representative is expected to provide an explanation of the relevant facts, covered transactions, and proposed TPM. Typically, taxpayers use the PFC submission as an agenda for the PFC. The taxpayer explains the industry; the taxpayer's organization, functions, and risks; the proposed covered transactions; the proposed TPM (and the previous TPM, if different); comparable selection criteria; and proposed data adjustments. Based on this presentation, the taxpayer requests the APMA program's response to the proposed APA and recordkeeping requirements and any concerns or questions.

Government role in PFC

The APMA personnel read the PFC submission before the PFC to develop a familiarity with the taxpayer's facts and the proposed APA. The taxpayer's presentation at the PFC further familiarizes the APMA team and allows them to ask general background questions. The IRS representatives can then specifically respond, based on APMA's experience with similar cases, to the taxpayer's proposed APA regarding the acceptability of the TPM, comparable search criteria, data adjustments, recordkeeping requirements, competent authority issues, the level of requisite additional information, and any other concerns. Note, however, that while the IRS's comments during a PFC are often very specific, the APMA program reserves its right to change its views and positions based on its review of the taxpayer's complete APA request.





6. Expanding to address interrelated issues

APMA may require, as a condition of continuing APA process, that the taxpayer expand the proposed scope of APA request to cover “interrelated matters.”³² This includes additional interrelated issues, additional taxable years including potential rollback years, and additional treaty countries. Rev. Proc. 2015-41 includes these further examples:

- Intercompany license of intangible property that was sold by the licensee to the licensor in an earlier year: APMA may believe the license should be evaluated consistent with the analysis performed for the earlier sale.
- Compensation for services provided by one company for the benefit of a related party when the services use intangible property that had been transferred from the service provider to the service recipient as part of a business restructuring: APMA may require the services to be valued the same way they were in connection with the restructuring.
- Value of a platform contribution transaction in a cost-sharing arrangement: APMA may ask whether the intangible development costs under the arrangement are being properly shared.
- Price to be paid by a U.S. distributor to a controlled foreign manufacturer for tangible goods the U.S. distributor resells to another controlled distributor in a third country: APMA may need to evaluate the price the foreign distributor pays to the U.S. distributor before agreeing to an APA on the price paid by the U.S. distributor to the foreign manufacturer.
- Other transactions that involve interrelated matters, such as global trading arrangements or transactions involving hybrid or disregarded entities.³³

With respect to interrelated matters, APMA will consider the views of the taxpayer and the applicable foreign competent authority and communicate to the taxpayer any concerns about interrelated matters and potential scope expansion at the earliest time possible.³⁴

7. Formal APA request

General

After the PFC, the taxpayer should understand the IRS’s initial reaction and areas of concern. The taxpayer must file the APA request within the time prescribed by statute for filing its federal income tax return for the first year of the proposed APA term.³⁵ If the taxpayer receives an extension to file its federal income tax return, it must file its APA request no later than the actual filing date of the return. The APA will be considered filed on the date the required user fee is paid, provided that a substantially complete APA request is filed with the APMA program within 120 days of the date that the user fee was paid for the first proposed APA year.³⁶ The APMA director will consider extending this deadline only in unusual circumstances. Furthermore, the director may consider the request to have been filed on a date subsequent to its actual filing in the event the APMA program’s evaluation of a request is delayed due to a lack of responsiveness or timeliness by the taxpayer.³⁷ An additional filing deadline applies in the case of bilateral and multilateral APA requests. In order to better coordinate the timing of discussions on bilateral and multilateral APAs with foreign competent authorities, the taxpayer should file a complete bilateral or multilateral APA request no later than 60 days after a corresponding bilateral or multilateral request proposing to cover substantially the same coverable issue(s) and APA years has been filed with a foreign competent authority.³⁸

	User fee structure (in U.S. dollars)
Regular APA request	60,000
Renewal of APA request (routine/nonroutine)	35,000/60,000
Small case APA request	30,000
Amending APA request or a completed APA	12,500

Taxpayers must pay their APA user fees electronically via www.pay.gov.³⁹

The user fee form requires the entry of the following U.S. taxpayer information:

- Name
- Tax identification number (TIN) or EIN
- Address (including city, state, and zip code)
- Power of attorney/contact person's name and phone number
- Type of request (original, renewal, or amendment)
- Type of agreement (unilateral, bilateral, or multilateral)
- Proposed term
- Foreign country(ies) involved.

Taxpayers should print a copy of the receipt generated on the last page and include a copy of both the completed form and the receipt with the APA submission.



Content of APA request

Rev. Proc. 2015-41 dictates the content of an APA request, which is more prescriptive than under the prior Revenue Procedure. New items include:

- Consent to extend statute of limitations – The taxpayer must provide a general consent to extend the statute of limitations for certain years.⁴⁰ When the APA request is filed, the remaining period of limitations for assessment of tax for each proposed APA year must be at least two years.⁴¹ If the remaining period of limitations for a proposed APA year is less than two years from such date, then the request must contain an executed general consent to extend the period of limitations for assessment of tax for the proposed APA year(s) to at least two years. In addition, the taxpayer and the IRS will execute consent agreements as necessary to extend the period of limitations for assessment of tax for each proposed APA year.⁴² Each required consent agreement will be either general or restricted, as specified in section 2.03 of the Revenue Procedure. A restricted consent will not be appropriate for a proposed APA year for which an issue other than the proposed covered issues is under ongoing or potential examination by the IRS.⁴³
- Projections – The taxpayer must estimate the dollar value of each issue in the proposed APA years.⁴⁴
- Covered issue diagrams – The taxpayer must include diagrams, charts, or similar depictions of its value chain and certain aspects of its legal, tax, and business structure as they pertain to the covered issues and to any interrelated matters APMA might reasonably consider.⁴⁵
- Noncovered issues – For each issue that is not a proposed covered issue, but is an issue that APMA might reasonably consider in analyzing the proposed covered issues, the taxpayer must provide a discussion of why in the interest of principled, effective, and efficient tax administration such issue need not be a covered issue, and of the extent to which such issue should be considered in the APA process.⁴⁶
- Segmentation of financial results – If the proposed covered method(s) is (are) applied to a subset of the assets, liabilities, income, and expenses in the financial statements, the taxpayer must provide a segmentation of the financial statements and describe in detail (i) those items in the segmented financial statements that have been allocated or apportioned to the applicable proposed covered issue(s) and to other issues, and (ii) the method(s) of allocation or apportionment applied.⁴⁷
- Draft APA – The taxpayer must provide a detailed discussion and explanation of the proposed APA terms and conditions as reflected in the draft APA submitted with the APA request, noting, in particular, any proposed APA terms and conditions that differ from the APA terms and conditions as reflected in the model APA.

Specific content

The information required to be included in the APA request is listed in Exhibit 2.

Signatures

The taxpayers' or the taxpayer's authorized representative must sign the APA request.⁴⁸

Copies and mailing

One original and eight copies of the APA request and any supplemental materials must be mailed or delivered to:

Deputy Commissioner (International)
Large Business and International Division
Internal Revenue Service
1111 Constitution Avenue, NW
SE:LB:IN:TTPO:APMA:M3-370
Washington, DC 20224

Attention: APMA

The APMA program office is physically located at:

SE:LB:TTPO:APMA
999 North Capitol Street, NE
Washington, DC 20003

The APA program also has offices located in Laguna Niguel, Los Angeles, and San Francisco, California with additional personnel located in New York and Chicago. Cases involving taxpayers located in the western states and Japanese cases are generally handled by the California offices.

8. Evaluation and negotiation

General

Upon the filing of a substantially complete APA request, the IRS will designate a team leader to oversee the APMA team's processing of the request. If the taxpayer participated in a PFC before filing the APA request, the IRS will generally select the team leader who presided over the PFC. The team leader will contact the taxpayer once APMA has determined that the APA request is complete and that the APA process should continue.⁴⁹ In most cases, the next step is an opening conference.⁵⁰ However, depending on APMA's experience and familiarity with the proposed covered issue(s) and method(s) and other aspects of the APA request, the APMA team may determine that an opening conference is not needed.⁵¹ Generally, the APMA team will forgo an opening conference only if it has no substantial disagreement with what the APA request proposes.⁵² If the APMA team decides to hold an opening conference, the APA team leader will work with the taxpayer to set a date for the conference.⁵³ The APMA team may request that the taxpayer provide responses to specific questions from the APMA team about the APA request before the opening conference or at the opening conference.⁵⁴ The APMA team leader may set or agree to a due date before the opening conference for such responses and may postpone the opening conference if the responses are not provided by that date.⁵⁵ After the APMA team receives the additional information from the taxpayer, it evaluates the information to determine the appropriate transfer pricing methodology and an acceptable range of results. The parties then attempt to reach an informal agreement on the taxpayer's request, followed by a formal agreement. The evaluation of the request does not constitute an examination or inspection of the taxpayer's books and records under §7605(b) or other provisions of the IRC.⁵⁶

The APMA program will schedule the evaluation and negotiation with the goal of completing a unilateral APA or completing the position paper within 12 months from the date the full request was filed.

APMA team

In a bilateral or multilateral APA, the APMA team will work with the taxpayer to develop a competent authority negotiating position that it can recommend for approval. For a unilateral APA, the APMA team will exert its best efforts to develop an APA that the APMA program can recommend for approval by the APMA director. The roles of the team members are as follows:

APMA team leader – The APMA team leader coordinates the IRS negotiating efforts and sets the tone of the negotiations. The leader works to coordinate the activities of the other IRS team members and to focus the negotiations on resolving the issues necessary to reach an agreement, applying the best method principles and a principled negotiation approach. In the context of a bilateral APA, the team leader is also responsible for negotiating the APA with the foreign competent authority.

APMA senior managers – The APMA program has 10 senior managers who assist the APMA director and assistant directors in managing the APA caseload. The senior managers are charged with reviewing the cases within their respective branch to ensure that § 482 is applied in a consistent manner. The senior managers who manage the economists are responsible for reviewing the economic analysis. In addition, the senior managers monitor the scheduling of individual cases to ensure that cases are processed in a timely manner. Senior managers also assist in resolving any differences of opinion between the APMA team leader, the economist, and field representatives.

APMA economist – The APMA economist is responsible for reviewing the functional and risk analysis, the comparables selection and adjustments, and the TPM proposed by the taxpayer. The APMA economist typically suggests modifications to the selection and adjustments of the taxpayer's proposed comparables. Occasionally, the economist will suggest changes in the TPM. Due to heavy caseloads, some cases will include an IRS economist from outside of the APMA program.

IRS field (examination) team – The APMA team generally includes an LB&I international examiner and LB&I field counsel from the IRS Operating Division that would otherwise conduct an examination of the taxpayer. If the taxpayer is currently undergoing a transfer pricing examination, the international examiner comes from the examination team conducting the transfer pricing examination. In addition, when the taxpayer is subject to a transfer pricing examination, the IRS field team may include the IRS examination team coordinator and others from the examination team with knowledge of the taxpayer, the taxpayer's operations, and its related-party transactions. The IRS field team assists other IRS team members to obtain a thorough understanding of the taxpayer's operations and activities, functions, and risks, and to evaluate the potential impact of a rollback of the APA TPM on the years under examination. This group will generally be provided an opportunity to review and comment on the U.S. position paper in the case of a bilateral or multilateral APA and on the proposed APA in the case of a unilateral APA.

APA case plan

The APA case plan was adopted by the APMA program to ensure that APA cases proceed in a timely fashion. Ordinarily, a case plan will be adopted to facilitate efficient processing of the taxpayer's APA request.⁵⁷ With or without a case plan, the APA team will endeavor to move through the APA process efficiently, given the scope and complexity of the proposed APA and the due diligence and analysis the APA team needs to undertake.⁵⁸ In preparing a case plan, the APA team and the taxpayer will discuss milestones, which will depend on the nature of the covered issue(s), the quality of the APA request and any responses already provided by the taxpayer, and the further due diligence and analysis required.⁵⁹ The time estimates for these milestones as reflected in a case plan are subject to revision.⁶⁰ The time required to achieve milestones can be affected by various factors including (a) the quality and

timeliness of information provided by the taxpayer; (b) the need to consider interrelated matters (see section 2.04(4)); (c) the emergence of unanticipated issues (for example, because of a change in the facts); (d) in the case of bilateral or multilateral APA requests, when the foreign competent authority(ies) are prepared to discuss the case; and (e) the ease with which an agreement can be reached with the taxpayer for unilateral APA requests or with the foreign competent authority(ies) for bilateral and multilateral APA requests.⁶¹ Formal imposition of the case plan differs from team leader to team leader.

Critical assumptions

The taxpayer requesting an APA must propose critical assumptions to support the APA. Critical assumptions are facts outside the control of the taxpayer or the IRS, the continued existence of which is material to the outcome of the TPM.⁶² Critical assumptions might include, for example, a particular mode of conducting business operations, a particular corporate or business structure, a range of expected business volume, or the relative value of foreign currencies. At least one critical assumption is included in each APA:

The business activities, functions performed, risks assumed, assets employed, and financial and tax accounting methods and classifications (and methods of estimation) of the taxpayer in relation to the covered transactions will remain materially the same as described or used in taxpayer's APA request. A mere change in business results will not be a material change.

Although most taxpayers view critical assumptions as protecting the IRS, they can also protect the taxpayer in the event unforeseen events cause the taxpayer to report a lower profitability. For example, a taxpayer concerned about the impact of a down economy could request a critical assumption that would allow the taxpayer to revise downward the profit expectations, should certain down economy triggering events occur.

9. Bilateral negotiations

Assuming successful negotiations between the taxpayer and the APMA team, the next stage of a bilateral APA consists of negotiations between treaty partners. At this point, the APA team will convey the substance of its views to the taxpayer, generally in a paper or memorandum having a length, content, and format appropriate to the scope and duration of the APA process and to the size and complexity of the proposed covered issue(s) and method(s) and other relevant facts and circumstances surrounding

the case.⁶³ In some cases, the APA team may present the paper or memorandum to the taxpayer for comment before the APA team formally presents its views to the foreign competent authority(ies).⁶⁴ In other cases, the APA team may issue the paper or memorandum simultaneously to the taxpayer and to the foreign competent authority(ies).⁶⁵ The taxpayer would then be invited to provide its comments to both the APA team and the foreign competent authority(ies) for their discussion and consideration in reaching a competent authority resolution.⁶⁶

Country	IRS meetings per year	Country	IRS meetings per year
Australia	1	Japan	3-4
Canada	3-4	Korea	2
China	1-2	Mexico	2
France	2	Netherlands	1
Germany	1-2	Switzerland	2
India	3-4	United Kingdom	2

The APMA team leader maintains regular contact with the foreign competent authority to ensure that both the U.S. and foreign competent authorities simultaneously develop an understanding of the APA request, including the relevant facts and the proposed TPM. In addition, the taxpayer's foreign affiliate should keep the foreign competent authority advised of progress in the U.S. APA negotiations and forward to the taxpayer APA team the concerns of the FTA. If these coordination activities go well, the final negotiations can proceed smoothly and relatively quickly.

Topics that arise in bilateral APA negotiations include the terms of the TPM, rollback to resolve transfer pricing issues in prior years, evaluations of the annual reports, and examinations of the taxpayer's compliance with the terms and conditions of the APA. Bilateral APAs may require simultaneous filing of annual reports with the IRS and the FTA.

Bilateral negotiations do not permit direct taxpayer involvement. However, the APMA team leaders generally both share a position paper and meet with the taxpayer to obtain information and listen to the taxpayer's position on issues. These meetings can be helpful to both the taxpayer

and the APMA team leader as the taxpayer remains involved in the process and the APMA team leader has access to taxpayer information.

Final agreement to the negotiated APA will be sought from the taxpayer, the IRS, and the foreign competent authority. If a competent authority agreement is not acceptable to the taxpayer, the taxpayer may withdraw the APA request. When competent authorities are unable to reach agreement, the IRS will attempt to negotiate a unilateral APA with the taxpayer.⁶⁷

A recent trend in international tax treaties is the inclusion of mandatory arbitration clauses that force the treaty partners into binding arbitration if they have been unable to reach a mutually agreeable resolution to double taxation within a stated period of time. Mandatory arbitration now applies in the United States' treaties with Belgium, Canada, France, and Germany, and the issue is included in protocols with Japan, Spain, and Switzerland that are pending Senate ratification. The arbitration clauses also provide comfort to taxpayers who now know that there is an incentive for the governments to strive to reach an agreeable solution.

10. Administration and renewal

The APA annual report

Once the APA has been finalized, certain administrative procedures must be followed, including the filing of an annual report that demonstrates (1) the taxpayer's good-faith compliance with the terms and conditions of the APA, (2) the calculation of any adjustments, and (3) satisfaction of any critical assumptions.⁶⁸ Taxpayers must submit an original and four copies of the annual report to the APMA office by the later of (a) 90 days after the time prescribed by statute for filing their federal income tax return for the year covered by the report, or (b) 90 days after the effective date of the APA.⁶⁹ In addition, the taxpayer must maintain books and records sufficient to enable the IRS to examine the taxpayer's compliance with the APA. Although this is a significant undertaking, it typically requires less effort than a documentation update.

Generally, the taxpayer will represent in the annual report that its activities have not materially changed from those described to the IRS during the APA negotiations and that the critical assumptions continue to be met. The taxpayer will then apply the TPM to its results for the year in question and compare those results to the results required by the APA, make any necessary adjustments, and reflect the computations and adjustments in a report provided to the IRS. The APMA team reviews the annual reports, contacting taxpayers if it is necessary to clarify or complete the information in the report.

APA primary adjustments

If the taxpayer's results for a year covered by an APA do not come within the range called for in the APA, the APA will generally require the taxpayer to make an adjustment to move its results to a point within the agreed range of results.⁷⁰ Whereas the § 482 regulations call for an adjustment to the median in the examination context, many APAs call for an adjustment to a point at the edge of the range. Furthermore, many APAs also allow for term tests that permit a primary adjustment to be made in the last year of the APA term, if the taxpayer's results fall outside of the agreed range. The taxpayer should reflect the APA primary adjustment on its timely filed return for the period in question.⁷¹ If the taxpayer is unable

to make the adjustments on its original return for the period, the taxpayer must reflect the adjustments on an amended return filed within 120 days of entering into the APA.⁷² APA primary adjustments are deemed to have been made on the last day of the tax year to which the adjustment applies.⁷³

Taxpayers may also face correlative adjustments and conforming adjustments when normal or routine adjustments are made by the taxpayer or the IRS. These adjustments may arise, for example, from the correction of computational errors. Such subsequent compensating adjustments will be subject to generally applicable IRC provisions relating to assessments, collection, and refunds of tax.⁷⁴

Examination

An APA provides protection against an in-depth transfer pricing examination. However, the existence of an APA does not prevent an examination per se, for the IRS may still require the taxpayer to establish (1) compliance with the APA's terms and conditions, (2) validity and accuracy of the annual report's material representations, (3) correctness of the supporting data and computations used to apply the TPM, (4) satisfaction of the critical assumptions, and (5) consistent application of the TPM.⁷⁵

The IRS will not reconsider the APA's TPM.⁷⁶ If the examination determines that any of these elements are not satisfied, the IRS's Service Operating Division must inform the APMA director. After consultations with the appropriate Service Operating Division personnel, APMA must then determine whether to enforce, revise, cancel, or revoke the APA.⁷⁷

Any audit adjustments not involving the interpretation of the TPM that affect the determination or computation of the operating results under the APA can be made without affecting the validity of the APA.⁷⁸ If agreed by the taxpayer, the corresponding adjustment to the transfer pricing is made through an additional compensating adjustment and treated as a subsequent compensating adjustment. Taxpayers have the right to challenge the proposed adjustments using normal administrative and judicial procedures.⁷⁹

Recordkeeping

Generally, taxpayers are required to maintain books and records sufficient to establish the correctness of their returns. In the APA context, taxpayers must maintain records sufficient to demonstrate their compliance with the terms and conditions of the APA. As part of APA negotiations, the taxpayer and the IRS may agree to the documents that the taxpayer must maintain to demonstrate compliance. If requested during an examination, the taxpayer must produce the agreed-upon records within 30 days of the request, or have this period extended for good cause.

Revocation, cancellation, or revision of an APA

Fraud, malfeasance, or disregard on the part of the taxpayer involving material facts set forth in the APA request, submissions made during the APA negotiations, or the annual report, or lack of good-faith compliance with the terms or conditions of an APA, can lead to IRS revocation of the APA.⁸⁰ The IRS can revoke the APA retroactively to the first day of the first tax year to which the APA applies.⁸¹ Revocation of the APA exposes the taxpayer to a transfer pricing examination, adjustments and penalties for all open years, and the possibility of a limitation or loss of Rev. Proc. 99-32 relief. In addition, in egregious cases, the IRS may deny the taxpayer foreign tax credits under Rev. Rul. 80-231 and unilateral relief under Rev. Proc. 2006-54.⁸²

The IRS may cancel, rather than revoke, the APA due to the taxpayer's misrepresentation, mistake as to a material fact, failure to state a material fact, failure to file a timely annual report, or lack of good-faith compliance with the terms and conditions of the APA.⁸³ Generally, the cancellation will be effective as of the beginning of the year in which the misrepresentation, mistake, failure to state a material fact, or noncompliance occurs.⁸⁴ The IRS may waive cancellation if the taxpayer can establish good faith and reasonable cause, and agrees to make the adjustments required by the IRS to correct for the misrepresentation, mistake, failure to state a material fact, or noncompliance.⁸⁵

Failure to meet a critical assumption, or changes in a law or treaty that supersedes and conflicts with the APA, may require a revision of the APA.⁸⁶ If the IRS and the taxpayer fail to reach an agreement on the revision, the IRS can cancel the APA. If the revision relates to a bilateral APA, the revised APA is submitted by the U.S. competent authority to the foreign competent authority for its agreement with the revisions.

Cancellations are quite rare; the IRS has canceled only 11 APAs since the inception of the program.⁸⁷ The IRS's December 16, 2011, cancellation of two APAs has generated new interest in the topic, but the Tax Court ultimately held that the IRS abused its discretion in that case.⁸⁸

Renewal

A taxpayer may request a renewal by following the same procedures that apply to an initial APA request, updating information and highlighting significant changes. Rev. Proc. 2015-41 also provides that taxpayers may choose to file an abbreviated APA request for a renewal.⁸⁹ At the PFC, APMA provides which contents of the APA request may not be needed.⁹⁰

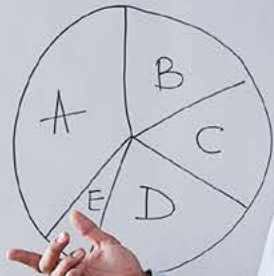
As long as the functions and risks between the parties remain similar to those in the initial APA, the renewal can be granted relatively quickly with little debate or renegotiation. The user fee for a routine renewal is less than that for the original request. Taxpayers are encouraged to file their requests to renew an APA no later than nine months before the end of the term of the existing APA.⁹¹

In general, negotiating a renewal APA should take less time and resources than negotiating the original APA. If the relevant intercompany transactions, functions, and risks remain the same as the original APA, negotiating a renewal should be limited to updating the economic analysis. However, the APMA program may scrutinize an APA renewal request if the taxpayer's results during the term of the original APA consistently fell at the edge of the agreed-upon arm's-length range.

Conclusion

Recent developments in transfer pricing enforcement by countries across the world ensure that APAs remain as vital as ever for taxpayers seeking the twin goals of certainty and reasonable compliance. Increased enforcement exposure has made developing a proactive transfer pricing dispute resolution strategy a tax priority for more

than just the largest of corporations. By following the outline provided here, taxpayers can understand and avail themselves of the APA process and work with the APMA program and FTAs to craft mutually agreeable transfer pricing solutions.



Citations

- ¹ www.oecd.org/tax/dispute/map-statistics-2006-2015.htm.
- ² www.oecd.org/ctp/BEPSActionPlan.pdf.
- ³ *Ibid.*
- ⁴ www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm.
- ⁵ *Ibid.*
- ⁶ D. Gregory and P. Shukovski, "IRS: As of 2014, 1,000 Transfer Pricing Cases Under Audit," 24 *Tax Management Transfer Pricing Report* 553 (September 4, 2015).
- ⁷ D. Gregory, "Tax Court Roundup: Medtronic Could Face Another Trial," 24 *Tax Management Transfer Pricing Report* 564 (September 14, 2015).
- ⁸ Treas. Reg. §§ 1.6662-6(b)(3); 1.6662-6(c)(6).
- ⁹ Treas. Reg. § 1.6662-6(d)(2)(ii).
- ¹⁰ OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, Action 5 – Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. dx.doi.org/10.1789/9789264241190-en.
- ¹¹ Rev. Proc. 2006-9, § 10.02.
- ¹² *Ibid.* § 11.03.
- ¹³ E. Yablonicky and B. Mantegani, "Rev. Proc. 2015-41: A Needed Reboot of the Advance Pricing Agreement Process," 24 *Tax Management Transfer Pricing Report* 708 (October 1, 2015).
- ¹⁴ 2011: Instructions for Schedule UTP (Form 1120), Cat. No.55028G.
- ¹⁵ "Tax Officials from Four Countries Tackle Challenges to MAP Process," 20 *Tax Management Transfer Pricing Report* 686 (January 12, 2012). Proctor & Gamble Co. executive explained the negotiation of similar advance pricing agreements in multiple jurisdictions.
- ¹⁶ S. Wrappe and K. Fujimori, "The Best Transfer Pricing Defense is a Good Offense: Using a Bilateral U.S. APA to Benchmark Reasonable Results," 23 *Tax Management Transfer Pricing Report* 629 (September 4, 2014).
- ¹⁷ Rev. Proc. 91-22.
- ¹⁸ Announcement 2012-13, IRB 2012-16 (Rev. April 16, 2012).
- ¹⁹ M. Moses and S. Schuster, "IRS to Combine APA, Competent Authority Functions in LB&I," 20 *Tax Management Transfer Pricing Report* 283 (July, 28, 2011).
- ²⁰ Announcement 2013-17, IRB 2013-16 911 (Rev. April 15, 2013). It is important to note that the merged APMA program had responsibility for negotiating both APA and CA cases.
- ²¹ Announcement 2014-14, 2014-16 IRB 948, (April 14, 2014).
- ²² Dolores W. Gregory, "APA Completions Drop By A Third In 2014, Owing To Complexity, Turnover, IRS Says," 23 *Tax Management Transfer Pricing Report* 1485 (April 2, 2015).
- ²³ Announcement 2016-12, IRB 2016-16, (April 18, 2016) and Announcement 2017-03, IRB 2017 (March 27, 2017).
- ²⁴ Rev. Proc. 2015-41, § 2.02.
- ²⁵ *Ibid.*, § 3.07.
- ²⁶ *Ibid.*, § 3.02(4).
- ²⁷ *Ibid.*, § 3.02(6).
- ²⁸ *Ibid.*
- ²⁹ *Ibid.*
- ³⁰ www.irs.gov/pub/irs-utl/apaprefilingconferencesandconsultations.pdf.
- ³¹ Rev. Proc. 2015-41, § 3.02(8)(b).
- ³² *Ibid.*, § 2.04(a).
- ³³ *Ibid.*, § 2.04(b).
- ³⁴ *Ibid.*, § 2.04(a).
- ³⁵ *Ibid.*, § 3.03(2).
- ³⁶ *Ibid.*, § 3.03(3)(b). For example, a taxpayer's calendar year 2013 could be covered by paying the user fee before September 15, 2014 (or the date on which the 2013 return was actually filed, if an extension was granted) if a comprehensive APA request is submitted within 120 days of the user fee payment.
- ³⁷ *Ibid.*, § 3.03(3)(a).
- ³⁸ *Ibid.*, § 3.03(2)(b).
- ³⁹ www.irs.gov/Individuals/International-Taxpayers/ChangestoAPAandLOBUserFeeFilingProcedures
- ⁴⁰ *Ibid.*, Appendix § 1.03.
- ⁴¹ *Ibid.*
- ⁴² *Ibid.*
- ⁴³ *Ibid.*
- ⁴⁴ *Ibid.*, Appendix § 1.02.
- ⁴⁵ *Ibid.*, Appendix § 1.03.
- ⁴⁶ *Ibid.*, Appendix § 1.02.
- ⁴⁷ *Ibid.*
- ⁴⁸ *Ibid.*, Appendix § 1.02.
- ⁴⁹ *Ibid.* § 4.03(1).
- ⁵⁰ *Ibid.*
- ⁵¹ *Ibid.*
- ⁵² *Ibid.*
- ⁵³ *Ibid.*
- ⁵⁴ *Ibid.*
- ⁵⁵ *Ibid.*

⁵⁶ Ibid. § 4.03(7). Internal Revenue Code refers to the IRC of 1986, as amended (26 U.S.C. §1 et seq.), and the relevant U.S. regulations (or “Treas. Reg.”) are the U.S. Treasury Regulations, as amended (26 C.F.R. Part 1).

⁵⁷ Ibid. § 5.03(3).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Rev. Proc. 2006-9, § 4.05.

⁶³ Rev. Proc. 2015-41, § 4.04(3).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Rev. Proc. 2006-9, § 7.02.

⁶⁸ Rev. Proc. 2015-41, § 7.02(1).

⁶⁹ Ibid., §7.02(2).

⁷⁰ Ibid., §7.02(1)

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid., §7.02(2).

⁷⁵ Ibid., § 7.03(1).

⁷⁶ Ibid.

⁷⁷ Ibid., § 7.06(2).

⁷⁸ Ibid., §7 .03(2).

⁷⁹ Ibid.

⁸⁰ Ibid., § 7.06(1).

⁸¹ Ibid., § 7.06(6).

⁸² Ibid.

⁸³ Ibid., § 7.06(2).

⁸⁴ Ibid., §7.06(7).

⁸⁵ Ibid., §7.06(5).

⁸⁶ Ibid., §7.06(7).

⁸⁷ Announcement 2016-12, IRB 2016-16, Table 3 (April 18, 2016).

⁸⁸ *Eaton Corp. v. Commissioner*, T.C. Memo 2017-147 (July 26, 2017).

⁸⁹ Rev. Proc. 2015-41, §8.01.

⁹⁰ Ibid., §3.04(2).

⁹¹ Ibid., §8.02.



Exhibit – APA request content

The Exhibit is an excerpt from Rev. Proc. 2015-41

Part 1: Executive Summary

- 1.1 Identifying information:** List the name, address, and taxpayer identification number(s) of each member of the proposed covered group and the Standard Industrial Classification (“SIC”) and the North American Industry Classification System (“NAICS”) codes (number and code description) of the controlled group as reported on the taxpayer’s most recently filed federal tax returns
- 1.2 Summary of APA request:** Provide an executive summary of the content of the APA request that addresses the following:
- Whether the taxpayer proposes a unilateral APA or a bilateral or multilateral APA, and, if applicable, the U.S. tax treaty(ies) and treaty articles governing the APA request;
 - Whether the APA request proposes a renewal of an existing APA or the extension of a competent authority resolution from competent authority or ACAP years into APA years;
 - The proposed prospective years and the proposed rollback years;
 - The proposed covered issue(s) and an estimated dollar value of such issue(s) in the proposed APA years; and
 - The proposed covered method(s), including, as applicable, the proposed tested party(ies), profit level indicator(s), and interquartile range(s)

Part 2: Administrative Information

- 2.1 Authorization:** List the names of and contact information for all individuals authorized by a Form 2848 to represent the taxpayer in connection with the APA request and all individuals authorized by a Form 8821 to inspect or receive confidential tax information about the taxpayer in connection with the APA request, along with a designation as to which individual will serve as the point of contact for the APA team
- 2.2 IRS Office:** Identify the IRS office having examination jurisdiction over the taxpayer, together with the name of and contact information for the taxpayer’s IRS Examination team manager if the taxpayer is under examination when the APA request is filed
- 2.3 Filed Years:** Provide a table with the following information for each member of the proposed covered group:
- All open filed years in the United States and the relevant treaty country(ies), whether or not such years are currently under examination by the IRS or a foreign tax authority;
 - The expiration dates of statutes of limitations for all open filed years in the United States and in the relevant treaty country(ies)
 - All open filed years in which a proposed covered issue or a substantially similar issue is under review by IRS Appeals or its equivalent in the relevant treaty country(ies); and
 - All open filed years in which an actual or proposed adjustment has been made by either the IRS or a foreign tax authority relating to the proposed covered issue(s) or to substantially similar issues
- 2.4 Request for SAP Review:** If applicable, include a statement that the APA request is intended to serve as a request for SAP review for specified taxable years, pursuant to section 5.02(6) of the revenue procedure
- 2.5 Optional e-mail memorandum of understanding:** At the taxpayer’s option, an executed memorandum of understanding in the form prescribed by APMA (as may be posted on the APMA website or otherwise available by contacting APMA) permitting APMA to communicate with the taxpayer’s authorized representatives through encrypted e-mail

Part 3: Proposed Covered Issue(s)

- 3.1 Pre-filing information:** Provide the following information:
- Whether a mandatory or optional pre-filing memorandum was filed; and
 - Whether a pre-filing conference was held and, if so, the date of and attendees at the conference
- 3.2 Rollback:** Provide the following information:
- If the taxpayer is seeking consideration of a rollback, list the proposed rollback years; and
 - If the taxpayer is not seeking consideration of a rollback, discuss the reasons as to why a rollback is not appropriate
- 3.3 Background on proposed covered group:** Provide background on the following points, with reference to the covered issue diagrams:
- The general history of the business operations of the proposed covered group and of the controlled group;
 - The worldwide gross revenue of the controlled group in the most recent taxable year available;
 - The functional currency of each member of the proposed covered group;
 - For each member of the proposed covered group, any business line(s) that is (are) outside the scope of the proposed covered issue(s); and
 - The industry in which the proposed covered group operates, including discussion of relevant macroeconomic and other industry-wide factors affecting the proposed covered group, the commercial features of the markets and geographical areas in which the proposed covered group operates, and the participants and competitors in the proposed covered group's industry
- 3.4 Narrative with reference to proposed covered issues in covered issue diagrams:** For each proposed covered issue, provide a detailed discussion of the following, with reference to the covered issue diagrams in Exhibit 11:
- The functions performed by each member of the proposed covered group in relation to the proposed covered issue;
 - The assets employed by each member of the proposed covered group in relation to the proposed covered issue;
 - The risks assumed by each member of the proposed covered group in relation to the proposed covered issue;
 - Transactional or commercial flows relating to the proposed covered issue(s) between and among members or business units of the proposed covered group, between members or business units of the proposed covered group and customers and other uncontrolled parties, and between members or business units of the proposed covered group and members or business units of the controlled group outside of the proposed covered group;
 - Principal intercompany contracts or other agreements, written or otherwise, between and among members of the proposed covered group relating to the proposed covered issue(s); and
 - Unless the proposed covered method involves a profit split (within the meaning of Treas. Reg. § 1.482-6 or Chapter II of the OECD Guidelines) between two or more members of the proposed covered group, the identity of the member of the controlled group that is proposed to be regarded as the principal in relation to the proposed covered issue, whether or not it is a member of the proposed covered group
- 3.5 Narrative with reference to non-proposed covered issues in covered issue diagrams:** For each issue that is not a proposed covered issue, but is an issue that APMA might reasonably consider in analyzing the proposed covered issues under the principles expressed in section 2.02(4)(a), a discussion of why in the interest of principled, effective, and efficient tax administration such issue need not be a covered issue, and of the extent to which such issue should be considered in the APA process

- 3.6** Rulings, determinations, and proceedings: Provide information on the following:
- Current or expired rulings issued by a relevant foreign tax authority covering intercompany transactions or business activities of members of the proposed covered group that are similar to the proposed covered issue(s);
 - The terms of any competent authority resolution addressing intercompany transactions or business activities of members of the proposed covered group that are similar to the proposed covered issue(s); and
 - Any judicial or administrative proceedings in the United States or in the relevant treaty country(ies) to which any members of the proposed covered group are or have been parties involving intercompany transactions or business activities that are similar to the proposed covered issue(s)

- 3.7** Ancillary issues: List the ancillary issues (if any) proposed to be covered by the APA

Part 4: Proposed Covered Method(s)

- 4.1** Selection and application of proposed covered method(s): Discuss the selection of the proposed covered method(s) with reference to the standards governing the selection of the “best method” under Treas. Reg. § 1.482-1(c) and, in the case of bilateral or multilateral APA requests, the selection of the “most appropriate” method under Chapter I of the OECD Guidelines, and how overall that method is applied, including the definition of the tested party(ies)

- 4.2** Search and screening process: Describe the research and screening process and criteria used to identify and select independent comparable agreements or independent companies or other market data upon which the proposed covered method is based, including the initial search universe, the qualitative and quantitative screens used to accept or reject potential comparable agreements or companies or other market data, the order in which different criteria were applied, the precise specification of each criterion (including for example the precise way in which multiyear averages are used, or in which requirements are applied across multiple years), and the numbers of potential comparable agreements or companies or other market data accepted and rejected at the different stages of the search and screening process

- 4.3** Application of proposed covered method(s): Provide a detailed explanation of (a) the data and assumptions used and (b) any adjustments made to the selected proposed comparable agreements or results of independent companies or other market data, or to the results of the tested party, such as adjustments relating to: (i) product line segregations, (ii) differences in accounting practices, (iii) differences in functions performed, assets employed, or risks assumed (especially noting working capital or other balance sheet adjustments made to the tested party(ies) or to the comparables and any differences between such adjustments and the adjustments incorporated into the APA template (as may be posted on the APMA website or otherwise available by contacting APMA), (iv) volume or scale differences, or (v) differences in economic or market conditions

- 4.4** Demonstration of proposed covered method(s): Provide a table summarizing the results of applying the proposed covered method(s) to the relevant members of the proposed covered group for (i) all proposed rollback years, (ii) the most recent three back years, if they are not proposed rollback years (or as many such back years as have data available, if not all have data available), (iii) the first proposed APA year, using actual data if available and otherwise using forecasted data, and (iv) other proposed APA years, using forecasted data, to the extent forecasts are available

- 4.5** Segmentation of financial results: If the proposed covered method(s) is (are) applied to a subset of the assets, liabilities, income, and expenses in the financial statements (see Exhibit 18), provide a segmentation of the financial statements and describe in detail (i) those items in the segmented financial statements that have been allocated or apportioned to the applicable proposed covered issue(s) and to other issues, and (ii) the method(s) of allocation or apportionment applied

Part 5: Proposed APA Terms and Conditions

- 5.1** Review of Proposed APA: Provide a detailed discussion and explanation of the proposed APA terms and conditions as reflected in the draft APA submitted with the APA request (see Exhibit 15), noting, in particular, any proposed APA terms and conditions that differ from the APA terms and conditions as reflected in the model APA (see Exhibit 15)

Exhibit 1	Contents of exhibits: Provide a table or similar comprehensive list of the exhibits submitted, indicating the form (printed, electronic, or both) in which they are submitted
Exhibit 2	Authorization form: Include a properly executed Form 2848 (Power of Attorney and Declaration of Representative) for all individuals authorized to represent the taxpayer in connection with the APA request or Form 8821 (Tax Information Authorization) for all individuals authorized to inspect or receive confidential tax information about the taxpayer in connection with the APA request
Exhibit 3	Protective claim: In the case of a bilateral or multilateral APA request, provide a statement affirming whether the APA request is to serve as a protective claim pursuant to section 11 of Rev. Proc. 2015-40 and, if so, include the information required by section 11.02(3) of Rev. Proc. 2015-40
Exhibit 4	Waiver of ex parte communication: If the APA request involves proposed rollback years in which the proposed covered issue(s) or a related issue is unresolved and under consideration by IRS Appeals, include a waiver, modeled on the following language, of the taxpayer's right to be present during communications between IRS Appeals and members of the APA team: Waiver of Ex Parte Communication: [Name of taxpayer(s)] agrees to the participation of IRS Appeals in the consideration of this APA request and hereby waives its right to be present during, or to participate in, meetings relating to the APA request or to be a party to discussions concerning the proposed covered issue(s) between IRS Appeals and members of the APA team
Exhibit 5	Consent to disclosure: In the case of a bilateral or multilateral APA request, include a declaration, dated and signed by an authorized officer of the taxpayer having personal knowledge of the facts concerning the proposed covered issue(s), that the taxpayer consents to the disclosure of the contents of the APA request – other than trade secrets, if the taxpayer so requests – to the applicable foreign competent authority(ies) within the limits contained in the U.S. tax treaty(ies) governing the APA request
Exhibit 6	Consents regarding period of limitations: Any executed consents to extend the period of limitations for assessment of tax that are required under section 2.03(3)(a) of the revenue procedure
Exhibit 7	“Penalties of perjury” declaration: Include the following “penalties of perjury” declaration: Under penalties of perjury, I declare that I have examined this [APA request] [supplemental submission relating to an APA request], including accompanying documents, and, to the best of my knowledge and belief, the [APA request] [supplemental submission] contains all the relevant facts relating to the [APA request] [supplemental submission], and such facts are true, correct, and complete.
Exhibit 8	User fee receipt: Include a copy of the receipt obtained after paying the required APA user fee (see section 3 of this Appendix)
Exhibit 9	Documents submitted to foreign competent authorities: List all documents or written submissions provided to a foreign tax authority or foreign competent authority in connection with the APA request, either prior to or concurrently with the submission of the APA request to APMA, noting the documents or written submissions for which English translations are available and any documents or written submissions provided to a foreign tax authority or foreign competent authority in connection with the APA request that are not included in the APA request submitted to APMA

Exhibit 10	Pre-filing Submissions: Include any pre-filing memoranda or other materials submitted in connection with the APA request
Exhibit 11	<p>Covered issue diagrams: Include diagrams, charts, or similar representations depicting the following information as it relates to the proposed covered issues and any interrelated matters that APMA might reasonably consider in analyzing the proposed covered issues under the principles expressed in section 2.02(4)(a), each presented in a manner similar to and with a degree of detail no less than that presented in the diagrams accompanying the case studies “Alpha” through “Foxtrot” in Joint Committee on Taxation, Present Law and Background Related to Possible Income Shifting and Transfer Pricing (JCX-37-10), July 20, 2010 (available at www.jct.gov; see also APMA website):</p> <ol style="list-style-type: none"> a. The controlled group’s legal structure, with clear indications as to the members of the proposed covered group; b. The controlled group’s tax structure, with clear indications as to, among other items, ownership relationships and tax filing characterizations of members of the proposed covered group under the Code and under applicable rules in the relevant treaty country(ies) (e.g., partnerships, branches, or disregarded entities); c. The controlled group’s and proposed covered group’s business units or similar organizational divisions as used for management purposes, together with a table, narrative, or other reconciliation showing the relationship between such business units and the legal entities comprising the controlled and proposed covered groups; d. The value chain of the proposed covered group, comprising commercial or transactional flows between and among members or business units of the proposed covered group, between members or business units of the proposed covered group and customers and other uncontrolled parties, and between members or business units of the proposed covered group and any other members or business units of the controlled group outside the proposed covered group; and e. Organization or management charts identifying executive-level functional or occupational roles within the business units or within members of the proposed covered group that are relevant to the proposed covered issue(s) (e.g., vice president of marketing for transactions involving sales of tangible goods), together with (i) the names of individuals occupying such executive-level functional roles at the time the APA request is filed, and (ii) headcounts for the relevant business units or members of the proposed covered group
Exhibit 12	APAs: Include a copy of the most recent APA, if any, that the taxpayer or another member of the proposed covered group has entered into with (i) the IRS, and (ii) each involved foreign tax authority, concerning transactions or other business activities within the scope of the proposed covered issue(s)

Exhibit 13	Selection process: Provide a table or similar report on the step-by-step results of applying criteria for selecting comparable agreements or independent comparable companies or other market data, including a table or matrix showing the reason(s) for rejecting agreements or independent companies or other market data (see part 4.2)
Exhibit 14	Information on selected comparables: As applicable, include a detailed discussion of the contractual terms (within the meaning of Treas. Reg. § 1.482-1(d)(3)(ii)) of selected comparable agreements, including the form of consideration charged or paid, and for APA requests in which the proposed covered method(s) involve(s) an application of the comparable profits method (as defined in Treas. Reg. § 1.482-5) or the transactional net margin method (as defined in the OECD Guidelines), include (i) unadjusted income statement data for the most recent five taxable years (or as many years as are available, if fewer than five years are available) and balance sheet data for the most recent six taxable years (or as many years as are available, if fewer than six years are available) of the selected independent comparable companies, and (ii) (if applicable) the application to such financial data of any adjustments pursuant to the proposed covered method(s) (see parts 4.3 and 4.4)
Exhibit 15	Proposed draft APA: Provide a proposed draft APA in a form substantially similar to APMA's current model APA (as may be posted on the APMA website or otherwise available by contacting APMA), together with a "redline" version of the same showing the differences between the model APA and the proposed draft APA
Electronic Version Only Required – For CD	
Exhibit 16	Application of APA template: For APA requests in which the proposed covered method involves an application of the comparable profits method (as defined in Treas. Reg. § 1.482-5) or the transactional net margin method (as defined in the OECD Guidelines), provide income statement data for the most recent five taxable years (or as many years as are available, if fewer than five years are available) and balance sheet data for the most recent six taxable years (or as many years as are available, if fewer than six years are available) for the relevant member(s) of the proposed covered group, using the APA template (as may be posted on the APMA website or otherwise available by contacting APMA)
Exhibit 17	Federal income tax filings: Provide copies of the following federal income tax forms for each of the three most recent filed years of the taxpayer: <ul style="list-style-type: none"> a. Form 1120 or applicable equivalent; b. Form 5471 ("Information Return of U.S. Persons With Respect to Certain Foreign Corporations"); c. Form 5472 ("Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business"); and d. Form 8858 ("Information Return of U.S. Persons With Respect to Foreign Disregarded Entities")

Exhibit 18	Financial statements: Provide copies of financial statements, including full income statements, balance sheets, and cash flow statements (audited, if available, and in English, if available), for each relevant member of the proposed covered group for each of the most recent three back years and specify the accounting standard used (e.g., U.S. GAAP)
Exhibit 19	Section 6662 documentation: Include a copy of the documentation prepared in consideration of section 6662(e) of the Code (and, if applicable, a copy of similar documentation filed with or subject to request by the relevant foreign tax authority(ies)) relating to intercompany transactions or business activities that are within the scope of the proposed covered issue(s) for each relevant member of the proposed covered group for each of the most recent three back years
Exhibit 20	Regulatory filings: Include a copy of the Form 10-K or similar annual SEC filing submitted for U.S. regulatory purposes by the controlled group for each of the most recent three back years
Exhibit 21	APA annual reports: For renewal APA requests, provide all APA annual reports filed with APMA with respect to the current APA
Exhibit 22	Intercompany agreements: Include copies of any written intercompany contracts or agreements between the taxpayer and other members of the proposed covered group that are within the scope of the proposed covered issue(s), with a statement of when each contract or agreement was actually executed, and a summary of any oral intercompany agreements that are material to the proposed covered issues. For proposed APAs relating to intangible development arrangements, these agreements or contracts would include, as applicable, documents forming or revising the intangible development arrangement and documents relating to use under the intangible development arrangement of rights, resources, and capabilities owned by participants or related non-participants.

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