

## UNITED STATES

KPMG US



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## US: 2021 statistics show an uptick in demand for APAs

Mark Martin and Thomas Bettge of KPMG in the US discuss the Internal Revenue Service's (IRS) advance pricing agreement (APA) statistics for 2021, and the state of the IRS APA programme.

Every year, the IRS Advance Pricing and Mutual Agreement programme (APMA) reports statistics on APAs, which are a dispute prevention tool that allows taxpayers and tax authorities to agree to the transfer pricing (TP) treatment of covered transactions on a prospective basis.

Sometimes, the statistics clearly show the influence of recent developments: the surge in applications in 2018 appeared to be due in part to US tax reform and in part to a looming increase in APA application fees.

Other times, the APA programme appears largely insulated from turmoil in the world at large: the 2020 statistics showed scarcely a trace of the raging COVID-19 pandemic. That was an impressive accomplishment when one considers that the US competent authority and its treaty partners had to transition to virtual modes of working, negotiate their normal caseload, and at the same time address the unanticipated effects of COVID-19 on taxpayers' APA compliance.

### APA statistics in the US in 2021

The 2021 statistics show a marked uptick in demand for APAs. After two years in which applications filed held steady at 121, 2021 saw 145 new APA requests. Eight of these were for multilateral APAs – not an enormous number by any means, but significant when one considers that only 29 multilateral APAs were requested in the preceding two decades.

As more multinational enterprises (MNEs) become embroiled in tax controversies with multilateral ramifications (such as cases involving multiple principal structures or sandwich transactions), multilateral APA requests will likely continue to rise. We will likely also see an increase in the adoption of 'synthetic' multilateral solutions, such as a bilateral APA between two countries and a coordinated unilateral APA with a third.

The jump in APA requests in 2021 speaks to the benefits of the APA programme, yet it also compounds the challenges that APMA faces in effectively managing its docket of APAs and mutual agreement procedure (MAP) cases. During 2021, the number of APAs executed fell marginally from 127 to 124. While this is consistent with prior years, the leap in demand caused APMA's overall APA inventory (the number of pending APA requests) to increase during 2021.

Then, too, APA processing times remain challenging. The year 2021 saw the average time for resolving unilateral APAs decrease to 24.4 months, but the average bilateral APA completion time rose to 43.0 months: slightly more than three and a half years.

### Addressing ongoing challenges

Increased investment in the APA programme may assist in lowering processing times and reducing APMA's case inventory. During 2021, APMA gained 16 APA team leaders and four economists, bringing its APA team to a total of 80 team leaders and 25 economists who are led by nine managers, three assistant directors, and the APMA director.

As the new personnel gain expertise, APMA will be better equipped to handle its APA and MAP inventories and to potentially play a role in the tax certainty process for Amount A of the OECD/G20 Inclusive Framework's Pillar One.

Yet adding APMA resources cannot be a panacea. Except for the unilateral APAs that make up a fraction of APMA's overall docket (39 out of 461 pending APAs), APA resolutions also depend on one or more treaty partners' willingness and ability to process cases in a timely manner.

Foreign investment in sufficient competent authority resources is indispensable, but attention should also be given to simplification measures that can provide expedited certainty for common cases, such as the framework for *maquiladora* cases negotiated by APMA and the Mexican competent authority.

The OECD's ongoing work to improve BEPS Action 14 – most recently through a public consultation in late 2020 – may play a key role in ensuring the further success of the APA programme, and of tax certainty more broadly.

One proposal made as part of the 2020 consultation was to require jurisdictions with a certain volume of TP MAP cases to establish APA programmes. This would move some TP cases out of MAP – where recurring issues may require a new case every year – into the APA programme, where they can be dealt with more efficiently.

Another proposal was to mandate statistical reporting for APAs. Reporting of MAP statistics, together with a peer review system, has played an important role in making MAP more efficient and more effective since the adoption of Action 14. Requiring similar reporting for APAs could improve APA outcomes in jurisdictions that do not currently publish APA statistics.

While ongoing improvement and investment in the APA programme are vital, the 2021 statistics are good news. They show that APAs continue to play a crucial role for both taxpayers and tax administrations looking for certainty with respect to difficult transfer pricing issues.

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