



LARGE BUSINESS AND
INTERNATIONAL DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

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MEMORANDUM FOR TREATY AND TRANSFER PRICING OPERATIONS
EMPLOYEES

FROM: Nicole L. Welch /s/ *Nicole L Welch*
Director, Treaty and Transfer Pricing Operations (Acting)

SUBJECT: Interim Guidance on Review and Acceptance of Advance Pricing
Agreement (APA) Submissions

Purpose: This memorandum provides guidance to employees of the Treaty and Transfer Pricing Operations (TTPO) practice area in the Large Business and International Division (LB&I) with respect to requests from taxpayers for an APA with the IRS.

Background: LB&I's Advance Pricing and Mutual Agreement (APMA) APA program provides a voluntary process whereby the IRS and taxpayers may resolve transfer pricing issues in a principled and cooperative manner on a prospective basis. APAs are one of several tools available to the IRS to address transfer pricing compliance and certainty. Although APAs are a popular choice among taxpayers for achieving (usually) bilateral advance certainty about the appropriate arm's length results for covered intercompany transactions, there are other treatment streams that also should be considered. Depending on the specifics of the proposed covered transactions, one treatment stream might be more successful than others. A successful outcome for achieving transfer pricing certainty is based not only on reaching agreement but also doing so with an appropriately commensurate commitment of financial and human resources for both the taxpayer and the tax administrations involved.

According to the governing APMA APA revenue procedure (Rev. Proc. 2015-41, 2015-35 I.R.B. 263 (Aug. 31, 2015)), APMA endeavors to administer the programs within its jurisdiction "in a manner that is consistent with U.S. tax treaty obligations and that secures the appropriate tax bases of the United States and its treaty partners, prevents

fiscal evasion, promotes consistency and reasonableness in outcomes, and provides taxpayers access to competent authority assistance and to the APA process in accordance with considerations of principled, effective, and efficient tax administration.” Rev. Proc. 2015-41, section 2.02(2). APMA’s acceptance of a taxpayer’s request to enter the APA program is discretionary, and APMA’s decision to decline to initiate the APA process is not subject to administrative review. Rev. Proc. 2015-41, sections 2.02(3) & 4.02(3). APMA’s acceptance of a taxpayer’s request to enter the APA program should be consistent with the strategic mission of the organization.

APA requests from taxpayers are a substantial portion of APMA’s caseload. These requests require payment of a user fee by taxpayers and on average take more than three years to complete with significant application of resources to conduct the requisite due diligence, technical analysis, and coordination with treaty partners. LB&I recognizes that, as part of its responsibilities to effective tax administration and to taxpayer service, it must make reasonable efforts to ensure taxpayer and tax administration resources are used as effectively as possible. This memorandum instructs APMA personnel on how to review and, where appropriate, accept taxpayer APA requests to align LB&I processes for APAs to be consistent with our strategy and maximize the probability of successful, timely, and comprehensive resolution of transfer pricing issues for both taxpayers and the IRS.

This guidance applies to both APA prefilling memoranda and APA submission requests, including renewals. The guidance applies to TTPO personnel and includes the process, the criteria to be considered, and the personnel to be included in determining whether a proposed APA request likely will be most successfully treated in the APA process or in another TTPO workstream. The review process included in this guidance is not intended to affect the proper analysis of compliance with the transfer pricing regulations; it is designed to produce the best result and support the best and highest use of transfer pricing resources for taxpayers and tax administrations. This guidance also is not intended to limit or decrease the number of APA requests accepted by APMA. Rather, its goal is to improve the quality and timeliness of APMA’s APA program by providing an early mechanism for identifying potential roadblocks to successfully concluding a proposed APA and opportunities for other paths to certainty.

Under this guidance, APMA will provide optional pre-submission review to taxpayers that wish to submit prefilling memoranda before submitting a formal APA request. In this pre-submission review, APMA will give a preliminary opinion whether the APA workstream is well suited to successfully achieve certainty for the proposed covered transactions and whether an alternative workstream is recommended for the taxpayer to consider. The intent is to provide taxpayers with this information in advance of their undertaking to draft and submit a formal APA request. After receiving an APA request, APMA will undertake a formal review of the request to determine whether to accept the request in full or in part. In both pre- and post-submission reviews, APMA will consider

the facts and circumstances underlying the request based on several criteria, none of which is dispositive.

The relevant considerations in this memorandum are consistent with considerations that must be undertaken in deciding whether to engage in joint or multilateral audits. The required consultations complement our requirement that transfer pricing examiners consult with APMA and the consultations undertaken to decide whether to participate in joint or multilateral audits. Moreover, this process ensures the collaboration of all our transfer pricing experts and fosters our larger program of mindful transfer pricing compliance and service to taxpayers.

Procedural Change: APMA must follow the process described in the attachment for review of prefiling memoranda, APA requests, and APA renewal requests filed by taxpayers from the effective date forward.

This memorandum requires consideration of specified criteria for review of each APA prefiling memorandum and each APA request, including requests for APA renewals, before determining whether an APA request will be accepted by APMA into the APA program. The process and criteria for review of these taxpayer submissions are defined in the attached instructions along with the designation of the IRS personnel to be involved and their respective roles.

To ensure a taxpayer's transfer pricing issues as presented in an APA request have the best chance for successful conclusion, APMA personnel will follow the defined process below for evaluating the relevant criteria and determining whether an APA is the most effective and efficient workstream for both the taxpayer and the tax administration(s). Given the significant time and resources required to develop and negotiate an APA, APMA must take appropriate steps to consider the specified review criteria and alternative workstreams in consultation with the Transfer Pricing Risk Assessment (TPRA) team and appropriate Transfer Pricing Practice (TPP) personnel to properly match the compliance risk presented by the transfer pricing issues proposed to be covered by an APA with the resources that would be required to achieve certainty for the taxpayer and the IRS.

This review process is an important step in meeting tax administration and taxpayer certainty goals with respect to transfer pricing issues and is consistent with the United States competent authority's commitment to "[ensuring] the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes." OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 – Final Report* (2015) at 9. The review process helps APMA properly consider how certain factors might impact the probability of a successful outcome. These factors relate to the experience APMA may have with the type of request or treaty partner to be involved, as well as the materiality and complexity of the transfer pricing issues

proposed to be covered by the APA. The APA review process takes a broad perspective, considering whether an alternative workstream such as the International Compliance Assurance Program (ICAP) or a joint audit is better suited to address the taxpayer's transfer pricing issues compared to an APA.

General instructions regarding the process for taxpayers to request an APA are found in Rev. Proc. 2015-41. General instructions for developing a competent authority APA position and negotiating an APA with a treaty partner are found in IRM 4.60.3.2.20-21 and Rev. Proc. 2015-41. Specific APMA instructions for review of taxpayer APA prefilling memoranda and APA requests are attached.

Effective Date: This memorandum applies to APA prefilling memoranda and APA requests, including renewal requests, filed from the date of issuance of this guidance forward.

Effect on Other Documents: This guidance will be incorporated into IRM 4.60.3 by a date not to exceed two years from its release.

Contact: For further information regarding this interim guidance memorandum and any of the specific issues addressed herein, please contact the Director of Treaty and Transfer Pricing Operations.

Attachment

cc: Division Counsel, LB&I
www.irs.gov

**Attachment to Interim Guidance Memorandum LB&I-XX-0x23-XXX
Instructions for APMA Review of Taxpayer APA Prefiling Memoranda
and APA Requests**

This document provides instructions to LB&I employees for implementing the required review of taxpayer advance pricing agreement (APA) prefiling memoranda and APA requests, including APA renewal requests, before a determination can be made whether the APA request will be accepted into the Advance Pricing and Mutual Agreement (APMA) program.

Instructions for APMA review of taxpayer APA prefiling memoranda and APA requests

To facilitate the required review, APMA will follow these procedures:

4.60.3.2.xx.1 Prefiling Memorandum Review

- (1) Section 3.02(4) of Revenue Procedure 2015-41 describes when a prefiling memorandum is required before a taxpayer submits an APA request. Where a prefiling memorandum is optional, see Rev. Proc. 2015-41, section 3.02(5), APMA will recommend a taxpayer seeking an APA to submit a prefiling memorandum to allow the taxpayer to benefit from a Prefiling Memorandum Review. In cases where the taxpayer submits a prefiling memorandum, APMA will review the memorandum for purposes of advising the taxpayer whether the APA workstream is well-suited to successfully achieve certainty for the proposed covered transactions and whether an alternative workstream is recommended for the taxpayer to consider.
- (2) The Prefiling Memorandum Review is intended to provide a rapid and high-level process through which taxpayers are provided information about the likely acceptance of an APA request, as well as other potentially applicable workstreams, to achieve transfer pricing certainty. The Prefiling Memorandum Review will be conducted by an APMA Team Leader or economist (together referred as the “APMA Team Leader”) and a member of the Transfer Pricing Risk Assessment (TPRA) team. For review procedures, see IRM Exhibit 4.60.3-2, Procedures for Prefiling Review (on page 2 of this attachment).
- (3) Based on the results of the review, the Prefiling Memorandum Review Team will send a recommendation for taxpayer action to the APMA frontline manager (FLM). The recommendation will be one of the following suggested actions for the taxpayer:
 - a) Proceed with submission of an APA request.
 - b) Consider an alternative workstream as a more effective route to tax certainty (if such an alternative workstream is identified) because the proposed APA is unlikely to be accepted by APMA. General statements supporting the recommendation should be included, along with the

suggested alternative workstream better suited to the proposed covered transactions and the Prefiling Memorandum Review Team's rationale.

- c) Provide additional information to APMA about the proposed APA:
 - i. The additional information provided by the taxpayer will be used by APMA to make a more informed recommendation about whether the request would be better addressed through an APA or an alternative workstream. This recommendation also could suggest the taxpayer schedule a prefiling conference with APMA to address concerns or questions identified during the Prefiling Memorandum Review.
 - ii. After receipt of the additional requested information, the Prefiling Memorandum Review Team will reconsider whether to recommend the taxpayer to proceed with submission of an APA request. That recommendation will be sent to the APMA FLM with general statements supporting the recommendation, along with the suggested alternative workstream better suited to the proposed covered transactions, if applicable.
- (4) The APMA FLM will make and orally communicate a decision about recommended taxpayer action (based on consideration of the Prefiling Memorandum Review Team recommendation) to the taxpayer. The APMA FLM and Team Leader will include documentation of the Prefiling Memorandum Review Team's analysis and recommendations, and the APMA FLM's decision and communication with the taxpayer, in the APMA IMS case to collect information and data and allow APMA to monitor consistency and validate effectiveness of the process. If the FLM makes a decision contrary to the recommendation of the Prefiling Memorandum Review Team, support for that decision also should be included in the APMA IMS case.
- (5) The Prefiling Memorandum Review generally should be completed, and the oral recommendation made to the taxpayer, within four weeks of the date of the prefiling memorandum or the date when additional information requested by APMA is submitted to APMA, whichever is later.

IRM Exhibit 4.60.3-2 Procedures for Prefiling Review

- 1) When the APMA Inventory Coordinator receives a prefiling memorandum submitted to APMA, the Inventory Coordinator will send a copy of the prefiling memorandum to the appropriate APMA assistant director (AD), the APMA IMS Coordinator, and the APMA Statute Program Manager per standard operating procedures.

- 2) Within the IMS system the APMA IMS Coordinator will create an IMS case for tracking purposes and assign the IMS case to the appropriate APMA AD. The APMA AD will assign the IMS case to an APMA FLM, who in turn will assign the IMS case and the Prefiling Memorandum Review to an APMA Team Leader. The APMA Statute Program Manager will notify the assigned APMA FLM and Team Leader of the status of the period of limitations for assessment of tax for each year of the proposed APA term, including rollback years.
- 3) The assigned APMA Team Leader is responsible for coordinating the Prefiling Memorandum Review and ensuring its completion. The assigned APMA Team Leader will contact the TPRA team manager to request the assignment of a TPRA team member to the Prefiling Memorandum Review. TPRA participates in the Prefiling Memorandum Review to provide early consideration of suitability for the International Compliance Assurance Program (ICAP), joint audit, or other tax certainty workstream as an alternative and preferred treatment to the APA process. The Prefiling Memorandum Review Team will consist of the APMA Team Leader and the assigned TPRA team member. The assigned APMA Team Leader will record the assigned TPRA team member as a contact in the IMS case.
- 4) The Prefiling Memorandum Review Team will evaluate the prefiling memorandum for suitability of the potential case for the APA program or an alternative workstream taking into consideration the facts and circumstances of the proposed APA case, including:
 - a) Whether the proposed covered transactions rise to a level of significance that justifies the use of resources necessary to engage in and complete an APA;
 - b) Whether the proposed APA term, including rollback years, would meet the requirements of Rev. Proc. 2015-41 or successor guidance regarding the remaining period of limitations for assessment of tax for each proposed APA year;
 - c) For bilateral or multilateral cases, whether there is a high probability that, by engaging with our income tax treaty partner(s) in an APA negotiation, transfer pricing compliance will be significantly enhanced;
 - d) For multilateral cases, whether the applicable international exchange agreements, including applicable income tax treaties, provide for the requisite exchange of information between the relevant tax administrations and the extent to which disclosure restrictions may constrain communications among the parties (see IRM 4.60.1.11.1.4(7));
 - e) Whether there is a potential for the proposed APA to impact prior tax year or period compliance;
 - f) Whether the proposed transactions are suitable for resolution through taxpayer participation in ICAP, based on factors including but not limited to:

- The scope, materiality, and complexity of the multinational enterprise (MNE) group's covered transactions in the United States and the jurisdictions participating in ICAP;
 - The MNE group's history of transparent and cooperative engagement with the IRS;
 - The MNE group's examination history with respect to transfer pricing and permanent establishment issues with the IRS; and
 - The anticipated availability of TPRA resources necessary to perform the ICAP risk assessment.
- g) Whether, in the case of a Compliance Assurance Process (CAP) taxpayer, the IRS has suggested that the proposed transactions might be suitable for resolution through an APA;
- h) Whether the proposed transactions potentially are suitable for resolution through a future potential TPP examination or joint audit, based on factors including but not limited to:
- Taxpayers (including foreign affiliates) with common tax years or periods under examination in the jurisdictions of the relevant tax administrations;
 - Common or complementary tax issues relevant to the tax administrations; and
 - Transactions that pose significant compliance risk to one or more tax administrations relative to the resources employed.

4.60.3.2.xx.2 APA Submission Review and Acceptance

- (1) Rev. Proc. 2015-41, Appendix defines the information required to be included in a taxpayer request to enter the APA program. Upon complete submission of an APA request by a taxpayer, as defined in Rev. Proc. 2015-41, section 3.03, APMA will review the submission to determine whether the APA workstream is best suited to successfully achieve certainty for the proposed covered transactions. APMA will then (a) accept the APA request or (b) decline to enter into the APA process with the taxpayer and recommend an alternative workstream for the taxpayer to consider.
- (2) The APA Submission Review Team will be led by an APMA FLM and include an APMA Team Leader or Economist (together referred as the "APMA Team Leader"), a Treaty Assistance and Interpretation Team (TAIT) analyst for any non-transfer pricing treaty issues raised by the request, the TPRA Manager (or designee), and a Transfer Pricing Practice (TPP) reviewer. For review procedures, see IRM Exhibit 4.60.3-3, Procedures for APA Submission Review (on page 6 of this attachment).

- (3) Based on the results of the Submission Review Team's review, the APMA FLM will send a recommendation to the APMA AD regarding suitability of the proposed APA for potentially achieving successful conclusion. The APMA FLM and APMA Team Leader will add documentation of the Submission Review Team's analysis and recommendation to the IMS case. The APMA FLM will aim to develop a consensus recommendation from the Submission Review Team; however, in the absence of consensus, the APMA FLM will decide what recommendation to send to the APMA AD. The APMA FLM will document the consensus recommendation or their alternative recommendation in the IMS case. The recommendation will be one of the following:
- a) Accept the taxpayer's APA request into the APA program. Depending on the specifics of the request, a recommendation to accept the APA request may include conditions including, but not limited to, the assignment of a TPP specialist to the APA case team or that certain covered transactions or rollback years not be accepted. A recommendation to accept the APA request may also be conditioned on communicating to the taxpayer challenges that increase the likelihood that the process could result in a failure to conclude an APA and any specific expectations regarding the taxpayer's provision of information and engagement in the process.
 - b) Decline to initiate the APA process with the taxpayer. Support for the recommendation based on the criteria above, as well as any alternative workstream the Submission Review Team believes would have a higher probability of success, should be included in the recommendation from the APMA FLM to the APMA AD.
- (4) If the APMA AD agrees with the APMA FLM recommendation to accept the APA request into the APA program, the APMA FLM will begin the APA process per existing procedures.
- (5) If the APMA AD agrees with the APMA FLM recommendation to decline to initiate the APA process with the taxpayer:
- a) Where APMA's experience with the proposed treaty party in MAP in the case of a foreign-initiated adjustment is better than the corresponding APA experience, or if there is favorable support for consideration of the proposed covered transaction in ICAP, the AD will elevate the recommendation to decline to initiate the APA process to the APMA director. If the APMA director agrees with the recommendation, the APMA AD will communicate the decision, a summary of the basis for the decision, and if applicable, a recommendation to consider applying to ICAP to the taxpayer orally. APMA then will send a formal decision letter to the taxpayer in accordance with Rev. Proc. 2015-41, section 4. If the APMA director decides to apply APMA resources and proceed with the APA process, APMA will follow its procedures for accepting the APA request. In such a case, the APMA director will provide

- documentation of their decision to the APMA FLM and Team Leader for inclusion in the IMS case.
- b) Where a joint audit might be a better treatment stream than an APA, the APMA AD will consult with the TPP territory manager (TTM) regarding resource allocation and the APMA AD will coordinate with the relevant Geographic Practice Area.
 - c) If LB&I elects to propose a joint audit, APMA will inform the taxpayer that it will not accept the APA request. TPP then will initiate contact with the taxpayer to discuss any timing and administrative issues relating to the joint audit process.
 - d) If LB&I does not elect to propose a joint audit of the transfer pricing issues presented by the APA request, then the APMA AD will elevate the recommendation to the APMA director, and the APMA director will decide whether to accept the APA request and apply APMA resources. If the APMA director decides to decline to initiate the APA process, APMA will send the taxpayer a formal decision letter in accordance with Rev. Proc. 2015-41, section 4. If the APMA director decides to apply APMA resources and proceed with the APA process, APMA will follow its procedures for accepting the APA request. The APMA director will provide documentation of their decision to the APMA FLM and Team Leader for inclusion in the IMS case.
- (6) If the APMA AD does not accept the recommendation of the APMA FLM, the APMA AD will elevate an alternate recommendation to the APMA director along with the APMA FLM recommendation and the corresponding support for both recommendations for final decision by the APMA director. Documentation supporting the APMA AD's recommendation and the APMA director's decision should be included in the APMA IMS case.
- (7) The Submission Review and Acceptance process should be completed within eight weeks of the filing date of the completed taxpayer APA request.

Exhibit 4.60.3-3 Procedures for APA Submission Review

- 1) When the APMA Inventory Coordinator receives an APA submission from a taxpayer, the Inventory Coordinator will send a copy of the submission to the appropriate APMA AD, the APMA IMS Coordinator, and the APMA Statute Program Manager per standard operating procedures.
- 2) The APMA IMS Coordinator will create an IMS case for tracking purposes and assign the IMS case in the system to the appropriate APMA AD. The APMA AD will assign the IMS case to an APMA FLM, who in turn will assign the IMS case and the APA Submission Review to an APMA Team Leader. The APMA Statute Program Manager will notify the assigned APMA FLM and Team Leader the status of the

period of limitations for assessment of tax for each year of the proposed APA term, including rollback years.

- 3) The assigned APMA FLM will form a Submission Review Team to assist in the suitability review of the submission. The APMA FLM will assign an APMA Team Leader and request TAIT participation for any non-transfer pricing treaty issues raised by the submission request. The APMA FLM will also contact the TPRA Manager to request participation by the TPRA Manager or a designee. The TPRA Manager will in turn solicit from the appropriate TPP TTM a TPP reviewer to be assigned to the Submission Review Team. The TPP reviewer must have sufficient expertise to provide meaningful input to the Submission Review Team while it applies the criteria in item 5 below and develops a recommendation.
- 4) To provide information to facilitate the Submission Review Team's review of the APA request:
 - a) The APMA Inventory Coordinator will provide the APMA FLM with a report including the taxpayer's open mutual agreement procedure (MAP) and APA cases, MAP and APA cases closed in the past three years, and any other APAs for which years remain in the APA term.
 - b) The TPP reviewer will provide a summary of the taxpayer's TPP examination history, if any.
 - c) The TPRA team will provide a risk assessment for the Submission Review Team's consideration.
- 5) The Submission Review Team will apply the following criteria to evaluate and develop a recommendation regarding suitability of the APA submission for assignment of APMA resources relative to alternative workstreams, considering the facts and circumstances of the proposed APA.
 - a) If a Prefiling Memorandum Review was not conducted for the proposed APA, the Prefiling Memorandum Review criteria defined above, including the transaction materiality and complexity;
 - b) Whether, based on APMA's experience, there is an actual or potential transfer pricing dispute that would be most efficiently resolved through an APA, considering factors including the taxpayer's proposed transfer pricing method (TPM), and the taxpayer's examination history in the United States or applicable foreign jurisdiction;
 - c) Whether the APA process likely will result in prospective APA years based on APMA's experience with the treaty partner, the type of covered transaction, and the taxpayer's industry;
 - d) Whether there is arbitration with the treaty partner and other country-specific strategic considerations;

- e) Whether APMA is best situated within TTPO to effectively analyze the proposed covered transactions, including development of facts and reliable financial data;
- f) Whether, in the opinion of the TPRA Submission Review Team member, the proposed transactions are suitable for ICAP, based on factors including but not limited to:
 - The scope, materiality, and complexity of the MNE group's covered transactions in the United States and the jurisdictions participating in ICAP;
 - The MNE group's history of transparent and cooperative engagement with the IRS;
 - The MNE group's examination history with respect to transfer pricing and permanent establishment issues with the IRS; and
 - The anticipated availability of TPRA resources necessary to perform the ICAP risk assessment;
- g) Whether the IRS has an interest in examining the covered transaction(s) based on TPP's workload selection process;
- h) The extent to which the transfer pricing issues posed by the covered transactions are secondary to the application of other domestic tax law provisions; and
- i) In the case of a request for a bilateral or multilateral APA, the views of the treaty partner(s), which the Submission Review Team may solicit in its discretion.
- j) Additional considerations pertaining to certain types of APA requests:
 - 1) Unilateral requests:
 - a) Whether a unilateral APA is the most efficient or only option to provide necessary certainty;
 - b) Whether, in the case of a CAP taxpayer, the IRS has suggested that the proposed transactions might be suitable for resolution through an APA;
 - c) Whether the request is part of a series of bilateral APAs, or the taxpayer's transaction structure is such that IRS has a need to price the transaction under the unilateral APA in order to work related bilateral APAs for the same taxpayer; and
 - d) Whether a unilateral APA would facilitate inappropriate base erosion or profit shifting in the other jurisdiction.
 - 2) Renewal requests:
 - a) Whether there is a continuing risk of a tax dispute or need for APMA to accept the APA renewal request;
 - b) Whether the request is a straightforward renewal that APMA can work in a streamlined manner;
 - c) Whether the treaty partner likely will agree to streamline the renewal process; and

- d) Whether the taxpayer is properly applying the TPM agreed in the prior APA based on review of the APA Annual Report and taxpayer's tax returns.
- 3) Rollback requests: The Submission Review Team will separately consider whether any requested rollback years should be accepted, considering:
- a) The amount of time remaining in the relevant periods of limitations on assessment at the time of the APA submission;
 - b) The IRS's interest in rolling back the TPM (including concerns regarding litigation and judicial determinations outlined in Rev. Proc. 2015-41, Section 5.02(7));
 - c) Whether APMA anticipates that an APA will result in an increase to U.S. taxable income for the rollback year;
 - d) If APMA anticipates that an APA will result in a decrease to U.S. taxable income for the rollback year, whether MAP provides a more efficient process for tax administration; and
 - e) Reasons the taxpayer did not apply for an APA for prior years.