

APMA releases ‘Interim Guidance on Review and Acceptance of Advance Pricing Agreement Submissions’

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In brief

The Acting Director of IRS Treaty and Transfer Pricing Operations (TTPO) on April 25 released a memorandum titled “Interim Guidance on Review and Acceptance of Advance Pricing Agreement (APA) Submissions,” which includes an attachment setting forth provisions that will be incorporated into the IRS Internal Revenue Manual by 2025 (collectively, the Guidance).

The Guidance outlines procedures and criteria for TTPO personnel — including Advance Pricing and Mutual Agreement (APMA) personnel — to follow in evaluating whether a proposed APA should be accepted into the APA process or in another TTPO workstream.

The takeaway: It remains to be seen what effects this Guidance will have on the APA process, including whether it might result in fewer APA requests being accepted into the APA program, and whether it would result in a change in the type of APAs that advance into the program. Given the IRS’s stated focus on evaluating the fitness of APA requests early in the process, applicants now may place a greater emphasis on the prefiling aspects of the APA process than in the past.

In detail

Background

In the past, APMA has been inclusive in terms of accepting APA requests into the APA process. While tax authorities in other jurisdictions have had ‘gating procedures’ in place before formally accepting an APA request into their programs, APMA historically has required limited or even no prefiling communication before accepting a case; prefiling memoranda only have been required in a defined set of circumstances, such as certain unilateral APA requests and requests that relate to certain complex intangibles issues, as outlined in Section 3.02(4) of Rev. Proc. 2015-41.

Review process

The Guidance applies to both APA prefiling memoranda and APA submission requests (including renewals). In explaining the background for the Guidance, the IRS states that the Guidance “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."

Pre-submission review

Under the Guidance, APMA will conduct a pre-submission review (i.e., Prefiling Memorandum Review) for taxpayers that wish to submit an optional prefiling memorandum in advance of their APA request. While the Guidance cites Rev. Proc. 2015-41, section 3.02(5), for situations where prefiling memoranda currently are optional, as a practical matter taxpayer choice on this item may be limited in the future as the Guidance states APMA will recommend APA-seeking taxpayers to submit a prefiling memorandum in all situations.

Upon submission of a prefiling memorandum, an APMA Team Leader (or Economist) and a Transfer Pricing Risk Assessment (TPRA) team member will be assigned to evaluate the memorandum on a variety of criteria, including:

- whether the proposed covered transactions are considered significant enough to justify the use of APMA resources to engage in and complete an APA.
- whether the proposed APA term, including rollback years, meets Rev. Proc. 2015-41 requirements regarding the period of limitations for assessment.
- for bilateral and multilateral APA cases, whether there is a high probability that engaging in negotiations with treaty partner(s) will significantly enhance transfer pricing compliance.
- for multilateral cases, whether the applicable international exchange agreements provide for sufficient information exchange between tax administrations.
- whether there is potential for the proposed APA to impact prior tax year or period compliance.
- whether the proposed transaction has been referred for an APA with respect to a Compliance Assurance Process (CAP) taxpayer.
- whether the proposed transactions are better suited for resolution through other mechanisms, such as the International Compliance Assurance Program (ICAP) or future Transfer Pricing Practice (TPP) or joint audits of the taxpayer.

Notably, regarding the potential suitability of other dispute resolution mechanisms, various factors will be considered, including the scope, materiality, and complexity of the proposed covered transactions and whether they touch jurisdictions participating in ICAP; the taxpayer's history of "transparent and cooperative engagement with the IRS"; the taxpayer's examination history with respect to transfer pricing and permanent establishment issues with the IRS; and the presence of common/complementary audits or issues with foreign tax administrations.

After completing the estimated four-week Prefiling Memorandum Review process, APMA, through a designated APMA frontline manager (FLM), will:

- notify the taxpayer to proceed with its APA submission
- provide a recommendation for the taxpayer to pursue a different method for obtaining tax certainty, or
- request additional details from the taxpayer before deciding whether to accept the APA application.

These recommendations will be communicated orally by the FLM.

Post-submission review

Once a complete APA request has been submitted, a more formal review process of the APA submission will determine whether the request ultimately is accepted into the APA program, or whether it is rejected and an

alternative workstream is identified (e.g., ICAP or joint audit) and recommended for the taxpayer to consider. This review process will be conducted by the APA Submission Review Team consisting of an APMA FLM, an APMA Team Leader or Economist, the TPRA Manager (or designee), a TPP reviewer, and a Treaty Assistance and Interpretation Team analyst for any non-transfer pricing treaty issues raised by the APA request.

Observation: A number of the general considerations and information inputs for this review process are interesting to note. The TPP reviewer will provide a summary of the taxpayer's TPP examination history, if any, and the TPRA team will provide a risk assessment for the Submission Review Team's consideration. The Submission Review Team apparently will start its evaluation with the Prefiling Memorandum Review criteria if a prefiling memorandum was not filed, which is consistent with the Guidance's recommendation that a prefiling memorandum should be submitted in all situations. APMA also will evaluate — based on its experience and the taxpayer's examination history in the United States and the applicable foreign jurisdiction — whether the proposed transfer pricing methodology (TPM) and covered transactions would be most efficiently resolved through an APA.

Other stated considerations are whether the APA process likely will result in prospective APA years given APMA's prior experiences with the indicated treaty partner and whether the relevant tax treaty contains an arbitration provision, among other country-specific 'strategic' considerations. This consideration raises a question as to whether bilateral or multilateral APA applications involving treaties with arbitration clauses might receive acceptance preference. Other considerations set forth in the Guidance may indicate potential reductions to APMA's inventory, such as whether APMA is the best suited forum within TTPO to analyze the proposed covered transactions, including the development of facts and reliable financial data; whether the IRS has an interest in examining the covered transactions based on TPP's workload selection process; and whether the transfer pricing issues that are posed are secondary to other domestic tax law issues.

Observation: Potential ICAP suitability will be further considered, and the Submission Review Team, in its discretion, may solicit the views of the applicable treaty partners. ICAP is mentioned prominently as an alternative workstream in the Guidance, but since ICAP is currently voluntary, it is unclear what these references will mean in practice.

The Guidance states that this review process for APA submissions is intended to be completed within eight weeks of the submission filing date.

Additional considerations pertaining to certain types of APA requests

The Guidance also highlights additional considerations for the review of unilateral APAs, APA renewals, and APAs requesting rollback periods.

Unilateral APAs

APMA will evaluate whether a unilateral APA is the most efficient or only option to provide the necessary tax certainty. As part of this review, APMA will consider (1) whether the taxpayer is a CAP taxpayer and whether it has been advised by the IRS CAP team to consider an APA; (2) whether the request is part of a series of bilateral APAs such that the IRS has a need to price the transaction under the unilateral APA in order to work related bilateral APAs with the same taxpayer; and (3) whether the unilateral APA would facilitate inappropriate base erosion or profit shifting in the other relevant jurisdiction(s).

APA renewals

Before accepting APA renewal requests, APMA will consider if there is a continuing risk of a tax dispute; whether the renewal request has potential for a streamlined resolution and, if so, whether the relevant treaty partner is likely to agree to streamlined procedures; and whether the taxpayer has properly applied the TPM agreed to in the prior APA(s).

APAs with rollback years

The Submission Review Team will consider whether any requested rollback years should be accepted by reviewing the period of limitations on assessment for those years, the effect on US taxable income relevant to the rollback years, and the reasons why the taxpayer did not apply for an APA to cover these years in the past. If the rollback results in an adjustment that decreases a taxpayer's US taxable income, APMA will consider whether a mutual agreement procedure provides a more efficient process for tax administration. APMA also will take into account other considerations with respect to rolling back the TPM, such as concerns regarding litigation and judicial determinations.

Observation: Other taxing authorities have screening criteria and conditions that they consider before formally agreeing to accept an APA request, but taxpayers have relied upon the open and collaborative nature of the US APA program and the certainty provided by APAs as the premier alternative dispute resolution forum for resolving transfer pricing controversies and the prevention of double taxation. Given the time and resources expended by the parties to conclude the typical APA, some reasonable screening procedures and working conditions could seem prudent, especially if, for example, there is an increasing prevalence of breakdowns well into the APA process.

Observation: At the same time, the criteria and considerations stated in the Guidance seem quite broad and include some subjective elements. The new procedures potentially introduce other stakeholders into the screening process, such as TPP examiners and foreign treaty partners, that could have an unknown impact on the decision-making and consensus-building dynamics of the review teams. It also appears taxpayers potentially may be subjected to dispute resolution venues that provide less certainty, or even audits, if acceptance into the APA program is not granted. The impact of these new procedures on the APA process and overall APA accessibility will be closely watched by taxpayers and practitioners alike. In addition to this Guidance, more changes to APMA's APA practices and procedures may be on the horizon in a revised APA Revenue Procedure, which the IRS has signaled is forthcoming.

Let's talk

For a deeper discussion of how the interim guidance might affect your business, please contact:

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