

Strategic Resets Under the New MAP and APA Revenue Procedures

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The IRS recently replaced Rev. Proc. 2006-54 for requesting assistance under the Mutual Agreement Procedure (“MAP”) article of U.S. tax treaties, and Rev. Proc. 2006-9 for requesting Advance Pricing Agreements (“APAs”). The new Rev. Procs. (2015-40 and 2015-41, respectively) largely track draft procedures issued in 2013 (Notices 2013-78 and 2013-79), but with some changes deferring to stakeholder comments. This alert identifies some of the key changes and explains how they may affect your strategy for managing these processes.

The new procedures reflect the recent integration of the APA program into the IRS Large Business and International Division, and manifest closer coordination between the APA and MAP programs. In general, they: (i) broaden access to the programs by expanding the scope of coverable issues; (ii) strengthen authority of the Advance Pricing and Mutual Agreement program (“APMA”) over MAP and APA cases and over other IRS processes; (iii) expand submission requirements; (iv) implement stricter timelines; and (v) overall, add some transparency to APMA considerations. The clear subtext is that APMA wants to improve the efficiency of both programs in a time of severely limited resources and in anticipation of amplified cross-border uncertainty and disputes in a post-BEPS world. The revised procedural framework injects new demands – as well as opportunities – for taxpayers, and adaptation will require thoughtful strategic consideration.

The new Rev. Procs. take effect immediately, except that taxpayers may elect to apply the old versions for MAP requests filed by October 30 and APA requests filed by December 29. Taxpayers contemplating MAP or APA requests should review the new Rev. Procs. to determine if there is merit to accelerating their requests.

The key changes, and some strategic considerations they raise, are summarized below.

I. Changes Common to MAP and APA Requests

1. **Expansion of Coverable Issues – Ancillary Issues:** The new Rev. Procs. provide that issues relating to interest on refunds and deficiencies and penalties regarding U.S.-initiated transfer pricing adjustments, collectively referred to as “ancillary issues,” may be addressed in MAP and APA cases. This clarification is a positive change from APMA’s previous tendency to shy away from such issues. However, the IRS dropped the 2013 proposal to include foreign tax credit issues – specifically, whether a payment is compulsory or not – presumably reflecting jurisdictional issues.

2. **Mandatory Pre-Filing Conference (“PFCs”) and Memoranda:** Historically, it has been left to the taxpayer to decide whether to request PFCs and submit pre-filing materials, with the option to conduct PFCs on a no-name basis. Although the new Rev. Procs. still provide for optional PFCs and consultation on a no-name basis, pre-filing memoranda are now mandatory, and require taxpayer identification, in certain cases, and the IRS may

require PFCs in these situations as well. These cases include: (i) a unilateral APA request for issue(s) that could be covered under a bilateral or multilateral APA, (ii) an abbreviated APA request, (iii) an APA request involving licensing of intangibles, global trading arrangements, business restructuring, unincorporated branches, pass-through entities, hybrid entities, or disregarded entities, and (iv) requests for MAP assistance for taxpayer-initiated positions. We generally advised taxpayers to request PFCs even under the old rules, as they enable early identification of complex and important issues and better use of IRS and taxpayer resources. Following APMA's implicit acknowledgement of the same benefits should help establish the cooperative working relationship that is so critical to successful APA and MAP proceedings.

3. **Joint Competent Authority ("CA") Presentations:** The new Rev. Procs. contemplate joint taxpayer presentations to all relevant CAs. These joint presentations may result from either a CA or a taxpayer request. APMA has, in the past, occasionally utilized joint presentations, but the new Rev. Procs. encourage them as a means to achieve mutual understanding of complex issues and to move cases forward in an efficient manner. To take advantage of this change, taxpayers must lay the groundwork for beneficial joint presentations with each of the CAs, which requires early coordination with the taxpayer's overseas offices and advisers and timely requests of the CAs.

4. **Informal Advice to Taxpayers:** The new Rev. Procs. offer "informal consultations" on any MAP or APA issue, and, of particular note, foreign tax credit issues. These consultations may provide a useful opportunity to assess the potential benefit of APMA assistance or to scope out procedural requisites relating to the creditability of foreign taxes. Such consultations will not be binding on the IRS or taxpayers, but it seems likely that APMA will communicate the substance of these discussions to the relevant IRS field team.

5. **Covered Issue Diagrams:** The new Rev. Procs. define "covered issue diagrams" as "[d]iagrams, charts, tables, or similar representations...that depict the structure and value chain of the proposed covered group as they relate to the proposed covered issue(s) and...interrelated issues." These diagrams are required in all APA requests and all mandatory APA pre-filing memoranda, as well as MAP requests that involve transfer pricing issues. We have long found such diagrams to be useful tools for conveying information in an understandable format.

6. **Increased User Fees:** User fees are increased under the new Rev. Procs. For MAP requests, the user fee for requesting discretionary LOB relief is increased from \$27,500 to \$37,000 (to be implemented in two phases). (No other user fees apply to MAP cases.) For APAs, (i) the user fee for an APA request is increased from \$50,000 to \$60,000, (ii) the user fees for small APA cases and for amendments are increased from \$22,500 and \$10,000 to \$30,000 and \$12,500, respectively, and (iii) a group rate of \$60,000 plus \$30,000 for each foreign CA involved beyond the first two will apply for multiple APA requests filed by the same controlled group within a 60-day period (previously, there was no add-on to the basic user fee in these cases).

II. Changes for MAP Requests Under Rev. Proc. 2015-40

1. **Taxpayer-Initiated Positions:** One of the more important changes made by Rev. Proc. 2015-40 is the expansion of subject matter that may be addressed in a MAP request to include “taxpayer-initiated” positions – i.e., the reporting of intercompany transactions based on prices that differ from those initially reported in order to properly reflect an arm’s length result. As written, the Rev. Proc. appears to permit self-initiated adjustments that either increase or decrease US income. APMA’s approach to these cases is, however, expected to be cautious. For example, APMA may be unwilling to ignore Treas. Reg. § 1.482-1(a)(3) (which permits taxpayers to adjust transfer prices to reduce US income only on an original return), but might accept self-initiated adjustments made by amending foreign returns. More broadly, APMA likely will not assist with self-initiated adjustments that, in its view, constitute after-the-fact tax planning (e.g., to take advantage of a foreign loss). We’ll hopefully know more after APMA begins implementing the new mandatory PFC rules. Self-initiated adjustments is one of the more obvious areas where taxpayers should have a plan, and potentially a long-range one. Later events often call into question the legitimate assumptions on which earlier transfer-pricing positions are based (e.g., a TPM inadvertently produces results that are inconsistent with expected outcomes). Keeping track of larger, more complex and more uncertain prices may be warranted until the years are closed in all pertinent jurisdictions.

2. **No Forced Expansion of Scope of MAP Request:** In Notice 2013-78, the IRS proposed to increase APMA’s control over the scope of MAP requests by conditioning acceptance or continuation of a case on the taxpayer’s agreement to expand its scope. The final Rev. Proc. abandoned this requirement, although APMA may still require taxpayers to produce information on interrelated issues, and may take that information into account in determining the relief to be granted (e.g., cases involving multi-part intangibles transactions). So, while APMA may request expansion of a MAP case, it remains obligated to try to reach a MAP resolution even if the taxpayer declines. In contrast (as discussed below), for APA requests, APMA has given itself authority to require expanded coverage.

3. **Coordination With Other Administrative or Judicial Proceedings:** Under Notice 2013-78, APMA proposed to accept cases involving U.S.-initiated adjustments (i) from IRS Exam, only if APMA had been consulted, and consented, prior to execution of a closing or settlement agreement (including a Form 870 waiver); and (ii) from IRS Appeals, only if a stringent 30-day request deadline was met and the taxpayer refrained from executing any settlement or closing agreement. Under the new rules, these conditions are scaled back, though to different degrees:

- *IRS Exam:* To ensure taxpayers’ access to MAP is not unnecessarily restricted, “standard” Form 870 waivers will not impede CA assistance. If the taxpayer previously signed some other form of closing or settlement agreement with IRS Exam, APMA will attempt only to obtain correlative relief from the foreign CA. It will not compromise the taxable amount set forth in such agreement. Access to MAP following resolution in the Fast Track Settlement Program is subject to the

same rules. Given the markedly different MAP consequences, taxpayers should work with their advisors, and also consider consultation with APMA, to evaluate these distinctions.

- *IRS Appeals:* APMA will completely deny assistance for MAP issues that are under Appeals jurisdiction unless the taxpayer “properly severs” such issues from its Appeals protest. To do so, a taxpayer must file a MAP request within 60 days after its opening conference with Appeals and refrain from executing a closing agreement or Form 870-AD settlement of the issue. The newly imposed 60-day window, although longer than the 30-day window proposed in Notice 2013-78, forces taxpayers to decide in a quick and possibly rushed manner whether to pursue a MAP issue in Appeals, MAP, or the Simultaneous Appeals Procedure (“SAP”). Taxpayers should, therefore, start considering this decision during audit, as soon as it becomes apparent that a transfer pricing adjustment may be made.

The new Rev. Proc. also clarifies that APMA has jurisdiction in joint SAP proceedings, with Appeals assisting to facilitate APMA’s unilateral consideration of the issue before presenting its position to the foreign CA. While elaborating somewhat on pertinent procedures, the Rev. Proc. is tantalizingly vague on the potential application of Appeals’ normal “hazards of litigation” considerations.

4. **More Restricted Access to Repatriation Benefits:** Under Rev. Proc. 2006-54, APMA had discretion to provide Rev. Proc. 99-32-type repatriation benefits “in appropriate cases” to taxpayers who had already executed a closing agreement or settlement with the IRS. In contrast, Rev. Proc. 2015-40, though retaining “sole discretion to agree to or decline a request for Competent Authority repatriation,” prohibits access to repatriation benefits as part of the MAP process for a taxpayer whose MAP request: (i) has been terminated by APMA on one or more grounds for denial of assistance, (ii) involves issues previously determined in litigation or covered by a closing agreement (or similar agreement), or (iii) was unresolved because the taxpayer rejected the resolution offered. Taxpayers unable to obtain repatriation benefits via the MAP process will be limited to whatever benefits might be available under Rev. Proc. 99-32 itself.

5. **Additional Submission Requirements and Availability of Exceptions:** Under Rev. Proc. 2015-40, taxpayers must submit, where applicable, (i) copies of section 6662(e) documentation or other documentation analyzing the MAP issues for the taxable years covered by the MAP request, (ii) certain financial data of the taxpayer’s controlled group prepared for regulatory, statutory, or reporting purposes, and (iii) the income statements and balance sheets of the taxpayer itself, segmented to demonstrate the effect of the MAP issue(s) on taxable income for the taxpayer and the controlled group, for three taxable years ending before and after the covered years. Although APMA had the ability to gather these items of information through post-submission requests under Rev. Proc. 2006-54, the new Rev. Proc. requires taxpayers to produce them up front, providing APMA with more information at the beginning of the process. At the same time, under the new Rev. Proc., APMA

“may permit exceptions to the filing requirements...on a case-by-case basis,” potentially lessening the burdensome effect of the up-front information production. It remains unclear under what circumstances such an exception may be granted, and our experience has been that no amount of information presented in the submission will avoid at least some follow-on information requests.

III. Changes for APA Requests Under Rev. Proc. 2015-41

1. **Preference for Bilateral APAs:** Rev. Proc. 2015-41 reinforces APMA’s preference for bilateral or multilateral APAs over unilateral APAs by obligating a unilateral APA applicant whose issues are coverable under a bilateral or multilateral APA to explain its reasons for requesting a unilateral APA in a mandatory pre-filing memorandum. APMA has full discretion to decline the request after considering the reasons set forth by the taxpayer. Moreover, a taxpayer who enters into a unilateral APA may face rejection of a subsequent MAP request for an issue that could have reasonably been covered by a bilateral or multilateral APA.

2. **Expanded Subject Matter - Covered “Issues”:** The potential subject matter of APA cases is enlarged from “covered transactions” to “covered issues.” This expands the breadth of the subject matter that APMA may handle in an APA beyond section 482, to include issues arising under other sections of the Code or U.S. tax treaties that implicate transfer pricing principles. For instance, issues arising under section 367(d) of the Code would be coverable to the extent transfer pricing principles apply.

3. **Forced Consolidation of Interrelated Matters:** Rev. Proc. 2006-9 generally permitted taxpayers to request expansion of the scope of their APA requests, but APMA could not mandate such an expansion. Rev. Proc. 2015-41 drastically strengthens the authority of APMA over the scope of APA requests by conditioning the acceptance and continuation of a case on the taxpayer’s agreement to expand the scope of the case as requested by APMA. Specifically, “APMA may condition its acceptance, continued consideration, or resolution of an APA request upon the agreement of the taxpayer...to expand the scope of the APA” to include interrelated issues, additional taxable years and additional treaty countries (collectively, “interrelated matters”). Although the new rule may promote more efficient resolution of cases, it could lead to more frequent denials of APA requests and in any event will require taxpayers to carefully consider related issues in deciding whether to pursue an APA. To avoid undesired consolidation of issues, an alternative to seeking an APA may be to take a self-initiated adjustment to MAP. APMA has indicated that it will not require issue expansion in MAP cases (as discussed above). This strategy would only make sense where the APA issues are driven by rollback considerations.

4. **Deadline for Requesting Rollbacks:** A taxpayer seeking to add rollback years to an APA now generally needs to make its rollback request in the APA request itself, i.e., at the beginning of its case, rather than at any point in time before the APA was executed as permitted under Rev. Proc. 2006-9. The earlier deadline eliminates the ability of taxpayers to assess the desirability of a rollback as negotiations of the APA terms progress. Alternatively, in appropriate cases, a self-initiated adjustment might provide access to MAP.

5. **Section 6662(e) Contemporaneous Documentation Requirement:** Rev. Proc. 2015-41 states that a complete APA request will be considered as “a factor” in determining whether the section 6662(e) documentation requirements have been met (which may be important if the APA process fails), but, contrary to commentators’ urging, is not definitive in this regard. Thus, taxpayers who have requested an APA must pay heed to such documentation requirements for covered issues until the APA is finalized. To enhance the benefits of an APA request, taxpayers may consider evaluating its completeness with reference to the section 6662(e) documentation requirements, and achieving contemporaneousness by completing the APA request prior to the filing of the return for the first APA year and appropriately updating the request annually.

6. **Starting the APA Process Sooner – “60 days within filing of foreign request”:** Previously, APA requests needed to be filed by the due date (including extensions) of the tax return for the first APA year. An additional 120-day extension was allowed for taxpayers who paid the user fee by the original deadline. Rev. Proc. 2015-41 potentially narrows this time frame for bilateral or multilateral APA requests by requiring a taxpayer to file within 60 days of filing its foreign request, if such date is earlier than that tax return due date. Under this new rule, taxpayers must consider filing deadlines imposed by foreign authorities to ensure the timely filing of their U.S. APA requests. Tardy U.S. filings will convert initial years into rollback, rather than “prospective” APA years (see 9. below), and extend the length of the expected APA term.

7. **Deference to MAP Repatriation Rules:** For repatriation issues that arise from bilateral and multilateral APAs, APMA generally will defer to the repatriation provisions of Rev. Proc. 2015-40. For all other APA cases, Rev. Proc. 99-32 treatment will govern the repatriation of funds. An important change, unfavorable to taxpayers, is that unlike Rev. Proc. 2006-9, Rev. Proc. 2015-41 no longer automatically eliminates interest charges on the resulting inter-company receivable.

8. **Additional Submission Requirements:** Taxpayers must now submit (i) additional financial information, including income statements and balance sheets, for certain companies if the proposed covered method is either the CPM or the TNMM, (ii) a draft of the proposed APA, and (iii) a copy of the most recent APA that the taxpayer or another member of the proposed covered group has entered into with the IRS and any other foreign tax authority regarding the proposed covered issues (in lieu of just a descriptive statement regarding prior APAs). Deference to the secrecy afforded foreign competent authority processes is no longer the standard in the latter situations.

9. **Term of APA May Differ From Taxpayer’s Request:** Under Rev. Proc. 2006-9, a taxpayer was generally required to propose at least five prospective years as the term of its APA. In addition, the APA Program aimed to have at least three prospective years remaining unexpired in the APA term “upon...the completion of the APA Program’s recommended negotiating position for Competent Authority” in bilateral or multilateral APA cases. Under Rev. Proc. 2015-41, APMA will now “seek to set the APA term so that there are at least three unexpired years...remaining in the APA term upon...the execution of the underlying competent authority resolution.” As a

practical matter, taxpayers likely will be required to include additional future years beyond those proposed in their initial APA request.

10. **Taxpayer Review of APMA Position in Bilateral or Multilateral Case:** Under Rev. Proc. 2006-9, the APA Program developed and provided a recommended negotiating position as a starting point for discussions with relevant foreign CAs. Prior to finalization of the position, the APA Program routinely conveyed tentative positions to taxpayers for comment. By contrast, Rev. Proc. 2015-41, states that in some cases “the APA team may issue the [position] simultaneously to the taxpayer and to the foreign competent authority(ies)” without providing the taxpayer an opportunity to comment. This change can only make the APA process more opaque and seems more advantageous to APMA than to taxpayers.

IV. Conclusion

Although the new Rev. Procs. generally impose greater information submission requirements and stricter deadlines, they also implement provisions aimed at broadening access to APMA assistance and creating a more interactive process for taxpayers. Whether the net effect of these changes will promote resolution of cases through more efficient and taxpayer-friendly MAP and APA processes remains to be seen. Moreover, many of the aspirational benefits, from scope to speed, are critically dependent on the cooperation of the relevant foreign competent authorities. Ongoing efforts at the OECD MAP Forum, conceived and led by the U.S. representatives, may help smooth the way and encourage complementary processes in other jurisdictions.

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