

May 25, 2023

## **NEW IRS GUIDANCE ON ACCEPTANCE OF ADVANCE PRICING AGREEMENT (APA) SUBMISSIONS AND INCREASED PRE-SUBMISSION REVIEW**

To Our Clients and Friends:

On April 25, 2023, the IRS' Treaty and Transfer Pricing Operations ("TTPO") director introduced new internal procedures for handling requests for Advance Pricing Agreements ("APAs"), a voluntary process for prospectively resolving transfer pricing issues and ensuring tax compliance.

### ***Background***

APAs are a valuable tool for taxpayers and taxing authorities to reach binding agreement on the arm's length price for present and future intercompany transactions. For many taxpayers, the principal benefit is tax certainty, and for bilateral or multilateral APAs (those involving more than one taxing authority) the elimination of double tax. Rev. Proc. 2015-41[1] ([here](#)) is the governing APA revenue procedure, and the Advance Pricing and Mutual Agreement ("APMA") program, a representative office of the U.S. competent authority and one of the divisions of TTPO, oversees the APA program. While APAs offer a collaborative and proactive method for resolving transfer pricing issues, APMA's acceptance of an APA request is discretionary. As indicated below, it appears that APMA will exercise more selectivity going forward.

### ***New APMA Guidelines Effective April 25, 2023***

In the "Memorandum for Treaty and Transfer Pricing Operations Employees" (the "Memorandum"), TTPO (1) provides guidance to its personnel (which include those in APMA) on how to review and determine whether to accept APA requests and (2) instructs TTPO personnel to provide taxpayers who submit pre-filing memoranda with guidance on whether an APA workstream is well-suited to achieve certainty for the proposed intercompany transactions (i.e., whether a APA request will be accepted or likely be successful). Per the Memorandum, these instructions are not intended to limit or decrease the number of APA requests accepted by APMA but aim to improve the quality and timeliness of the APA program by identifying potential roadblocks and opportunities for alternative paths to certainty, such as the International Compliance Assurance Program (the "ICAP") or joint audits. The Memorandum is effective for all submissions and requests filed as of April 25, 2023, and the IRS intends the guidance to be incorporated into the Internal Revenue Manual within two years.

Prior to publication of the Memorandum, IRS officials previewed the forthcoming guidance. In late 2022, Nicole Welch, Acting Director of TTPO, emphasized that APAs are just one tool to prevent transfer pricing disputes and that the program should focus on ensuring that an APA is the best

workstream to resolve a taxpayer's transfer pricing issue. She also highlighted the need for the program to align resources with the risks posed by transactions and learn from the successes and challenges of other jurisdictions that have adopted a more selective approach to advance pricing agreements.[2] In March 2023, Jennifer Best, the acting Deputy Commissioner of the Large Business and International division ("LB&I"), previewed the April guidance, explaining that this process would allow taxpayers to obtain preliminary views from the APMA before submitting a formal APA request, providing more clarity on the IRS' perspective. Best noted that this approach is aimed at investing time upfront in the APA process, with early engagement to communicate the IRS' thoughts on the feasibility of the proposed APA.[3]

Under Rev. Proc. 2015-41, 2015-35 I.R.B. 263 (Aug. 31, 2015) ("Rev. Proc. 2015-41") (here), APMA encourages taxpayers to voluntarily submit an optional pre-filing memorandum and request a pre-filing conference prior to filing the APA request.[4] The Rev. Proc. specifically recommends such voluntary submissions for novel or complex issues, but it does not explicitly provide reasons why a voluntary pre-filing memoranda may be beneficial to the taxpayer or the U.S. competent authority. The Memorandum (although directed to TTPO employees) and recent comments by IRS officials both provide valuable insight to taxpayers considering APAs as a means to achieve certainty with respect to significant intercompany transactions.

### *TTPO's New Criteria for Acceptance of APA Submissions*

Given the expense of filing an APA application and the 3-year average time frame to reach APA resolutions, an advance opinion from APMA on whether the APA submission would likely reach a successful result serves a valuable function (and brings the APA process into closer alignment with Chief Counsel's private letter ruling ("PLR") program),[5] but perhaps more meaningful is TTPO's new criteria for determining whether APAs (including renewals) should be accepted and whether TTPO may "recommend" that taxpayers seek an alternative workstream, such as a **joint or multilateral audit** with foreign tax authorities.

Relevant to the pre-filing submissions and formal APA requests, including APA renewals, TTPO provides a long list of criteria that must be evaluated to determine whether an APA will be accepted as the preferred avenue to achieve transfer-pricing certainty. For large, bilateral or multilateral issues, the criteria appear to reflect a few specific underlying concerns regarding (1) APMA's and foreign competent authorities' ability to adequately develop the facts, (2) whether treaty partners are likely to be helpful in improving transfer-pricing compliance, and (3) whether the APA is principally prospective in nature.

### *Implications for the APA Program*

Although the Memorandum's stated purpose is not to limit or reduce the number of accepted APA requests, we believe the criteria reflect a more selective approach to APAs (consistent with Nicole Welch's prior statements) and that it indicates a preference for relatively more unilateral action by the IRS Examination function (with the assistance of TTPO) to audit large taxpayers or to replace the APA process with other processes that do not provide the legal certainty of an APA. Thus, the guidance

appears to reflect a shift in the IRS' approach that reduces certainty with respect to challenging transfer pricing issues and increases the likelihood of double tax, at least from our perspective.[6] Perhaps it is yet to be seen, but the Memorandum guidance does not appear to comport with recent OECD inclusive framework initiatives, including the recent OECD guidance in the “Bilateral Advance Pricing Agreement Manual” and the “Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements” (both of which the US approved). Beyond resource constraints, perhaps the more stringent APA case selection process (including with respect to APA renewals) is in reaction to the *Eaton* case, which involved the IRS's failed attempt to revoke two APAs.[7]

Presumably this is the first of many updates to APA procedures. Since 2021, Treasury's Priority Guidance plan has included, “Guidance updating Rev. Proc. 2015-41, providing the procedures for requesting and obtaining advance pricing agreements and guidance on the administration of executed advance pricing agreements.”[8] Prior to the issuance of Rev. Proc. 2015-41, the IRS issued a proposed version in Notice 2013-79, 2013-2 C.B. 653 for public comment. The public is not afforded the opportunity to comment on internal IRS processes and procedures, but the new, immediately effective, APA procedures detailed in the Memorandum (which the IRS intends to incorporate into the IRM), rather than a Revenue Procedure, are an unusual surprise. APAs are a critical multilateral, inclusive, program that should be enhanced and supported as primary means to resolve challenging transfer pricing positions that are innate to the complex business operations of large multinationals. The tax community (including the IRS) is benefited by taxpayers' comments to proposed changes. The opportunity to comment on future, material changes to APA procedures would be most welcome.

In conclusion, before taxpayers invest time and effort in drafting and submitting a formal APA request, the new IRS procedures for pre-submission review allow the APMA to provide a preliminary opinion on the suitability of the APA workstream for achieving certainty in proposed transactions and whether an alternative workstream is recommended and may also offer assurance for taxpayers. It could be assumed that, even though the new guidance asserts it “is not intended to limit or decrease the number of APA requests accepted by APMA,” the new procedures under the interim guidance issued by the IRS may potentially lead to a decline in the number of APAs requested and accepted into the program.

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[1] Rev. Proc. 2015-41, 2015-35 I.R.B. 263 (Aug. 31, 2015).

[2] See David van den Berg, *IRS Advance Pricing Unit May Become More Selective*, Law360 Tax Authority (Oct. 6, 2022), <https://www.law360.com/tax-authority/articles/1537536>; Shaw Tim, *Transfer Pricing Enforcement, Advance Agreement Changes Coming, IRS Official Says*, Thompson Reuters, Checkpoint Learning (Mar. 14, 2023), <https://tax.thomsonreuters.com/news/transfer-pricing-enforcement-advance-agreement-changes-coming-irs-official-says/>.

[3] See Isabel Gottlieb, *IRS Planning Changes to Advance Pricing Agreement Process*, Daily Tax Rep. (BNA), Mar. 7, 2023, [https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-international/X86FR3PC000000?bna\\_news\\_filter=daily-tax-report-international#jcite](https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-international/X86FR3PC000000?bna_news_filter=daily-tax-report-international#jcite).

[4] Rev. Proc. 2015-41, 2015-35 I.R.B. 263, § 3.02.

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[5] See IRS Pre-Submission Conf., IRM 32.3.2.4.2 (Aug. 11, 2004), [https://www.irs.gov/irm/part32/irm\\_32-003-002#idm140414975120816](https://www.irs.gov/irm/part32/irm_32-003-002#idm140414975120816). One potentially important difference between Chief Counsel's PLR program and the current APA Rev. Proc. is that the Rev. Proc. permits pre-submission conferences on an anonymous basis, whereas the PLR procedures do not.

[6] See also Kristen A. Parillo, *IRS Refining Its Transfer Pricing Approach*, 106 Tax Notes Int'l 1696 (June 24, 2022) (quoting Jennifer Best's comments that LB&I is expanding audit coverage for transfer pricing and looking to become more selective in accepting APAs).

[7] *Eaton Corp. v. Comm'r*, 47 F.4th 434 (6th Cir. 2022), *aff'g in part, rev'g in part*, T.C. Memo. 2017-147.

[8] See IRS 2022—2023 Priority Guidance Plan, at 17 (May 5, 2023), <https://www.irs.gov/pub/irs-utl/2022-2023-pgp-3rd-quarter-update.pdf>.



*Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any of the following leaders and members of the firm's Tax and Global Tax Controversy and Litigation practice groups, or the following authors:*

*C. Terrell Ussing – Washington, D.C. (+1 202-887-3612, [tussing@gibsondunn.com](mailto:tussing@gibsondunn.com))  
Anne Devereaux\* – Los Angeles (+1 213-229-7616, [adevereaux@gibsondunn.com](mailto:adevereaux@gibsondunn.com))  
Galya Savir – New York (+1 212-351-2399, [gsavir@gibsondunn.com](mailto:gsavir@gibsondunn.com))*

## **Tax Group:**

*Dora Arash – Los Angeles (+1 213-229-7134, [darash@gibsondunn.com](mailto:darash@gibsondunn.com))  
Sandy Bhogal – Co-Chair, London (+44 (0) 20 7071 4266, [sbhogal@gibsondunn.com](mailto:sbhogal@gibsondunn.com))  
Michael Q. Cannon – Dallas (+1 214-698-3232, [mcannon@gibsondunn.com](mailto:mcannon@gibsondunn.com))  
Jérôme Delaurière – Paris (+33 (0) 1 56 43 13 00, [jdelauriere@gibsondunn.com](mailto:jdelauriere@gibsondunn.com))  
Michael J. Desmond – Los Angeles/Washington, D.C. (+1 213-229-7531, [mdesmond@gibsondunn.com](mailto:mdesmond@gibsondunn.com))  
Anne Devereaux\* – Los Angeles (+1 213-229-7616, [adevereaux@gibsondunn.com](mailto:adevereaux@gibsondunn.com))  
Matt Donnelly – Washington, D.C. (+1 202-887-3567, [mjdonnelly@gibsondunn.com](mailto:mjdonnelly@gibsondunn.com))  
Pamela Lawrence Endreny – New York (+1 212-351-2474, [pendreny@gibsondunn.com](mailto:pendreny@gibsondunn.com))  
Benjamin Fryer – London (+44 (0) 20 7071 4232, [bfryer@gibsondunn.com](mailto:bfryer@gibsondunn.com))  
Brian R. Hamano – Los Angeles (+1 310-551-8805, [bhamano@gibsondunn.com](mailto:bhamano@gibsondunn.com))  
Kathryn A. Kelly – New York (+1 212-351-3876, [kkelly@gibsondunn.com](mailto:kkelly@gibsondunn.com))  
Brian W. Kniesly – New York (+1 212-351-2379, [bkniesly@gibsondunn.com](mailto:bkniesly@gibsondunn.com))  
Loren Lembo – New York (+1 212-351-3986, [llembo@gibsondunn.com](mailto:llembo@gibsondunn.com))  
Jennifer Sabin – New York (+1 212-351-5208, [jsabin@gibsondunn.com](mailto:jsabin@gibsondunn.com))  
Hans Martin Schmid – Munich (+49 89 189 33 110, [mschmid@gibsondunn.com](mailto:mschmid@gibsondunn.com))  
Eric B. Sloan – Co-Chair, New York/Washington, D.C. (+1 212-351-2340, [esloan@gibsondunn.com](mailto:esloan@gibsondunn.com))  
Jeffrey M. Trinklein – London/New York (+44 (0) 20 7071 4224 /+1 212-351-2344),*

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*jtrinklein@gibsondunn.com)*

*John-Paul Vojtisek – New York (+1 212-351-2320, jvojtisek@gibsondunn.com)*

*Edward S. Wei – New York (+1 212-351-3925, ewei@gibsondunn.com)*

*Lorna Wilson – Los Angeles (+1 213-229-7547, lwilson@gibsondunn.com)*

*Daniel A. Zygielbaum – Washington, D.C. (+1 202-887-3768, dzygielbaum@gibsondunn.com)*

## ***Global Tax Controversy and Litigation Group:***

*Michael J. Desmond – Co-Chair, Los Angeles/Washington, D.C. (+1 213-229-7531,*

*mdesmond@gibsondunn.com)*

*Saul Mezei – Washington, D.C. (+1 202-955-8693, smezei@gibsondunn.com)*

*Sanford W. Stark – Co-Chair, Washington, D.C. (+1 202-887-3650, sstark@gibsondunn.com)*

*C. Terrell Ussing – Washington, D.C. (+1 202-887-3612, tussing@gibsondunn.com)*

*\*Anne Devereaux is an of counsel working in the firm's Los Angeles office who is admitted only in Washington, D.C.*

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