

## UNITED STATES

KPMG US



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## IRS introduces new review procedures for APAs

**Mark Martin and Thomas Bettge of KPMG in the US discuss the recently announced IRS procedures for reviewing advance pricing agreement (APA) requests and what these procedures mean for taxpayers.**

For more than three decades, the IRS APA programme has provided taxpayers with a way to obtain certainty for TP issues, usually on a bilateral basis. The programme has not been without its challenges, but it has been and remains an important tool that benefits taxpayers and tax administrations alike. The continuing allure of the APA programme can be seen in the IRS' 2022 APA statistics, which saw taxpayer interest at a near-record high.

In a recent article, we noted that one factor behind the spike in APA requests in 2022 may have been a series of public comments from IRS officials indicating that the IRS was in the process of updating its APA acceptance procedures. On April 25, this update materialised in the form of a memorandum from the IRS Large Business and International division, which describes review procedures for both APA requests and prefiling memoranda.

### Review of APA Requests

When an APA request is submitted, the new review procedures require consultation between the Advance Pricing and Mutual Agreement programme (APMA), which handles APA and competent authority cases, and the IRS Transfer Pricing Practice, which includes IRS' TP examination function. The memorandum describes a number of factors that the review team should consider, including APMA's experience with the treaty partner in question. Importantly, the final decision on whether to accept an APA remains with APMA, rather than with the Transfer Pricing Practice.

The guidance is clear that these consultations are "not intended to limit or decrease the number of APA requests accepted by APMA." Rather, they are meant to ensure that the case is handled through the workstream best suited to providing tax certainty under the circumstances, which may include alternative workstreams such as the International

Compliance Assurance Programme (ICAP) or a joint audit. ICAP is a multi-lateral risk assessment programme for TP and permanent establishment issues, and joint audits can be requested by taxpayers to coordinate local audit activity in each country in a manner intended to avoid inconsistent tax authority positions and double taxation. However, ICAP does not provide the same level of certainty as an APA and joint audits can be arduous if not properly coordinated. Taxpayers requesting APAs may therefore wish to take the time to explain in their applications why the APA programme, rather than one of these alternatives, is the best workstream for their circumstances.

### Prefiling review

Existing APA procedures under Rev. Proc. 2015-41 allow (and in some circumstances require) taxpayers to file prefiling memoranda and participate in prefiling conferences. The new memorandum builds on these existing procedures by giving taxpayers the opportunity to obtain prefiling review of a contemplated APA submission, with the IRS offering feedback on whether an APA is the best mechanism to provide certainty in the taxpayer's case. To access this prefiling review, which should take around four weeks (or more, if additional information is required), the taxpayer must file a prefiling memorandum.

The new procedures therefore greatly increase the importance of the prefiling process. Going forward, taxpayers may wish to file prefiling memoranda even in cases where they are not required, to obtain the benefit of an IRS review prior to the submission of an APA request. However, the IRS's ability to request additional information as part of the prefiling review could result in a prolonged prefiling process in some cases.

### Impact

The new review procedures are just one part of a broader effort to update the US APA programme: the IRS has also been working on changes to the underlying APA revenue procedure, as well as the related revenue procedure for mutual agreement procedure cases. It is too early to assess the practical effects of the new review procedures, but public comments from IRS officials are encouraging and suggest a concern for addressing taxpayers' cases through the most effective means, rather than an intent to curtail the APA programme.

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