



APA & MAP COUNTRY GUIDE 2018 – UNITED STATES

New paths ahead for international tax
controversy





UNITED STATES

APA PROGRAM

KEY FEATURES							
Competent authority	Advance Pricing and Mutual Agreement office ('APMA'), under the Large Business and International ('LB&I') Division of the Internal Revenue Service ('IRS')						
Relevant provisions	Revenue Procedure 2015-41 ('Rev Proc 2015-41'); and Guidance available on the APMA website.						
Types of APAs available	Unilateral, bilateral, and multilateral APAs are available.						
Acceptance criteria	No specific guidance.						
Key timing requests, deadlines	A Taxpayer is required to file an APA request within the time prescribed for filing its federal income tax return for the first proposed APA year. For bilateral and multilateral APAs, requests must be filed no later than 60 days after the corresponding request has been filed with the foreign tax authorities.						
APA term limits	Taxpayers are encouraged to propose terms covering at least five prospective years.						
Filing fee	<table><tbody><tr><td>General fee</td><td>USD 60,000</td></tr><tr><td>Renewal fee</td><td>USD 35,000</td></tr><tr><td>Small cases fee</td><td>USD 30,000</td></tr></tbody></table>	General fee	USD 60,000	Renewal fee	USD 35,000	Small cases fee	USD 30,000
General fee	USD 60,000						
Renewal fee	USD 35,000						
Small cases fee	USD 30,000						
Rollback availability	An APA may cover one or more rollback years. Taxpayers should include a rollback request as part of its APA request. APMA may consider implementing a rollback even in the absence of a request. APMA will not agree to cover a closed filed year with a rollback of a unilateral APA request except in unusual circumstances.						
Collateral issues	Any open back years of the Taxpayer under examination by the IRS must be identified in a pre-filing memorandum. A member of the IRS examination team involved in the Taxpayer's case will be involved in any APA negotiations with APMA.						



UNITED STATES (cont'd)

PRE-FILING REQUIREMENTS

Overview

APMA may require the Taxpayer to meet in a pre-filing conference and submit a pre-filing memorandum. Taxpayers may also request a pre-filing conference or choose to submit a pre-filing memorandum. Pre-filing memoranda are recommended for APA requests that may present novel or complex substantive or procedural issues, and requests for which APMA could reasonably have concerns regarding interrelated matters. Mandatory pre-filing memoranda must include:

- whether a pre-filing conference is sought and issues the Taxpayer wishes to discuss and three possible dates for the conference at least two weeks after submission of the memorandum;
- covered issue diagrams;
- name and contact information of the Taxpayer, and authorisation for the Taxpayer's representatives and points of contact to inspect or receive confidential tax information; and
- identification of all open back years and which, if any, are under investigation by the IRS.

Both optional and mandatory pre-filing memoranda must be accompanied by an 'APMA Pre-file conference request' form, available on the IRS website.

APMA will notify the Taxpayer whether it will accept or decline a request to hold a pre-filing conference, and may require a conference even where one has not been requested.

Anonymous pre-filing availability

Pre-filing is available on an anonymous basis.



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS

Content of application (cont'd)

APA requests must contain a request letter, as well as the following 22 'exhibits':

1. Contents of exhibits – provide a table or similar comprehensive list of the exhibits submitted, indicating the form in which they have been submitted;
2. Authorisation forms – for representatives of the Taxpayer (e.g., an enrolled agent, lawyer or certified public accountant), and/or for those authorised to inspect or receive confidential information about the Taxpayer;
3. Protective claim – for bilateral or multilateral APAs, a statement affirming whether the request is to serve as a protective claim;
4. Waiver of ex parte communication – if the APA involves rollback years, a waiver of the Taxpayer's right to be present during communications between the IRS Appeals and the APMA team;
5. Consent to disclosure – for disclosure of an APA request to any applicable foreign tax authorities;
6. Consents regarding period of limitations – any executed consents to extend the period of limitations for assessment of tax;
7. 'Penalties of perjury' declaration – a declaration signed by the Taxpayer that the APA request and supporting documentation contains all relevant facts, and that such facts are true, correct and complete;
8. User fee receipt – obtained after paying required APA user fee;
9. Documents submitted to foreign competent authorities – a list of all documentation or written submissions provided to a foreign tax authorities in connection with the APA request;
10. Pre-filing submissions – any pre-filing memoranda submitted in connection with the APA request;



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS (cont'd)

Content of application (cont'd)

11. Covered issue diagrams – including the controlled group's legal structure, tax structure, business units, the value chain of the proposed covered group, and organisational charts;
12. APAs – the most recent APA, if any, that the Taxpayer has entered into with the IRS or foreign tax authorities;
13. Selection process – a report on results of applying criteria for selecting comparable agreements or independent comparable companies or other market data, including tables or matrix showing reasons for rejecting agreements, independent companies or other market data;
14. Information on selected comparables – a detailed discussion of the contractual terms of selected comparable agreements, as applicable;
15. Proposed draft APA – submitted in a form similar to APMA's current model APA (available on the APMA website or on request) and a 'redline' version of the same showing the differences between the model APA and the proposed draft APA;
16. Application of APA template – for APA requests that involve an application of the comparable profits method or the transactional net margin method, provide income statement data for the previous five taxable years and balance sheet data for the previous six taxable years for the relevant members of the proposed covered group, using the template provided by the IRS;
17. Federal income tax filings – Forms 1120, 5471, 5472, 8858 for each of the three most recent filed years of the Taxpayer;
18. Financial statements – full income statements, balance sheets, cash flow statements for the most recent three back years, specifying accounting standard used;



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS (cont'd)

Content of application (cont'd)

19. Section 6662 documentation – documentation prepared in consideration of the transfer pricing penalty under IRC s 6662(e) for each relevant member of the proposed covered group for each of the most recent three back years;
20. Regulatory filings – Securities and Exchange Commission filing by the controlled group for each of the most recent three back years;
21. APA annual reports – for renewal requests only; and
22. Intercompany agreements – copies of intercompany contracts or agreements between the Taxpayer and other members of the covered group within the scope of the covered issues.

Language

The documentation should be submitted in English.

SME provisions

To be eligible for a small cases APA:

- sales revenues must be less than USD 500m in each of most recent three tax years;
- the aggregate value of the proposed covered issue(s) cannot be expected to exceed USD 50m in any given year for the duration of the APA;
- the aggregate value of any transfer of rights in, or rights to use, intangibles cannot be expected to exceed USD 10m in any given year for the duration of the APA; and
- no proposed covered issue can involve intangible property arising from, or otherwise relate to, and intangible development arrangement.

Taxpayers that are eligible for the small cases APA may submit a complete APA request together with the fee, or may contact APMA to discuss filing an abbreviated APA request.



UNITED STATES (cont'd)

OTHER PROCEDURAL CONSIDERATIONS (cont'd)

General

APMA follows a standard pre-filing, application and monitoring process. There are no unique procedural aspects.

Monitoring & compliance

The Taxpayer must provide an annual report for the duration of the APA, demonstrating compliance with the APA terms and conditions, and any adjustments. The report must be filed with APMA by the later of (i) the 15th day of the 12th month following the close of the APA year, or (ii) 90 days after the effective date of the APA. APMA may require the following documentation in an annual report:

- a statement regarding any material differences between business operations during the APA year and the description of business operations contained in the APA request;
- a statement concerning any material changes to the Taxpayer's accounting methods and classifications, and methods of estimation from those described in the APA request;
- any changes to the Taxpayer notice information;
- a description of any failure to meet critical assumptions;
- a statement identifying whether or not any material information submitted while the APA request was pending is discovered to be false, incorrect or incomplete;
- the amount, reason for, and financial analysis of any compensating adjustments for the APA year;
- the amounts, description, reason for, and financial analysis of any book-tax difference relevant to the TP method for the APA year;
- a statement regarding whether the Taxpayer intends to request a renewal, modify or cancel the APA;
- financial statements, analysis and accounting details to demonstrate compliance with the TP method;
- an organisational chart;
- a copy of the APA and any amendments; and
- a penalty of perjury statement.



UNITED STATES (cont'd)

OTHER PROCEDURAL CONSIDERATIONS (cont'd)

Renewal procedure

Taxpayers may seek renewal of an APA, and the renewal process generally follows the same process as APA requests unless the IRS permits the submission of an abbreviated APA request. An abbreviated APA request may be filed if the Taxpayer can show that the applicable law, facts and circumstances, economic conditions, proposed covered issues and methods and other relevant factors are reasonably expected to be substantially the same as those in the proposed renewal APA years.



UNITED STATES (cont'd)

MAP PROGRAM

KEY FEATURES	
Competent authority	Advance Pricing and Mutual Agreement office ('APMA'), under the Large Business and International ('LB&I') Division of the Internal Revenue Service ('IRS')
Relevant provisions	Revenue Procedure 2015-40 ('Rev Proc 2015-40')
Acceptance criteria	<p>Taxpayers may request a MAP (a 'Competent Authority Request') if taxation has or is likely to occur that is not in accordance with the provisions of a DTT to which the United States is signatory. In addition, the Taxpayer must be resident either in the United States or the other relevant contracting state; they must meet the prescribed time limits; and satisfy the prescribed conditions for a Competent Authority Request. Taxpayers must submit a pre-filing memorandum prior to filing a Competent Authority Request if the issues will involve a taxpayer-initiated position. The pre-filing memorandum must identify the Taxpayer, explain the factual and legal basis of the Taxpayer-initiated position, and describe any administrative, legal, or other procedural steps undertaken in the relevant foreign country, and any communications with the relevant foreign country regarding the position. For a Competent Authority Request that does not involve a Taxpayer-initiated position, there is no mandatory pre-filing procedure, although the IRS recommends submissions of a pre-filing memorandum and pre-filing conference in such circumstances. The pre-filing memorandum must propose at least three possible dates for a pre-filing conference, each at least two weeks after the date that the pre-filing memorandum is submitted.</p>
Key timing requests, deadlines	<p>Most of the United States' DTTs permit Taxpayers to present a case to the IRS within a prescribed period from the first notification to the Taxpayer of the actions giving rise to taxation not in accordance with the DTT. However, time limits may vary, and the relevant DTT should be consulted for the applicable time limit.</p>



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS

Content of application

Taxpayers must include the following in a formal Competent Authority Request:

1. Identifying information – Provide the following information for the Taxpayer filing the Competent Authority Request:
 - name;
 - address and phone number;
 - countries of residence for purposes of the treaty;
 - US taxpayer identification number or foreign taxpayer identification number; and
 - names and countries of incorporation or residence of all members of the controlled group whose taxable incomes would be affected by a competent authority resolution being reached in the case.
2. Authorisations and Contacts – Provide names and contact information for the following:
 - Power of Attorney;
 - all individuals authorised to inspect or receive confidential tax information about the Taxpayer in connection with the Competent Authority Request; and
 - the individual(s) who will serve as the Taxpayer's point(s) of contact for the APMA office.
3. IRS Office – Provide the following information:
 - for issues arising from United States-initiated adjustments, identify the IRS office that made the adjustment and provide the name of and contact information for the taxpayer's IRS Examination team manager; and
 - for issues not arising from United States-initiated adjustments, identify the IRS office having examination jurisdiction over the Taxpayer or United States members of the controlled group and provide the name of and contact information for the Taxpayer's IRS Examination team manager if the Taxpayer is under examination when the Competent Authority Request is filed.



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS (cont'd)

Content of application

4. Treaty(ies) – Identify the DTT(s) and articles under which the request is being filed.
5. Summary of competent authority issues – Provide a summary of the competent authority issues for which assistance is being requested.
6. Years and amounts – Provide the taxable years and amounts at issue, presented in both United States Dollars and foreign currency, together with the exchange rate(s) that was used for currency conversion during the applicable taxable years.
7. Taxpayer proceedings – Provide:
 - a summary of relevant United States and foreign judicial and administrative proceedings involving the Taxpayer or other members of the controlled group, that are relevant to the competent authority issues for which assistance is being requested (including all information related to notifications provided to the relevant treaty country(ies)); and
 - a summary of all other United States judicial proceedings that concern the Taxpayer's federal tax liability for any taxable period involved in the competent authority request.
8. Other proceedings – To the extent known, provide a summary of any relevant foreign judicial and public administrative proceedings not involving the Taxpayer or members of the controlled group but concerning an issue similar to the competent authority issue for which the competent authority request is being filed.
9. Statutes of limitations – Provide the expiration dates of applicable statutes of limitations in both the United States and the treaty country(ies) for the taxable years covered by the Competent Authority Request.
10. Competent authority issues – Provide a thorough, informative explanation of the competent authority issues for which assistance is requested.



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS (cont'd)

Content of application

11. Prior or current U.S. competent authority assistance – State whether or not each competent authority issue set forth in the Competent Authority Request is the same or similar to an issue considered in a prior or current competent authority or APA request covering the same or other taxable years.
12. Pre-filing information – Indicate whether a pre-filing memorandum was filed; and whether a pre-filing conference was held.
13. Coordination with other proceedings – Provide information on whether the Taxpayer entered into a previous agreement with IRS; and for any competent authority issue for which assistance is being requested that has been under the jurisdiction of IRS Appeals pursuant to a protest, the date of any opening conference with IRS Appeals and evidence showing that the taxpayer has properly severed the competent authority issue from the issues in its protest that will remain under the jurisdiction of IRS Appeals; and whether a simultaneous appeals procedure ('SAP') review is sought.
14. Accelerated Competent Authority Procedure ('ACAP') years – Provide the following information:
 - whether the taxpayer requests ACAP and, if so, the ACAP years proposed to be covered;
 - whether the taxpayer does not seek to apply the competent authority resolution to one or more ACAP years and its reasons for not requesting ACAP (such as the transactions at issue not having occurred in subsequent taxable years); and
 - whether the taxpayer has filed a bilateral or multilateral APA request pursuant to Rev. Proc. 2015-41 that proposes to cover one or more issues covered by the Competent Authority Request and, if so, whether it included a rollback request for ACAP years in its APA request.



UNITED STATES (cont'd)

APPLICATION REQUIREMENTS (cont'd)

Content of application

- 15.** Ancillary issues – List the ancillary issues (if any) the Taxpayer requests be addressed in the competent authority resolution, e.g., competent authority repatriation
- 16.** Attachments not included – List any required Competent Authority Request attachments that the Taxpayer has not included in its Competent Authority Request, together with explanations as to why such items are not included.
- 17.** Prescribed attachments – A Competent Authority Request must also include certain prescribed attachments after the request letter. A list of these can be found under Section 2 of the Appendix to 'Rev Proc 2015-40'.

Language

The documentation should be submitted in English.



UNITED STATES (cont'd)

OTHER PROCEDURAL CONSIDERATIONS

Interaction with domestic proceedings

Competent Authority Requests can be made while domestic disputes remain live. If the case is with IRS Appeals, the Taxpayer can transfer jurisdiction to the APMA office at any time, or can request simultaneous consideration by Appeals and the APMA office.

Arbitration

The United States has included an arbitration clause in a number of its MAP provisions under DTTs.

STATISTICS

APA

There were 386 pending APA applications and 116 executed applications as of 31 December 2017. The average completion time was 46.9 months for bilateral APAs and 40.4 months for unilateral APAs. The IRS has had an APA program since 1991.

MAP

The United States had a total of 967 active MAP applications as of 31 December 2016. The average time needed to close MAP cases is 32 months for both transfer pricing and other cases.



UNITED STATES (cont'd)

DOUBLE TAXATION TREATY NETWORK

The following treaties include MAP provisions which are the basis for bilateral and multilateral APA negotiations:

Armenia	Denmark	Italy ^(I)	Morocco	Sri Lanka
Australia	Egypt	Jamaica	Netherlands	Sweden
Austria	Estonia	Japan ^{(I)(V)(VI)}	New Zealand	Switzerland
Azerbaijan	Finland	Kazakhstan ^(I)	Norway	Tajikistan
Bangladesh	France ^(I)	Korea (Republic of)	Philippines	Thailand
Barbados	Georgia	Kyrgyzstan	Poland	Trinidad
Belarus	Germany ^(I)	Latvia	Portugal ^(VI)	Tunisia
Belgium ^(I)	Hungary	Lithuania	Romania	Turkey
Bulgaria	Iceland	Luxembourg	Russia	Turkmenistan
Canada ^(I)	India	Malta	Slovak Republic	Ukraine
China	Indonesia	Mexico ^(I)	Slovenia	United Kingdom
Cyprus	Ireland ^(I)	Moldova	South Africa	Uzbekistan
Czech Republic	Israel		Spain	Venezuela

NOTES

- I denotes treaties with MAP arbitration provisions.
- II denotes treaties with the USSR that remain applicable until a separate tax treaty is concluded.
- III denotes treaties between the countries' representative office in Taipei and the Taipei Economic and Cultural Office in the relevant country.
- IV denotes treaties that became effective within the last five years.
- V denotes treaties that are awaiting ratification.
- VI denotes MAP provisions identical to para 3, art 25 of the OECD Model Convention with respect to Taxes on Income and on Capital.
- VII arbitration is to be conducted under the statutes of the ECJ.
- VIII arbitration is to be conducted under the statutes of the ICJ.

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