Memo

To Nicole Welch, Acting Director, APMA
Burton Mader, Senior Advisor, APMA
Cleve Lisecki, Chief, IRS Office of Associate Chief Counsel (International) Branch 7
Angella Holland, Senior Counsel, IRS Office of Associate Chief Counsel (International) Branch 6

From KPMG LLP

cc Mark Martin, Washington National Tax, KPMG LLP

Date June 1, 2022

Comments on Proposed Updates to Revenue Procedures 2015-40 and 2015-41

KPMG LLP ("KPMG") welcomes the inclusion of guidance updating Rev. Proc. 2015-40 and Rev. Proc. 2015-41 on the 2021-2022 Priority Guidance Plan, and the invitation in Notice 2022-21 to provide recommendations regarding the 2022-2023 Priority Guidance Plan. The excellent work of the IRS Advance Pricing and Mutual Agreement program ("APMA") to facilitate effective treaty-based dispute resolution and prevention through mutual agreement procedure ("MAP") cases and advance pricing agreements ("APAs") is crucial to promoting tax certainty for U.S. taxpayers, and sets an example for the rest of the world at a time when tax certainty is often imperiled. Our experience is that the existing MAP and APA procedures generally function well and deliver appropriate outcomes that eliminate taxation not in accordance with the applicable treaty. Bearing in mind the significance of the MAP and APA programs, we respectfully submit the following comments on aspects of APA and MAP practice that could be improved in the updated guidance.

As a procedural matter common to both revenue procedures, we would stress that among the many challenges of the Covid-19 pandemic, one boon has been the ability to file MAP and APA requests and related materials electronically. The physical submission requirements contained in Rev. Procs. 2015-40 and 2015-41 are cumbersome and result in unnecessary waste and expense. We strongly urge APMA to codify in successor guidance that MAP and APA requests and related submissions may be made electronically through secure file transfer protocol sites, and that electronic signatures are acceptable.

I. Updates to Rev. Proc. 2015-40

Protective Claims

Section 11 of Rev. Proc. 2015-40 lays out protective claim requirements. However, protective claims are frequently unnecessary in the MAP context. Most U.S. income tax treaties permit the competent authorities to implement MAP resolutions notwithstanding domestic time limitations. The U.S.-Germany treaty, for instance, provides that "[a]ny agreement reached shall be implemented notwithstanding any time limits or other procedural

©2022 KPMG LLP, a Delaware limited liability partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

limitations in the domestic law of the Contracting States."[1] Other treaties, such as the U.S.-Korea treaty, contain no such override of domestic limitations on their face, but the relevant Technical Explanations from Treasury clarify that broad treaty language[2] does in fact override the statute of limitations.[3]

Ultimately, it appears that only four U.S. income tax treaties do not satisfactorily permit the IRS to override the U.S. statute of limitations for purposes of implementing a MAP resolution. The Pakistan and Greece treaties lack language pertaining to the implementation of a MAP resolution, and the Venezuela treaty expressly requires that the statute of limitations be extended in accordance with domestic procedures. The Mexico treaty provides a limited override of domestic time limits for a period of ten years from the due date or date of filing (whichever is later) of the tax return in the state that is not proposing an adjustment. Because transfer pricing examinations frequently last several years, and because a MAP case can take several years after that, this ten-year limitation is problematic.

Because the vast majority of U.S. income tax treaties permit the IRS to override domestic time limitations, we believe that Rev. Proc. 2015-40 overstates the importance of protective claims and may lead to confusion. To limit unnecessary compliance burdens and ensure that effective MAP relief is available, we recommend that successor guidance 1) list the treaties for which APMA believes a protective claim is required to implement a MAP resolution and 2) clarify that in all other cases, APMA understands the relevant treaty language to permit it to implement a MAP agreement or a unilateral grant of relief pursuant to a MAP request notwithstanding the statute of limitations.

Implementation of MAP Resolutions

We have encountered circumstances in which an IRS Service Center rejects an amended return implementing a MAP resolution that APMA has reached with a foreign competent authority and which the taxpayer has accepted, on the grounds that the amended return constitutes an untimely claim for refund. Such rejections require taxpayers to take the additional step of filing a protest and may ultimately require substantive consideration by IRS Appeals. A Service Center's refusal to implement a MAP resolution therefore risks wasting the time and resources that APMA, the foreign competent authority, and the taxpayer have devoted to resolution of a case, and needlessly requires additional IRS and taxpayer time and effort. Failure to implement MAP resolutions violates item 1.1 of the BEPS Action 14 minimum standard and undermines the IRS's credibility as

---

[1] Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, art. 25(2).

[2] Convention between the United States of America and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and the Encouragement of International Trade and Investment, art. 27(4) ("In the event that the competent authorities reach such an agreement, taxes shall be imposed on such income, and refund or credit of taxes shall be allowed, by the Contracting States in accordance with such agreement.").

[3] Technical Explanation of the Convention between the United States of America and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and the Encouragement of International Trade and Investment, Signed at Seoul on June 4, 1976 ("Under paragraph (4), in cases in which the competent authorities reach an agreement, taxes will be imposed on such income, and refund or credit of taxes allowed, by the Contracting States in accordance with such agreement. This permits the issuance of a refund or credit notwithstanding procedural barriers otherwise existing under a Contracting State's law, such as the statute of limitations. However, it does not authorize imposition of additional taxes after the statute of limitations has run."). The Technical Explanations to the U.S. treaties with Morocco, Thailand, and Trinidad and Tobago clarify that similar language overrides domestic time limitations. The treaty with the Commonwealth of Independent States ("CIS," i.e., the former Soviet Union), which presently applies to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan, does not expressly include an override of domestic time limitations and does not have a Technical Explanation. However, the relevant treaty language resembles the language found in the U.S. treaties with Korea, Morocco, Thailand, and Trinidad and Tobago, and thus we believe the CIS treaty should likewise be understood to override domestic time limitations. The Romanian treaty is similar to the CIS treaty.

a leader in tax certainty on the world stage. Accordingly, successor guidance to Rev. Proc. 2015-40 should provide that APMA will coordinate with the applicable IRS Service Center to implement a MAP resolution in a timely manner, and the IRS should establish procedures for appropriately escalating any disputes or differences in interpretation regarding implementation.

Annual Notification Requirements

Sections 11 and 12 of Rev. Proc. 2015-40 currently require that protective claims and treaty notifications submitted to APMA be updated annually until a MAP application has been filed. This annual notification requirement creates administrative burdens and could imperil effective MAP relief for a taxpayer that misses a single annual notification, even though the taxpayer timely files the initial protective claim and/or treaty notification as well as the MAP request. Moreover, because applicable U.S. income tax treaties (in the case of treaty notification requirements) and Treas. Reg. § 301.6402-2 (in the case of protective claims) require only a single filing and do not require annual updates, we would question whether Rev. Proc. 2015-40's imposition of annual notification requirements is authorized.

Accordingly, we recommend that the annual notification requirement be eliminated for both protective claims and treaty notifications. While we understand that annual notifications could potentially help APMA anticipate the volume and nature of future potential MAP cases, we believe that APMA should consider whether these burdensome annual compliance obligations are absolutely necessary.

Commencement Date for Arbitration

Section 10.02 of Rev. Proc. 2015-40 states that, for determining the commencement date under an arbitration treaty, "[t]he U.S. competent authority generally takes the position that it has received all information necessary to undertake substantive consideration for a competent authority resolution only when it has received a complete competent authority request as described in this revenue procedure." We strongly agree with this position. Successor guidance should require APMA to inform the taxpayer of when the commencement date has occurred, taking into account the views of the other competent authority regarding the sufficiency of information provided (e.g., for purposes of determining when arbitration will commence).

Treaty provisions that permit the competent authorities to delay arbitration by mutual agreement can serve an important and valid purpose, but may be misused to the detriment of taxpayers. For example, we are aware that many taxpayers have experienced issues with dilatory competent authority tactics under the EU Arbitration Convention. To promote taxpayer confidence in treaty-based arbitration, to ensure that arbitration provisions function as intended, and to facilitate quicker resolution of MAP cases in line with BEPS Action 14, successor guidance should provide that APMA will not agree to extend the arbitration date without the consent of the taxpayer.

Secondary Adjustments

Section 4.02(2) of Rev. Proc. 2015-40 allows the competent authorities in a MAP case to negotiate repatriation terms that differ from those laid out in Rev. Proc. 99-32. This is referred to as competent authority repatriation and commonly allows for repatriation payments to be made free of the interest that would need to be accrued on Rev. Proc. 99-32 payments. Under current procedures, competent authority repatriation is available only if requested in writing prior to the competent authorities reaching a tentative resolution to the case.

Many jurisdictions, including important U.S. MAP partners such as Japan, the United Kingdom, and China, do not recognize secondary adjustments. Among jurisdictions that do have a secondary adjustment concept, many do not follow the same logic as the U.S. rules. KPMG authors recently published a broad survey of secondary adjustment rules that illustrates the extreme diversity of practice in this area.[4]

[4] Sean Foley, Cameron Taheri, and Lillie Sullivan, "Country-by-Country Survey of Global Secondary Adjustment Rules,"

Because U.S. secondary adjustment concepts have not achieved broad global acceptance, and many jurisdictions do not subscribe to the secondary adjustment theory at all, there are many cases where competent authority repatriation free of any interest obligation could be provided for without the need to consult the foreign competent authority. Moreover, implementing competent authority repatriation with an interest component creates significant administrative burdens for both taxpayers and tax authorities, as taxpayers would need to file (and tax authorities would need to process) multiple amended returns to recognize interest-related income and deductions in both countries for all back years in which interest would have been due. We therefore recommend that competent authority repatriation include interest-free repatriation by default, and that APMA permit competent authority repatriation even if not requested in writing prior to a tentative resolution (with the understanding that in some cases competent authority repatriation may not be provided after a tentative resolution has been reached, due to the need to negotiate with the foreign competent authority).

Coordination with IRS Appeals

Section 6.04(3) of Rev. Proc. 2015-40 generally provides that the U.S. competent authority may entertain a request for assistance that pertains to an issue that was previously submitted to IRS Appeals, but only if the competent authority request is filed no later than 60 days after the taxpayer's opening conference with Appeals, assuming certain other criteria are satisfied. We believe this is generally an appropriate rule.

However, because Rev. Proc. 2006-54 previously allowed for substantive IRS Appeals consideration of issues before submission of a competent authority request, there exists a risk that some taxpayers may be caught off guard by this coordination rule. This is especially true of smaller corporate taxpayers and individuals that may have previously accessed the MAP program infrequently or not at all, and that may rely on tax practitioners who do not regularly assist with competent authority requests. Moreover, many Appeals cases may progress for substantially more than 60 days following the opening conference without any substantive developments, and thus competent authority requests submitted to APMA after the 60-day period has passed may not be distinguishable in a meaningful way from those submitted during that period. As a result, we recommend that the coordination with Appeals rule be modified to provide that cases submitted more than 60 days after an Appeals opening conference may be accepted at APMA's discretion.

Streamlined Submission Requirements

We understand that one aim of the IRS in revisiting Rev. Procs. 2015-40 and 2015-41 is to simplify and streamline MAP and APA submission requirements, and we welcome those efforts. We recommend that you consider eliminating the following requirements that are currently imposed by the Appendix to Rev. Proc. 2015-40:

- Tab 7: While a list of information and documents provided to a foreign tax authority in a foreign language may be helpful, we would note that there is no corresponding requirement to include information and documents provided to a foreign tax authority in English, and it is not clear why a more burdensome requirement should be applied when the foreign tax authority primarily conducts its business in a language other than English. More importantly, in the case of foreign-initiated adjustments, there may be several years' worth of submissions and information request responses that would need to be listed, many of which may have little bearing on the issues under consideration. Accordingly, we recommend eliminating the Tab 7 requirement and instead obtaining information on foreign tax authority submissions during due diligence, as needed.
- Tab 8: The requirements of Tab 8 are voluminous and varied. Splitting them into separate tabs would facilitate a more logical organization. In addition, the following requirements should be modified or removed:

2021 TNTI 138-14, July 21, 2021, https://www.taxnotes.com/tax-notes-today-international/transfer-pricing/country-country-survey-global-secondary-adjustment-rules/2021/07/21/76mbg.

- Financial data should be required only for the years at issue, not for three years before and after the period at issue. Because segmentation may be required to provide relevant financial data, providing six additional years that are not at issue in the case can impose a significant additional burden on taxpayers and, in many cases, offers no discernible benefit. Inquiries regarding financial results prior to and following the relevant period should be addressed through due diligence.

- The requirement that financial data be provided for all entities whose taxable incomes may be affected often results in the provision of financial data that is not meaningful. For instance, in cases where a foreign tax authority audits a local affiliate whose counterparty is a U.S. principal with a much broader scope of activity, providing financial data for the U.S. principal is generally not instructive. We recommend that the requirement be modified to require financial data only from "relevant" entities, similar to the requirement under Exhibit 18 of Rev. Proc. 2015-41.

- The requirement to provide "[i]ncome statements and balance sheets, segmented as necessary to demonstrate the effect of the competent authority issue(s)" should be modified to require segmented income statements only. Balance sheets generally cannot be reliably segmented and should be requested only on an overall (unsegmented) basis.

- The covered issue diagrams requirement should be limited to an organizational chart (with tax structure information) and value chain diagram. The other covered issue diagrams currently required by Tab 8 are useful only in a minority of cases. We understand that this requirement was developed in response to tax shelter concerns reflected in the Joint Committee on Taxation's report "Present Law and Background Related to Possible Income Shifting and Transfer Pricing" (JCX-37-10, July 20, 2010). However, the tax shelter concerns addressed in that report are generally inapposite to APAs, and the covered issue diagrams therefore do not provide materially meaningful information in most cases. While requesting this information may be appropriate in some cases, this information should not be required by default.

II. Updates to Rev. Proc. 2015-41

Several of the comments made above with respect to Rev. Proc. 2015-40 also apply to Rev. Proc. 2015-41 (e.g., comments regarding protective claims and secondary adjustments), and we respectfully recommend that analogous changes be made in successor guidance to Rev. Proc. 2015-41. In addition, we wish to make a number of comments that are specific to Rev. Proc. 2015-41.

Expansion of Coverage

Section 2.02(2) of Rev. Proc. 2015-41 states that:

> APMA's APA program provides a voluntary process whereby the IRS and taxpayers may resolve transfer pricing issues and issues for which transfer pricing principles may be relevant in a principled and cooperative manner on a prospective basis. Ancillary issues such as interest and penalties may also be resolved, but only to the extent to which APMA has authority under the Code or under a U.S. tax treaty to resolve the issues.

We believe that these are helpful guiding principles. Successor guidance should expressly clarify that APAs can provide certainty with respect to a number of issues for which transfer pricing principles are relevant, including (but not limited to) the existence and proper remuneration of a permanent establishment, BEAT and Subpart F issues, and whether the use of a transfer pricing structure or method (e.g., a profit split method) is considered to create a partnership for U.S. tax purposes. We believe that the merger of the Treaty Assistance and

Interpretation Team into APMA will help to facilitate a broader scope for APAs that promotes tax certainty for transfer pricing-adjacent issues while remaining true to the historical core of the APA program.

Consents to Extend the Statute of Limitations

Under section 2.03(3), a general consent to extend the statute of limitations is required if the limitations period for a proposed APA year has fewer than two years remaining as of the filing of the APA request, and general consents are generally required when the statute must be extended during the APA process. The requirement that a general rather than a restricted consent (i.e., a consent limiting the statute extension to the issues identified in the APA request and any other issues agreed with APMA) be used does not promote effective tax administration and may deter taxpayers from seeking APAs. We recommend that successor guidance permit a restricted consent to be used both as of the filing of the APA request and during the APA process. In addition, successor guidance should provide that APMA will facilitate statute extensions as part of a pre-filing conference for taxpayers who do not already have an assigned IRS examination team.

APA Submission as § 6662 Documentation

Section 3.07 of Rev. Proc. 2015-41 provides that "[t]he submission of a complete APA request, updated and supplemented in accordance with the requirements of this section 3, will be a factor taken into account in determining whether the taxpayer has met the documentation requirements of Treas. Reg. §1.6662-6(d)(2)(iii) for the proposed APA years." However, the precise interaction between this guidance and the documentation requirements under Treas. Reg. § 1.6662-6(d) is not clear, and there is a risk that penalties could be assessed against taxpayers that have requested APAs in good faith, creating unfair surprise.

Successor guidance to Rev. Proc. 2015-41 should provide that the submission of a substantially complete APA request in good faith will satisfy the transfer pricing documentation requirements of Treas. Reg. § 1.6662-6(d) (and by extension, the good cause and reasonable faith defense applicable to other accuracy-related penalties[5]) for all years during which the APA request is pending (including a year in which APMA communicates to the taxpayer that it will not accept the APA request), assuming the taxpayer applies the proposed APA methodology on its U.S. tax return. If this is not considered acceptable, successor guidance should specify what materials in addition to a substantially complete APA request (e.g., annual memoranda with the taxpayer's financial information) would be deemed to satisfy the transfer pricing documentation requirements of Treas. Reg. § 1.6662-6(d).

Implementation of APA Resolutions

Section 7.01(1) of Rev. Proc. 2015-41 requires that an APA primary adjustment (if applicable) be reported on an amended U.S. return for the relevant APA year that is filed within 120 days of the effective date of the APA. In cases where the taxpayer is under IRS examination as of the effective date of the APA, it is often more efficient from both the taxpayer's and the IRS's perspective to have the taxpayer's IRS examination team process the APA primary adjustment, which can be done without filing an amended return. Successor guidance should clarify that having the taxpayer's IRS examination team process the adjustment is appropriate and that the taxpayer is not required to file an amended return if, within 120 days of the APA's effective date, the IRS examination team agrees to the taxpayer's request that the examination team process the adjustment.

Availability of Rollback

Section 5.02(4) of Rev. Proc. 2015-41 states that "[e]xcept in unusual circumstances, APMA will not agree to cover a closed filed year with a rollback of a unilateral APA request." One fairly common circumstance in which the use of an APA with rollback to a closed year is appropriate is where the taxpayer's proposed methodology involves either no change to the closed rollback year(s) or involves an upward adjustment to such year(s) from

[5] Treas. Reg. § 1.6662-6(b)(3) ("A taxpayer that meets the requirements of paragraph (d) of this section with respect to an allocation under section 482 will be treated as having established that there was reasonable cause and good faith with respect to that item for purposes of section 1.6664-4.").

a U.S. perspective. In such a case, an APA with rollback will often provide a valuable means of reducing foreign risk, and should be encouraged in the interest of sound tax administration. Successor guidance should therefore provide that closed years can be covered by rollback in such cases, while still allowing APMA to agree to apply rollback to closed years in unusual circumstances. Successor guidance should also clarify that the statute extension rules do not prevent a closed year from being covered via rollback.

Streamlined Submission Requirements

We recommend that you consider eliminating the following requirements that are currently imposed by the Appendix to Rev. Proc. 2015-41:

- Exhibit 11: As noted above in regard to the covered issue diagram requirement under Tab 8 of Rev. Proc. 2015-40, we believe that only an organizational chart (with tax structure information) and value chain diagram should be required by default, and that additional covered issue diagrams should be requested during the due diligence process, if at all.

- Exhibit 15: While soliciting taxpayer input on the proposed terms of an APA is crucial to the APA process, it is often difficult to provide meaningful input at the time the APA request is filed, and what input is provided often lays fallow for several years. Accordingly, successor guidance should eliminate the requirement that an APA request include a proposed draft APA, but should provide that taxpayer input on the terms of an APA will be solicited at an appropriate stage in the APA process.

- Exhibit 16: Although Exhibit 16 is helpful in some cases, there are other cases involving the CPM for which it does not provide meaningful information. For instance, this is the case where the CPM is applied to a segment of a taxpayer's activity and many of the items requested by Exhibit 16 are not maintained on a segmented basis. We believe that the CPM template currently required as Exhibit 16 would be more appropriate as a due diligence tool, and that taxpayers should be required to complete the CPM template only when requested by APMA during the due diligence phase following APMA's receipt of an APA request.

- Exhibit 17: The tax return forms requested in Exhibit 17 are typically of limited utility for the APA process, given that transfer pricing methodologies are applied on the basis of the taxpayer's or tested party's books, rather than its tax returns. In addition, such forms are already in the possession of the IRS, and will contain voluminous extraneous information that may not be appropriate to disclose to the foreign competent authority. In appropriate cases, such information could be requested during the due diligence phase.

- Exhibit 18 and Section 4.5: In our experience, cash flow statements are frequently not germane to the resolution of a case, and should not be required in Exhibit 18. In addition, Section 4.5 should be modified to require segmentation of income statements only (and not segmentation of balance sheets), for the reasons discussed above with respect to Tab 8 of Rev. Proc. 2015-40.

- Exhibits 12, 20, and 21: To reduce the administrative burden associated with filing an APA request, taxpayers should not be required to provide information that is already in the IRS's possession (such as the prior U.S. APA(s) requested in Exhibit 12, and the prior APA annual reports requested in Exhibit 21) and information that is publicly available via U.S. government sources (such as the Securities and Exchange Commission filings requested in Exhibit 20). For Exhibits 12 and 21, it should suffice if the taxpayer identifies any prior APAs and provides the relevant signing dates. As noted above, the tax return forms listed in Exhibit 17 should also not be required as part of an APA submission.

III. Conclusion

In today's environment, consideration of environmental, social, and governance ("ESG") matters and increasing global tax authority scrutiny both make treaty-based tax certainty crucial to U.S. taxpayers, and bolstering tax certainty requires a willingness to revisit existing procedures. In that regard, we welcome the inclusion of updates to Rev. Procs. 2015-40 and 2015-41 on the 2021-2022 Priority Guidance Plan.

We do not intend our comments to in any way detract from APMA's impressive achievements in the MAP and APA space, which are borne out in the MAP and APA statistics and provide an exemplary model for tax authorities around the world. Rather, we hope that in revisiting Rev. Procs. 2015-40 and 2015-41, you will take these recommendations into account to further improve the MAP and APA programs. Should you have any questions, we would be glad to discuss.

* * * *

KPMG Contacts	E-mail
Thomas Bettge	tbettge@kpmg.com
Sean Foley	sffoley@kpmg.com
Mark Horowitz	mhorowitz@kpmg.com
Theresa Kolish	tkolish@kpmg.com
Mark Martin	mrmartin@kpmg.com
Marissa Rensen	mrensen@kpmg.com
Cameron Taheri	ctaheri@kpmg.com