March 18, 2014

Mr. John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Re: Comments on Notice 2013-79 Proposed Procedures for Advance Pricing Agreements

Dear Commissioner Koskinen:

Enclosed are comments and recommendations addressing proposed procedures for advance pricing agreements set forth in Notice 2013-79. These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Michael Hirschfeld
Chair

Enclosure

cc: Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
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    Steven Musher, Associate Chief Counsel (International), Internal Revenue Service
    Michael Danilack, Deputy Commissioner (International), Internal Revenue Service
    Richard McAlonan, Director, Advance Pricing and Mutual Agreement, Internal Revenue Service
These comments on proposed procedures for advance pricing agreements are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

These comments were prepared by members of the Transfer Pricing Committee (the Committee) of the American Bar Association Section of Taxation. Principal responsibility for preparing these comments was exercised by Darrin Litsky. Substantive contributions were made by Clark Armitage, Henry Birnkrant, Matthew Kramer, Darrin Litsky, Alexey Manasuev, and Peyton Robinson. These comments were reviewed by Matthew Frank, Chair of the Committee, and by Tracy Gomes, Vice-Chair of the Committee. The Comments were further reviewed by Mark Martin, a former Chair of the Committee on behalf of the Committee on Government Submissions, and by Brian Trauman, Council Director.

Although the members of the Section of Taxation who participated in preparing these comments have clients who might be affected by procedures addressed by these comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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Date: March 18, 2014
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I. Introduction and Summary

The following comments address proposed procedures for advance pricing agreements ("APAs") issued by the Internal Revenue Service (IRS, or the Service) in Notice 2013-79 (the “Notice”).1 While proposed procedures for requesting competent authority assistance under tax treaties were issued at the same time in Notice 2013-78,2 the comments herein are limited to the proposed procedures for APAs, except to the extent necessary to address the impact of proposed competent authority assistance procedures on the proposed procedures for APAs. Working in close coordination with the task force that prepared these comments, a separate task force has prepared comments on the proposed competent authority assistance procedures.

At the outset, the Committee appreciates the substantial effort and thought put into the proposed procedures by the IRS, and specifically the Advance Pricing and Mutual Agreement Program (the “APMA Program” or “APMA”) and the Office of the Chief Counsel (International). As noted in our detailed comments, in many areas, the proposed procedures improve upon the current procedures.

The Committee has previously issued comments on the operation of the Service’s APA Program. In February 2005, in response to Announcement 2004-98,3 the Committee submitted comments (the “2005 comments”) on the operation of the Service’s Advance Pricing Agreement program (the “APA Program”).4 More recently, in January 2012, the Committee issued comments (the “2012 comments”) regarding the operation of the APA Program and the newly created APMA Program, the successor to the APA Program.

In early 2012, the APA Program was moved from the Office of Chief Counsel and merged with that portion of the Office of the U.S. Competent Authority (“USCA”) that resolves transfer pricing cases under the mutual agreement procedures of the United States’s bilateral income tax conventions. As noted in Notice 2013-79, the proposed procedures reflect structural changes undertaken by the IRS, specifically, the realignment and consolidation of IRS transfer pricing resources under the Director of Transfer Pricing Operations and the creation of the APMA Program.

As we noted in our 2012 comments, the APA Program has been an indispensable asset to both U.S. taxpayers and the U.S. government in settling transfer pricing issues for over 20 years. Over 1,200 advance pricing agreements have been completed,5 and with

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5 In Announcement 2013-17, 2013-16 I.R.B. 911, the IRS announced that 1155 APAs had been executed from 1991 through 2012. As of August 15, 2013, the IRS had executed an additional 78 APAs. Dolores
transfer pricing scrutiny on the rise, it is of paramount importance that the APMA Program’s successful track record be sustained. Most of the United States's major trading partners operate similar programs, and these APA programs have developed into the globally preferred venue for dispute avoidance and resolution.

During 2012, APMA reported a record number of 140 completed APAs, a remarkable achievement. APA processing times for executed APAs declined only slightly, an understandable fact, given that APMA was working off an older inventory of cases. We expect that the results for 2013 will demonstrate a marked improvement in case processing times.

While we applaud APMA’s recent efforts and the additional resources made available to APMA by the IRS, the proposed procedures give us some concern that these achievements may be lessened by more onerous APA filing requirements and a much more formalistic approach to processing APAs. Setting aside the merits of any particular requirement in the proposed procedures, their net effect is to increase dramatically the amount of information and documents that must be included in an APA application. For example, the proposed procedures require:

- covered issue diagrams for multiple scenarios;
- a list of all information and documents provided to the non-U.S. competent authority;
- prior and current APAs (translated, if in a foreign language);
- a populated IRS CPM template;
- tax returns; and
- a proposed draft APA.

In addition, various translation requirements are imposed. In short, the new procedures impose a number of additional documentation requirements on APA applicants. Conversely, although the proposed changes allow for an abbreviated APA request in certain, limited circumstances, it is difficult to point to any other provisions that are intended to be a cost/time-saving measure for taxpayers.

The impact of these proposed changes, when considered in the whole, may be to discourage APA applications. Taxpayers considering an APA balance the cost and time involved with the certainty and prospective protection offered. For some taxpayers, the increased costs will tip the balance against the APA route. This possible outcome should not be welcomed by the IRS. We respectfully request that minimizing taxpayer burden in obtaining reasonably necessary information be a central goal of the final procedures.


6 Id.
The following summarizes our recommendations and comments:

- Definition of a “Complete APA Request.” An APA request should be considered “complete” if it contains substantially all information (as required by the Notice’s Appendix) that is reasonably necessary for the APMA team to evaluate the proposed covered methods. See Sections II.A and VIII.A below.

- Definition of Material/Materiality. A general definition of what the drafters intended would be a welcome clarification. Materiality should turn on whether correcting an item could reasonably have resulted in an APA with significantly different terms and conditions or in a significant change in the outcome of an application of a transfer pricing methodology (“TPM”). See Section II.B below.

- Rollbacks. We recommend that the final procedures be more reflective of current procedures, which do not condition the acceptance of an APA request or completion of an APA on a taxpayer’s agreement to a rollback and where a rollback request may be submitted by the taxpayer at any time prior to the execution of the APA. While we appreciate that APMA may wish to suggest rollbacks, we believe that neither taxpayer-initiated nor APMA-initiated rollbacks should be required as part of entering into an APA. Additionally, and consistent with our 2005 comments, we recommend that the final procedures include language that APMA will provide preliminary advice at the conclusion of the prefiling requirements as to whether a taxpayer’s proposed rollback request is appropriate, and in the absence of a rollback request by the taxpayer, whether the IRS would seek to impose a rollback. Further, in situations in which the IRS would seek to impose a rollback for a bilateral or multilateral APA, APMA would seek preliminary views from the corresponding foreign competent authority prior to conditioning the APA request upon an imposed rollback. See Section III below.

- Unilateral APAs. We recommend that the final procedures acknowledge the circumstances when a unilateral APA may be appropriate. While we agree that in many instances bilateral and multilateral APAs are preferable because they are more effective in avoiding future double tax disputes, in certain instances those APAs are not practical. Additionally, we recommend removing from the final procedures the implication that the Service would either deny pertinent foreign tax credits in the event of a foreign-initiated adjustment on transactions covered by a unilateral APA or in some way penalize a taxpayer for not seeking a bilateral or multilateral APA. Also, in the context of a unilateral APA, we recommend that the final procedures maintain the status quo under current procedures by not limiting a taxpayer’s ability to obtain competent authority relief in the event of a foreign-initiated adjustment. See Section IV below.

- APA Scope. The expansion of the scope of issues that may be addressed in an APA is a welcome addition. While the Committee welcomes the overall scope expansion, we are concerned that the language in the proposed procedures
concerning the scope of covered issues signals a change in attitude by the APMA program towards a less collaborative posture vis-à-vis the taxpayer. While we agree that in some instances it may be appropriate to expand the coverage of an APA, expansion should be limited to instances when that expansion would have a strong likelihood of producing a more reliable arm’s length price for the taxpayer’s proposed covered issues, compared to an approach without the expanded scope. See Section V below.

- Consent to Extend Limitations Period. While we appreciate the added language regarding statute extensions, certain considerations make the use of restricted consents especially appropriate in the context of an APA. Final procedures should reflect the view that a restricted consent in most instances is sufficient to address IRS concerns. See Section VI below.

- Pre-filing Procedures. While pre-filing conferences and procedures are an important part of the APA process, some new features give cause for concern. Specifically, the formality of the proposed pre-filing procedures creates the need for both informal procedural and substantive advice prior to initiation of the formal pre-filing procedures. Such informal advice may also provide an opportunity for an anonymous taxpayer to seek advice prior to entering the formalized pre-filing procedures. Additionally, the IRS should be able to waive pre-filing procedures in appropriate circumstances. Regarding the new requirement of a perjury statement for pre-filing procedures, a taxpayer may either not be aware of all the facts or may be seeking pre-filing advice as to what facts the IRS deems relevant to include in the APA request; accordingly, a perjury statement for pre-filing procedures is both unnecessary and inappropriate. See Section VII below.

- Covered Issue Diagrams. The scope of the covered issue diagrams required under the proposed procedures is extremely burdensome (e.g., charts used for management purposes reconciling to legal structure charts, and organization charts identifying executives and head count). In light of these concerns, the final procedures should define more precisely the scope of information required for the covered issue diagram; provide exhibit formats for common types of transactions covered under APAs; and tailor the amount of information required for the diagrams more specifically to the transactions proposed for APA coverage. See Section VIII.B below.

- Items Required by the Notice’s Appendix.
  - Our detailed comments below raise concerns about the Appeals waiver required (Exhibit 4). See Section VIII.C.1.a below.
  - For documents submitted to foreign competent authorities (Exhibit 9), this required exhibit appears to go beyond the factual information included in documents by requiring a listing of the contents of oral discussions in
which a taxpayer provided analysis in response to questions from the foreign tax authority or foreign competent authority. We recommend that the description of Exhibit 9 be modified to require only documents, not information, to be listed, and that all factual information be reduced to a written submission that is made available to all competent authorities involved in the APA request. See Section VIII.C.1.b below.

- With respect to APAs between foreign affiliates and foreign tax authorities (Exhibit 12), translation into English may be burdensome and duplicative of information the IRS already possesses. While in limited instances such information may contain information reasonably necessary to evaluate the proposed covered issues, we recommend that, instead of requiring such APAs as part of Exhibit 12, the taxpayer instead be required to list such APAs under Exhibit 9, and provide a short description of the covered issue(s) for each such APA. After evaluating these short descriptions, the IRS can subsequently decide whether to seek translated documents. See Section VIII.C.1.c below.

- Requiring a draft APA at the time the APA request is filed (Exhibit 21) appears premature and imposes the cost of preparing what may prove to be a worthless and unused document on the taxpayer. We recommend elimination of this requirement, or as an alternative when a proposed TPM is sufficiently complex based on pre-filing procedures, requiring a proposed draft TPM (equivalent to the “Appendix A” in the standard U.S. APA). See Section VIII.C.1.f below.

- Protective Claims. In the event the APA application is withdrawn or rejected, we recommend that final procedures provide that any protective claim be allowed to survive such action, which would reassure taxpayers that they would not lose their ability to address years that might otherwise fall out of time limits set in certain tax treaties. See Section X below.

- APA Request as Contemporaneous Documentation. The proposed procedures are welcome in providing APA taxpayers with limited assurance regarding these penalties. However, as described below, we request greater certainty. A taxpayer filing a complete APA request should be treated as having satisfied both the specified/unspecified method (i.e., had a reasonable basis for selecting and applying the chosen method) and documentation requirements of Reg. § 1.6662-6(d)(2),(3), and thus any resulting section 482 adjustment should not be subject to a net adjustment penalty under Reg. § 1.6662-6(c). Even if the IRS decides not to adopt the position we propose that complete APA requests be afforded penalty protection, special consideration should be given to the taxpayer filing for a renewal APA. See Section XI below.

- Supplemental and Updated Information. As opposed to requiring information that is merely “relevant”, we recommend that supplemental and updated information
only be requested when “reasonably necessary” to an APA request. See Section XIII below.

• Actions on APA Requests.
  o We recommend that APMA generally attempt to assign the same APMA Team Leader who handled the pre-filing conference to the later processing of the APA application. See Section XIV.A below.
  o We recommend that the final procedures provide the taxpayer with the opportunity to hold a conference with the APMA Director to review a decision to reject or suspend the APA process. See Section XIV.B below.

• Case Plans. We recommend that the final procedures require the issuance of a case plan developed with input from the taxpayer and appropriately updated during the pendency of the APA request. Further, a case plan requirement must be supported by active management by APMA Senior Managers. See Section XV below.

• IRS Memorandum (position papers). We recommend that the final procedures make clear that the taxpayer will have a reasonable opportunity to respond to the IRS’s position prior to dissemination to a foreign competent authority. See Section XVI below.

• APA Repatriation. We do not see any detriment to the government in allowing a taxpayer to make an APA repatriation determination for any year covered under an APA until the completion of its annual report for that year. Accordingly, we recommend that a taxpayer be provided the flexibility of opting in or out of APA repatriation any time prior to filing its annual report for any APA year. See Section XIX below.

• Renewal APAs. We welcome the attempt to obtain efficiencies in the renewal process and suggest additional measures that can be taken without sacrificing the government’s desire to ensure that the APA renewal is appropriate and that circumstances have not significantly changed. The measures for abbreviated requests for renewal APAs do not go far enough to meet the objective of obtaining desired efficiencies. While the proposed measures allow taxpayers to file abbreviated requests if certain requirements are fulfilled, they do not contain provisions designed to ensure that APMA completes the requests more quickly and efficiently. Specifically, the final procedures should reflect an approach whereby in most instances a taxpayer is permitted to update its previous APA request or prepare an updated report without the necessity of a pre-filing conference. The final procedures should address how an abbreviated bilateral or multilateral renewal request will be coordinated with treaty partners. If only one treaty partner to a bilateral renewal APA agrees to an abbreviated APA request,
then the objective of obtaining efficiencies in obtaining a renewal APA process will have been thwarted. See Section XXII below.

- **Small Case APAs.** We recommend that final procedures maintain the separate category of small transactions available under current procedures. Further, as noted elsewhere with respect to abbreviated APA requests, we have genuine concerns that the proposed procedures are excessively burdensome on small business taxpayers, limiting the access to transfer pricing certainty that is available to larger taxpayers. See Section XXIV below.

- **Effective Date.** Due to the extensive changes in pre-filing procedures and format and content to apply for an APA request, we recommend that the final procedures become effective no earlier than six months after the date of publication. See Section XXV below.

- **Coordination with Mutual Agreement Procedure Process.** When a taxpayer agrees to expand a MAP case to include APA years, we recommend that the final APA procedures specify the requirements for an APA request that would be waived if the taxpayer were able to represent that the applicable law, facts and circumstances, economic conditions, and other relevant factors are expected to be substantially the same in both the proposed APA years and rollback years compared to the years covered by the MAP resolution. See Section XXVI.

For ease of reference, the main headings below refer to the corresponding sections of the proposed revenue procedure included in the Notice.

**II. Definitions (§ 1)**

The proposed revenue procedure provides a table of definitions, something that was not included in any past APA revenue procedure. This is a constructive addition, as it aids taxpayers in interpreting key terms in the revenue procedure. We comment elsewhere on several of the specific definitions provided. Here, we recommend adding definitions of “complete APA request” and “material/materiality.”

**A. “Complete APA Request”**

The table of definitions does not provide a separate definition of “complete APA request.” Rather, the term is defined piecemeal in several other places in the proposed procedures.\(^7\)

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\(^7\) See Sections 1.01 (contrasting Abbreviated APA Request with complete APA request), 3.04 (specifying the quality of information that must be provided in the APA request), 3.05 (requiring payment of a user fee), 3.10(1) (indicating that a request may be complete even if it does not contain all relevant information), and 3.11(1) (suggesting that, if material errors and omissions are promptly corrected, they will be treated as relating back to the date of the original filing of the APA request), and the second paragraph of the Appendix (summarizing what is required for an APA request to be complete).
We find these various definitional components to be confusing in application and prone to adding more compliance time that can be readily remedied by adding a single definition. Providing a definition that references the provisions cited above would help remedy some of the shortcomings, but uncertainty would remain. Is completeness to be governed by the “reasonably necessary” standard, by a potentially much broader “relevance” standard, or by a potentially conflicting directive issued by an APMA staff member during a pre-filing conference? Does remediying a material error or omission relate back to the date the submission is filed? Does the fact that an APMA team requests and is provided supplemental “relevant” information render the original APA request incomplete?

We believe that a definition of “complete APA request” would reduce the possibility for confusion. The definition should treat an APA request as “complete” if it contains substantially all information (required by the Appendix) that is reasonably necessary for the APMA team to evaluate the proposed covered methods. If a taxpayer remedies a material error or omission promptly after being made aware of it (by providing “reasonably necessary” information), the initial APA request should not be viewed as incomplete (that is, the correction should relate back to the date of the initial APA request). We think the key concern from the IRS point of view should be that the APMA team has the information it requires to proceed without delay to complete its analysis and reach a sound conclusion. So long as the taxpayer submits an APA request that contains substantially all information reasonably necessary and provides such additional requested information in a timely manner that does not slow the APMA team’s progress on the matter, the original APA request should be deemed complete.

A “complete APA request” definition that incorporates the above principles would appear to meet the objectives of the proposed revenue procedure. As described in detail below, such a definition is particularly relevant for: (1) establishing the first APA year; (2) providing a basis for terminating the APA process; (3) establishing whether the APA request will be a “factor” in determining whether the taxpayer has met the documentation requirements of Reg. § 1.6662-6(d)(2)(iii); and (4) establishing a treaty arbitration commencement date.

Establishing First APA Year: Under section 3.03(3) and (4) of the proposed procedures, submission of a complete APA request by the prescribed due date allows the first proposed APA year to be included in the APA term. Assuming a taxpayer timely files an APA request and promptly corrects any noted deficiencies in that request, APMA would

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8 This issue is present in the current procedures set forth in Rev. Proc. 2006-9. Adapting the final procedures to provide a single coherent definition of “complete APA request” is undoubtedly challenging and may create the need to reconcile other provisions. This may account for the dictate in section 4.02(3) of the proposed procedures that APMA’s determination “as to whether an APA request is complete . . . is not subject to administrative review.” Section 4.02(3) is the subject of another comment, below.

9 Even in the context of preparing transfer pricing documentation as protection against penalties, the IRS recognizes that a taxpayer may weigh the expense of additional efforts to locate new data with both the likelihood of finding additional data that would improve the reliability of results and the amount by which any new data would change the taxpayer’s taxable income. Reg. §1.6662-6(d)(2)(ii)(2). See also preamble to penalty regulations, TD 8656 (Jan. 1996), 1996-1 C.B. 329.
seem to have little incentive to treat the initial APA request as incomplete. Such treatment would cause the year to be a rollback year,\(^\text{10}\) which would unnecessarily require coordination with IRS Exam. The proposed procedures indicate elsewhere (for example, at section 2.02(3)) that APMA wishes to deemphasize the importance of procedural posture in handling transfer pricing cases. Treating a proposed APA year as a rollback year would not serve that purpose.

**Basis for Terminating APA Process:** The proposed procedures provide that APMA may terminate an APA process based on the taxpayer’s “failure to include the materials required by this revenue procedure in the APA request (see section 3) or the materials requested by the APA team during the APA process.”\(^\text{11}\) Our recommended definition of “complete APA request” does not prevent APMA from terminating an APA process. Importantly, the proposed procedures authorize APMA to make a supplemental request for any relevant information:

> The information, documents, and materials required of APA requests that are identified in the Appendix may not exhaust items relevant to an APA team’s evaluation of a given APA request. If the APA team determines that it needs additional information to analyze the APA request, the taxpayer will be asked, and thereby required, to provide such information.\(^\text{12}\) [Emphasis supplied.]

Additionally, section 4.02(1) of the proposed procedures allows APMA to terminate an APA process if a taxpayer fails to provide “the materials requested by the APA team during the APA process.”

**Factor in IRC Section 6662(e) Documentation:** Section 3.08 of the proposed procedures provides that a complete APA request is a “factor in determining whether the taxpayer has met the documentation requirements of Reg. § 1.6662-6(d)(2)(iii) for the proposed APA years.” The level of completeness would not seem to require an alteration in this rule. Whatever the standard for completeness, the information provided would seem to be a “factor” in determining compliance with those documentation requirements. As discussed below, we recommend changes to section 3.08 of the proposed procedures that would provide greater certainty for APA taxpayers. In that discussion, we explain why our recommended definition of “complete APA request” would remain appropriate.

**Treaty Arbitration:** For rules regarding bilateral and multilateral APAs that may involve arbitration, section 4.05 refers the reader to section 12 of the proposed competent authority revenue procedure (Notice 2013-78), which provides:

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\(^{10}\) Alternatively, APMA could simply not cover the first proposed year (even as a rollback year). This would seem undesirable if APMA has decided to entertain APA discussions with the taxpayer for subsequent years.

\(^{11}\) Notice 2013-79, § 4.02(1).

\(^{12}\) Notice 2013-79, § 3.10.
In general, the commencement date for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities. The U.S. competent authority generally takes the position that it has received information necessary to undertake substantive consideration for a mutual agreement only when it has received a complete MAP request as described in this revenue procedure.\footnote{13}{The U.S.-Canada treaty provides that the “commencement date” for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities.” Protocol Amending the Convention between the United States of America and Canada with respect to Taxes on Income and on Capital, Art. 21, deleting and replacing Art. 26, §7(b) (Sept. 21, 2007).}

The standard for completeness under treaty arbitration provisions is thus consistent with our recommended definition for “complete APA request.” Both require taxpayers to provide information that is necessary for the APMA team to evaluate the proposed covered methods.

We note that for treaty arbitration purposes the timing of the “commencement date” is governed by the applicable Memorandum of Understanding, which may not permit a taxpayer’s correction of material errors or omissions to relate back to the initial filing date.\footnote{14}{For example, the “Memorandum of Understanding between the Competent Authorities of Canada and the United States of America” provides that, if an APA request is incomplete, the taxpayer will be asked to correct and, “[o]nce complete information is provided, . . . each competent authority will inform the other competent authority of the date it received the information necessary to undertake substantive consideration for a mutual agreement. The latter of these dates will be the Commencement Date.” §4.c.} This potential difference in the date on which a submission is deemed complete for treaty arbitration is appropriate (i.e., the competent authorities want to ensure sufficient time after receiving all necessary information to fully develop the case).

Rev. Proc. 2006-9 uses the term “substantially complete” rather than “complete.” The text of Rev. Proc. 2006-9 describes “substantially complete” as containing “the information required.”\footnote{15}{Rev. Proc. 2006-9, § 4.01.} Historically, the term has been applied by APMA in a manner that allows the IRS to exercise some flexibility in determining whether the information and documentation provided in the APA request are sufficient to commence processing the APA request. We understand that the “substantially complete” terminology differs from terminology used to determine a “commencement date” for treaty arbitration purposes, and so may no longer be appropriate for the APA revenue procedure. However, the omission of the term might be inferred to preclude the flexibility that the APMA Program has historically exercised in these determinations. We recommend including a statement in the final procedures confirming that reasonable judgment will be brought to bear on the question of whether an APA request is complete.

Our last point on this issue is that there is some uncertainty regarding whether an “abbreviated APA request” will be treated as a “complete APA request” for the above purposes. The proposed procedures contrast an abbreviated APA request with a complete

\footnote{13}{The U.S.-Canada treaty provides that the “commencement date” for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities.” Protocol Amending the Convention between the United States of America and Canada with respect to Taxes on Income and on Capital, Art. 21, deleting and replacing Art. 26, §7(b) (Sept. 21, 2007).}
\footnote{14}{For example, the “Memorandum of Understanding between the Competent Authorities of Canada and the United States of America” provides that, if an APA request is incomplete, the taxpayer will be asked to correct and, “[o]nce complete information is provided, . . . each competent authority will inform the other competent authority of the date it received the information necessary to undertake substantive consideration for a mutual agreement. The latter of these dates will be the Commencement Date.” §4.c.}
\footnote{15}{Rev. Proc. 2006-9, § 4.01.}
request in numerous places. We submit that an APMA-approved abbreviated APA request should be treated as a complete APA request for all of the above purposes. Clarification on this point would be helpful.

B. **“Material/Materiality”**

The terms “material” and “materiality” appear in numerous places in the proposed procedures:

- Section 1.01: Critical assumption definition: “Any fact the continued existence of which is material to the issue(s) and method(s) covered by an APA.”
- Section 3.11(1): Duty to correct for material errors and material omissions.
- Section 3.11(2): Duty to notify APMA regarding material changes to information previously submitted.
- Section 7.01(1): Duty to correct, through the APA Annual Report process, any materially false, incorrect, or incomplete information submitted during the APA process.
- Section 7.03(1): Authorizing IRS exam to require taxpayers to establish “the accuracy of the APA annual report’s material representations.”
- Section 7.06(1): Authorizing the IRS to revoke an APA due to fraud, malfeasance, or disregard involving “material facts in the request or subsequent submissions (including an annual report).”
- Section 7.06(2): Authorizing the IRS to cancel an APA due to mistake with respect to a material fact, or failure to state a material fact.
- Section 7.06(3): Authorizing the IRS to cancel an APA due to a material change in governing law.
- Section 7.06(5): Authorizing APMA to waive cancellation if the taxpayer can show good faith and reasonable cause and agrees to make all adjustments proposed to correct for a mistake regarding a material fact or the failure to state a material fact.
- Appendix, Introduction: Determining the completeness of an APA request to be governed by relevancy and materiality considerations.\(^{16}\)
- Appendix, section 3.05: For purposes of section 3.03 of the Appendix, an amendment includes coverage of additional issues or other determinations and material changes to a proposed covered method.

Section 7.06(4) provides two explanations of what is meant by the term “material”. For purposes of revoking or canceling an APA,\(^{17}\) “APMA will consider facts material if, for example, knowledge of the facts could reasonably have resulted in an APA with significantly different terms and conditions.”\(^{18}\) With respect to annual reports, “APMA will consider facts material if, for example, knowledge of the facts would have resulted in

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\(^{16}\) As discussed above (“complete APA request”), we recommend changes to this provision that would clarify the reference to materiality.

\(^{17}\) Notice 2013-79, § 7.06(1), (2).

\(^{18}\) Notice 2013-79, § 7.06(4).
(a) a materially different allocation of income, deductions, or credits than those reported in the annual report.”19

Given the proposed revenue procedure’s extensive use of the term “material”, a general definition of what is intended would be a welcome clarification.20 In general, we believe that materiality should turn on whether correcting an item “could reasonably have resulted in an APA with significantly different terms and conditions.” We also recognize that an item should be treated as material if it is an item that significantly changes the outcome of an application of a TPM. A general definition that includes these components could replace the section 7.06(4) definitions.

III. Rollbacks (§ 2.02(3), § 5.02)

A. Background and Importance of Rollbacks

A request for a rollback allows taxpayers to apply the agreed upon TPM under the APA request to open prior tax years when the facts, law, and available records are substantially the same as those under the proposed APA.21 The ability to request a rollback is a very important part of the APA process, because in our experience it is usually the most effective tool for resolving transfer pricing issues for prior tax years.22 A relatively high percentage of new APA requests (that is, not renewal APA requests) involve a rollback.23

B. APMA-Initiated Rollbacks

While generally following the rollback policy contained in the current revenue procedure,24 the proposed revenue procedure provides that APMA may condition the

19 Id.
20 The OECD’s recent discussion draft on transfer pricing documentation recognizes the importance of a common understanding of materiality, albeit for a different purpose (preparing transfer pricing documentation):

Not all transactions that occur between associated enterprises are sufficiently material to require full documentation. Obviously, tax administrations have an interest in seeing the most important information while at the same time they also have an interest in seeing that MNEs are not so overwhelmed with compliance demands that they fail to consider and document the most important items. Thus, transfer pricing documentation requirements should include specific materiality thresholds…

OECD, Discussion Draft on Transfer Pricing Documentation and CbC Reporting, §§ 29 and 30 (Jan. 30, 2014).

22 The current revenue procedure recognizes that rollbacks may be an “effective means of enhancing voluntary compliance and of using available resources to address unresolved transfer pricing issues.” Rev. Proc. 2006-9, § 8.01.
23 From the 2011 APA Program Annual Report issued by the IRS, it can be derived that at least 12 APAs out of 27 nonrenewal APAs executed in 2011 involved a rollback. See Ann. 2012-13, 2012-16 I.R.B. 805 (Apr. 2, 2012), Tables 1 and 29. The 2012 APMA Program Annual Report changed in format and content from the 2011 annual report and similar information cannot be derived.
acceptance of an APA request on the taxpayer’s agreement to a rollback. The proposed revenue procedure clarifies that APMA may exercise such authority when APMA has clear interests in proposing a rollback and the taxpayer does not offer clear reasons against doing so. It is unclear when APMA may have such “clear interests,” and no procedures are provided on how the taxpayer should express its reasons against the proposed APMA rollback.

A greater concern is that under the proposed procedures APMA can propose a rollback at any time during the APA process and, if the taxpayer refuses to accept the rollback, may terminate the APA process. At that point, the taxpayer and APMA may have already invested substantially in the APA process by the time APMA initiated its rollback request.

The rollback provisions contained in the proposed procedures, if adopted as currently drafted, would have significant implications for taxpayers and the APA process overall. It is unclear what led to this change in the IRS rollback policy. Under current procedures, in the absence of the taxpayer’s rollback request, the Service has the discretion to apply the same or a similar TPM as that agreed to in an APA to prior years, including making related adjustments to reflect differences in facts, economic conditions, and applicable legal rules. In comparison, the proposed procedures allow APMA to deny an APA request unless the taxpayer agrees to an imposed rollback. Because the APA process is and always has been a voluntary process, we strongly recommend that final procedures be made more reflective of current procedures, which do not condition the acceptance of an APA request or completion of an APA on a taxpayer agreeing to a rollback. While we appreciate that APMA may wish to suggest rollbacks, we believe that neither taxpayer-initiated nor APMA-initiated rollbacks should be required as part of entering into an APA.

C. Timing for Submitting Rollback Requests

Under the current revenue procedure, a rollback request may be submitted by the taxpayer at any time prior to the execution of the APA. Under the proposed procedures, if a taxpayer desires a rollback, then a rollback request should be included in the taxpayer’s APA request. APMA may consider a later request for an APA rollback

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25 Notice 2013-79, § 2.02(3).
26 Id.
27 Notice 2013-79, § 5.02(4).
28 Under the current revenue procedure, the APA process is open to any eligible taxpayers (whether or not they make a rollback request). If APMA’s ability to reject the APA request because of a taxpayer’s failure to accept the Service’s rollback request is included in the final revenue procedure, an APA would be available only to taxpayers that decided a rollback may be acceptable to them prior to applying for an APA. Consequently, we are concerned that imposing rollbacks on taxpayers could discourage taxpayers from seeking APAs.
31 Notice 2013-79, § 5.02(1).
only if the APA rollback request is submitted in writing within three months after the APA request is filed, unless APMA agrees otherwise.  

Under current procedures, a taxpayer with uncertainty about how the competent authorities would resolve its bilateral APA request may be hesitant to request a rollback. The flexible approach of the current procedures is working reasonably well, and we see no compelling reason to adopt a three-month deadline to submit a rollback request.

**D. Rollback Notification**

In our 2005 comments, we recommended that the Service provide preliminary advice to a taxpayer in the pre-filing meeting as to whether the proposed method is suitable for a rollback. In a similar manner, we recommend that the final procedures state that APMA will provide preliminary advice at the conclusion of the pre-filing requirements as to whether a taxpayer’s proposed rollback request is appropriate, and in the absence of a rollback request by the taxpayer, whether the IRS would seek to impose a rollback. Further, in situations in which the IRS would seek to impose a rollback for a bilateral or multilateral APA, we recommend that APMA would contact, with the taxpayer’s consent, the corresponding foreign competent authority(ies) to obtain its (their) preliminary views prior to conditioning the APA request on an imposed rollback.

**IV. Unilateral APAs (§ 2.02(4))**

**A. Preference for Bilateral and Multilateral APAs**

Like the current procedures, the proposed procedures state a clear preference for bilateral and multilateral APAs compared to unilateral APAs. While we agree that in many instances bilateral and multilateral APAs are preferable because they are more effective in avoiding future double tax disputes, in certain instances such APAs are not practical. For example, a U.S.-based multinational may provide headquarters services to affiliates in over 50 treaty countries. While a bilateral APA involving each country may be very effective in avoiding double taxation, in most situations it is not likely to be practical for but a handful of countries receiving such services.

In a second example, a U.S. multinational receives royalties for licensing its technology to affiliates in 20 countries, which in the aggregate are material but are not material with respect to any one country. A third example may involve a taxpayer that has a long history of obtaining U.S. unilateral APAs. Accordingly, we recommend that the Service provide guidance in the final procedures describing the circumstances when a unilateral APA would be appropriate.

**B. Effective and Practical Standard**

Both the current procedures and proposed procedures express a preference toward obtaining a bilateral or multilateral APA when it would have been effective and practical, 

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32 Id.
33 Notice 2013-79, § 2.02(4); Rev. Proc. 2006-9, § 7.06.
citing Reg. § 1.901-2(e)(5)(i) as it applies in the context of foreign tax credits. The citation to Reg. § 1.901-2(e)(5)(i) inappropriately implies that the Service would either deny pertinent foreign tax credits in the event of a foreign-initiated adjustment on transactions covered by a unilateral APA or in some way penalize a taxpayer for not having sought a bilateral or multilateral APA. When the Service agrees it is appropriate to enter into a unilateral APA, the taxpayer should not be penalized for entering into that unilateral APA. Accordingly, we would remove the reference to that regulation in the proposed procedures.

C. Limitations on Competent Authority Assistance in the Event of a Foreign-Initiated Adjustment

To achieve the same objective, the current procedures provide protection to a taxpayer entering into a unilateral APA by not limiting the taxpayer’s ability to obtain competent authority relief in the event of a foreign-initiated adjustment with the following provision:

Section 7.05 of Rev. Proc. 2002-52 provides in part that, if a taxpayer reaches a settlement on an issue pursuant to a written agreement, the U.S. competent authority will endeavor only to obtain a correlative adjustment from a treaty country and will not undertake any actions that would otherwise change such agreement. The restrictions imposed under section 7.05 of Rev. Proc. 2002-52 with respect to the discretion of the U.S. competent authority to negotiate correlative relief will not apply to a unilateral APA.\(^\text{34}\)

While the current procedures provide protection to a taxpayer with a unilateral APA in the event of a foreign-initiated adjustment, the proposed procedures do not contain a provision that provides taxpayers with similar protection, because the language in the current procedures appear to have been excised. We recommend that such language be reinserted and that the final procedures make clear that the existence of a unilateral APA will not result in the denial of competent authority assistance, in whole or in part.\(^\text{35}\)

V. Expansion of APA Scope (§ 1.01, § 2.02(5))

A. Expansion of APA Scope is a Welcome Addition

The proposed procedures provide a welcome expansion of the scope of certain issues that may be addressed in an APA compared to that available under current procedures.\(^\text{36}\) Specifically, the Committee endorses the proposed procedures’ expansion of covered ancillary issues to include interest on refunds and deficiencies, penalties with respect to U.S.-initiated adjustments, and the determination of whether a payment is compulsory for foreign tax credit purposes as provided in Treas. Reg. § 1.901-2(e)(5).\(^\text{37}\)

\(^{34}\) Rev. Proc. 2006-9, § 7.07.
\(^{35}\) See Notice 2013-78, § 6.02.
\(^{37}\) Notice 2013-79, § 1.01 (definitions of “ancillary issues” and “coverable issues”).
B. Concerns Regarding the IRS Dictating the Scope of an APA

While the Committee welcomes the overall scope expansion, we are concerned that the language in the proposed procedures concerning the scope of covered issues signals a change in attitude by the APMA program towards a more inflexible, less collaborative posture vis-à-vis the taxpayer. Specifically, the proposed procedures state that APMA may:

- encourage the taxpayer to expand the scope of the proposed APA to include coverable issues relevant to the proposed covered issues when a comprehensive resolution of the coverable issues would further the interests of sound tax administration; and
- condition its acceptance of an APA request on the taxpayer’s agreement to include such other issues among the covered issues, when APMA has clear interests in doing so, and the taxpayer does not offer clear reasons against doing so.  

Conditioning acceptance of an APA request on the taxpayer’s agreement to accept the IRS’s preferred scope has several implications:

- APMA may not be in a position to determine what issues should be covered on the basis of a pre-filing meeting and an accompanying memorandum.
- Such an approach substantially undermines the historical sense that the IRS and taxpayers are approaching the process in a cooperative, consensus building way.
- The proposed approach raises the question as to how much input taxpayers will have into the scope of APA coverage.

While the proposed procedures allow taxpayers to disagree with a proposed IRS scope expansion, they do not contain any standard by which the IRS would evaluate the taxpayer’s objection. While we agree in some instances that it may be appropriate to expand the coverage of an APA, we believe that such scope expansion should be limited to instances when the expansion of scope would have a strong likelihood of producing a more reliable arm’s length price for the taxpayer’s proposed covered issues than an approach without such scope expansion.

In addition, examples showing (i) the circumstances under which APMA might encourage taxpayers to cover additional issues, and (ii) the reasons why APMA would regard such coverage as furthering the interest of sound tax administration, would help taxpayers prepare for any inquiries regarding those other issues.

38 Notice 2013-79, § 2.02(5).
Revenue Procedure 2008-31 made it clear that determining which issues to resolve was a joint undertaking between taxpayers and the APA Program. We recommend adopting the same tone in the final procedures.

C. Hypothetical Transactions

Taxpayers sometimes face great uncertainty in structuring and valuing transactions, which they are contemplating to undertake, but which represent a departure from their current operations. Such hypothetical transactions tend to arise in the context of cost sharing arrangements and certain types of intangibles transfers. Input from APMA on how best to structure and value those transactions could be invaluable. The APMA Program would seem to have legal authority to accept such hypothetical transactions and to reach agreement on them. In finalizing the proposed procedures, APMA has the opportunity to clarify whether the government will accept such hypothetical transactions and, if so, the conditions under which they would be accepted and processed. Some conditions might include the extent to which taxpayers have developed the proposed transactions, whether the transactions are seriously contemplated or still only hypothetical, the potential response by foreign tax authorities that may be involved in the proposed transactions, and the taxpayer’s profile, including prior history in the APMA Program.

VI. Consent to Extend Limitations Period (§ 2.03(3))

Section 2.03(3) of Notice 2013-79 states that throughout the APA process, the taxpayer and the IRS will execute consent agreement(s) as necessary to extend the period of limitations for assessment of tax for each proposed APA year and for each proposed APA rollback year. The taxpayer will be instructed as to the type of consent to execute, viz., general or restricted, and the duration of the extension for each proposed APA year and each proposed APA rollback year.

An explicit provision highlighting the need for consents is a welcome addition to the APA revenue procedure. Under current procedures, discussion of statute extensions was limited to a requirement that the APA request discuss whether the period of limitations for the rollback years had expired in the United States or in foreign countries, and if not, when the periods of limitations would expire. There was no explicit requirement that the statute be extended for a year that might close during the APA due diligence period. The Notice helps clarify any confusion on this point.

While we appreciate the added language regarding statute extensions, the Notice as currently drafted takes a unilateral approach to determining which type of consent will be made available to taxpayers, stating that taxpayers will be “instructed” as to the type of consent to execute. Absent a compelling reason for issuing a general consent, a restricted consent is in most instances sufficient to address IRS concerns. Accordingly, such


restricted consents should be more easily obtained in the context of an APA than they have been under current and past APA practice because general consents needlessly keep open issues which are not in dispute or tied to the covered issues in the APA. We recognize that the IRS’s position is that the taxpayer’s right to a restricted consent is limited to the right to request a restricted consent41 and that the IRS cannot be compelled to enter into restricted consents.42 However, certain considerations make the use of restricted consents especially appropriate in the context of an APA.

First, despite the IRS's narrow position regarding taxpayer rights to restricted consents, the IRS views a consent as a mutual agreement, with both parties, the taxpayer and the IRS, having the right to determine what they will agree to in the consent.43 That view of consents is consistent with the collaborative approach to analyzing issues in the context of an APA.

Second, the APA process is voluntary. Final procedures that ensure that restricted consents will be more readily available could reassure taxpayers that entering into the APMA Program will not mean that taxpayers are entering into a general audit.

Third, IRM 25.6.22.8.3(2) advises that the IRS may request consents restricted to one or more issues where, in light of reasonable tax administration, resolution of such issue or issues requires establishment of an IRS position through court decision, regulation, ruling or other headquarters action, or where other equally meritorious circumstances exist. An APA requires the establishment of an IRS position. Issuing restricted consents in the context of the APA process would therefore be consistent with this general IRM guideline.

In our experience, there are three reasons commonly given by the IRS for refusing to provide restricted consents in an APA context: (i) due diligence on the transactions proposed for APA coverage may lead to a finding of additional issues that may need to be adjusted; (ii) it can be difficult to craft language with sufficient precision to limit the consents; and (iii) the procedures required of IRS personnel to obtain restricted consents are burdensome.

Regarding the first IRS objection that due diligence may lead to the need for analysis on additional issues, that concern should be mitigated by Notice 2013-79’s proposed expansion of coverage. If that proposal is retained in the final version of the revenue procedure, the IRS and taxpayers will have the opportunity to determine, in what should be a collaborative environment, the issues that will be covered and analyzed in the APA process. The IRS Examination Team should be well informed of those issues by the end of that determination. Moreover, as stated, providing an easier route to restricted consents could reassure taxpayers that they will not be subject to a general audit just because they entered into a voluntary program with the IRS. Taxpayers seek an APA in part to hasten the resolution of transfer pricing issues compared to the normal

41 See Internal Revenue Manual (IRM) 25.6.22.8.1(3). Emphasis on "request" is in the original.
42 Id.
43 Id.
examination and MAP process. They do not seek APAs to extend the time for the IRS to examine issues that are not the subject of the APA request. Further, we cannot help but invoke the motto adopted by the APMA Program just a few years ago of “Certainty Sooner.” “Certainty Sooner” for transactions covered by the APA should not mean “Certainty Later” for non-APA issues.

Regarding the second IRS objection (difficulty in drafting appropriate language), IRM 25.6.22.8.2 sets out five conditions that must be met before the IRS will enter into a restricted consent. The first two conditions are (i) the number of unresolved issues required to be covered by the restricted consent do not make it impractical to do so; and (ii) the scope of the restrictions must be clearly and accurately described for all the unresolved issues.

This second objection, and the response to it, is tied inextricably to the first. APMA personnel and taxpayers should have the opportunity to discuss and define the issues that will be covered in a collaborative forum. Drafting precise language on the issues to be covered should not be an impediment to entering into a restricted consent.

Regarding the third issue (procedural hurdles), the fourth and fifth conditions under IRM 25.6.22.8.2 that must be met before a restricted consent can be issued are (iv) the use of the restricted consent is approved by an appropriate IRS official; and (v) the wording in the restricted consent has been approved by IRS Counsel. These administrative requirements should not present procedural hurdles to obtaining a restricted consent in an APA context. For example, a representative from IRS Counsel is typically already involved in the APA process. They should thus be well aware of the issues to be covered and of the appropriate language for those issues in the consent.

VII. Pre-filing Procedures (§ 3.02)

Pre-filing conferences (PFCs) are an important part of the APA process, and the proposed procedures retain some features and add others that are important for making PFCs helpful to taxpayers and the IRS.44 However, there are a few new features that give cause for concern, especially when the goals of having a successful PFC outcome may be frustrated. The following items of the proposed procedures are of particular concern to us:

1. **Informal contact availability.** The proposed procedures move away from informal PFCs and instead require the submission of a pre-filing memorandum to make the initial request for a PFC. Most importantly, the formality of the proposed pre-filing procedures creates the need for both informal procedural and substantive advice prior to initiation of the formal pre-filing procedures.

For example, the proposed procedures do not provide for, or suggest, that a taxpayer may call APMA to discuss the need for a PFC, the timing for a PFC, the likely assignment of a particular Team Leader (especially in the case of a renewal APA), or other features of the

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44 Notice 2013-79, § 3.02.
IRS-taxpayer interaction. We believe such administrative contacts would help improve the effectiveness of PFCs.

Under the proposed procedures, a pre-filing memorandum must provide three proposed dates for a PFC, but it is unclear whether the dates should be next week, next month, or later. Taxpayers need informal access to clarify, at a minimum, the administrative and coordination aspects of a PFC. In comparison, current APA procedures provide contact numbers for scheduling a PFC, and the final procedures should provide for similar access. Also, we recommend that the final procedures expressly permit a taxpayer to request a pre-filing conference (either in person, via phone, or videoconference) prior to the initiation of the more formal APA pre-filing procedures (i.e., a pre-pre-filing conference).

(2) **Anonymous PFCs.** The increased controls and discouragement of anonymous PFCs may prevent some taxpayers who would otherwise be inclined to enter into an APA from approaching APMA. For example, as the IRS is well aware, cost sharing has been a contentious issue. Requiring a taxpayer using an “intangible development agreement” (i.e., cost sharing) to have a PFC on a named basis may elevate the difficulties with field exam teams involved in evaluating it before the taxpayer has even filed for an APA.

If a cost sharing taxpayer has an ongoing and unagreed audit with the field exam team, coming in on a named basis will put that taxpayer in a potentially worse position just to explore if an APA would be feasible. Our prior recommendation for a pre-PFC on an anonymous basis would address such concerns. Alternatively, there should be provision for the APMA Director to permit an anonymous PFC and corresponding anonymous PFC memorandum on a case-by-case basis. As noted above, if informal access is provided for administrative and coordination purposes, then a representative would presumably be able to call the appropriate personnel to make his or her case for an anonymous PFC (which presumably would require some writing or exchange of letters to evidence any grant of a waiver).

(3) **Need for Pre-filing Memorandum.** In some cases, taxpayers have had bilateral APAs in place, but either the IRS or the taxpayer has wanted to expand coverage with a separate unilateral APA (for example, a bilateral APA with the Netherlands, but a unilateral APA covering the same transaction flow with Ireland). In those instances, it does not appear a pre-filing memorandum, or possibly even a PFC, should be required, although the proposed procedures appear to require such a memorandum. We recommend that there be provision for the APMA Director or an APMA Senior Manager to waive the pre-filing requirements under such circumstances. If the IRS APMA team already understands the transactions and issues, and the expansion is to add a unilateral APA for the same transaction flow, the requirement to file a pre-filing memorandum and possibly have a PFC may be unnecessary. Giving discretion to the APMA Director or

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45 Notice 2013-79, § 3.02(6)(c).
46 Rev. Proc. 2006-9, § 3.03.
47 Notice 2013-79, § 3.02(4).
Senior Manager to waive the requirement, depending on the circumstances, will help alleviate the situation.

(4) **Penalties of Perjury.** The proposed procedures require a taxpayer in a PFC on a named basis to provide a penalties of perjury statement.\(^{48}\) This seems incongruous with section 3.02(9) of Notice 2013-79, which provides that any statements from APMA personnel in the PFC are advisory only.\(^{49}\) Because of the nature of pre-filing procedures a taxpayer may either not be aware of all the facts or may be seeking pre-filing advice as to what facts the IRS deems relevant to include in the APA request. A perjury statement for pre-filing procedures is both unnecessary and inappropriate. Accordingly, we recommend that the final procedures not include such a pre-filing perjury statement requirement.

**VIII. Content and Form of APA Request (§ 3.04 and Appendix)**

**A. Complete APA Request**

Section 3.04(1) of the proposed APA Rev. Proc. states that an APA “must comply with the requirements set forth in the Appendix before it will be considered complete.” Section 4.03 of the proposed APA revenue procedure confirms that APMA will not process an APA request until it is “complete.” In contrast, Rev. Proc. 2006-9 states that significant analysis of an APA request can occur as soon as “a substantially complete request has been filed.”\(^{50}\)

The use of the term “substantially complete” in Rev. Proc. 2006-9 provides a basis for the IRS to exercise some flexibility in determining whether the informational and documentation requirements for the APA request are sufficiently satisfied to allow processing of the APA request to begin. Although the text of Rev. Proc. 2006-9 describes “substantially complete” as containing “the information required,” the absence of any reference to “all information required” in the description of substantially complete and the use of “substantially” to modify “complete” appear to allow the IRS to exercise some discretion in determining whether an APA request is sufficiently complete to be processed.\(^{51}\) The flexibility in Rev. Proc. 2006-9 to accept an APA request that is substantially complete also is consistent with the flexibility in the information requirements. For example, section 4.03(10) states that the required financial and tax data of the parties “may include (but need not be limited to) data from [certain listed sources].”

The proposed revenue procedure’s elimination of references to a “substantially complete” APA request and its detailed enumeration of the required contents of an APA request

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\(^{48}\) Notice 2013-79, § 3.02(6)(a).
\(^{49}\) Notice 2013-79, § 3.02(9).
\(^{51}\) Rev. Proc. 2006-9 describes an APA request as substantially complete as follows: “An APA request will normally be considered not ‘substantially complete’ . . . unless the request contains the information required below (as may be modified by agreement of the parties).” Rev. Proc. 2006-9, § 4.01, 2006-1 C.B. 278, 280-81.
appear intended to eliminate the need to determine whether the taxpayer’s APA request provides sufficient information to allow APMA to evaluate the APA request.

We understand and respect the IRS’s desire not to waste time and resources seeking information and documents that are relevant to an APA request, but instead to have as much of that potentially relevant information and documents available at the start of the IRS examination of the APA request. We nevertheless note that one of the attractions of the APMA Program is its flexibility in reaching reasonable results, and decreasing flexibility diminishes the APMA Program’s utility and attractiveness to taxpayers. In addition, the intake process for an APA request allows the IRS to determine whether deficiencies must be addressed before the IRS devotes resources to an APA request. We therefore recommend that the final procedures allow the IRS to continue to proceed on the basis of a “substantially complete” APA request, rather than requiring a “complete” APA request to proceed.

B. Covered Issue Diagrams

The proposed procedures would require a “covered issue diagram” to be included in the pre-filing memorandum and in the APA request. In the Notice's Definition section, a covered issue diagram is defined as diagrams, charts, or similar representations described in the Appendix of the Notice that depict, among other items, the legal structure, tax structure, business unit structure, intercompany flows, and value chain of the controlled group and proposed covered group.

Covered issue diagrams are further described in the Notice's Appendix, Section 1.03, Exhibit 11. According to the Appendix, the covered issue diagrams would depict certain information, presented in a manner similar to and with a degree of detail no less than that presented in the diagrams accompanying the case studies “Alpha” through “Foxtrot” in Joint Committee on Taxation, Present Law and Background Related to Possible Income Shifting and Transfer Pricing (JCX-37-10) dated July 20, 2010. The specific requirements are discussed further below.

We believe the Notice's discussion of the covered issues diagram should be both clarified and narrowed. First, the scope of information required is not clear. For example, the Notice defines “covered issue diagram” as showing the structure, intercompany flows, and value chain not just of the proposed covered group, but of the controlled group generally. The Notice defines "covered group" as the group of U.S. and non-U.S. taxpayers within a controlled group, including the taxpayer filing the APA request, whose intercompany transactions or other business activities are within the scope of the covered issue(s). The phrase "within the scope of the covered issues" could be read broadly or

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52 Notice 2013-79, § 3.02(6)(d).
53 Notice 2013-79, Appendix, Section 1.02, Part 3, item 3.4 and Appendix, Section 1.03 (reference to Exhibit 11).
54 Notice 2013-79, § 1.01 (definition of “covered issue diagrams”).
55 2010 WTD 139-29 (Tax Analysts); Also, available at www.jct.gov and TaxCore® Congressional Documents (Bloomberg BNA Daily Tax Report).
56 Notice 2013-79, § 1.01 (definition of “covered group”).
narrowly. If the phrase is read broadly, it could include any transaction even remotely related to the proposed covered transaction. If the phrase is read narrowly, it could be interpreted as including only the specific transaction proposed for APA coverage. Clarification is needed on exactly what the phrase "within the scope of the covered issues" might mean.

Second, if the phrase is interpreted broadly, the covered issue diagram could look something like the following from the Joint Committee document, which shows the value chain for the "Bravo" foreign controlled group:

Assume that the transaction proposed for APA coverage is only the sale of Product X from Bravo Netherlands to Bravo U.S. It is unclear what much of the remaining value chain of the foreign controlled group and the foreign covered group has to do with that particular transaction. The relevance of the value chain for the U.S. side of the transaction could be equally tenuous.

We believe that the covered issues diagrams should be more narrowly focused to include only the transfer pricing issue proposed for APA coverage. Narrowing the scope of the diagrams required in an APA request is especially important because transfer pricing analyses are necessarily fact-specific. The surrounding business units, overall tax and legal structure of the controlled group, entity status, commercial transaction flows, and organization charts are normally not relevant to the tested transaction. The addition of extraneous transactions and information detracts from placing the focus of attention on the proposed covered transactions, increasing burdens and slowing progress.

57 2010 WTD 139-29 (Tax Analysts); Also, available at [www.jct.gov](http://www.jct.gov) and TaxCore® Congressional Documents (Bloomberg BNA Daily Tax Report).
Third, the scope of the information required under the proposed procedures is highly burdensome. The Notice's Appendix sets out the diagrams required as exhibits to an APA request:\(^58\)

- a. The controlled group’s legal structure, with clear indications as to the members of the proposed covered group;

- b. The controlled group’s tax structure, with clear indications as to, among other items, ownership relationships and tax filing characterizations of members of the proposed covered group under the Code and under applicable rules in the relevant treaty country(ies) (e.g., partnerships, branches, or disregarded entities);

- c. The controlled group’s and proposed covered group’s business units or similar organizational divisions as used for management purposes, together with a table or other reconciliation showing the relationship between such business units and the legal entities comprising the controlled and proposed covered groups;

- d. The value chain of the proposed covered group, comprising commercial or transactional flows between and among members or business units of the proposed covered group, between members or business units of the proposed covered group and customers and other uncontrolled parties, and between members or business units of the proposed covered group and any other members or business units of the controlled group outside the proposed covered group;

- e. Organization or similar charts identifying executive-level functional or occupational roles within the business units or within members of the proposed covered group that are relevant to the proposed covered issue(s) (e.g., vice president of marketing for transactions involving sales of tangible goods), together with (i) the names of individuals occupying such executive-level functional roles at the time the APA request is filed, and (ii) headcounts for the relevant business units or members of the proposed covered group; and

- f. Intercompany contracts or agreements, whether written or implied, between and among members of the proposed covered group and between and among members of the proposed covered group and members of the controlled group outside the proposed covered group.

We do not see the relevance of all the information set out in items a through f. In particular, tax filing characterizations (item b) and the controlled group's and covered group’s business units seem unnecessary. They are also not defined, and the contours of the requirement are unclear. The value chain (item d) is discussed above. Organizational charts identifying executive-level functions or occupational roles (item e) are generally not relevant to most transactions proposed to be covered in an APA. Several of the intercompany agreements required in item f would also be irrelevant. Especially, but not

\(^{58}\) Notice 2013-79, Appendix, § 1.03 (Exhibits).
only, for small case taxpayers, the information proposed to be included in the APA request would be a significant burden.

In our experience, most taxpayers include in their APA requests basic diagrams related to their proposed covered transactions. Those diagrams help clarify the parties and transaction flows involved in the transactions proposed for APA coverage. Notice 2013-79 makes inclusion of such a diagram mandatory and also requires inclusion of other general types of information. The amount of information requested greatly exceeds the amount most taxpayers currently provide in APA requests.

In light of these concerns, we believe the final procedures should define more precisely the scope of information required for the covered issue diagram; provide exhibit formats for common types of transactions covered under APAs; and tailor the amount of information required for the diagrams more specifically to the transactions proposed for APA coverage. Any information extraneous to those transactions should not be required to be provided in the APA request. Instead, taxpayers and the APMA team assigned to a case should be able to reach agreement in the course of APA negotiations on the scope of the diagrams required.

C. Appendix

The proposed revenue procedure includes an Appendix that sets forth instructions on preparing and filing an APA request.

1. Section 1: Content of APA Requests

Section 1 of the Appendix introduces specific ordering and content requirements. While the flexibility afforded taxpayers under current procedures to decide how best to organize the material to help the reader understand the request has some merit, we recognize that consistency in organization and presentation are likely to facilitate the efficient processing of APA requests. On balance, we agree with the proposed procedures’ imposition of a required organization of the information and material in an APA request.

a) Exhibit 4: Waiver of Ex Parte Communications

The Appendix requires as Exhibit 4 to an APA request a waiver by the taxpayer of the right to be present at discussions between IRS Appeals and members of the APA team about issues relating to a rollback to pre-APA years that are under the jurisdiction of IRS Appeals. While one can understand the reasons for the Appeals officer and the APA team to be able to have confidential discussions about aspects of reaching an agreement with the taxpayer, the ex parte communications can compromise the independence of the Appeals officer in the event that the taxpayer and the IRS do not reach agreement on a rollback of the APA to the years under Appeals’ jurisdiction. On balance, we

recommend eliminating the requirement that the taxpayer waive its right to participate in discussions between Appeals and the APA staff on matters relating to its APA request. Alternatively, to the extent IRS Appeals personnel is participating in discussions with foreign tax officials, if the IRS wants a waiver for communications with foreign tax officials pursuant to a mutual agreement provision of a treaty, the waiver could be limited to such discussions and communications.

b) Exhibit 9: List of All Information or Documents Submitted

The Appendix requires as Exhibit 9 to an APA request a list of all “information or documents” submitted to a foreign tax authority or foreign competent authority in connection with the APA request. We appreciate the need for both tax authorities to work with the same set of facts in analyzing an APA request. However, the requirement appears to go beyond the factual information included in documents and appears to require a listing of the contents of oral discussions of both factual and non-factual information, in which taxpayer provided analysis in response to questions from the foreign tax authority or foreign competent authority. Accordingly, we recommend that the final procedures limit the requested information in Exhibit 9 to factual information provide orally to either of the tax authorities that may be relevant to an evaluation of the APA request and that such factual information be reduced to a written submission.

c) Exhibit 12: Prior or Current APAs

The Appendix requires as Exhibit 12 to an APA request a copy of “any prior or current APA” to which the taxpayer or another member of the proposed covered group is a party and that relates to the scope of the proposed covered issues. With respect to APAs with the IRS, we suggest that, rather than requiring a copy of “any prior or current APA,” the final procedures require a copy of only the most recent APA with the IRS, if any, for each member of the proposed covered group. While the requirement to provide “any prior or current APA” could technically be satisfied by providing a copy of a single APA between the taxpayer and the IRS, the description of Exhibit 12 could also be construed as requiring all APAs between members of the taxpayer’s controlled group and the IRS.

The APMA Program (including its predecessor the APA Program) has been in existence for approximately 23 years. Taxpayers that have been in the program since its inception may have been parties to five or six APAs. The language should be clarified to make clear that the IRS does not intend to require that Exhibit 12 include copies of all APAs between the IRS and the taxpayer’s controlled group, but only the most recent APAs concluded.

With respect to APAs between foreign affiliates and foreign tax authorities, the text of such APAs is likely to be, in many instances, in languages other than English. Also, the APA between a foreign affiliate and a foreign tax authority might be the counterpart to an APA with the IRS, so that providing it does not give the IRS additional information, but translating it adds substantial costs to the taxpayers. We recommend that, instead of requiring such APAs as part of Exhibit 12, the taxpayer be required to list those APAs
under Exhibit 9 and provide a short description of the covered issue(s) for each such APA.

d) Exhibit 15: Application of APA Template

The Appendix requires taxpayers that seek to apply the CPM method to include in Exhibit 15 of the APA request data for the relevant members of the controlled group in a template that APMA will make available on its website. To the extent that shifting to the taxpayer the obligation to enter the financial data into the template would improve the IRS’s ability to process the APA request, we do not object to imposing this requirement on the taxpayer.

e) Exhibit 16: Federal Income Tax Filings

The Appendix requires that certain federal income tax filings be included in Exhibit 16 of the APA request. Our experience indicates that the IRS generally agrees to APAs without reviewing income tax returns, and that income tax returns do not give the IRS any information relevant to the APA request being considered. All financial information from both the tested parties and the comparable uncontrolled entities are book accounting data that apply generally accepted accounting principles and not tax financial data, so the tax data are not usable with the comparable data. The proposed procedures give APMA the ability to request these tax returns as part of its processing of an APA request if it determined that the financial information on the returns is relevant. It is therefore unclear why this requirement is in section 1 of the Appendix. We recommend that section 1 of the Appendix be revised by eliminating the requirement to include copies of tax returns as Exhibit 16.

f) Exhibit 21: Proposed Draft APA

The Appendix requires taxpayers to include a proposed draft APA under Exhibit 21 to an APA request. While we recognize that the process of drafting the APA brings issues that must be addressed to the surface, we question whether drafting the APA before the IRS has even considered if it agrees with the methodology or analysis is premature. APMA can certainly ask the taxpayer to prepare a draft of the APA during the APA process, after the tax authorities and the taxpayers have generally agreed on a methodology, but drafting the text of the APA before such agreement is reached imposes the cost of preparing what may prove to be an unusable document on the taxpayer. We recommend that section 1 of the Appendix be revised by eliminating the requirement to include a draft APA as Exhibit 21.

As an alternative to requiring a full-blown proposed draft APA, requiring a proposed draft TPM (equivalent to the “Appendix A” in the standard U.S. APA) when the proposed TPM is sufficiently complex based on pre-filing procedures would be less burdensome.
Section 2: Manner and Media of APA Request Filings

Section 2 of the Appendix to the proposed procedures sets forth the guidance on submitting paper and electronic copies of an APA request. We compliment the IRS on recognizing that the paper version of the submission does not need to contain the entire submission. Including Exhibits 12 through 22 only in electronic versions is appropriate.

Section 3: User Fees

Section 3 of the Appendix omits the language found in current procedures to the effect that all APA requests filed by a taxpayer and all members of its controlled group within a 60-day period are treated as a single APA request for purposes of the user fee. Calculation of the user fee as provided in current procedures recognizes that the IRS analysis of the assets employed, functions performed, and risks incurred as part of the due diligence for an APA request would be substantially duplicated for another APA request that the controlled group submits for a different set of controlled transactions. In such circumstances, multiple APA requests are likely to be an accommodation to the foreign tax authority. As long as the multiple requests are filed at approximately the same time so as to avoid the need for the IRS to do its analysis at different times, requiring multiple fees for requests from the same taxpayer appears unfair. We recommend that section 3 of the Appendix be revised by adding back the provision that, for purposes of computing the fee, all APA requests filed by a taxpayer and all members of its controlled group within a 60-day period are treated as a single APA request.

IX. Email Communications (§ 3.06)

Under current practice, APMA Team Leaders communicate via email with authorized taxpayer representatives, but in most instances do not include any identifying information and frequently make references to relevant parties in code using the first letter of the taxpayer’s name.

APMA Team Leaders generally do not send email attachments that include a taxpayer’s identifying information, and instead rely on faxed materials, notwithstanding the diminished use of faxes in business today. Faxed documents are less efficient to work with than electronic versions and make it harder to identify changes in exchanging draft APAs.

Our Committee supports any proposal that would allow APMA to communicate securely, freely, and efficiently with taxpayers and taxpayer representatives. Accordingly, as provided for in the proposed procedures, we welcome a process whereby a taxpayer and the Service execute a memorandum of understanding (“MOU”) permitting APMA to communicate with the taxpayer’s authorized representatives through encrypted e-mail. To encourage APMA personnel to take full advantage of the benefits of email communications, we would suggest the final APA procedures go further by indicating

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61 Notice 2013-79, § 3.06.
how execution of the MOU allows for the IRS to exchange confidential taxpayer information with taxpayer and taxpayer representatives, and how those exchanges result in improved efficiencies in processing an APA.

X. Protective Claims for Refunds (§ 3.07)

Section 3.07 of the proposed procedures advises that a protective claim may be included in a bilateral or multilateral APA request. While this is a potentially valuable feature for taxpayers, it is not clear that the protective claim would survive if the APA application is withdrawn or rejected. The section states: “For purposes of this revenue procedure only…” Thus, taxpayers with a protective claim issue may be forced to file, out of caution, a protective claim under the MAP revenue procedure contemporaneously with the APA submission.

We recommend that the final procedures provide that, in the event the APA application is withdrawn or rejected, any protective claim will be allowed to survive that action, which would reassure taxpayers that they will not lose their ability to address years that might otherwise fall out of time limits set in certain tax treaties.

XI. APA Request as Contemporaneous Documentation (§ 3.08)

In order to avoid transfer pricing penalties, a taxpayer applying a specific method (i.e., a method specified under the section 482 regulations) must meet the specified method requirement and the contemporaneous documentation requirement. Similarly, a taxpayer applying an unspecified method must meet the unspecified method requirement and the contemporaneous documentation requirement. Both require that the taxpayer have a “reasonable basis” for selecting and applying its chosen method, and have in place, when the U.S. federal income tax return is filed for the taxable year, the required documentation. These requirements “encourage a taxpayer engaged in related party transactions to prepare a factual and economic analysis based on reasonably available related party and third party market data that substantiates the price chosen, and to maintain appropriate documentation of that analysis.”

A. APA Procedures Should Provide Greater Certainty that a Complete APA Request Meets Documentation Requirements for Covered Issues

The proposed procedures provide that an APA request 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).” Current procedures under Rev. Proc. 2006-9 make no mention as to whether an APA request satisfies the contemporaneous documentation requirements.
requirements. Accordingly, the proposed procedures are a laudable first step toward providing APA taxpayers with limited assurance regarding these penalties. However, as described below, we believe that the APMA Program should provide greater certainty that transfer pricing penalties will not be imposed for the covered issues.

Current procedures are silent as to whether a taxpayer that has requested an APA, and may even have executed an APA, will be treated as having satisfied either the specified/unspecified method or contemporaneous documentation requirements of the regulations. An IRS exam team could still impose penalties if the mathematical thresholds are met. A taxpayer whose APA process has been terminated for any reason faces heightened scrutiny for penalties.

We believe this uncertainty should change for taxpayers that have submitted a “complete APA request,” under our recommended standard for completeness (discussed above). Specifically, as discussed below, a taxpayer filing a complete APA request should be treated as having satisfied both the specified/unspecified method (i.e., had a reasonable basis for selecting and applying the chosen method) and documentation requirements of Reg. § 1.6662-6(d)(2),(3) and thus any resulting section 482 adjustment not be subject to a net adjustment penalty under Reg. § 1.6662-6(c).

At the very least, the final procedures should be clear that no transfer pricing penalties will be assessed against a taxpayer for covered issues addressed in an APA. While we have always assumed that an APA adjustment (i.e., an adjustment arising from the application of the TPM in an APA) would never result in a transfer pricing penalty, confirmation in the final procedures would be a welcome addition.

**B. Taxpayer Filing a Complete APA Request Meets the Specified/Unspecified Method Requirement**

In order to meet the specified/unspecified method requirement, a taxpayer is required to have a “reasonable basis” for selecting and applying its chosen method. This requires a somewhat detailed analysis of a taxpayer’s efforts to select an appropriate TPM, and to have reasonably developed and applied it. When an APA request is filed, and even when it is deemed to be “complete,” it may not always be immediately apparent to APMA that the taxpayer has satisfied the specific requirements of this prong. We believe, however, that the APA setting presents different considerations for evaluating whether a taxpayer had a reasonable basis for selecting, developing, and applying a method.

Unlike contemporaneous transfer pricing documentation, which may or may not be evaluated closely, a taxpayer requesting an APA understands that its method is going to be reviewed, tested, discussed, and negotiated. If the taxpayer lacks a reasonable basis for its position and is not willing to work with APMA to adopt a more appropriate TPM, it will not last long in the APMA Program. In addition, in the authors’ experience, the broad framework of taxpayer-proposed methods is accepted, perhaps with some modifications on the details, in the vast majority of APAs. This suggests that nearly all APA taxpayers would satisfy the applicable reasonable basis standard in the penalty regulations.
Based on these considerations, APMA faces little risk from treating all taxpayers submitting a complete APA request as having satisfied the reasonable basis standard. 69

C. Taxpayer Filing a Complete APA Request Meets the Documentation Requirement

Regarding required documentation, APMA has spent a great deal of time developing an Appendix that provides a detailed list of required content and documents; a list that reflects APMA’s specific experience of over 20 years with the APA process and is complete for that purpose. A taxpayer whose APA request has been accepted into the APMA Program as “complete” by definition has maintained the documents necessary to substantiate its proposed method.

D. Special Consideration to the Taxpayer Filing for a Renewal APA

Even if the IRS decides not to adopt the position we propose that complete APA requests be afforded penalty protection, special consideration should be given to the taxpayer filing for a renewal APA. For example, APMA might treat APA renewal requests that employ the same TPM as the prior APA as satisfying the requirements. In fact, the reasonable basis prong of the regulations gives some deference to the fact that the subject transactions are covered, for prior years, by an APA. 70

E. Timing Issues in Connection With Penalty Protection

We have two points regarding timing. First, the proposed procedures permit an APA request to be filed after the taxpayer has filed a U.S. federal income tax return for the first APA year. 71 We believe APMA should clarify that a submission that is timely filed under section 3.03(4) will be treated as in existence on the return filing date, and so satisfy the “contemporaneousness” requirement of IRC § 6662(e). Again, a taxpayer that anticipates requesting an APA, and that pays a dollar file user fee on the extended due date for the return, has already developed a TPM that it believes to be the most appropriate TPM for the covered issues. Such relation back is not unprecedented. The regulations themselves permit certain documents to be developed after the return is filed. 72

Second, while the APA process is pending, the taxpayer may be required to file one or more additional U.S. federal income tax returns. A taxpayer’s complete APA request, if timely supplemented, corrected, and updated pursuant to sections 3.10 and 3.11 (during

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69 It is unlikely that a taxpayer would use an APA application process as penalty protection. In any event, other penalties may apply to a taxpayer that seeks to do so. If APMA determines that taxpayers are abusing penalty protection, it has the authority to modify the provision at any time.
70 Reg. § 1.6662-6(d)(2)(ii)(A)(6).
71 Notice 2013-79, § 3.03(4).
72 See Reg. § 1.6662-6(d)(2)(iii)(A) (summary description of relevant data obtained after the close of the year but before the tax return is filed; and index of principal and background documents).
the pendency of the APA request), should be treated as satisfying the contemporaneous documentation requirements of Reg. § 1.6662-6(d)(2)(iii) for such years.

While it may be appropriate, as discussed above, to require a taxpayer to comply with its proposed TPM for APA years that are completed when the APA request is submitted, we do not believe that such a requirement is appropriate for later APA years. APA negotiations may have moved substantially away from the taxpayer’s proposed TPM, putting the taxpayer in the awkward position of complying with a TPM that likely will result in material adjustments. Therefore, we recommend that for purposes of compliance with the contemporaneous documentation requirements, while negotiations over the TPM are ongoing, that a taxpayer be allowed to apply a different TPM than originally proposed in its APA application or a different application of the proposed TPM without jeopardizing penalty protection. We note that the potentially different TPM will still need to be a TPM selected and applied in a reasonable manner to comply with the regulation, but the selection may, as we propose, be based on the status of negotiations rather than what was originally proposed.

F. APMA Notification of Penalty Protection

Under the proposed procedures, APMA would notify the taxpayer in writing whether its APA request is complete. It would be helpful if the template for this letter advises a taxpayer that has filed a complete APA request that it has satisfied the contemporaneous documentation requirements of Reg. § 1.6662-6(d)(2)(iii). If a taxpayer requests, APMA could issue a similar letter for later years, if the taxpayer has satisfied the requirements of sections 3.10 and 3.11 of the proposed procedures, as discussed above.

XII. Information Symmetry between Competent Authorities (§3.10(2))

Our Committee fully supports the principle reflected in the proposed procedures that require providing the same factual information to all relevant competent authorities involved in processing an APA request. Because certain documents may be prepared in a foreign language and translation of all such documents may be a substantial burden, we support the approach of the proposed procedures that seeks to minimize that burden through the use of indexes to catalogue information and documents.

In some countries, APA due diligence is performed by the local tax authority rather than the competent authority. Accordingly, a taxpayer may provide factual information to support its APA request directly to the local tax authority and that information may or may not be passed along to the corresponding competent authority. Therefore, the proposed procedures regarding information symmetry should be extended to information

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73 Notice 2013-79, § 4.01.
74 Notice 2013-79, § 3.10(2).
75 In our discussion of the Notice’s Appendix, Exhibit 9 (Section VIII.C.1.b above), we recommend that the final procedures impose a requirement that all factual information that is made available to either of the tax authorities in other than written form and that can be relevant to an evaluation of the APA request be reduced to a written submission that is made available to all competent authorities involved in the APA request.
and documents provided in connection with the APA request to not only a competent authority but also to a local tax authority involved in the evaluation of the APA request.

XIII. Supplemental and Updated Information (§ 3.10, § 3.11)

It has become a staple of the APA process that the APMA Team will issue multiple follow-on information requests. We have at times been concerned about the burden imposed by these requests and in our experience these requests sometimes have led to the development and production of sensitive information that is not necessary or relevant, or only marginally relevant. We think it helpful that the proposed procedures limit the scope of APA requests to what the APMA Team “needs to analyze the APA request.”76 An APMA Team needs some ability to cast a net beyond the four corners of the APA request, but that discretion should be exercised with due regard to the costs and burden on the taxpayer of providing the information.

On the other hand, Section 3.11(1) provides that “[t]he taxpayer must also submit any information or documents discovered or created during the APA process that are, or reasonably may be, relevant to the APA request.” We think use of the term “relevant” here is overbroad – every APA will involve tremendous amounts of information that is relevant, but not needed to process the APA. We suggest replacing the term relevant with “reasonably necessary” (i.e., the standard that we recommend above for evaluating whether an APA request is complete).

Finally, as noted in our discussion of “complete APA request” above, a supplemental submission should not be treated as causing the APA request, as originally filed, to be treated as incomplete.

XIV. Actions on APA Requests (§ 4.01, § 6.10)

A. Team Leader Assignments

The proposed procedures provide that the APMA Team Leader contact information will be provided to the taxpayer in a decision letter as to whether the APA request is complete or not.77 We recommend that APMA generally attempt to assign the same APMA Team Leader who handled the PFC to the later processing of the APA application. In contrast, current procedures provide: “If a pre-filing conference was held with the taxpayer, the Team Leader generally will be designated from among the APA Program staff attending the pre-filing conference.”78 Accordingly, such a policy requires APMA at the time of the PFC to select the most appropriate Team Leader to handle the APA, as opposed to one who happens to be most available at the time.

While we recognize that it is not practical to provide assurances that the Team Leader will be the same each time, current procedures, when followed, have generally been a

76 Notice 2013-79, § 3.10(1).
77 Notice 2013-79, § 4.01.
78 Rev. Proc. 2006-9, § 6.03.
positive aspect for both the IRS and APA taxpayers. The final procedures should maintain the current policy in this regard.

**B. Denial of Assistance**

Under current procedures, the taxpayer has an avenue for review of the APMA Program’s decision to reject the APA request. Specifically, the taxpayer is granted at least one conference of right with the APA (now APMA) Director, with other conferences potentially granted at the Director’s discretion.79

The proposed revenue procedure does not contain the conference of right opportunity for the taxpayer. In addition, it specifically states that “APMA’s decision as to whether an APA request is complete or to deny, suspend, or terminate assistance is not subject to administrative review.”80 In addition, the proposed revenue procedure does not require APMA to provide the reasons for rejecting or suspending the APA process.

We believe that providing the taxpayer with the opportunity to hold a conference with the APMA Director to review the APMA decision to reject or suspend the APA process is the proper exercise of sound tax administration. Not affording the taxpayer the opportunity to plead its case and potentially addressing APMA concerns before making a final decision on the taxpayer’s APA request detracts from the fairness and objectivity expected from the APA process.

We recommend that the final procedures restore the conference of right with the APMA Director as provided in current procedures.81

We also believe the Service should be more transparent on the reasons for withdrawing and rejecting APA requests, as a general matter. Accordingly, we reiterate our previous comments in this respect.82 We continue to believe that sharing publicly with taxpayers the reasons for withdrawal and rejection of APA requests would be very helpful in deciding whether to pursue an APA, or in preparing the submission to avoid a situation that may lead to a withdrawal or rejection. As a point of comparison, the Canada Revenue Authority’s annual APA/CA Report provides background on withdrawals.

**XV. Case Plans (§ 4.03(3))**

The proposed procedures appear to make case plans optional,83 unlike current procedures, which make them mandatory.84 However, under current APMA practice, the issuance of case plans is inconsistent. Some APMA Team Leaders consistently provide case plans and some APMA Team Leaders consistently fail to provide case plans. Although not true in every instance, our experience is that Team Leaders who provide

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80 Notice 2013-79, § 4.02(3).
82 ABA Tax Section Transfer Pricing Committee 2012 comment letter.
83 Notice 2013-79, § 4.03(3).
and actively monitor case plans tend to process cases more expeditiously than those who do not. We view case plans as an essential tool in avoiding excessive delays by both the taxpayer and APMA.

Of course, we understand that new facts, issues, or events may result in a deviation from the case plan. We recommend that each case plan be updated to reflect any deviation.

Lastly, a case plan should be a collaborative document whereby APMA and the taxpayer work together to formulate it. Accordingly, in developing the case plan, the APMA Team Leader should take into account input from the taxpayer.

Therefore, we recommend that the final procedures require the issuance of a case plan that is developed with input from the taxpayer, and that case plans be updated on an as-needed basis to reflect the current status of the APA request. Further, the mere inclusion of a case plan requirement is not enough, but active management of APMA Team Leader’s case plans by APMA Senior Managers should be made a priority.

XVI. IRS Memorandum Conveying Substance of APA Team’s Views in a Bilateral APA (§ 4.03(5))

The proposed procedures for bilateral and unilateral APAs refer to a “memorandum conveying the substance of the APA team’s views on the proposed APA,”85 which was previously referred to as the IRS recommended negotiating position (frequently referred to as either the “RNP” or the “IRS position paper”).86 While on the surface there appears to be no substantive change from past procedure or practice, the proposed procedures statement that the memorandum is tailored to the “size and complexity of the proposed covered issues” appears appropriate.87

Under current procedures, prior to finalization of the RNP for use in negotiations with the foreign competent authority, the IRS is required to convey the substance of the position to the taxpayer.88 Unfortunately, the proposed procedures are not clear whether the taxpayer will be invited to respond prior to dissemination of the IRS’s position to the foreign competent authority. Accordingly, we recommend that the final procedures make clear that the taxpayer will have a reasonable opportunity to respond to the IRS’s position as reflected in the memorandum prior to dissemination of that position to the foreign competent authority.

XVII. Opening Conferences (§ 4.03(1))

The proposed procedures suggest that the APMA Team Leader has the discretion to deny the taxpayer an opening conference.89 In certain cases, a taxpayer may find such an

85 Notice 2013-79, § 4.03(5).
87 Id.
89 Notice 2013-79, § 4.03(1).
opening conference highly desirable. For example, the taxpayer may believe that the covered issues or TPMs are sufficiently complex or novel, that it is desirable to hold an opening conference for the benefit of the IRS APMA team, or that an opening conference would be helpful to obtain information about the APMA team’s position.

Section 2.02(2) of the proposed procedures note, “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.” In this spirit of cooperation based on the founding principles of the APA Program, we recommend that the final procedures include the following language pertinent to opening conferences:

Determination as to the desirability or necessity of an opening conference will be made with due regard for the taxpayer’s view. In the normal course, time and resources permitting, a taxpayer’s request for an opening conference will generally be honored.

XVIII. Execution of APA (§ 4.06)

The proposed procedures include the following language:

In the case of an APA that includes a member of a consolidated group other than the common parent (as defined in Treas. Reg. § 1.1502-1), the common parent must also sign the APA as provided in Treas. Reg. § 1.1502-77.90

Using the term “also” in the above-cited sentence makes it unclear whether the intent is to require APA signatures from both (i) an officer of the member of the consolidated group other than the common parent and (ii) an officer the common parent. Such a requirement is inconsistent with Reg. § 1.1502-77, whereby the common parent for a consolidated return year is the sole agent for the consolidated group that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year for each member in the consolidated group,91 and inconsistent with current and past practice and procedures of the APMA Program.

We recommend that the final procedures make clear that the only required signature in a consolidated group context is that of an officer of the common parent of the consolidated group.

XIX. APA Repatriation (§ 7.02)

The proposed procedures provide for “APA repatriation” (based on MAP repatriation under the proposed procedures for obtaining competent authority assistance92) in bilateral and multilateral APAs, which seems a potential improvement, given the broader issues

90 Notice 2013-79, § 4.06 (emphasis added).
91 Reg. § 1.1502-77(a)(1).
92 Notice 2013-78, § 11.
that may be covered, over a taxpayer’s election of “APA Revenue Procedure Treatment” under current procedures. However, we are concerned that a requirement for a specific request for MAP repatriation before agreement is reached could create a trap for the unwary. For example, the resolution of the APA transfer pricing method and covered transactions may determine a taxpayer’s view of repatriation, but it appears repatriation would not be an election, and would not even be available if not specifically requested.

Our experience has been that taxpayers need flexibility to make adjustments following an APA or MAP agreement. For example, in some countries, despite the MAP resolution, the taxpayer may face increased local pressure not to make an actual income adjustment, and therefore may just pay any additional tax due from the adjustment but not repatriate the income. It appears the APA repatriation provision would require a taxpayer to commit to a certain income adjustment. We do not see a compelling government need for a taxpayer to make such a determination for any year covered under an APA until the completion of its annual report for such year.

Accordingly, we recommend that a taxpayer be provided the flexibility of opting in or out of APA repatriation any time prior to filing its annual report for any APA year. For example, the annual report requirements in the model APA could include a provision requiring an explanation of how the taxpayer handled any APA repatriation issues.

XX. Record Retention (§ 7.04(2))

The proposed procedures put taxpayers in a “Catch-22” position as it relates to the provision of certain information. Specifically, the proposed procedures state that “the fact that a non-U.S. jurisdiction may impose a penalty upon the taxpayer or other person for disclosing any such requested material will not constitute reasonable cause for noncompliance with the IRS’s request to provide additional information and documents upon IRS examination.”

With respect to bilateral and multilateral APAs, the U.S. competent authority should not agree to a method dependent on documents that cannot be produced under local law. Further, in such an event, the Service should seek to revise the APA with the foreign competent authority rather than cancel or revoke an APA.

In our view, taxpayers should not be put in a situation where they are effectively either penalized by a foreign government or tax authority for providing such information or penalized by the IRS for not providing that information (for instance, by the IRS revoking or cancelling the APA). The Service has other means to obtain that information. For example, the Service can avail itself of the Exchange of Information Agreements or relevant exchange of information provisions in applicable U.S. income tax treaties. We recommend that the proposed procedures remove the aforementioned provision.

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XXI. Revoking and Cancelling an APA (§ 7.06(1))

The proposed procedures provide that “APMA may revoke an APA due to fraud or malfeasance (as defined in section 7121 of the Code)”. The terms “fraud” and “malfeasance” are used, but not defined, in IRC § 7121(b). We recommend amending the quoted parenthetical to read “(within the meaning of section 7121 of the Code).”

XXII. Renewing an APA and Abbreviated APA Requests (§ 8.01)

The proposed procedures provide that a request to renew a current APA may be made either by filing a complete APA request or an abbreviated APA request. A taxpayer must obtain APMA’s permission to file an abbreviated APA request; permission will be granted only if the taxpayer satisfies certain pre-filing requirements, and the facts, circumstances, law, economic conditions and other factors surrounding the covered issues and method are reasonably expected to be substantially the same for the renewal APA term.

Recent APA statistics show that the time required to complete unilateral and bilateral renewal APAs is approximately the same as the time required to complete new APA requests. In 2012, bilateral renewals took an average of 44.8 months to complete, while new bilateral APAs took an average of 47.5 months. In fact, during the same year, unilateral renewal APAs took approximately two months longer to process than new unilateral APAs.

In light of the protracted process for completing renewal APAs, a stated commitment to making the APA process more efficient is welcome. However, we believe the measures for abbreviated requests for renewal APAs do not go far enough to meet the objective of obtaining desired efficiencies.

While the proposed measures allow taxpayers to file abbreviated requests if certain requirements are fulfilled, they do not contain any provisions to ensure that APMA completes the requests more quickly and efficiently. Moreover, the process for receiving APMA approval to file a renewal request is potentially more burdensome than filing a full APA renewal request. The Notice’s proposals for filing abbreviated APA requests require a pre-filing meeting and associated due diligence that could potentially be more extensive than that required to draft a complete renewal submission. Even after a taxpayer fulfills all pre-filing requirements, APMA may nevertheless decline to permit the taxpayer to file an abbreviated APA request. We recommend that the final procedures adopt a different tone regarding renewal APAs. Specifically, the final

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95 Notice 2013-79, § 7.06(1).
96 Notice 2013-79, § 8.01.
97 Id.
99 The average length of time required to complete a unilateral renewal was 30.1 months, which exceeded the average completion time needed to complete a new unilateral APA of 28.4 months by 2.3 months. Ann. 2013-17, 2013-16 I.R.B. 911 (March 25, 2013), Table 6.
procedures should reflect an approach whereby in most instances a taxpayer is permitted to merely update its previous APA request or prepare an update report without the necessity of a pre-filing conference.

The proposed procedures do not address how the submission of an abbreviated bilateral or multilateral renewal request will be coordinated with treaty partners, if at all. If only one treaty partner to a bilateral renewal APA agrees to an abbreviated APA request, then the objective of obtaining efficiencies in obtaining a renewal APA process will have been thwarted.

In sum, to the extent the abbreviated renewal APA request proposals are intended to make the renewal process more efficient, those proposals should be improved with concrete measures regarding how APMA will complete the cases more quickly and coordinate with treaty partners.

XXIII. Exchange of Information (§ 9.04)

The proposed procedures do not address the sharing of nonfactual information and do not contain procedures allowing taxpayers to redact information that may not be relevant to the APA request or protected under applicable laws. We recommend that the proposed revenue procedure be revised to describe circumstances under which the taxpayer may redact the additional information/documents provided to the Service under this rule.

XXIV. Small Case APAs (Appendix)

For the first time since 1998, the Service appears to have departed from its policy to accommodate APA requests by small business taxpayers. Under current procedures, small business taxpayers were either taxpayers from controlled groups with less than $200 million (“small taxpayers”) or taxpayers with transactions volumes that did not exceed $10 million for intangible property or $50 million otherwise (“small transactions”).

The proposed procedures eliminate the reference to “small business taxpayers” and replace it with a new term – “small case APA”. Importantly, the proposed procedures no longer provide for the opportunity to process small business transactions under the small business taxpayer APA simplified process.

While the user fee for a small case APA remains the same ($22,500) under the proposed procedures, an APA request is eligible for the small case APA user fee only if all of the following apply: (i) the controlled group has sales revenues, within the

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102 Notice 2013-79, Appendix, § 3.04.
103 Notice 2013-79, Appendix, § 3.03(3).
meaning of Treas. Reg. § 1.482-5(d)(1), of less than $500 million in each of its three most recent pre-APA years; (ii) the aggregate value of the proposed covered issue(s) is not expected to exceed $50 million in any given year of the proposed APA years; (iii) the aggregate value of any transfer of rights in, or rights to use, intangibles is not expected to exceed $10 million in any given year of the proposed APA years; and (iv) no proposed covered issue involves intangible property arising from, or otherwise related to, an intangible development arrangement.104

We believe that as the proposed revenue procedure is formulated, small case APAs are likely to be less accessible, notwithstanding the threshold increase from $200 million to $500 million in sales revenues. Accordingly, we recommend that final procedures maintain the separate category of small transactions as qualifying for small case APAs, consistent with current procedures.

As previously noted above with respect to abbreviated APA requests, we have concerns that the proposed procedures are excessively burdensome on small business taxpayers, limiting access to transfer pricing certainty that is available to larger taxpayers.

XXV. Effective Date (§ 3.07)

The language in the proposed procedures does not make clear the length of time taxpayers will have to prepare for the final procedures.105 Specifically, it is not clear how the IRS will determine the effective date of the new revenue procedure. Due to the extensive changes in pre-filing procedures and format and content to apply for an APA request, we recommend that the final procedures be effective no earlier than six months from date of publication.

At the very least, if a taxpayer has paid its user fee prior to the effective date of the final procedures and subsequently files a substantially complete APA request within 120 days after the date the user fee was paid, that APA request should continue to be governed under Rev. Proc. 2006-9 unless agreed otherwise.

XXVI. Coordination with the Mutual Agreement Procedure Process (§ 3.02, § 5.01)

The proposed competent authority procedures authorize a taxpayer to request that a MAP resolution be extended to cover ACAP years and give the IRS authority to expand the scope of a MAP case to include ACAP years.106 The proposed competent authority procedures do not, however, give the IRS authority to expand the scope of a MAP resolution to APA years. Instead, it provides that the U.S. competent authority, in appropriate cases, “will encourage taxpayers to extend MAP resolutions to future years that could be covered by an APA.” We agree with the distinction that the proposed competent authority procedures make between APA years and ACAP years. Insofar as the business operations during the APA years can be changing significantly in ways that

104 Notice 2013-79, Appendix, § 3.03(4).
are not yet known, the taxpayer should ultimately decide whether it has sufficient information to extend a MAP resolution to APA years before such an extension is considered.

The proposed APA procedures make clear that a taxpayer must file an APA request to extend a MAP resolution to APA years.\textsuperscript{107} Although the proposed procedures state that a taxpayer wanting to do so must use the pre-filing process to secure approval to file an abbreviated APA request,\textsuperscript{108} the time and resources the taxpayer must invest in the pre-filing process and the uncertainty of the outcome could discourage taxpayers from doing so. We recommend that the final APA procedures specify what requirements for an APA request would be waived if the taxpayer were able to represent that the applicable law, facts and circumstances, economic conditions, and other relevant factors surrounding the taxpayer’s proposed APA years and proposed APA rollback years are reasonably expected to be substantially the same as the years covered by the MAP resolution.

\textsuperscript{107} Notice 2013-79, § 5.01(1).
\textsuperscript{108} Notice 2013-79, § 3.02(4); and § 5.01(2).