



Section of Taxation

10th Floor
740 15th Street, N.W.
Washington, DC 20005-1022
202-662-8670
FAX: 202-662-8682

January 5, 2012

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Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Advance Pricing and Mutual Agreement Program

Dear Commissioner Shulman:

Enclosed are comments on the advance pricing and mutual agreement program. These comments represent the views 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,

A handwritten signature in black ink that reads "William M. Paul".

William M. Paul
Chair, Section of Taxation

Enclosure

cc: Emily S. McMahon, Acting Assistant Secretary (Tax Policy), Department of the Treasury
William J. Wilkins, Chief Counsel, Internal Revenue Service
Manal S. Corwin, Deputy Assistant Secretary (International Tax Affairs), Department of the Treasury
Jeffrey Van Hove, Tax Legislative Counsel, Department of the Treasury
Michael J. Caballero, International Tax Counsel, Department of the Treasury
Samuel M. Maruca, Director, Transfer Pricing Operations, Internal Revenue Service
John E. Hinding, Director, Advance Pricing Agreement Program, Internal Revenue Service

**ABA SECTION OF TAXATION
COMMENTS ON THE ADVANCE PRICING AND MUTUAL
AGREEMENT PROGRAM**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for the preparation of these comments was exercised by E. Miller Williams, Jr. of the Transfer Pricing Committee of the Section of Taxation. Substantive contributions were made by Kerwin Chung, Sean F. Foley, Daniel Karen, Patricia G. Lewis, Darrin Litsky, Alexey Manasuev, Mark Martin, and Charles Triplett. The Comments were reviewed by Darrin Litsky and Sean F. Foley, successive Committee Chairs. The comments were further reviewed by Steven C. Wrappe of the Section’s Committee on Government Submissions and by Joan Arnold and Brian Trauman, successive Council Directors for the Transfer Pricing Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the principles 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.

Contact Person: E. Miller Williams, Jr.
(404) 817-5077
Miller.Williams@ey.com

Date: January 5, 2012

EXECUTIVE SUMMARY

In February 2005, in response to Announcement 2004-98,¹ we submitted comments on the operation of the Internal Revenue Service's ("Service") Advance Pricing Agreement program (the "APA Program").² Given the passage of time and recent developments surrounding the APA Program, the Committee on Transfer Pricing submits these comments on our own initiative. In particular, the Comments focus on the operation of the current APA Program and the newly created Advance Pricing and Mutual Agreement program ("APMA Program").

The APA Program has been an indispensable asset to both U.S. taxpayers and the U.S. government in settling transfer pricing issues for the past 20 years. Over 900 advance pricing agreements ("APAs") have been completed,³ and with transfer pricing scrutiny on the rise, it is of paramount importance for the APA Program's successful track record to be sustained. Most of the U.S.'s major trading partners operate similar programs and these APA programs have developed into the globally preferred venue for dispute avoidance and resolution.

The Comments address the following issues:

- Developing Safeguards to Ensure the Prevention of Double Taxation: The APMA Program is collapsing into one person the historically separate roles of developing and negotiating the Recommended Negotiating Positions ("RNP"). The APMA Program should establish and articulate specific standards and responsibilities for the various participants connected to the APMA Program so that it creates and maintains goals that minimize double tax for taxpayers;
- Efficiency and Other Recommendations: The APMA Program could provide an even more valuable function to taxpayers through a number of measures, including but not limited to obtaining increased funding and dedicated resources, providing for a streamlined small business taxpayer APA process, confirming that APA submissions satisfy transfer pricing documentation requirements, and improving communications with taxpayers;
- Treatment of Renewal APA Requests: The APMA Program should allocate its resources in a way that is commensurate with the complexity of the renewal APA requests it receives, such that straightforward renewal APA requests, or straightforward portions of more complex renewal APA requests,

¹ Announcement 2004-98, 2004-2 C.B. 983.

² ABA Section of Taxation "Comments Regarding Advance Pricing Agreement Program Guidance (Announcement 2004-98 (February 17, 2005), available at <http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2005/050217tp.authcheckdam.pdf>.

³ Announcement 2011-22, 2011-16 I.R.B. 672.

are expedited consistent with existing guidelines for renewal requests set forth in Rev. Proc. 2006-9⁴; and

- **Informal Policies in the Prior APA Program:** The APMA Program should provide taxpayers with an alternative dispute resolution program that is flexible. Inflexible APA informal policies that may hinder the effectiveness of the APMA Program should be revisited.

DISCUSSION

I. Developing Safeguards to Ensure the Prevention of Double Taxation

The Service recently announced that the APA Program will shift from the Office of Chief Counsel to an office under the Transfer Pricing Director in the Service's Large Business & International division's international operation, where it will become part of the APMA Program together with Competent Authority ("CA").⁵ We commend this movement because we believe it has the potential to (1) alleviate the backlog of pending APA requests, (2) provide additional travel resources and case staffing to allow for more efficient case development, consistent with that of our treaty partners' APA programs, and (3) increase efficiency by eliminating procedural steps between APA development of recommended negotiating positions ("RNP") and the beginning of CA negotiations.

Nevertheless, we believe it is important to consider appropriate safeguards related to the development and the negotiation of the RNP. Historically, the APA Program has been responsible for developing the RNP in bilateral APAs based on the Office of Chief Counsel's – specifically, Associate Chief Counsel (International)'s ("ACCI") – historical substantive expertise in interpreting Section 482 issues and often more detailed understanding of the facts of a case.⁶ ACCI developed the RNP without regard to the OECD Guidelines or treaty provisions, and without regard to how the treaty partner might view the position, how the treaty partner might create its own position, and/or how historical treaty negotiations have taken place or been resolved.

Further, historically, CA analysts have been experienced negotiators who have been responsible for accepting those RNPs from ACCI and considering those same points identified above, and determining how best to reach a resolution with the treaty partner that avoids double taxation. CA analysts may deviate from the RNP in order to resolve the case; this deviation is both acceptable and appropriate, and we generally have observed collegial cooperation and respect between ACCI (and the APA Program) and CA.

⁴ Rev. Proc. 2006-9, 2006-2 I.R.B. 278.

⁵ IR-News Rel. 2011-81.

⁶ References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

By combining the APA Program and CA into the APMA Program under the new Transfer Pricing Director, the Service has the potential to increase the efficiency of the APA Program by eliminating a number of steps and processing time in each bilateral APA request. However, by integrating the due diligence and negotiating responsibilities to achieve this efficiency, the Service should be mindful of the potential hazard of having those who developed the RNP also negotiate the APAs, thereby becoming less likely to deviate during those negotiations from the positions established as RNPs. This could prolong negotiations and possibly preclude bilateral agreement, undoing any efficiency achieved through the streamlining of this process.⁷

We recommend that revised APA procedures for the APMA be developed so that the entire bilateral APA process, from start to finish, focuses both the taxpayer and the APMA Program on reaching a bilateral APA based on a consideration of the OECD Guidelines and relevant treaty provisions, views of the treaty partner, and historical treaty negotiations with the treaty partner.

Additionally, to assist the APMA Program in achieving the same historical success that CA has achieved in the past in relieving double taxation, we recommend negotiation skills training that focus on avoiding entrenchment and facilitating mutual agreement.

Regarding unilateral APAs, we recommend that safeguards be implemented to ensure that unilateral APA requests receive the same balanced consideration as the APMA Program uses in evaluating and negotiating bilateral APA requests.

II. Efficiency and Other Recommendations

In this section, we detail several suggestions to increase the efficiency of the APMA Program and enhance its value to taxpayers and the government. We initially divide the recommendations between primary areas of focus, toward which we ascribe more immediacy, and additional recommendations. We follow with a detailed discussion of how each recommendation may have a positive impact on the APMA Program.

Primary areas of focus:

1. Increase the APMA Program's funding and resources;
2. Streamline the APA renewal process; and
3. Increase integration of the U.S. CA experience in the development of negotiating positions:

⁷ The recent trend toward mandatory binding arbitration provisions for APA matters in tax treaties mitigates this entrenchment risk by helping to steer both governments towards more moderate positions, which is conducive to obtaining a bilateral agreement and alleviating double taxation. However, at this time, there are only four such tax treaties in force.

Additional recommendations:

4. Confirm that a substantially complete APA submission satisfies the transfer pricing documentation requirements for the proposed covered transactions while the APA request is pending;
5. Streamline the small business taxpayer APA process;
6. Formally involve taxpayers in the drafting process;
7. Make prefiling conferences more efficient;
8. Enhance communication between the APMA Program and taxpayers;
9. Publish public presentations by APMA Program personnel on the APA Program's website;
10. Increase transparency on reasons for withdrawals and rejections of APA requests;
11. Involve taxpayers in continuous APMA Program improvement; and
12. Publish CA meeting schedules on the APMA Program website.

Discussion

1. Increase the APMA Program's funding and resources. Taxpayers and the Service have been cognizant of the APA Program's lack of funding and resources for a long time, and it is well-recognized that adequate funding of the newly formed APMA Program is critical to its proper function. We know the creation of the APMA Program is intended in part to lead to increased funding, leading in turn to the hiring of additional staff and a corresponding decrease in case processing time.

We are also of the view that increased funding, and proper authority to allocate travel budgets, is crucial to the APA process. Face-to-face meetings with taxpayers, even if kept to a minimum – which we suggest would include the prefiling conference and first post-filing conference – are necessary to the APMA Program, and occasionally require travel for APA team members. Further, currently, the position of APA Director does not have an annual travel budget that the Director can allocate to priority cases on a systematic basis.

2. Streamline the APA renewal process. Our comments with regard to this important item are contained in Section III below of this letter, Treatment of Renewal APA Requests.

3. Increase integration of the U.S. CA experience in the development of negotiating positions. Of course, this will be an area of focus for the newly created APMA Program, such that case processing times, and the occurrence of significant

technical or implementation issues, are reduced. However, we suggest that the APMA Program could make a larger contribution to this reduction in the processing times and the occurrence of issues, if it took into greater consideration CA's experience with a given treaty partner and CA's recommendations when drafting the RNP.

4. Confirm that a substantially complete APA submission satisfies the transfer pricing documentation requirements for the proposed covered transactions while the APA request is pending. The APA procedures should provide that if the APA submission is substantially complete, such submission shall be deemed to satisfy the transfer pricing documentation requirements set forth in Regulation Section 1.6662-6(d)(2)(iii) for the proposed covered transactions while the APA request is pending so long as the taxpayer has filed its tax returns consistently with the proposed APA request. This proposed change would eliminate any uncertainty to a taxpayer while its APA request is pending.

5. Streamline the small business taxpayer APA process. We recommend that the APMA Program reevaluate the procedures related to the small business taxpayer APA process. It is our experience that this process does not operate as intended and as reflected in Rev. Proc. 2006-9.⁸ Rather, despite provisions intended to reduce requirements and reduce case processing time for small business taxpayer APA requests, we have found that the APA Program has been approaching these requests in the same manner as it has large taxpayer cases, and the APA Program has been reluctant to reduce the burden of information requested.

6. Formally involve taxpayers in the drafting process. Currently, taxpayers are not formally or consistently involved in the drafting of RNPs, briefing documents, or the APA Agreement. Given the current workload of the APA Program staff, we believe that the new APMA Program should adopt formalized procedures whereby taxpayers assist in the process, by providing drafts of the central documents based upon APMA Program-provided templates and interaction with the APMA Team Leader.

We acknowledge that, as part of the internal APA approval process, a briefing memorandum discussing the APA, the background of the taxpayer, the transactions, and results is appropriate. However, we understand that some of these memorandums are in excess of 100 pages. This may be excessive and takes significant time for the APA team to prepare. This prevents the case file from moving timely through the APA approval process.

7. Make prefiling conferences more efficient. Prefiling conferences are a great way to discern the APMA Program's preliminary perception of a proposed transfer pricing methodology ("TPM"). We recognize that, in the past, the APA Program has tried to increase efficiency in this important area by appointing a senior staff person to

⁸ See Rev. Proc. 2006-9, 2006-2 I.R.B. 278, Section 9. Although the revenue procedure states that "[a]t the request of a small business taxpayer ("SBT"), the APA Program may apply" less stringent requirements, in our experience, it rarely, if at all, happens.

coordinate all prefiling meetings. Given that this approach, and general resource constraints, will often lead to a different Team Leader being assigned to a matter than the person who attended the prefiling conference, we recommend that the APMA Program adopt a procedure where briefing memoranda or notes from the meeting are memorialized for use by the APA teams of both the IRS and the taxpayer. To reduce the burden on the APMA Program, the documents could be prepared by the taxpayer or its advisors and edited and consented to by the APMA Program member(s) who attended the prefiling conference.

8. Enhance communication between the APMA Program and taxpayers. The Service should streamline the e-mail correspondence rules and allow APA team members (and CA analysts to the extent applicable) to exchange correspondence by e-mail.⁹ While the Service is commended for making significant progress (not so long ago all correspondence was exchanged via fax), this process should be further improved.

We recommend that the APMA Program add an option for the taxpayer to provide a short-form email authorization statement (which could be included in the APA request if the taxpayer wishes) and file it as part of the APA process (at or after the APA request is filed). In addition, more than one representative of the taxpayer should be able to participate in the e-mail information exchange.

9. Publish public presentations by APMA Program personnel on the APMA Program's website. The APMA Program staff has various speaking engagements and, in most cases, there are presentation materials that the APMA Program staff uses. Such materials may provide helpful insight on the Program's current trends and challenges. Importantly, to the extent applicable, the presentation materials can assist taxpayers filing new APA requests in addressing any pertinent areas of concern discussed in those materials. Accordingly, we recommend that any external presentations made by the APMA Program personnel be posted on the APMA Program website.

10. Increase transparency on reasons for withdrawals and rejections of APA requests. Taxpayers and practitioners would find it useful to have more information regarding reasons for withdrawals and rejections of APA requests. We understand that APA requests may be withdrawn or rejected for a variety of reasons that may or may not have anything to do with the APA process itself. Greater transparency into such withdrawals and rejections would be helpful information that may play a role in deciding whether to pursue an APA or in preparing the submission to avoid a situation that may lead to a withdrawal or rejection. For example, the Canada Revenue Authority's annual APA/CA Report provides background on withdrawals.

11. Involve taxpayers in continuous APMA Program improvement. The APMA Program should have an ongoing dialogue with tax practitioners and taxpayers to

⁹ Currently, taxpayers must sign a Memorandum of Understanding with the Office of Chief Counsel with respect to the use of encrypted e-mail to exchange taxpayer information. The process, however, has some limitations and is not streamlined.

provide continuous and ongoing input on the development of the APMA Program. We recommend that the APMA Program hold “town hall” style meetings or set up an advisory board.

12. Publish CA meeting schedules on APMA Program website. Additionally, we recommend that the APMA Program consistently publish or furnish the schedule of meetings with foreign competent authorities. The APMA Program should take into account the upcoming meeting schedule for purposes of case plans and prioritizing its resources.

III. Treatment of Renewal APA Requests

We believe that the APMA Program could be made more efficient in its handling of requests to renew an existing APA. We recommend that the APMA Program allocate its resources commensurate with the complexity of the renewal requests received. The following discussion sets forth a proposal for how this might be done.

Renewal APAs can be divided into several different classes. In the simplest case, the “straight renewal” APA, the covered transactions, facts, and the TPM are substantially the same as in the existing APA. These renewal APAs should take relatively little time to process. Alternatively, in some renewal APA requests, the covered transactions, facts (including perhaps economic circumstances), or TPM, or some combination thereof, have changed from the existing APA. Where there are significant changes from the existing APA, such renewal APA requests may rightfully require relatively more time to process.

The procedures for handling renewal APAs should recognize these differences. The current practice whereby all renewal APAs are subjected to something akin to a *de novo* review is inefficient and appears to have overwhelmed the APA Program’s resources, and could make the APMA Program less efficient than is intended. Thus, the opportunity to expedite the handling of renewal APAs should be reinvigorated.

A. Straight Renewal APAs

Where there is a straight renewal APA request, we recommend that a streamlined, “fast-track” renewal process be applied, separate from the current process and without requiring such cases to wait on the completion of more complicated cases before they are considered. In other words, such cases should be allowed to “jump to the head of the line,” perhaps to a different group within the APMA Program.

Currently, Rev. Proc. 2006-9, Section 12, provides that taxpayers requesting renewals should use the same procedures for filing initial requests, and should request a prefiling conference to discuss the suitability of streamlined submission requirements. Then, the APA Program will endeavor to expedite the processing of the renewal, with expedited treatment most likely applied where the following conditions exist:

- substantially the same law and policy applied to the existing APA;

- no substantial differences exist between the taxpayer’s proposed TPM and the TPM under the existing APA;
- no material changes occurred in the taxpayer’s facts or circumstances since the parties entered into the existing APA; and
- for a bilateral APA, a rollback or closed year considerations did not influence the TPM in the existing APA.¹⁰

In these cases, the APA Program is supposed to consider the continuing applicability of the existing APA, using updated comparables as appropriate, and focusing on any changed facts and circumstances.

Rev. Proc. 2006-9 also recognizes that certain cases may require additional analysis, and provides an example of such a case, where “experience and insight gained from applying the TPM to actual data (for example, APA annual reports) may provide insight that indicates the need to modify the TPM.”¹¹

The “fast-track” renewal process we recommend is consistent with the current procedures, but would further streamline the process in a ministerial manner, and make the process closer in scope to the filing of APA annual reports when the conditions listed above are present. The APMA Program’s procedures should recommend that a taxpayer requesting this expedited treatment present the following documents in its renewal APA submission: (1) the prior APA submission(s); (2) the existing APA; (3) annual reports filed under the existing APA;¹² and (4) an updated submission.¹³ For the updated submission, the APA team should restrict itself to reviewing the basic facts and agreement from the existing APA term, updating comparables data, and updating the application of the same TPM applied in the existing APA, which will include an updated range of prices or results that is proposed for the renewal APA, all consistent with the procedures set forth in Rev. Proc. 2006-9.

In those cases where the conditions listed above are not present, we recommend that a more robust submission be made, as described below. We strongly recommend that a prefiling conference be held to determine whether the conditions listed above are present such that the fast-track renewal process could be implemented, and to determine the appropriate level of documentation to include as part of the APA submission.

¹⁰ Rev. Proc. 2006-9, 2006-2 I.R.B. 278, Section 12.

¹¹ *Id.*

¹² The model APA published by the APA Program requires a copy of the APA to be included as part of the annual report filing. See Announcement 2010-21, 2010-15 I.R.B. 551, Attachment A, Appendix C.

¹³ We also recommend that the taxpayer’s prior APA submission, prior APA, and annual reports filed under the prior APA be submitted only in electronic form.

B. Other Renewal APAs

We recognize that not all APA renewal requests will be appropriate for a fast-track procedure, in their entirety. If the conditions listed above are not present for all aspects of the renewal APA request, as determined in a prefiling conference or through subsequent communications – for instance, if there are any material changes to the taxpayer’s facts and circumstances – then a more robust submission should be made with respect to those aspects of the request so the APMA Program can better consider how to best address and/or expedite the renewal APA request.

Generally, a more robust submission will be appropriate when there is a change in some important aspect(s) of the existing APA agreement, such as new facts, new transactions (which either did not exist during the existing APA term or existed but were not covered transactions), removed transactions (e.g., dispositions), or proposed changes to the TPM, ranging from relatively minor refinements to an entirely different approach. While a renewal APA request that involves changes such as these should receive a greater level of review than a straight renewal APA, we believe that it would be appropriate for the greater level of review to focus on the issues that have changed and for the APA team to apply a more expedited review (similar to that described above regarding straight renewal APAs) to the issues that have not.

C. Examples

While it is impossible to describe every type of renewal situation, some examples are useful.

Example 1: New Fact and New Comparability Adjustment Requested. Taxpayer A requests a renewal of its existing APA and all material aspects of the renewal request are the same as the existing APA, except that Taxpayer A has erected a new plant that is now operating at low capacity levels. Taxpayer A requests a capacity utilization adjustment for the new plant that would be applied to the existing APA’s TPM. The fast-track procedures generally should apply to this renewal APA request, but Taxpayer A should fully brief and address the capacity utilization issue. After discussion with Taxpayer A, the APA team should focus its due diligence on the merits and magnitude of the capacity utilization adjustment and not revisit whether the existing APA’s TPM still remains the “best method.”

Example 2: New Covered Transactions – Same Product Type. Taxpayer B requests a renewal of its APA and all material aspects of the renewal request are the same as the existing APA, except that instead of distributing only generic widgets Taxpayer B now also distributes specialized widgets. The existing APA applies the comparable profits method (“CPM”) and Taxpayer B is the tested party. Taxpayer B’s functions and risks in distributing both types of widgets are the same as in the existing APA and hence the comparable set would be expected to be similar for a renewal APA. This case should be treated as a straight renewal APA request under streamlined procedures.

Example 3: *New Covered Transactions – Different Product Type.* Taxpayer C requests a renewal of its APA and all material aspects of the renewal request are the same as the existing APA, except that instead of just distributing generic widgets Taxpayer C now also distributes computers. As in Example 2, the existing APA applies the CPM and Taxpayer C is the tested party. Taxpayer C's functions and risks in distributing computers are not the same as the functions and risks in distributing generic widgets, which was covered in the existing APA, and so a modification of the TPM or comparable search may be appropriate as it pertains to the distribution of computers. Therefore, if the two distribution activities are not closely integrated, it may be appropriate to apply fast-track procedures to the generic widget distribution business, but not to the computer distribution business. On the other hand, if the two distribution activities are closely integrated, it would not be appropriate to apply fast-track procedures to any portion of this renewal APA request.

Example 4: *New TPM Requested.* Taxpayer D requests a renewal of its APA and all material aspects of the renewal request are the same as the existing APA, except Taxpayer D proposes a new TPM. It would not be appropriate to apply fast-track procedures to Taxpayer D's renewal APA request.

IV. APA Program Policy Issues

We believe that the APMA Program going forward should minimize the use of informal policies. Our collective experience is that informal policies prevent flexibility in the APMA Program and do not take into account the unique circumstance of each taxpayer. The informal policies described below and other similar informal policies should be carefully reviewed by the APMA Program.

1. **Fixed or Predetermined Industry Comparable Sets.** The APA Program maintains certain fixed or predetermined industry comparable sets that it uses for specific industries. These comparable sets were developed in prior APA cases and may or may not be appropriate comparable sets in any particular APA request. Accordingly, a policy to use only the fixed or predetermined sets and not to consider other comparables or to utilize the taxpayer's comparable sets is not consistent with the arm's length standard or the ideals of the APMA Program. Rather comparable sets should be analyzed on a case-by-case basis consistent with the tested party's functions and risk. This approach is in accordance with the Section 482 Regulations.

2. **Adjustments to Median in Recommended Negotiating Position in Bilateral APAs.** In RNPs, the IRS is insisting on adjustments to the median as opposed to adjustments to the edge of the agreed-upon range as is standard in bilateral APAs. A better approach would be to present the comparables set for discussion by the U.S. and foreign tax authority. It may be appropriate to present information to the foreign tax authority that suggest the reasons that the median is appropriate, as opposed to stating that the median is the only right answer.

3. **IRS and Taxpayer Ranges are Substantially Similar.** Historically, if the taxpayer and the IRS were reasonably close in their respective determinations of the

arm's length range, the IRS would agree that the taxpayer's proposed range was reasonable and accept it. More recently, the IRS has deviated from the approach of testing the reasonableness of the taxpayer's range and sought to impose its own level of precision on taxpayers and treaty partners. This rigid standard slows down the CA process and makes it more difficult to reach a settlement that avoids double taxation. Accordingly, the IRS should not insist on such precision but be more flexible. This approach is consistent with the spirit of the APA Program providing flexibility to taxpayers.

4. **No Multiple Year Averaging Allowed.** In some cases, the IRS is not permitting taxpayers to apply a multiple year range and is insisting that the tested party's results be within the range each APA year. This practice is inconsistent with the Section 482 regulations. We recommend that taxpayers be allowed to utilize multi-year averaging in reaching a determination on the APA.

5. **Interest Rates Used in Making Comparability Adjustments.** The IRS has taken a one-size-fits-all approach in its selection of interest rates in determining comparability adjustments. Its determination of the interest rate does not take into account the tested party's actual interest cost. A better approach would be to analyze and determine the appropriate interest rates consistent with the tested party's risk profile and economic circumstances on a case-by-case basis.

V. Conclusion

The APA Program has enjoyed great success in its twenty-year history, and we offer these suggestions only to improve an already exceptional organization. We do believe, however, that there are some overriding principles essential to the APA Program's continued success in the evolving and ever-demanding field of transfer pricing, and its movement into the newly formed APMA Program may provide a unique opportunity to improve this important function. The APMA Program needs to be properly staffed and funded, and make efficient use of its resources, so that it can achieve timely resolution of its cases. The APMA Program should be flexible, while still working to achieve fairness among taxpayers. Lastly, it is essential that it be maintained in the form of an alternative dispute resolution program with the aim of facilitating the avoidance of double taxation in bilateral cases.