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Why Financial Institutions Should Consider APAs In the Current Transfer Pricing Environment

The authors make a case for seeking a financial services advance pricing agreement, pointing to increased uncertainty in the financial area under Dodd-Frank and Basel III, more in-depth audits under the Internal Revenue Service's Transfer Pricing Practice, and improved efficiency in the Advance Pricing and Mutual Agreement Program.

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During the 1990s, the Internal Revenue Service concluded a significant number of advance pricing agreements with companies in the financial services industry. However, the demand for APAs by financial institutions waned after the issuance in 1998 of the proposed regulations regarding the allocation and sourcing of income and deductions among taxpayers engaged in a global dealing operation.[1]

For a variety of reasons, the time is now right for financial institutions to reconsider the value of an APA. The proposed global dealing regulations are outdated and no longer provide clear, internationally accepted guidance, and new non-tax regulatory requirements (such as the Dodd-Frank Act and Basel III) have created new complexity and uncertainty. APAs can provide a means to obtain certainty in a time- and cost-effective manner. Moreover, recent changes within the IRS are making the APA process more efficient while making the transfer pricing examination process more rigorous.

Early Years

APAs historically had been used by many financial institutions to obtain certainty on the appropriate allocation of profit or loss attributable to their global dealing operations. In fact, financial institutions with global dealing operations were among the very first users of the APA Program, serving as test cases for the APA concept in the early 1990s. Despite the risks associated with the new APA process, financial institutions sought APAs to obtain certainty in a highly uncertain environment. Indeed, in its first statutory annual report to Congress (covering 1991-1999), the APA Program reported that it had concluded more APAs with financial institutions than for any other industry.[2]

Prior to the issuance of the proposed regulations, the rationale for a financial institution to seek an APA was clear. There was no transfer pricing guidance tailored to the unique circumstances of the financial services industry, and available transfer pricing methods were viewed as having little relevance to financial institutions. It was also unclear how transfer pricing principles applied to determine the attribution of income to permanent establishments or whether intracompany transactions between a branch and the head office or between two branches of a single entity should be recognized in the first instance. Furthermore, the so-called all or nothing rule of Regs. §1.863-7 generally sourced *all* income from a notional principal contract to the residence of the taxpayer. This led to distortive and uneco-

[1] REG-208299-90, 63 Fed. Reg. 11177-01, issued 3/6/98. See 6 *Transfer Pricing Report* 801, 3/11/98.

[2] See Annual Report Concerning Advance Pricing Agreements, IRS Announcement 2000-35, 8 *Transfer Pricing Report* 1020, 4/5/00.

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nomic results in the case of global dealing operations in which traders and marketers in multiple jurisdictions contributed to a global ''book'' on a fully integrated basis.

In this environment of uncertainty and potential double taxation, a financial institution had much to gain by entering into a bilateral or a unilateral APA. In 1994, the IRS published Notice 94-40, in which it summarized its early experience in issuing APAs to taxpayers that had fully integrated global trading operations.[3] In the notice, the IRS described (in very general terms) the profit split transfer pricing methods that had been developed to determine the allocation of income from global dealing operations among both related entities and branches of a single entity. While the notice provided useful insight into how the APA Program addressed the difficulties of financial institutions engaged in global trading, the document stated on its face that it was not intended to prescribe generally applicable guidance. Therefore, if anything, the notice likely had the effect of *increasing* the demand for APAs by financial institutions.

1998 Proposed Regulations

As noted above, the proposed regulations were issued in 1998. They specified new transfer pricing methods for global dealing operations, including two profit split methods—the residual profit split and total profit split methods—and provided a new rule under Regs. §1.863-3 that sources income from a global dealing operation in the same manner as the income would be allocated under Regs. §1.482-8 if each qualified business unit (QBU) were a separate entity, thereby eliminating the distortive results of the ''all or nothing'' rule.

In the years following the proposed regulations, the demand for APAs by financial institutions fell, such that with the exception of 2004 (when the IRS completed 10 financial products APAs), relatively few APAs have been concluded with financial institutions. The drop-off in financial products APAs between 2000 and 2001 reflects the multiple-year completion time typical for most complex APAs such as financial products APAs. Thus, most of the 14 APAs completed in 2000 were probably APAs that were requested before the proposed regulations were issued in 1998.

The sharp drop-off in completions of APAs with financial institutions came as no surprise, as the proposed regulations provided much needed certainty and made self-compliance feasible and cost-effective.

Nevertheless, the scope of the proposed regulations is limited and stops short of providing comprehensive transfer pricing and source of income guidance to financial institutions. First, a ''global dealing operation'' is defined as consisting of ''the execution of customer transactions,'' which effectively excludes most proprietary positions.[4] Second, the regulations apply only to ''participants'' in global dealing operations or other members of a dealer's controlled group, but only if such other members perform marketing, sales, pricing, risk management or brokering activities related to the activities of the dealer.[5] Expressly excluded from the types of activities that give rise to ''participant'' status are ''credit analysis, accounting services, back office services, general supervision and control over the policies of the controlled taxpayer, or the provision of a guarantee of one or more transactions entered into by a regular dealer in securities or other participant.''[6] As discussed below, the carve-out of guarantees both from the proposed global dealing regulations and the subsequent regulations on services (Regs. §1.482-9) creates a significant guidance gap in what has become an increasingly thorny and uncertain area in transfer pricing. Moreover, the link in the definition of a ''securities dealer'' potentially eligible to be treated as a global dealing ''participant'' to the Section 475(c)(2) definition of ''securities'' has been interpreted to exclude global trading in non-securities, including commodities. Finally, as provided in their preamble, the proposed regulations' allocation rules do not apply to the allocation of interest expense.[7]

[3] 1994-1 C.B. 351, 3/11/94. See 2 *Transfer Pricing Report* 808, 4/13/94.

[4] Prop. Regs. §1.482-8(a)(2)(i).

[5] Prop. Regs. §1.482-8(a)(2)(ii)(A), -8(a)(2)(iii)-(iv).

[6] Prop. Regs. §1.482-8(a)(2)(ii)(B).

[7] Preamble, 63 Fed. Reg. 11177-01, 11183. See note 1.

Financial Products APAs by Year[8]

1991-1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
40	14	3	0[9]	4	10	≤6	≤3	≤3	≤3	0[10]	0	≤6	0-7[11]

[8] *Source:* IRS annual APA statutory reports for 1991-1999 and 2000-2011, available at http://www.irs.gov/Businesses/Corporations/Annual-APA-Statutory-Reports. For the 2012 annual statutory report, see 21 *Transfer Pricing Report* 1143, 4/4/13.

[9] The IRS completed six APAs involving ''other'' types of covered transactions in 2002. It is possible that these might have included one or more financial products APAs.

[10] The IRS completed eight APAs involving ''other'' types of covered transactions in 2009. It is possible that these might have included one or more financial products APAs.

[11] The 2012 Annual Report listed no financial products APAs under ''types of covered transactions.'' However, a chart indicates that 3 percent of APAs covered ''other'' types of covered transactions (that is, something other than the sale of tangible property, the performance of services, or the use of intangible property). Furthermore, the report lists the completion of seven APAs for taxpayers in the ''Finance, Insurance and Real Estate Industries.''

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OECD PE Profit Attribution Report

Not long after the proposed regulations were issued, the United States entered into a new income tax treaty with the United Kingdom that adopted the ''distinct and separate enterprise approach'' for attributing profits to PEs.[12] Subsequent treaties and treaty protocols also adopted this approach. Similar to the proposed regulations, these new treaties treat a PE as if it were a ''distinct and separate enterprise,'' then determine the profits attributable to the PE by applying transfer pricing methods (those based on Organization for Economic Cooperation and Development guidelines, including potentially profit split methods) by analogy. To this end, the Exchange of Notes accompanying the U.S.-U.K. Income Tax Treaty provides that ''in determining the amount of attributable profits, the permanent establishment shall be treated as having the same amount of capital that it would need to support its activities if it were a distinct and separate enterprise.''[13]

The treaties and treaty protocols provide few details on how to apply this new approach, leaving room for differing interpretations by different tax authorities. In order to promote a greater consensus regarding the attribution of profits to PEs under income tax treaties, the OECD published its ground-breaking Report on the Attribution of Profits to Permanent Establishments, which sets forth the ''authorised OECD approach,'' or AOA, both generally (Part I) and specifically in the contexts of banks (Part II), global trading (Part III) and insurance (Part IV).[14] While the OECD report was not published in substantially final form until 2006, earlier iterations were published as discussion drafts beginning in 2001, thereby providing guidance on the implementation of the new Article 7 of the U.S.-U.K. treaty. Central to application of the AOA to financial institutions is the identification of the key entrepreneurial risk-taking (KERT) and other ''people'' functions necessary to create and subsequently manage financial instruments. Once the KERT and other people functions of a PE are identified, the PE is attributed economic ownership of the financial assets created and managed by those functions, the associated risks, and the capital necessary to support those functions, assets and risks.[15] The attribution of capital to the location of the KERT functions was intended to address perceived policy concerns that a multinational financial institution could shift income by ''booking'' transactions in a low-tax jurisdiction that has capital but does not perform KERT functions. Once the PE is identified as a ''distinct and separate enterprise'' with attributed functions, assets, risks, and capital, transfer pricing methods are applied to the PE's ''dealings'' in order to determine the amount of profit attributable to the PE.[16]

While it is possible to interpret the proposed regulations in a manner consistent with the AOA, there are several notable differences in approach and emphasis. First, while the proposed regulations provide supplemental guidance on comparability factors that build on the non-hierarchical, facts-and-circumstances guidance of Regs. §1.482-1(d)(3),[17] the OECD report places a much heavier emphasis on functions—particularly KERT functions—as the cornerstone of the functional and factual analysis. Second, while the proposed regulations suggest that the provision of capital by one entity for the benefit of another (through guarantees or other credit support) should always be regarded as a ''routine'' contribution,[18] the OECD report more flexibly allows for the provision of capital in the separate-entity context to be treated as a routine or a nonroutine contribution, compensable with either a market-benchmarked return or a share of the residual profits as appropriate.[19] Neither the proposed regulations nor the OECD report, however, provides specific guidance on how to determine arm's-length compensation for the provision of capital. Third, while the OECD report backs into the amount of interest expense (referred to as funding costs) attributable to and deductible by PEs by first attributing ''free'' (non-interest bearing) capital under the AOA described above (based on the KERT function analysis),[20] the proposed regulations do not address the allocation of interest expense, which under U.S. domestic law is governed exclusively by Regs. §1.882-5.

Another area in which the proposed regulations differ in emphasis from the OECD report is on the treatment of dependent agent PEs. The proposed regulations acknowledge the possibility of a deemed QBU arising from the activities of a U.S. dependent agent of a global dealing participant, but provide little additional guidance.[21] In contrast, the OECD report provides specific guidance, essentially treating a dependent agent as two taxpayers:

- a dependent agent enterprise (that is, the entity) resident in the host country, and
- a dependent agent PE of the nonresident enterprise.

The allocation and attribution of profits in such a case requires separate analyses under Article 9 and Article 7 of the applicable income tax treaty.[22] Under Article 9, the dependent agent enterprise is allocated arm's-length compensation for its services (for example, trading) performed for the nonresident enterprise, while the nonresident enterprise retains a return on the capital necessary to support the assets and risks of the enterprise. Under Article 7, a portion of the nonresident enterprise's return on capital may then be attributed to its dependent agent PE, consistent with the amount of capital attributed to the PE under the AOA described above. This results in the reallocation of the return to

[12] Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, signed at London, July 24, 2001, as amended by Protocol, signed at Washington, July 19, 2002.

[13] See Exchange of Notes, United States Response to United Kingdom Note Setting Forth Additional Agreements Regarding the U.S.-U.K. Double Tax Convention, signed July 24, 2001, Art. 7.

[14] The report, dated 7/22/10, is available online at http://www.oecd.org/dataoecd/23/41/45689524.pdf. The 2010 version cited herein does not differ in material respects from the earlier reports published in 2006 and 2008.

[15] See Part III of the report, paras. 201-241.

[16] Part III, paras. 249-273.

[17] Prop. Regs. §1.482-8(a)(3).

[18] Prop. Regs. §1.482-8(e)(6)(ii).

[19] OECD report, Part III, paras. 156-164.

[20] Part III, para. 241.

[21] See Prop. Regs. §1.863-3(h)(3)(iv).

[22] OECD report, Part III, para. 275.

capital away from the booking location and to the location of the KERT functions, which is the same result obtained in the case of global trading conducted through branch PEs. While an example in the proposed regulations suggests a similar bifurcated analysis, its placement in a single example rather than an operative rule makes the intended treatment less than obvious.[23] Moreover, while neither the OECD report nor the proposed regulations provides guidance on the circumstances in which a dependent agent PE or deemed QBU will be found to exist, the prominence given to dependent agent PEs in the OECD report is itself a cause of uncertainty because it implicitly suggests that they are a common occurrence among global dealing operations conducted through separate entities.

While the precise degree of consistency between the OECD report and the proposed regulations can be debated, the reality is that the OECD report was viewed as the true game-changer. However, complying in the post-AOA world is not as simple as putting the regulations aside in favor of the OECD report. Despite the acknowledged shortcomings of the proposed regulations, the Treasury Department and the IRS reaffirmed in the preamble to the 2009 services regulations that taxpayers could continue to rely on these regulations.[24] In contrast, the OECD report, though relevant to treaty-based positions, is not the law of the land for U.S. taxpayers. Complicating matters further, IRS officials made promises of reproposed global dealing regulations in the mid-to-late 2000s that presumably would closely track the OECD report.[25] Such regulations, however, have yet to be issued even though they remain on the IRS' business plan.[26]

Moreover, while the OECD report provides some useful clarifications and directional guidance, it stops short of providing the specific, unequivocal guidance that financial institutions need and, in many instances, raises more questions than it provides answers. For example, on the now-critical issue of how to attribute free capital within a single enterprise, the OECD report provides two very different ''authorised'' approaches:

- the capital allocation approach, in which the enterprise's actual free capital is attributed between the head office and PEs, generally on the basis of relative risk-weighted assets, and
- the thin capitalization approach, in which PEs are essentially imputed a capital structure benchmarked by reference to comparable financial institutions.[27]

It also provides a safe harbor ''quasi-thin capitalisation'' approach that imputes to a PE the minimum amount of ''free'' capital that its host jurisdiction would require if it were an independent enterprise.[28] As the OECD report describes, there is no international consensus on which of these approaches should be applied and in which circumstances, and there are many variations for how each of these three approaches can be applied.

Why Now?

There are two compelling reasons why financial institutions should consider an APA—particularly a bilateral or multilateral APA—in the current environment. First, the uncertainty level for financial institutions transfer pricing in the post-financial crisis era is materially higher now than at any time since the proposed regulations were issued. Second, recent fundamental internal changes within the IRS are making the APA process more efficient while also making the transfer pricing examination process more rigorous.

The Post-Financial Crisis World: New Challenges, New Uncertainty

The post-financial crisis era has created many new transfer pricing challenges, including the residual effects of losses, new increased regulatory capital requirements, and restructurings and movements of KERT functions prompted by business and regulatory considerations. Moreover, global tax authorities are becoming more aggressive in their scrutiny of financial guarantees and other financial transactions.

Residual Effects of Losses

In the wake of the global financial crisis, the International Monetary Fund estimated that global bank losses would total $2.28 trillion, including $885 billion for the U.S. banks.[29] In many cases, the worst of the loss years (2009-10) are currently under examination by the IRS and other tax authorities. Global dealing losses are particularly troublesome from a transfer pricing perspective because the profit split methods work best when profits, not losses, are being split. For example, a profit split method in which trading profits are split based on the relative compensation (including bonuses) of traders and marketers makes sense in profitable years, but in a loss year, the method can paradoxically have the effect of attributing most of the loss to the location that did the most to minimize losses. It is easy to imagine a situation where one tax authority argues for the application of the usual profit split formula to split losses (in the interest of year-to-year consistency) while another tax authority argues that the usual profit split is distortive and demands a completely different transfer pricing approach.

As such, rather than allocating operating losses in the same manner as trading profits, it may be more appropriate to attribute losses entirely to the capital provider on the theory that the capital provider is the only person with the financial capacity to absorb losses. While rational and consistent with the Section 482 regulations governing risk allocation,[30] this approach also has its shortcomings given the general IRS view that the provision of capital to a global dealing operation is a routine, rather than a nonroutine, contribution. Where

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[23] See Prop. Regs. §1.863-3(h)(3)(v), Example 3.

[24] T.D. 9456, 74 Fed. Reg. 38830-01 at 38835. See 18 *Transfer Pricing Report* 290, 8/6/09.

[25] ''IRS to Repropose Global Dealing Rules in Early 2007, Project Called Top Priority,'' 15 *Transfer Pricing Report* 619, 12/20/06; ''Musher Predicts Global Dealing Reproposal, Other Transfer Pricing Developments in 2008,'' 16 *Transfer Pricing Report* 711, 1/31/08.

[26] ''Regulations under §482 on global dealing operations'' is the second of four transfer pricing projects listed in the second-quarter update to the IRS's 2012-13 Priority Guidance Plan. See 25 *Daily Tax Report* K-4, 2/6/13.

[27] OECD report, Part II, para. 97 and following.

[28] *Ibid.*

[29] Martin Crutsinger, ''IMF trims loss estimate from financial crisis,'' Associated Press, 4/20/10, available at http://www.nbcnews.com/id/36662585/ns/business-world_business/t/imf-trims-loss-estimate-financial-crisis/43915204.

[30] Regs. §1.482-1(d)(3)(iii)(B).

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capital is treated as routine, this approach can have the effect of allocating unlimited downside to the capital provider even though its upside is strictly limited to its benchmarked return.

Increased Capital Requirements

During (and following) the global financial crisis, governments and regulators adopted new minimum capital requirements for banks and other financial institutions that have the effect of increasing both the quantity and quality of capital that financial institutions must maintain. These include the requirements of the Collins Amendment to the Wall Street Reform and Consumer Protection Act of 2010 (commonly referred to as the Dodd-Frank Act) and Basel III,[31] as well as numerous other regulations issued by bank regulators throughout the world. From a transfer pricing and sourcing perspective, this means that financial institutions that had worked out a way to allocate and reward capital that was acceptable to the tax authorities may now need to go back to the drawing board.

Restructurings and Movement of KERT Functions

The post-financial crisis environment has brought about—and likely will continue to bring about—restructurings to deal with troubled assets and new regulatory requirements. Under the so-called push-out rule of the Dodd-Frank Act, banks will be required to consign much of their derivatives activities to non-banks that do not receive federal assistance (including insurance from the Federal Deposit Insurance Corporation).[32] Likewise, the Volcker Rule of the Dodd-Frank Act restricts ''banking entities'' from engaging in proprietary trading and private fund sponsorship and investment activities.[33] New registration and regulatory requirements including mandatory clearing are making fundamental changes to the over-the-counter derivatives markets. Aside from the need to comply with these new legal and regulatory requirements, the economic conditions of the financial crisis have prompted many financial institutions to undertake a restructuring in one form or another for business reasons. In light of the view set forth in the OECD report that so-called KERT functions are essentially super-factors that determine the attribution of assets, risks, capital, and ultimately profits, multinational financial institutions can expect intense scrutiny by the tax authorities any time a restructuring results in a cross-border transfer of KERT or other important people functions.

Scrutiny of Financial Guarantees

In the current environment, financial institutions are also facing increased uncertainty regarding the treatment of financial guarantees and other similar credit support agreements. In the United States (as in most jurisdictions), there are no regulations or other guidance directly on point. Financial guarantees expressly fall outside the scope of both the proposed global dealing regulations and the Section 482 services regulations.[34] Both within and without the United States, substantial uncertainty exists regarding issues of transaction recognition (when does a guarantee constitute a compensable transaction), transactional characterization (whether a guarantee should be characterized as a service, property transfer, or something else), the role of implicit support or passive association, and acceptable valuation methods.

Despite the lack of guidance, some tax authorities have been aggressive in their scrutiny of related-party guarantee fees. Probably the most widely reported and closely watched example of this scrutiny was the Canada Revenue Agency's position in *General Electric Capital Canada Inc. v. The Queen* that the guarantee fee paid by a Canadian affiliate should be reduced to zero under an ''implicit support'' (passive association) theory.[35] Both the Tax Court of Canada and the Federal Court of Appeal rejected the CRA's position that implicit support reduces the guarantee fee to zero and found the taxpayer's actual guarantee fee to be arm's-length. But this victory was at best illusory as both courts accepted the CRA's view that ''implicit support'' should in principle be taken into account in evaluating a subsidiary's creditworthiness. This controversial position has been criticized as inconsistent with the arm's-length standard, which at its most basic level, asks what price would be agreed to by two *uncontrolled* taxpayers had they entered into the same transaction under the same circumstances.[36]

Faster APAs—and More Extensive Audits

While the above-described factors are increasing uncertainty, the true game-changers are the recent internal changes within the IRS that have had the effect of improving the efficiency of the APA process while making the examination process potentially more rigorous. Indeed, the structural inefficiencies and resource constraints that stood in the way of APAs generally and financial services APAs specifically now appear to be fully resolved.

The IRS's newly reorganized APA office, the Advance Pricing and Mutual Agreement (APMA) Program, combines the APA Program—formerly under the Office of Associate Chief Counsel (International)—with the Competent Authority office of the Large Business & International division. This move allowed the IRS's APA function to significantly expand its personnel, including economists. More staff, as well as the elimination of the inefficient hand-off between the APA Program and Competent Authority, and a program director who has intimated that perfection will not be allowed to be the

[31] See, for example, Dodd Frank Wall Street Reform and Consumer Protection Act, H.R. 4173 §165(b)(1)(A)-(B), 136 *Daily Tax Report* K-8, 7/19/10; Basel Committee on Banking Supervision, ''Basel III: A global regulatory framework for more resilient banks and banking systems'' (December 2010; revised June 2011), available at http://www.bis.org/publ/bcbs189.pdf.

[32] Dodd-Frank Act, §716.

[33] Dodd-Frank Act, §619.

[34] However, the preamble to the current services regulations indicates that Treasury and the IRS intend to address transfer pricing for financial guarantees in future guidance. T.D. 9456, 74 Fed. Reg. 38830-01 at 38835-36. See note 25, above.

[35] 2009 TCC 563 (2009), *aff'd*, 201 FCA 344 (2010).

[36] Regs. §1.482-1(b)(1).

enemy of the good, all portend significant increases in efficiency and productivity.[37]

Moreover, the bilateral negotiation process is improving and becoming more efficient as a result of improved relationships between the United States and many key tax treaty partners and as a result of the inclusion of mandatory arbitration provisions in some of the United States' newer income tax treaties. These developments are already resulting in an increased number of APA completions and are expected to substantially reduce APA negotiation time and improve prospectivity.

Realistically, complex APAs, such as financial institutions APAs covering global dealing, guarantees, and restructurings, will always take longer to complete than simpler APAs and may be designated ''strategic'' cases that require the involvement of the Office of Associate Chief Counsel (International). However, APMA Director Richard McAlonan has suggested that APAs, including more complicated ones, should take no longer than three years to complete.[38]

As before, financial institutions and other multinationals choosing not to pursue an APA are subject to the usual transfer pricing examination process. A multinational choosing to forgo the APA process should bear in mind that, at the same time that the IRS has substantially expanded its APA resources, it has also expanded its examination-side transfer pricing resources by forming a Transfer Pricing Practice staffed by approximately 60 economists and tax law specialists dedicated solely to transfer pricing examinations. While the intent of the practice may be to improve the quality of transfer pricing examinations (and not necessarily the quantity or size of adjustments), these additional resources mean more extensive, in-depth, and expensive transfer pricing examinations. Moreover, it is likely that this expansion of resources will allow the IRS to ''branch out'' its transfer pricing enforcement focus from transfers of intangibles to other areas, including financial institutions and their transactions.

Finally, there is the very real possibility of new, reproposed global dealing regulations, which remain on Treasury's and the IRS's business plan. In that regard, an APA can provide a degree of ''insurance'' against any change in tax law, as having an APA in place can effectively buy additional time necessary to comply with the new law.[39] For example, if new regulations are issued in 2014, a financial institution with an APA covering 2013-17 would effectively have an additional three years to analyze the impact of the regulations and determine how to best comply. Moreover, taxpayers seeking an APA during the pendency of a regulation project have a unique opportunity to educate the IRS and thereby influence the development of the regulations for the better.

Conclusion

For reasons set forth above relating to both external market conditions and internal changes within the IRS, financial institutions should now consider the many benefits of obtaining an APA. As noted above, an APA can be beneficial in resolving (or prospectively addressing) any number of difficult and uncertain transfer pricing or related issues, such as the allocation and sourcing of global dealing income (or losses), the allocation of capital and interest expense, the transfer pricing consequences of a restructuring, or the pricing of an intercompany financial guarantee or similar credit support agreement. In making the determination as to whether an APA makes sense, as with all APAs, a financial institution may wish to consider scheduling a prefiling conference with the APMA Program, which can be conducted on a named or anonymous basis and does not require a user fee or the submission of substantial amounts of information up front.

[37] ''Setting Ambitious Agenda for APMA, New Director Sees Perfectionism Conflicting with Goal of Increased Output,'' 21 *Transfer Pricing Report* 330, 7/26/12; ''APMA Closes 140 Cases in 2012, Exceeding New Applications Received,'' 21 *Transfer Pricing Report* 913, 1/24/13.

[38] ''APAs Should Take IRS No More Than 3 Years to Complete, Official Says,'' 2013 *Tax Notes Today* 54-2, 3/20/13.

[39] Of course, proposed regulations do not have the binding effect of law, but they reflect the IRS's view as to how current law should be best interpreted and applied.

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