May 10, 2014

Via US Mail:

Internal Revenue Service,
CC:PA:LPD:PR (Notice 2013-79),
Room 5203,
P.O. Box 7604,
Ben Franklin Station, Washington, DC 20044

Via Electronic Mail: Notice.Comments@irscounsel.treas.gov

Re: Comments and Recommendations on Notice 2013-79 and Notice 2013-78

Dear Sir or Madam,

Set out below are comments and recommendations pertaining to the proposed APA revenue procedure set forth in Notice 2013-79 (the "APA Notice" or "APA revenue procedure) and the proposed Competent Authority revenue procedure set forth in Notice 2013-78 (the "CA Notice" or the "CA revenue procedure") (together, the "Notices"). These comments and recommendations were prepared by the undersigned, each in his individual capacity, not as a representative of a firm or company or organization and not on behalf of a client. Each of the undersigned has a keen interest in the matters addressed in the Notices, each having served as Director of the former APA Program, in the aggregate from 1991 to 2011.

We are writing because of our strong support for the APA process and our belief that it continues to play an important role in dispute resolution in the transfer pricing area, reducing administrative costs and uncertainty for both the government and taxpayers.

We know that the proposed APA revenue procedure is motivated by a desire to cause the merged APMA Program to be as efficient as it possibly can be. Our primary comment, however, is that, in an apparent attempt to be comprehensive, to identify and forestall all situations in which APA negotiations might run into difficulties or perhaps simply because of the varying perspectives of the many different drafters, the proposed APA revenue procedure may create a tone which could discourage some taxpayers, with respect to whom APAs might offer benefits to both the government and the taxpayer, from pursuing agreements with the Service. The tone that we perceive arises in our view not only from certain language used in the revenue procedure, but also from some of the technical rules proposed in the revenue procedure. In our comments below, we believe our most useful potential contribution is to offer suggestions for the analysis and, ideally, revision of these particular portions of the revenue procedure. We hope that you will find these comments helpful in the continuing improvement of this important program for international tax compliance.

Most of our comments pertain to the proposed APA revenue procedure set forth in Notice 2013-79. We begin with those.

1. Passim -- (comments on tone). Our comments start with the observation that the APA program provides substantial benefits not only to taxpayers, but also to the IRS and foreign tax authorities and that the need for cooperative issue resolution in transfer pricing is at least as great today as it has ever been. The APA process must be a central focus of enhanced compliance efforts, and it can be made more attractive to taxpayers without compromising IRS interests. The APA revenue procedure is critical to making the process work. It determines access to the program, creates a framework for responsible discussion, and facilitates principled case resolution. The APA program works best when both taxpayers and the IRS embrace the voluntary, collaborative, and reciprocal nature of the process.

With this perspective in mind, we are concerned that Notice 2013-79 reflects a different tone from earlier APA revenue procedures and that this tone may signal a less-supportive IRS attitude about the APA process. We could cite specific examples in the Notice,[1] and do touch on some in our detailed comments below, but the basis for our principal concern derives from our overall impression that the APA Notice:

(i) downplays the alternative dispute resolution qualities of the APA process and its unique role in transfer pricing compliance;
(ii) imposes one-sided obligations and commitments on taxpayers, while granting APMA expanded discretion and unilateral decision-making authority;
(iii) uses language and adopts rules that reflect APMA's experience in certain exceptional cases, but makes the program sound as if it is in broad need of protection from generally abusive taxpayers; and
(iv) adopts a one-size-fits-all model that, although ostensibly intended to streamline the process, will reduce flexibility and increase the upfront investment needed to enter the program.

Perhaps we are reading too much into the language of the Notice or not giving enough credit to APMA's likely implementation of the final revenue procedure. Indeed, the IRS has made significant investments in the APA process over the past few years, and APMA has significantly improved its productivity over the same period. No doubt, taxpayer interest in the process remains high and is likely to grow as the need for certainty in transfer pricing increases. Still, it is unsettling when the first public guidance issued since the APA program was moved from IRS Chief Counsel to the IRS reflects a discernible audit-like mentality and adopts language and rules that, at least at the margin, seem to make the process more one-sided, less flexible, more costly, and less attractive to taxpayers. We doubt that the drafters of the Notice were intending this result and are optimistic that the final APA revenue procedure can be re-worded and revised to better reflect the Program's

[1] For a detailed list of examples, *see* Craig. A. Sharon, *Notice 2013-79: A Change in Attitude?, BNA* Tax Management International Journal, at p. 122 (February 14, 2014).

traditional voluntary, collaborative, and practical nature without adversely affecting IRS interests.

2. Sections 2.02(3) & 5.02(4) -- (conditioning APMA program access on taxpayer agreement to accept rollbacks). Some of the text in the new proposed revenue procedure suggests that acceptance into the APMA program will be conditioned on the taxpayer's agreement to roll back an APA method to years that predate the proposed term of the APA. See § 2.02(3) ("APMA may also condition its acceptance of an APA request upon the taxpayer's agreement to roll back the terms of its proposed APA ... where APMA has clear interests in doing so and the taxpayer does not offer clear reasons against doing so.") See also § 5.02(4) ("If the taxpayer refuses to accept an APA rollback, APMA may decline to initiate the APA process or suspend or terminate the process if it has already begun.") The relevance of this text presumes, of course, that the taxpayer objects to the rollback and so the text seems to signal that the APMA program will use its ability to deny access to the program as leverage to extract taxpayer concessions with respect to matters in non-APA years.

If the APMA program is going to screen cases at the outset and reject cases on the basis that the matters proposed to be addressed in the APA are not significant enough to warrant inclusion – a new practice in our experience – we can see circumstances in which it may be appropriate to decline a case unless additional prospective years or rollback years are added. In this situation, the decision to reject the case would be made on the merits of the application (i.e., the case does not meet the materiality threshold for acceptance). We do not find this objectionable.

But we strongly caution against any suggestion that the ability to deny access to the program (to a case that would otherwise meet the criteria for inclusion) will be used as leverage to extract concessions from taxpayers with regard to matters outside the scope of the APA. This sends an unhealthy signal in our view, and is counter to statements made by the APA program in the past that it seeks neither to reward taxpayers for participating in the program nor to exploit taxpayer interest in the program to extract concessions from them. We suggest that the text be edited or supplemented to make clear that APMA will not seek to extract concessions from taxpayers with respect to prior, non-APA years as a condition for acceptance into the program with respect to a case that would otherwise qualify for inclusion.

3. Section 2.03(3) – (Extension of statute of limitations). The APA Notice proposes to require taxpayers to extend the statute of limitations to include all years covered by an APA request, inclusive of all rollback years. This requirement does not materially change current IRS practice; however, it has been our experience that IRS exam teams and field counsel are reluctant to enter into restricted statute extensions for years covered by an APA proceeding. We do not understand this reluctance, particularly when the only issue that prevents the statute from expiring is the review by the IRS of the covered transactions to the APA. We recommend that the IRS become more open to the use of restricted consents, particularly in these situations. To assist in the greater acceptance of the use of restrictive consents, we recommend that the APMA office work

closely with IRS counsel to develop standardized language for use by IRS exam teams to maintain the statute of limitations for tax years whose sole reason for remaining open is due to the taxpayer's participation in the APA process.

4. Section 3.02(4) – (Anonymous mandatory pre-filings). Section 3.02(4) of the APA Notice prohibits anonymous pre-filings for the enumerated mandatory pre-filing topics (e.g., unilateral requests when a bilateral is available, cost-sharing cases, global dealing, etc.). We understand the thinking that full transparency is needed on subjects that the IRS deems to be sensitive or complex, but a hard and fast prohibition on anonymity may hurt the IRS and taxpayers alike, because such conferences allow APMA to learn about new and emerging issues early on and to steer them toward the more cooperative APA environment. The APMA program should want these cases. At a minimum, APMA should make clear that it remains open to informal anonymous consultations.

5. Section 3.08 – (APA request as 6662 documentation). Section 3.08 of the proposed revenue procedure states that a completed 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)." The proposed APA revenue procedure, by noting that an APA request is only a "factor" in determining whether the relevant documentation requirements have been met, does not give taxpayers any useful information. Not only is the weight and character of this "factor" never defined, but the mere mention of one factor implies the existence of others, which are also undefined. This language does not go far enough toward providing guidance to taxpayers or the IRS. At a minimum, the proposed revenue procedure should endorse the view that the IRS's acceptance of an APA request, which necessarily meets the standards set forth in the proposed revenue procedure, creates a presumption that the requirements of Treas. Reg. §1.6662-6(d)(2)(iii) have been met. The relevant language could caveat that such a presumption would be invalid in cases of fraud, malfeasance or misrepresentation. The proposed revenue procedure should also go further to provide taxpayers with a safe harbor that exempts a taxpayer that is accepted into the APA process from having to prepare contemporaneous documentation while the covered transactions are being evaluated by the IRS. In doing so, taxpayers would no longer be required to use their limited budgets for this unnecessary task since APA teams regularly require updates of any changes in facts as well as the most recent taxpayer financial data which would form the foundation of a contemporaneous documentation study, while they are evaluating the transfer pricing methodology. In addition, executed APAs provide for a mechanism to true-up any adjustments that may be required by the terms of the APA. Therefore, we see little risk to the IRS to formalize this procedure while at the same time providing an excellent opportunity to help U.S. taxpayers reduce their overall cost of compliance.

6. Section 5.02(1) -- (deadline for requesting rollbacks). Section 5.02(1) requires that a request for a rollback be "submitted in writing within three months after the APA request is filed, unless APMA agrees otherwise." The new deadline would appear to be an unnecessary restriction on a means of dispute resolution which historically has been valuable to both the government and taxpayers. The taxpayer may not be in a position to know whether a rollback is sensible, or even feasible, until the terms of an APA

under negotiation become clearer during the course of APA negotiations. Moreover, the mere fact that a taxpayer requests a rollback does not obligate the IRS to grant it. It would seem sensible to leave open to taxpayers the possibility of requesting a rollback at any time during the pendency of APA negotiations, if it appears a rollback might lead to a fair and efficient resolution of issues pending in open years preceding the first year to which an APA is to apply. If a deadline is retained, taxpayers should be provided more than three months from the filing date to make the decision (e.g., three months after the opening conference).

7. Section 7.01 -- (forward-thinking disclosures). Section 7.01(1) requires that an annual report disclose "any pending or contemplated requests to renew, modify, or cancel the APA." The word "contemplated" is subject to difficulty in interpretation. We suggest that the language read "any intention which the taxpayer has reached to renew, modify, or cancel the APA, including the expected timing of the taxpayer's request for renewal, modification or cancellation." If the taxpayer's plans with respect to whether or when to request renewal, modification or cancellation change after submission of the annual report, the taxpayer should notify APMA of the change as soon as is reasonably feasible."

8. Appendix Section 1.02, Part 3.4 – (Detailed Information Associated with the Covered Issue Diagram). The Notice at Appendix Section 1.02, Part 3.4 states that the application must contain a "***detailed discussion*** of each proposed covered issue with reference to the covered issue diagrams: ". Bullets a, b, and c following this pronouncement state that the detailed discussion must include the functions, assets, and risks of each member of the proposed covered group, i.e. the entities to be covered by the APA, "***in relation to the proposed covered issue(s)***". This seems entirely reasonable. Where the draft Notice goes astray is in bullet d which extends the "detailed discussion" to:

> "Transactional or commercial flows between and among members of the proposed covered group, between members of the proposed covered group and customers and other uncontrolled parties, and between members of the proposed covered group and members of the controlled group outside of the proposed covered group."

Importantly, this detailed discussion of transactional or commercial flows is not limited to any relation to the proposed covered issue(s). The Notice is overly broad in its request for information associated with the covered issue diagrams. Bullet d should be amended to limit the information required to that which is related to the proposed covered issue(s). The broadly defined covered issue diagram will provide the IRS with the necessary information to understand the full supply chain. The current draft Notice could make the APA application so burdensome that taxpayers will avoid the program.

9. Appendix Section 3.02 – (User fee). Our final comment with respect to Notice 2013-79 pertains to the change in the user fee language. The current revenue procedure, Rev. Proc. 2006-9, requires a separate user fee for each APA request, then proceeds to define an APA request as an APA submission and further provides that all APA submissions

filed within a 60-day period by one or more members of a controlled group shall be considered a single APA request. Rev. Proc. 2006-9, section 4.12.

The proposed revenue procedure eliminates the language that equates an APA request with an APA submission and further eliminates the 60-day rule. It states only: "a separate user fee is required for each unilateral, bilateral, or multilateral APA request." Appendix Section 3.02. We are concerned that this language may resurrect problems that Rev. Proc. 2006-9 was intended to solve.

The current revenue procedure language was a reaction to prior language similar to that in the new proposed revenue procedure. Prior to Rev. Proc. 2006-9, the governing revenue procedure stated "a separate user fee is required for each APA request." Rev. Proc. 2004-40, section 4.12. It then elaborated on what was meant by "each APA request," explaining that a single APA submission may be deemed to include more than one APA request if the submission covers multiple fact patterns requiring separate analyses. Rev. Proc. 2004-40, section 4.12(1). The intent was to adjust the amount of the fee to reflect the amount of work the case would entail.

In practice, however, the program found it near impossible to apply the standard in a consistent way. It was a recurring problem, leading to debates with taxpayers over what is a "separate request" in circumstances where the program itself was not confident that it could reconcile its position from one case to another. Moreover, in 2005, when the APA program analyzed its time records for 130 cases, it found only a weak correlation between the hours spent working on a case and the criteria by which the "separate request" user fees were determined. All of these points were noted in a May 2005 speech by then-IRS Chief Counsel Donald Korb during which he announced several initiatives to improve the program, including the initiative to simplify the fee structure.

The current revenue procedure, Rev. Proc. 2006-9, defines an APA request as an APA submission to eliminate the need to debate, e.g., whether a bilateral APA request that has a unilateral element to it is one APA request or two, whether an APA request dealing with the sale, financing, and warranty of goods is one APA request or two or three, and many other variations of the same "separate request" question. The revenue procedure then provides the 60-day rule to avoid discriminating based on packaging – i.e., based on whether the material is submitted as one omnibus submission or as separately bounded submissions. The 60-day period is provided because the key, in the view of the APA program at the time, was to make sure the full set of materials was in hand when the APA team started its work. Given the time it takes to complete the case in-take process and organize a team, the program believed that submissions filed within 60 days of the original submission would be timely enough not to prejudice the handling of the case.

The fee schedule was also meant to promote comprehensive resolution of issues by removing user fee disincentives to expanding the scope of APA coverage. The fact, noted above, that the 2005 study of case time showed only a weak correlation between the number of hours worked on a case and the number of "separate requests" involved in the case suggested that there were significant time savings achieved by having a single APA

team address multiple transactions at one time, another reason to encourage taxpayers to submit as many issues as possible, all at once.

With that as background, we urge clarification of the new proposed user fee language: "a separate user fee is required for each unilateral, bilateral, or multilateral APA request." It is not clear whether the reference to "each ... APA request" means the same as it did in Rev. Proc. 2004-40 and requires evaluation of whether there are multiple "separate requests" in a single APA filing, or is it meant impliedly to continue the Rev. Proc. 2006-9 language that equates a single request with everything contained in the submission. If the former (a return to the Rev. Proc. 2004-40 standard), we urge reconsideration. Our experience convinces us that that approach was discarded for good reasons. If the latter, this should be clearly stated.

We also note uncertainty about the new language delineating "unilateral, bilateral, or multilateral" APA requests. In our experience, it has been common for a bilateral APA request to include a complementary unilateral element. It is not clear under the new proposed language whether that APA request would be regarded for fee purposes as two requests or as one. It is also not clear whether an APA submission that seeks two or more bilateral APAs would be regarded as a single APA request or as multiple requests and, if the latter, it is not clear to us why an APA request that seeks two separate two-party agreements (US-Country A, US-Country B) should be twice the fee of an APA request that seeks an agreement among all three parties. Our observations suggest a single multilateral APA may be *more effort* than two bilateral APAs, and certainly is not half the effort as the new proposed fee schedule may suggest. We recommend the proposed revenue procedure anticipate and address these types of issues.

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Before concluding, we mention a few issues pertaining to the MAP procedures in Notice 2013-78.

1. Section 1.01 – (Interest and penalties). Section 1.01 of the CA Notice provides a new definition of "ancillary" issues which may be eligible for coverage by a MAP resolution. Notably, the list of ancillary issues includes "interest on refunds and deficiencies, penalties with respect to U.S.-initiated adjustments . . . ." Historically, the U.S. Competent Authority has taken the position that it will not negotiate refund and deficiency interest or the amount of any penalty. These have been thought to involve domestic law and to be beyond the scope of the U.S. Competent Authority. This policy position of the U.S. Competent Authority, however, was inconsistent with paragraph 3 of article 25 (MAP) of the U.S. model treaty as well as the more than one dozen tax treaties that expressly allow for MAP negotiations on interest and penalties, e.g., U.K., Germany, and Denmark. This change to the U.S. Competent Authority policy is welcome.

2. Section 2.02 -- (Applicability of MAP to taxpayer-initiated adjustments). The decision by the Service to permit taxpayer-initiated adjustments is a positive step towards

addressing what has been a long gray area of the Mutual Agreement Process. This change will help strengthen compliance with the arm's length standard by promoting a framework premised on taxpayer voluntary compliance rather than enforcement. We believe that for taxpayer-initiated adjustments to provide the relief envisioned, however, there must be a two-way street between the US and its treaty partners on this issue. At present, it is not clear that all treaty partners would reciprocate by allowing a taxpayer-initiated adjustment. We encourage the U.S. Competent Authority to continue to take the lead with our treaty partners and urge their participation in permitting taxpayer-initiated adjustments that will help in fostering a global tax system that is founded on the fundamental premise of voluntary compliance.

3. Section 4.01 – (Manner of Filing MAP Requests – Authorization Forms). Section 4.01 of the Notice provides that a taxpayer must submit one original, bound printed submission containing signed originals of the cover letter, penalties of perjury declaration, consent to disclose, and, as applicable, authorization forms, including e-mail authorization. Appendix Section 1.02, 1.3 lists the authorization forms as including Form 2848 (Power of Attorney and Declaration of Representative), and Form 8821 (Tax Information Authorization). Under the current Revenue Procedure, the practice is to submit originals of the MAP application, the penalties of perjury declaration, and the consent to disclose. The practice regarding Form 2848 is less clear. Taxpayers and their representatives typically sign Form 2848 and then scan them into an electronic format, which is then printed and signed by the other party. As a practical matter, it is difficult to prepare a Form 2848 with two original signatures. This is much less of an issue for the other original signatures listed in Section 4.01 of the Notice as these are typically all signed at one time by the taxpayer. It is our experience that copies of Form 2848 are often accepted by the U.S. Competent Authority office, but at other times an original is required. Importantly, Treas. Reg. Sec. 601.504(c)(4) provides that: "The Internal Revenue Service will accept either the original or a copy of a power of attorney. A copy of a power of attorney received by facsimile transmission (FAX) also will be accepted." We recommend that, consistent with Treas. Reg. Sec. 601.504(c)(4), the Notice be revised to make clear that copies of authorization forms, particularly Form 2848, be allowed.

4. Section 9.01(4) – (Action by U.S. Competent Authority – Exclusive Jurisdiction). Section 9.01(4) of the Notice states that the "U.S. competent authority will assume sole jurisdiction over all MAP issues set forth in a MAP request it has accepted. . . Any further administrative action by the IRS (e.g., assessment and collection procedures) . . . will be postponed unless the U.S. competent authority instructs otherwise." Section 9.01(4) is consistent with Section 7.01 of Rev. Proc. 2006-54, so this does not represent a change in policy. It seems clear from this language that if a taxpayer request for U.S. Competent Authority assistance is accepted prior to the issuance of a 30-day letter, i.e., at the stage of the Notice of Proposed Adjustment (NOPA), there shall be no further IRS administrative action, including the issuance of a 30-day letter, unless the U.S. Competent Authority instructs otherwise. We understand the U.S. Competent Authority has a long-standing policy to this effect. Unfortunately, it has been our experience that IRS examiners do not always comply with this policy. This creates a problem because the issuance of a 30-day letter triggers increased interest (an additional two percent) for corporate deficiencies

in excess of $100,000 under IRC Section 6621(e), so called "hot interest." Given that the Competent Authority process can take years, with much of this time not in the control of the taxpayer, preventing the imposition of hot interest is only fair. To ensure the policy with respect to the issuance of a 30-day letter is followed consistently, we recommend amending the language in Notice Section 901(4) to read: "Any further administrative action by the IRS (e.g., ***issuance of a 30-day letter***, assessment and collection procedures) with respect to any issue under the jurisdiction of the U.S. competent authority will be postponed unless the U.S. competent authority instructs otherwise."

We appreciate the opportunity to comment on the Notices.

Respectfully submitted,

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