



**Covid-19: Impact  
on (the Other) TP**

**APAs: The Quest for Certainty  
in Times of Uncertainty**



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# APAs: The Quest for Certainty in Times of Uncertainty

## I. INTRODUCTION

We are in the midst of a crisis, the breadth and depth of which changes daily and the full impact of which will not be known for some time. Understandably, companies want and need to take action to deal with the uncertainty caused by Covid-19, or to take measures to enable their operations to weather possible outbreaks or similar events in the future. Those actions have transfer pricing implications, and if companies have an Advance Pricing Arrangement (“APA”), or are pursuing an APA, the uncertainty created by Covid-19 heightens the need for careful scrutiny of a company’s transfer pricing policy.

## II. CONSIDERATIONS

During this period of economic crisis and uncertainty created by Covid-19, companies that utilize an APA to obtain transfer pricing certainty should give due consideration to how changes in the markets and economic conditions impact their transfer pricing policy that is either already the subject of an existing APA or is under review in an ongoing APA process. In particular, companies may want to evaluate (i) how changes in transfer pricing or the incurrence of non-recurring, one-time extraordinary expenses to address Covid-19 may impact or be incorporated into the APA; (ii) whether any of the economic support funds or measures being rolled out around the globe need to be factored into the company’s transfer pricing models and APAs and, if so, how; (iii) whether it is feasible or advisable to continue with an APA already in force considering the impact of Covid-19; (iv) the desirability of continuing with an APA application given the uncertainty around what the future economic conditions might be

during the APA term; and (v) how Covid-19 changes the outlook and timeline for the APA process.

### A. Does Covid-19 Impact My Company’s APA or APA Request?

The current economic environment that many companies are facing is likely quite different than the economic environment the companies faced at the time of filing the APA request and that environment is changing rapidly. Some companies are experiencing negative impacts and others positive impacts as the impact of this pandemic varies widely depending on the industry and the geography of the taxpayer. Many companies are evaluating their business and transfer pricing models and how they might need to adapt under varying possible circumstances (e.g., more versus less severe downturns, shorter versus longer periods of downturn, quick rebound versus long-term change, etc.). This is a difficult issue that companies are grappling with.

In addition, companies hit hard by the Covid-19 outbreak may need additional financial resources and may be contemplating reducing profit margins in local jurisdictions. It is important to first distinguish cash needs from profits as some short-term cash needs can be addressed without affecting profits, for example, through modifying payment terms on intercompany payables/receivables or short-term loans. However, if companies want to revise their transfer pricing, undertake new transactions or terminate certain transactions, it is important to understand the impacts of those decisions on an APA and what and when such changes should be disclosed to the treaty partners.

From a U.S. perspective, companies must timely notify the Advance Pricing and Mutual Agreement Program (“APMA”) of all material changes and updates to information previously submitted in connection with the APA request, which would include material changes to the transfer pricing of the proposed covered transactions. Failure to update APMA of a material change in fact could jeopardize negotiations. A fact is considered to be material if, for example, knowledge of the facts could have reasonably resulted in an APA with significantly different terms and conditions. Thus, to the extent the operations or transfer pricing of the company has materially changed as a result of Covid-19, these changes should be disclosed to the treaty partners. A further discussion of the types of changes to the APA proposal that could be considered from a U.S. perspective are included in Section III, below.

Under U.S. procedures, companies are able to request an amendment to an APA request at any time before the APA is consummated and APMA will give such a request due consideration. Once an APA is reached, however, it may be revised only by mutual agreement of the parties to the APA. For a bilateral APA, this will include seeking consent of the applicable treaty partner if APMA is willing to agree to the revision proposed by the company. If the treaty partners are unable to reach an agreement to amend an APA, then the APA remains in force without revision. In some cases, however, APMA and the taxpayer may agree unilaterally to (i) revise the APA with respect to one or more APA years; or (ii) to cancel the APA as of a specific date. It is unclear, however, how broad the scope of such revisions could be absent agreement with the bilateral treaty partner.

**China.** China utilizes an interquartile range and typically asks taxpayers in an APA to aim for the median of the range. The Chinese transfer pricing regulations also require a term test and if, upon the expiration of the APA, the weighted average margin over the entirety of the APA term is below the median, and the

taxpayer does not make an upward self-adjustment to the median, the Chinese tax authorities will not accept an APA renewal application. It is therefore acceptable for the margin to drop below the median in individual years, and as long as it is still above the lower quartile, the Chinese tax authorities will not make an adjustment. However, if the taxpayer wants to renew the APA, it will need to make a term adjustment to bring the overall margin to the median before the APA expires. That said, if there is specific language in the APA about how it must be implemented, then the company will need to adhere to that specific APA language. If a company is already operating at the lower quartile and wants to reduce it below that point, then it may want to revise the terms of the APA without annulling it.

**Canada.** It is more difficult to generalize about the pricing terms in a Canadian APA. Each taxpayer’s APA will specify the agreed transfer pricing terms. In the case of a routine service provider this may be a specific point rather than a range or there could be a very narrow range specified to allow some administrative simplicity if the result is off by a few tenths of a percent. While an arm’s-length range could be specified and is in some cases, whether it is or not depends on the agreement reached with the treaty partner. That being said, each APA will also include one or more critical assumptions and provisions that will allow the Canada Revenue Agency (“CRA”) to revise, cancel, or revoke the APA. Canadian APA’s typically include a standard term that allows taxpayers to advise the Director of circumstances that might require a revision of the APA but such revisions are granted at the discretion of the Director (in consultation with the treaty partner). Additionally, taxpayers are required to notify the director of material changes to the taxpayer’s business within 30 days.

**Latin America.** In most Latin American jurisdictions, as long as the company’s APA request has not been ruled on by the tax

authority, it is still possible to update the economic circumstances and/or the facts surrounding the transaction being analyzed. For these purposes, it is important to make a complementary filing, describing in detail the new facts that could modify the price or consideration in the transaction covered by the APA, in addition to including the proposed modification to the transfer pricing methodology reflecting the circumstances of the case (such as new comparability adjustments, modifications to the set of comparable companies or transactions as appropriate to the new facts, and differentiated profit margins for each period covered by the APA, among others).

If an APA has been reached and it covers the 2020 fiscal year, companies should conduct a detailed review of the critical assumptions in order to analyze the viability of renegotiating the terms originally reached with the tax authority. If the critical assumptions permit and a change is needed, the process would be to file a statement with the tax authority on the economic impacts and/or functional changes endured by reason of Covid-19, with the purpose of (i) revising the APA with respect to one or more APA years, or (ii) canceling the APA. If the critical assumptions do not allow for the renegotiation of the terms of an APA, such as in the case of Mexico, in practice this may be done by describing in the annual compliance report those extraordinary events/facts/expenses (due to Covid-19) that affected the transfer price in the transaction(s) covered by the APA.

**Europe.** European jurisdictions are quite unique in their APA processes with each being heavily dependent on the tax authorities involved. But, in many instances, APAs do not cover extraordinary scenarios such as pandemics, which could have a significant impact on the transfer pricing model. Potential impacts on the transfer pricing model could be (i) market conditions; (ii) other external Covid-19 related factors; (iii) business restructurings; (iv) changes in the taxpayer's functional and

risk profile; and /or (v) the taxpayer's value chain organization. Therefore, taxpayers that have entered APAs should review the terms and conditions of the APA to identify options for adjustments due to the economic downturn related to Covid-19.

Some tax authorities may want to break up the APA term into two separate terms, i.e., a "downturn" period and "normal" period. However, not all jurisdictions are likely to follow this approach. In general, proactively contacting the competent authorities in your jurisdiction and proposing changes to the APA conditions (i.e., critical assumptions and comparables) that arise due to the Covid-19 crisis is recommended. For example, one could assert that the target profit under the APA should be reduced in line with decreasing margins that can be expected to be achieved by comparable companies because of Covid-19. This is a constructive way of addressing potential difficulties with the competent authorities. It is, however, not entirely clear as to what extent the competent authorities would be willing to enter into such conversations with the taxpayer.

In some jurisdictions, APAs are agreements between countries only, but not between the country's tax administration and the taxpayer. The taxpayer is then not necessarily legally bound to adhere to the terms and conditions of the APA. When economic conditions gravely differ from what they had been understood to be when requesting the APA, an option to be considered is to break free from the terms of the APA, especially if the APA indeed has no clause on crisis situations.

It is expected that a change in critical assumptions as well as a potential lack of comparables will be taken into account by most tax authorities. If tax authorities are not willing to discuss a change in critical assumptions, the economic impact of Covid-19 may cause critical assumptions not to be met. Failing to meet critical assumptions could

potentially impact the validity of the APA, as discussed further below in Section IV.

## B. Does a Company Need to Factor Any Government Support into Its Transfer Pricing Under an APA and If so, How?

Governments around the world are announcing extreme measures, the likes of which have never been seen before. These are varied and wide ranging from income replacement and salary subsidies, interest-free or low-interest loans, guarantees, or grants, to name just a few examples. A critical question for taxpayers that have APAs is how these amounts should be treated for transfer pricing purposes. For example, if an entity receives compensation from a related party on a cost-plus basis, should any government grants or

	Costs	Costs	
Revenue	99	110	[a]=[f]+[h]
R&D Costs	60	60	[b]
Government Assistance	(10)	(10)	[c]
Other Costs	40	40	[d]
Operating Profit	9	20	[e]=[a]-[b]-[c]-[d]
Costs Subject to Mark-up	90	100	[f]=[b]+[c]+[d] or =[b]+[d]
Mark-up (%)	10%	10%	[g]
Mark-up (\$)	9	10	[h]=[f]*[g]

wage subsidies be netted against costs for computing the cost base that is subject to mark-up or should it be kept out of the computation and become additional income for the entity that received it? Consider the following numerical example:

As illustrated above, this decision can have a material impact on intercompany charges and the resulting profits realized by the subsidiary. Given the magnitude of the supports being rolled out to mitigate the economic impact of Covid-19, taxpayers should be sure to identify and track any such supports and give due consideration to local transfer pricing rules/laws as they might apply to these types of

amounts and how the terms of their APAs should be interpreted in this regard, which may be challenging since this type of scenario would not likely have been anticipated.

**Canada.** As an example, the CRA has published administrative guidance suggesting that the amounts should be excluded from transfer pricing computations and the full benefit should remain in Canada unless the taxpayer can prove that arm's-length parties would treat such government support differently.

## C. What Can a Company Do If It Has an APA but Wants to Terminate It Because of the Impact of Covid-19?

Companies that are experiencing significant changes and impacts from Covid-19 may wish to completely withdraw from an APA. Under U.S. APA procedures, if a company wishes to terminate an APA, it should analyze whether the economic and business impacts from Covid-19 have triggered a failure in a critical assumption included in the APA. (Further discussion of Covid-19 and critical assumptions is included in Section IV, below.) Typically, it will be difficult to cancel an APA with APMA once it is entered into and the parties will instead often try to revisit and reopen the APA. Nevertheless, Covid-19 presents unique circumstances and APMA may be willing to entertain a cancellation if the parties are unable or unwilling to revise the APA. Such cancellation will be effective as of the beginning of the taxable year in which the critical assumption failed. For periods following the effective date of the cancellation, the APA has no further force and effect for the Internal Revenue Service or the company.

**China.** Although the Chinese APA template does not list the critical assumptions, in practice, both force majeure (including natural disasters) and economic downturns are commonly contained in the critical assumptions of the APA. After Covid-19 broke out in China, many companies have already

cited force majeure in their commercial dealings, and therefore it may be possible to terminate an APA in China on this basis. In addition, the economic downturn that follows may also be used as a reason to terminate an APA with the Chinese tax authorities if the facts and circumstances are not sufficient to justify force majeure. If a taxpayer wants to cite a critical assumption to revise or terminate the APA, the Chinese tax authorities would require the taxpayer to report the material changes which affects the APA within 30 days, and describe the impact on the APA. The Chinese tax authorities would analyze the impact, and decide to revise or terminate the APA based on the materiality of the impact.

**Canada.** Once an APA is signed in Canada, it is difficult for a taxpayer to cancel it. The standard terms allow the Director to cancel if there is a breach of a critical assumption and a revision cannot be agreed, if there was a material misrepresentation or omission on the part of the taxpayer, or if there is a failure to comply with the terms of the APA on the part of the taxpayer (and that failure would have to be such that simply making an audit adjustment to bring the taxpayer into compliance with the terms of the APA would be an insufficient remedy). Cancellation is at the discretion of the Director, and the Director could elect to continue to apply the existing APA.

The Director also has the right to revoke the APA, *ab initio*, under certain circumstances, including for non-compliance with a material term of the APA.

**Latin America.** In the case of Latin America, it is highly advisable to analyze the critical assumptions of each APA, to assess (i) whether the economic impacts sustained could put the APA's validity at risk (especially if there are changes in the functions, assets and risks assumed); and (ii) whether or not it would be possible to renegotiate the terms originally agreed upon with the tax authority. If it is decided that the APA will be canceled for any

reason after analyzing the specific case, this may be done by filing a notice with the tax authority, describing the material facts and/or circumstances giving rise to the request to cancel the APA.

**Europe.** How the taxpayer can get out of an APA depends on the rules on APAs in the countries involved, but is potentially simple for the taxpayer, assuming that bi- or multilateral APAs have been concluded.

In order to provide necessary information to the tax authorities, in most EMEA countries the taxpayer is obligated to provide the tax authorities with an annual APA report. Herein, the taxpayer must provide information on the implementation of an APA and whether the taxpayer satisfied the critical assumptions. For example, in Spain, a brief report should be filed annually jointly with the Corporate Income Tax Return. In this report, the taxpayer must expressly draw attention to every single deviation and state whether it has made any adjustments, and, if so, which. If the taxpayer breaches this obligation, consequences may follow, the harshest being the tax authorities withdrawing from an APA. If, according to the report, critical assumptions have not been satisfied, tax authorities will usually request the taxpayer to submit proposals for making relevant adjustments to the mutual agreement before withdrawing from an APA.

The taxpayer, however, can use this procedure to its advantage if it wants to get out of an APA. If the taxpayer no longer adheres to the critical assumptions under the APA, the tax authorities must no longer apply the APA. The taxpayer may simply inform the tax authorities by truthfully stipulating in their annual APA report that it no longer adhered to the critical assumptions under an APA. Consequently, the tax authorities will withdraw from the APA or will request the taxpayer to submit proposals for adjusting the APA.

## **D. If a Company Has Submitted an APA Request but No Longer Wants One Because of Uncertainty Created by Covid-19, How Does the Company Withdraw and What Are the Consequences?**

The substantial impact of Covid-19 may motivate companies in the process of negotiating an APA to reconsider their APA proposal and to consider full withdrawal from the program. Depending on the facts, a company should first consider whether an adjustment or amendment to the APA proposal is feasible under the procedures described above. If not, under U.S. APA procedures, taxpayers may unilaterally withdraw an APA request at any time before an APA is executed by filing a request with APMA. While the consequences of a withdrawal may be relatively minor, APMA generally will not refund user fees once it has begun its due diligence. Further, companies should carefully consider how information shared during the course of the APA process might be used during a field audit or subsequent proceedings.

**China.** Both the tax authorities and the taxpayers can terminate the APA negotiations at any time before the APA is executed, without having to cite Covid-19. Companies would have to file a report and explain the reasons they want to withdraw. In addition, according to the Chinese transfer pricing regulations, if a taxpayer withdraws the APA application, all the information shared and obtained during the discussion will be kept confidential by both taxpayers and tax authorities. Tax authorities cannot use the non-factual information obtained during this process, including proposals, reasoning, positions and judgment, against taxpayers in an audit of the same transactions.

**Canada.** As in the United States, a taxpayer is free to withdraw its request for an APA at any time up to the time it is signed. Canada does not impose a user fee for obtaining an APA but does require payment of a cost recovery amount, intended to cover the CRA's out of pocket costs (for things such as site visits) and any unused funds are refunded to the taxpayer. This decision should not be taken lightly and due consideration to suggesting a different approach to dealing with the consequences of Covid-19 should be given. Taxpayers should also recognize that any information provided to the CRA in connection with a request for an APA is considered to have been obtained for the purposes of administering the *Income Tax Act* (Canada) and as such can be shared with and used by the audit function. Since APAs are typically more collaborative undertakings than audits, taxpayers are expected to, and generally do, provide more information to tax authorities through this process than through audits and the implications of this disclosure should also be weighed in the decision making process.

**Latin America.** In the Latin American region, taxpayers generally may elect to cancel the APA request at any time, before formalizing the agreement; for these purposes, they will need to file a notice of withdrawal with the tax authority. While there are generally no repercussions from the tax authority due to the APA withdrawal, we advise evaluating, before filing the notice, whether the information and documentation supplied during the process is sensitive information that the tax authority might use in an eventual audit for future tax years.

**Europe.** If the taxpayer wants to withdraw its APA application, for example because the profit forecasts outlined in an APA application are no longer valid due to Covid-19, the taxpayer can withdraw an APA application or amend an APA application.

The withdrawal of an APA application means that there is no longer any basis for conducting the APA procedure, i.e., the procedure is terminated. From a procedural point of view, an APA application can be withdrawn at any time. Until an APA has been concluded with legal effect, the applicant may alter its APA application at any time. In many EMEA countries, e.g., in Germany, a substantial alteration to an APA application is regarded as a new application. The consequences of withdrawing or amending an APA application certainly depend on the status of an APA application and the amount of work performed by the competent authorities so far. In particular, if tax authorities have already started working on an APA application, the consequences of withdrawing and amending an APA application most likely will affect the relationship with the tax authorities, so relationship management is an important goal to keep in mind.

For example, under German law, fees for an APA procedure will be assessed as soon as the APA application is filed. The standard fee for an APA is 20,000 euro. If there is already an APA in place that the taxpayer wants to extend, fees will be reduced to 15,000 euro.<sup>1</sup> As the fees are assessed and due upon filing an APA application, the fees will not be refunded if the taxpayer withdraws its APA application. Amendments to prior APA filings are charged at a reduced rate of 10,000 euro. However, in other countries, such as Spain, the taxpayer is not obliged to pay any fees in order to request an APA. Hence, the withdrawal of the proposal would not result in any economic loss for the taxpayer.

## **E. If a Company Decides to Continue with the APA Process, How Does Covid-19 Impact the Outlook and Timeline for the APA Process?**

Covid-19 is likely to extend the timeline for most companies' APA applications globally. Many countries are under lockdown right now and international travel has been severely restricted. As a result, competent authorities have to reschedule their meetings or use alternatives such as video/audio conferencing. In addition, the tax authorities of many countries are not fully functioning and are facing systems limitations, as their employees have to work from home and take care of their children at the same time. While APMA and many other tax authorities continue to work on and review APA applications and are trying to minimize delays as much as possible, companies should anticipate that systems limitations, travel restrictions, and work-from-home challenges will inevitably lead to a delay in the APA process.

**China.** The Covid-19 outbreak has also given rise to some geopolitical tension between some countries, which may trickle down to their competent authorities. This could also hamper negotiations and further delay the process.

**Canada.** The members of the Competent Authority Services Division of the CRA, which handles MAP and APA requests, is deemed non-essential so they are working from home at the moment. They also face significant restrictions on their ability to access CRA resources (including email, IT networks, and files) so processes are expected to move more slowly. Priority will be given to files that are approaching key domestic or treaty based deadlines.

**Europe.** We expect that Covid-19 will result in longer processing times for APAs as the tax authorities are also facing challenges and restrictions in their everyday work, i.e., by working remotely. Therefore, it is more difficult for the tax authorities to coordinate internally as well as with the competent authority(ies) of

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<sup>1</sup> For taxpayers qualifying as small to medium companies in the meaning of the legislative regulations on transfer pricing documentation, the fees are limited to 10,000 euro, 7,500 euro and 5,000 euro, respectively.



other countries in the case of bilateral and multilateral APAs. Some EMEA countries, besides adopting other measures related to the deferral of taxes, also have put all tax-related administrative procedures on hold. In this regard, such countries have enacted measures on the suspension of tax audit procedures due to the current situation. This includes not only putting a freeze on previous procedures, but also avoiding starting new procedures, including the negotiation of new APAs.

### III. PERTINENT APA EXPERIENCE FROM SIMILAR ECONOMIC EVENTS IN THE PAST

Guidance during this Covid-19 environment can be gleaned from experience with APAs during prior recessions and economic shocks. For instance, as a result of the recession of 2008, APMA agreed to or considered certain adjustments to the APA proposals to address the unique impacts of downturn on an industry or individual company, particularly as compared to the uncontrolled companies used in the APA transfer pricing analysis. In light of this, companies should consider how prior APA experience may guide their analyses with respect to Covid-19 and should consider whether adjustments should be proposed for their APAs.

Based on relevant experience, such adjustments could include, for example:

- Separating the APA term into separate testing periods - i.e., a "normal" period and a "downturn" period, during which certain downward adjustments to the ranges or screening mechanisms for the comparables would be allowed;
- Applying a term test so that the impact of certain non-recurring, extraordinary expenses can be spread out over a longer period of years, rather than resulting in an adjustment to the single

year's results during which the non-recurring expense was incurred;

- Permitting certain extraordinary expenses incurred to respond to the economic environment or system losses to either be borne entirely by the parent company or shared among the relevant entities if appropriate;
- Making adjustments to the comparable sets to account for the economic impacts of the downturn, particularly where the tested party and comparables experience dissimilar impacts and levels of economic demand, thereby compromising the reliability of a particular method. This could include, for instance, (a) using comparables' data from different years, (b) using a regression or other statistical method to make an adjustment based on the economic impact of swings in revenue, (c) modifying the screening criteria either to eliminate companies that did not experience similar economic and financial distress, or, in the alternative, to include companies that would otherwise be removed in the course of a typical analysis due to financial distress, (d) applying a longer testing period to smooth out the non-transfer pricing related results, or (e) expanding the acceptable range of results beyond the interquartile range.

In the United States, the APA statutory reports from 2010 and 2011 are instructive for companies considering the impact of Covid-19 on their APAs. In particular, during 2010 and 2011, the APMA received numerous inquiries about the potential effect on existing and pending APAs of the economic downturn and the major earthquake and tsunami that struck Japan in 2011. The APA Report for 2010, for instance, notes the following:

Whether or not a special "down-economy adjustment" might be appropriate

depends on a variety of factors, including whether or not the tested party and the comparables have been similarly affected by the downturn, the tested party's historic risk profile and performance, and a taxpayer's willingness to accept a symmetrical adjustment (e.g., in a renewal APA) when the economy improves. Approaches to the down economy that have been considered include changing the APA term, waiting for more current financial data, using a different set of comparables, and/or applying a longer testing period.

APMA agreed that certain adjustments may potentially be appropriate to address the impact of the down economy on companies. Given this history, companies should carefully evaluate whether these types of adjustments would be useful in helping the company reach a successful resolution of their APA-related concerns given the impacts of Covid-19 and could be proposed to the treaty partners.

During the fallout of the 2008 recession and subsequent economic shocks, the APMA adopted a general policy not to reopen closed, agreed-to cases in the absence of a critical assumption on point. The U.S. APA statutory report for 2012 disclosed that there were no more than three APAs where a critical assumption was triggered and, in those cases, it related to "catastrophic events." Thus, few APAs were reopened or canceled as a result of a critical assumption being triggered in relation to the economic downturn. This experience, however, may not dictate APMA's current consideration of Covid-19 with respect to closed cases because, as discussed further below, there has been a change in the language in the U.S. APA template which may suggest increased flexibility to reopen cases as a result of material changes in economic conditions.

#### IV. CRITICAL ASSUMPTIONS

Depending on the actual impact of Covid-19 on the industry or individual company, it may provide a company with a basis to assert that a critical assumption in the APA has been triggered. APAs will define in advance the critical assumptions upon which the agreement is based and can include any fact about the company, industry, or general economic conditions. Under the old APA template in place prior to the release of a new model template on May 11, 2018, APMA included the following critical assumption language:

The business activities, functions performed, risks assumed, assets employed, and financial and tax accounting methods and classifications [and methods of estimation] of Taxpayer in relation to the Covered Transactions will remain materially the same as described or used in Taxpayer's APA Request. A mere change in business results will not be a material change.

APMA changed the critical assumption language in the U.S. APA template released on May 11, 2018. In particular, in its May 2018 model template draft, APMA revised the critical assumption language as follows:

The Covered Entities' business activities, functions performed, risks assumed, assets employed, contractual terms, **markets, and economic conditions** **faced** in relation to the Covered Issue(s) will remain materially the same as described in the APA Request. For this purpose, a mere change in business results will not be a material change.

APMA reverted to the earlier version of the critical assumption language in its most recent draft of the APA template, released in

December 2019, which left out the reference to markets and economic conditions.

Nevertheless, the May 2018 APA template language suggests that, at least at one point, APMA agreed that material changes in the market and economic conditions will trigger the critical assumption. This approach is also consistent with the *Organization for Economic Co-Operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (the “TPG”), which recommends that APAs should include flexibility to account for significant and uncontrolled changes in economic circumstances. In particular, paragraph 4.146 of the 2017 TPG states the following:

At the conclusion of an APA process, the tax administrations should provide confirmation to the associated enterprises in their jurisdiction that no transfer pricing adjustment will be made as long as the taxpayer follows the terms of the arrangements. There should also be a provision in an APA (perhaps by reference to a range) that provides for possible revision or cancellation of the arrangement for future years **when business operations change significantly, or when uncontrolled economic circumstances** (e.g. significant changes in currency exchange rates) critically affect the reliability of the methodology in a manner that independent enterprises would consider significant for purposes of their transfer pricing.

**Europe.** In many EMEA countries, the critical assumptions underlying an APA must be clearly specified.

Critical assumptions could be (i) consistent shareholding ratios; (ii) consistent market conditions, market shares, business volumes, sales prices (e.g., no drastic changes due to

new technology); (iii) consistent conditions, e.g., relating to supervisory rights, customs duties, import and export restrictions, international payment transactions; and (iv) consistent exchange rates and interest rates.

All of the above are potentially impacted by Covid-19. Therefore, taxpayers must keep the following in mind: If any one of these conditions is defined as a critical assumption under an APA, a violation or disappearance of this condition could result in the tax authorities having a reason and cause to withdraw from or terminate the APA. Depending on the wording of the APA, the consequence might also be the “automatic” termination of the APA without any tax authority declaration.

However, with regard to bilateral and multilateral APAs, tax authorities may be willing to take up negotiations with the other countries involved in the APA in order to adjust the APA to the altered circumstances. In order to adjust the APA, the taxpayer may be required to enclose necessary documents. Additionally, depending on the jurisdiction, this procedure may only be available to the taxpayer upon request. If the taxpayer does not file such a request or if an adjustment by mutual agreement with the other country is not possible, depending on the wording of the APA, the APA may lose effect as from the date when the critical assumptions are no longer satisfied.

## V. PROCEDURAL UPDATES FROM TAX AUTHORITIES

As a result of changes to APMA’s operations amidst the turmoil created by Covid-19, APMA has issued modified procedures to assist taxpayers filing APA and MAP submissions, including APA requests, APA annual report filings, and extensions. In particular, APMA will accept filings through a one-way, secure portal through which representatives, including Baker McKenzie, can send APA, MAP, and annual

report submissions.<sup>2</sup> Nevertheless, as soon as feasible, APMA still requests that companies send the required number of hard copies, with original signatures (which may be modified), and other required materials set forth in Rev. Proc. 2015-40 (MAPs) and Rev. Proc. 2015-41 (APAs) and will not start reviewing the case before they receive these hard copies. APMA still has procedures in place to receive and process submissions.

Extensions continue to be granted only by the APMA Director and can be requested by an email to Heather Snodgrass (for MAP or APA requests) or Tony Duca (for APA annual reports), copying the team leader, manager, and assistant director (if known). The email should explain the circumstances behind the request and state the length of extension requested.

Importantly, APMA cannot waive treaty notification deadlines. Thus, companies should still provide the U.S. competent authority all information it would need for a request to provide timely notification under a given treaty and for the U.S. competent authority to notify its treaty partner.

**Canada.** The Competent Authority Services Division (“CASD”) is working to identify the best way for it to continue to advance cases, accept new cases, and communicate with taxpayers. While some issues can be handled by phone, providing taxpayers with conditional letters, query sheets, and other formal communications is more challenging since the CRA is not permitted to transfer taxpayer information by email. Voicemail messages

may also be left for the Director or the managers. Taxpayers are advised not to file paper copies at the moment since the mail room is closed and they will not be picked up or reviewed for the time being. It is recommended that taxpayers communicate with the department (at [MAP-APA/PAA-APP.CPB/DGPO@cra-arc.gc.ca](mailto:MAP-APA/PAA-APP.CPB/DGPO@cra-arc.gc.ca)) prior to submitting filings to agree to appropriate protocols (such as using a secure file transfer system to electronically file materials) with the appropriate individuals at CASD.

## VI. CONCLUSION

Covid-19 has led to many extreme situations and the actions being taken around the globe to contain and slow the spread of the virus is unprecedented. The impacts are widespread and reach every country, industry, and person around the globe to one degree or another. For some, the impacts are dire, for others it could be the opposite. Ultimately, few companies will be unaffected. The actions of governments around the globe are similarly unprecedented as they work desperately to mitigate the negative impacts on the global economy and this will certainly be telescoped to, and be understood by, tax authorities. While this does not guarantee any particular outcome, it does suggest that keeping the lines of communication with the relevant tax authorities open and thinking creatively about potential solutions to the challenges presented, is highly advisable.

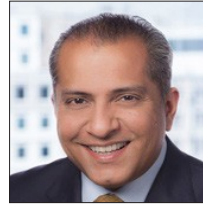
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<sup>2</sup> APMA will also accept submissions by email. For APA and MAP materials submitted by email, APMA requests that such emails be sent directly to Heather Snodgrass at [Heather.L.Snodgrass@irs.gov](mailto:Heather.L.Snodgrass@irs.gov). In addition, rather than sending all the files normally required in the MAP or APA submission, APMA requests that only the following documents be attached as .pdf to the email: (1) the APA request or MAP request letter (with the content required by the applicable revenue procedure); (2) the signed/scanned Form 2848 or other authorization form; (3) the signed/scanned consent to disclosure; and (4) the signed/scanned penalties of perjury statement. While APMA will acknowledge receipt in a separate email and will use the date of the email as the application date, it will not start processing the case until it receives the formal, complete request (within a reasonable amount of time after the email). If filed by email, APMA requests that APA annual report filings be sent to Tony Duca at [Anthony.W.Duca@irs.gov](mailto:Anthony.W.Duca@irs.gov). APMA will likewise acknowledge receipt, but requests that companies submit the full, complete APA annual report (with the number of required copies) as expeditiously as possible.

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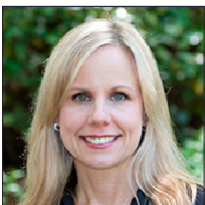
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