

# INTERNAL REVENUE BULLETIN



## HIGHLIGHTS OF THIS ISSUE

**Bulletin No. 2022-15**  
**April 11, 2022**

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

## ADMINISTRATIVE

### **Announcement 2022-7, page 946.**

This Announcement is issued pursuant to § 521(b) of Pub. L. 106-170, the Ticket to Work and Work Incentives Improvement Act of 1999, which requires the Secretary of the Treasury to report annually to the public concerning advance pricing agreements (APAs) and the Advance Pricing and Mutual Agreement Program (APMA Program), formerly known as the Advance Pricing Agreement Program (APA Program). This twenty-third report describes the experience, structure, and activities of the APMA Program during calendar year 2021.

## EMPLOYEE PLANS

### **REG-121508-18, page 996.**

This document sets forth proposed regulations relating to certain multiple employer plans (MEPs) described in

the Internal Revenue Code. The proposed regulations provide an exception, if certain requirements are met, to the application of the “unified plan rule” for MEPs in the event of a failure by one or more employers participating in the plan to take actions required of them to satisfy the applicable requirements of the Code. These proposed regulations would affect certain MEPs, participants in those MEPs (and their beneficiaries), employers participating in those MEPs, and plan administrators of those MEPs. This document also withdraws proposed regulations published in the Federal Register on July 3, 2019, amending the application of the unified plan rule to MEPs and provides a notice of a public hearing.

# The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

## Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

### **Part I.—1986 Code.**

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

### **Part II.—Treaties and Tax Legislation.**

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

### **Part III.—Administrative, Procedural, and Miscellaneous.**

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

### **Part IV.—Items of General Interest.**

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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# Part I

## Announcement and Report Concerning Advance Pricing Agreements

### Announcement 2022-7

#### March 22, 2022

This Announcement is issued pursuant to § 521(b) of Pub. L. 106-170, the Ticket to Work and Work Incentives Improvement Act of 1999, which requires the Secretary of the Treasury to report annually to the public concerning advance pricing agreements (APAs) and the Advance Pricing and Mutual Agreement Program (APMA Program), formerly known as the Advance Pricing Agreement Program (APA Program). The first report covered calendar years 1991 through 1999. Subsequent reports covered each calendar year 2000 through 2020 separately. This twenty-third report describes the experience, structure, and activities of the APMA Program during calendar year 2021. It does not provide guidance regarding the application of the arm's length standard.

Part I of this report includes information on the structure, composition, and operation of the APMA Program; Part II presents statistical data; and Part III includes general descriptions of various elements of the APAs executed in 2021, including types of transactions covered, transfer pricing methods used, and completion time.

Nicole L. Welch  
Acting Director, Advance Pricing and Mutual Agreement Program

**Part I. The APMA Program – Structure, Composition, and Operation**  
**[Pub. L. 106-170 § 521(b)(2)(A)]**

In February 2012, the former APA Program was moved from the Office of Chief Counsel to the Office of Transfer Pricing Operations<sup>1</sup> within the Large Business and International Division of the IRS and combined with the U.S. Competent Authority staff responsible for transfer pricing cases, thereby forming the APMA Program (APMA).

As of December 31, 2021, APMA's APA cases were handled by 80 team leaders, 25 economists, 9 managers, and 3 assistant directors.<sup>2</sup> Each assistant director oversees three managers who lead teams consisting of both team leaders and economists. APMA's main office is in Washington, DC, and it also has offices in northern California (San Francisco and San Jose), southern California (Los Angeles and Laguna Niguel), Chicago, and New York.

On August 31, 2015, a new revenue procedure governing APA applications was published in 2015-35 I.R.B. on page 263. Revenue Procedure (Rev. Proc.) 2015-41 provides guidance, information and instructions on APA requests and the administration of APAs. Rev. Proc. 2015-41 updates and supersedes Rev. Proc. 2006-9, 2006-1 C.B. 278, as modified by Rev. Proc. 2008-31, 2008-1 C.B. 1133, which is also superseded.

Model APAs appear as appendices to this report. Appendix 1 is the model for APAs covered by Rev. Proc. 2006-9. Appendix 2 is the current model APA for APAs covered by Rev. Proc. 2015-41. A list of primary APMA contacts is available at <https://www.irs.gov/businesses/corporations/apma-contacts>.

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<sup>1</sup> In 2017, Transfer Pricing Operations became Treaty & Transfer Pricing Operations ("TTPO").

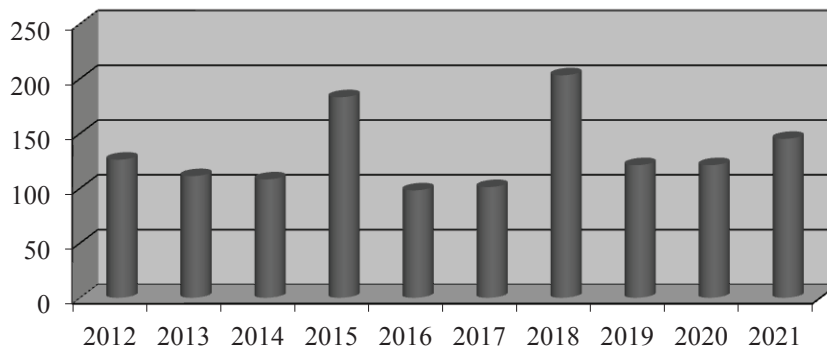
<sup>2</sup> In late 2020, TTPO's Treaty Assistance and Interpretation Team (TAIT) joined APMA, bringing the total number of groups in APMA to four. The three legacy APMA groups have primary responsibility for cases arising under the business profits and associated enterprises articles of U.S. tax treaties. TAIT endeavors to resolve competent authority issues arising under all other articles of U.S. tax treaties including issues arising under U.S. tax treaties relating to estate and gift taxes. As such, TAIT is separate from APMA's APA program, and the total numbers of team leaders and managers handling APA cases do not include TAIT analysts and managers.

**Part II. APMA Program Statistical Data**  
**[Pub. L. 106-170 § 521(b)(2)(C)(i-viii)]**

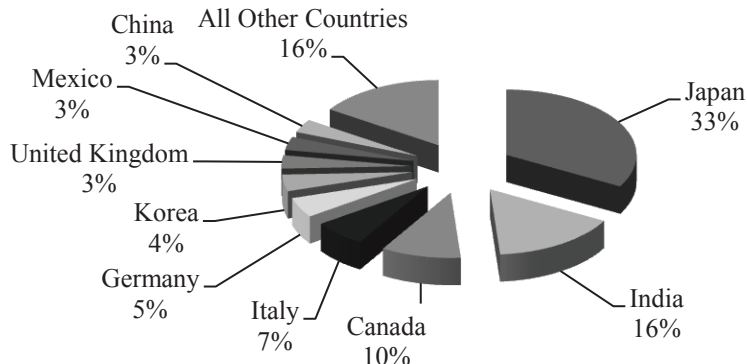
**Table 1: APA Applications Filed § 521(b)(2)(C)(i)**

	Unilateral	Bilateral	Multilateral	Total
Filed 1991-1999 <sup>3</sup>				401
Filed 2000-2020	637	1,724	29	2,390
Filed in 2021	16	121	8	145
<b>Total Filed 1991-2021</b>				<b>2,936</b>

**Applications Filed  
2012-2021**



**Bilateral APAs  
Filed per Country 2021**



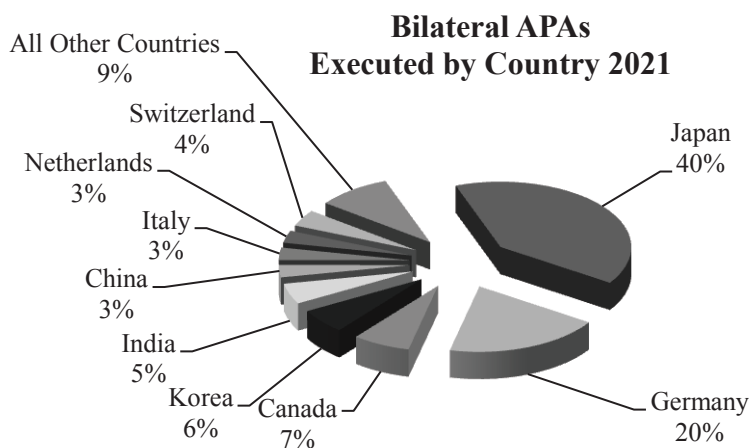
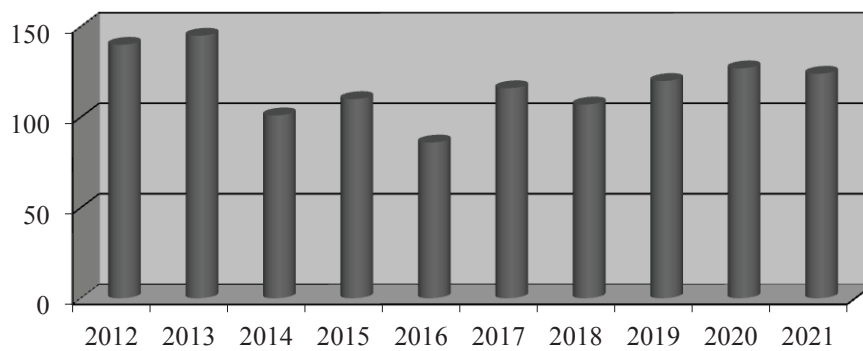
The charts above illustrate the number of complete applications filed per year and the bilateral requests received in 2021 per foreign country. As of December 31, 2021, APMA had also received 29 user fee filings that were not yet accompanied by substantially complete APA applications, in addition to the 145 complete APA applications.

<sup>3</sup>The first APA Statutory Report, which compiled APA data from 1991-1999, did not report the cumulative number of applications for those years by submission type, so the cumulative totals cannot be reported in that manner.

**Table 2: Executed<sup>4</sup> and Pending APAs  
§ 521(b)(2)(C)(ii-vi)**

	Unilateral	Bilateral	Multilateral	Total
Total Executed 1991-2020	662	1,385	20	2,067
Total Executed in 2021	25	98	1	124
<b>Total Executed 1991-2021</b>	<b>687</b>	<b>1,483</b>	<b>21</b>	<b>2,191</b>
<b>Total Pending as of 12/31/2021</b>	<b>39</b>	<b>395</b>	<b>27</b>	<b>461</b>
<i>Renewals Executed in 2021<sup>5</sup></i>	<i>19</i>	<i>59</i>	<i>0</i>	<i>78</i>
<i>Renewals Pending<sup>6</sup> as of 12/31/2021</i>	<i>26</i>	<i>147</i>	<i>12</i>	<i>185</i>

**APAs Executed  
2012-2021**



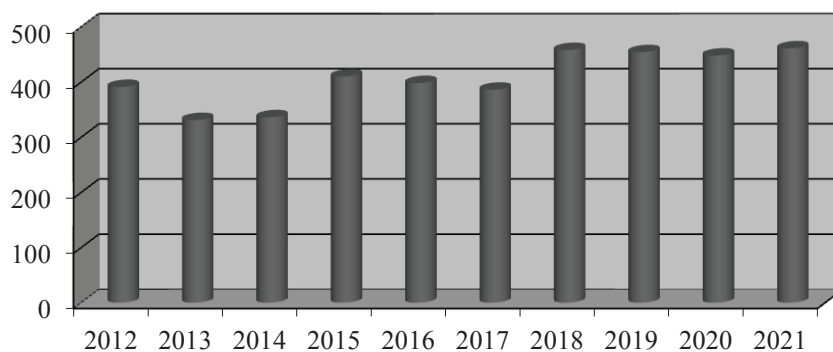
In 2021, the percentage of renewals executed increased (63 percent of all APAs executed in 2021 versus 59 percent in 2020). The charts above illustrate trends in the number of APAs executed per year and the countries involved in the bilateral APAs that were executed in 2021.

<sup>4</sup>Executed APAs refers to all APAs finalized or renewed.

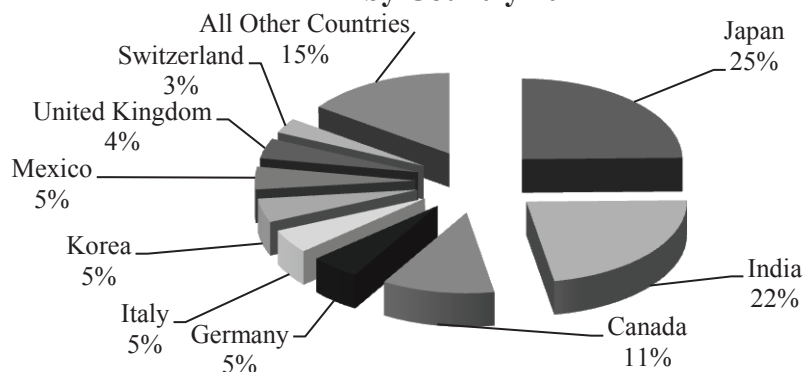
<sup>5</sup>The number of renewals executed is included in the total number of APAs executed during the year.

<sup>6</sup>The number of renewals still pending as of year-end is also included in the total number of pending APAs.

### Pending APAs 2012-2021



### Pending Bilateral APAs by Country 2021



As the top chart illustrates, the number of pending requests increased slightly relative to December 31, 2020. As of December 31, 2021, almost half of the pending bilateral APA requests involved either Japan or India.

**Table 3: APAs Revoked or Cancelled and Applications Withdrawn  
§ 521(b)(2)(C)(vii)**

	Unilateral	Bilateral	Multilateral	Total
Revoked or Cancelled in 2021	0	0	0	0
<b>Total Revoked or Cancelled 1991-2021<sup>7</sup></b>				<b>11</b>
Applications Withdrawn in 2021	1	4	1	6
<b>Total Applications Withdrawn 1991-2021<sup>8</sup></b>				<b>279</b>

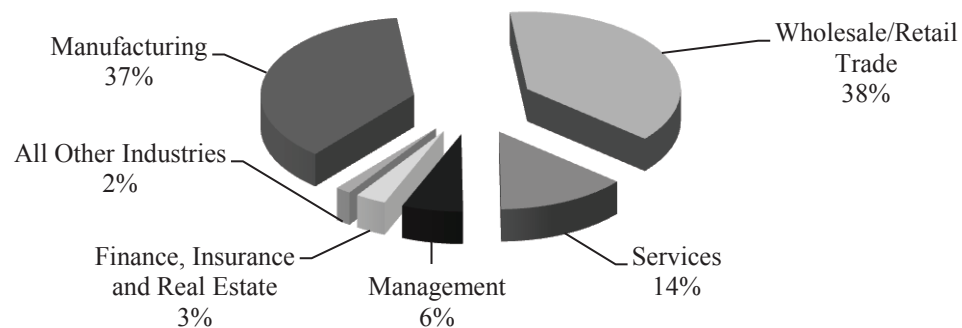
<sup>7</sup>The first APA Statutory Report, which compiled APA data from 1991-1999, did not report the cumulative number of applications for those years by submission type, so the cumulative totals cannot be reported in that manner.

<sup>8</sup>See *supra* note 7.

**Table 4: APAs Executed in 2021 by Industry**  
**§ 521(b)(2)(C)(viii)**

Industry	
Manufacturing	46
Wholesale/Retail Trade	47
Services	17
Management	8
Finance, Insurance, and Real Estate	4
All Other Industries	2

**APAs Executed  
in 2021 by Industry**



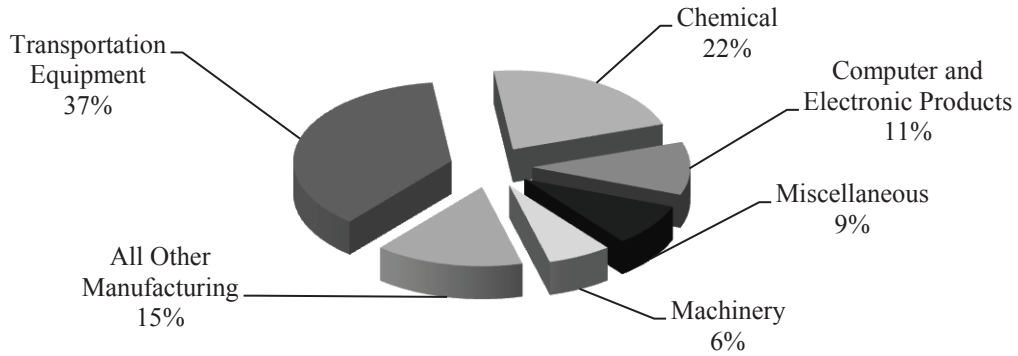
**Table 4a: Manufacturing APAs Executed in 2021**

Type of Manufacturing	
Transportation Equipment	17
Chemical	10
Computer and Electronic Products	5
Miscellaneous <sup>9</sup>	4
Machinery	3
All Other Manufacturing	7

<sup>9</sup>Industries in the Miscellaneous Manufacturing subsector (NAICS Code 339) make a wide range of products that cannot readily be classified in specific NAICS manufacturing subsectors.



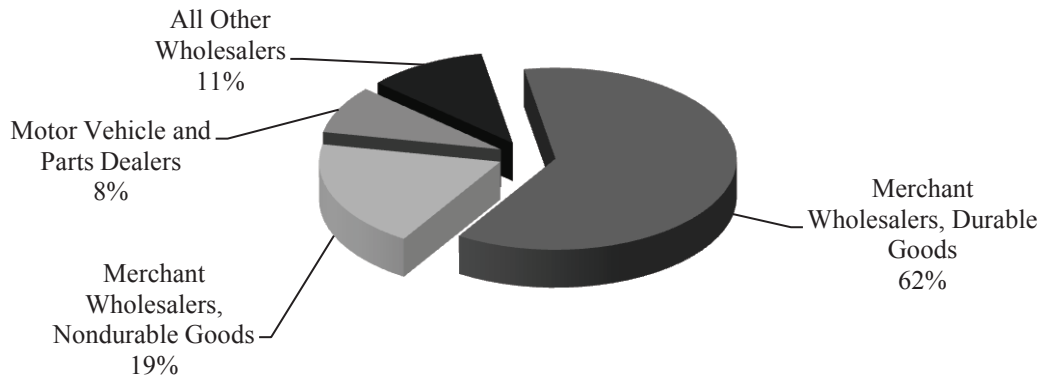
**Type of Manufacturing APAs  
Executed in 2021**



**Table 4b: Wholesale/Retail Trade APAs Executed in 2021**

Type of Wholesale/Retail Trade	
Merchant Wholesalers, Durable Goods	29
Merchant Wholesalers, Nondurable Goods	9
Motor Vehicle and Parts Dealers	4
All Other Wholesalers	5

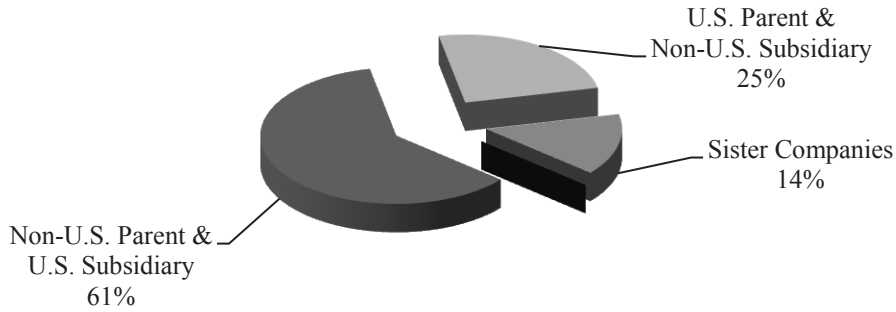
**Type of Wholesale/Retail Trade APAs  
Executed in 2021**



**Part III. General Descriptions of APAs Executed in 2021**  
**[Pub. L. 106-170 § 521(b)(2)(D) and (E)]**

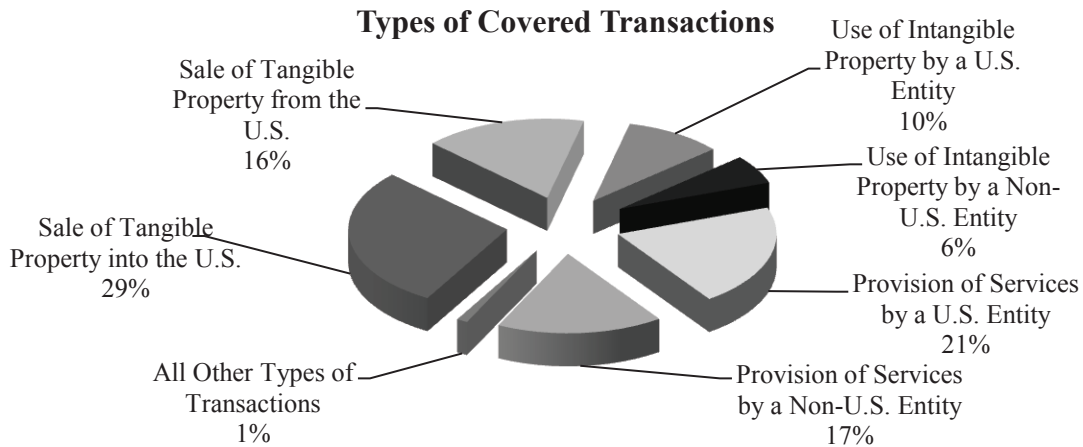
**Nature of the Relationships**  
**§ 521(b)(2)(D)(i)**

**Relationships between Controlled Parties**



As in prior years, more than half of the APAs executed in 2021 involved transactions between non-U.S. parents and U.S. subsidiaries.

**Covered Transactions, Functions and Risks, and Tested Parties**  
**§ 521(b)(2)(D)(ii-iii)**

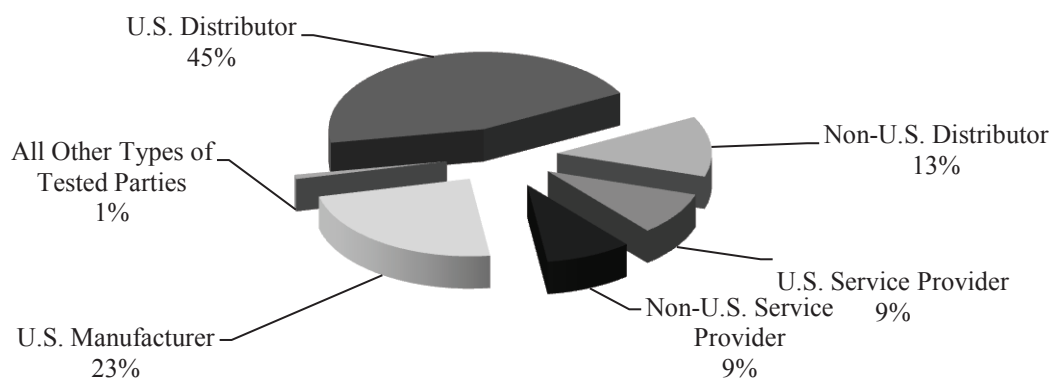


Most of the transactions<sup>10</sup> covered in APAs executed in 2021 involve the sale of tangible goods or the provision of services. Fifteen percent of the transactions involve the use of intangible property, which can be among the most challenging transactions in APMA’s inventory.

In the majority of APAs, the covered transactions involve numerous business functions and risks. For instance, with respect to functions, APAs involving manufactured products typically involve a controlled group that conducts research and development (R&D), engages in product design and engineering, manufactures the product, markets and distributes the product, and performs support functions such as legal, finance, and human resources. Regarding risks, the controlled group may assume a variety of risks, including market risks, R&D risks, financial risks, credit and collection risks, product liability risks, and general business risks. In the APA evaluation process, a significant amount of time and effort is devoted to understanding how the functions and risks are allocated among the controlled group of companies that are party to the covered transactions. For methods requiring the selection of a tested party, the tested party chosen generally will be the least complex of the controlled taxpayers.

<sup>10</sup> APAs often cover more than one type of transaction.

## Types of Tested Parties



Consistent with prior years, a majority of tested parties<sup>11</sup> in 2021 were U.S. distributors, U.S. manufacturers, or U.S. service providers.

### Transfer Pricing Methods Used § 521(b)(2)(D)(iv)

In 2021, the most commonly used transfer pricing method (TPM) for both the sale of tangible property and the use of intangible property continued to be the comparable profits method/transactional net margin method (CPM/TNMM). The CPM/TNMM was used for 85 percent of these types of transactions.

For covered transactions involving tangible and intangible property that used the CPM/TNMM, the operating margin (OM) is still the most common profit level indicator (PLI) used to benchmark results. It was used 65 percent of the time. Other PLIs, such as the Berry Ratio and return on total cost, made up the other 35 percent. As used here, “OM” is defined as the ratio of operating profit to sales,<sup>12</sup> and “Berry Ratio” is defined as the ratio of gross profit to operating expenses.<sup>13</sup> Most services transactions (90 percent) also used the CPM/TNMM with the OM and operating profit to operating expense being the most common PLIs (used 56 percent of the time).<sup>14</sup>

### Sources of Comparables, Comparables Selection Criteria, and Nature of Adjustments to Comparables or Tested Party Data § 521(b)(2)(D)(v-vii)

For the APAs executed in 2021 that involved the CPM/TNMM with a North American tested party, the most widely used data source for comparables was Standard and Poor’s Compustat/Capital IQ database. Different sources were used in other cases (e.g., where the tested party was not a U.S. or Canadian entity or where transaction-based methods were applied). The other most commonly used databases are listed in the table below.

**Table 5: Sources of Comparable Data**

Bureau van Dijk (BvD)	Prowess
Global Vantage	RoyaltySource
ktMINE	RoyaltyStat
Orbis	

In making comparability adjustments, typical balance sheet adjustments, as identified in Treas. Reg. §§ 1.482-1(d)(2) and 1.482-5(c)(2)(iv), were made in most cases, including where appropriate, adjustments for payables, receivables, and inventory. In addition, where appropriate, adjustments for different accounting practices were made to convert from LIFO to FIFO inventory accounting, and a small number of cases involved the accounting reclassification of expenses, e.g., from COGS to operating expenses.

<sup>11</sup> Not all the executed APAs involve a tested party.

<sup>12</sup> See Treas. Reg. § 1.482-5(b)(4)(ii)(A).

<sup>13</sup> See Treas. Reg. § 1.482-5(b)(4)(ii)(B).

<sup>14</sup> The majority of APAs that covered services transactions also included tangible/intangible transactions and are not tested under a separate PLI.

**Ranges, Goals, and Adjustment Mechanisms**  
**§ 521(b)(2)(D)(viii-ix)**

Most transactions covered in APAs target an interquartile range as described in Treas. Reg. § 1.482-1(e)(2)(iii)(C). Where the transaction involves a royalty payment for the use of intangible property, both specific royalty rates and ranges have been used. Where the covered transaction is the sale or license of intangible property, and the payment for such transfer would be a royalty based solely on external comparable uncontrolled transactions, a secondary or confirming method, e.g., a test of the post-royalty operating margin or cost-plus mark-up, has sometimes also been used. The testing periods of the APAs executed in 2021 were either a single year, the term of the APA only, or the term of the APA plus rollback years.

APAs executed in 2021 included several mechanisms for making adjustments to the tested party results when the results fall outside the interquartile range or do not match the point required by the APA. Examples of the mechanisms used include an adjustment bringing the tested party's results for a single year to either the closer edge of the range or the median of the range, an adjustment to bring the results over the APA term to the closer edge of the range, or an adjustment to bring the results to a specified point or royalty rate.

**Critical Assumptions**  
**§ 521(b)(2)(D)(v)**

The model APAs used by the IRS (included as Appendix 1 and Appendix 2 of this report) include standard critical assumptions that there will be no material changes to the taxpayer's business or to its tax or financial accounting practices during the APA term. A few bilateral cases have also included critical assumptions tied to the taxpayer's profitability in a certain year or over the term of the APA. Pursuant to § 7.06(3) of Rev. Proc. 2015-41, APMA will cancel an APA in the event of a failure of a critical assumption unless the parties agree to revise the APA.

**Term Lengths of APAs Executed in 2021**  
**§ 521(b)(2)(D)(x)**

**Table 6: Term Lengths of APAs Executed in 2021**

Term Length (years)	Number of APAs
1	2
2	1
3	2
4	6
5	73
6	19
7	6
8	5
9	3
10	4
12	2
15	1
Average	6

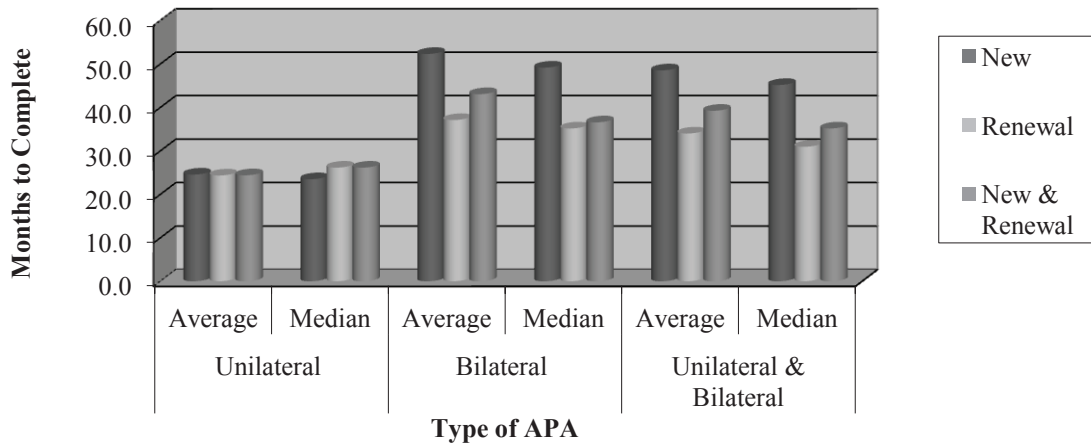
As described in § 3.03(1) of Rev. Proc. 2015-41, taxpayers should request an APA term that would cover at least five prospective years and may also request that the APA be "rolled back" to cover one or more earlier taxable years, although the appropriate APA term is decided on a case-by-case basis. Of the APAs executed in 2021, 22 percent included rollback years. A substantial number of those APAs with terms of greater than five years were submitted as a request for a five-year term, and the additional years were agreed to between the taxpayer and the IRS (or, in the case of a bilateral APA, between the IRS and the foreign government upon the taxpayer's request) to ensure a reasonable amount of prospectivity in the APA term.

**Amount of Time Taken to Complete New and Renewal APAs**  
**§ 521(b)(2)(E)**

**Table 7: Months to Complete New and Renewal APAs Executed in 2021**

	Unilateral		Bilateral		Unilateral & Bilateral	
	Average	Median	Average	Median	Average	Median
New	24.5	23.5	52.3	49.2	<b>48.5</b>	<b>45.2</b>
Renewal	24.3	26.1	37.1	35.1	<b>34.0</b>	<b>30.9</b>
<b>New &amp; Renewal</b>	<b>24.4</b>	<b>26.1</b>	<b>43.0</b>	<b>36.6</b>	<b>39.2</b>	<b>35.1</b>

**Months to Complete New and Renewal APAs Executed in 2021**



Although the median time required to complete an APA increased in 2021 to 35.1 months (versus 32.7 months in 2020), it remains lower than the median completion times in 2019 (38.8 months) and in 2018 (40.2 months).

**Efforts to Ensure Compliance with APAs**  
**§ 521(b)(2)(F)**

As described in § 7.02(1) of Rev. Proc. 2015-41, taxpayers are required to file annual reports to demonstrate compliance with the terms and conditions of their APAs. The filing and review of these annual reports are critical parts of the APA process. Through annual report review, the APMA Program monitors taxpayer compliance with APAs on a contemporaneous basis. Annual report review also provides current information on the success or problems associated with the various TPMs adopted in the APA process.

**Nature of Documentation Required in Annual Report**  
**§ 521(b)(2)(D)(xi)**

APAs require taxpayers to file timely and complete annual reports describing their operations and demonstrating compliance with the APA's terms and conditions. Not every annual report will include each of the items listed in the following table; they are required where the facts demonstrate a need for such documentation.

1.	Statement regarding all material differences between Taxpayer's business operations during APA year and description of Taxpayer's business operations contained in Taxpayer's APA request. If there are no material differences, a statement to that effect.
2.	Statement concerning all material changes in Taxpayer's accounting methods and classifications, and methods of estimation, from those described or used in Taxpayer's request for the APA. If there has been no material change in accounting methods and classifications or methods of estimation, a statement to that effect.
3.	Any change to the Taxpayer notice information.
4.	Description of any failure to meet critical assumptions. If there has been none, a statement to that effect.
5.	Statement identifying whether any material information submitted while the APA request was pending is discovered to be false, incorrect, or incomplete.
6.	The amount, reason for, and financial analysis of any compensating adjustment, for the APA year, including but not limited to the amounts paid or received by each affected entity; the character (such as capital or ordinary expense) and country source of the funds transferred, and the specific line item(s) of any affected U.S. tax return; and any change to any entity classification for federal income tax purposes of any member of Taxpayer's group that is relevant to the APA.
7.	The amounts, description, reason for, and financial analysis of any book-tax difference relevant to the TPM for the APA year, as reflected on Schedule M-1 or Schedule M-3 of the U.S. return for the APA year.
8.	Statement regarding whether Taxpayer contemplates requesting, or has requested, to renew, modify, or cancel the APA.
9.	Financial statements and any necessary account detail to show compliance with the TPM, with a copy of the opinion from an independent certified public accountant or other documentation required by paragraph 5(f) of the APA.
10.	Financial analysis demonstrating Taxpayer's compliance with TPM.
11.	Organizational chart.
12.	A copy of the APA and any amendment.
13.	A penalty of perjury statement.

**Approaches for Sharing of Currency or Other Risks**  
**§ 521(b)(2)(D)(xii)**

In appropriate cases, APAs may provide specific approaches for dealing with risks, including currency risk, such as adjustment mechanisms and/or critical assumptions.

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**ADVANCE PRICING AGREEMENT**  
**between**  
*[Insert Taxpayer’s Name]*  
**and**  
**THE INTERNAL REVENUE SERVICE**

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**PARTIES**

The Parties to this Advance Pricing Agreement (APA) are the Internal Revenue Service (IRS) and *[Insert Taxpayer’s Name]*, EIN \_\_\_\_\_.

**RECITALS**

*[Insert Taxpayer Name]* is the common parent of an affiliated group filing consolidated U.S. tax returns (collectively referred to as “Taxpayer”) and is entering into this APA on behalf of itself and other members of its consolidated group.

Taxpayer’s principal place of business is *[City, State]*. *[Insert general description of taxpayer and other relevant parties]*.

This APA contains the Parties’ agreement on the best method for determining arm’s-length prices of the Covered Transactions under I.R.C. section 482, the Treasury Regulations thereunder, and any applicable tax treaties.

*{If renewal, add}* [Taxpayer and IRS previously entered into an APA covering taxable years ending \_\_\_\_\_ to \_\_\_\_\_, executed on \_\_\_\_\_.]

**AGREEMENT**

The Parties agree as follows:

1. *Covered Transactions.* This APA applies to the Covered Transactions, as defined in Appendix A.
2. *Transfer Pricing Method.* Appendix A sets forth the Transfer Pricing Method (TPM) for the Covered Transactions.
3. *Term.* This APA applies to the APA Term, as defined in Appendix A.
4. *Operation.*
  - a. Revenue Procedure 2006-9 governs the interpretation, legal effect, and administration of this APA.
  - b. Nonfactual oral and written representations, within the meaning of sections 10.04 and 10.05 of Revenue Procedure 2006-9 (including any proposals to use particular TPMs), made in conjunction with the APA Request constitute statements made in compromise negotiations within the meaning of Rule 408 of the Federal Rules of Evidence.
5. *Compliance.*
  - a. Taxpayer must report its taxable income in an amount that is consistent with Appendix A and all other requirements of this APA on its timely filed U.S. Return. However, if Taxpayer’s timely filed U.S. Return for any taxable year covered by this APA (APA Year) is filed prior to, or no later than 60 days after, the effective date of this APA, then Taxpayer must report its taxable income for that APA Year in an amount that is consistent with Appendix A and all other requirements of this APA either on the original U.S. Return or on an amended U.S. Return filed no later than 120 days after the effective date of this APA, or through such other means as may be specified herein.

- b. *{Use or edit the following when U.S. Group or Foreign Group contains more than one member.}* [This APA addresses the arm’s-length nature of prices charged or received in the aggregate between Taxpayer and Foreign Participants with respect to the Covered Transactions. Except as explicitly provided, this APA does not address and does not bind the IRS with respect to prices charged or received, or the relative amounts of income or loss realized, by particular legal entities that are members of U.S. Group or that are members of Foreign Group.]
- c. For each APA Year, if Taxpayer complies with the terms and conditions of this APA, then the IRS will not make or propose any allocation or adjustment under I.R.C. section 482 to the amounts charged in the aggregate between Taxpayer and Foreign Participant[s] with respect to the Covered Transactions.
- d. If Taxpayer does not comply with the terms and conditions of this APA, then the IRS may:
- i. enforce the terms and conditions of this APA and make or propose allocations or adjustments under I.R.C. section 482 consistent with this APA;
  - ii. cancel or revoke this APA under section 11.06 of Revenue Procedure 2006-9; or
  - iii. revise this APA, if the Parties agree.
- e. Taxpayer must timely file an Annual Report (an original and four copies) for each APA Year in accordance with Appendix C and section 11.01 of Revenue Procedure 2006-9. Taxpayer must file the Annual Report for all APA Years through the APA Year ending [insert year] by [insert date]. Taxpayer must file the Annual Report for each subsequent APA Year by [insert month and day] immediately following the close of that APA Year. (If any date falls on a weekend or holiday, the Annual Report shall be due on the next date that is not a weekend or holiday.) The IRS may request additional information reasonably necessary to clarify or complete the Annual Report. Taxpayer will provide such requested information within 30 days. Additional time may be allowed for good cause.
- f. The IRS will determine whether Taxpayer has complied with this APA based on Taxpayer’s U.S. Returns, the Financial Statements, and other APA Records, for the APA Term and any other year necessary to verify compliance. For Taxpayer to comply with this APA, *{use the following or an alternative}* an independent certified public accountant must render an opinion that Taxpayer’s Financial Statements present fairly, in all material respects, Taxpayer’s financial position under U.S. GAAP.
- g. In accordance with section 11.04 of Revenue Procedure 2006-9, Taxpayer will (1) maintain the APA Records, and (2) make them available to the IRS in connection with an examination under section 11.03. Compliance with this subparagraph constitutes compliance with the record-maintenance provisions of I.R.C. sections 6038A and 6038C for the Covered Transactions for any taxable year during the APA Term.
- h. The True Taxable Income within the meaning of Treasury Regulations sections 1.482-1(a)(1) and (i)(9) of a member of an affiliated group filing a U.S. consolidated return will be determined under the I.R.C. section 1502 Treasury Regulations.
- i. *{Optional for US Parent Signatories}* To the extent that Taxpayer’s compliance with this APA depends on certain acts of Foreign Group members, Taxpayer will ensure that each Foreign Group member will perform such acts.
6. *Critical Assumptions.* This APA’s critical assumptions, within the meaning of Revenue Procedure 2006-9, section 4.05, appear in Appendix B. If any critical assumption has not been met, then Revenue Procedure 2006-9, section 11.06, governs.
7. *Disclosure.* This APA, and any background information related to this APA or the APA Request, are: (1) considered “return information” under I.R.C. section 6103(b)(2)(C); and (2) not subject to public inspection as a “written determination” under I.R.C. section 6110(b)(1). Section 521(b) of Pub. L. 106-170 provides that the Secretary of the Treasury must prepare a report for public disclosure that includes certain specifically designated information concerning all APAs, including this APA, in a form that does not reveal taxpayers’ identities, trade secrets, and proprietary or confidential business or financial information.
8. *Disputes.* If a dispute arises concerning the interpretation of this APA, the Parties will seek a resolution by the Director of the Advance Pricing and Mutual Agreement Program, to the extent reasonably practicable, before seeking alternative remedies.



9. *Materiality.* In this APA the terms “material” and “materially” will be interpreted consistently with the definition of “material facts” in Revenue Procedure 2006-9, section 11.06(4).
10. *Section Captions.* This APA’s section captions, which appear in *italics*, are for convenience and reference only. The captions do not affect in any way the interpretation or application of this APA.
11. *Terms and Definitions.* Unless otherwise specified, terms in the plural include the singular and vice versa. Appendix D contains definitions for capitalized terms not elsewhere defined in this APA.
12. *Entire Agreement and Severability.* This APA is the complete statement of the Parties’ agreement. The Parties will sever, delete, or reform any invalid or unenforceable provision in this APA to approximate the Parties’ intent as nearly as possible.
13. *Successor in Interest.* This APA binds, and inures to the benefit of, any successor in interest to Taxpayer.
14. *Notice.* Any notices required by this APA or Revenue Procedure 2006-9 must be in writing. Taxpayer will send notices to the IRS at the address and in the manner set forth in Revenue Procedure 2006-9, section 4.11. The IRS will send notices to:

Taxpayer Corporation  
 Attn: Jane Doe, Sr. Vice President (Taxes)  
 1000 Any Road  
 Any City, USA 10000  
 (phone: \_\_\_\_\_)

15. *Effective Date and Counterparts.* This APA is effective starting on the date, or later date of the dates, upon which all Parties execute this APA. The Parties may execute this APA in counterparts, with each counterpart constituting an original.

**WITNESS,**

The Parties have executed this APA on the dates below.

**[Taxpayer Name in all caps]**

By: \_\_\_\_\_  
 Jane Doe  
 Sr. Vice President (Taxes)

Date: \_\_\_\_\_, 201\_\_

**IRS**

By: \_\_\_\_\_  
 Nicole L. Welch  
 Acting Director, Advance Pricing and Mutual  
 Agreement Program

Date: \_\_\_\_\_, 201\_\_

## APPENDIX A

### COVERED TRANSACTIONS AND TRANSFER PRICING METHOD (TPM)

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**1. Covered Transactions.**

[Define the Covered Transactions.]

**2. APA Term.**

This APA applies to Taxpayer's taxable years ending \_\_\_\_\_ through \_\_\_\_\_ (APA Term).

**3. TPM.**

{Note: If appropriate, adapt language from the following examples.}

[The Tested Party is \_\_\_\_\_.]

• **CUP Method**

The TPM is the comparable uncontrolled price (CUP) method. The Arm's Length Range of the price charged for \_\_\_\_\_ is between \_\_\_\_\_ and \_\_\_\_\_ per unit.

• **CUT Method**

The TPM is the CUT Method. The Arm's Length Range of the royalty charged for the license of \_\_\_\_\_ is between \_\_\_\_\_% and \_\_\_\_\_% of [Taxpayer's, Foreign Participants', or other specified party's] Net Sales Revenue. [Insert definition of net sales revenue or other royalty base.]

• **Resale Price Method (RPM)**

The TPM is the resale price method (RPM). The Tested Party's Gross Margin for any APA Year is defined as follows: the Tested Party's gross profit divided by its sales revenue (as those terms are defined in Treasury Regulations sections 1.482-5(d)(1) and (2)) for that APA Year. The Arm's Length Range is between \_\_\_\_\_% and \_\_\_\_\_%, and the Median of the Arm's Length Range is \_\_\_\_\_%.

• **Cost Plus Method**

The TPM is the cost plus method. The Tested Party's Cost Plus Markup is defined as follows for any APA Year: the Tested Party's ratio of gross profit to production costs (as those terms are defined in Treasury Regulations sections 1.482-3(d)(1) and (2)) for that APA Year. The Arm's Length Range is between \_\_\_\_\_% and \_\_\_\_\_%, and the Median of the Arm's Length Range is \_\_\_\_\_%.

• **CPM with Berry Ratio PLI**

The TPM is the comparable profits method (CPM). The profit level indicator is a Berry Ratio. The Tested Party's Berry Ratio is defined as follows for any APA Year: the Tested Party's gross profit divided by its operating expenses (as those terms are defined in Treasury Regulations sections 1.482-5(d)(2) and (3)) for that APA Year. The Arm's Length Range is between \_\_\_\_\_ and \_\_\_\_\_, and the Median of the Arm's Length Range is \_\_\_\_\_.

• **CPM using an Operating Margin PLI**

The TPM is the comparable profits method (CPM). The profit level indicator is an operating margin. The Tested Party's Operating Margin is defined as follows for any APA Year: the Tested Party's operating profit divided by its sales revenue (as those terms are defined in Treasury Regulations section 1.482-5(d)(1) and (4)) for that APA Year. The Arm's Length Range is between \_\_\_\_\_% and \_\_\_\_\_%, and the Median of the Arm's Length Range is \_\_\_\_\_%.

• **CPM using a Three-year Rolling Average Operating Margin PLI**

The TPM is the comparable profits method (CPM). The profit level indicator is an operating margin. The Tested Party's Three-Year Rolling Average operating margin is defined as follows for any APA Year: the sum of the Tested Party's operating profit (within the meaning of Treasury Regulation section 1.482-5(d)(4) for that APA Year and the two preceding years, divided by the sum of its sales revenue (within the meaning of Treasury Regulation section 1.482-5(d)(1)) for that APA Year and the two preceding years. The Arm's Length Range is between \_\_\_\_% and \_\_\_\_%, and the Median of the Arm's Length Range is \_\_\_\_%.

• **Residual Profit Split Method**

The TPM is the residual profit split method. *[Insert description of routine profit level determinations and residual profit-split mechanism].*

*[Insert additional provisions as needed.]*

**4. Application of TPM.**

For any APA Year, if the results of Taxpayer's actual transactions produce a [price per unit, royalty rate for the Covered Transactions] [or] [Gross Margin, Cost Plus Markup, Berry Ratio, Operating Margin, Three-Year Rolling Average Operating Margin for the Tested Party] within the Arm's Length Range, then the amounts reported on Taxpayer's U.S. Return must clearly reflect such results.

For any APA year, if the results of Taxpayer's actual transactions produce a [price per unit, royalty rate] [or] [Gross Margin, Cost Plus Markup, Berry Ratio, Operating Margin, Three-Year Rolling Average Operating Margin for the Tested Party] outside the Arm's Length Range, then amounts reported on Taxpayer's U.S. Return must clearly reflect an adjustment that brings the [price per unit, royalty rate] [or] [Tested Party's Gross Margin, Cost Plus Markup, Berry Ratio, Operating Margin, Three-Year Rolling Average Operating Margin] to the Median.

For purposes of this Appendix A, the "results of Taxpayer's actual transactions" means the results reflected in Taxpayer's and Tested Party's books and records as computed under U.S. GAAP *[insert another relevant accounting standard if applicable]*, with the following adjustments:

- (a) [The fair value of stock-based compensation as disclosed in the Tested Party's audited financial statements shall be treated as an operating expense]; and
- (b) To the extent that the results in any prior APA Year are relevant (for example, to compute a multi-year average), such results shall be adjusted to reflect the amount of any adjustment made for that prior APA Year under this Appendix A.

**5. APA Revenue Procedure Treatment**

If Taxpayer makes an adjustment under paragraph 4 of this Appendix A (a "primary adjustment"), Taxpayer and its related foreign entity may elect APA Revenue Procedure Treatment in accordance with section 11.02(3) of Revenue Procedure 2006-9 and avoid the possible adverse tax consequences of a secondary adjustment that would otherwise follow the primary adjustment.

*[Insert additional provisions as needed.]*

**APPENDIX B**  
**CRITICAL ASSUMPTIONS**

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This APA's critical assumptions are:

1. 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.

*[Insert additional provisions as needed.]*

## APPENDIX C

### APA RECORDS AND ANNUAL REPORT

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#### APA RECORDS

The APA Records will consist of all documents listed below for inclusion in the Annual Report, as well as all documents, notes, work papers, records, or other writings that support the information provided in such documents.

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#### ANNUAL REPORT

The Annual Report (and each of the four copies required by paragraph 5(e) of this APA) will include:

1. Two copies of a properly completed APA Annual Report Summary in the form of Appendix E to this APA, one copy of the form bound with, and one copy provided separately from, the rest of the Annual Report.
2. A table of contents, organized as follows:
3. Statements that fully identify, describe, analyze, and explain:
  - a. All material differences between the U.S. Group's business operations (including functions, risks assumed, markets, contractual terms, economic conditions, property, services, and assets employed) during the APA Year from the business operations described in the APA Request. If there have been no material differences, the Annual Report will include a statement to that effect.
  - b. All material differences between the U.S. Group's accounting methods and classifications, and methods of estimation used during the APA Year, from those described or used in the APA Request. If any change was made to conform to changes in U.S. GAAP (or other relevant accounting standards) Taxpayer will specifically identify the change. If there has been no material change in accounting methods and classifications or methods of estimation, the Annual Report will include a statement to that effect.
  - c. Any change to the Taxpayer notice information in paragraph 14 of this APA.
  - d. Any failure to meet any critical assumption. If there has been no failure, the Annual Report will include a statement to that effect.
  - e. Whether or not material information submitted while the APA Request was pending is discovered to be false, incorrect, or incomplete.
  - f. Any change to any entity classification for federal income tax purposes (including any change that causes an entity to be disregarded for federal income tax purposes) of any Worldwide Group member that is a party to the Covered Transactions or is otherwise relevant to the TPM.
  - g. The amount, reason for, and financial analysis of (1) any primary adjustments made under Appendix A for the APA Year; and (2) any (a) secondary adjustments that follow such primary adjustments or (b) accounts receivable that Taxpayer establishes, in lieu of secondary adjustments, by electing APA Revenue Procedure Treatment pursuant to paragraph 5 of Appendix A and Revenue Procedure 2006-9, section 11.02(3), for the APA Year, including but not limited to:
    - i. the amounts due or owed, and paid or received by each affected entity;
    - ii. the character (such as capital, ordinary, income, expense) and country source of the funds transferred, and the specific affected line item(s) of any affected U.S. Return;

- iii. the date(s) and means by which the payments are or will be made; and
  - iv. whether or not APA Revenue Procedure Treatment was elected pursuant to paragraph 5 of Appendix A and Revenue Procedure 2006-9, section 11.02(3).
- h. The amounts, description, reason for, and financial analysis of any book-tax difference relevant to the TPM for the APA Year, as reflected on Schedule M-1 or Schedule M-3 of the U.S. Return for the APA Year.
- i. Whether Taxpayer contemplates requesting, or has requested, to renew, modify, or cancel the APA.
4. The Financial Statements, and any necessary account detail to show compliance with the TPM, including consolidating financial statements, segmented financial data, records from the general ledger, or similar information if the assets, liabilities, income, or expenses relevant to showing compliance with the TPM are a subset of the assets, liabilities, income, or expenses presented in the Financial Statements.
5. *{Use the following or the alternative prescribed by paragraph 5(f) of this APA:}* A copy of the independent certified public accountant's opinion required by paragraph 5(f) of this APA.
6. A financial analysis that reflects Taxpayer's TPM calculations for the APA Year. The calculations must reconcile with and reference the information required under item 4 above in sufficient account detail to allow the IRS to determine whether Taxpayer has complied with the TPM.
7. An organizational chart for the Worldwide Group, revised annually to reflect all ownership or structural changes of entities that are parties to the Covered Transactions or are otherwise relevant to the TPM.
8. A copy of the APA and any amendment.
9. A penalty of perjury statement, executed in accordance with Revenue Procedure 2006-9, section 11.01(6) and (7).

## APPENDIX D

### DEFINITIONS

The following definitions control for all purposes of this APA. The definitions appear alphabetically below:

<b>Term</b>	<b>Definition</b>
Annual Report	A report within the meaning of Revenue Procedure 2006-9, section 11.01.
APA	This Advance Pricing Agreement, which is an “advance pricing agreement” within the meaning of Revenue Procedure 2006-9, section 2.04.
APA Records	The records specified in Appendix C.
APA Request	Taxpayer’s request for this APA dated _____, including any amendments or supplemental or additional information thereto.
APA Year	This term is defined in paragraph 5(a) of this APA.
Covered Transaction(s)	This term is defined in Appendix A.
Financial Statements	Financial statements prepared in accordance with U.S. GAAP and stated in U.S. dollars.
Foreign Group	Worldwide Group members that are not U.S. persons.
Foreign Participants	[name the foreign entities involved in Covered Transactions].
I.R.C.	The Internal Revenue Code of 1986, 26 U.S.C., as amended.
Pub. L. 106-170	The Ticket to Work and Work Incentives Improvement Act of 1999.
Revenue Procedure 2006-9	Rev. Proc. 2006-9, 2006-1 C.B. 278.
Transfer Pricing Method (TPM)	A transfer pricing method within the meaning of Treasury Regulation section 1.482-1(b) and Revenue Procedure 2006-9, section 2.04.
U.S. GAAP	U.S. generally-accepted accounting principles.
U.S. Group	Worldwide Group members that are U.S. persons.
U.S. Return	For each taxable year, the “returns with respect to income taxes under subtitle A” that Taxpayer must “make” in accordance with I.R.C. section 6012. { <i>Or substitute for partnership: For each taxable year, the “return” that Taxpayer must “make” in accordance with I.R.C. section 6031.</i> }
Worldwide Group	Taxpayer and all organizations, trades, businesses, entities, or branches (whether or not incorporated, organized in the United States, or affiliated) owned or controlled directly or indirectly by the same interests.

**APPENDIX E**

**APA ANNUAL REPORT SUMMARY FORM**

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The APA Annual Report Summary on the next page is a required APA Record. The APA Team Leader supplies some of the information requested on the form. Taxpayer is to supply the remaining information requested by the form and submit the form as part of its Annual Report.



<b>APA Annual Report SUMMARY</b>	<b>Department of the Treasury—Internal Revenue Service</b> <b>Large Business and International Division</b> <b>Treaty and Transfer Pricing Operations</b> <b>Advance Pricing and Mutual Agreement Program</b>	<b>APA No.</b> _____ <b>Team Leader</b> _____ <b>Economist</b> _____ <b>Intl Examiner</b> _____
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<b>APA Information</b>	<b>Taxpayer Name:</b> _____ <b>Taxpayer EIN:</b> _____ <b>NAICS:</b> _____ <b>APA Term:</b> Taxable years ending _____ to _____ <b>Original APA</b> <input type="checkbox"/> <b>Renewal APA</b> <input type="checkbox"/> <b>Annual Report due dates:</b> _____, 201__ for all APA Years through APA Year ending in 200__; for each APA Year thereafter, on _____ [month and day] immediately following the close of the APA Year <b>Principal foreign country(ies) involved in covered transaction(s):</b> _____ <b>Type of APA:</b> <input type="checkbox"/> unilateral <input type="checkbox"/> bilateral with _____ <b>Tested party is</b> <input type="checkbox"/> US <input type="checkbox"/> foreign <input type="checkbox"/> both <b>Approximate dollar volume of covered transactions (on an annual basis) involving tangible goods and services:</b> <input type="checkbox"/> N/A <input type="checkbox"/> <\$50 million <input type="checkbox"/> \$50-100 million <input type="checkbox"/> \$100-250 million <input type="checkbox"/> \$250-500 million <input type="checkbox"/> >\$500 million <b>APA tests on (check all that apply):</b> <input type="checkbox"/> annual basis <input type="checkbox"/> multi-year basis <input type="checkbox"/> term basis <b>APA provides (check all that apply) a:</b> <input type="checkbox"/> range <input type="checkbox"/> point <input type="checkbox"/> floor only <input type="checkbox"/> ceiling only <input type="checkbox"/> other _____ <b>APA provides for adjustment (check all that apply) to:</b> <input type="checkbox"/> nearest edge <input type="checkbox"/> median <input type="checkbox"/> other point
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<b>APA Annual Report Information (to be completed by the Taxpayer)</b>	<b>APA date executed:</b> _____, 201__ <b>This APA Annual Report Summary is for APA Year(s) ending in 200__ and was filed on _____, 201__</b> <b>Check here</b> <input type="checkbox"/> <b>if Annual Report was filed after original due date but in accordance with extension.</b> <b>Has this APA been amended or changed?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Effective Date:</b> _____ <b>Has Taxpayer complied with all APA terms and conditions?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Were all the critical assumptions met?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Has a Primary Compensating Adjustment been made in any APA Year covered by this Annual Report?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>If yes, which year(s):</b> 200__ <b>Have any necessary Secondary Compensating Adjustments been made?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Did Taxpayer elect APA Revenue Procedure treatment?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Any change to the entity classification of a party to the APA?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Taxpayer notice information contained in the APA remains unchanged?</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Taxpayer's current US principal place of business: (City, State)</b> _____
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<b>APA Annual Report Checklist of Key Contents (to be completed by the Taxpayer)</b>	<b>Financial analysis reflecting TPM calculations</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Financial statements showing compliance with TPM(s)</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Schedule M-1 or M-3 book-tax differences</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Current organizational chart of relevant portion of world-wide group</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Attach copy of APA</b> <input type="checkbox"/> yes <input type="checkbox"/> no <b>Other APA records and documents included:</b>
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<b>Contact Information</b>	<b>Authorized Representative</b>	<b>Phone Number</b>	<b>Affiliation and Address</b>

APPENDIX 2— Model APA (based on Rev. Proc. 2015-41)

TEMPLATE FOR ADVANCE PRICING AGREEMENT

UNDER REVENUE PROCEDURE 2015-41

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The Advance Pricing and Mutual Agreement Program (“APMA”) of the Internal Revenue Service (“IRS”) is providing this template for use in drafting advance pricing agreements (“APAs”) issued under IRS Revenue Procedure 2015-41, 2015-35 I.R.B. 263 (“Rev. Proc. 2015-41”). This template is designed to systematize how taxpayers propose terms for their APAs and standardize language used in executed APAs. It will improve efficiency in the APA process and enhance consistency in the administration of the APA program.

Rev. Proc. 2015-41 requires that taxpayers include as part of a complete APA request a draft APA and a “redline” comparison of the proposed draft APA against the current model APA. *See* section 2.03, exhibit 15, of the Appendix to Rev. Proc. 2015-41. This template serves as the model APA. A taxpayer is required to produce the “redline” comparison by following the instructions below to edit this template with tracked changes. The draft APA and “redline” comparison are then to be included in Word format in the complete APA request. (Before editing the template with tracked changes, a taxpayer should remove this introduction and the instructions below from the Microsoft Word file.)

The assigned APMA team will review the APA’s terms proposed in the draft APA. If the APMA team accepts the proposed terms in light of its review of the taxpayer’s complete APA request and other information obtained during the APA process, then the text of the draft APA, edited as needed to fill in any information not available at the time of the APA Request, will be adopted as the text of a finally executed APA. If the APMA team does not accept the proposed terms, it will discuss modifications to the draft APA with the taxpayer during the APA process. For bilateral and multilateral APAs, the terms of the executed APA will of necessity be consistent with the terms of the underlying mutual agreement between the United States and one or more treaty partners.

#### GENERAL INSTRUCTIONS

The template is designed to minimize editing by using an options-based format for selecting from terms presented in certain sections of the model APA. The options presented are those which APMA considers standard and which it has accepted in final APAs. These options are not binding on APMA, however. APMA reserves the right to modify the option selections, the specific option language used, or any other terms before executing an APA with the taxpayer.

Options are indicated by square brackets (“[ ]”). An “x” should be inserted between the brackets to indicate the selected option (“[x]”). Options that are not selected should not be deleted, but instead should be left in the text of the draft APA. The options to which APMA and the taxpayer ultimately agree for the final APA will be indicated by the presence or absence of an “x”. The term associated with the “x” will be given operative effect in the executed APA.

Certain options are flagged with an asterisk after the square brackets (“[ ]\*”). To facilitate the APMA team’s subsequent review of the draft APA, the asterisks should not be deleted. Taxpayers that select flagged options are required to specifically provide justification for the selection in the APA request. *See* section 1.02, Part 5, of the Appendix to Rev. Proc. 2015-41.

The template contains placeholder phrases consisting of a hashtag followed by one or more words in block capital letters (e.g., “#COUNTRY”). Generally, the taxpayer should replace a placeholder phrase with appropriate text, subject to the following conventions:

- If a placeholder phrase occurs within an option that the taxpayer has rejected, the taxpayer should change the hashtag to a caret (e.g., change “#COUNTRY” to “^COUNTRY”) but otherwise leave the phrase intact.<sup>15</sup> The caret indicates that the Taxpayer has rejected this option. For example, for a bilateral APA with Japan, the lines on the first page just below the title would read:

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<sup>15</sup> As a result, almost all occurrences of the hashtag in the template will be replaced with a caret or other text in the taxpayer’s draft APA. The few remaining occurrences of the hashtag will mark a placeholder phrase that cannot yet be replaced with appropriate text (see, for example, the placeholder phrase in paragraph 6(e) for a date that cannot be determined until the APA nears execution). Searching the draft APA for the hashtag will locate all placeholder phrases that still need replacement.

Bilateral with Japan

Multilateral with ^COUNTRIES

Unilateral

- The placeholder phrase “#CURRENCY” should be replaced, for example, with “U.S. dollars,” “Euros,” or “Japanese yen.”
- The placeholder phrase “#DATE” should be replaced with a date in the format of “December 31, 2020.”

The APA Term will be expressed as dates certain, e.g., “January 1, 2017 to December 31, 2022, inclusive”, rather than as particular tax years.

Taxpayers may need to draft custom text for situations or options not included in the template. For example, a taxpayer may propose additional critical assumptions to address specific regulatory contingencies or conditions the taxpayer is expected to face during the term of the APA. As another example, the provision titled “Limitation on Assistance” at the end of the Recitals might be modified based on an understanding reached in the prefiling stage of the APA process. In some cases, a particular critical assumption might facilitate reaching an agreement on an APA. Taxpayers that include custom text are required to specifically provide justification for the inclusion in the APA request, just as selecting an option with an asterisk requires justification. Any custom text must also be evident in the “redline” comparison of the proposed draft APA.

## INSTRUCTIONS ON TABLES

The template contains certain tables that the taxpayer should edit. Entries in the tables will not contain hashtags, but taxpayers nevertheless should fill in the information and add additional rows to the tables if needed. Taxpayers also should fill in the “APA Information” in the table in Appendix D, to the extent available or proposed.

## INSTRUCTIONS ON APPENDIX A

Appendix A of this template contains the description of the APA’s covered issue(s) and covered method(s). Taxpayers should note the following points in completing Appendix A:

- The template includes just one covered issue with one corresponding covered method. If there is more than one covered Issue proposed for the APA, the taxpayer should add additional covered issues in Appendix A, section 3, with tracked changes.
- If there is more than one covered method, the taxpayer should first replicate the template’s entire text for Covered Method 1 in Appendix A, section 4, without tracked changes, to provide template text for each additional covered method, and then edit the text for each covered method with tracked changes.
- Normally, each covered issue will have its own corresponding covered method. However, in some cases, a covered method may apply at once to more than one covered issue. For example, covered issues may be proposed to be aggregated and tested by a single covered method. In such cases, the heading for that covered method could read, for example, “Covered Method for Covered Issues 1-3”.
- Any interaction between different covered methods should be adequately explained in the text, and in an appropriate manner. For example, an explanation might be provided in an introduction at the start of section 4 of Appendix A, preceding the description of the respective covered methods.

Appendix A uses the term “Tested Party.” When applied in the context of methods that consider, or test, data from only one party to a transaction, this term is similar in concept to the term “tested party” as discussed in the OECD Guidelines at paragraphs 3.18 and 3.19, and as defined in the U.S. Treasury Regulations section 1.482-5(b)(2). However, some methods consider, or test, data from both parties to a transaction, where there is no singular “tested” party. Even in applying such methods, however, it is typically the case that one particular party’s results are formally tested for compliance with the method. For purposes of this template, in such circumstances, the party whose results are formally tested in applying any particular method is the “Tested Party”, even if that party is not strictly a “tested party” as discussed in the OECD Guidelines paragraphs 3.18 and 3.19, or as defined in the U.S. Treasury Regulations section 1.482-5(b)(2).

**ADVANCE PRICING AGREEMENT**

**between  
#SIGNATORY  
and  
THE INTERNAL REVENUE SERVICE**

- Bilateral with #COUNTRY
- Multilateral with #COUNTRIES
- Unilateral

Term: #DATE to #DATE, inclusive

This APA is commonly referred to as #APA NAME.

**PARTIES**

The Parties to this APA are the Internal Revenue Service (“IRS”) and #NAME OF EACH NON-IRS SIGNATORY, WITH EIN.

- #SIGNATORY will be referred to as “U.S. Taxpayer.”
- #SIGNATORY is the common parent of an affiliated group filing consolidated U.S. tax returns and is entering into this APA on behalf of both itself and the following members of its consolidated group: #MEMBERS OF GROUP. All members of this consolidated group will be referred to collectively as “U.S. Taxpayer.”

**RECITALS**

This APA is a renewal of one or more prior APAs, which are listed below in reverse chronological order:

<b>Party(ies)</b>	<b>Execution Date</b>	<b>Term</b>

*Key:*

- **Party(ies):** The signatory(ies) to the prior APA, other than the IRS, with each signatory’s taxpayer identification number;
- **Execution Date:** The date, or the later of the dates, on which the prior APA was executed;
- **Term:** The term of the prior APA.

- This is a bilateral APA within the meaning of Rev. Proc. 2015-41 and implements the terms of a mutual agreement reached between the United States and #COUNTRY.
- This is a multilateral APA within the meaning of Rev. Proc. 2015-41 and implements the terms of a mutual agreement reached among the United States, #COUNTRIES.
- This APA is a unilateral APA within the meaning of Rev. Proc. 2015-41 and is not based on any mutual agreement.

The Parties to this APA are defined in the “Parties” section above. Regarding the Party(ies) to this APA other than the IRS:

- No such Party has an immediate parent or owner that is not a U.S. entity.
- One or more such Parties has an immediate parent or owner that is not a U.S. entity, as follows:

Party	Parent's or Owner's Identifying Information	Parent's or Owner's Contact Information

Key:

- **Party:** Name of the Party having an immediate parent or owner that is not a U.S. entity;
- **Parent's or Owner's Identifying Information:** Name of the immediate parent or owner of such Party, and the taxpayer identification number of that parent or owner for income tax purposes in its country of residence;
- **Parent's or Owner's Contact Information:** The immediate parent's or owner's address and phone number.

The term "Worldwide Group" is defined below in paragraph 12 of this APA. The ultimate parent entity or owner of Worldwide Group is:

#ENTITY NAME, ADDRESS, AND PHONE

U.S. Taxpayer's principal place of business is #CITY, #STATE. #BRIEF DESCRIPTION OF U.S. TAXPAYER AND NON-U.S. TAXPAYER (DEFINED IN SECTION 1 OF APPENDIX A), AND SPECIFICALLY OF EACH COVERED ENTITY (DEFINED IN SECTION 1 OF APPENDIX A).

This APA contains the Parties' agreement on the Covered Method(s) for resolving the Covered Issue(s) under Code section 482 and any other Code sections that are identified in Appendix A to this APA, the U.S. Treasury Regulations thereunder, and (if applicable):

The income tax convention(s) between the United States and #COUNTRY(IES).

This APA shall not limit the authority of the IRS to (1) verify compliance with this APA as to the Covered Issue(s), or (2) audit issues other than Covered Issue(s), including issues that arise under Code section 482 and any other Code sections identified in Appendix A to this APA, and the U.S. Treasury Regulations thereunder.

#### LIMITATION ON ASSISTANCE

The Covered Issue(s) may relate to one or more countries which (i) have an income tax convention with the United States, but (ii) are not a party to a mutual agreement whose terms are implemented by this APA. U.S. Taxpayer acknowledges that the IRS may decline to provide competent authority assistance concerning taxation by such country(ies) that relates to the Covered Issue(s). See section 2.02(4)(d) of Rev. Proc. 2015-41.

## AGREEMENT

The Parties agree as follows:

1. *Covered Entities.* This APA's Covered Entities are defined in Appendix A.
2. *Covered Issue(s).* This APA applies to the Covered Issue(s), as defined in Appendix A.
3. *Covered Method(s).* Appendix A sets forth the Covered Method(s) for the Covered Issue(s).
4. *Term.* This APA applies to the APA Term, as defined in Appendix A.
5. *Operation.*
  - a. Rev. Proc. 2015-41 governs the interpretation, legal effect, and administration of this APA.
  - b. The APMA program provides a voluntary process whereby the IRS and taxpayers may resolve transfer pricing issues and issues for which transfer pricing principles may be relevant in a principled and cooperative manner on a prospective basis. As such, the APA process (as defined in Rev. Proc. 2015-41) is an alternative to dispute resolution that benefits both taxpayers and the IRS and that is intended to promote and encourage open communication. Accordingly, the IRS and U.S. Taxpayer agree that neither party will attempt to use nonfactual oral or written representations, within the meaning of sections 6.04 and 6.05 of IRS Revenue Procedure 2015-41 (including any proposals to use particular Covered Method(s)), made in conjunction with the APA Request in any judicial or administrative proceeding. The IRS and U.S. Taxpayer also agree that factual representations made in conjunction with the APA Request may be used in judicial and administrative proceedings.
6. *Compliance.*
  - a. U.S. Taxpayer must report its taxable income in an amount that is consistent with Appendix A and all other requirements of this APA. U.S. Taxpayer must so report its taxable income in the following manner:
    - i. For any APA Tax Year for which U.S. Taxpayer timely files its original U.S. return prior to, or no later than 60 days after, the U.S. Effective Date, U.S. Taxpayer must so report its taxable income for that APA Tax Year in one of the following ways:
      - A. on such original U.S. return;
      - B. on an amended U.S. return submitted no later than 120 days after the U.S. Effective Date;
      - C. through a means proposed by U.S. Taxpayer and accepted by the applicable IRS practice area no later than 120 days after the U.S. Effective Date (or by such other deadline as is agreed between U.S. Taxpayer and the applicable IRS practice area); or
      - D. if applicable:
        - [\*] no later than 120 days after the U.S. Effective Date through the following means: #DESCRIPTION OF MEANS.
    - ii. For all other APA Tax Years, U.S. Taxpayer must so report its taxable income on its timely filed original U.S. return.
    - iii. The provisions of paragraphs 6(a)(i) and 6(a)(ii) are modified by this paragraph 6(a)(iii). If a Covered Method includes a term test (including the case of an annual test with a supplemental term test) or a subterm test, as described in section 4 of Appendix A, then the APA Covered Year as of which the term test or subterm test applies would change in the event of an Early Termination. Specifically, while in the absence of an Early Termination a term test would apply as of the last APA Covered Year, in the event of an Early Termination the term test would apply as of an earlier APA Covered Year. Similarly, while in the absence of an Early Termination a subterm test would apply as of the last APA Covered Year in the subterm, in the event of an Early Termination the subterm test might apply as of an earlier APA Covered Year. In these situations, the Early Termination might not be established in time for U.S. Taxpayer to know to apply the term test or subterm test as of the earlier APA Covered Year in reporting taxable income as required under paragraphs 6(a)(i) and

6(a)(ii) for the APA Tax Year corresponding to that earlier APA Covered Year. In such cases, U.S. Taxpayer may need to correct its reporting for that APA Tax Year. Specifically, U.S. Taxpayer will need to correct its income reporting for that APA Tax Year if the application of the term test or subterm test in that earlier APA Covered Year changes the existence or amount of an APA Primary Adjustment for the Covered Method for that APA Tax Year. In such cases:

- A) The resulting incorrectness in the prior reporting for that APA Tax Year is excused; and
  - B) U.S. Taxpayer must correct such prior reporting through a means listed in paragraph 6(a)(i) within 120 days of the Early Termination being established.
- b. For each Covered Issue, if any, that involves determination of pricing and/or income allocation<sup>16</sup> under Code section 482 (or Code section 367(d)) as modified by any applicable income tax convention, this APA addresses the pricing and/or income allocation between U.S. Taxpayer and Non-U.S. Taxpayer in the aggregate. Except as explicitly provided, this APA does not address and does not bind the IRS with respect to pricing or income allocation (1) among particular legal entities that are members of U.S. Taxpayer, or (2) among particular legal entities that are members of Non-U.S. Taxpayer. In addition, this APA does not address pricing or income allocation between an entity that is not a Covered Entity, and any entity.
- c. For each APA Tax Year, if U.S. Taxpayer complies with the terms and conditions of this APA, then, provided that this APA remains effective for that APA Tax Year for a particular Covered Issue, the IRS will not make or propose any allocation or adjustment that is inconsistent with the application under this APA of the applicable Covered Method to that Covered Issue.
- d. If U.S. Taxpayer does not comply with the terms and conditions of this APA, then the IRS may:
- i. enforce the terms and conditions of this APA and make or propose allocations or adjustments based on the application of the Covered Method(s) to the Covered Issue(s) as provided in this APA;
  - ii. cancel or revoke this APA under section 7.06 of Rev. Proc. 2015-41; or
  - iii. revise this APA, if the Parties agree.
- e. U.S. Taxpayer must timely file an Annual Report for each APA Tax Year in accordance with this paragraph 6(e), Appendix C to this APA, and section 7.02 of Rev. Proc. 2015-41. Annual Reports for multiple APA Tax Years may be combined, provided that all required information for each APA Tax Year is clearly presented. For each Annual Report, U.S. Taxpayer must submit an original printed version containing a signed original “penalties of perjury” declaration, one printed copy of the contents of the original printed version, and an electronic copy of the contents of the original printed version. Any exhibits in the printed version must be tabbed, and the electronic copy is subject to the same requirements, as to medium and format, that are specified for APA requests in section 2 of the Appendix to Rev. Proc. 2015-41. Upon request, U.S. Taxpayer must provide additional copies of the printed version, at addresses specified by the IRS. U.S. Taxpayer must file the Annual Report for each APA Tax Year by the later of (i) #DATE CERTAIN, NORMALLY APPROXIMATELY 90 DAYS AFTER THE U.S. EFFECTIVE DATE, and (ii) the fifteenth day of the twelfth month following the close of the APA Tax Year. The IRS may by notice request additional information reasonably necessary to clarify or complete the Annual Report. (See paragraph 16, and section 3(c) of Appendix C, regarding notices.) U.S. Taxpayer will provide such requested information within 30 days from the date of the notice unless a later date is specified in the notice. Additional time may be allowed for good cause in the discretion of the Director of the Advance Pricing and Mutual Agreement Program.
- f. The IRS will determine whether U.S. Taxpayer has complied with this APA based on U.S. Taxpayer’s U.S. returns, the Financial Statements and additional statements required under this paragraph 6(f), and other APA Records, for all APA Tax Years and any other tax year necessary to verify compliance. The Financial Statements and additional statements required for a particular tax year are:

- [] For every U.S. Covered Entity, the Financial Statements together with the additional statements specified in paragraph 6(f)(i); and for every Non-U.S. Covered Entity, the Financial Statements together with the additional statements specified in paragraph 6(f)(ii).

<sup>16</sup>As used in this APA, “income allocation” includes allocation of loss.

- \* For every U.S. Covered Entity, the Financial Statements together with the additional statements specified in paragraph 6(f)(i).
- \* For every Non-U.S. Covered Entity, the Financial Statements together with the additional statements specified in paragraph 6(f)(ii).
- i. For each U.S. Covered Entity, the additional statements consist of the following statement(s):
  - An audit opinion for that U.S. Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
  - \* One or more of the following, as indicated:
    - An accountant's report for that U.S. Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
    - A self-certification for that U.S. Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
    - A self-certification for that U.S. Covered Entity's Financial Statements, together with a tying certification for that entity's Financial Statements, as defined in paragraph 6(f)(iii).
    - #OTHER MEANS OF VERIFYING THE RELIABILITY OF THE U.S. COVERED ENTITY'S FINANCIAL STATEMENTS.
- ii. For each Non-U.S. Covered Entity, the additional statements consist of the following statement(s):
  - An audit opinion for that Non-U.S. Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
  - \* One or more of the following, as indicated:
    - An accountant's report for that Non-U.S. Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
    - A self-certification for that Non-U.S. Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
    - A self-certification for that Non-U.S. Covered Entity's Financial Statements, together with a tying certification for that Covered Entity's Financial Statements, as defined in paragraph 6(f)(iii).
    - #OTHER MEANS OF VERIFYING THE RELIABILITY OF THE NON-U.S. COVERED ENTITY'S FINANCIAL STATEMENTS.
- iii. With reference to the Financial Statements for a particular Covered Entity for a particular tax year, certain terms used in paragraphs 6(f)(i) and 6(f)(ii) are defined as follows:
  - A. An audit opinion is an opinion of an independent certified public or chartered accountant who audited the Financial Statements.
  - B. An accountant's report is a report of an independent certified public or chartered accountant who is associated with the Financial Statements.
  - C. A self-certification is an attestation, as defined in paragraph 6(f)(iii)(E), that the Financial Statements have been prepared according to the Applicable Accounting Standard.
  - D. A tying certification consists of the following:
    - (1) An attestation, as defined in paragraph 6(f)(iii)(E), that the Financial Statements can be reconciled to the consolidated Financial Statements for that entity's direct or indirect parent according to workpapers provided with the attestation;



- (2) The workpapers referred to in paragraph 6(f)(iii)(D)(1), which must demonstrate the consolidation of the Covered Entity's Financial Statements into the Financial Statements of the parent referred to in paragraph 6(f)(iii)(D)(1);
- (3) The Financial Statements of the parent referred to in paragraph 6(f)(iii)(D)(1); and
- (4) An audit opinion (as defined in paragraph 6(f)(iii)(A)) for the Financial Statements of the parent referred to in paragraph 6(f)(iii)(D)(1).

E. An attestation is an affirmation by an officer of the Covered Entity in the following form:

I, [Officer's Name and Title], of [Name of Covered Entity] affirm under penalties of perjury that the facts stated below are true. I either have adequate first-hand knowledge to make this affirmation or have gained adequate knowledge to make this affirmation through diligent consultation(s) with one or more individuals who have first-hand knowledge.

[Facts attested to.]

[Signature]

- g. In accordance with section 7.04 of Rev. Proc. 2015-41, U.S. Taxpayer will (1) maintain the APA Records, and (2) make them available to the IRS in connection with an examination under section 7.03 of Rev. Proc. 2015-41. Compliance with this subparagraph constitutes compliance with the record-maintenance provisions of Code sections 6038A and 6038C for the Covered Issue(s) for any APA Covered Year.
  - h. The "true taxable income" within the meaning of U.S. Treasury Regulations sections 1.482-1(a)(1) and (i)(9) of a member of an affiliated group filing a U.S. consolidated return will be determined under the U.S. Treasury Regulations under Code section 1502.
  - i. To the extent that U.S. Taxpayer's compliance with this APA depends on certain acts of other members of Worldwide Group, U.S. Taxpayer will ensure that such other members will perform such acts.
7. *Critical Assumptions.* The Critical Assumptions, which are this APA's critical assumptions as defined in Rev. Proc. 2015-41, appear in Appendix B. If any Critical Assumption has not been met, then Rev. Proc. 2015-41, section 7.06, governs, as modified by Appendix B to this APA.
8. *Disclosure.* This APA, and any background information related to this APA or the APA Request, are: (1) considered "return information" under Code section 6103(b)(2)(C); and (2) not subject to public inspection as a "written determination" under Code section 6110(b)(1). Section 521(b) of Pub. L. 106-170 provides that the Secretary of the Treasury must prepare a report for public disclosure that includes certain specifically designated information concerning all APAs, including this APA, in a form that does not reveal taxpayers' identities, trade secrets, and proprietary or confidential business or financial information.
9. *Disputes.* If a dispute arises concerning the interpretation or application of this APA, the Parties will seek a resolution by the Director, Treaty and Transfer Pricing Operations, to the extent reasonably practicable, before seeking alternative remedies.
10. *Materiality.* In this APA the terms "material" and "materially" will be interpreted in a manner consistent with the description of "material facts" in Rev. Proc. 2015-41, section 7.06(4).
11. *Paragraph Captions.* This APA's paragraph captions, which appear in italic type, are for convenience and reference only. The captions do not affect in any way the interpretation or application of this APA.
12. *Terms and Definitions.*
- a. Unless otherwise specified, terms in the plural include the singular and vice versa.
  - b. Appendix A contains definitions for certain terms used in this APA's body and appendices.

c. Certain terms used in this APA's body and appendices are defined as follows:

<b>Term</b>	<b>Definition</b>
Annual Report	A report within the meaning of Rev. Proc. 2015-41, section 7.02.
Advance Pricing Agreement, or "APA"	An "advance pricing agreement" within the meaning of Rev. Proc. 2015-41, section 2.02. Unless context indicates otherwise, "this APA" or "the APA" denotes the particular APA that is executed below.
APA Records	(Defined in Appendix C.)
APA Request	U.S. Taxpayer's request for this APA, which was dated #DATE, including any amendments or supplemental or additional information thereto (including but not limited to any responses to due diligence questions).
Critical Assumptions	(Defined in paragraph 7.)
Financial Statements	Balance sheet, income statement, statement of cash flow, and explanatory notes, prepared in accordance with the Applicable Accounting Standard as defined in section 7 of Appendix A.
Non-U.S. Group	In any APA Tax Year, Worldwide Group members that are not U.S. persons.
Parties	(Defined in the Recitals near the start of this APA.)
Pub. L. 106-170	The Ticket to Work and Work Incentives Improvement Act of 1999.
U.S. Effective Date	(Defined in paragraph 17 and in section 7 of Appendix A. Those definitions are intended to have the same meaning. In case of conflict, the definition in paragraph 17 controls.)
U.S. Group	In any APA Tax Year, Worldwide Group members that are U.S. persons.
Worldwide Group	In any APA Tax Year, U.S. Taxpayer and all organizations, trades, businesses, entities, or branches (whether or not incorporated, organized in the United States, or affiliated) owned or controlled directly or indirectly by the same interests.

13. *Deadline References.* If a deadline under this APA falls on a Saturday, Sunday, or a legal holiday in the District of Columbia, the deadline is extended to the next succeeding day that is not a Saturday, Sunday, or legal holiday in the District of Columbia.
14. *Entire Agreement and Severability.* This APA is the complete statement of the Parties' agreement. The Parties will sever, delete, or reform any invalid or unenforceable provision in this APA to approximate the Parties' intent as nearly as possible.
15. *Successor in Interest.* This APA binds, and inures to the benefit of, any successor in interest to U.S. Taxpayer.
16. *Notice.* Any notices required by this APA or Rev. Proc. 2015-41 must be in writing. U.S. Taxpayer will send notices to the IRS at:

Commissioner, Large Business and International Division  
Internal Revenue Service  
1111 Constitution Avenue, NW  
SE:LB:TTPO:APMA:NCA534-01  
Washington, DC 20224  
(Attention: APMA)

The IRS will send notices to:

#NAME AND ADDRESS  
(phone: #PHONE)

The IRS also will send notices to, if applicable:

#REPRESENTATIVE'S NAME AND ADDRESS  
(phone: #PHONE)

provided that a valid IRS Form 2848 "Power of Attorney and Declaration of Representative" for that person was included in the most recent Annual Report (or, if no Annual Report has been filed, was included in the APA Request).

17. *U.S. Effective Date and Counterparts.* This APA is effective starting on the date, or later date of the dates, upon which all Parties execute this APA (“U.S. Effective Date”). The Parties may execute this APA in counterparts, with each counterpart constituting an original.

***WITNESS,***

The Parties have executed this APA on the dates below.

**#SIGNATORY NAME IN BOLD FACE BLOCK CAPITAL LETTERS**

By: \_\_\_\_\_ Date: \_\_\_\_\_, 20\_\_\_\_  
#NAME  
#TITLE

**INTERNAL REVENUE SERVICE**

By: \_\_\_\_\_ Date: \_\_\_\_\_, 20\_\_\_\_  
Nicole L. Welch  
Acting Director, Advance Pricing and Mutual Agreement Program

**APPENDIX A**  
**COVERED ENTITIES, TERM, COVERED ISSUE(S), COVERED METHOD(S), INCOME REPORTING,**  
**CONFORMING ADJUSTMENTS AND REPATRIATION OF FUNDS,**  
**CERTAIN SUBSEQUENT ADJUSTMENTS,**  
**AND DEFINITIONS**

Section 1 of this Appendix lists the Covered Entities. Section 2 defines the APA Term, APA Tax Years, and APA Covered Years. Section 3 describes the Covered Issue(s). Section 4 describes the Covered Method applicable to each Covered Issue.

Section 5 describes the application of the Covered Method(s) to income reporting and the possible need for an APA Primary Adjustment under one or more Covered Methods. Section 6 addresses conforming adjustments and repatriation of funds following APA Primary Adjustments.

Section 7 provides definitions that apply both to this Appendix and to the APA as a whole. The definitions table is based on a standard, inclusive model, and thus may include terms not used in this APA.

**1. Covered Entities**

The U.S. Covered Entity(ies) are:

#LIST OF EACH U.S. ENTITY INVOLVED IN ONE OR MORE COVERED ISSUE(S), AND ALSO (LISTED FIRST) ANY CONSOLIDATED RETURN PARENT FOR ANY SUCH ENTITY. FOR EACH ENTITY, NAME, ADDRESS, PHONE, AND EIN.

The term “U.S. Taxpayer” includes collectively all U.S. Covered Entities and any other entities that are in a consolidated return group with a U.S. Covered Entity.

The Non-U.S. Covered Entity(ies) are:

# LIST OF EACH NON-U.S. ENTITY INVOLVED IN ONE OR MORE COVERED ISSUE(S), AND ALSO (LISTED FIRST) ANY COMMON TAX REPORTING PARENT FOR ANY SUCH ENTITY. FOR EACH ENTITY, NAME, ADDRESS, AND PHONE.

The term “Non-U.S. Taxpayer” includes collectively all Non-U.S. Covered Entities and any other entities that are in a common tax reporting group with a Non-U.S. Covered Entity.

The term “Covered Entities” includes both the U.S. Covered Entities and the Non-U.S. Covered Entities.

**2. APA Term, APA Tax Years, and APA Covered Years**

The APA applies to the period from #DATE to #DATE, inclusive (the “APA Term”).

The APA Term does not include a Rollback.

The APA Term includes a Rollback, which covers from #DATE to #DATE, inclusive (the “Rollback Period”).

A tax year of U.S. Taxpayer that is wholly or partly contained in the APA Term is called an “APA Tax Year.” For a particular APA Tax Year, the portion of such APA Tax Year that is contained in the APA Term is called an “APA Covered Year.” Such APA Tax Year and APA Covered Year are said to “correspond” to each other or to be “corresponding.”

**3. Covered Issue(s)**

The Covered Issue(s) are as described below.

***Covered Issue 1:***

#DESCRIPTION OF COVERED ISSUE.

#### 4. Covered Method(s)

Each Covered Method applies to one or more Covered Issues. A Covered Method and the Covered Issue(s) to which the Covered Method applies are said to “correspond,” or to be “corresponding”.

The Covered Methods are summarized in the following table and are described in detail below. In case of conflict with this table, the detailed descriptions of the Covered Methods below, and the descriptions in section 3 above of the Covered Issues, control.

Covered Method Number	Applies to Covered Issues Number(s)	Summary Description of Corresponding Covered Issues	Type of Method; Results Tested	Point or Range	Testing Frequency and Periods
1					

This Appendix A uses the term “Tested Party.” When applied in the context of methods that consider, or test, data from only one party to a transaction, this term is similar in concept to the term “tested party” as discussed in the OECD Guidelines paragraphs 3.18 and 3.19, and as defined in the U.S. Treasury Regulations section 1.482-5(b)(2). However, some methods consider, or test, data from both parties to a transaction, where there is no singular “tested” party. Even in applying such methods, however, it is typically the case that one particular party’s results are formally tested for compliance with the method. For purposes of this template, in such circumstances, the party whose results are formally tested in applying any particular method is the “Tested Party”, even if that party is not strictly a “tested party” as discussed in the OECD Guidelines paragraphs 3.18 and 3.19, or as defined in the U.S. Treasury Regulations section 1.482-5(b)(2).

##### ***Covered Method for Covered Issue 1:***

###### **a. Tested Party**

The Tested Party is #TESTED PARTY.

###### **b. Financial Results Tested (Type of Method)**

- The Covered Method is an implementation of the comparable uncontrolled price method under the OECD Guidelines and of the comparable uncontrolled price method under the U.S. Treasury Regulations. The Tested Party’s financial results to be tested are:
  - per unit price paid, defined as the total amount paid for #DESCRIPTION OF GOODS divided by the number of #DESCRIPTION OF A UNIT OF GOODS purchased.
  - per unit price received, defined as the total amount received for #DESCRIPTION OF GOODS divided by the number of #DESCRIPTION OF A UNIT OF GOODS sold.
- The Covered Method is an implementation of the comparable uncontrolled price method under the OECD Guidelines and of the comparable uncontrolled services price method under the U.S. Treasury Regulations. The Tested Party’s financial results to be tested are:
  - per unit price paid, defined as the total amount paid for #DESCRIPTION OF SERVICES divided by the number of #DESCRIPTION OF A UNIT OF SERVICES received.
  - per unit price received, defined as the total amount received for #DESCRIPTION OF SERVICES divided by the number of #DESCRIPTION OF A UNIT OF SERVICES provided.
- The Covered Method is an implementation of the comparable uncontrolled price method under the OECD Guidelines and of the comparable uncontrolled transaction method under the U.S. Treasury Regulations. The Tested Party’s financial results to be tested are the royalty paid for the license of #DESCRIPTION OF LICENSED INTANGIBLE PROPERTY divided by the Tested Party’s:
  - sales revenue from sales of #DESCRIPTION OF GOODS/SERVICES.
  - #OTHER ROYALTY BASE.

- The Covered Method is an implementation of the comparable uncontrolled price method under the OECD Guidelines and of the acquisition price method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.
- The Covered Method is an implementation of the comparable uncontrolled price method under the OECD Guidelines and of the market capitalization method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.
- The Covered Method is an implementation of the resale price method under the OECD Guidelines and of the resale price method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are the gross profit margin from the sale of #DESCRIPTION OF GOODS.
- The Covered Method is an implementation of the resale price method under the OECD Guidelines and of the gross services margin method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are the gross services margin from the provision of #DESCRIPTION OF SERVICES.
- The Covered Method is an implementation of the cost plus method under the OECD Guidelines and of the cost plus method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are the gross profit markup.
- The Covered Method is an implementation of the cost plus method under the OECD Guidelines and of the cost of services plus method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are the gross services profit markup from the provision of #DESCRIPTION OF SERVICES.
- The Covered Method is based on the principles of the low value-adding intra-group services approach under the OECD Guidelines and of the services cost method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are the markup on total costs for providing #DESCRIPTION OF SERVICES.
- The Covered Method is an implementation of the transactional net margin method under the OECD Guidelines and of the comparable profits method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested, as reflected in its net profit indicator (per OECD Guidelines) or profit level indicator (per U.S. Treasury Regulations), are its:
  - operating margin.
  - markup on total costs.
  - Berry ratio.
  - return on operating assets.
  - return on invested capital.
  - \* #OTHER NET PROFIT INDICATOR OR PROFIT LEVEL INDICATOR, WITH DEFINITION.
- The Covered Method is an implementation of the profit split (residual analysis) method under the OECD Guidelines and of the residual profit split method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.
- The Covered Method is an implementation of the profit split (contribution analysis) method under the OECD Guidelines and of the comparable profit split method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.
- The Covered Method is an implementation of an income based valuation technique as referenced in paragraph 6.153 of the OECD Guidelines and of the income method under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.
- The Covered Method is an implementation of (i) a sharing of the cost of current contributions in proportion to overall expected benefits, within a cost contribution arrangement under the OECD Guidelines, and (ii) a sharing of intangible

development costs in proportion to reasonably anticipated benefits, within a cost sharing arrangement under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.

- The Covered Method is a method that is not specified under the OECD Guidelines and not specified under the U.S. Treasury Regulations. The Tested Party's financial results to be tested are described in subsection (c) below.

Such financial results are determined according to the Applicable Accounting Standard, with the proviso that in determining such results, accounting principles and conventions that are generally accepted in the trade or industry must be used.

Such financial results are tested against a point or range as described below. The test is carried out with a frequency, and for certain time periods, as described below. If and when these financial results do not satisfy the test, they must be adjusted as described in section 5 of this Appendix A.

### **c. Testing of Financial Results Against a Point or Range**

The Tested Party's financial results are tested as follows:

- The financial results must equal #X.
- The financial results must be within an Arm's Length Range.
  - The Arm's Length Range is from #X to #Y inclusive.
    - This Arm's Length Range has an associated Median value of #Z.
    - This Arm's Length Range has no associated Median value.
  - Two Arm's Length Ranges apply. The first is from #W to #X inclusive and applies to the annual test described in subsection (d) below. The second is from #Y to #Z inclusive and applies to the term test described in subsection (d) below.
    - The first Arm's Length Range has an associated Median value of #P, and the second Arm's Length Range has an associated Median value of #Q.
    - These Arm's Length Ranges have no associated Median value.
  - Two Arm's Length Ranges apply. The first is from #W to #X inclusive and applies to the subterm test described in subsection (d) below. The second is from #Y to #Z inclusive and applies to the annual test described in subsection (d) below.
    - The first Arm's Length Range has an associated Median value of #P, and the second Arm's Length Range has an associated Median value of #Q.
    - These Arm's Length Ranges have no associated Median value.
  - Two Arm's Length Ranges apply. The first is from #W to #X inclusive and applies to the test for the first subterm described in subsection (d) below. The second is from #Y to #Z inclusive and applies to the test for the second subterm described in subsection (d) below.
    - The first Arm's Length Range has an associated Median value of #P, and the second Arm's Length Range has an associated Median value of #Q.
    - These Arm's Length Ranges have no associated Median value.
- #OTHER DESCRIPTION, FOR EXAMPLE THE EVALUATION AND TESTING MECHANICS FOR A PROFIT SPLIT, AN INCOME METHOD, AN UNSPECIFIED METHOD, OR A SHARING OF COSTS UNDER A COST CONTRIBUTION ARRANGEMENT/COST SHARING ARRANGEMENT.

#### d. Testing Frequency and Testing Periods

The Tested Party's financial results are tested as of certain APA Covered Years, and for certain time periods, as follows:

- The results are tested annually, meaning that they are tested as of each APA Covered Year, for a period consisting of that APA Covered Year.
- There is no additional term test.
- There is an additional term test. For this test, the results are tested as of the Last Effective APA Covered Year, for the period consisting of the Last Effective APA Covered Year and all prior APA Covered Years.

The application of the annual test and the application of the additional term test are coordinated as described in section 5 of this Appendix A.

- \* The results are tested on a term basis, meaning that they are tested only once, as of the Last Effective APA Covered Year, for a period consisting of the Last Effective APA Covered Year and all prior APA Covered Years.
- \* The results are tested on the basis of two subterms. For this purpose, the APA Term is divided into two subterms. The first subterm consists of all APA Covered Years ending on or before #DATE, and the second subterm consists of all other APA Covered Years. For each subterm, the results are tested as of the Last Effective APA Subterm Covered Year, for a period consisting of the Last Effective APA Subterm Covered Year and all prior APA Covered Years in the subterm.
- \* The results are tested on a subterm basis for all APA Covered Years ending on or before #DATE (the "subterm"), and are tested annually for each other APA Covered Year, as follows:

The results are tested as of the Last Effective APA Subterm Covered Year, for a period consisting of the Last Effective APA Subterm Covered Year and all prior APA Covered Years in the subterm.

The results are tested as of each APA Covered Year that is not in the subterm, for a period consisting of that APA Covered Year.

- \* The results are tested on a cumulative basis, meaning that (except as provided in the following sentence) they are not tested as of the first APA Covered Year but they are tested as of each other particular APA Covered Year for a period consisting of such particular APA Covered Year and all prior APA Covered Years. However, if the Last Effective APA Covered Year is the first APA Covered Year, then the results are tested as of the first APA Covered Year, for a period consisting of such APA Covered Year.
- \* The results are tested on a three-year rolling average basis, meaning that the results are tested as of each APA Covered Year, for a period consisting of the APA Tax Year corresponding to the APA Covered Year (but excluding any portion of that APA Tax Year that is after the APA Term), and the Tested Party's two preceding tax years.

#### e. Other Provisions

The Tested Party's financial results, to be tested as described above, are for:

- The Tested Party as a whole.
- Only a segment of the Tested Party's activity. #DETAILED DESCRIPTION OF THE SEGMENT AND OF THE ALLOCATION AND APPORTIONMENT METHODS USED, INCLUDING ANY APPLICABLE FORMULAS AND DEFINITIONS OF QUANTITIES USED IN THOSE FORMULAS. THIS DESCRIPTION SHOULD BE DETAILED ENOUGH TO ENABLE A STRAIGHTFORWARD VERIFICATION OF COMPLIANCE BY THE IRS EXAMINATION TEAM.

When the Tested Party's financial results are tested as of a given APA Covered Year, those results shall reflect, to the extent relevant, any APA Primary Adjustment for this Covered Method made under section 5 of this Appendix A for the APA Tax Year corresponding to any prior APA Covered Year.



For this Covered Method, if applicable:

- \* For APA Covered Years ending on or before #DATE, it is agreed that this Covered Method, yields financial results as shown below, and that any APA Primary Adjustments under section 5 of this Appendix A are as shown below. #TEXT AND/OR TABLES SHOWING THE FINANCIAL RESULTS, THE TESTING OF THOSE FINANCIAL RESULTS UNDER THE COVERED METHOD, AND ANY RESULTING APA PRIMARY ADJUSTMENTS.

For this Covered Method, if applicable:

- This Covered Method addresses the pricing for a transfer of intangible property (which does not constitute a platform contribution transaction as defined in U.S. Treasury Regulations section 1.482-7(b)(1)(ii)) within the meaning of U.S. Treasury Regulations section 1.482-4. That pricing will not be subject to periodic adjustments by the IRS, during or after the APA Term, under U.S. Treasury Regulations section 1.482-4(f)(2) or (6).
- This Covered Method addresses the pricing for a platform contribution transaction (“PCT”). That PCT will not be treated as a Trigger PCT within the meaning of U.S. Treasury Regulations section 1.482-7(i)(6)(i) for purposes of making periodic adjustments, during or after the APA Term, under U.S. Treasury Regulations section 1.482-7(i)(6).

## 5. Application of Covered Method(s) to Income Reporting

For each APA Tax Year, and for each Covered Method and corresponding Covered Issue(s), the amounts reported by U.S. Taxpayer and Non-U.S. Taxpayer for income tax purposes under the laws of the United States and #COUNTRY(IES) must clearly reflect the Tested Party’s actual transactions, allocations, and/or recordkeeping, as applicable, that relate to such Covered Issue(s), adjusted as necessary to conform with section 4 of this Appendix A. Accordingly, for each particular APA Tax Year and corresponding APA Covered Year, and for each such Covered Method:

- i. If the Tested Party’s financial results are tested as of such APA Covered Year and do not conform with section 4 of this Appendix A, then the tax reporting for such APA Tax Year must clearly reflect an adjustment that brings such results into conformance (an “APA Primary Adjustment”). If section 4 of this Appendix A specifies conformance to an Arm’s Length Range, then the adjustment shall be to:
  - the Median.
  - \* the near edge of the Arm’s Length Range.
  - \* the Median for Covered Issues #SPECIFY WHICH ONES, and the near edge of the Arm’s Length Range for Covered Issues #SPECIFY WHICH ONES.
- ii. If an adjustment is not required under paragraph (i) above, then the tax reporting must clearly reflect the Tested Party’s financial results, with no adjustment. In this case there is no APA Primary Adjustment.
- iii. If both an annual test and an additional term test apply under such Covered Method, and such APA Covered Year is the Last Effective APA Covered Year, so that as of such APA Covered Year the Tested Party’s financial results are tested under both the annual test and the term test, then paragraphs (i) and (ii) above are modified by this paragraph (iii), which coordinates the application of both tests. As explained in more detail below, the annual test is applied first, followed by the term test. Specifically, the need for and amount of any APA Primary Adjustment for such APA Covered Year will be determined as follows:
  - A. First apply paragraphs (i) and (ii) above under the assumption that only the annual test applies. Any required adjustment will be referred to as the “annual adjustment” rather than an “APA Primary Adjustment.” If there is no required adjustment, the annual adjustment is considered to be zero.
  - B. Next, apply paragraphs (i) and (ii) above to the Tested Party’s financial results as adjusted by any nonzero annual adjustment, under the assumption that only the term test applies to those results. Any required adjustment under this application of paragraphs (i) and (ii) will be referred to as the “term adjustment” rather than an “APA Primary Adjustment.” If there is no such required adjustment, the term adjustment is considered to be zero.

C. Add the annual adjustment and term adjustment, taking account of the magnitude and (if nonzero) direction of each. If this sum is zero, there is no APA Primary Adjustment for such APA Covered Year. If this sum is nonzero, this sum gives the magnitude and direction of the APA Primary Adjustment for such APA Covered Year. Any APA Primary Adjustment, or the lack of an APA Primary Adjustment, must be clearly reflected in the tax reporting for such APA Tax Year (see paragraphs (i) and (ii) above).

iv. If this APA is unilateral and such APA Covered Year is within the Rollback Period, then:

Paragraphs (i)-(iii) above notwithstanding, an APA Primary Adjustment will not be made if that APA Primary Adjustment would decrease the income of U.S. Taxpayer for such APA Tax Year.

\* Paragraphs (i)-(iii) above apply without modification.

If indicated, the above provisions on APA Primary Adjustments are modified as follows:

\* Any APA Primary Adjustment that would be made under the above provisions for an APA Tax Year ending before #DATE will instead be made for the APA Tax Year ending #THE SAME DATE (the “Telescoping Year”). For each particular Covered Method, all APA Primary Adjustments that are made for the Telescoping Year (including any APA Primary Adjustments that are moved to the Telescoping Year as just described, as well as any APA Primary Adjustment originally made for the Telescoping Year) are netted.

The foregoing provision applies without modification.

The foregoing provision applies with the following modification. An APA Primary Adjustment that is thus moved from a particular APA Tax Year (the “Original Year”) to the Telescoping Year shall be increased in amount to reflect the time value of money. That increase will consist of multiplication by a factor that is an annual rate raised to a power. The annual rate is  $1.\#XY$ . The power is the quotient of (i) the average of the number of months by which the end of the Telescoping Year is later than the end of the Original Year, and the number of months by which the start of the Telescoping Year is later than the start of the Original Year (with any fractions of months rounded to whole months), (ii) divided by twelve.

For U.S. tax purposes, the generally applicable Code rules will apply with respect to APA Primary Adjustments, except as otherwise provided in Rev. Proc. 2015-41 or in this APA.

## 6. Conforming Adjustments and Repatriation of Funds

The provisions in this section 6 apply to “Repatriable Issues,” which are Covered Issues that concern transactions between associated enterprises that fall under Article 9 of the OECD Model Tax Convention. Such transactions correspond to transactions that under U.S. law are subject to application of Code section 482, as modified by any applicable treaty provision.

If the application of a Covered Method to a Repatriable Issue requires an APA Primary Adjustment under section 5 of this Appendix A for a given APA Tax Year, then for U.S. tax purposes there generally must be a corresponding conforming adjustment as specified in U.S. Treasury Regulations section 1.482-1(g)(3) as amplified by Rev. Proc. 99-32 or any successor revenue procedure. However, for this purpose, all APA Primary Adjustments for such APA Tax Year arising from the application of a Covered Method to a Repatriable Issue are first netted to yield a net APA Primary Adjustment for such APA Tax Year. Only if the net APA Primary Adjustment is nonzero is a conforming adjustment required.

For each APA Tax Year with a nonzero net APA Primary Adjustment, for U.S. tax purposes the conforming adjustment will be accomplished in the following steps:

i. The conforming adjustment will be accomplished between #U.S. ENTITY and #NON-U.S. ENTITY, which will be referred to here as “U.S. Entity” and “Non-U.S. Entity”, respectively. An intercompany payable will be established between U.S. Entity and Non-U.S. Entity in the amount and direction of the net APA Primary Adjustment, as of the last day of such APA Tax Year. This payable will be denominated in #CURRENCY. The payable will be treated as indebtedness for all U.S. federal tax purposes; provided, however, that the payable will not be treated as indebtedness for purposes of Code section 956 if the payable is satisfied within 90 days of the close of the APA Tax Year with respect to which it is established.

ii.  The intercompany payable will bear interest at an arm’s length rate.

- Such arm's length rate is not specified in this APA and will be determined under applicable legal principles.
  - Such arm's length rate is determined as follows. #DESCRIPTION OF ARM'S LENGTH RATE (FOR EXAMPLE, FOR A U.S. DOLLAR PAYABLE, A CERTAIN APPLICABLE FEDERAL RATE UNDER U.S. TREASURY REGULATIONS SECTION 1.482-2(a)(2)(iii)(C)).
  - This APA is bilateral or multilateral. As agreed between the United States and #COUNTRY(IES), the intercompany payable will not bear interest.
- iii. The intercompany payable must be satisfied, in a manner permitted under Rev. Proc. 99-32 or any successor revenue procedure, within 90 days of the later of (1) the date for timely filing (with extensions) of the U.S. return for such APA Tax Year, and (2) the APA's U.S. Effective Date. If any amount of the intercompany payable is not otherwise so satisfied within that 90-day period, such amount, on the last day of such period, will be deemed (1) to be paid between U.S. Entity and Non-U.S. Entity in satisfaction of the payable, and (2) to be paid (directly or indirectly, as specified below) between U.S. Entity and Non-U.S. Entity in the opposite direction (that is, from the deemed recipient of the intercompany payable to the deemed payor of the intercompany payable). These two deemed payments on the same day will cancel and thus yield no net cash flow between these two entities. The second of these deemed payments will be referred to as the "reverse payment." The reverse payment will be deemed to be as follows:
- A. If the net APA Primary Adjustment increases U.S. income:
- The reverse payment will be deemed to be a contribution to capital from U.S. Entity to Non-U.S. Entity, either directly, or indirectly through the corporate chain, as the case may be.
  - The reverse payment will be deemed to be a distribution from U.S. Entity to Non-U.S. Entity, either directly, or indirectly through the corporate chain, as the case may be.
  - The reverse payment will be deemed to be a distribution from U.S. Entity to #COMMON PARENT, either directly, or indirectly through the corporate chain, as the case may be, followed by a contribution by #COMMON PARENT to non-U.S. Entity, either directly or indirectly through the corporate chain, as the case may be.
- B. If the net APA Primary Adjustment decreases U.S. income:
- The reverse payment will be deemed to be a contribution to capital from non-U.S. Entity to U.S. Entity, either directly, or indirectly through the corporate chain, as the case may be.
  - The reverse payment will be deemed to be a distribution from non-U.S. Entity to U.S. Entity, either directly, or indirectly through the corporate chain, as the case may be.
  - The reverse payment will be deemed to be a distribution from non-U.S. Entity to #COMMON PARENT, either directly, or indirectly through the corporate chain, as the case may be, followed by a contribution by #COMMON PARENT to U.S. Entity, either directly, or indirectly through the corporate chain, as the case may be.

This situation is generally described in paragraph 4.66 of the OECD Guidelines, and in U.S. Treasury Regulations section 1.482-1(g) and Rev. Proc. 99-32.

In this APA, if applicable:

- \* For the APA Tax Year(s) ending on or before #DATE, it is agreed that the net APA Primary Adjustment(s), if any, from the application of the Covered Methods are as follows: #FOR EACH SUCH APA TAX YEAR, DESCRIPTION OF WHETHER THERE IS A NET APA PRIMARY ADJUSTMENT, AND IF SO THE AMOUNT AND DIRECTION. IF THERE IS MORE THAN ONE COVERED METHOD FOR A REPATRIABLE ISSUE, ALSO PROVIDE A TABLE SHOWING THE DERIVATION, FOR EACH SUCH APA TAX YEAR, OF THE NET APA PRIMARY ADJUSTMENT FROM THE APA PRIMARY ADJUSTMENT (OR LACK OF ONE) FOR EACH SUCH COVERED METHOD. #FOR ANY SUCH NET APA PRIMARY ADJUSTMENTS, DESCRIPTION OF THE MEANS BY WHICH THE CONFORMING ADJUSTMENT HAS BEEN OR WILL BE SATISFIED, WITH APPLICABLE DATES.

## 7. Definitions

The definitions in the table below apply to this APA.

The defined terms in this table include certain measures of profitability (e.g., operating profit, operating margin). Most of these measures are ultimately defined in terms of sales revenue, operating expenses, and operating assets (defined terms), and cogs and non-interest-bearing liabilities (undefined terms). The definitions of sales revenue, operating expenses, and operating assets contain a limitation to the relevant business activity. Similarly, each use of the terms “cogs” and “non-interest-bearing liabilities” is accompanied by a limitation to the relevant business activity. Therefore, the measures of profitability based on these five terms all are defined with a limitation to the relevant business activity. (Certain other measures of profitability in this table relate to the provision of services and are defined with reference to those services. Therefore, those measures as well contain a limitation to the relevant business activity.)

<b>Term</b>	<b>Definition</b>
Arm’s Length Range	With respect to a particular Covered Method, a numerical range that defines the values for which certain financial results of the Tested Party are considered to satisfy the arm’s length standard. (This term may be referenced in section 4 of this Appendix A.)
APA Primary Adjustment	(Defined in section 5 of this Appendix A.)
APA Covered Year	(Defined in section 2 of this Appendix A.)
APA Term	(Defined in section 2 of this Appendix A.)
APA Tax Year	(Defined in section 2 of this Appendix A.)
Applicable Accounting Standard	The Applicable Accounting Standard is #CHOOSE FROM U.S. GAAP, IFRS, ETC. for U.S. Taxpayer and #CHOOSE FROM U.S. GAAP, IFRS, ETC. for Non-U.S. Taxpayer.
Berry ratio	The ratio of gross profit to operating expenses.
Code	The U.S. Internal Revenue Code of 1986, title 26 of the United States Code, as amended.
correspond, corresponding	(With regard to APA Covered Years and APA Tax Years, defined in section 2 of this Appendix A; with regard to Covered Issues and Covered Methods, defined in section 4 of this Appendix A.)
Covered Entity(ies)	(Defined in section 1 of this Appendix A.)
Covered Issue(s)	(Defined in section 3 of this Appendix A.)
Covered Method	A method used to resolve one or more Covered Issues, as described in section 4 of this Appendix A. (In some cases, this method may be a “transfer pricing method” within the meaning of chapter II of the OECD Guidelines and U.S. Treasury Regulations section 1.482-1(b).)
Critical Assumption fails, failure of a Critical Assumption	A Critical assumption “fails” when the Critical Assumption has not been met. This situation is referred to as the “failure” of the Critical Assumption.
Early Termination	A termination of this APA’s effectiveness, either in its entirety or only as applied to certain Covered Issues before the end of the APA Term. Such a termination could result from one or more of the following circumstances: (i) a Critical Assumption failure, (ii) a violation of the terms and conditions of this APA, (iii) a cancellation of the APA under Rev. Proc. 2015-41, and (iv) an amendment of the APA. If an Early Termination so terminates this APA’s effectiveness as applied to a particular Covered Issue, the Early Termination is said to “apply” to or for that Covered Issue.  Any such termination of effectiveness would occur as of the end of an APA Tax Year (see Rev. Proc. 2015-41, section 7.06). Because such end of an APA Tax Year is before the end of the APA Term, such end of an APA Tax Year is also the end of the corresponding APA Covered Year (see the definitions of APA Tax Year and APA Covered Year in section 2 of this Appendix A). Thus, an Early Termination always would occur as of the end of an APA Covered Year. That fact is assumed in the definitions in this table of Last Effective APA Covered Year and Last Effective APA Subterm Covered Year.
Gross profit	Sales revenue, less cost of goods sold for the relevant business activity.
Gross profit margin	gross profit, divided by sales revenue
Gross profit markup	gross profit, divided by cost of goods sold for the relevant business activity

<b>Term</b>	<b>Definition</b>
Gross services margin	In connection with a provision of services, the ratio of gross services profit to the price paid for the services in an uncontrolled transaction. For this purpose, gross services profit equals the amount of such price that is retained by the Tested Party.
Gross services profit markup	In connection with a provision of services, gross services profit, divided by transactional costs. For this purpose, gross services profit equals sales revenue less transactional costs. Also, for this purpose, transactional costs equal costs directly attributable to providing the services. Such costs would include, for example, all compensation attributable to employees directly involved in the performance of such services, and costs of materials and supplies consumed or made available in rendering the services.
IFRS	International Financial Reporting Standards.
Invested capital	Operating assets, less non-interest-bearing liabilities used in the relevant business activity.
IRS	The Internal Revenue Service, an agency of the U.S. government.
IFRS	International Financial Reporting Standards.
Last Effective APA Covered Year	For a particular Covered Method, the last APA Covered Year for which this APA remains effective as to the Covered Issue(s) corresponding to that Covered Method. The Last Effective APA Covered Year will be the last APA Covered Year unless an Early Termination applies to such Covered Issue(s). <i>See also</i> the definition in this table of Early Termination.
Last Effective APA Subterm Covered Year	For a particular Covered Method, and with reference to a particular set of APA Covered Years that is defined as a subterm, the last APA Covered Year in the subterm for which this APA remains effective as to the Covered Issue(s) corresponding to that Covered Method. The Last Effective APA Subterm Covered Year will be the last APA Covered Year in the subterm unless an Early Termination applies to such Covered Issue(s) and renders the APA ineffective as to such Covered Issue(s) before the end of the subterm. <i>See also</i> the definition in this table of Early Termination.
Markup on total costs	The ratio of operating profit to total costs.
Median	With respect to a particular Arm's Length Range, the median of a set of observations of market data from which that Arm's Length Range was determined.
Non-U.S. Taxpayer	(Defined in section 1 of this Appendix A.)
Non-U.S. Covered Entity(ies)	(Defined in section 1 of this Appendix A.)
OECD Guidelines	Organisation for Economic Co-operation and Development, <i>OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations</i> (July 2017).
OECD PE Report	Organisation for Economic Co-operation and Development, <i>2010 Report on Attribution of Profit to Permanent Establishments</i> (July 22, 2010).
Operating assets	The value of all assets used in the relevant business activity, including fixed assets and current assets (such as accounts receivable and inventories). The following items are excluded from operating assets: cash, cash equivalents, short-term investments, deferred tax assets, tax refunds, intangibles, investments in subsidiaries, portfolio investments.
Operating expenses	All expenses (including depreciation) not included in cost of goods sold except for interest expense, domestic and foreign income taxes, amortization of intangibles, and any other expenses not related to the operation of the relevant business activity. Operating expenses normally include, for example, expenses associated with advertising, promotion, sales, marketing, warehousing and distribution, administration, and a reasonable allowance for depreciation. For U.S. Taxpayer, foreign income taxes are defined in U.S. Treasury Regulations section 1.902-1(a)(7).
Operating margin	The ratio of operating profit to sales revenue.
Operating profit	Sales revenue, less cost of goods sold for the relevant business activity, less operating expenses.
Rev. Proc. 99-32	A revenue procedure issued by the IRS that is cited as Rev. Proc. 99-32, 1999-2 C.B. 296.
Rev. Proc. 2015-41	A revenue procedure issued by the IRS that is cited as Rev. Proc. 2015-41, 2015-35 I.R.B 263.
Repatriable Issue	(Defined in section 6 of this Appendix A.)

<b>Term</b>	<b>Definition</b>
Relevant Financial Data	With respect to a particular Covered Method, the financial results of the Tested Party that are tested, together with any other financial data (of the Tested Party or any other party) that are considered in determining compliance with the Covered Method.
Return on invested capital	(Defined in the same way as “return on operating assets,” but with “operating assets” replaced by “invested capital” wherever it occurs in the definition.)
Return on operating assets	<p>With respect to a particular Covered Method, the Tested Party for that Covered Method, and a testing period used in that Covered Method, the operating profit over the testing period divided by the time-weighted average operating assets over the testing period.</p> <p>For this purpose, the time-weighted average operating assets over the testing period is the sum, over all APA Covered Years in the testing period, of the following product: (i) the simple average of the operating asset levels at the start and end of the APA Tax Year corresponding to such APA Covered Year, multiplied by (ii) the ratio of the number of calendar days in the APA Covered Year, to 365.</p> <p>For example, suppose that (i) the testing period consists of two consecutive APA Covered Years, the first with 183 calendar days and the second with 366 calendar days, (ii) the total operating profit over those two years is exactly 3.4, and (iii) the operating assets levels are exactly 10 at the start of the APA tax year corresponding to the first APA Covered Year, 16 at the end of the APA Tax Year corresponding to the first APA Covered Year (which is also the start of the APA Tax Year corresponding to the second APA Covered Year), and 22 at the end of the APA Tax Year corresponding to the second APA Covered Year. Then the time-weighted average operating assets over the testing period is <math>[(10+16)/2]*(183/365) + [(16+22)/2]*(366/365) = 25.5699</math>. The return on operating assets is then <math>3.4/25.5699 = 13.30\%</math>.</p>
Rollback Period	(This term, if applicable, is defined in section 2 of this Appendix A.)
Sales revenue	Total receipts from sale of goods and provision of services, less returns and allowances, for the relevant business activity.
Tax year	A standard or irregular year that is used for tax reporting purposes. For U.S. Taxpayer, a tax year is a “taxable year,” as defined in Code section 441.
Tested Party	(Defined in section 4 of this Appendix A with regard to a particular Covered Method.)
Testing period	The time period over which financial results are tested (see section 4 of Appendix A to this APA).
Total costs	Cost of goods sold for the relevant business activity, plus operating expenses.
U.S. Treasury Regulations	Tax regulations issued by the U.S. Treasury Department, found at title 26 of the Code of Federal Regulations.
U.S. Covered Entity(ies)	(Defined in section 1 of this Appendix A.)
U.S. Effective Date	The date, or later date of the dates, upon which the APA is executed by the IRS and by or on behalf of each U.S. Covered Entity.
U.S. GAAP	U.S. generally accepted accounting principles.
U.S. return	Any of the “Returns with respect to income taxes under subtitle A” required by Code section 6012, and any “return” for a partnership required by Code section 6031.
U.S. Taxpayer	(Defined in section 1 of this Appendix A.)

## APPENDIX B

### CRITICAL ASSUMPTIONS

The Critical Assumptions are:

1. 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.
2. The Covered Entities' financial accounting methods and classifications and methods of estimation in relation to the Covered Issue(s) and Covered Method(s) will remain materially the same as described or used in the APA Request.

If indicated, the effect of a critical assumption failure may be limited as follows:

- The failure of Critical Assumptions #XXX listed above will affect the effectiveness of this APA only as to Covered Issues #YYY listed in Appendix A. Thus, as to the other Covered Issues, the APA will remain in force (except to the extent some other condition affects the APA's effectiveness as to those Covered Issues).

The Covered Entities will not cause a critical assumption to fail for the purpose of rendering the APA ineffective, unless they have an independent business justification (unrelated to rendering the APA ineffective) for the action that causes the critical assumption to fail. If one or more Covered Entities do cause a critical assumption to fail for the purpose of rendering the APA ineffective, and without such independent business justification, then the Covered Entities will not withhold consent to an amendment to this APA to the effect that this APA will continue in force without regard to such failure. In this case, if a Covered Entity refuses to sign such an amendment, such an amendment may be executed without such signature and will then have the same force and effect as if the amendment had such signature.

## APPENDIX C

### APA RECORDS AND ANNUAL REPORT

#### APA RECORDS

The APA Records will consist of all documents listed below for inclusion in the Annual Report, as well as all documents, notes, work papers, records, or other writings that support the information provided in such documents.

#### ANNUAL REPORT

An Annual Report must be submitted for each APA Tax Year in accordance with paragraph 6(e) of the APA and section 7.02 of Rev. Proc. 2015-41.

For each APA Tax Year, the Annual Report (and each copy or version as required by paragraph 6(e) of the APA) will include:

1. Two copies of a properly completed APA Annual Report Summary in the form of Appendix D to this APA, one copy of the form bound with, and one copy provided separately from, the rest of the Annual Report. (The electronic version of the Annual Report need have only one copy of this item.)
2. A table of contents organized according to the additional required items listed below.
3. For such APA Tax Year and the corresponding APA Covered Year, statements that fully identify, describe, analyze, and explain:
  - a. All material differences between the Covered Entities' business activities, functions performed, risks assumed, assets employed, contractual terms, markets, and economic conditions faced in relation to the Covered Issues during such APA Covered Year from those same items described in the APA Request. If there have been no such material differences, the Annual Report will include a statement to that effect.
  - b. All material differences between Covered Entities' financial accounting methods and classifications and methods of estimation in relation to the Covered Issues and Covered Methods used during such APA Covered Year, from those described or used in the APA Request. If any change was made to conform to changes in the Applicable Accounting Standard, U.S. Taxpayer will specifically identify the change. If there have been no such material differences, the Annual Report will include a statement to that effect.
  - c. Regarding notices under paragraph 16 of the APA:
    - i. A current statement of how the IRS should provide such notices to U.S. Taxpayer (and, if applicable, to U.S. Taxpayer's representative).
    - ii. A copy of any such notices that were submitted by U.S. Taxpayer to the IRS after the last Annual Report was submitted (or, if there was no prior Annual Report, after the APA was executed). If there were no such notices, the Annual Report will include a statement to that effect.
  - d. Any failure of any Critical Assumption. If there has been no such failure, the Annual Report will include a statement to that effect.
  - e. Whether or not material information submitted while the APA Request was pending is discovered to be false, incorrect, or incomplete, and if so a correction or completion of that information, as applicable.
  - f. Any change to any entity classification for federal income tax purposes (including any change that causes an entity to be disregarded for federal income tax purposes) of any Worldwide Group member that is a Covered Entity or is otherwise relevant to the Covered Issue(s) or Covered Method(s).



- g. The following regarding any APA Primary Adjustments made for such APA Tax Year under Appendix A to this APA:
  - i. The amounts of any APA Primary Adjustments;
  - ii. The circumstances that led to such APA Primary Adjustments being necessary;
  - iii. A calculation of the net APA Primary Adjustment as defined in Appendix A to this APA; and
  - iv. A complete description of the means by which the conforming adjustment (see section 6 of Appendix A to this APA) is accomplished, including:
    - A. a description of any accounts payable established, including the entities involved and when the payables are established;
    - B. a description of any amounts paid or deemed paid (including amounts paid or deemed paid in satisfaction of an intercompany payable established as described in section 6 of Appendix A to this APA, and including any deemed reverse payments as described in section 6 of Appendix A to this APA), that specifies the entities involved, when the amounts are paid or deemed paid, and by what means any amounts are actually paid; and
    - C. the character (such as capital, ordinary, income, expense, dividend, contribution to capital) and country source of any payments and deemed payments, and the specific affected line item(s) of any affected U.S. return;
  - h. A detailed numerical explanation of how the result of the application of the Covered Methods is reflected on the U.S. return, with reference to particular line items on the U.S. return. This explanation shall include the amounts, description, reason for, and financial analysis of any book-tax differences, as reflected on Schedule M-1 or Schedule M-3 of the U.S. return for such APA Tax Year, that (i) are relevant to an APA Primary Adjustment, (ii) otherwise are relevant to the book and tax treatment of any income or expense item that is part of the Relevant Financial Data for, or is determined by, any Covered Method for such APA Tax Year, or (iii) otherwise are relevant to the APA. U.S. Taxpayer shall not simply attach a copy of the pertinent schedule. Rather, U.S. Taxpayer shall specifically identify the relevant items from that schedule and shall describe in appropriate detail the nature of those items, how they arose, and how they are accounted for.
    - i. Whether or not U.S. Taxpayer contemplates requesting, or has requested, to renew, modify, or cancel the APA.
- 4. The Financial Statements and additional statements required under paragraph 6(f) of the APA, for such APA Tax Year and for any other tax year whose financial data are relevant to compliance with the APA for such APA Tax Year;
- 5. A financial analysis that includes U.S. Taxpayer's calculations to apply the Covered Method(s) to the Covered Issue(s) for such APA Covered Year and supports those calculations with additional material that ties those calculations to the Financial Statements. The intent of this requirement is that the analysis submitted should provide a clear, complete, detailed, and self-contained means by which the IRS can verify compliance with the Covered Method(s). This requirement is further explained as follows:
  - a. The additional material must support every numerical input to U.S. Taxpayer's calculations.
  - b. The additional material could include, for example, consolidating financial statements, segmented financial data, and records from the general ledger.
  - c. Where segmented data are used, U.S. Taxpayer must specify in detail how it accomplished the segmentation, including how it made allocations and apportionments, including (i) the definition and calculation of any apportionment keys used, and (ii) the calculations applying such keys. The inputs used for those various calculations must be tied to the Financial Statements.
  - d. The additional material must be annotated sufficiently to let the IRS easily trace U.S. Taxpayer's entire calculations to objective, verifiable sources of data.
  - e. Where needed for clarity, terms must be defined.
- 6. The financial results pertinent to the Covered Method(s), for such APA Covered Year and all prior years, entered along with data concerning the Covered Method(s) in an electronic results template available by contacting APMA.

7.  An organizational chart for Worldwide Group, revised annually to reflect all ownership or structural changes of the Covered Entities and any other entities that are relevant to the Covered Issue(s) or are otherwise relevant to the Covered Method(s).
- \* An organizational chart for a part of Worldwide Group that includes all Covered Entities and includes any other entities relevant to the Covered Issue(s) or Covered Method(s), revised annually to reflect all ownership or structural changes of entities that are involved in the Covered Issue(s) or are otherwise relevant to the Covered Issue(s) or Covered Method(s).
8. A valid IRS Form 2848 “Power of Attorney and Declaration of Representative” for any representative to receive notices under paragraph 16 of this APA.
9. A copy of the APA and any amendment.
10. A penalty of perjury statement, executed in accordance with Rev. Proc. 2015-41, sections 7.02(8) and (9).

**APPENDIX D**

**APA ANNUAL REPORT SUMMARY FORM**

The APA Annual Report Summary on the next page is a required APA Record. APMA supplies some of the information requested on the form. U.S. Taxpayer is to supply the remaining information requested by the form and submit the form as part of its Annual Report.

<b>Internal Revenue Service</b>	APMA Case No.	
<b>Large Business and International Division</b>	Reviewer	
<b>Treaty &amp; Transfer Pricing Operations</b>	Team Leader	
<b>Advance Pricing Mutual Agreement Program</b>	Economist	
	Other APA Team Members	

**APA Information**

U.S. Taxpayer's Name	
U.S. Taxpayer's EIN	
U.S. Taxpayer's NAICS	
Unilateral/Bilateral/Multilateral	
Original or Renewal	
APA Common Name, if any	
APA Request Filing Date	
Date APA Executed	
APA Term (date-to-date, inclusive)	
Foreign Countr(y)ies Involved	
Annual Report Due Dates for years ending on or before [date]:	
Annual Report Due Dates for other years: [last month of tax year] 15 following close of year	
Covered Methods Summary Description	
(e.g., CPM, operating margin 2%-5%)	
Taxpayer's Principal Representative	

**APA Annual Report Information:**

Year(s) covered by this Annual Report		
Issues for APMA's special attention (or "None")		
Taxpayer Notice Person	Name	
<i>If necessary, include a current Form 2848 for the Notice Person</i>	Title	
	Address	
	City/State/Zip	
	Phone/Fax	
	Email	
Current Representative, if any	Name	
<i>Include a current Form 2848 for the representative</i>	Title	
	Address	
	City/State/Zip	
	Phone/Fax	
	Email	

**Date Annual Report Filed (to be filled in by APMA):**

\_\_\_\_\_

# Notice of Proposed Rulemaking

## Multiple Employer Plans

### REG-121508-18

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing; withdrawal of notice of proposed rulemaking.

**SUMMARY:** This document sets forth proposed regulations relating to certain multiple employer plans (MEPs) described in the Internal Revenue Code (the “Code”). The proposed regulations provide an exception, if certain requirements are met, to the application of the “unified plan rule” for MEPs in the event of a failure by one or more employers participating in the plan to take actions required of them to satisfy the applicable requirements of the Code. These proposed regulations would affect certain MEPs, participants in those MEPs (and their beneficiaries), employers participating in those MEPs, and plan administrators of those MEPs. This document also withdraws proposed regulations published in the **Federal Register** on July 3, 2019, amending the application of the unified plan rule to MEPs and provides a notice of a public hearing.

**DATES:** Written or electronic comments must be received by Friday, May 27, 2022. A public hearing on these proposed regulations has been scheduled for Wednesday, June 22, 2022, at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by Friday, May 27, 2022. If no outlines are received by Friday, May 27, 2022, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. EST on Friday, June 17, 2022. The telephonic hearing will be made accessible to people with

disabilities. Requests for special assistance during the telephonic hearing must be received by Thursday, June 16, 2022.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-121508-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-121508-18), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

For those requesting to speak during the hearing, send an outline of topic submissions electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-121508-18).

Individuals who want to testify (by telephone) at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-121508-18 and the word TESTIFY. For example, the subject line may say: Request to TESTIFY at Hearing for REG-121508-18. The email should include a copy of the speaker’s public comments and outline of topics. Individuals who want to attend the public hearing by telephone must also send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-121508-18 and the word

ATTEND. For example, the subject line may say: Request to ATTEND Hearing for REG-121508-18. To request special assistance during the telephonic hearing contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred) or by telephone at (202) 317-5177 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Pamela Kinard at (202) 317-6000 or Tom Morgan at (202) 317-6700; concerning submission of comments or requests for a public hearing, Regina Johnson (202) 317-5177 (not toll-free numbers) or by sending an email to [publichearings@irs.gov](mailto:publichearings@irs.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 413(c) of the Code and proposed regulations under section 413(e) of the Code. This document also withdraws proposed regulations under section 413(c) that were published in the **Federal Register** on July 3, 2019 (84 FR 31777) (section 413(c) proposed regulations).

##### *I. General Rules Relating to MEPs Including the Unified Plan Rule*

Section 413(c) provides rules for a plan maintained by more than one employer.<sup>1</sup> A plan described in section 413(c) often is referred to as a multiple employer plan (MEP) or a section 413(c) plan.

Final regulations under section 413 were published in the **Federal Register** on November 9, 1979, 44 FR 65061 (the final section 413 regulations). The final section 413 regulations apply to MEPs described in section 413(c) and to collectively bargained plans described in section 413(b) (plans that are maintained pursuant to certain collective-bargaining

<sup>1</sup> Section 210 of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406 (88 Stat. 829), as amended (ERISA), also provides rules relating to plans maintained by more than one employer. Similar to section 413(c) of the Code, section 210(a) of ERISA states that the minimum participation standards, minimum vesting standards, and benefit accrual requirements under sections 202, 203, and 204 of ERISA, respectively, shall be applied as if all employees of each of the employers were employed by a single employer. Under section 101 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App.), the Secretary of the Treasury has interpretive jurisdiction over section 413 of the Code, as well as ERISA section 210.

agreements between employee representatives and one or more employers).

Pursuant to section 413(c) and the final section 413 regulations, all of the employers maintaining a MEP (participating employers) are treated as a single employer for purposes of certain Code requirements, which include the following requirements:

- under section 413(c)(1) and 26 CFR 1.413-2(b), the rules addressing plan participation under section 410(a) and the regulations thereunder are applied as if all employees of each of the employers that maintain the plan are employed by a single employer;
- under section 413(c)(2) and § 1.413-2(c), in determining whether a MEP is, with respect to each participating employer, a plan for the exclusive benefit of its employees (and their beneficiaries), all of the employees participating in the plan are treated as employees of each such employer; and
- under section 413(c)(3) and § 1.413-2(d), the minimum vesting standards under section 411 are applied as if all employers that maintain the plan constitute a single employer.

Other rules are applied separately to each participating employer. For example, under § 1.413-2(a)(3)(ii), the minimum coverage requirements of section 410(b) generally are applied to a MEP on an employer-by-employer basis.

A plan is not described in section 413(c) unless it is maintained by more than one employer and is a single plan under section 414(l). See §§ 1.413-2(a)(2)(i) and 1.413-1(a)(2). Under § 1.414(l)-1(b), a plan is a single plan if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

Under § 1.413-2(a)(3)(iv), the qualification of a MEP “is determined with respect to all employers maintaining the section 413(c) plan” (sometimes referred

to as the unified plan rule). Therefore, the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan.

The section 413(c) proposed regulations, which are being withdrawn, would have created an exception to the unified plan rule for certain defined contribution MEPs. The exception generally would have been available, provided that certain conditions were satisfied, if a participating employer in a MEP was solely responsible for a qualification failure that the employer was unable or unwilling to correct, or if a participating employer failed to comply with a plan administrator’s request for information about a qualification failure that the plan administrator reasonably believed might exist.

Written comments responding to the section 413(c) proposed regulations were received, and a public hearing was held on December 11, 2019. The provisions of these proposed regulations were informed by the comments received with respect to the section 413(c) proposed regulations.

## II. SECURE Act Provisions Related to MEPs

Section 101(a) of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), which was enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act of 2020, Public Law 116-94 (133 Stat. 2534), added section 413(e) to the Code. Section 413(e) creates a statutory exception to the unified plan rule for certain types of MEPs and directs the Secretary to issue guidance that is appropriate to carry out that provision. A MEP is eligible for the exception to the unified plan rule if it is a section 413(c) defined contribution plan<sup>2</sup> described in section 401(a) or consists of individual retirement accounts described in section 408 (including by

reason of section 408(c)),<sup>3</sup> provided that the MEP either is maintained by employers that have a “common interest” or has a “pooled plan provider.”<sup>4</sup> Section 413(e)(1) provides that, with certain exceptions, this type of MEP will not be treated as failing to meet the applicable requirements under the Code merely because one or more employers of employees covered by the plan fail to take actions that are required for the plan to meet those requirements.

Section 413(e)(2)(A) provides that section 413(e)(1) will not apply unless the terms of the plan provide that, in the case of any employer in the plan failing to take the actions described in section 413(e)(1), the assets of the plan attributable to employees of that employer (or beneficiaries of those employees) will be transferred to a plan maintained only by that employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of those employees (and their beneficiaries) to retain the assets in the plan. Section 413(e)(2)(A) also states that section 413(e)(1) will not apply unless the terms of the plan provide that, in the case of any employer failing to take the actions described in section 413(e)(1), the employer (and not the plan or any other employer in the plan) will be liable for any liabilities with respect to the plan attributable to employees of that employer (or their beneficiaries), except to the extent provided by the Secretary.

Section 413(e)(2)(B) provides that, if the pooled plan provider of a plan described in section 413(e)(1)(B) does not perform substantially all of the administrative duties required by section 413(e)(3)(A)(i) for any plan year, the Secretary may provide that the determination as to whether the plan meets the applicable Code requirements for a plan described in section 401(a) or a plan that consists of individual retirement accounts described in

<sup>2</sup>Although section 403(b) plans are defined contribution plans, they are not plans described in section 401(a) or 408. Therefore, section 413(e)(1) does not apply to section 403(b) plans.

<sup>3</sup>Prior to the SECURE Act, section 413(c)(2) of the Code provided, “For purposes of section 401(a), in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries all plan participants shall be considered his employees.” Section 101(a)(2) of the SECURE Act amended section 413(c)(2) of the Code so that it applies for purposes of section 408(c) of the Code in addition to section 401(a) of the Code.

<sup>4</sup>Section 101(c) of the SECURE Act also amended title I of ERISA to introduce the term “pooled plan provider,” as well as the term “pooled employer plan” for a plan with a pooled plan provider. See ERISA sections 3(44) and 3(43), respectively. These ERISA provisions do not address compliance under the Code for plans described in section 401(a) or 408, but the requirements for pooled plan providers and pooled employer plans are otherwise similar to the requirements in section 413(e).

section 408 (including by reason of section 408(c)), whichever is applicable, will be made in the same manner as would be made without regard to section 413(e)(1).

Section 413(e)(3)(A) provides that, for purposes of section 413(e), the term pooled plan provider means, with respect to any plan, a person who:

- is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person responsible to perform specified administrative duties;
- registers as a pooled plan provider with the Secretary, and provides such other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider;
- acknowledges in writing that such person is a named fiduciary (within the meaning of section 402(a)(2) of ERISA), and the plan administrator, with respect to the plan; and
- is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA.<sup>5</sup>

The administrative duties for which the pooled plan provider is responsible are the duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) that are reasonably necessary to ensure that (1) the plan meets any requirements under ERISA or the Code applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408, whichever is applicable, and (2) each employer in the plan takes actions that the Secretary or the pooled plan provider determines are necessary for the plan to meet those requirements, including providing to the pooled plan provider any disclosures or other information that the Secretary may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet the requirements of section 401(a) or 408. In determining whether a person

meets the requirements to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer under section 414 (b), (c), (m), or (o) are treated as one person.

Section 413(e)(3)(B) provides that the Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of section 413(e). Section 413(e)(3)(D) provides that each employer in a plan with a pooled plan provider is treated as the plan sponsor with respect to the portion of the plan attributable to employees of the employer (or their beneficiaries), except with respect to the administrative duties of the pooled plan provider described in section 413(e)(3)(A)(i).

Section 413(e)(4)(A) directs the Secretary to issue guidance that the Secretary determines appropriate to carry out section 413(e), including guidance: (i) identifying the administrative duties and other actions required to be performed by a pooled plan provider under section 413(e); (ii) describing the procedures to be taken to terminate a plan which fails to meet the requirements to be a plan described in section 413(e)(1), including the proper treatment of, and actions needed to be taken by, any employer in the plan and the assets and liabilities of the plan attributable to employees of the employer (or their beneficiaries); and (iii) identifying appropriate cases to which the rules of section 413(e)(2)(A) will apply to employers in the plan failing to take the actions described in section 413(e)(1), taking into account whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements applicable to the plan under section 401(a) or 408, whichever is applicable, has continued over a period of time that demonstrates a lack of commitment to compliance.

Section 413(e)(4)(B) states that an employer or pooled plan provider will not be treated as failing to meet a requirement of guidance issued pursuant to section 413(e)

(4) if, before the guidance is issued, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of section 413(e) to which the guidance relates.

Section 413(e)(5) requires the Secretary to publish model plan language which meets the requirements of section 413(e) and section 3(43) and (44) of ERISA and which may be adopted in order for a plan to be treated as a plan that has a pooled plan provider.

Section 101(e)(2) of the SECURE Act states that nothing in the amendments made by section 101(a) of the SECURE Act shall be construed as limiting the authority of the Secretary of the Treasury or the Secretary's delegate (determined without regard to such amendments) to provide for the proper treatment of a failure to meet any requirement applicable under the Code with respect to one employer (and its employees) in a multiple employer plan

## Explanation of Provisions

### I. Overview

The proposed regulations provide guidance to implement the exception to the unified plan rule for section 413(e) plans (unified plan exception). The proposed regulations define a section 413(e) plan as a defined contribution plan described in section 401(a), or a plan that consists of individual retirement accounts described in section 408 (including accounts described in sections 408(c), 408(k), or 408(p)), that is a section 413(c) plan (as defined in §1.413-2(a)(2)) and that (1) is maintained by employers that have a common interest other than having adopted the plan or (2) has a pooled plan provider. Because a section 413(e) plan is a type of section 413(c) plan, a section 413(e) plan is subject to all of the rules of section 413(c), including the rules for participation in section 413(c)(1) and the rules for vesting in section 413(c)(3).<sup>6</sup>

These proposed regulations do not provide guidance on whether a section 413(e) plan is maintained by employers that have

<sup>5</sup>The Department of Labor has issued guidance on the application of the bonding provision in its final rule on registration requirements for pooled plan providers. See 85 FR 72934, 72936 n.5 (November 16, 2020).

<sup>6</sup>For rules relating to section 413(c) plans, see §1.413-2.

a common interest other than having adopted the plan. The Treasury Department and the IRS request comments on what (if any) guidance would be helpful regarding whether employers have such a common interest, including how any guidance should be coordinated with guidance issued by the Department of Labor. An employer that desires to participate in a section 413(e) plan may choose to participate in a defined contribution plan described in section 401(a) or 408 with a pooled plan provider in order to ensure that the plan is a plan described in section 413(e).<sup>7</sup>

Under the unified plan exception, a section 413(e) plan is not treated as failing to meet the requirements under the Code applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, merely because of a participating employer failure.<sup>8</sup> For the unified plan exception to apply, the proposed regulations provide that certain conditions must be satisfied, including that the section 413(e) plan administrator must notify the participating employer of the participating employer failure and, in certain circumstances, transfer amounts attributable to the employees of the unresponsive participating employer to a separate plan maintained by the employer or provide an election to certain participants to remain in the plan or to have their accounts transferred to another eligible retirement plan.

In addition to defining a section 413(e) plan, the proposed regulations provide a number of other definitions, including the following: (1) a section 413(e) plan administrator is the plan administrator, within the meaning of section 414(g), of a section 413(e) plan; (2) a participating employer is one of the employers maintaining a section 413(e) plan; (3) an

unresponsive participating employer is a participating employer that has a participating employer failure; (4) an employee is a current or former employee of a participating employer; (5) a beneficiary is a beneficiary of a deceased employee or an alternate payee (as defined in section 414(p)) with respect to an employee; and (6) a participating employer is one of the employers maintaining a section 413(e) plan. As discussed in the following paragraphs, the proposed regulations also include definitions for the following terms: (1) participating employer failure, (2) amounts attributable to the employees of the unresponsive participating employer, and (3) pooled plan provider.

The proposed regulations define a participating employer failure in a section 413(e) plan as a failure to provide information or a failure to take action. A failure to provide information is defined as a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to respond in a timely manner to a reasonable request by the section 413(e) plan administrator for data, documents, or any other information that the plan administrator reasonably believes is necessary to determine whether a section 413(e) plan is in compliance with a requirement of section 401(a) or 408 as it relates to the participating employer. A failure to take action is defined as a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to comply in a timely manner with a reasonable request by a section 413(e) plan administrator to take action needed for the section 413(e) plan to satisfy a requirement of section 401(a) or 408 as it relates to the participating employer. For purposes of these definitions, a section 413(e) plan administrator's request would not be considered reasonable if it fails to

give the employer sufficient time to provide information or take action (and, consequently, a participating employer's failure to respond to an unreasonable request would not be considered a participating employer failure).

The proposed regulations define amounts attributable to the employees of the unresponsive participating employer as plan assets and account balances held by a section 413(e) plan on behalf of employees of an unresponsive participating employer that are attributable to their employment with the unresponsive participating employer. The proposed regulations provide rules that apply if there is no separate accounting for amounts that are attributable to employment with the unresponsive participating employer and with other participating employers.<sup>9</sup> If a participant's account balance includes amounts that are attributable to current employment with the unresponsive participating employer and to previous employment with one or more other participating employers, the entire account balance is treated as attributable to employment with the unresponsive participating employer. On the other hand, if a participant's account balance includes amounts that are attributable to current employment with a participating employer that is not the unresponsive participating employer and to previous employment with the unresponsive participating employer, none of the account balance is treated as attributable to employment with the unresponsive participating employer. For purposes of this definition, a participant's most recent employment with a participating employer in the MEP will be treated as the participant's current employment.

Under the proposed regulations, the term pooled plan provider means, with respect to any plan, a person who: (1) registers as a pooled plan provider with the Commissioner; (2) is designated by the

<sup>7</sup>The Department of Labor has advised the Treasury Department and the IRS that an arrangement with a pooled plan provider can qualify as a pooled employer plan under section 3(43)(A) of ERISA without regard to whether the arrangement could be structured as a plan maintained by employers that have a common interest other than having adopted the plan. See also 86 FR 51488, 51490, n.12.

<sup>8</sup>Section 1.416-1, Q&A G-2, includes a rule similar to the unified plan rule, providing that a failure by a MEP to satisfy section 416 with respect to employees of one participating employer means that all participating employers in the MEP are maintaining a plan that is not a qualified plan. This rule is based on the unified plan rule in §1.413-2(a)(3)(iv). Therefore, if a section 413(e) plan has an unresponsive employer that fails to satisfy section 416 and the section 413(e) plan meets the conditions for the exception to the unified plan rule, the section 413(e) plan will not be disqualified for the section 416 failure. The rules in §1.416-1 are outside the scope of these proposed regulations, but the Treasury Department and the IRS intend to address the topic in a broader guidance project updating the regulations under section 416.

<sup>9</sup>In defining the amounts attributable to the employees of the unresponsive participating employer, the references in these proposed regulations to circumstances in which there is no "separate accounting" are not intended to address the recordkeeping obligations under Title I of ERISA, including sections 107 and 209 of ERISA, of an employer, plan administrator, or other plan fiduciary.



terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person required to perform certain administrative duties; (3) acknowledges in writing that, with respect to the plan, it is a named fiduciary and the plan administrator; and (4) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA.

The requirement to register as a pooled plan provider with the Commissioner is fulfilled by satisfying the parallel requirement under ERISA to register as a pooled plan provider with the Department of Labor. On November 16, 2020, the Department of Labor issued final regulations under section 3(44) of ERISA (29 CFR 2510.3-44) with respect to the registration requirement. *See* 85 FR 72934.

Consistent with section 413(e)(3)(A) (i), the proposed regulations require a pooled plan provider to perform all administrative duties that are reasonably necessary to ensure that: (1) the plan meets any applicable requirement under ERISA or the Code for a plan described in section 401(a) or for a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, and (2) each participating employer takes actions, including providing any disclosures or other information, that are necessary for the plan to meet those requirements.<sup>10</sup>

The administrative duties of a pooled plan provider include, but are not limited to, the following:

- (1) Monitoring compliance with the terms of the plan, and Code and ERISA requirements;
- (2) Maintaining accurate plan data, including providing up-to-date participant and beneficiary information;
- (3) Performing and conducting coverage, top-heavy, and discrimination testing under sections 401(a)(4), (k), and (m), 408(k), 410, and 416, if applicable;
- (4) Processing all employee transactions (such as investment changes, loans, and distributions);

(5) Satisfying Code and ERISA reporting and notice requirements (such as reporting requirements under sections 6047 (Form 1099-R, “Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.”) and 6058 (Form 5500, “Annual Return/Report of Employee Benefit Plan”), and notice requirements under sections 401(k)(12)(D) and (13)(E) and 402(f)); and

(6) Updating the plan to reflect statutory changes to the Code and ERISA, to the extent the responsibility for updating the plan document has been delegated to the section 413(e) plan administrator.

## II. *Conditions for Application of Exception to Unified Plan Rule*

### A. *In General*

The proposed regulations provide that, under the unified plan exception, a section 413(e) plan is not disqualified on account of a participating employer failure, provided that the plan satisfies certain conditions, which are described in Parts II.B through II.G of this Explanation of Provisions.

### B. *Plan Language*

The proposed regulations provide that the terms of the section 413(e) plan document must include language describing the procedures that will be followed to address a participating employer failure, including a description of the notices that the section 413(e) plan administrator will send in the case of a participating employer failure (described in Part II.C of this Explanation of Provisions, titled “Notice Requirements”). The plan must also state that the section 413(e) plan administrator will send the first notice (or, if applicable, the combined first and second notice) by specified deadlines that depend on the type of failure. With respect to a failure to provide information, the specified deadline for sending the first notice is 12 months following the end of the plan year for which the information is necessary to

determine whether the section 413(e) plan is in compliance with a requirement of section 401(a) or 408. With respect to a failure to take action, the specified deadline is 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs.

In addition, the plan terms must describe the actions that the section 413(e) plan administrator will take if, by the end of the 60-day period following the date the final notice is provided, the unresponsive participating employer does not take appropriate remedial action with respect to the failure or initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer. The terms of the section 413(e) plan must also provide that if an unresponsive participating employer does not either take appropriate remedial action or initiate a spinoff by that deadline, participants who are employees of the unresponsive participating employer have a nonforfeitable right to the amounts credited to their accounts that are attributable to employment with the unresponsive participating employer, determined in the same manner as if the plan had terminated pursuant to section 411(d)(3). In connection with the finalization of these proposed regulations, the Treasury Department and the IRS intend to publish guidance in the Internal Revenue Bulletin setting forth model language that may be used for this purpose.

The section 413(c) proposed regulations provided that a plan was ineligible for the unified plan exception if the plan was under examination before the first notice with respect to a participating employer failure was provided to an unresponsive participating employer. These proposed regulations do not include that condition. However, see the discussion in Part VI of this Explanation of Provisions, titled “Coordination with EPCRS,” on correcting a failure to send the first notice by the specified deadline, including when a plan is under examination.

<sup>10</sup> In determining whether a person meets the requirements to be a pooled plan provider with respect to any section 413(e) plan, all persons who perform services for the plan and who are treated as a single employer under section 414(b), (c), (m), or (o) are treated as one person.

### C. Notice Requirements

The proposed regulations require the section 413(e) plan administrator to provide up to three notices regarding a participating employer failure to the unresponsive participating employer; with the final notice, if applicable, also being provided to participants who are employees of the employer (and their beneficiaries) and the Department of Labor.<sup>11</sup>

The first notice must describe the participating employer failure (or failures), as well as the actions the unresponsive participating employer must take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer. The first notice must also explain the consequences under the terms of the plan if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including that participants who are employees of the employer will not have any further contributions made to the plan on their behalf and that individuals who are responsible for the failure may have adverse tax consequences.

If, by the end of the 60-day period following the date the first notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff (as described in Part II.D of this Explanation of Provisions, titled "Actions by Unresponsive Participating Employer"), then the section 413(e) plan administrator must provide a second notice to the employer. The second notice must be provided no later than 30 days after the expiration of the 60-day period following the date the first notice is provided. The second notice must include the information required to be included in the first notice. The second notice must also state that, if, within 60 days following the date the second notice is provided,

the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then a final notice describing the participating employer failure and the consequences of not correcting the failure will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

The proposed regulations provide that if, by the end of the 60-day period following the date the second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(e) plan administrator must provide a final notice to the employer. The final notice must be provided no later than 30 days after the expiration of the 60-day period following the date the second notice is provided. Within this time period, the final notice must also be provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Office of Enforcement of the Employee Benefits Security Administration in the Department of Labor (or its successor office).<sup>12</sup> The final notice must include the information required to be included in the first notice and specify the final deadline for an unresponsive participating employer to take action (which is 60 days after the final notice is provided). The final notice must also state that the notice is being provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

The section 413(c) proposed regulations also required plan administrators to send up to three notices with respect to a participating employer failure, but provided a 90-day period between notices. The shorter 60-day period between notices in these proposed regulations is provided in response to comments recommending that the overall notice period be shortened.

### D. Actions by Unresponsive Participating Employer

The proposed regulations provide that after the unresponsive participating employer has received notice of the participating employer failure, the employer has the opportunity to either take appropriate remedial action or initiate a spinoff. The final deadline for the unresponsive participating employer to take one of these actions is 60 days after the final notice is provided. The consequences of the employer's failure to meet this deadline are described in Part II.F of this Explanation of Provisions, titled "Required Actions Following Employer's Failure to Meet Deadline."

The proposed regulations provide that if a participating employer failure is a failure to provide information, the unresponsive participating employer takes appropriate remedial action with respect to that failure if the employer (or any person that is treated as a single employer with the employer under section 414(b), (c), (m), or (o)) provides the data, documents, or other information requested by a section 413(e) plan administrator (or arranges for that information to be provided to the section 413(e) plan administrator). If a participating employer failure is a failure to take action, the unresponsive participating employer takes appropriate remedial action with respect to the failure if the employer (or any person that is treated as a single employer with the employer under section 414(b), (c), (m), or (o)) takes all actions requested by the section 413(e) plan administrator, such as making corrective contributions, needed for the section 413(e) plan to satisfy the applicable requirements of section 401(a) or 408.

As an alternative to taking appropriate remedial action with respect to a failure to provide information or a failure to take action, the proposed regulations provide that an unresponsive participating employer may, after receiving notice of the participating employer failure, initiate a spinoff. An unresponsive participating employer

<sup>11</sup> As described in Part II.E.2 of this Explanation of Provisions, titled "Failure to Provide Information that Becomes a Failure to Take Action," if the notices relate to a failure to provide information that becomes a failure to take action, then a new series of notices may be required.

<sup>12</sup> The notice to the Department of Labor should be mailed to the Employee Benefits Security Administration's Office of Enforcement (or its successor office). The Office of Enforcement is currently located at 200 Constitution Ave. NW, Suite 600, Washington, DC 20210.

initiates a spinoff by directing the section 413(e) plan administrator to spin off amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer in a manner consistent with the terms of the section 413(e) plan. If the section 413(e) plan is described in section 401(a), then the spun-off plan must also be a section 401(a) plan. If the section 413(e) plan consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), (k), or (p)), then the spun-off plan must also consist of individual retirement accounts described in section 408. The section 413(e) plan administrator must implement the spinoff, as described in Part II.E.2 of this Explanation of Provisions, titled “Implementing a Spinoff.”

#### *E. Actions by Section 413(e) Plan Administrator Relating to Remedial Action or Employer-Initiated Spinoff*

##### *1. Failure to Provide Information that Becomes a Failure to Take Action*

The proposed regulations describe when a failure to provide information becomes a failure to take action. This situation could occur if an unresponsive participating employer takes appropriate remedial action with respect to a failure to provide information, and the section 413(e) plan administrator determines that, based on the information provided by the employer, there is a failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer’s participation in the section 413(e) plan. If the section 413(e) plan administrator makes a reasonable request for the employer to take the actions needed to satisfy the requirement, and the employer does not comply in a timely manner with that request, then the failure to provide information becomes a failure to take action.

If a failure to provide information becomes a failure to take action, a section 413(e) plan will be eligible for the unified plan exception with respect to the failure to take action by satisfying the conditions set forth in the proposed regulations with respect to that failure. In satisfying those conditions, notices provided during the

period that the failure was a failure to provide information are not taken into account. For example, a final notice that the section 413(e) plan administrator provided in connection with the failure to provide information would not satisfy the final notice requirement with respect to the failure to take action.

However, in response to comments on the section 413(c) proposed regulations that there were too many notices required in cases in which the failure to provide information became a failure to take action, the proposed regulations permit the section 413(e) plan administrator to reduce the number of notices that it sends to the employer in this situation. Specifically, if the section 413(e) plan administrator had provided the second notice with respect to a failure to provide information before it became a failure to take action, then the section 413(e) plan administrator may satisfy the requirement to send a first and second notice with respect to the failure to take action by sending a combined first and second notice to the unresponsive participating employer, provided that (1) the section 413(e) plan administrator’s request to take action (described in the first paragraph under this Part II.E of this Explanation of Provisions) is made as soon as reasonably practicable after the determination of the failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer’s participation in the section 413(e) plan, and (2) the section 413(e) plan administrator provides the combined first and second notice with respect to the failure to take action not later than 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs. The combined first and second notice must include information similar to the information required for the first and second notices described in Part II.C of this Explanation of Provisions, titled “Notice Requirements.” For example, the combined first and second notice must describe the participating employer failure, the actions the unresponsive participating employer would need to take to remedy the failure, and the consequences under the terms of the plan if the employer neither takes appropriate remedial action with respect to the failure nor initiates a spinoff of amounts attributable to the employees of

the unresponsive participating employer. In addition, the combined first and second notice must specify that, if, within 60 days following the date the combined first and second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the final notice described in Part II.C of this Explanation of Provisions, titled “Notice Requirements,” will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

##### *2. Implementing a Spinoff*

The proposed regulations provide that if, instead of taking appropriate remedial action (as described in Part II.D of this Explanation of Provisions, titled “Actions by Unresponsive Participating Employer”), an unresponsive participating employer initiates a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan established and maintained by the employer, or to a separate plan sponsored by the employer that consists of individual retirement accounts, then the section 413(e) plan administrator must implement and complete the spinoff as soon as reasonably practicable after the employer initiates the spinoff. Under a safe harbor in the proposed regulations in §1.413-3(d)(2), the section 413(e) plan administrator is treated as satisfying this requirement if the spinoff is completed within 180 days of the date on which the unresponsive participating employer initiates the spinoff. Comments are requested on whether there are any circumstances in which it would be appropriate for any of the amounts attributable to the employees of the unresponsive participating employer to remain in the MEP after the employer has specifically directed that there be a spinoff, and, if so, what those circumstances are, and for which employees this treatment may be appropriate.

#### *F. Required Actions Following Employer’s Failure to Meet Deadline*

The proposed regulations provide that if, by the final deadline (60 days after the final notice is provided), an unresponsive

participating employer neither takes appropriate remedial action nor initiates a spinoff, then as soon as reasonably practicable after that deadline, the section 413(e) plan administrator must: (1) stop accepting contributions from the unresponsive participating employer and its employees; (2) provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries); and (3) to the extent provided in the proposed regulations, provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election regarding treatment of their plan accounts. In addition, the section 413(e) plan administrator must distribute benefits as soon as administratively feasible following an individual's election or following the section 413(e) plan administrator's determination that it is not required to provide an individual with an election.<sup>13</sup>

The notice to participants required by §1.413-3(e)(1)(ii)(B) and (e)(2) of the proposed regulations must state that: (1) no further contributions will be made to the section 413(e) plan on behalf of participants who are employees of the unresponsive participating employer; (2) participants who are employees of the unresponsive participating employer have a nonforfeitable right to amounts credited to their accounts that are attributable to employment with the unresponsive participating employer; and (3) a participant who is an employee of the unresponsive participating employer (or, if applicable, any beneficiary of the participant) will receive additional information regarding the disposition of the participant's or beneficiary's account.

To satisfy the election requirement in §1.413-3(e)(1)(ii)(C) of the proposed regulations, except as otherwise provided by the proposed regulations, a section 413(e) plan administrator must provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election to have amounts attributable to the employees of the unresponsive participating employer (1) directly rolled over to an eligible

retirement plan within the meaning of section 402(c)(8), or (2) remain in the section 413(e) plan. With respect to this election, under a default rule in §1.413-3(e)(3)(ii) of the proposed regulations, an individual who fails to make an affirmative election is treated as having elected to have those amounts remain in the section 413(e) plan.

The option to remain in the plan is consistent with section 413(e)(2)(A), which requires the terms of the plan to provide, in part, that the plan assets attributable to the employees of the unresponsive participating employer will be transferred to an eligible retirement plan or to another arrangement that the Secretary determines is appropriate, unless the Secretary determines that it is in their best interests to retain the assets in the plan. The Treasury Department and the IRS have determined that it is in the best interest of an individual who elects to remain in the section 413(e) plan to have that election followed. In addition, the default rule with respect to that election, under which the account of an individual who does not make an affirmative election will remain in the section 413(e) plan, is consistent with the consent requirements of section 411(a)(11).

The proposed regulations provide that if an individual elects to have amounts attributable to the employees of the unresponsive participating employer remain in the section 413(e) plan, those amounts must remain in the section 413(e) plan until a distribution is made under the terms of the plan without regard to section 413(e). Although the terms of the section 413(e) plan continue to apply to a participant remaining in the plan, the section 413(e) plan administrator may not have contact with the participating employer after contributions have ceased (and, therefore, may not be notified about the individual's severance from employment with the employer). Accordingly, the proposed regulations provide that, in determining whether a participant is entitled to a distribution upon severance from employment, a section 413(e) plan administrator may rely on the participant's representation that the participant has experienced a severance from employment, unless the

section 413(e) plan administrator has actual knowledge to the contrary.

The option to remain in the plan is not available to an individual if plan terms would have provided for a mandatory distribution of those amounts had the participant experienced a severance from employment. Instead, those amounts must be distributed from the section 413(e) plan. In this situation, the proposed regulations provide rules for the disposition of the mandatory distribution, based on the applicability of section 401(a)(31) under the terms of the plan that would apply in the case of a severance from employment. Comments are requested on whether there should be special rules for mandatory distributions that apply in this situation, including in cases involving missing participants.

The proposed regulations provide that the portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(B) must be directly rolled over to an eligible retirement plan. In accordance with section 401(a)(31)(B), the section 413(e) plan administrator must provide the individual with an election for the rollover to be made either to an eligible retirement plan chosen by the individual or to an individual retirement plan of a designated trustee or issuer. For example, a section 413(e) plan administrator is not required to provide the option to remain in the plan to an individual with an account balance of \$3,000 if, consistent with sections 401(a)(31)(B) and 411(a)(11), plan terms require mandatory distributions with respect to a participant who experiences a severance from employment with an account balance of up to \$5,000 and automatic rollover of distributions with respect to a participant who experiences a severance from employment with an account balance that exceeds \$1,000.

For any portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(A) (but not section 401(a)(31)(B)), the section 413(e) plan administrator must provide the individual with an election in accordance with section 401(a)(31)(A)

<sup>13</sup> Whether an action is taken as soon as administratively feasible is determined under all the facts and circumstances. See Rev. Rul. 89-87, 1989-2 CB 81 (Whether a distribution is made as soon as administratively feasible after the date of plan termination specified by an employer is to be determined under all the facts and circumstances of a given case but, generally, a distribution that is not completed within one year following the date of termination will be presumed not to have been made as soon as administratively feasible.)

for that portion to be rolled over directly to an eligible retirement plan chosen by the individual or, if no eligible retirement plan is chosen, paid directly to the individual.

For the portion of a mandatory distribution that is not subject to the requirement to offer a direct rollover option under section 401(a)(31), the section 413(e) plan administrator must pay the individual. For example, a section 413(e) plan administrator is not required to provide an election to an individual with an account balance of less than \$200 if, consistent with section 411(a)(11) and §1.401(a)(31), Q&A-11, plan terms require that mandatory distributions of less than \$200 be paid directly to distributees.

Giving an individual an election to have amounts transferred to an individual retirement plan generally does not mean that a distribution may be paid directly to the individual. However, if, pursuant to the proposed regulations, an individual makes an election to have an amount directly rolled over to an eligible retirement plan, and a portion of the amount is not an eligible rollover distribution described in section 402(c)(4), then that portion must be paid directly to the individual. For example, the portion of a distribution that would be a required minimum distribution under section 401(a)(9) must be paid directly to the individual rather than directly rolled over. In addition, if an individual is otherwise entitled to a distribution from the section 413(e) plan without regard to section 413(e), the individual may elect to have amounts paid directly to the individual.

Any election that is provided to an individual pursuant to the proposed regulations must include an effective opportunity for the individual to make the election. Whether an individual has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which the election may be made, and any other conditions on the election.

### *G. Duties of a Pooled Plan Provider*

The proposed regulations provide that, if a section 413(e) plan has a pooled plan provider during the plan year of a participating employer failure, the unified plan exception will not apply unless the pooled plan provider performs substantially all of the administrative duties that are required of the pooled plan provider for that year.

### *III. Other Rules*

#### *A. Form of Notices and Elections*

Any notice required to be provided or election required to be made under the proposed regulations must be in written or electronic form. For notices and elections provided to or made by participants and beneficiaries, see generally §1.401(a)-21 for rules permitting the use of electronic media to provide applicable notices and make participant elections with respect to retirement plans.

#### *B. Status of Spun-off Plan*

In the case of any plan that is spun off in accordance with the proposed regulations, any participating employer failure that would have caused the section 413(e) plan to fail to meet the requirements of section 401(a) or 408, as applicable, but for the application of the unified plan exception, will result in the spun-off plan failing to meet those requirements.

#### *C. Responsible Parties*

The proposed regulations provide that a participating employer demonstrates a lack of commitment to compliance if the participating employer fails to take appropriate remedial action or initiate a spinoff by the final deadline (60 days after the final notice). The IRS reserves the right to pursue appropriate remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the failure to satisfy the requirements of section 401(a) or 408, as

applicable, even in the party's capacity as a participant or beneficiary (such as by not treating a section 413(e) plan distribution made with respect to the owner of a participating employer as an eligible rollover distribution).

### *IV. Updates to Section 413(c) Regulations*

The proposed regulations update existing §1.413-2 to reflect legislation enacted after the regulations were issued. The proposed regulations update the rules for determining the number of employers maintaining a plan for purposes of the requirement in §1.413-2(a)(2)(i)(B) of the proposed regulations that a section 413(c) plan must be maintained by more than one employer. For purposes of that requirement, the proposed regulations include a rule that the number of employers maintaining a plan is determined by treating any employers described in section 414(m) (relating to affiliated service groups) as if such employers are a single employer. The existing regulations in §1.413-2(a)(2) were issued in 1979 and, therefore, did not address section 414(m), which was added by section 201(a) of the Miscellaneous Revenue Act of 1980, Pub. L. 96-605 (94 Stat. 3521). Section 414(m) provides that all employers in an affiliated service group shall be treated as a single employer for certain purposes.

The proposed regulations also modify the definition of a section 413(c) plan and the unified plan rule in the final section 413(c) regulations to apply to a plan that consists of individual retirement accounts under section 408, remove a reference to section 405(a) from the final section 413(c) regulations (because that section was repealed), and modify the final section 413(c) regulations to add that the exclusive benefit provision in section 413(c)(2) applies for purposes of section 408(c).<sup>14</sup>

### *V. Withdrawal of Section 413(c) Proposed Regulations*

Because section 101 of the SECURE Act amended the Code with respect to

<sup>14</sup> Section 414(l) does not apply to a plan that consists of individual retirement accounts described in section 408. Therefore, in §1.413-2(a)(2)(i)(A), the proposed regulations limit the cross references to section 413(a) and §1.413-1(a)(2) to apply only to qualified plans.

the unified plan rule after the issuance of the section 413(c) proposed regulations, the Treasury Department and the IRS withdraw the section 413(c) proposed regulations.

## VI. Coordination with EPCRS

### A. In General

Under EPCRS,<sup>15</sup> a failure to follow plan terms is an operational failure that adversely affects plan qualification. An operational failure would include, for example, a section 413(e) plan administrator's failure to provide the first notice by the applicable deadline included in plan terms, discussed in Part II.B of this Explanation of Provisions, titled "Plan Language." EPCRS sets forth three programs for correcting operational failures.

Under the Self-Correction Program (SCP), a plan sponsor that follows established compliance practices and procedures may correct operational failures without paying a fee or sanction. A plan sponsor of a qualified plan (for example, a plan that is intended to satisfy section 401(a)) may correct significant operational failures under SCP if the plan has a favorable determination letter or a favorable opinion or advisory letter.<sup>16</sup> In general, correction of a significant operational failure through SCP must be completed by the last day of the correction period, which generally ends on the last day of the third plan year following the plan year for which the failure occurred.<sup>17</sup> However, the correction period for a significant operational failure that occurs for any plan year ends on the first date the plan or plan sponsor is under examination<sup>18</sup> for that plan year.<sup>19</sup>

Under the Voluntary Correction Program (VCP), a plan sponsor, at any time before audit, may file a VCP submission, pay an applicable user fee, implement corrective actions, and satisfy any other

conditions in an IRS compliance statement for correction of an operational failure in a qualified plan, SEP, or SIMPLE IRA Plan. In general, if the plan or plan sponsor is under examination, VCP is not available.

Under the Audit Closing Agreement Program (Audit CAP), if an operational failure (other than a failure corrected through SCP or VCP) is identified on audit, the plan sponsor may correct the failure and pay a sanction. The sanction imposed will bear a reasonable relationship to the nature, extent, and severity of the failure, and will be based on a number of factors,<sup>20</sup> including the maximum payment amount (which is approximately equal to the tax the IRS could collect upon plan disqualification).

### B. Using EPCRS to Correct an Operational Failure to Timely Provide the First Notice

A section 413(e) plan administrator's failure to provide the first notice with respect to a participating employer failure by the applicable deadline included in plan terms would not affect the section 413(e) plan's eligibility for the unified plan exception. However, the failure to follow plan terms would result in an operational failure treated as a significant operational failure under EPCRS that is independent of any underlying participating employer failure.

Whether SCP, VCP, or Audit CAP is available to correct an operational failure to provide the first notice by the applicable deadline will be determined under the rules of EPCRS. Because the failure is a significant operational failure, the failure may be corrected under SCP only if correction is completed (or substantially completed) by the end of the correction period, and the correction period generally ends on the last day of the third plan year following the plan year containing the

deadline for sending the first notice. For example, if the deadline for sending the first notice is December 31, 2024, a failure to provide notice by that deadline generally may be corrected through SCP until December 31, 2027 (assuming the plan year is the calendar year). If, however, the plan or plan sponsor comes under examination for 2024 beginning on July 1, 2026, the correction period for SCP ends on July 1, 2026, and SCP is no longer available (unless the correction had been substantially completed by that date).

A failure to provide the first notice by the deadline included in the terms of the plan may also be corrected under VCP. If, for example, the deadline for sending the first notice is December 31, 2024, and the correction period under SCP ends on December 31, 2027, then a VCP application may be submitted with respect to the failure in 2028 or in a later year, provided that neither the plan nor the plan sponsor is under examination for the plan year ending December 31, 2024. If SCP and VCP are not available with respect to a failure, the failure may be corrected under Audit CAP.

### C. Resolution of Participating Employer Failure

If the unresponsive participating employer provides the information requested by the section 413(e) plan administrator in connection with a failure to provide information, there is no longer a failure to provide information. If the unresponsive participating employer takes the action requested by the plan administrator in connection with a failure to take action (and the plan satisfies the requirements of SCP, VCP, or Audit CAP, as applicable, with respect to the underlying failure), there is no longer a failure to take action. In either case, if a participating employer failure no longer exists, an operational failure to provide the first notice by the deadline included in plan terms with respect to that

<sup>15</sup>The Employee Plans Compliance Resolution System (EPCRS) is a comprehensive system of correction programs for sponsors of certain retirement plans, including plans that are intended to satisfy the requirements of sections 401(a), 408(k), and 408(p). EPCRS provides procedures for an employer to correct a plan's failure to satisfy an applicable qualification requirement so that the failure does not result in disqualification of the plan. EPCRS has been updated and expanded several times, most recently in Rev. Proc. 2021-30, 2021-1.R.B. 324. The discussion in this Part VI of this Explanation of Provisions is limited to the application of EPCRS to qualified plans under section 401(a). See Rev. Proc. 2021-30 for rules under sections 408(k) and 408(p).

<sup>16</sup>See section 4.03 of Rev. Proc. 2021-30.

<sup>17</sup>Section 9 of Rev. Proc. 2021-30 addresses the period for correcting significant operational failures under SCP, including some exceptions to this general rule.

<sup>18</sup>Under examination is defined in section 5.08 of Rev. Proc. 2021-30.

<sup>19</sup>If correction has been substantially completed (as described in section 9.03 of Rev. Proc. 2021-30) before the end of the correction period, correction is permitted to be completed after the end of the correction period.

<sup>20</sup>See section 14 of Rev. Proc. 2021-30.

participating employer failure is treated as corrected.

### Proposed Applicability Date

These regulations are proposed to apply beginning on the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Pursuant to section 413(e)(4)(B), until the final regulations are published, an employer or pooled plan provider may rely on a good faith, reasonable interpretation of the provisions of section 413(e) to which the final regulations relate. Compliance with these proposed regulations is considered reliance on a good faith, reasonable interpretation of the provisions of section 413(e) to which the final regulations relate.

### Availability of IRS Documents

For copies of recently issued revenue procedures, revenue rulings, notices and other guidance published in the Internal Revenue Bulletin, please visit the IRS Web site at [www.irs.gov](http://www.irs.gov) or contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

### Special Analyses

#### I. Regulatory Impact Analysis

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

#### II. Paperwork Reduction Act

The following provisions of the proposed regulations contain a collection of information: (1) §1.413-3(a)(2)(i) (requirement to adopt plan language); (2) §1.413-3(a)(2)(ii)(A), (b), and (d)(1)(ii) (requirement to provide notice with respect to a participating employer failure); (3) §1.413-3(a)(3) (requirements to

be a pooled plan provider); (4) §1.413-3(e)(1)(ii)(B) and (e)(2) (requirement to provide notice to certain participants and beneficiaries; and (5) §1.413-3(e)(1)(ii)(C), (e)(3), and (e)(4) (requirement to provide an election to certain participants and beneficiaries). The collection of information contained in proposed §1.413-3 will generally be carried out by section 413(e) plan administrators seeking to satisfy the conditions for the exception to the unified plan rule. The collection of information in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

#### 1. Plan Language Requirement, §1.413-3(a)(2)(i)

Section 1.413-3(a)(2)(i) states that, as one of the conditions of the exception to the unified plan rule, a section 413(e) plan must include plan language that sets forth the procedures that will be followed to address participating employer failures. Thus, a section 413(e) plan will not be eligible for the exception to the unified plan rule if it does not satisfy this plan-language requirement. In general, the plan language requirement is a one-time paperwork burden for each section 413(e) plan. In addition, after final regulations are issued, the IRS intends to publish model plan language, which will help to minimize the burden.

We estimate that the burden for this requirement under the Paperwork Reduction Act of 1995 will be 3 hours per section 413(e) plan. Given the potential benefits of satisfying the conditions for the unified plan exception, we assume that approximately 95 percent of section 413(e) plans (4,275 section 413(e) plans<sup>21</sup>) will be amended to satisfy this condition. Therefore, the total burden of this requirement is estimated to be 12,825 hours (4,275 section 413(e) plans times 3 hours). However, because a section 413(e) plan that adopts an amendment will generally do so on a one-time basis, to determine an annual estimate, the total time is divided

by three, or 4,275 hours annually (section 413(e) plans times 1 hour).

#### 2. Notice Requirements, §1.413-3(a)(2)(ii)(A), (b), and (d)(1)(ii)

Section 1.413-3(a)(ii)(A) of the proposed regulations provide that notice is another condition of the exception to the unified plan rule. In most cases, §1.413-3(b) of the proposed regulations would require a section 413(e) plan administrator to send up to three notices informing an unresponsive participating employer of a participating employer failure and the consequences if the employer fails to take remedial action or initiate a spinoff from the section 413(e) plan. After each notice is provided, the employer has 60 days to take appropriate remedial action or initiate a spinoff from the section 413(e) plan. If the employer takes those actions after the first or second notice is provided, subsequent notices are not required. Thus, it is possible that a section 413(e) plan administrator will send fewer than three notices to an employer. However, because the notice requirements only apply if an employer has already been unresponsive to the section 413(e) plan administrator's requests, we assume that in most cases, all three notices will be provided.

Section 1.413-3(d)(1)(ii) of the proposed regulations provide that if a failure to provide information becomes a failure to take action, the section 413(e) plan administrator may be required to send up to two (rather than three) notices with respect to the failure to take action by combining the first and second notices. This rule applies if the section 413(e) plan administrator had provided the second notice with respect to the failure to provide information and certain other conditions are satisfied.

We estimate that the burden of preparing the notices will be an average of 3 hours per unresponsive participating employer. We estimate that approximately 450 section 413(e) plans (10 percent of the 4,500 total estimated section 413(e) plans described in footnote 20) will provide notice with respect to one unresponsive participating employer per year. We

<sup>21</sup> This calculation uses data from the 2018 Form 5500, "Annual Return/Report of Employee Benefit Plan." These filings indicate that there are approximately 4,523 defined contribution MEPs. See 2018 Form 5500 Annual Reports Abstract ([dol.gov](http://dol.gov)). We estimate that 4,500 defined contribution MEPs will satisfy the requirements to be a section 413(e) plan.

estimate that approximately 10 percent of section 413(e) plans (10 percent of 4,500 section 413(e) plans is 450 section 413(e) plans) will provide notice with respect to one unresponsive participating employer per year. Therefore, we estimate a burden of 1,350 hours (450 section 413(e) plans times 3 hours). As with all estimates in this collection of information, we expect to be able to adjust these estimates based on experience after the regulations are finalized.

The notices must be sent to the unresponsive participating employer and the final notice will also be sent to plan participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor. We estimate that, on average, a section 413(e) plan administrator will send the final notice to approximately 50 plan participants who are employees of the unresponsive participating employer (and their beneficiaries). Based on the estimate in the previous paragraph that 450 section 413(e) plans will provide notice with respect to one unresponsive participating employer per year, we estimate the burden of distributing these notices to be an average of 2 hours per section 413(e) plan, for a total burden of 900 hours (450 section 413(e) plans times 2 hours).

### *3. Requirements for Pooled Plan Providers, §1.413-3(a)(3)*

Under the proposed regulations, the term pooled plan provider means, with respect to any plan, a person who satisfies the following requirements: (1) registers as a pooled plan provider with the Commissioner (§1.413-3(a)(3)(i)(A)); (2) is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person required to perform certain administrative duties (§1.413-3(a)(3)(i)(B)); (3) acknowledges in writing that, with respect to the plan, it is a named fiduciary and the plan administrator (§1.413-3(a)(3)(i)(C)); and (4) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance

with section 412 of ERISA (§1.413-3(a)(3)(i)(D)).

Pursuant to proposed §1.413-3(a)(3)(i)(A), the requirement to register as a pooled plan provider under section 413(e) is fulfilled by satisfying the parallel requirement under ERISA to register as a pooled plan provider with the Department of Labor. On November 16, 2020, the Department of Labor issued final regulations under section 3(44) of ERISA (29 CFR §2510.3-44) with respect to the registration requirement. *See* 85 FR 72934. The OMB Control Number associated with the requirement in those regulations is 1210-0164.

With respect to §1.413-3(a)(3)(i)(B) and (C), the Department of Labor estimates that roughly 3,200 pooled plan providers will file an original registration, and that there will be 3,460 supplemental filings in the first year. *See* 85 FR 72952. A supplemental filing may amend the original registration to include information for pooled employer plans that either begin or cease operations, or it can be used to make certain other changes to the initial filing. Based on this data, we estimate that in the first year a large number of the estimated supplemental filings, or 3,000, will be used to report the beginning of pooled employer plan operations. In subsequent years, we estimate that approximately 450 plans with pooled plan providers will commence operations.<sup>22</sup> We estimate the combined burden of §1.413-3(a)(3)(i)(B) and (C) to be an average of 15 minutes per section 413(e) plan, for a total initial burden of 750 hours (3,000 section 413(e) plans times 15 minutes) and a total annual burden of 112.5 hours (450 section 413(e) plans times 15 minutes).

### *4. Notice to Participants, §1.413-3(e)(1)(ii)(B) and (e)(2)*

If an unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff by the deadline in the proposed regulations, then the section 413(e) plan administrator must provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries) stating the following: (1) no further contributions

will be made to the section 413(e) plan on their behalf; (2) they have a nonforfeitable right to amounts credited to their accounts that are attributable to employment with the unresponsive participating employer; and (3) they will receive additional information regarding the disposition of their accounts. We estimate that in a given year, 5 percent of all section 413(e) plans (225 section 413(e) plans) will provide this notice, and that each notice will be sent to approximately 50 individuals. We also estimate that the burden for this requirement is 1 hour. Based on this number, we estimate that the burden of preparing and distributing the notices will be 225 hours (225 section 413(e) plans times 1 hour).

### *5. Election, §1.413-3(e)(1)(ii)(C), (e)(3) and (4)*

If an unresponsive participating employer neither takes appropriate remedial action nor initiates a spinoff by the deadline in the proposed regulations, then the section 413(e) plan administrator generally must provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election to have amounts attributable to the employees of the unresponsive participating employer directly rolled over to an eligible retirement plan within the meaning of section 402(c)(8) or remain in the section 413(e) plan. A participant whose account is subject to the mandatory distribution rules will have an alternative election. We estimate that in a given year, 5 percent of all section 413(e) plans (225 section 413(e) plans) will provide an election, and that each election will be sent to approximately 50 individuals. We also estimate that the burden for this requirement is 3 hours. Based on this number, we estimate that the burden for this requirement will be 675 hours (225 section 413(e) plans times 3 hours).

Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer,

<sup>22</sup>This estimate was informed by the Department of Labor's estimate of the number of pooled employer plans expected to commence operations. *See* 85 FR 72952-3



SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by Friday, May 27, 2022. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

Estimated total average annual record-keeping burden: 7,750 hours

Estimated average annual burden per response: 1 hour, 43 minutes

Estimated number of recordkeepers: 4,500

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### III. *Regulatory Flexibility Act*

It is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that the proposed regulations reflect the statutory changes to section 413 made by section 101 of the SECURE Act. More specifically, these regulations merely conform existing regulations under section 413(c)

and implement new regulations under section 413(e) in a manner that is consistent with the new statutory language.

Although these proposed regulations might affect a substantial number of small entities, the economic impact of these proposed regulations is not expected to be significant. These regulations are not expected to result in economically meaningful changes in behavior for MEPs and participating employers. While MEPs may be an efficient way to reduce costs and complexity associated with establishing and maintaining defined contribution plans, some employers may be reluctant to join a MEP because of the potential adverse impact of the unified plan rule. These proposed regulations will implement a statutory exception to the unified plan rule, thus eliminating a potential barrier to an employer joining a MEP.

It is unlikely that the exception to the unified plan rule will be used often in a section 413(e) MEP. In general, it is expected that participating employers in defined contribution MEPs will comply with applicable requirements for a defined contribution plan. Accordingly, the use of the exception to the unified plan rule by a section 413(e) plan is expected to be rare.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of these regulations on small entities. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

### **Comments and Public Hearing**

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the “ADDRESSES” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Comments are specifically requested on what (if any) guidance would be helpful regarding whether employers

have a common interest other than having adopted a plan, as described in Part I.A of the Explanation of Provisions, titled “Overview.” Comments are also specifically requested on the rules for mandatory distributions for employees of an unresponsive participating employer, as described in Part II.F of the Explanation of Provisions, titled “Required Actions Following Employer’s Failure to Meet Deadline.”

Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at [www.regulations.gov](http://www.regulations.gov) or upon request.

A telephonic public hearing has been scheduled for June 22, 2022, beginning at 10 a.m. EST. The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments by telephone at the hearing must submit electronic or written comments and an outline of the topics to be addressed and the time to be devoted to each topic by Friday, May 27, 2022 as prescribed in the preamble under the **ADDRESSES** section.

A period of 10 minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at [www.regulations.gov](http://www.regulations.gov), search IRS and REG-121508-18. Copies of the agenda will also be available by emailing a request to [publichearings@irs.gov](mailto:publichearings@irs.gov). Please put “REG-121508-18 Agenda Request” in the subject line of the email.

### **Drafting Information**

The principal authors of these regulations are Jamie Dvoretzky and Pamela Kinard, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes (EEE)). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

### **Withdrawal of Proposed Amendments to the Regulations**

Under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking that

was published in the **Federal Register** on Wednesday, July 3, 2019 (84 FR 31777) is withdrawn.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

### PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Amend § 1.413-2 by revising paragraph (a)(2), (a)(3)(iv), (a)(4), and (c) to read as follows:

#### §1.413-2 Special rules for plans maintained by more than one employer.

(a) \* \* \*

(2) *Section 413(c) plan*—(i) *Definition of section 413(c) plan*. A plan (and each trust which is part of such plan) is a section 413(c) plan if—

(A) The plan is a single plan (which for a qualified plan is a single plan within the meaning of section 413(a) and §1.413-1(a)(2)); and

(B) The plan is maintained by more than one employer.

(ii) *Determining the number of employers maintaining the plan*. For purposes of paragraph (a)(2)(i)(B) of this section, the number of employers maintaining a plan is determined by treating any employers described in section 414(b) (relating to a controlled group of corporations), any employers described in section 414(c) (relating to trades or businesses under common control), or any employers described in section 414(m) (relating to affiliated service groups), whichever is applicable, as if such employers are a single employer.

(iii) *Master or prototype plans and common trust funds*. A master or prototype plan is not a section 413(c) plan unless such a plan is described in this paragraph (a)(2). Similarly, the mere fact that a plan,

or plans, utilize a common trust fund or otherwise pool plan assets for investment purposes does not, by itself, result in a particular plan being treated as a section 413(c) plan.

(3) \* \* \*

(iv) Whether a section 413(c) plan complies with the requirements of section 401(a), 403(a), or 408 is determined with respect to all participating employers. Consequently, the failure by one participating employer (or by the plan itself) to satisfy an applicable requirement of those sections will result in the section 413(c) plan failing to satisfy that requirement with respect to all employers maintaining the section 413(c) plan. However, the rules in this paragraph (a)(3)(iv) do not apply to the extent provided in section 413(e) and §1.413-3.

(4) *Applicability dates*—(i) *General applicability date*. Except as otherwise provided in paragraph (a)(4)(ii) of this section, section 413(c) and this section apply to a plan for plan years beginning after December 31, 1953.

(ii) *Special applicability date*. Paragraphs (a)(2), (a)(3)(iv), and (c) of this section apply beginning on the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. For earlier periods, the rules of paragraphs (a)(2), (a)(3)(iv), and (c) of 26 CFR 1.413-2 (revised as of April 1, 2021) apply.

\* \* \* \* \*

(c) *Exclusive benefit*. In the case of a plan subject to this section, in determining whether the plan of an employer is for the exclusive benefit of its employees (and their beneficiaries) for purposes of sections 401(a) and 408(c), all of the employees participating in the plan shall be treated as employees of the employer.

\* \* \* \* \*

Par. 3. Section 1.413-3 is added to read as follows:

#### §1.413-3 Special Rules for Section 413(e) Plans

(a) *Exception to unified plan rule for section 413(e) plans*—(1) *In general*. Notwithstanding §1.413-2(a)(3)(iv), a section 413(e) plan will not be treated as failing to meet the requirements under the Code applicable to a plan described in section

401(a) or to a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, merely because of a participating employer failure, provided that the conditions in paragraph (a)(2) of this section are satisfied.

(2) *Conditions for exception to general rule*. The conditions for the exception to the unified plan rule in paragraph (a)(1) of this section are set forth in paragraphs (a)(2)(i) through (iii) of this section.

(i) *Plan language*. The terms of the section 413(e) plan must set forth the procedures that will be followed to address a participating employer failure, including:

(A) A description of the notices that the section 413(e) plan administrator will send in the case of a participating employer failure, pursuant to paragraph (b) of this section;

(B) A statement that the section 413(e) plan administrator will send the first notice described in paragraph (b)(1) of this section (or, if applicable, the combined first and second notice described in paragraph (d)(1)(ii) of this section) by a specified deadline (which, for a failure to provide information, is 12 months following the end of the plan year for which the information is necessary to determine whether the section 413(e) plan is in compliance with a requirement of section 401(a) or 408 and which, for a failure to take action, is 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs;

(C) A description of the actions that the section 413(e) plan administrator will take if, by the final deadline described in paragraph (c)(1) of this section, an unresponsive participating employer does not either take appropriate remedial action pursuant to paragraph (c)(2) of this section or initiate a spinoff pursuant to paragraph (c)(3) of this section; and

(D) A statement that if an unresponsive participating employer does not either take appropriate remedial action or initiate a spinoff by the final deadline described in paragraph (c)(1) of this section, participants who are employees of the unresponsive participating employer have a nonforfeitable right to the amounts credited to their accounts that are attributable to employment with the unresponsive

participating employer, determined in the same manner as if the plan had terminated pursuant to section 411(d)(3).

(ii) *Section 413(e) plan administrator obligations.* A section 413(e) plan administrator must—

(A) Satisfy the notice requirements described in paragraph (b) of this section with respect to the participating employer failure (taking into account the rules for a combined first and second notice described in paragraph (d)(1)(ii) of this section);

(B) Implement a spinoff in accordance with paragraph (d)(2) of this section if an unresponsive participating employer initiates a spinoff pursuant to paragraph (c)(3) of this section; and

(C) Take the actions required in paragraph (e) of this section if an unresponsive participating employer fails either to take appropriate remedial action with respect to the participating employer failure (as described in paragraph (c)(2) of this section) or initiate a spinoff (as described in paragraph (c)(3) of this section) by the final deadline described in paragraph (c)(1) of this section.

(iii) *Pooled plan providers.* If the section 413(e) plan has a pooled plan provider during the plan year of the participating employer failure, the pooled plan provider must perform substantially all of the administrative duties that are required of the pooled plan provider pursuant to paragraph (a)(3)(ii) of this section for the plan year.

(3) *Section 413(e) plans administered by pooled plan providers—(i) Requirements to be a pooled plan provider.* With respect to a section 413(e) plan, for purposes of this section, a pooled plan provider is a person who—

(A) Registers as a pooled plan provider with the Commissioner by satisfying the registration requirements in section 3(44)(A)(ii) of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829), as amended (ERISA), in accordance with guidance issued by the Department of Labor,

(B) Is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person required to perform the administrative duties described in paragraph (a)(3)(ii) of this section,

(C) Acknowledges in writing that, with respect to the plan, it is a named fiduciary and the plan administrator, and

(D) Is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of ERISA.

(ii) *Administrative duties required of pooled plan provider—(A) In general.* A pooled plan provider is required to perform all administrative duties that are reasonably necessary to ensure that the plan meets any applicable requirement under ERISA or the Code for a plan described in section 401(a) or for a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), whichever is applicable, and each participating employer takes actions, including providing any disclosures or other information, that are necessary for the plan to meet the requirements described in this paragraph (a)(3)(ii)(A).

(B) *Administrative duties.* The administrative duties of a pooled plan provider include, but are not limited to, the following:

(1) Monitoring compliance with the terms of the plan, and Code and ERISA requirements;

(2) Maintaining accurate plan data, including up-to-date participant and beneficiary information;

(3) Performing and conducting coverage, top-heavy, and discrimination testing under sections 401(a)(4), (k), and (m), 408(k), 410, and 416, if applicable;

(4) Processing all employee transactions (such as investment changes, loans, and distributions);

(5) Satisfying Code and ERISA reporting and notice requirements (such as reporting requirements under sections 6047 and 6058 and notice requirements under sections 401(k)(12)(D) and (13)(E) and 402(f)); and

(6) Updating the plan to reflect statutory changes to the Code and ERISA, to the extent the responsibility for updating the plan document has been delegated to the section 413(e) plan administrator.

(iii) *Aggregation rules.* In determining whether a person meets the requirements to be a pooled plan provider with respect to any section 413(e) plan, all persons who perform services for the plan and who are

treated as a single employer under section 414(b), (c), (m), or (o) are treated as one person.

(4) *Definitions.* The following definitions apply for purposes of this section:

(i) *Amounts attributable to the employees of the unresponsive participating employer.* Amounts attributable to the employees of the unresponsive participating employer are plan assets and account balances held by a section 413(e) plan on behalf of employees of an unresponsive participating employer that are attributable to their employment with the unresponsive participating employer. If there is no separate accounting for amounts that are attributable to employment with the unresponsive participating employer and with other participating employers, and a participant's account balance includes amounts that are attributable to current employment with the unresponsive participating employer and to previous employment with one or more other participating employers, the entire account balance is treated as attributable to employment with the unresponsive participating employer. On the other hand, if a participant's account balance includes amounts that are attributable to current employment with a participating employer that is not the unresponsive participating employer and to previous employment with the unresponsive participating employer, none of the account balance is treated as attributable to employment with the unresponsive participating employer. For purposes of this paragraph (a)(4)(i), a participant's most recent employment with a participating employer in the section 413(e) plan will be treated as the participant's current employment.

(ii) *Beneficiary.* A beneficiary is a beneficiary of a deceased employee or an alternate payee (as defined in section 414(p)) with respect to an employee.

(iii) *Employee.* An employee is a current or former employee of a participating employer.

(iv) *Failure to provide information.* A failure to provide information is a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to respond in a timely manner to a reasonable request by the section 413(e) plan administrator for data,

documents, or any other information that the plan administrator reasonably believes is necessary to determine whether a section 413(e) plan is in compliance with a requirement of section 401(a) or 408 as it relates to the participating employer.

(v) *Failure to take action.* A failure to take action is a failure of a participating employer (or any person that is treated as a single employer with that employer under section 414(b), (c), (m), or (o)) to comply in a timely manner with a reasonable request by a section 413(e) plan administrator to take action needed for the section 413(e) plan to satisfy a requirement of section 401(a) or 408 as it relates to the participating employer.

(vi) *Participating employer.* A participating employer is one of the employers maintaining a section 413(e) plan.

(vii) *Participating employer failure.* A participating employer failure in a section 413(e) plan is a failure to provide information (as defined in paragraph (a)(4)(iv) of this section) or a failure to take action (as defined in paragraph (a)(4)(v) of this section).

(viii) *Section 413(e) plan.* A section 413(e) plan is a defined contribution plan described in section 401(a) or a plan that consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), (k), or (p)) that—

(A) Is a section 413(c) plan (as defined in § 1.413-2(a)(2)), and

(B) Is maintained by employers that all have a common interest other than having adopted the plan or has a pooled plan provider as described in paragraph (a)(3) of this section.

(ix) *Section 413(e) plan administrator.* A section 413(e) plan administrator is the plan administrator, within the meaning of section 414(g), of a section 413(e) plan.

(x) *Unresponsive participating employer.* An unresponsive participating employer is a participating employer that has a participating employer failure.

(b) *Notice.* The section 413(e) plan administrator satisfies the notice requirements with respect to a participating employer failure if it satisfies the requirements of this paragraph (b).

(1) *First notice.* The section 413(e) plan administrator must provide notice to the unresponsive participating employer

describing the participating employer failure, the actions the employer must take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer. In addition, the notice must explain the consequences under the terms of the plan if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including that participants who are employees of the employer will not have any further contributions made to the plan on their behalf and that individuals who are responsible for the failure may have adverse tax consequences.

(2) *Second notice.* If, by the end of the 60-day period following the date the first notice described in paragraph (b)(1) of this section is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(e) plan administrator must provide a second notice to the employer. The second notice must be provided no later than 30 days after the expiration of the 60-day period described in the preceding sentence. The second notice must include the information required to be included in the first notice. The second notice must also state that if, within 60 days following the date the second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then a final notice describing the participating employer failure and the consequences of not correcting the failure will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

(3) *Final notice.* If, by the end of the 60-day period following the date the second notice described in paragraph (b)(2) of this section is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then the section 413(e) plan administrator must provide a final notice to the employer. The final notice

must be provided no later than 30 days after the expiration of the 60-day period described in the preceding sentence. Within this time period, the final notice must also be provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Office of Enforcement of the Employee Benefits Security Administration in the Department of Labor (or its successor office). The final notice must include the information required to be included in the first notice and specify the final deadline for an unresponsive participating employer to take action set forth in paragraph (c) (1) of this section. The final notice must also state that the notice is being provided to participants who are employees of the unresponsive participating employer (and their beneficiaries) and to the Department of Labor.

(c) *Actions by unresponsive participating employer—*(1) *In general.* An unresponsive participating employer takes appropriate remedial action with respect to a participating employer failure if it satisfies the requirements of paragraph (c) (2) of this section. Alternatively, an unresponsive participating employer initiates a spinoff for purposes of paragraph (a) (2) of this section if the employer satisfies the requirements of paragraph (c)(3) of this section. The final deadline for an unresponsive participating employer to take one of these actions is 60 days after the final notice described in paragraph (b)(3) of this section is provided to the employer.

(2) *Appropriate remedial action—*(i) *Appropriate remedial action with respect to a failure to provide information.* If a participating employer failure is a failure to provide information, the unresponsive participating employer takes appropriate remedial action with respect to that failure if the employer provides the data, documents, or other information requested by a section 413(e) plan administrator (or arranges for that information to be provided to the section 413(e) plan administrator).

(ii) *Appropriate remedial action with respect to a failure to take action.* If a participating employer failure is a failure to take action, the unresponsive participating employer takes appropriate remedial action with respect to the failure if the employer (or any person that is treated as a single employer with the employer under

section 414(b), (c), (m), or (o)), takes all actions requested by the section 413(e) plan administrator, such as making corrective contributions, needed for the section 413(e) plan to satisfy the applicable requirements of section 401(a) or 408.

(3) *Employer-initiated spinoff.* After receiving a notice described in paragraph (b) of this section, an unresponsive participating employer initiates a spinoff pursuant to this paragraph (c)(3) by directing the section 413(e) plan administrator to spin off amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan that is maintained by the employer in a manner consistent with the terms of the section 413(e) plan. If the section 413(e) plan is described in section 401(a), then the spun-off plan must also be a section 401(a) plan. If the section 413(e) plan consists of individual retirement accounts described in section 408 (including accounts described in section 408(c), 408(k), or 408(p)), then the spun-off plan must also consist of individual retirement accounts described in section 408.

(d) *Section 413(e) plan administrator's response to employer's remedial action—*

(1) *Rules for a failure to provide information that becomes a failure to take action—*(i) *In general.* This paragraph (d)(1) provides rules that apply if a failure to provide information becomes a failure to take action. This situation could occur if the unresponsive participating employer takes appropriate remedial action by providing the information described in paragraph (c)(2)(i) of this section and, based on this information, the section 413(e) plan administrator determines that there is a failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer's participation in the section 413(e) plan. If the section 413(e) plan administrator makes a reasonable request for the employer to take the actions needed to satisfy the requirement, and the employer does not comply in a timely manner with that request, then, in accordance with paragraph (a)(4)(v) of this section, the failure to provide information becomes a failure to take action. In that case, the section 413(e) plan will be eligible for the exception in paragraph (a)(1) of this section with respect to the failure to take action by satisfying the conditions set forth in paragraph (a)(2)

of this section with respect to that failure, taking into account the rules of this paragraph (d)(1).

(ii) *Ability to combine first and second notices in certain circumstances.* For purposes of applying paragraph (a)(2)(ii)(A) of this section in the case of a failure to provide information that becomes a failure to take action, notices provided during the period that the failure was a failure to provide information are not taken into account. For example, a final notice that the section 413(e) plan administrator provided in connection with the failure to provide information would not satisfy the final notice requirement with respect to the failure to take action. However, if the section 413(e) plan administrator had provided the second notice described in paragraph (b)(2) of this section with respect to a failure to provide information before it became a failure to take action, then the section 413(e) plan administrator may satisfy the requirement to send a first and second notice with respect to the failure to take action by sending a combined first and second notice that includes the information described in paragraph (d)(1)(iii) of this section to the unresponsive participating employer, provided that—

(A) The section 413(e) plan administrator's request to take action described in paragraph (d)(1)(i) of this section is made as soon as reasonably practicable after the determination of the failure to satisfy a requirement of section 401(a) or 408 as it relates to that employer's participation in the section 413(e) plan; and

(B) The section 413(e) plan administrator provides the combined first and second notice with respect to the failure to take action not later than 24 months following the end of the plan year in which the failure to satisfy a requirement of section 401(a) or 408 occurs.

(iii) *Contents of combined first and second notice.* To satisfy the requirements of a combined first and second notice described in paragraph (d)(1)(ii) of this section, the notice must—

(A) Describe the participating employer failure, the actions the unresponsive participating employer would need to take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer

to a separate single-employer plan that is maintained by the employer,

(B) Explain the consequences under the terms of the plan if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including that participants who are employees of the employer will not have any further contributions made to the plan on their behalf and that individuals who are responsible for the failure may have adverse tax consequences, and

(C) Specify that if, within 60 days following the date the combined first and second notice is provided, the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, then a notice describing the participating employer failure and the consequences of not correcting the failure will be provided to participants who are employees of the employer (and their beneficiaries) and to the Department of Labor.

(2) *Implementing employer-initiated spinoff.* If an unresponsive participating employer initiates a spinoff pursuant to paragraph (c)(3) of this section by directing the section 413(e) plan administrator to spin off amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan established and maintained by the employer, or to a separate plan sponsored by the employer that consists of individual retirement accounts, then the section 413(e) plan administrator must implement and complete the spinoff as soon as reasonably practicable after the employer initiates the spinoff. The section 413(e) plan administrator is treated as satisfying the requirement of the prior sentence if the spinoff is completed within 180 days of the date on which the unresponsive participating employer initiates the spinoff.

(e) *Required actions following employer's failure to meet deadline—*(1) *In general—*(i) *Deadline for action.* If, by the final deadline described in paragraph (c)(1) of this section, the unresponsive participating employer neither takes appropriate remedial action pursuant to paragraph (c)(2) of this section nor initiates a spinoff pursuant to paragraph (c)(3) of this section, then the requirements of paragraph

(e)(1)(ii) and (iii) of this section must be satisfied.

(ii) *Requirements for section 413(e) plan administrator.* As soon as reasonably practicable after the final deadline described in paragraph (e)(1)(i) of this section, the section 413(e) plan administrator must—

(A) Stop accepting contributions from the unresponsive participating employer and its employees;

(B) Provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries) as described in paragraph (e)(2) of this section; and

(C) Provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election regarding treatment of their plan accounts to the extent provided in paragraph (e)(3) or (4) of this section.

(iii) *Timing of distributions.* The section 413(e) plan administrator must distribute benefits as soon as administratively feasible following an individual's election that is made pursuant to paragraph (e)(3) or (4) of this section or following the section 413(e) plan administrator's determination that it is not required to provide an individual with an election pursuant to paragraph (e)(4)(iv) of this section.

(2) *Contents of notification.* The notice required under paragraph (e)(1)(ii)(B) of this section must include the information described in this paragraph (e)(2).

(i) *No contributions.* The notice must state that no further contributions will be made to the section 413(e) plan on behalf of participants who are employees of the unresponsive participating employer.

(ii) *Full vesting.* The notice must state that participants who are employees of the unresponsive participating employer have a nonforfeitable right to amounts credited to their accounts that are attributable to employment with the unresponsive participating employer.

(iii) *Information about disposition of accounts.* The notice must state that a participant who is an employee of the unresponsive participating employer (or, if applicable, any beneficiary of the participant) will receive additional information regarding the disposition of the participant's or beneficiary's account.

(3) *Election for direct rollover or to remain in section 413(e) plan—(i) General rule.* Except as provided in paragraph (e)(4) of this section, a section 413(e) plan administrator must provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election to have amounts attributable to the employees of the unresponsive participating employer—

(A) Subject to the rules of paragraph (e)(5) of this section, directly rolled over to an eligible retirement plan within the meaning of section 402(c)(8); or

(B) Remain in the section 413(e) plan.

(ii) *Default.* An individual who fails to make an affirmative election described in paragraph (e)(3)(i)(A) of this section is treated as having elected to have the amounts described in paragraph (e)(3)(i) of this section remain in the section 413(e) plan.

(iii) *Individuals remaining in section 413(e) plan.* If, pursuant to paragraph (e)(3)(i)(B) of this section, an individual elects to have the amounts described in paragraph (e)(3)(i) of this section remain in the section 413(e) plan, those amounts must remain in the section 413(e) plan until a distribution is made under the terms of the plan without regard to section 413(e). To determine whether a participant is entitled to a distribution upon severance from employment under the terms of the plan without regard to section 413(e), a section 413(e) plan administrator may rely on the participant's representation that the participant has experienced a severance from employment unless the plan administrator has actual knowledge to the contrary.

(4) *Rules for individuals subject to mandatory distributions—(i) No election to remain in plan.* The option to remain in the plan described in paragraph (e)(3)(i)(B) of this section with respect to amounts described in paragraph (e)(3)(i) of this section is not available to an individual if the terms of the plan would have provided for a mandatory distribution of those amounts had the participant experienced a severance from employment. Instead, those amounts must be distributed from the section 413(e) plan.

(ii) *Mandatory distributions subject to automatic rollover.* The portion of the mandatory distribution that is an eligible

rollover distribution subject to section 401(a)(31)(B) must be directly rolled over to an eligible retirement plan. In accordance with section 401(a)(31)(B), the section 413(e) plan administrator must provide the individual with an election for the eligible retirement plan to be—

(A) An eligible retirement plan chosen by the individual, or

(B) An individual retirement plan of a designated trustee or issuer.

(iii) *Mandatory distributions not subject to automatic rollover.* For the portion of the mandatory distribution that is an eligible rollover distribution subject to section 401(a)(31)(A) (but not section 401(a)(31)(B)), the section 413(e) plan administrator must provide the individual with an election in accordance with section 401(a)(31)(A) for that portion to be—

(A) Rolled over directly to an eligible retirement plan chosen by the individual; or

(B) If no eligible retirement plan is chosen pursuant to paragraph (e)(4)(iii)(A) of this section, paid directly to the individual.

(iv) *Individuals who are ineligible for direct rollover.* For any portion of a mandatory distribution that is not subject to the requirement to offer a direct rollover option under section 401(a)(31), the section 413(e) plan administrator must pay the individual. For example, a section 413(e) plan administrator is not required to provide an election to an individual with an account balance of less than \$200 if, consistent with section 411(a)(11) and §1.401(a)(31)-1, Q&A-11, plan terms require that mandatory distributions of less than \$200 be paid directly to distributees.

(5) *Amounts not eligible for rollover.* If an individual makes an election to have an amount described in paragraph (e)(3)(i) of this section directly rolled over to an eligible retirement plan pursuant to paragraph (e)(3) or (4) of this section, and a portion of the amount is not an eligible rollover distribution described in section 402(c)(4), then that portion must be paid directly to the individual. For example, the portion of a distribution that would be a required minimum distribution under section 401(a)(9) must be paid directly to the individual.

(6) *Effective opportunity to make election.* Any election that is provided to an individual pursuant to paragraph (e) (3) or (4) of this section must include an effective opportunity for the individual to make the election. Whether an individual has an effective opportunity to make an election is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which the election may be made, and any other conditions on the election.

(f) *Other rules—(1) Form of notices and elections.* Any notice provided or election made pursuant to paragraph (b) or (e) of this section must be in written or electronic form. For notices and elections provided to or made by participants and beneficiaries, see generally §1.401(a)-21 for rules permitting the use of electronic

media to provide applicable notices and make participant elections with respect to retirement plans.

(2) *Status of spun-off plan.* In the case of any plan that is spun off in accordance with paragraph (d)(2) of this section, any participating employer failure that would have caused the section 413(e) plan to fail to meet the requirements of section 401(a) or 408, as applicable, but for the application of the exception set forth in paragraph (a)(1) of this section, will result in the spun-off plan failing to meet those requirements.

(3) *Responsible parties.* A participating employer demonstrates a lack of commitment to compliance if the participating employer fails to take appropriate remedial action pursuant to paragraph (c)(2) of this section or initiate a spinoff pursuant to paragraph (c)(3) of this section by the final deadline described in paragraph (c)

(1) of this section. The IRS reserves the right to pursue appropriate remedies under the Code against any party (such as the owner of the participating employer) who is responsible for the failure to satisfy the requirements of section 401(a) or 408, as applicable, even in the party's capacity as a participant or beneficiary (such as by not treating a section 413(e) plan distribution made with respect to the owner of a participating employer as an eligible rollover distribution).

(g) *Applicability date.* This section applies beginning on March 28, 2022.

**Douglas W. O'Donnell,**  
*Deputy Commissioner for Services  
and Enforcement.*

(Filed by the Office of the Federal Register on February 25, 2021, 8:45 a.m., and published in the issue of the Federal Register for March 28, 2022, 87 F.R. 17225)

# Definition of Terms

*Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:*

*Amplified* describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

*Clarified* is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

*Distinguished* describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

*Obsoleted* describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

*Revoked* describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the

new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

*Supplemented* is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

*Suspended* is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

# Abbreviations

*The following abbreviations in current use and formerly used will appear in material published in the Bulletin.*

A—Individual.  
Acq.—Acquiescence.  
B—Individual.  
BE—Beneficiary.  
BK—Bank.  
B.T.A.—Board of Tax Appeals.  
C—Individual.  
C.B.—Cumulative Bulletin.  
CFR—Code of Federal Regulations.  
CI—City.  
COOP—Cooperative.  
Ct.D.—Court Decision.  
CY—County.  
D—Decedent.  
DC—Dummy Corporation.  
DE—Donee.  
Del. Order—Delegation Order.  
DISC—Domestic International Sales Corporation.  
DR—Donor.  
E—Estate.  
EE—Employee.  
E.O.—Executive Order.  
ER—Employer.

ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
FR.—Federal Register.  
FUTA—Federal Unemployment Tax Act.  
FX—Foreign corporation.  
G.C.M.—Chief Counsel's Memorandum.  
GE—Grantee.  
GP—General Partner.  
GR—Grantor.  
IC—Insurance Company.  
I.R.B.—Internal Revenue Bulletin.  
LE—Lessee.  
LP—Limited Partner.  
LR—Lessor.  
M—Minor.  
Nonacq.—Nonacquiescence.  
O—Organization.  
P—Parent Corporation.  
PHC—Personal Holding Company.  
PO—Possession of the U.S.  
PR—Partner.  
PRS—Partnership.

PTE—Prohibited Transaction Exemption.  
Pub. L.—Public Law.  
REIT—Real Estate Investment Trust.  
Rev. Proc.—Revenue Procedure.  
Rev. Rul.—Revenue Ruling.  
S—Subsidiary.  
S.P.R.—Statement of Procedural Rules.  
Stat.—Statutes at Large.  
T—Target Corporation.  
T.C.—Tax Court.  
T.D.—Treasury Decision.  
TFE—Transferee.  
TFR—Transferor.  
T.I.R.—Technical Information Release.  
TP—Taxpayer.  
TR—Trust.  
TT—Trustee.  
U.S.C.—United States Code.  
X—Corporation.  
Y—Corporation.  
Z—Corporation.



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<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2020–27 through 2020–52 is in Internal Revenue Bulletin 2020–52, dated December 27, 2021.

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<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2020–27 through 2020–52 is in Internal Revenue Bulletin 2020–52, dated December 27, 2021.

# **Internal Revenue Service**

## **Washington, DC 20224**

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## **INTERNAL REVENUE BULLETIN**

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at [www.irs.gov/irb/](http://www.irs.gov/irb/).

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