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Via Email: CPCANMAPG@cra-arc.gc.ca

Re: TEI Comments on Information Circular 94-4R2, International Transfer Pricing: Advance Pricing Arrangements (APAs)

Dear Minister Freeland:

On behalf of Tax Executives Institute, Inc. (“TEI”), I am pleased to share our initial comments on certain aspects of the proposed Information Circular 94-4R2, International Transfer Pricing: Advance Pricing Arrangements (“the IC”).

TEI Background

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. Today, the organization has 56 chapters across North and South America, EMEA, and Asia, including four chapters in Canada. Our nearly 6,500 members represent 2,800 of the world’s leading companies, many of which either are resident or do business in Canada. Over 15 percent of TEI’s membership comprises tax professionals who work for Canadian businesses in a variety of industries across the country. TEI members are responsible for tax affairs of their employers and must contend daily with provisions of the tax law relating to the operation of business enterprises. The following recommendations reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.

As the preeminent association of in-house tax professionals worldwide, TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of government and taxpayers. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply

1 in a cost-efficient manner. The diversity, professional training, and global viewpoints of our
2 members enable TEI to bring a balanced and practical perspective to the legislative proposals
3 discussed herein.

4 **TEI Comments**

5 TEI appreciates the Department of Finance’s invitation to comment on the IC. Our
6 comments focus on certain aspects of the IC, as well as concerns regarding its broad application
7 and potential impact on taxpayers’ views of the Canadian Advance Pricing Arrangement
8 (“APA”) program as an effective and efficient mechanism for seeking tax certainty for
9 significant cross-border intra-group transactions involving transfer pricing matters. TEI would
10 be pleased to have further discussions with the Department of Finance regarding Canada’s
11 APA program, including the application and administration thereof, and the IC specifically.
12 Further discussions will allow for a more fulsome conversation outlining our members’
13 experiences with the current APA program, including where challenges have occurred, with the
14 aim to ensure the Canadian APA program is highly regarded both domestically and
15 internationally.

16 As outlined in the IC, an APA may provide a taxpayer with:

- 17 a) tax certainty in multiple jurisdictions for future taxation years and significantly reduce
18 the risk of double taxation,
- 19 b) a reduction in the risk, or limiting the scope, of the audit of a covered transaction,
- 20 c) protection from transfer pricing penalties,
- 21 d) a more collaborative approach for ongoing audits,
- 22 e) a potential rollback of the agreed upon APA pricing to non-statute barred taxation
23 years,
- 24 f) easier resolution of complex and potentially contentious issues than in multiple audit
25 settings and later mutual agreement procedure (“MAP”) processes.

26 TEI supports the Canadian APA program and agrees that the above benefits are attractive
27 to taxpayers as fiscal certainty is a critical element of ensuring Canada remains a competitive
28 investment environment. TEI also views the benefits of a successful APA program as mutually
29 valuable to taxpayers and tax authorities.

30 In general, TEI’s members have had less favorable experiences with the Canadian APA
31 program than with other tax authorities in the administration of, and resolution arising from,
32 their APA programs. We were hopeful the changes to the IC would help lead to an improved
33 taxpayer experience with the Canadian APA program. Regrettably, upon review of the IC, we
34 are concerned the Canadian APA program is less likely to be viewed and pursued as a viable
35 option by Canadian taxpayers to achieve reasonable, efficient, and timely resolution of eligible

36 transfer pricing issues. The IC, if enacted as proposed, will likely dissuade many taxpayers
37 from seeking an APA with the Canada Revenue Agency (“CRA”) in the first instance. Or worse,
38 divert investment to other jurisdictions where fiscal tax certainty and tax resolution in a timely
39 manner is a priority. Our specific comments are outlined below.

40 *Undue Taxpayer Burden and Ability for Timely and Effective Resolution*

41 A significant shift in the cost, effort, timeline and requirements of the IC places an undue
42 burden on taxpayers. Additional requirements imposed by the CRA are for the taxpayer to
43 prepare an analysis of not only the Transfer Pricing Methodology (“TPM”) the taxpayer
44 determined as most appropriate, as well as reasons why other methods may not have been used,
45 but also to perform analysis on what the results would have been under CRA’s proposed method.
46 This is part of an general broadening of information a taxpayer must submit prior to being
47 admitted into the APA program. Even more information is required once a taxpayer is accepted
48 into the program. Taxpayers are required to not only pay for their own experts and advisors, but
49 also any experts the CRA deems necessary to bring in to rebut the taxpayer’s position.

50 In addition to this increased gatekeeping, burden, and cost to the taxpayer, we note the
51 following with respect to certain sections of the IC:

- 52 • 28. o – Requires full disclosure of all audits, appeals, litigation in all jurisdictions for all
53 years including future years, for all entities within the scope of the APA. This
54 requirement reaches far beyond the scope of what CRA would be able to access even
55 on audit, creating an all-encompassing “Super Audit” of the multinational enterprise
56 (“MNE”), which is not only impractical and inefficient for both the taxpayer and the
57 CRA, but a significant hurdle to meet and an unreasonable barrier to program
58 eligibility.
- 59 • 28. q – Requires disclosure of all APAs in place, or in progress, in other jurisdictions
60 within the MNE group. This information should be available to the CRA through the
61 Tax Information Exchange Agreement network, which is the appropriate avenue for
62 obtaining this level of disclosure. The Canadian APA process should not serve as a
63 mandatory disclosure of tax rulings to which the Canadian taxpayer is not even a
64 party.
- 65 • 42. c – CRA can deny entry in situations where the taxpayer includes transactions that
66 have not taken place. This requirement may be appropriate for a restructuring
67 transaction, for example. However, in the case of a transaction stream for a new
68 business line, new product, or where the MNE has established a new entity that will
69 supply Canada with the product or service to be one of the covered transactions, it is
70 inappropriate to exclude such transactions from the APA program.
- 71 • 45. – As noted above, taxpayers are expected to provide a full analysis of any alternate
72 TPMs requested by the CRA or foreign competent authorities and to address any other

73 CRA concerns. This requirement will be exceedingly difficult to meet if the TPM in
74 question is not appropriate to the industry or the transaction. There is also a danger of
75 unlimited analysis being requested without a clear path to efficient resolution due to
76 this requirement alone.

77 • 95. – The APA report is due within 180 days of the APA year, which is the same
78 timeline as corporate tax filing due dates. This deadline places an onerous burden on
79 tax departments, which are experiencing greater compliance requirements in the
80 beginning of the year from added BEPS reporting, shortened T1134 reporting
81 deadlines on top of T2, T5, T5013 and other filings. In addition we note:

- 82 ○ some of the foreign information requested, such as legal entity financial
83 statements, is not readily available,
- 84 ○ the other jurisdiction may have an alternate tax year end,
- 85 ○ the audit of compliance by the CRA will not occur for some time, and
- 86 ○ the statute of limitations for international transactions is three years longer
87 than the normal reassessment period,

88 For these reasons, TEI requests the APA report deadline be extended to a
89 minimum of 12 months following the end of the taxation year.

90 • Part IX – Other APA Requests – Request for a Unilateral APA. The IC no longer
91 recognizes a Unilateral APA as a legitimate APA avenue other than under narrow
92 circumstances. This is a concern to TEI, as unilateral APAs are often a viable way of
93 achieving resolution in a timely manner, are offered in other jurisdictions around the
94 world, and, in the absence of this option, will undoubtedly lead to an increase in tax
95 disputes and greater fiscal uncertainty for taxpayers.

96 • 115. Renewing an APA – renewals are now more onerous with a full submission
97 prefile process, and often a full-blown APA as indicated in paragraphs 116 and 117, at
98 the discretion of the CRA. Many transactions span more than a five-year APA period
99 and given the cost and effort of entering an APA under existing rules, this requirement
100 is another huge deterrent to the program and not consistent with practice globally.
101 With an emphasis of the CRA on time in the program to complete an APA, the policy
102 rationale behind this requirement is unclear to us.

103 **Conclusion**

104 Predictability and certainty in tax matters are important considerations for TEI members.
105 As highlighted above, TEI has serious concerns that Canada’s APA program will now face greater
106 barriers to entry for taxpayers and be viewed globally as excessively burdensome and not a viable
107 option for taxpayers to utilize. It will also be seen as a tool for CRA to extract unreasonable

108 amounts of information from an MNE and its operations beyond Canada's borders under
109 timelines that do not respect the limited resources available to taxpayers.

110 TEI appreciates the opportunity to share our preliminary feedback at this stage and looks
111 forward to engaging in meaningful, substantive consultations with the CRA to discuss this
112 important matter further. TEI members stand ready to assist CRA in striking the appropriate
113 balance between practical administrability and meeting the government's policy aims when it
114 comes to APA program matters.

115 TEI's comments were prepared under the aegis of TEI's Canadian Income Tax Committee,
116 whose Chair is Steve Saunders. Should you have any questions about TEI's comments, please
117 contact Mr. Saunders at 403.801.4657 or steve.saunders@atcom.com, or Benjamin R. Shreck of the
118 Institute's legal staff at 202.464.8353 or bshreck@tei.org.

119 Respectfully submitted,
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