

LEADING FIRMS

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The persistence of deficits and growing public displeasure with perceived tax avoidance has increased both the number of audits and the likelihood of fundamental change to transfer pricing in the US.

“There are structural deficits in the US and around the world that are motivating countries in need of money to try to get it from corporations, rather than average citizens,” said Rob Plunkett of Deloitte.

Melinda Phelan of Baker & McKenzie agreed: “Governments are becoming much more aggressive in terms of auditing what were routine transactions, and are proposing more frequent and larger adjustments.”

The IRS has also become more sophisticated. Assistant treasury secretary, Michael Mundaca, has reorganised, and substantially increased, the Revenue’s team of transfer pricing specialists. The result is “an IRS that is more assertive and smarter on how it audits transfer pricing in this country’

according to Paul Oosterhuis of Skadden Arps Slate Meagher & Flom.

Many transfer pricing professionals expect changes to transfer pricing will come from legislative, rather than regulatory reforms. “I think legislation is going to drive business decisions for a lot of companies both from an OECD standpoint and a Congressional standpoint,” said EY’s Purvez Captain.

Public opinion is another source of concern. “The biggest issue right now is base erosion and profit shifting,” said KPMG’s Brian Trauman. “The fact that companies are shifting profits to low-tax jurisdictions, even while complying with the law, does not resonate well with the public,” he said.

Baker & McKenzie’s Phelan agreed: “Companies are increasingly concerned that what are perfectly appropriate and legitimate attempts to comply with the law are in the current environment sometimes perceived and misunderstood.”

As a result, “a lot of companies are looking at their transfer pricing and making sure it matches up with the functions and risks that they have,” she added.

Henry Birnkrant of Alston & Bird said the challenges arising from increased audits and public scrutiny have created two different markets for transfer pricing services.

“There is a market for what I call commodity work, basic compliance. Most companies want documentation to show they have tried to comply with transfer pricing rules,” said Birnkrant. “This is mostly the province of accounting firms and low-cost providers.”

“Then there are bespoke, value-added services, usually from law firms, custom-designed to withstand IRS scrutiny. Their clients want more dedicated resources and the benefit of a law firm more geared to advocacy,” Birnkrant added.

The present environment greatly favours law firms, said Rocco Femia of Miller & Chevalier. “There is a greater emphasis on finding advisers who are capable of litigating.”

Patricia Sweeney, also of Miller & Chevalier, added: “The firm is getting referrals from accounting firms for significant transfer pricing work. The accountants need to demonstrate the ability to litigate even if

Tax rates at a glance	As of January 1 2013	As of June 11 2012	IRS - As of January 1 2012
Corporate income tax	35% (a)	35% (a)	35%
Capital gains tax	35%	35%	35%
Branch Tax	35% (a)	35% (a)	35%
Withholding tax (b)			
Dividends	30% (c)	30% (c)	30%
Interest	30% (c)(d)	30% (c)(d)	30%
Royalties from patents, know-how, etc.	30% (c)	30% (c)	30%
Branch Remittance Tax	30% (e)	30% (e)	30%
Net Operating Losses (years)			
Carryback	2 (f)	2 (f)	2
Carryforwards	20 (f)	20 (f)	20

- a) In addition to corporation tax and branch tax, many states levy income or capital-based taxes. An alternative minimum tax is imposed.
- b) Withholding tax rates may be reduced by treaty.
- c) Withholding tax on dividends, interest and royalties from patents, know-how etc. is applicable to payments to non-residents.
- d) Interest on certain portfolio debt obligations issued after July 18 1984 and noneffectively connected bank deposit interest are exempt from withholding tax.
- e) Branch remittance tax is the branch profits tax.
- f) Regarding carryback and carryforwards, special rules apply to certain types of losses and entities.

Source: Tax advisers from Alvarez & Marsal Taxand

they can't do it themselves, with someone next to them."

In all, law firms expect the demand for transfer pricing services, particularly audit defense, to remain a business driver for years to come.

"I see the future as one where there will be continuing disputes between taxpayers and governments in the transfer pricing area," said Joel Williamson of Mayer Brown.

Tier 1

Led by Henry Birkrant, Alston & Bird's transfer pricing group provides consulting and planning services to US and foreign multinationals, and assists them in the development and implementation of tax-efficient transfer pricing strategies. It also helps with the

preparation and filing of documentation and with negotiating advance pricing agreements with the IRS as well as with foreign tax authorities. Alston & Bird's extensive experience with APAs dates to August 1990, when the firm filed the second-ever such agreement in the US on behalf of Japan's Panasonic. The firm also represents clients in audits and appeals to the IRS and in court.

Deloitte has a full-service transfer pricing practice comprising more than 230 professionals across the country. Todd Wolosoff is Deloitte's US and global managing tax partner for transfer pricing. In New York, Rob Plunkett leads the firm's financial services group, which provides transfer pricing services to investment banks and other financial institutions. Darcy Alamuddin is head of the Chicago transfer pricing

team, whose clients include companies in the manufacturing, consumer products, engineering, executive recruiting and healthcare sectors. The Houston and Dallas practice, led by **Randy Price** and **John Wells**, mainly services multinational oil & gas companies. **Mark Nehoray**, head of transfer pricing in Los Angeles, has a clientele of mostly media and entertainment companies. The San Francisco practice, led by **Ron Saake**, deals almost entirely with transfer pricing for tech companies in Silicon Valley. The Washington team, headed by **Arindam Mitra**, is particularly strong in audit defense and in negotiating competent authority and advance pricing agreements (APAs).

DLA Piper prides itself on offering the same transfer pricing services as the large accounting firms – planning, documentation, advance pricing agreements (APAs) and litigation – but with a more personalised service and with more input from high-level, experienced transfer pricing professionals. The firm’s global transfer pricing practice comprises 200 professionals and is led by **D. Clarke Norton** in the New York office. **Alan Winston Granwell** is in charge of transfer pricing at the Washington, DC, office, while **David Colker** leads transfer pricing operations in San Francisco and Palo Alto. Recent personnel changes include the promotion of Palo Alto’s **Joy Dasgupta** to principal economist. The firm is representing a publicly traded retailer of children’s clothing in competent authority negotiations between the US and Canada. It is also representing a life sciences company in negotiations for the first bilateral APA between the US and Ireland.

EY has one of the largest transfer pricing practices in the US, with 48 partners. The practice provides services for all four “pillars” of transfer pricing: The practice is led by **Purvez Captain**, Americas director of transfer pricing; **Jay Camillo**, Americas market’s leader of transfer pricing; and **David Canale**, Americas leader of transfer pricing controversy.

Fenwick & West is a nationwide transfer pricing practice with Fortune 500 companies among its clients. Transfer pricing strategy accounts for about half of its transfer pricing business, with the other half coming from litigation. The firm has successfully

defended a number of clients, including Apple, Hitachi, Limited Brands, Adaptec and DHL either before the IRS or in state or federal courts. The firm’s transfer pricing planning practice is led by **Jim Fuller**, who is widely recognised by peers for his expertise in corporate tax and international tax. **Kenneth Clark** leads the firm’s litigation team.

Led by **Brian Trauman**, **KPMG**’s transfer pricing practice is one of the largest in the US, with 19 partners and 301 fee earners. The practice offers multinationals an “end-to-end” transfer pricing service comprising planning, documentation, implementation and controversy, although clients are also free to engage KPMG for specific transfer pricing services. Through its “operational transfer pricing” approach, KPMG helps clients to set, maintain and adjust their transfer pricing structures and build processes to automate them, creating efficiencies throughout the company. The practice is assisting a manufacturer and supplier of high-tech products to automate the monitoring and adjusting of transfer prices using transaction-level data “mined” from source systems.

Miller & Chevalier brings together lawyers who are widely renowned for their transfer pricing expertise, including practice leader, **Rocco Femia**, recognised by his peers for his work on complex and high-value transfer pricing matters. **Alex Zakupowsky**’s clients celebrate him for his technical expertise and negotiating skills, while **Kevin Kenworthy** is known for his skill as a litigator. The practice advises multinationals on transfer pricing strategy, negotiates advance pricing agreements (APAs) and guides them through the competent authority process. In the last two years, Miller & Chevalier has helped resolve transfer pricing adjustments initiated by tax authorities in the US, Canada, Germany, Mexico, Korea, Japan and India. Clients are from a broad range of business sectors, including oil & gas, natural resources, pharmaceuticals, electronics, telecommunications and retail.

Skadden Arps Slate Meagher & Flom advises US and non-US multinationals on the establishment of sound and effective transfer pricing strategies, and works with outside economists to prepare contemporaneous documentation. The firm also negotiates

competent authority issues and advance pricing agreements (APAs) with the IRS and other national tax authorities, and represents clients in transfer pricing disputes at both the administrative and judicial levels. **John Breen** is Skadden's national leader for transfer pricing.

PwC provides services in all areas of transfer pricing, including planning, documentation, advance pricing agreements (APAs), supply chain management and controversy and dispute resolution. **Horacio Pena** leads PwC's transfer pricing network in the US, while **Kevin Brown** is the US tax controversy and dispute resolution leader.

Sullivan & Cromwell focuses on transfer pricing for large financial institutions and non-US multinational companies. Clients are advised on which transfer pricing strategies to adopt, and on what corporate restructuring is required to implement these strategies. The firm also advises clients on documenting transfer pricing compliance, but consults with an economist who reviews calculations. The firm takes a proactive approach to controversy, by negotiating bilateral and multilateral APAs with the tax authorities of different countries. The firm is representing a multinational client in a significant transfer pricing dispute involving cost-sharing/cost-contribution agreements in which the OECD and US transfer pricing rules are arguably in conflict. **Don Korb**, a former IRS Chief Counsel, leads the transfer pricing practice. Other partners include **Andy Solomon** and **S. Eric Wang**, who have significant first-hand knowledge of the issues that the IRS and other tax authorities raise in transfer pricing disputes.

Led by **George Gerachis**, **Vinson & Elkins'** transfer pricing team comprises attorneys located in the firm's Austin, Dallas, Houston, Washington and London offices. The team assists with the planning and documentation of transfer pricing strategies, focusing on pricing for intangibles, cost-sharing and services. The team also negotiates APAs, and resolves transfer pricing disputes through competent authority procedures and in trials at both the administrative and judicial levels. **Vinson & Elkins** is representing **Transocean** in tax disputes concerning the

company's 2006 to 2009 federal income tax returns. The IRS is asserting the existence of intangibles arising from the performance of technical and engineering services between and among **Transocean** subsidiaries, as well as hundreds of millions of dollars in income adjustments related to the value of deep water drilling services. The total value of the adjustments in the case is about \$1 billion.

Tier 2

Alvarez & Marsal – Taxand is a full-service transfer pricing firm working with US and foreign clients in a variety of business segments, including consumer goods, oil & gas, IT, advertising and pharmaceuticals. As head of international operations, CEO **Robert Lowe** is also in charge of transfer pricing, although **Steve Labrum** oversees the firm's US and UK transfer pricing operations on a daily basis. In the past year, **A&M Taxand** assisted a client – a provider of next-generation data centre solutions – to set up a cost-sharing arrangement in conjunction with a procurement entity and then relocate major procurement functions and interaction in Asia to a new procurement company in Singapore. The firm is also assisting a client in the advertising industry to manage and deploy newly developed intangible property as advertising continues to move from a service-oriented delivery system to a technology-based platform.

Melinda Phelan, head of transfer pricing at **Baker & McKenzie**, estimates that about 60% of her firm's 175 or so tax professionals are involved in transfer pricing. The firm provides all transfer pricing services: planning, documentation, APAs and controversy. It is representing a number of leading US and non-US multinationals challenging large transfer pricing adjustments, in appeals and in court. The firm is also negotiating several APAs, including two bilateral APAs – one between the US and Mexico, and the other between the US and Canada – for a larger retail company.

Led by **Ricardo Rosero**, **Basefirma** is an international boutique firm for transfer pricing and international tax services. The firm provides services in all areas of transfer pricing: planning, documentation, APA, intangible assets valuation and audit defense. **Basefirma**

uses sophisticated statistical and financial models, to defend transfer pricing policies, and consults with local law firms on how to best approach local tax authorities. The firm provides transfer pricing services to 350 clients in 14 countries, including major businesses from virtually every economic sector.

Caplin & Drysdale focuses mainly on transfer pricing controversy, and combines extensive transfer pricing expertise with a deep bench of preeminent tax litigators to represent clients in audits, appeals and litigation, and to negotiate APAs and competent authority relief on their behalf. The practice is led by **Patricia Lewis**, who has worked at Caplin & Drysdale for over four decades. **David Rosenbloom**, who frequently serves as an expert witness in transfer pricing cases, previously served as international tax counsel and director of the Office of International Tax Affairs in the US Treasury Department. New hires include **Elan Keller**, former managing director and tax director for US operations at Macquarie; **Pete Lowy**, a prominent litigator; and **Richard Skillman**, a former acting chief counsel of the IRS.

Duff & Phelps established its transfer pricing practice in October 2012, after acquiring Ceteris, the largest independent transfer pricing firm in North America. The practice comprises 13 partners, including practice leader **Mike Heimert**, and more than 50 transfer pricing professionals overall. The practice provides services in all areas of transfer pricing, including APAs, competent authority and audit defense before the IRS and other tax authorities around the world. About 85% to 90% of the firm's clients are US multinational corporations, although it is representing a growing number of foreign clients.

Mayer Brown's transfer pricing practice focuses primarily on controversy and disputes, and represents clients in both administrative and judicial proceedings. The practice, which comprises 14 partners, is led by **Joel Williamson**, who is the firm's lead trial attorney in tax litigation. Williamson has served as trial counsel for Mayer Brown in several landmark transfer pricing cases brought before US courts. Previously, he represented the US government as Special Trial Attorney for the IRS.

In the last year, Mayer Brown successfully represented Eaton in the US Federal District Court in the first case to address the right of the IRS to cancel an APA, and whether the burden of proof regarding the need to cancel an APA belongs to the IRS or the taxpayer. An October 2012 decision resulted in a tax savings of \$75 million and the cancellation of \$52 million in penalties. Summary judgment motions regarding the burden of proof are pending.

Mark Martin leads **McDermott Will & Emery's** interdisciplinary team of lawyers, economists and accountants who lend considerable expertise in support of international transfer pricing projects. The practice is heavily controversy-oriented, with Martin and partners, **Cym Lowell** and **Mark Horowitz**, leading a seven-member, full-service controversy team focused on transfer pricing. It is negotiating competent authority cases with the tax authorities of the UK, Italy, Japan and the Netherlands. It also does a brisk business in APAs, which include both bilateral and multilateral. A fourth partner, **John Woodruff**, advises on transfer pricing strategy.

Morgan, Lewis & Bockius' transfer pricing practice has three core offerings: transactional support, consulting, and controversy and litigation. The practice also has extensive experience in using the APA and competent authority programmes to avoid possible controversy. Clients are from a broad range of sectors, including pharmaceuticals, technology, banking and finance. **Baron Bassett** is head of the practice.

White & Case employs seven lawyers focused on transfer pricing in the US, including practice leader **Brian Gleicher**, who has over fifteen years of transfer pricing experience, and is considered an expert on transfer pricing matters related to South Korea and Japan. **Kim Boylan** litigates and negotiates APAs, and has over 25 years of experience advising on transfer pricing matters, including the new cost-sharing regulations. **Michael Quigley**, partner of counsel, advises White & Case on transfer pricing in multiple jurisdictions. The practice is focused on APAs and dispute resolution before the IRS, foreign tax authorities, competent authorities and the US courts, including the Tax Court, the Court of Federal Claims, federal district courts

and various federal appellate courts. Much of the firm's transfer pricing business originates in Japan, India and Korea, and **Gary Thomas**, who leads the global tax practice from Japan, also assists in some transfer pricing matters. The firm is advising a multi-bil-

lion dollar Korean distributor on transfer pricing issues arising from related party sales, and is representing a US manufacturer and its Japanese subsidiary in the competent authority process to resolve a transfer pricing assessment from Japan's tax authority.

Mexico

Tax authorities

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LEADING FIRMS

1 Baker & McKenzie

Deloitte

Mancera (EY)

PwC

2 Basefima

KPMG

SKATT International

President Enrique Peña Nieto's latest efforts to increase Mexico's tax revenue, the lowest in the OECD, will likely boost demand for transfer pricing services while hastening the end of the transfer pricing boutique, in favour of the full service model.

"As part of the new Presidential administration, there will be some important changes in the Tax Administration Service (SAT), specifically in the transfer pricing department where Salvador Cruz will be named this week as the new Central Administrator," said Moises Curiel of Baker & McKenzie. "Meeting with the SAT's general administration of large taxpayers, he said very clearly that his intention is to attack aggressive tax planning for restructuring."

Curiel added that at a recent international tax conference, Oscar Molina, head of SAT's Large Taxpayer Administration, said he will pay special attention to approximately 270 companies that restructured themselves as maquilas – manufacturing companies located in northern Mexico's free trade zone – to obtain tax incentives. "They are the

first targets for the Minister of Finance," said Curiel. "They will go for those particular audits."

The Large Taxpayer Administration also plans to launch a new unit that will be "more oriented toward attacking companies with aggressive tax planning restructuring," said Curiel. He also said that advance pricing agreements (APAs) will remain the best option for companies to obtain certainty in their related party transactions.

Also, in August 2013, the Mexican congress approved a series of proposals that would impose a 5% royalty on the net profits of mining companies. "Transfer pricing would have a significant impact on royalties, and a number of foreign firms are likely to weigh in on the matter," said Simon Somohano of Deloitte.

The takeaway is that one cannot underestimate the importance of sound and effective transfer pricing planning. "The tax systems in general are getting more mature and leaving fewer opportunities for tax planning," Somohano said. "So transfer pricing planning has to be more sophisticated and more central to tax planning."

Consequently, more of Mexico's transfer pricing practices are becoming one-stop shops for planning, documentation and audit defense services. "What we have seen in the last several years has been an implosion of boutique firms," said Jorge Castellon of Mancera, an EY member firm. "More and more firms are bringing capabilities in-house. That leads to less compliance work for firms like us."

Tier 1

Baker & McKenzie's transfer pricing practice comprises three partners and 16 fee-earners in five practice