

# AVOIDING SCANDALS THROUGH TAX RULINGS TRANSPARENCY

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## ABSTRACT

*In 2014, the International Consortium of Investigative Journalists broke the “LuxLeaks” scandal, revealing numerous tax rulings that the press termed “sweetheart deals” granted to multinational companies. Many countries offer tax rulings because they provide certainty to taxpayers and the government on the tax consequences of a planned transaction. Yet, secrecy that is followed by leaks and criticism is a recurring aspect of these rulings, both in the United States and Europe.*

*LuxLeaks, which revealed secret rulings from the small European country of Luxembourg, was international headline news. It helped trigger widespread reforms. Tax authorities, including those of European countries and the United States, now automatically share information about cross-border advance rulings with other countries’ tax authorities. But Luxembourg’s tax rulings otherwise remain confidential. The United States treats a type of tax ruling, the Advance Pricing Agreement (APA), similarly: it exchanges information about APAs with other countries but does not otherwise disclose them.*

*How transparent should tax rulings be? Secret rulings protect taxpayer confidentiality but also impose costs on various stakeholders. This Article (1) draws on the repeated scandals involving tax rulings to develop an original typology of these costs; (2) catalogues the levels of possible rulings disclosure, connecting each level with the costs it would address; and (3) examines potential arguments against rulings transparency. The Article concludes that, despite government resistance, best practices call for public disclosure of anonymized tax rulings—both letter rulings and APAs—heavily redacted, if necessary.*

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	INTRODUCTION .....	220
I.	A PRIMER ON TAX RULINGS.....	224
	A. <i>Advance Tax Rulings</i> .....	224
	B. <i>Advance Pricing Agreements</i> .....	226
II.	A TYPOLOGY OF COSTS OF NONTRANSPARENT TAX RULINGS.....	231
	A. <i>Costs to Countries</i> .....	231
	1. <i>Loss of Tax Base</i> .....	231
	2. <i>Distortion of Competition</i> .....	233
	3. <i>Embarrassing Leaks</i> .....	235
	4. <i>Lack of Protection for a Weak Tax Administration</i> .....	239
	5. <i>Tax Administrator Corruption or             the Appearance of Corruption</i> .....	240
	B. <i>Costs to Taxpayers</i> .....	244
	1. <i>Barriers to Access</i> .....	244
	2. <i>Inconsistent Tax Treatment</i> .....	246
	C. <i>Risks to Tax Advisers</i> .....	248
	1. <i>“Fighting in the Dark”</i> .....	248
	2. <i>“Private Libraries”</i> .....	250
III.	DISCLOSURE RESPONSES.....	251
	A. <i>Oversight Bodies</i> .....	252
	B. <i>Exchanges with Other Countries         of Rulings Summaries</i> .....	253
	1. <i>The European Commission’s Approach</i> .....	254
	2. <i>The OECD’s Approach</i> .....	256
	C. <i>Disclosure to the Public</i> .....	257
	1. <i>Assessing the Possible Downsides of Disclosure</i> .....	258
	(a) <i>Are Disclosed Tax Rulings Useless?</i> .....	260
	(b) <i>Taxpayer Use of Others’ Rulings</i> .....	261
	(c) <i>Expense of Publishing Rulings</i> .....	263
	(d) <i>Decline in Rulings Volume?</i> .....	264
	(e) <i>Would Confidential Taxpayer                 Information Be Disclosed?</i> .....	269
	2. <i>Special Concerns in the APA Context</i> .....	271
	CONCLUSION .....	275

## INTRODUCTION

Many countries, including the United States, use tax rulings, which are agreements between taxpayers and the government about the tax consequences of a planned transaction. A ruling provides certainty for the requesting taxpayer, and both parties avoid the potential cost of a tax audit on that issue. Should these rulings by the tax administration be considered confidential tax information, legal guidance available to the general public, or something in between?

Governments have often prioritized taxpayer confidentiality, keeping rulings private.<sup>1</sup> However, the lack of transparency has significant downsides, including the risk of embarrassing leaks. In 2014, the small European country of Luxembourg made international headline news when the International Consortium of Investigative Journalists (ICIJ) released hundreds of previously confidential tax rulings that the Luxembourg tax administration had granted.<sup>2</sup> What became known as the “LuxLeaks” scandal, and the events that followed, revealed that Luxembourg had granted thousands of tax rulings to multinational companies over a period of several years.<sup>3</sup> The *Wall Street Journal* quoted a Luxembourg tax lawyer as stating that “[t]he corporate structures . . . approved [in these rulings] account[ed] for up to 80% of Luxembourg’s €1.5 billion in annual corporate tax revenue.”<sup>4</sup>

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1. See *infra* text accompany notes 71-75 (noting that U.S. APAs are kept confidential); *infra* text accompanying notes 324-25 (discussing pre-1976 U.S. tradition of confidential letter rulings); 111 CONG. REC. 11814 (1965) (statement of Sen. Gore) (“[IRS] Commissioner Cohen, in testifying before the Finance Committee . . . stated that in applying for a ruling the taxpayer ‘bares his financial soul.’ The implication seemed to be that a ruling itself contained material that could not be published.”).

2. JAKE BERNSTEIN, SECRECY WORLD: INSIDE THE PANAMA PAPERS INVESTIGATION OF ILLICIT MONEY NETWORKS AND THE GLOBAL ELITE 200 (2017) (“[T]he Lux Leaks revelations, published on November 5, 2014, shook Europe. Thirty partners published at the same time.”). For a database of the released documents, see *Luxembourg Leaks Database: Search the Documents*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourg-leaks-database/> [<https://perma.cc/PZN8-ZXLGJ>] (last visited Apr. 7, 2023).

3. See Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 1-2 (2017) (“In November 2014, The International Consortium of Investigative Journalists (ICIJ) made public hundreds of leaked, privately negotiated advance tax agreements (ATAs).”; *id.* at 5 (noting that the leak is called the “LuxLeaks scandal”); OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, HARMFUL TAX PRACTICES—2020 PEER REVIEW REPORTS ON THE EXCHANGE OF INFORMATION ON TAX RULINGS: INCLUSIVE FRAMEWORK ON BEPS: ACTION 5, at 283-84 (2021), <https://www.oecd.org/tax/beps/harmful-tax-practices-2020-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-f376127b-en.htm> [<https://perma.cc/9V3N-68CS>] (stating that Luxembourg issued 1,922 tax rulings between January 1, 2010 and April 1, 2016); OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, HARMFUL TAX PRACTICES—PEER REVIEW REPORTS ON THE EXCHANGE OF INFORMATION ON TAX RULINGS: INCLUSIVE FRAMEWORK ON BEPS: ACTION 5, at 196 (2017), <https://dx.doi.org/10.1787/9789264285675-en> [<https://perma.cc/A8BQ-FHG4>] [hereinafter OECD 2017] (noting that “[a]s [of] 18 October 2017, the process to identify all past [Luxembourg] rulings had been completed” and 7,894 exchanges on past rulings issued between January 1, 2010 and April 1, 2016 had occurred); *id.* at 189 (referring to 5,600 Luxembourg past rulings for the same period).

4. Matthew Karnitschnig & Robin van Daalen, *Business-Friendly Bureaucrat Helped Build Tax Haven in Luxembourg*, WALL ST. J. (Oct. 21, 2014, 10:44 PM), <http://www.wsj.com/articles/luxembourg-tax-deals-under-pressure-1413930593> [<https://perma.cc/4LEL-9DYJ>] (quoting Alain Steichen).

The LuxLeaks database reveals that Luxembourg's tax rulings often were lengthy<sup>5</sup> and covered multiple issues,<sup>6</sup> yet the process for issuing the rulings seemed surprisingly rapid. Many of the rulings were signed by the tax administration on the day the taxpayer's representatives submitted them.<sup>7</sup> The *Lëtzebuenger Land* newspaper reported that a business lawyer recalled that "[w]ith a little luck, we could put through 'a good fifteen rulings in two hours.'"<sup>8</sup> By contrast, U.S. tax rulings typically take months for the U.S. tax administration, the Internal Revenue Service (IRS), to conclude.<sup>9</sup>

In theory, parties negotiating tax rulings should have adverse interests, with the tax administration seeking to prevent the taxpayer from reducing the tax base in that country. However, that assumes that the tax administration wants to maximize revenue in every case and that the tax base is fixed. Because they are individualized, tax rulings can be used to provide special deals.<sup>10</sup> Moreover, a tax administration can tax profits that would otherwise be taxed by another

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5. See BERNSTEIN, *supra* note 2, at 185 (stating that certain "submitted tax agreements . . . averaged between twenty and one hundred pages in length").

6. Professor Omri Marian examined a sample of 172 rulings. Marian, *supra* note 3, at 2. The rulings in that sample contained a mean number of issues of 4.93, a median of 5, and a mode of 5. The range was zero issues (only one ruling) to 16 issues (also one ruling). Rulings containing 4 to 6 issues collectively comprised 47.09% of his sample. These figures were calculated using Professor Marian's raw data. The author thanks him for allowing her access to his data.

7. See Marian, *supra* note 3, at 17 (finding, in a sample of 172 rulings in the ICIJ database, that "about 40% . . . were approved the same day they were submitted").

8. Bernard Thomas, *La cinquième colonne*, D'LÉTZEBUERGER LAND (Nov. 14, 2014) (Lux.), <http://www.land.lu/page/article/751/7751/FRE/index.html> [<https://perma.cc/Q39N-W5RL>] ("Avec un peu de chance, on pouvait faire passer « une bonne quinzaine de rulings en deux heures », se rappelle un avocat d'affaires."). The translation in the text and all uncredited translations in this Article were done by the author.

9. See TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2010-10-106, CHIEF COUNSEL CAN TAKE ACTIONS TO IMPROVE THE TIMELINESS OF PRIVATE LETTER RULINGS AND POTENTIALLY REDUCE THE NUMBER ISSUED (2010), <https://web.archive.org/web/20170518162016/https://www.treasury.gov/tigta/auditreports/2010reports/201010106fr.html> [<https://perma.cc/YJP9-VCHQ>] ("In 35 (54[%]) of the 65 cases [examined], Counsel took from 121 to 180 calendar days to provide the taxpayer with the letter ruling . . . [and] 15 (23[%]) of the 65 cases took longer than the 180-calendar day goal to close the case (ranging from 199 to 3,548 calendar days . . .)."); I.R.S., ANNOUNCEMENT AND REPORT CONCERNING ADVANCE PRICING AGREEMENTS 12 (2019), <https://www.irs.gov/pub/irs-drop/a-19-03.pdf> [<https://perma.cc/5DQP-9XRW>] (reporting that APAs averaged 32 to 45 months to complete, depending on the type and whether it was a renewal of an existing APA).

10. See Allison Christians, *Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time*, 76 TAX NOTES INT'L 1123, 1124-25 (2014) (referring to "a known issue for international tax law: far too much of it seems to involve secret deals among specific taxpayers and governments, to the detriment of the public at large"); Ruth Mason, *Identifying Illegal Subsidies*, 69 AM. U. L. REV. 479, 515 (2019) ("Due to their obscurity, the complexity of the laws they apply, their confidentiality, and their application to only a single taxpayer, tax rulings represent an ideal mechanism for governments to deliver benefits to a favored taxpayer while denying similar treatment to the taxpayer's competitors.").

country by providing a ruling that has the effect of shifting profits into the jurisdiction and offering a low effective tax rate on the profits shifted<sup>11</sup>—much lower than statutory rates.

For example, the use of negotiated margins subject to tax in a ruling can significantly lower the effective tax rate by greatly reducing the amount subject to tax at that rate. Luxembourg's statutory tax rate was about 29% during the period of the leaked rulings.<sup>12</sup> However, as Professor Omri Marian explained, "Luxembourg's . . . practice allowed for . . . taxable margins . . . as low as 0.015625[%]."<sup>13</sup>

LuxLeaks helped foster international discussions about rulings transparency and legal change. In recent years, tax authorities, including those of European countries and the United States, have been required by the European Commission (EC) and the Organisation for Economic Cooperation and Development (OECD) to share information about cross-border advance rulings with other countries' tax authorities.<sup>14</sup> As discussed in this Article, this information-exchange approach targets an important set of risks that nontransparent tax rulings pose to other countries, but it fails to address all of the costs that such rulings impose.

This Article makes several original contributions. First, it draws on the repeated scandals involving tax rulings to develop an original typology of the costs of nontransparent tax rulings. Second, the Article analyzes what types of disclosures would address which costs. Third, the Article catalogs and interrogates potential downsides of rulings transparency. Finally, drawing on this framework, the Article

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11. See Wojciech Morawski, *Will the European Union Put an End to the "Golden Age" of Tax Ruling?*, 3 ACTA UNIVERSITATIS CAROLINAE—IURIDICA 53, 55 (2020) ("Harmful tax competition may also consist in issuing tax ruling[s] that are beneficial to taxpayers and that facilitate tax avoidance (or sometimes tax evasion) in another country."). For example, Ruth Mason and Stephen Daly discuss the European "[C]ommission's early assertion that the Irish Revenue Commissioners and Apple had 'reverse engineered' the agreed formula for taxable profits in 1991" in a transfer pricing ruling. Ruth Mason & Stephen Daly, *State Aid: The General Court Decision in Apple*, 99 TAX NOTES INT'L 1317, 1325-26 (2020).

12. See Omri Marian, *Is Something Rotten in the Grand Duchy of Luxembourg?*, 84 TAX NOTES INT'L 281, 283 (2016) (noting that Luxembourg's corporate tax rates were "about 29[%] combined national and local rate during the period relevant to the leaks").

13. *Id.* at 286. Professor Marian also wrote that "the determination of the taxable spread depended solely on the face amount of financing made through Luxembourg. The spread diminishes as the amount financed through Luxembourg increases." *Id.* at 285. Similarly, the French TV show *Cash Investigation* shows British tax expert Richard Brooks stating the following: "Les entreprises sont taxées sur une toute petite marge de revenus ou des capitaux qui passent par le Luxembourg. Et plus les sommes d'argent sont importantes, moins elles sont taxées. C'est un forfait en fait, pour utiliser le Luxembourg." (meaning "Companies are taxed on a very small margin of revenue or capital that passes through Luxembourg. And the larger the sums are, the less they are taxed. It's a fee, in effect, for using Luxembourg."). *Cash Investigation: Paradis Fiscaux: Les Petits Secrets des Grandes Entreprises* at 21:32-21:44 (Premières Lignes May 11, 2012).

14. See *infra* Section III.B.

analyzes what best practices in rulings transparency should look like—an issue that should matter to the many countries and subnational governments that issue tax rulings.

Part I of the Article provides background on advance tax rulings and a similar type of document known as an Advance Pricing Agreement (APA). This Part also discusses the differing transparency of these rulings at the federal level in the United States. In Part II, this Article identifies and develops a typology of the costs of nontransparent tax rulings—to countries, taxpayers, and tax advisers. Part III discusses possible disclosure remedies; potential downsides of transparency, including the argument some have made that publication of tax rulings would reduce demand for them, which U.S. data does not support; and special considerations for APAs. The Article concludes that best practices call for publication of anonymized letter rulings and as close as possible to that for APAs.

## I. A PRIMER ON TAX RULINGS

Tax rulings are a type of *ex ante* legal guidance provided to taxpayers. Unlike general, published guidance, rulings are tailored to the requesting taxpayer's situation.<sup>15</sup> There are two principal types of tax rulings issued to specific taxpayers: advance tax rulings (also called letter rulings) and APAs.<sup>16</sup> Both are used by countries all over the world.

### A. *Advance Tax Rulings*

The OECD defines the term “advance ruling” as follows: “[a] letter ruling, which is a written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts.”<sup>17</sup> That is, advance tax rulings are taxpayer-specific rulings that allow the taxpayer receiving the ruling to obtain assurance about the tax treatment of a transaction, typically before undertaking the

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15. See STEPHEN DALY, TAX AUTHORITY ADVICE AND THE PUBLIC 13 (2020).

16. This Article uses the term “ruling” or “tax ruling” to refer to both letter rulings and APAs. Cf. Christians, *supra* note 10, at 1124 (stating that “advance pricing agreements . . . are a kind of private letter ruling”).

17. *Glossary of Tax Terms*, OECD, <http://www.oecd.org/ctp/glossaryoftaxterms.htm#https://perma.cc/8CWQ-K3SP> (last visited Apr. 7, 2023). The Internal Revenue Service defines the term “letter ruling” as follows:

A “letter ruling” is a written determination issued to a taxpayer by an Associate office in response to the taxpayer’s written inquiry, filed prior to the filing of returns or reports that are required by the tax laws, about its status for tax purposes or the tax effects of its acts or transactions. A letter ruling interprets the tax laws and applies them to the taxpayer’s specific set of facts.

Rev. Proc. 2019-1, 2019-01 I.R.B. 8. In the United States, letter rulings are also referred to as private letter rulings (PLRs). See Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 471-72 (2017).

transaction.<sup>18</sup> For example, a company seeking to restructure may seek a ruling that the planned restructuring will receive the tax treatment contemplated. In the United States, such rulings are often referred to as “private letter rulings” (PLRs).<sup>19</sup>

Letter rulings are valuable to both the taxpayer and the tax administration.<sup>20</sup> Certainty for taxpayers is commonly cited as an important justification for a tax rulings program.<sup>21</sup> However, that is not the only benefit. For example, one article argues that, in addition to offering “certainty as an aid to business,” tax rulings “make it easier for taxpayers to compute their taxes correctly in the first instance” and “lay the groundwork for fair and economical tax administration.”<sup>22</sup> One commentator called letter rulings “an indispensable tool in the modern world of tax administration and compliance.”<sup>23</sup>

The IRS first announced its letter rulings program in 1953,<sup>24</sup> but, until the 1970s, PLRs were not routinely made publicly available.<sup>25</sup> During that period, only a small percentage were published.<sup>26</sup> The IRS preferred to avoid public disclosure because “[b]y so doing, the [Internal Revenue] Service limited the scope of the ruling and, accordingly, limited its risk.”<sup>27</sup> However, this lack of transparency of rulings

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18. CARLO ROMANO, *ADVANCE TAX RULINGS AND PRINCIPLES OF LAW: TOWARDS A EUROPEAN TAX RULINGS SYSTEM?* 78 (2002).

19. See Blank, *supra* note 17, at 471.

20. See Gerald G. Portney, *Letter Rulings: An Endangered Species?*, 36 TAX LAW. 751, 754-55 (1983) (discussing benefits of tax rulings to the taxpayer); Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 765 (1965) (listing, by then-Chief Counsel of the IRS, of five benefits to the government of tax rulings).

21. See, e.g., Carlo Biz, *Countering Tax Avoidance at the EU Level After 'Luxleaks.'* *A History of Tax Rulings, Transparency and BEPS: Base Erosion Profit Shifting or Bending European Prospective Solutions?*, 12 DIRITTO E PRATICA TRIBUTARIA INTERNAZIONALE 1035, 1040 (2015) (citing the benefits, in the tax rulings context, of legal certainty, predictability, and “legitimate expectation”).

22. Norman A. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 5 (1954).

23. Maartin Ellis, *General Report, Advance Rulings*, in 84B IFA CAHIERS DE DROIT FISCAL INTERNATIONAL 24 (1999).

24. Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 345 (2008).

25. See Portney, *supra* note 20, at 753 (“Things stayed pretty much unchanged until the mid-1970s, despite the appearance of the Freedom of Information Act (‘FOIA’) on July 4, 1967. Private ruling letters remained private.”).

26. Thomas R. Reid III, *Public Access to Internal Revenue Service Rulings*, 41 GEO. WASH. L. REV. 23, 25 (1972) (“Although the number of rulings issued publicly has increased considerably since 1952, the absolute number of published rulings is still *de minimis*; in each of the past five years, fewer than three percent of all tax rulings were made public.” (footnote omitted)).

27. Rogovin & Korb, *supra* note 24, at 346.

created problems for taxpayer representatives,<sup>28</sup> as well as the government,<sup>29</sup> and was widely criticized.<sup>30</sup> Prompted by litigation, Congress changed the law in the mid-1970s,<sup>31</sup> enacting Internal Revenue Code (Code) section 6110 in 1976.<sup>32</sup>

Section 6110 states in part: “Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.”<sup>33</sup> To protect the taxpayer, the statute also provides for the redaction of identifying details.<sup>34</sup> In addition, it provides that letter rulings have no precedential value.<sup>35</sup> The Joint Committee on Taxation’s Explanation of the 1976 Act explains that the lack of precedential value avoids the problem of needing to subject PLRs “to considerably greater review than is provided under present procedures.”<sup>36</sup>

### B. Advance Pricing Agreements

Large multinational companies may have hundreds of related entities in dozens of countries.<sup>37</sup> APAs are similar to letter rulings but reflect an agreement between such a taxpayer and one or more tax administrations regarding intercompany (transfer) pricing.<sup>38</sup> The OECD has defined the term “APA” as “[a]n arrangement that determines,

28. See *infra* text accompanying notes 209-13.

29. See *infra* text accompanying notes 144-52.

30. See Reid, *supra* note 26, at 25 (“In Congress, among scholars, and in the private tax bar it has been suggested that the ruling system is unfair and inimical to the public interest.” (footnotes omitted)).

31. Portney, *supra* note 20, at 753 (“[I]n 1974 and 1975, the Service lost two cases in which the disclosure of private letter rulings was sought under FOIA [(the Freedom of Information Act)]. The Courts of Appeals for the District of Columbia Circuit in *Tax Analysts and Advocates v. I.R.S.* and for the Sixth Circuit in *Freuhauf [sic] Corporation v. I.R.S.* concluded that private letter rulings were not ‘returns’ exempt from disclosure under an exception to FOIA.” (footnotes omitted)).

32. See *id.*

33. I.R.C. § 6110(a).

34. I.R.C. § 6110(c)(1).

35. I.R.C. § 6110(k)(3).

36. STAFF OF THE JOINT COMM. ON TAX’N, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 309 (Joint Comm. Print 1976) [hereinafter JOINT COMM. ON TAX’N, REFORM ACT OF 1976 REPORT].

37. See Javier Garcia-Bernardo et al., *Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network*, 7 SCI. REPS. 1, 1 (2017) (“For example, the Britain-based banking and financial services company *HSBC* is composed of at least 828 legal corporate entities in 71 countries. The largest brewing company in the world, *Anheuser-Busch InBev*, consists of at least 680 corporate entities involving 60 countries.”).

38. Susan C. Borkowski, *Advance Pricing (Dis)Agreements: Differences in Tax Authority and Transnational Corporation Opinions*, 22 INT’L TAX J. 23, 24 (1996) (“Advance pricing agreements (APAs) are pre-transaction agreements about acceptable transfer pricing methods for a given time period.”).



in advance of controlled transactions, an appropriate set of criteria . . . for the determination of the transfer pricing for those transactions over a fixed period of time.”<sup>39</sup>

Transfer pricing, which allocates the tax base of a multinational enterprise among the various countries involved,<sup>40</sup> has been called “one of the most significant problems in modern international taxation.”<sup>41</sup> Professor Adam Rosenzweig provides the following simple example:

[A]ssume a company manufactures widgets in Country A and sells those widgets in Country B. It costs \$200 to manufacture a widget in Country A, and it can be sold for \$700 in Country B, for a total of \$500 worldwide profit per widget. Which country is entitled to tax that \$500?<sup>42</sup>

In Rosenzweig’s example, the company, Country A, and Country B all have an interest in the answer to this question. The taxpayer will not want to be taxed twice on the same amount, and Country A and Country B both have potential tax to collect.<sup>43</sup> “The territorial nature of powers of taxation means that companies are not free to transfer their profits and losses at will from one tax jurisdiction to another.”<sup>44</sup> Transfer pricing is what allocates the \$500 between the two countries.<sup>45</sup> To accomplish that, “a hypothetical intermediate step is added,”<sup>46</sup> so that the widget is deemed to be transferred from the manufacturer to a hypothetical retailer in Country B that then sells it to the consumer.<sup>47</sup> The hypothetical price at which the (fictional) retailer bought the product is what determines how much of the \$500 of profit is allocated to Country A and how much to Country B.<sup>48</sup>

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39. OECD, OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS 23 (2017), <https://dx.doi.org/10.1787/tpg-2017-en> [<https://perma.cc/N8ZM-L782>]. In 2003, Victor Thuronyi described APAs as “[a] fairly recent development, started in the United States and already imitated in a number of mostly OECD countries.” VICTOR THURONYI, COMPARATIVE TAX LAW 212 (2003).

40. Adam H. Rosenzweig, *An Antigua Gambling Model for the International Tax Regime*, 44 WASH. U. J.L. & POL’Y 79, 84 (2014).

41. Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 169 (2009).

42. Rosenzweig, *supra* note 40, at 84.

43. See Kristin E. Hickman, Comment, *Should Advance Pricing Agreements Be Published?*, 19 NW. J. INT’L L. & BUS. 171, 172 (1998).

44. Case C-898/19 P, Ireland v. Eur. Comm’n, ECLI:EU:C:2021:1029, ¶ 73 (Dec. 16, 2021).

45. Rosenzweig, *supra* note 40, at 84.

46. *Id.* at 86.

47. *Id.*

48. In the example provided by Rosenzweig, “assume the retail price was \$300. The sale from Country A to Country B would generate \$100 of profit, which Country A would tax. The retail store in Country B would have a profit of \$400 from selling the widget it bought for \$300 for \$700.” *Id.*

“In general, transfer pricing rules are based on the ‘arm’s length’ principle. This principle stipulates that prices are not artificially manipulated when they resemble prices which are set as if companies were independent of each other, i.e. at arm’s length.”<sup>49</sup> These prices, because they are based on counterfactuals, lack a single “correct” figure. Moreover, the taxpayer is not indifferent about the allocation of profits, in part because countries’ tax rates differ. The taxpayer’s incentive is to set the hypothetical price so as to locate most of the profit in the lower-taxed jurisdiction.<sup>50</sup> For example, if Country A in Rosenzweig’s example is a low-tax jurisdiction and Country B is a high-tax jurisdiction, the taxpayer has an incentive to treat the price on the hypothetical sale from Country A to the store in Country B as a high amount—say \$650. If respected, this would mean that \$450 is taxed in low-tax Country A,<sup>51</sup> while only \$50 is taxed in high-tax Country B.<sup>52</sup>

Governments can try to respond to alleged abuses by questioning the transfer prices companies determine, but this could result in expensive and protracted litigation.<sup>53</sup> The APA process allows advance agreement on the transfer price, thus avoiding potential audit and litigation costs.<sup>54</sup> The cost savings for both sides make APAs attractive to both the tax administration and the taxpayer.<sup>55</sup>

The APA was “introduced in the United States in 1991 . . . . Following the introduction of these agreements in the United States, similar procedures were gradually adopted in other countries, and by 2007[,]

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49. Phedon Nicolaides, *State Aid Rules and Tax Rulings*, 15 EUR. ST. AID L.Q. 416, 416 (2016).

50. See Givati, *supra* note 41, at 142 (“Transfer pricing . . . utilizes tax arbitrage between related companies to minimize tax payments. By setting the transfer prices of international transactions between related companies, income is shifted to the legal entity located in a low tax rate jurisdiction, and tax payments are thereby reduced.”); Diane M. Ring, *On the Frontier of Procedural Innovation: Advance Pricing Agreements and the Struggle to Allocate Income for Cross Border Taxation*, 21 MICH. J. INT’L L. 143, 146 (2000) (“If the [related] parties agree to an artificially high or low price for the goods, services, intangibles or borrowing, they can strategically place their total profits in the ‘best’ (i.e. lowest tax) country. Such off-market pricing is possible because the parties’ common control or ownership means they share a common economic interest.”).

51. That is, \$650 minus the \$200 production cost in the example. See *supra* text accompanying note 42.

52. That is, the \$700 sales price in the example, see *supra* text accompanying note 42, minus \$650.

53. See Richard C. Stark et al., *Consistency, Sunshine, Privacy, Secret Law, and the APA Program*, 61 TAX NOTES INT’L 1049, 1064 (2011) (“Litigating this type of case is extraordinarily costly and time-consuming for the taxpayer, the IRS, and the courts for many reasons . . . .”). For example, the company “GSK [GlaxoSmithKline] and the IRS argued for fourteen years over the correct transfer prices the U.S. subsidiary paid to its United Kingdom parent for several drugs.” Sharon Burnett & Darlene Pulliam, *Transfer Pricing Seven Years After Glaxo Smith Kline*, 41 SW. ECON. REV. 99, 99 (2014).

54. Ring, *supra* note 50, at 147.

55. Lisa M. Nadal, *News Analysis: Who Killed the Senate APA Report?*, 118 TAX NOTES 366, 367 (2008) (“Perhaps the most interesting aspect of APAs is that taxpayers and the IRS both seem to love them. In a world where those two sides often vigorously oppose each other, seldom does one find an area where rivals so clearly converge.”).

advance pricing agreements were offered in many countries around the world.”<sup>56</sup> APAs typically involve significant amounts of money.<sup>57</sup> U.S. APAs typically cover periods of three to five years.<sup>58</sup>

There are distinct types of APAs, based on how many parties are involved.<sup>59</sup> A “unilateral” APA involves only the taxpayer and one tax authority.<sup>60</sup> For example, a unilateral U.S. APA would involve the taxpayer and the IRS.<sup>61</sup> Bilateral and multilateral APAs involve multiple jurisdictions’ Competent Authorities.<sup>62</sup> In the United States, the Competent Authority is the Deputy Commissioner of the IRS.<sup>63</sup> An agreement among Competent Authorities “is normally based on the mutual agreement provision of tax treaties between the jurisdictions.”<sup>64</sup> “Only bilateral and multilateral APAs . . . can provide legal certainty as to how the tax authorities of countries involved consider the taxpayer-specific application of a [transfer-pricing method].”<sup>65</sup>

U.S. APAs have been non-public documents since the program’s inception.<sup>66</sup> In the 1991 Revenue Procedure announcing the APA program, the IRS declared that “[t]he information received or generated by the Service during the APA process relates directly to the potential tax liability of the taxpayer under the Internal Revenue Code. Therefore, the APA and such information are subject to the confidentiality

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56. Givati, *supra* note 41, at 142-43.

57. See Blank, *supra* note 17, at 514 (“Advance Pricing Agreements are among the most economically valuable forms of ex ante tax administration.”).

58. See *id.* at 515. The period may be even longer. See Matthew Frank et al., *Insight: Advance Pricing Arrangement Series: Americas*, BLOOMBERG L.: DAILY TAX REP. (June 21, 2019, 3:01 AM), <https://news.bloombergtax.com/daily-tax-report/insight-advance-pricing-arrangement-series-americas> [<https://perma.cc/6BWG-CHUT>] (“It is now not unusual for an APA term to be 10 years or more—and this was a feature of 17 of the 107 [U.S.] APAs executed in 2018.”). Some APAs lack an end date. See Lorraine Eden & William Byrnes, *Transfer Pricing and State Aid: The Unintended Consequences of Advance Pricing Agreements*, 25 TRANSNAT’L CORPS. 9, 23-24 (2018).

59. See OECD, *supra* note 39, at 23 (“An advance pricing arrangement may be unilateral involving one tax administration and a taxpayer or multilateral involving the agreement of two or more tax administrations.”).

60. Andrew B. Whitford, *The Reduction of Regulatory Uncertainty: Evidence from Transfer Pricing Policy*, 55 ST. LOUIS U. L.J. 269, 286 (2010) (“A unilateral APA involves one tax authority and a taxpayer; a bilateral or multilateral APA involves two or more tax authorities.”).

61. See Todd Welty et al., *Evaluating and Leveraging Alternative Dispute Resolution Options in Tax Disputes Involving Financial Institutions*, 25 J. TAX’N & REG. FIN. INSTS. 25, 31 (2012) (explaining, in the U.S. context, that “[a] bilateral or multilateral APA involves a request for an APA between the taxpayer, the [Internal Revenue] Service, and a mutual agreement between relevant foreign competent authorities, whereas a unilateral APA involves only the IRS and the taxpayer, and does not prevent foreign tax administrations from taking a different position”).

62. See *id.*

63. Rev. Proc. 2015-40, 2015-35 I.R.B. 236 § 1.04.

64. Alexander Vogeles & Markus Brem, *Do APAs Prevent Disputes?*, 14 INT’L TAX REV. 35, 35 (2003).

65. *Id.*

66. See Hickman, *supra* note 43, at 174.

requirements of section 6103 of the Code.”<sup>67</sup> However, as with PLRs, a publisher filed suit for release of the APAs.<sup>68</sup> Yet, before the court issued a decision, “the IRS conceded that APAs are ‘rulings’ ” and thus were subject to release under the statute applicable to letter rulings, Code section 6110.<sup>69</sup>

In response to this IRS concession, some companies approached Congress expressing concern about the planned publication of redacted APAs.<sup>70</sup> Congress quickly amended Code section 6103 to provide that “any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement”<sup>71</sup> constitute protected “return information.”<sup>72</sup> Information protected by Code section 6103 is an exception to the Freedom of Information Act (FOIA).<sup>73</sup> As a result, U.S. APAs are not publicly available.<sup>74</sup> In fact, in contrast with documents covered by FOIA, where nonconfidential “information that can be reasonably segregated from the sensitive portion of the document must be disclosed[,] [u]nder the 1999 change, the IRS can no longer disclose APAs no matter how much legal analysis and nonsensitive information the APA might contain.”<sup>75</sup>

As a compromise, the 1999 legislation required the IRS to issue an annual report on APAs.<sup>76</sup> However, those reports “do[] not discuss specific APAs.”<sup>77</sup> Moreover, the reports only “provide[] disassembled statistical data”<sup>78</sup> that have been analogized to an unhelpful “auto

67. Rev. Proc. 91-22, 1991-1 C.B. 526 § 11. Code section 6103 provides in part that “[r]eturns and return information shall be confidential . . . except as authorized by this title.” I.R.C. § 6103(a).

68. Tracy A. Kaye, *Tax Transparency: A Tale of Two Countries*, 39 FORDHAM INT’L L.J. 1153, 1193 (2016) (describing the lawsuit by legal publisher BNA).

69. STAFF OF THE JOINT COMM. ON TAX’N, 106TH CONG., GEN. EXPLANATION OF TAX LEGISLATION ENACTED IN THE 106TH CONG. 34 (Comm. Print 2001) [hereinafter JOINT COMM. ON TAX’N, EXPLANATION OF TAX LEGISLATION 2001], <http://www.jct.gov/s-2-01.pdf> [<https://perma.cc/C83B-6WDS>] (“Although the court had not issued a ruling in the case, the IRS announced its plan to publicly release both existing and future APAs.”).

70. See *id.*; Kaye, *supra* note 68, at 1195.

71. I.R.C. § 6103(b)(2)(C); Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 521(a), 113 Stat. 1860, 1925.

72. See I.R.C. § 6103(a) (stating that “[r]eturns and return information shall be confidential”).

73. See 5 U.S.C. § 552(b)(3) (“This section does not apply to matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title), if that statute [meets certain requirements].”); Kaye, *supra* note 68, at 1194. Violations of section 6103 can be privately enforced in a civil suit for damages. See I.R.C. § 7431.

74. See Kaye, *supra* note 68, at 1195.

75. Kenneth A. Gary, *Revolving Door Keeps Spinning, APA Program Keeps Ticking*, 102 TAX NOTES 443, 443 (2004).

76. See Pub. L. No. 106-170, § 521(b), 113 Stat. 1860, 1925 (requiring the report and specifying its contents).

77. Lisa M. Nadal, *Should Advance Pricing Agreements Be Disclosed?*, 51 TAX NOTES INT’L 867, 871 (2008).

78. Stark et al., *supra* note 53, at 1069.

manufacturer's catalogue, providing no pictures or descriptions of the various models sold, but rather enumerating the aggregate number of carburetors, pistons, axles, bolts, body panels, and other parts used during the year."<sup>79</sup> Thus, U.S. APAs remain nontransparent.

## II. A TYPOLOGY OF COSTS OF NONTRANSPARENT TAX RULINGS

Although a letter ruling or APA can only be relied on by the taxpayer to whom it is issued, rulings issued to others nonetheless provide valuable information for similarly situated taxpayers because they show how the tax administration has ruled previously.<sup>80</sup> Opaque rulings—those that are shared by the tax administration only with the taxpayer and/or tax adviser receiving the ruling—eliminate this benefit.

Opaque rulings also give rise to several costs, which is perhaps ironic, given that rulings are generally used to reduce costs.<sup>81</sup> This Part organizes the costs into categories according to who bears most of the burden of these costs.<sup>82</sup> This original typology identifies important risks that opaque rulings impose on countries, taxpayers, and tax advisers.

### A. *Costs to Countries*

Nontransparent tax rulings create at least five risks or costs to countries. Costs to countries other than the country issuing the ruling may be most salient—and are discussed first—but several costs are borne by the country providing opaque rulings.<sup>83</sup>

#### 1. *Loss of Tax Base*

One concern a tax rulings regime, particularly a nontransparent one, poses for other countries is the negative externality of loss of tax

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79. *Id.* at 1061.

80. *See id.* at 1068 (“Given the frequency with which particular issues are dealt with in the APA program, it must be the case that substantial information concerning the way that the IRS applies law to facts exists and could be disclosed, and that this information would greatly advance an effort to better define transfer pricing outcomes consistently with the way the IRS exercises its statutory discretion.”). For a discussion of the context of similarly situated taxpayers, see *infra* notes 183-93 and accompanying text.

81. *See supra* text accompanying notes 22-23.

82. All of the risks could be viewed as ultimately borne by countries or by its members, but, to assist analysis, this Article considers the narrowest category of stakeholder who bears significant costs.

83. For EU countries, the transparency of a country's rulings could also affect the risk that a ruling is investigated by the European Commission as state aid. *See* Eden & Byrnes, *supra* note 58, at 26 (“[G]reater transparency should improve the overall process and make APAs less likely to fall afoul of state aid regulations.”). For a brief discussion of tax rulings as state aid, see *infra* text accompanying notes 95-106.

base.<sup>84</sup> For example, Professor Omri Marian studied a sample of the LuxLeaks rulings and argued that Luxembourg “manufactured” tax arbitrage that saved multinational entities significant amounts of taxes in return for a comparatively small payment to Luxembourg.<sup>85</sup> He explained that a country like Luxembourg can insert itself between two jurisdictions that have consistent tax rules. This “intermediary jurisdiction could issue regulatory instruments that make it seem *as if* there exist differences between the tax laws of the source and residence jurisdictions,”<sup>86</sup> allowing a multinational taxpayer to avoid taxation by either of the two other jurisdictions.

In the example Marian uses, a Country A corporate investor making an investment in a corporation located in Country B could use either debt or equity and would have been taxed in one of those two countries because they have similar tax laws, seemingly leaving no room for tax arbitrage.<sup>87</sup> However, with the cooperation of a third country (Country C) that issues a favorable tax ruling regarding the tax treatment of payments made to and from a shell corporation incorporated there and inserted in the middle of the transaction, “[i]n the simplest terms possible, the ATA [Advance Tax Agreement] took a deductible interest payment from Country B and forwarded it to Country A as a non-includible dividend.”<sup>88</sup> Thus, neither Country A nor Country B collect tax on the transaction.

In such a scenario, both Country A and Country B suffer because of Country C’s tax ruling.<sup>89</sup> The taxpayer benefits by paying less tax, and Country C—a country such as Luxembourg—benefits by getting a small percentage of the taxpayer’s tax savings (denominated as tax on the shell corporation).<sup>90</sup> Moreover, if a country becomes overly reliant

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84. See European Commission Fact Sheet Memo/15/4069, Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency, at 2.1 (Mar. 18, 2015), [https://europa.eu/rapid/press-release\\_MEMO-15-4609\\_en.htm](https://europa.eu/rapid/press-release_MEMO-15-4609_en.htm) [<https://perma.cc/UQ66-PUTZ>] [hereinafter Eur. Comm’n, Combatting Corporate Tax Avoidance] (“For example, tax rulings which offer a low level of taxation in one Member State can encourage companies to artificially shift profits there, leading to serious revenue losses for other Member States.”).

85. Marian, *supra* note 3, at 3 (“This Article labels Luxembourg’s administrative behavior as ‘arbitrage manufacturing.’ Arbitrage manufacturing can generally be described as a process in which a jurisdiction issues a regulatory instrument to a taxpayer who resides outside the jurisdiction, in respect of an investment located outside the jurisdiction, in return for a fee.”).

86. *Id.* at 23-24.

87. *Id.* at 24-25.

88. *Id.* at 26.

89. Developing countries are among the countries that suffer due to profit shifting. See Chi Tran, Comment, *International Transfer Pricing and the Elusive Arm’s Length Standard: A Proposal for Disclosure of Advance Pricing Agreements as a Tool for Taxpayer Equity*, 25 SW. J. INT’L L. 207, 209 (2019) (“A 2009 Christian Aid report substantiated the [Senate Permanent Investigations] Subcommittee’s finding, estimating that less developed countries lose approximately \$160 billion in tax revenue each year due to profit shifting and multinational corporation tax avoidance schemes.”).

90. See Marian, *supra* note 3, at 26; see also *supra* notes 12-13 and accompanying text.

on revenue from opaque tax rulings, that creates budgetary risks if the system is not sustainable long-term.<sup>91</sup> The economic effects on that country may also have negative spillover effects on its trading partners.<sup>92</sup>

## 2. *Distortion of Competition*

There are other possible cross-border effects as well. “EU [European Union] Member States [have] argued that secret tax rulings . . . can lead to artificial capital flows and movements of taxpayers and thus harm the proper functioning of the European internal market.”<sup>93</sup> One commentator argued that secret rulings “distort competition and put in [an] unfavourable situation less mobile businesses.”<sup>94</sup>

The European Commission (EC) has investigated certain tax rulings and found that they provided prohibited state aid,<sup>95</sup> which, in a nutshell, is the provision of a selective private advantage that affects trade within the EU.<sup>96</sup> Tax rulings are permissible in the EU, but

91. Stephen Daly, *The OMC, Intelligent Accountability and the Monitoring of National Tax Authorities*, 85 MODERN L. REV. 1109, 1116 (2022).

92. *See id.* (focusing on the EU context).

93. Alicja Brodzka, *Better Governance Through More Transparency on Advance Cross-Border Tax Rulings*, 6 J. GOVERNANCE & REG. 7, 8 (2017).

94. *Id.*

95. In 2014, the EC asked all “Member States . . . to confirm whether they provide tax rulings, and, if they do, to request a list of all companies that have received a tax ruling from 2010 to 2013.” European Commission Press Release IP/14/2742, *State Aid: Commission Extends Information Enquiry on Tax Rulings Practice to All Member States* (Dec. 17, 2014), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_2742](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2742) [<https://perma.cc/5ACC-UYWC>]. Among other cases, “[i]n October 2015, the European Commission concluded that Luxembourg had granted selective tax advantages to Fiat, and the Netherlands to Starbucks.” Brodzka, *supra* note 93, at 10. In July 2020, the General Court of the European Court of Justice reversed a lower court decision that Ireland had granted state aid to Apple via two tax rulings. *See* Romain Dillet, *Apple and Ireland Win Appeal Against the European Commission’s \$15 Billion Tax Ruling*, TECHCRUNCH (July 15, 2020, 6:22 AM), <https://techcrunch.com/2020/07/15/apple-and-ireland-win-appeal-against-the-european-commissions-15-billion-tax-ruling/> [<https://perma.cc/4JBN-QNXG>].

96. State aid is prohibited by Article 107 of the Treaty on the Functioning of the European Union, which provides:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2008 O.J. (C 115) 91. The EC has explained that for a measure to constitute state aid, the following four things must be true:

- there has been an *intervention by the State* or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs . . .);
- the intervention *gives the recipient an advantage on a selective basis*, for example to specific companies or industry sectors, or to companies located in specific regions[;]

“[t]he grant of a tax ruling must . . . respect the State aid rules.”<sup>97</sup> State aid is not a tax doctrine; reduced taxation (furnished in any of a number of ways<sup>98</sup>) is just one possible tool for providing a prohibited selective advantage.<sup>99</sup>

Previously, the EC investigated entire rulings regimes, but its more recent state aid cases have focused on rulings granted to individual companies.<sup>100</sup> The Commission’s actions reflect the idea that a ruling or “APA can move over from the tax realm (where the APA is viewed as a beneficial policy that reduces . . . tax disputes) and into the—at least perceived—realm of competition policy.”<sup>101</sup> Although the existence of a ruling issued to a particular taxpayer does not necessarily show a selective advantage,<sup>102</sup> it shows the presence of a government intervention authorizing a particular tax treatment to that taxpayer.

The EC’s use of the state aid doctrine to tackle tax rulings is controversial.<sup>103</sup> As one article framed it, in the sluggish economy following the Great Recession, the EC turned to the use of “state aid control (for which the EC has exclusive competence).”<sup>104</sup> In addition, the United States has objected to the EC’s approach.<sup>105</sup> The United States

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- . . . competition has been or may be distorted; [and]
  - the intervention is likely to affect trade between Member States.

*State Aid Overview*, EUR. COMM’N, [https://competition-policy.ec.europa.eu/state-aid/state-aid-overview\\_en](https://competition-policy.ec.europa.eu/state-aid/state-aid-overview_en) [<https://perma.cc/EGH6-9WGC>] (last visited Apr. 7, 2023) (emphasis added); see also *id.* (“State aid is defined as an advantage in any form whatsoever conferred by national public authorities to undertakings on a selective basis.”).

97. *Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of The European Union*, 2016 O.J. (C 262) 1, 37.

98. See Stephen Daly, *The Power to Get It Wrong*, 137 L.Q. REV. 280, 286-87 (2021) (listing as possibilities (1) the content of substantive tax rules, (2) discretionary application of the tax laws, and (3) “administration of the tax rules”).

99. See *id.* at 287.

100. Ruth Mason, *Tax Rulings as State Aid FAQ*, 154 TAX NOTES 451, 458 (2017).

101. Eden & Byrnes, *supra* note 58, at 11. Cf. Mason, *supra* note 100, at 452 (“Originally designed to prevent protectionism, over time the scope of the state aid prohibition has expanded, and now, it embraces a stance against harmful tax competition.”).

102. See Richard Lyal, *Transfer Pricing Rules and State Aid*, 38 FORDHAM INT’L L.J. 1017, 1040 (2015) (“[T]he mere existence of an advance tax ruling, of a system for granting tax rulings, or of legislation that envisages tax rulings, is entirely neutral from a State aid perspective. The function of a tax ruling is in principle to apply the general rules to a particular case, but doing so in advance rather than after the fact and for a more or less prolonged period rather than a single tax year.”).

103. See, e.g., James Anderson et al., *UK Plans to Maintain State Aid Regime Post-Brexit*, SKADDEN (Aug. 30, 2018), <https://www.skadden.com/insights/publications/2018/08/uk-plans-to-maintain-state-aid-regime-post-brexit> [<https://perma.cc/476C-6W3G>] (referring to “the EC’s highly controversial application of the state aid rules to tackle tax rulings and fiscal incentive schemes”).

104. Nicholas J. DeNovio et al., *State Aid: What It Is, and How It May Affect Multinationals and Tax Departments*, 68 TAX EXEC., Mar./Apr. 2016, at 15, 17.

105. The Treasury Department argued in a white paper that the EC had made two changes in these cases, including “collaps[ing] the concepts of ‘advantage’ and ‘selectivity,’



has an interest because many of the companies involved are U.S. multinationals.<sup>106</sup> Although the Commission has brought only a handful of such cases in recent years,<sup>107</sup> its treatment of some tax rulings as state aid may deter the issuance of rulings, especially now that ruling summaries are exchanged with other countries.<sup>108</sup>

### 3. *Embarrassing Leaks*

Secret rulings also pose a risk of leaks and of embarrassment of government officials, which may have follow-on lawmaking consequences as well.<sup>109</sup> In the United States, the Congressional record includes several embarrassing incidents from the 1950s and 1960s, as discussed below.<sup>110</sup> U.S. officials may also have been embarrassed in the 2000s by reporting in *Tax Notes* on the alleged suppression of a Senate report on APAs.<sup>111</sup> In Luxembourg, LuxLeaks, which occurred

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which are distinct requirements under State aid law.” U.S. DEPT OF THE TREAS., THE EUROPEAN COMMISSION’S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS 6 (2016), <https://home.treasury.gov/system/files/131/WhitePaper-EU-State-Aid-8-24-2016.pdf> [<https://perma.cc/KW5Y-F4SX>].

106. See *id.* at 5 (“[T]he investigations appear ‘to be targeting U.S. companies disproportionately.’” (quoting Letter from U.S. Senate Comm. on Fin. to Jacob J. Lew, U.S. Sec’y of the Treasury (Jan. 15, 2016))). If U.S. multinationals pay more tax to other countries, they may receive a foreign tax credit, lowering their U.S. tax. *Id.* at 4-5. A Treasury Department white paper expressed concern that this “would effectively constitute a transfer of revenue to the EU from the U.S. government and its taxpayers.” *Id.* at 4. However, Dan Shaviro has pointed out that this may simply be a failure to gain revenue, rather than an actual loss to the U.S. fisc. Daniel Shaviro, *Foreign Tax Credits to the Rescue?*, START MAKING SENSE (Dec. 5, 2015, 4:13 PM), <http://danshaviro.blogspot.com/2015/12/foreign-tax-credits-to-rescue.html> [<https://perma.cc/8QYC-F24V>].

107. See Steven D. Felgran & Mat Hughes, *Transfer Pricing Meets State Aid: Conflicting Arm’s-Length Standards and Other Lessons from the Apple Saga*, 88 TAX NOTES INT’L 959, 963 (2017) (listing seven state aid cases, involving rulings issued by Belgium, Ireland, Luxembourg, and the Netherlands).

108. See Bernard Thomas, *Retour au bureau d’imposition Sociétés 6*, D’LÉTZEBUERGER LAND (June 30, 2017) (Lux.), <http://www.land.lu/page/article/120/333120/FRE/index.html> [<https://perma.cc/ANH5-DNKP>] (“[O]n préfère éviter l’échange automatique des rulings; tant par peur d’une fuite dans la presse . . . que par crainte d’une énième enquête de la Commission européenne pour aide d’État illégale.” (meaning “[W]e prefer to avoid the automatic exchange of rulings, as much out of fear of a leak in the press . . . as out of fear of yet another investigation by the European Commission for illegal state aid.”)). Cf. Adrien Giraud & Sylvain Petit, *Tax Rulings and State Aid Qualification: Should Reality Matter*, 2017 EUR. ST. AID L.Q. 233, 241 (2017) (“It is precisely because of the difficulty of this [transfer-pricing] exercise that companies need to be able to obtain a certain level of security from tax authorities through rulings. The intervention of the Commission, which second-guesses tax administrations, is not helpful in this respect.” (footnote omitted)).

109. See Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 557 (2018) (“The [LuxLeaks] leak raised uncomfortable questions for Jean-Claude Juncker, the EC President, who was Luxembourg’s finance minister during the period the rulings were issued. There were also consequences for the whistleblowers.” (footnote omitted)).

110. See *infra* text accompanying notes 144-50.

111. See *infra* text accompanying notes 134-37.

on November 5, 2014, is a prominent example, as it was international headline news.<sup>112</sup> Jean-Claude Juncker, then President of the EC,<sup>113</sup> was the subject of a failed “no confidence” vote by the European Parliament later that month.<sup>114</sup>

There have been other embarrassing disclosures regarding Luxembourg rulings too. In 2015, during his EC presidency, Juncker released a missing page of a report<sup>115</sup> a couple of weeks after claiming he did not recall such a page existing.<sup>116</sup> The report, written in 1997 by Jeannot Krecké,<sup>117</sup> was titled “Rapport Sur la Fraude Fiscale au Luxembourg” (Report on Tax Fraud in Luxembourg).<sup>118</sup> The page Juncker released contains the section headed “tax ruling.”<sup>119</sup> “Mr Krecké has said he did not release the page originally as he deemed it too sensitive for public disclosure.”<sup>120</sup> However, there were

112. See *supra* note 2 and accompanying text.

113. Mr. Juncker served as President of the EC from 2014 to 2019. *Jean-Claude Juncker*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jean-Claude\\_Juncker](https://en.wikipedia.org/wiki/Jean-Claude_Juncker) [https://perma.cc/9Q4E-PKGJ] (last visited Apr. 7, 2023).

114. See Philip Blenkinsop, *EU's Juncker Survives No-Confidence Vote Over Tax Deals*, REUTERS (Nov. 27, 2014, 6:15 AM), <https://www.reuters.com/article/us-eu-juncker/eus-juncker-survives-no-confidence-vote-over-tax-deals-idUSKCN0JB13Q20141127> [https://perma.cc/E73P-SSGC] (“The censure motion in the European Parliament in Strasbourg, France, was resoundingly defeated by 461 votes to 101.”).

115. See Eric Maurice, *Juncker Produces Missing Page on Tax Rulings*, EU OBSERVER (Sept. 30, 2015, 18:57), <https://euobserver.com/economic/130501> [https://perma.cc/MA8F-ZY5D]. The page in question can be accessed at <https://s3.eu-central-1.amazonaws.com/euobs-media/495d0a51a0f6f76e9715d06031eff99d.pdf> [https://perma.cc/JDL7-4MK2] in French [hereinafter Krecké Page].

116. Maurice, *supra* note 115.

117. *Id.* Krecké “was at the time vice-president of the Luxembourg Socialist Workers’ Party (LSWP).” *Id.*

118. See JEANNOT KRECKÉ, RAPPORT SUR LA FRAUDE FISCALE AU LUXEMBOURG, <https://www.lequotidien.lu/wp-content/uploads/2015/09/97-rapport-sur-la-fraude-fiscale-au-luxembourg-Krecke.pdf> [https://perma.cc/M9S3-LSBH].

119. See Krecké Page, *supra* note 115. The section starts on that page and takes up about three-fourths of the page, so it does not appear to continue beyond that page. See *id.*

120. Matthew Holehouse, *EU's Juncker Releases Secret 'Luxleaks' Tax Advice*, TELEGRAPH (Sept. 30, 2015, 8:22 PM), <https://www.telegraph.co.uk/news/worldnews/europe/eu/11902939/EU-s-Juncker-releases-secret-Luxleaks-tax-advice.html> [https://perma.cc/R7FN-NXLP]; see also Fabio De Masi, *Krecké Report: Question for Written Answer E-009264-15 to the Commission* (June 5, 2015), [https://www.europarl.europa.eu/doceo/document/E-8-2015-009264\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2015-009264_EN.html) [https://perma.cc/ED9X-2WAY] (“[S]everal pages dealing with tax ruling practices were not published, as they were considered too sensitive for public exposure. This has been confirmed internally by Jeannot Krecké and never officially denied by the Luxembourg Government.”).

three copies of the report that contained that page, of which one reportedly was given to Mr. Juncker,<sup>121</sup> who, in 1997, was Luxembourg's Prime Minister and Minister of Finance.<sup>122</sup>

Most recently, in July 2021, a group of European newspapers reported on an investigation, in conjunction with the Tax Justice Network and the Signals Network, termed "LuxLetters."<sup>123</sup> They reported that, since 2015, an informal process known as "information letters" arose in Luxembourg and existed alongside the official tax rulings process.<sup>124</sup> The Tax Justice Network described the process as follows: "According to sources familiar with the practice, the process involves a careful dance of nods and winks through which information letters are unofficially given consent by the tax authority."<sup>125</sup> The Luxembourg

121. Véronique Poujol, *Un rapport sur les rulings de 1997 en édition limitée*, PAPERJAM (Nov. 12, 2014) (Lux.), <https://paperjam.lu/article/news-un-rapport-sur-les-rulings-en-edition-limitee> [<https://perma.cc/9AAR-86G4>] ("Le tirage de cette version non édulcorée du rapport sur la fraude fiscale serait limité, d'après nos informations, à trois exemplaires, dont un avait été remis à Jean-Claude Juncker." (meaning "The circulation of this unaltered version of the report on tax fraud would be limited, according to our information, to three copies, one of which had been given to Jean-Claude Juncker.")).

122. *Jean-Claude Juncker*, *supra* note 113. Mr. Juncker was Luxembourg's Minister of Finance from 1989 to 2009. *Id.* He was the Prime Minister of Luxembourg from 1995 to 2013. *Id.*

123. See *EU and OECD Half-Measures Fail to Detect Luxembourg's Shadow Tax Rulings*, TAX JUST. NETWORK (July 1, 2021), <https://taxjustice.net/press/eu-and-oecd-half-measures-fail-to-detect-luxembourgs-shadow-tax-rulings/> [<https://perma.cc/F9BX-CZR8>] [hereinafter TAX JUST. NETWORK] ("An international investigation conducted by Le Monde, Süddeutsche Zeitung, El Mundo, Woxx and Investigative Reporting Project Italy, with the Tax Justice Network and The Signals Network, reveals the existence and application of secret tax practices in Luxembourg that breach EU transparency rules.").

124. Maxime Vaudano et al., « *LuxLetters* » : la nouvelle astuce pour contourner la transparence fiscale au Luxembourg, LE MONDE (July 1, 2021, 19:01) (Fr.), [https://www.lemonde.fr/evasion-fiscale/article/2021/07/01/luxletters-la-nouvelle-astuce-pour-contourner-la-transparence-fiscale-au-luxembourg\\_6086592\\_4862750.html](https://www.lemonde.fr/evasion-fiscale/article/2021/07/01/luxletters-la-nouvelle-astuce-pour-contourner-la-transparence-fiscale-au-luxembourg_6086592_4862750.html) [<https://perma.cc/9UM9-CAVR>] ("Déployées autour de 2015 pour combler le vide créé par la fin des rescrits d'ancienne génération, ces lettres devaient permettre de tester l'administration fiscale sur la nature des schémas encore acceptés au Luxembourg." (meaning "Deployed around 2015 to fill the void created by the end of the old generation of rulings, these letters were intended to test the tax administration on the nature of the strategies still accepted in Luxembourg.")).

125. TAX JUST. NETWORK, *supra* note 123. In theory, an information letter accepted by a tax authority could create a claim of "legitimate expectations" by a taxpayer. See R.A. de Boer et al., *Over het delen van in te nemen standpunten en zienswijzen met de Belastingdienst*, 7390 WEEKBLAD FISCAAL RECHT 978, 980 (2021) (Neth.). As R.A. de Boer et al. note, in the Netherlands:

Een vervolgvraag die opkomt, is in hoeverre navordering van belasting in de zin van art. 16 lid 1 AWR nog tot de mogelijkheden behoort nadat de belastingplichtige de Belastingdienst actief heeft geïnformeerd over een zienswijze of in te nemen standpunt en dat bij het vaststellen van de aanslag is gevolgd. . . .

Algemene beginselen van behoorlijk bestuur, zoals het vertrouwensbeginsel, kunnen aan navordering van belasting in de zin van art. 16 lid 1 AWR in de weg staan.

*Id.* (meaning "The next question is to what extent an additional claim for tax within the meaning of Art. 16 sub 1 AWR is still possible after the taxpayer has actively informed the

government denied the reports that the tax administration agreed to such letters, stating in part, “The claims made are false and entirely unsubstantiated: there is no such thing in Luxembourg as an informal or oral confirmation by tax authorities of a taxpayer’s tax position based on letters written either by taxpayers themselves or their tax advisors.”<sup>126</sup>

On the world stage, there have been other embarrassing disclosures in the rulings context. For example, in 1999, a report known as the Primarolo report “identified the advance tax rulings system in the Netherlands as a harmful tax practice, because certain tax arrangements resulted in artificial or non-standard arrangements.”<sup>127</sup> The government reacted by making “the tax ruling system . . . more rigorous and requir[ing] greater economic[] substance.”<sup>128</sup>

In 2015, Kluwer International Tax Blog revealed the 1999 report on tax rulings referred to as the Simmons & Simmons report.<sup>129</sup> The Simmons & Simmons report allegedly had been suppressed by France because it disclosed France’s favorable deal with Disney.<sup>130</sup> France likely was embarrassed by the disclosure.<sup>131</sup>

Tax Authorities about a viewpoint or position to be taken and that viewpoint or position has been followed in the assessment. . . . General principles of proper administration, such as the principle of the protection of legitimate expectations, may preclude postclearance recovery of tax within the meaning of Section 16(1) AWR.” (as translated by Deepl.com)).

126. *LuxLetters: Statement by the Luxembourg Government on Press Articles Published About Tax Rulings and So-Called Information Letters*, GOVERNMENT.LU, <https://gouvernement.lu/en/dossiers/2021/luxletters.html> [<https://perma.cc/RDC8-WG3D>] (July 4, 2021).

127. MICHEL VAN DIJK ET AL., *THE NETHERLANDS: A TAX HAVEN?* 35 (2006), [https://www.researchgate.net/publication/228129844\\_The\\_Netherlands\\_A\\_Tax\\_Haven](https://www.researchgate.net/publication/228129844_The_Netherlands_A_Tax_Haven) [<https://perma.cc/VJS2-3VTZ>]; see also Code of Conduct Grp., Council of the Eur. Union, *Report on the Code of Conduct (Business Taxation)* at 314, SN 4901/99 (Nov. 23, 2000), [https://taxation-customs.ec.europa.eu/system/files/2016-09/primarolo\\_en.pdf](https://taxation-customs.ec.europa.eu/system/files/2016-09/primarolo_en.pdf) [<https://perma.cc/FA6N-WF44>] (listing “Measures With Harmful Features” by country).

128. Biz, *supra* note 21, at 1045.

129. Theo Keijzer, *Why a 1999 EU Study Was Kept a Secret Till Now: France Made Tax Deals Outside the Law*, KLUWER INT’L TAX BLOG (Nov. 1, 2015), <http://kluwertaxblog.com/2015/11/01/why-a-1999-eu-study-was-kept-a-secret-till-now-france-made-tax-deals-outside-the-law/> [<https://perma.cc/2866-RJ59>].

130. Avinash Bhikie, *French Government Negotiated Tax Deals Directly*, NU (Oct. 29, 2015, 18:38 PM) (Neth.), <https://www.nu.nl/politiek/4154935/franse-regering-onderhandelde-rechtstreeks-belastingdeals.html> [<https://perma.cc/7G6G-46M6>] (“CDA MP Pieter Omtzigt managed to get his hands on the documents . . . . According to the MP, the appendices to the investigation state that French ministers immediately entered into direct negotiations with Euro Disney about the tax rates.” (translation from Dutch by Google)); see also Theo Keijzer, *A Mysterious Study in the Code of Conduct Report 1999 and a Rumoured French Connection*, KLUWER INT’L TAX BLOG (Apr. 22, 2015), <http://kluwertaxblog.com/2015/04/22/a-mysterious-study-in-the-code-of-conduct-report-1999-and-a-rumoured-french-connection/> [<https://perma.cc/V9N8-QFXV>] (“Strong rumour has it the report was not published because the French administration did not like it and certainly did not want it out in the open.”).

131. Keijzer, *supra* note 129 (“The French Government had every reason to suppress the publication of the study and annex.”).

#### 4. *Lack of Protection for a Weak Tax Administration*

Another risk to countries of nontransparent rulings is the possibility that the fisc suffers for the benefit of private taxpayers. The specific risk is that the taxpayer may obtain an excessive tax benefit if the tax authority is weak and tax deals are opaque—even to other entities in that country’s government<sup>132</sup>—and thus not monitored. Transparent rulings can help give a weak tax administration cover to demand concessions because of pressures it faces from other domestic stakeholders, such as the Treasury Department or Ministry of Finance.<sup>133</sup>

This risk may have manifested itself in the United States with respect to APAs. In the early 2000s, “[e]xcerpts leaked to the press revealed that there were problems with the APA program, including accusations that the program was poorly managed and that the IRS was giving away the store by agreeing to terms highly favorable to big business.”<sup>134</sup> In 2003, the U.S. Senate began investigating the APA program.<sup>135</sup> The report was never released.<sup>136</sup> “[David] Bowen, who was chief of APA Branch 3 in 2001-2002, said the investigation was halted because, ‘first, the report was informally lobbied into submission. Second, the Republican [Finance Committee], which initiated the inquiry, went from majority to minority. After that, the report died for all practical purposes.’”<sup>137</sup>

Lee Sheppard reported that “Senate investigators found IRS officials signing off on APAs in a hurry in their anxiousness to make a deal and show a good number of deals completed.”<sup>138</sup> Sheppard also stated that “Senate investigators found that pushier taxpayers got better deals, and got transfer price breaks. Investigators found that the IRS knowingly allowed some taxpayers to set their transfer prices at

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132. For example, a U.S. Senate Report complained that “since June 1, 1925, the commissioner has refused to give this committee copies of unpublished rulings.” S. REP. NO. 69-27, at 233 (1926). Stephen Daly has argued that in the United Kingdom, “there is inadequate examination of the correctness, clarity and accessibility of HMRC advice.” DALY, *supra* note 15, at 85. Cf. Marian, *supra* note 12, at 291 (“In a September 17, 2015, hearing, members of the European Parliament grilled [Jean-Claude] Juncker [Luxembourg’s former Minister of Finance] on his alleged role in Luxembourg’s tax practices . . . . Juncker forcefully denied any involvement in or knowledge of the practices exposed in LuxLeaks.”).

133. The author thanks Stephen Daly for this point. In effect, this would be a negotiating strategy employed to increase the power of the tax administration in the negotiation. See Jeffrey Z. Rubin & I. William Zartman, *Asymmetrical Negotiations: Some Survey Results That May Surprise*, 11 NEGOT. J. 349, 356 (1995) (“Weaker parties typically respond not by acting submissive, but by adopting appropriate countering strategies of their own.”); see also *id.* at 361 (“Perhaps the major source of power—seen as means of controlling outcomes—[is] the ability to bring in support from external actors.”).

134. Nadal, *supra* note 55, at 366.

135. *Id.*

136. *Id.*

137. *Id.* at 369.

138. Lee A. Sheppard, *Draft Senate Finance APA Report Shows Incompetent IRS*, 107 TAX NOTES 1631, 1633 (2005).

a discount below comparable uncontrolled prices.”<sup>139</sup> Sheppard further reported that “the nonpaying companies’ home countries go to bat for them. Those countries have learned that stonewalling American competent authorities usually results in a concession because American negotiators are terrified of double taxation, particularly when the taxpayer is an American company.”<sup>140</sup>

##### 5. *Tax Administrator Corruption or the Appearance of Corruption*

A related risk is that the tax administration grants taxpayers rulings that they would otherwise not receive, or more favorable rulings than they would otherwise get.<sup>141</sup> This can result from outright corrupt activity—such as bribes—or from relationships between particular taxpayers and members of the tax administration. Corruption relies on secrecy.<sup>142</sup> Conversely, secrecy increases the risk of corruption.<sup>143</sup>

The United States provides several examples of at least perceived corruption, as it has experienced situations of irregular behavior regarding tax rulings that are described in Congressional records. For example, in the 1950s, as part of a report to the House Ways and Means Committee on tax administration, Congressman Robert W. Kean reported on

six cases in which top Treasury officials had intervened on behalf of the taxpayer. The Monsanto and Lasdon cases . . . illustrate the way in which Treasury officials brought influence to bear to produce questionable results favorable to the taxpayer in these cases. The revenue loss as the result of the decisions in these cases was in excess of \$10 million.<sup>144</sup>

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139. *Id.* at 1632.

140. *Id.*

141. Corruption could also involve denial of a ruling request for illegitimate reasons, perhaps when other similarly situated taxpayers obtained rulings. *Cf.* OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 29 (1998), <https://www.oecd.org/tax/harmful/1904176.pdf> [<https://perma.cc/2SFM-6LWG>] (“Special administrative practices may be contrary to the fundamental procedures underlying statutory laws. This may encourage corruption and discriminatory treatment, especially if the practices are not disclosed.”). For a general discussion of the denial of a ruling to one of two competitors, see *infra* Section II.B.2.

142. See Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 615 (1993).

143. See Joseph J. Thorndike, *Historical Perspective: APA Program Highlights IRS Struggle to Balance Privacy and Secrecy*, 102 TAX NOTES 447, 447 (2004) (“[S]ecrecy, no matter how well-intentioned, always comes with a price. It fosters public distrust and opens the door to corruption.”).

144. SUBCOMM. ON ADMIN. OF THE INTERNAL REVENUE L., 83RD CONG., INTERNAL REVENUE INVESTIGATION: REPORT TO THE COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES 10 (Subcomm. Print 1953) (Robert W. Kean) [hereinafter KEAN REPORT]. Four of the six cases involved rulings. See *infra* text accompanying note 147. No information is provided there about the Treasury officials’ specific motivations.

The report observed that these officials were political appointees.<sup>145</sup> The report also stated that it was “indisputably clear that intervention in tax cases by Treasury officials for political or personal reasons not only produced improper decisions in tax cases, but also had an adverse effect on the entire internal revenue system.”<sup>146</sup> Congressman Kean concluded on the rulings issue that “[c]areful study of the four Treasury interference cases involving rulings suggests that a policy of publication of all policy rulings might have deterred Treasury officials from intervention on behalf of the taxpayers.”<sup>147</sup>

Letter rulings did not all become public immediately after Kean’s report, but the IRS did increase its publication efforts. In a 1954 article, one commentator remarked that “[o]ne of the most important developments in tax rulings is the program of the Internal Revenue Service for increased publication of rulings.”<sup>148</sup> He further explained that “[t]his program resulted in part from criticism from Congressional sources that non-publication of rulings permitted favoritism and protected the use of ‘influence,’” along with criticism from practitioners.<sup>149</sup>

IRS rulings continued to mostly be confidential in the 1960s. In 1965, Senator Gore explained to the U.S. Senate how Congress’s grant to the Du Pont company of a special tax-relief bill in connection with a divestiture “was marred by a last-minute change in a Treasury ruling. This change, negotiated and issued in secrecy, and contrary to the clear intent of Congress, resulted in a loss of revenue, by Treasury’s own admission, in the amount of some \$56 million.”<sup>150</sup> In introducing a bill that would require the publication of all tax rulings with a revenue effect of \$100,000 or more,<sup>151</sup> Senator Gore argued:

The reasons given by former [Treasury] Secretary Dillon for changing the 1962 ruling are so flimsy, his reasoning so specious, his conduct so strange and at such variance with announced regular procedure, and the results such a blatant handout of public money to a very few people who do not need it, that I believe if he and other officials had known that this secret new ruling was to be made public immediately upon issuance, then that ruling would not have been made.<sup>152</sup>

The United States is not alone in facing this type of issue. In Luxembourg, in the late 2000s, Paul Daubenfeld, an employee of the Luxembourg tax administration (Administration des Contributions

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145. KEAN REPORT, *supra* note 144, at 36 (“Corruption, of course, is possible at any level of Government, but political influence conceivably would be less strongly felt by career employees of the Bureau than by politically appointed Treasury officials.”).

146. *Id.* at 10.

147. *Id.* at 35.

148. Sugarman, *supra* note 22, at 37.

149. *Id.*

150. 111 CONG. REC. 11810 (1965) (statement of Sen. Gore).

151. *Id.* at 11814.

152. *Id.* at 11811.

Directes), was accused of corruption relating to tax rulings.<sup>153</sup> French businessman “Mr. Jumeaux [was] suspected of having paid fees to Paul Daubenfeld in exchange for his intervention in certain corporate tax files of his Luxembourg fiduciary.”<sup>154</sup> Daubenfeld, in turn, accused other tax administrators of conducting private accounting practices after hours,<sup>155</sup> apparently with respect to companies they also handled on behalf of the tax administration.<sup>156</sup>

Even in the absence of confirmed corruption or conflict of interest, secrecy may lead to rumors of impropriety. For example, as with letter rulings, “[b]ecause advance pricing agreements are not published, the IRS has been accused of cutting secret ‘deals’ with individual taxpayers that are not subject to any legal standard or review.”<sup>157</sup>

An additional concern is recruitment by the private sector of tax officials with insider knowledge. This happened in the United States with the respect to the IRS’s predecessor, the Bureau of Internal Revenue (BIR). One scholar explained:

Rulings were known only to insiders, including affected taxpayers, their representatives, and relevant BIR employees. As [a] committee

153. Patrick Théry, *Le fisc luxembourgeois sur le banc des accusés*, L’ESSENTIEL (Nov. 22, 2009, 21:30) (Lux.), <http://www.lessentiel.lu/de/news/story/31593031> [<https://perma.cc/9DH6-JNCJ>].

154. Marina Nickels, *5 ans de prison requis au Luxembourg contre un homme d’affaires français*, TAGEBLATT (Dec. 3, 2009, 17:49) (Lux.), <http://www.tageblatt.lu/nachrichten/luxemburg/5-ans-de-prison-requis-au-luxembourg-contre-un-homme-daffaires-francais-97535691/> [<https://perma.cc/C538-3ATW>] (“M. Jumeaux est soupçonné d’avoir versé à Paul Daubenfeld des commissions en échange de son intervention dans certains dossiers d’imposition de sociétés de sa fiduciaire luxembourgeoise.”).

Similarly, in Australia, Nick Petroulias, a former Assistant Tax Commissioner, “used his position in the tax office to secure private tax rulings for companies in which he had a financial interest.” DALY, *supra* note 15, at 157; *see also Petroulias v R* [2014] NSWCCA 108 (Austl.).

155. *See* Théry, *supra* note 153 (“Selon Paul Daubenfeld . . . au moins sept autres fonctionnaires du fisc luxembourgeois sont concernés. D’après lui, ils avaient créé leur propre société de comptabilité.” (meaning “According to Paul Daubenfeld . . . at least seven other Luxembourg tax officials are involved. According to him, they had created their own accounting company.”)).

This type of issue is not unique to Luxembourg. In the United States, a recent report by the Treasury Inspector General for Tax Administration “identified 167 employees who potentially engaged in prohibited activities such as tax preparation, and 2,196 employees who hold positions that, depending on the nature of the outside employment activity, have a higher risk for a real or perceived conflict of interest.” TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2019-10-080, PROCESSES DO NOT ADEQUATELY REDUCE THE RISK THAT OUTSIDE EMPLOYMENT ACTIVITIES WILL CONFLICT WITH EMPLOYEES’ OFFICIAL DUTIES, at highlights page (2019).

156. *See* Patrick Théry, *Le procès du siècle n’aura pas lieu*, INTIMECONVICTION (Nov. 25, 2009) (Fr.), <http://www.intimeconviction.fr/le-proces-du-siecle-naura-pas-lieu/11/2009/> [<https://perma.cc/5QLN-C8AP>] (“[L]a seconde enquête concernant les pratiques de certains fonctionnaires des contributions qui faisaient aussi la comptabilité de sociétés dont ils traitaient les dossiers a peu de chances d’aboutir.” (meaning “The second investigation into the practices of certain civil servants who also did accounting work for the companies whose files they dealt with is unlikely to succeed.”)).

157. Hickman, *supra* note 43, at 190.



report observed, “This system has created . . . a special class of tax practitioners, whose sole stock in trade is a knowledge of the secret methods and practices of the Income Tax Unit.” Knowledge of secret precedents had made Bureau employees extremely valuable to corporate taxpayers, fostering a damaging rate of turnover.<sup>158</sup>

Similarly, in the present day, “firms that employ . . . former insiders and specialists tout their specialized expertise and insider knowledge of the APA program and draw on their knowledge of the IRS and its past agreements in advising and advocating for clients.”<sup>159</sup> The 2004 U.S. Senate review of APAs may have been prompted in part by “an appearance of impropriety associated with Washington’s ‘revolving door.’”<sup>160</sup>

Corruption or even the appearance of corruption can foster distrust of the tax administration,<sup>161</sup> undermining its legitimacy.<sup>162</sup> Moreover, the agency may not legally be allowed to defend its actions by revealing taxpayer information.<sup>163</sup> These circumstances render transparency especially important. In line with that idea, in the 1950s, a U.S. Congressional report stated that “the Bureau [of Internal Revenue] should make public as many as possible of its administrative decisions. *Their availability to public scrutiny should serve as a deterrent to favoritism and enable the public to satisfy itself as to the impartiality of tax administration.*”<sup>164</sup> In the 1970s, after the Du Pont incident discussed above,<sup>165</sup> one commentator argued that “[f]ull disclosure of letter rulings would assure that neither incompetence . . . nor deliberate favoritism is being concealed, and would promote indispensable confidence in the rulings process and the tax system in general.”<sup>166</sup> Today, a statement in the IRS’s Internal Revenue Manual similarly reflects a concern for perceived impartiality:

The assignment of letter rulings must comply with the policy provided for in this section. *It is important that the public is confident that the*

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158. Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 751 (2001) (quoting S. REP. NO. 69-27, at 235 (1926)).

159. Stark et al., *supra* note 53, at 1070.

160. Kevin A. Bell, *Variety of Concerns’ Driving Senate Review of APAs*, 102 TAX NOTES 333, 333 (2004).

161. Blank, *supra* note 17, at 456 (“[G]iven the enormous financial stakes involved, often billions of dollars in potential tax liability, and the IRS’s ex ante bargaining position, advance tax rulings pose unique threats to the integrity of the IRS, whether perceived or actual.” (footnote omitted)).

162. *Id.* at 488 (“Non-disclosure of ex ante tax administration . . . threatens the sociological legitimacy of the IRS by causing the public to question the agency’s integrity.”).

163. *Id.* at 517 (“Despite the intimation [in a news story regarding APAs] of collusion between the IRS and taxpayers, the IRS is prohibited from addressing the accusations publicly as a result of general tax privacy rules.”).

164. KEAN REPORT, *supra* note 144, at 30 (emphasis added).

165. See *supra* text accompanying notes 150-52.

166. Stuart I. Oran, Comment, *Public Disclosure of Internal Revenue Service Private Letter Rulings*, 4 U. CHI. L. REV. 832, 837 (1973).

*letter ruling program is administered fairly and impartially.* The policy is intended to foreclose the risk and the potential perception that practitioners can unduly influence the process for assigning a case to a specific counsel attorney.<sup>167</sup>

## B. Costs to Taxpayers

### 1. Barriers to Access

Taxpayers also face risks from nontransparent tax rulings. One cost relates to who is able to access the rulings process and past rulings. When letter rulings and/or APAs are transparent, existing rulings provide reference material that some taxpayers may not be able to afford to get otherwise.<sup>168</sup> This raises an issue of horizontal equity because unequal access to rulings may result in different treatment of taxpayers engaging in the same type of transaction.<sup>169</sup>

Similarly, in the absence of published rulings, some taxpayers may not know about the availability of tax rulings or how to obtain one.<sup>170</sup> In that case, only taxpayers who can afford a knowledgeable tax adviser may be able to access the rulings process.<sup>171</sup> For example, the U.S.

167. IRM 32.3.2.3.1 (July 9, 2014) (emphasis added). This policy appears to respond to a 2013 Treasury Inspector General for Tax Administration report. See TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-081, CHIEF COUNSEL SHOULD TAKE STEPS TO MINIMIZE THE RISK OF OUTSIDE INFLUENCE ON ITS LETTER RULINGS 3 (2013), [https://www.tigta.gov/sites/default/files/reports/2022-06/201310081fr\\_0.pdf](https://www.tigta.gov/sites/default/files/reports/2022-06/201310081fr_0.pdf) [<https://perma.cc/J745-GK2K>] (“Chief Counsel does not have written policies and a management information system with complete and accurate information to assess the potential that tax practitioners or taxpayers have influenced the letter ruling process to obtain more expeditious and favorable letter rulings.”).

168. See Tran, *supra* note 89, at 223 (“[D]isclosure would level the playing field for smaller multinationals that lack the resources to execute an APA themselves. Just as not every company can afford to conduct a costly transfer pricing study, not every multinational can afford to enter into an APA with the IRS and/or other taxing authorities.”).

169. See *infra* note 179 and accompanying text.

170. See OECD, *supra* note 141, at 44-45 (“The ignorance of the existence of a regime for obtaining administrative decisions on specific planned transactions, or of the conditions for granting or denying such decisions, may result in unequal treatment of taxpayers since the lack of public information on this regime may put taxpayers in different positions when determining their tax situation.”); see also Jennifer Carr, *Transparency? Informal and Invisible Guidance in Kentucky*, 65 ST. TAX NOTES 303, 304 (2012) (stating that in Kentucky during the period that rulings were confidential, one lawyer commented that “someone who practices tax only occasionally may not even know what to do, given the DOR’s unadvertised and informal approach to providing written guidance”).

171. See Carr, *supra* note 170, at 304. (“[T]he [Kentucky] DOR’s failure to publish its written guidance greatly benefits large tax practices, which can accumulate and rely on legal guidance that is unavailable to smaller firms or individual taxpayers.”). Cf. Adrian A. Kragen, *The Private Ruling—An Anomaly of Our Internal Revenue System*, 45 TAXES 331, 335 (1967) (stating that under the then-existing system, “[i]t seems completely inconsistent with the basic principles of our system that the IRS should give taxpayers, in effect, special consideration merely because they are sophisticated enough, or have counsel sophisticated enough, or have enough tax dollars at stake, to warrant the request for a private ruling”).

state of Kentucky has experienced access barriers resulting from the apparent need to have insider knowledge of its Department of Revenue (DOR).

Mark F. Sommer, chair of the tax and finance practice group at Bingham Greenebaum Doll LLP, described a “free-form” and “ad hoc” process by which taxpayer representatives approach DOR staff who they know in order to receive written or verbal guidance about a tax matter. . . .

. . . .

That process may seem refreshingly unbureaucratic, but it can have drawbacks. Describing the practice for receiving written guidance as “very informal,” [another lawyer] added that the DOR can be a “closed shop unless you know all the players.”<sup>172</sup>

With respect to Luxembourg, LuxLeaks revealed numerous rulings provided to clients by the tax office called Sociétés 6, via a process that reportedly was quite rapid.<sup>173</sup> At the time, Luxembourg’s rulings process was uncodified<sup>174</sup> and confidential.<sup>175</sup> The apparent dominance of Sociétés 6 in the tax rulings process could raise concern about rulings access by taxpayers who would need to apply to a different tax office. Two Luxembourg attorneys wrote:

[T]ax ruling requests could in principle be filed with each of the tax offices of the Luxembourg tax administration. However, in practice, tax office Companies 6 (bureau d’imposition Sociétés 6), in charge of holding companies, securitization companies, financial institutions, insurance companies, investment funds, and similar entities, is known for having issued the bulk of the tax rulings. For private individuals and taxpayers not affiliated with this tax office, it may have been more difficult to obtain a tax ruling. This raised issues regarding the principle of equality before the tax law, which is entrenched in the Luxembourg constitution under article 101.<sup>176</sup>

The fact that the LuxLeaks documents related primarily to clients of PwC and secondarily to a handful of firms that included other Big

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172. Carr, *supra* note 170, at 304. Kentucky subsequently lost a lawsuit and began disclosing its rulings. See *infra* notes 328-29 and accompanying text.

173. Karnitschnig & van Daalen, *supra* note 4. Sociétés 6 is the tax office that issued most of Luxembourg’s tax rulings. See Marian, *supra* note 3, at 17. “Société” means “company” or “firm” in English. See *Translation of Société—French-English Dictionary*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/french-english/societe> [<https://perma.cc/AT6W-LLS9>] (last visited Apr. 7, 2023).

174. Patrick Mischo & Franz Kerger, *After “Lux Leaks”: Welcome Changes to Luxembourg’s Tax Ruling Practice*, 77 TAX NOTES INT’L 1197, 1197 (2015). For more detail on the pre-2015 Luxembourg tax rulings practice, see Leandra Lederman, *Lux in the Time of Confidential Tax Rulings 23* (2021) (unpublished manuscript) (on file with the author).

175. Wayne L. Nesbitt et al., *A Reexamination of Investors’ Reaction to Tax Shelter News: Evidence from the Luxembourg Tax Leaks*, J. ACC. & ECON. 5-6 (2022); see also Karnitschnig & van Daalen, *supra* note 4.

176. Mischo & Kerger, *supra* note 174, at 1198.

Four accounting firms<sup>177</sup> may also have fostered an impression of privileged access. In any case, after LuxLeaks, the Luxembourg Ministry of Finance addressed this possible perception, stating in December 2014:

It has to be emphasized that any taxpayer has the possibility to address himself to his tax office, including, as the case may be, to “Bureau d’Imposition Sociétés 6[.]” and this on an equal basis. Thus, it would be false to state that a privileged access or treatment has been specifically reserved or granted to the Big Four accountancy firms, or any other entity.<sup>178</sup>

## 2. *Inconsistent Tax Treatment*

If letter rulings are not observable, some taxpayers may obtain concessions that others do not, raising issues of horizontal equity.<sup>179</sup> Perceived procedural unfairness may also undermine taxpayer trust in government. Professor Allison Christians has persuasively argued that “[p]reserving trust generally requires that all taxpayers be subject to the same set of rules, while confidentiality leaves room for differential treatment that won’t be seen—and possibly protested—by the public.”<sup>180</sup>

Differential treatment of taxpayers may be due to individual agents’ decisions on rulings, or it may simply be that some taxpayers do not know that it is possible to obtain a favorable ruling.<sup>181</sup> A 1972 article describing the situation in the United States during the period

177. Marian, *supra* note 3, at 8 (“The first [leaked batch of rulings], which included 548 documents issued to 340 MNCs, was made public in November 2014. This batch was leaked by Antoine Deltour, a former employee at PwC’s Luxembourg office. Naturally, the documents leaked by Deltour contained mostly documents drafted or submitted by PwC.”). “The [second] set of documents reveals that the aggressive tax structures are being brokered not only by PwC but also by Luxembourg-based law and tax firms and the other ‘Big Four’ accounting firms: Ernst & Young (now branded as EY), Deloitte and KPMG.” Alison Fitzgerald & Marina Walker Guevara, *New Leak Reveals Luxembourg Tax Deals for Disney and Koch Brothers*, IRISH TIMES (Dec. 9, 2014, 21:00), <https://www.irishtimes.com/business/economy/new-leak-reveals-luxembourg-tax-deals-for-disney-and-koch-brothers-1.2031621> [<https://perma.cc/67VU-YREH>].

178. LUXEMBOURG MINISTRY OF FIN., POSITION PAPER ON TAX TRANSPARENCY AND RULINGS 1 (2014), <https://europaforum.public.lu/fr/actualites/2014/12/gouv-ruling-luxleaks-prises-positions-position-paper-transparency-and-rulings.pdf> [<https://perma.cc/D934-GFVU>].

179. See DALY, *supra* note 15, at 60; see also Blank, *supra* note 17, at 456 (“[T]axpayers have an interest in determining whether the IRS is issuing advance tax rulings on equitable terms to like-situated taxpayers.”); Ring, *supra* note 50, at 195 (“[I]f the conclusions reached in APA negotiations with taxpayer A are not disclosed or are disclosed in a fairly limited form, then taxpayer B who does not seek an APA may receive different treatment than taxpayer A . . .”).

180. Christians, *supra* note 10, at 1123.

181. See DALY, *supra* note 15, at 60 (observing that individual revenue agents may “make de facto changes to the law to fit their personal morality”); *id.* at 73 (referring to “internal policies that affect classes of taxpayer[s] but these policies are unpublished,” and raising the issue of whether the taxpayer recognizes the need to seek advice from the tax agency). Rulings cost can also be a barrier for some taxpayers. See Ring, *supra* note 50, at 193-94.

when letter rulings were not generally published stated that “[a]mong the tax practitioners contacted, virtually all knew of circumstances in which taxpayers gained an advantage by obtaining a private ruling or learning of one of which competitors were unaware.”<sup>182</sup>

Even where two competitors both apply for similar rulings, they may not obtain the same result. This has happened in the United States.<sup>183</sup> One instance, which occurred during the non-publication era,<sup>184</sup> was described in *International Business Machines Corp. v. United States*.<sup>185</sup> In that case, IBM had one main competitor between 1951 and 1958, Remington Rand.<sup>186</sup> “Before mid-April 1955, both companies paid on these articles the ten percent excise tax . . . for the sale or lease of ‘business machines[.]’ ”<sup>187</sup> However, in 1955, Remington Rand obtained a letter ruling stating that the tax did not apply to its machines.<sup>188</sup> IBM learned about the existence of its competitor’s ruling “through its customers.”<sup>189</sup> IBM urgently requested an identical ruling but did not receive one.<sup>190</sup> Ultimately, IBM had to sue to try to obtain comparable tax treatment.<sup>191</sup>

A more recent example involves Glaxo’s unsuccessful request for an APA in a context in which a similarly situated competitor, SmithKline Beecham, had obtained one for a similar drug.<sup>192</sup> “[T]he basic facts concerning discovery, development, and promotion [of the drugs] were similar. . . . The economist who provided the transfer pricing study

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182. See Reid, *supra* note 26, at 25 n.15.

183. See KEAN REPORT, *supra* note 144, at 35 (“[P]ublication of the Monsanto ruling would have caused embarrassing protests by the Public Service Co. of New Hampshire, to which a ruling had been denied on like facts.”). Cf. Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. CIN. L. REV. 531, 532-33 (2005) (describing the GlaxoSmithKline APA situation).

184. See *supra* text accompanying notes 25-35.

185. *Int’l Bus. Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965).

186. See *id.* at 915-16.

187. *Id.* at 916.

188. *Id.* The private ruling was “in the form of a short telegram.” *Id.*

189. *Id.*

190. *Id.*

191. *Int’l Bus. Machs. Corp. v. United States*, 343 F.2d 914, 917 (Ct. Cl. 1965) (“Plaintiff was thus held liable for the excise tax for the full period from June 1951 through January 1958—roughly the same period for which Remington had been relieved of the tax.”). IBM won in court under a statute addressing retroactivity in IRS rulings. *Id.* at 921-22. The facts of the *IBM* case are unusual, and other taxpayers who have argued for an IRS “duty of consistency” generally have not been successful. See Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent?*, 40 TAX L. REV. 411, 422 (1985) (“[L]ater cases have limited *IBM* to its peculiar facts.”).

192. See Pietruszkiewicz, *supra* note 183, at 532-33 (“GlaxoSmithKline contends that the IRS granted a favorable APA to . . . former competitor SmithKline Beecham Plc for its ulcer drug, Tagamet, in 1993, and that its 1994 request for a similar APA for its ulcer drug, Zantac, was not acted upon by the IRS even though the Zantac product was similar to Tagamet.”).

accompanying the [SmithKline Beecham] APA application also prepared the study for an APA requested for [the drug] Zantac and regarded the two cases as closely comparable.”<sup>193</sup>

These examples also show that the size of a company does not protect it from disadvantaged treatment. The Council On State Taxation (COST), “a lobbying group representing the state tax interests of many *Fortune* 1000 companies,” accordingly favors publication of anonymized letter rulings.<sup>194</sup> It has argued that “[w]hile individual taxpayers may perceive advantages in obtaining what they believe is a beneficial ruling, ultimately the broader taxpaying public pays the price for inconsistency in application of the tax laws.”<sup>195</sup>

### C. *Risks to Tax Advisers*

Another risk of opaque rulings—the lack of a level playing field in tax representation—affects certain tax advisers (and thus their clients). Note that the only parties who have access to a particular confidential tax ruling are members of the tax administration—who have access to every ruling<sup>196</sup>—the taxpayer and/or tax advisor receiving the ruling, and anyone with whom that small group shares it.<sup>197</sup> The unfairness of this selective access manifests itself both when comparing private tax advisers to IRS attorneys and when comparing one tax adviser to another, as discussed below.

#### 1. *“Fighting in the Dark”*

When letter rulings are not published, tax administration employees likely have greater access to sources of legal authority than taxpayers and their representatives do. In 1953, a U.S. Senator described “the situation that used to exist where a taxpayer’s representative

193. Stark et al., *supra* note 53, at 1066 & n.137.

194. Maria Koklanaris, *Private Letter Rulings Can Be a Costly, Secretive Affair*, 82 ST. TAX NOTES 889, 889 (2016).

195. *Id.* (quoting COST).

196. It is certainly possible that not all tax administration employees could access all rulings. An article from 1967 states that “advice [by the Tax Rulings Division] is not circulated to the staff of the IRS as a matter of routine. Thus, the average agent would be, as would the average taxpayer in the usual instance, ignorant of the ruling.” Kragen, *supra* note 171, at 335. However, that is not necessarily always the case. The comprehensive IRS indexing described in *Tax Analysts & Advocates v. Internal Revenue Service*, 362 F. Supp. 1298, 1301-02 (1973), facilitated access. See *infra* text accompanying notes 206-07. Modern technology makes sharing confidential documents internally even easier. A 1976 article astutely observes, “computer systems may eventually do an excellent job of assisting research into private rulings.” Earl G. Thompson, *The Disclosure of Private Rulings*, 59 MARQ. L. REV. 529, 542 (1976).

197. See Portney, *supra* note 20, at 753 (“Private ruling letters remained private to the taxpayers to whom they were issued (plus anyone with whom they wished to share them) . . .”); Oran, *supra* note 166, at 837 (stating in 1973 that “[a]lthough private letter rulings are not generally available to the public, such rulings are available to some tax practitioners, particularly those in large tax firms”).

would confer with an agent and the agent would disagree with the taxpayer on the ground of a ruling about which the taxpayer could know nothing. It was a sort of fighting-in-the-dark situation.”<sup>198</sup> This raises rule-of-law issues because “all laws should be prospective, open, clear, relatively stable and . . . the making of particular laws should be guided by open, stable, clear, and general rules.”<sup>199</sup>

The IRS apparently was trying at that time to eliminate the problem of IRS reliance on unpublished rulings.<sup>200</sup> In 1965, then-Chief Counsel of the IRS<sup>201</sup> Mitchell Rogovin stated:

[S]ince the King Subcommittee hearings in 1951, the prior practice of Service personnel relying on unpublished materials has been discontinued. To this end[,] the preface to the Cumulative Bulletin states[,] “No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases.”<sup>202</sup>

However, IRS citation of an unpublished ruling happened again in a case decided in 1967.<sup>203</sup>

Even if the tax administration does not cite nonpublic rulings, non-transparent rulings provide the administration with greater insight than private practitioners have into trends regarding how the tax administration is interpreting the law. Tax administration positions may evolve over time in a series of rulings.<sup>204</sup> A 1972 article stated that “[i]n

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198. *Internal Revenue Investigation: Hearings Before a Subcomm. of the Comm. on Ways and Means, H.R.*, 83d Cong. 1566 (1953) (statement of John E. Tobin, Chief Counsel) [hereinafter *Hearings*]; see also Sugarman, *supra* note 22, at 37 (mentioning the “criticism by practitioners that ‘secret rulings’ to field offices of the Service put the taxpayer at an unfair disadvantage in attempting to argue with revenue agents”).

199. DALY, *supra* note 15, at 43; see also CHRISTOPHE WAERZEGGERS & CORY HILLIER, INT’L MONETARY FUND, 1 TAX LAW IMF TECHNICAL NOTE: INTRODUCING AN ADVANCE TAX RULING (ATR) REGIME 8 (2016), <https://www.imf.org/en/Publications/Tax-Law-Technical-Note/Issues/2016/12/31/Introducing-an-Advance-Tax-Ruling-ATR-Regime-43933> [<https://perma.cc/YFA3-3BCF>] (“[I]ssu[ance] of private tax rulings by the tax authority has the potential to give rise to a parallel method of tax policy-making, thereby resulting in a hidden source of tax law which runs counter to the normal operation of the rule of law.”).

200. See *Hearings*, *supra* note 198, at 1566 (statement of Norman A. Sugarman, Assistant Commissioner, Bureau of Internal Revenue).

201. See *Mitchell Rogovin*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mitchell\\_Rogovin](https://en.wikipedia.org/wiki/Mitchell_Rogovin) [<https://perma.cc/T8GG-WCWZ>] (last visited Apr. 7, 2023).

202. Rogovin, *supra* note 20, at 767 (citing 1964-1 C.B. 1).

203. *U.S. Thermo Control Co. v. United States*, 372 F.2d 964, 966 (Ct. Cl. 1967) (explaining that the government had submitted an IRS affidavit stating “that private rulings have consistently held that truck and trailer refrigeration units were subject to the automotive parts and accessories tax”).

204. See James P. Holden & Michael S. Novey, *Legitimate Uses of Letter Rulings Issued to Other Taxpayers—A Reply to Gerald Portney*, 37 TAX LAW. 337, 340 (1984) (“[L]etter rulings are . . . to some extent a medium through which the Service can, on a case-by-case basis, develop or extend such an interpretation. As such, they do not merely reflect preexisting interpretations but rather constitute an integral part of the process by which such interpretations come into existence.”).

some specialized areas of tax practice, individual rulings constitute the only existing Service interpretation of the law. In other fields, private rulings conflict with the published position of the IRS.”<sup>205</sup>

In addition, regardless of whether or how often the IRS cited unpublished rulings in litigation, they served as a body of knowledge for IRS personnel. It appears that in the era in which most IRS letter rulings were not generally published, the IRS catalogued and indexed the rulings that it thought had future value. An opinion published in litigation brought by Tax Analysts described the IRS’s filing process for letter rulings and technical advice memoranda as follows:

[Certain] letter rulings and [technical advice] memos are deemed to have a continuing “reference” value for internal IRS purposes, and these are placed in the IRS’ permanent reference file . . . . *The reference file is organized by code section and an “index-digest” card file is maintained*, giving citations to the main “reference” file and usually summarizing the contents of the reference file.<sup>206</sup>

Moreover, this IRS file system previously “was called the ‘precedent’ file.”<sup>207</sup> In 1967, “[f]iles occupying over two thousand linear feet of shelf space were laboriously re-stamped ‘reference’ in place of ‘precedent.’”<sup>208</sup>

## 2. “Private Libraries”

During the period of nontransparent IRS letter rulings, some large tax advisors amassed collections of rulings that helped them understand the IRS’s views on specific issues.<sup>209</sup> This could provide them with an advantage over tax advisors who did not have numerous clients requesting tax rulings.<sup>210</sup> Some U.S. tax advisers reportedly would exchange unpublished letter rulings with other advisers, likely because “an attorney providing a ruling to his counterpart in another firm can expect the favor to be returned.”<sup>211</sup> This expanded the circle of insiders but still kept rulings from being widely available.<sup>212</sup>

205. Reid, *supra* note 26, at 24 (footnote omitted).

206. Tax Analysts & Advocs. v. Internal Revenue Serv., 362 F. Supp. 1298, 1301-02 (D.D.C. 1973) (emphasis added).

207. *Id.* at 1305.

208. *Id.* at 1305 n.35 (citing Simmons Dep. at 18, 58-59).

209. See Oran, *supra* note 166, at 837. This was true in Australia as well. INSPECTOR-GEN. OF TAX’N, AUSTRALIAN GOV’T, REVIEW OF ASPECTS OF THE AUSTRALIAN TAXATION OFFICE’S ADMINISTRATION OF PRIVATE BINDING RULINGS (2010), [https://www.igt.gov.au/wp-content/uploads/2021/07/404\\_administration-of-private-binding-rulings.pdf](https://www.igt.gov.au/wp-content/uploads/2021/07/404_administration-of-private-binding-rulings.pdf) [<https://perma.cc/T4NL-BQTV>] [hereinafter AUSTRALIAN INSPECTOR-GENERAL REPORT].

210. Oran, *supra* note 166, at 838 (“As a result of the Service’s stance against full disclosure, those who privately obtain a large sample of letters may receive a competitive advantage.”).

211. Reid, *supra* note 26, at 28-29.

212. See *id.* at 29. (“It is unlikely that a member of the general public, with nothing to offer in exchange, will be able to obtain such information from a private tax attorney.”).



Similarly, in the 1990s, “private libraries of APAs started developing in the major public accounting and law firms.”<sup>213</sup> Professor Diane Ring has observed that, “[o]stensibly, the government has no interest in some taxpayers being better advised than others, nor would it seek affirmatively to provide a profitable specialty to a limited pool of advisors.”<sup>214</sup>

The same issue of private libraries available only to select insiders can arise in U.S. states that do not publish letter rulings. In Kentucky, during the period that its rulings were not published, an article reported that “the DOR’s failure to publish its written guidance greatly benefits large tax practices, which can accumulate and rely on legal guidance that is unavailable to smaller firms or individual taxpayers. [A lawyer] described one colleague’s accumulation of guidance as ‘a treasure trove’ . . . .”<sup>215</sup> Accordingly, at least in the United States, confidential tax rulings have resulted in private bodies of knowledge fully accessible to the tax administration and partly accessible to large tax advisers but unavailable to the general public and most smaller firms.

The next Part of this Article first discusses the range of possible disclosure options and which of the concerns discussed in this Section each one would remedy. It then examines potential costs of full disclosure.

### III. DISCLOSURE RESPONSES

The obvious remedy for risks stemming from lack of transparency is increased disclosure. The question then becomes how much transparency is appropriate. While that question could be framed as how much of each ruling to disclose, anonymizing rulings makes sense when they are shared outside the context of tax administration (such as exchanges with other countries). Therefore, the focus here is not on *what* to share but rather on *with whom* rulings should be shared. Theoretical possibilities include disclosure to a watchdog group (domestic or international), to countries, to tax advisers (under a system barring redisclosure), and to all taxpayers—that is, the general public.

While the costs that each of these remedies would address would no doubt vary depending on the effectiveness of the actor and the scope of its power, disclosure to tax advisers is inherently limited in scope. It would mainly serve to level the playing field for tax advisers and assist those taxpayers who have tax advisers. It would not accomplish disclosure goals related to countries, nor would it allow taxpayers to access rulings without a tax adviser, unless it became *de facto* public distribution. Disclosure to watchdog groups, countries, and the public are examined in more detail below.

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213. Kaye, *supra* note 68, at 1193.

214. Ring, *supra* note 50, at 205 n.227.

215. Carr, *supra* note 170, at 304.

### A. Oversight Bodies

Theoretically, rulings could be shared with a watchdog entity. Depending on the scope of its charge, a domestic watchdog group could monitor all domestic risks that tax rulings pose, including barriers to access. A domestic oversight group should not be located within the tax administration because that would likely facilitate capture by the tax administration.<sup>216</sup> A structurally independent body would review issued rulings and could investigate the rulings process as needed. It could be an existing body, such as a committee within the legislature charged with fiscal matters, but it would have to be one with sufficient tax expertise to monitor tax rulings.<sup>217</sup> For example, the founder of Tax Analysts, Tom Field,<sup>218</sup> suggested that the Joint Committee on Taxation could oversee U.S. APAs.<sup>219</sup>

If APAs continue not to be disclosed, perhaps due to special challenges they pose in that regard,<sup>220</sup> subjecting them to oversight by an appropriate body, particularly an international one, would likely be an improvement. On the international front, it is worth mentioning the Code of Conduct Group, which “[t]he EU’s Finance Ministers established . . . on 9 March 1998, under the chairmanship of UK Paymaster General Dawn Primarolo, to assess the tax measures that may fall within the scope of the Code of Conduct for business taxation.”<sup>221</sup>

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216. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (“[T]he creation of an independent agency is often motivated by a concern with agency capture.”).

217. For example, in the UK, “the PAC [(Public Accounts Committee)] covers a very wide range of topics besides taxation and has no formal advisers on taxation.” Judith Freedman, *Managing Tax Complexity: The Institutional Framework for Tax Policy-Making and Oversight* (Working Paper, 2015), <https://core.ac.uk/reader/288287950> [<https://perma.cc/E47P-DS77>].

218. *About Tax Analysts: History of Tax Analysts*, TAX ANALYSTS, <https://web.archive.org/web/20200106071506/http://www.taxhistory.org:80/www/website.nsf/Web/HistoryOfTaxAnalysts?OpenDocument> [<https://perma.cc/F5HX-F6NF>] (last updated Jan. 6, 2020).

219. Thomas F. Field, *Needed: Effective APA Oversight*, 102 TAX NOTES 419, 420 (2004).

220. See *infra* Section III.B.2.

221. *Harmful Tax Competition*, EUR. COMM’N, [https://taxation-customs.ec.europa.eu/harmful-tax-competition\\_en](https://taxation-customs.ec.europa.eu/harmful-tax-competition_en) [<https://perma.cc/F7KN-66SG>] (last visited Apr. 7, 2023).

The two principal problems with the Code of Conduct Group are (1) although “[t]he Code . . . does have political force,”<sup>222</sup> it “ha[s] no enforcement mechanism,”<sup>223</sup> and (2) the group lacks transparency.<sup>224</sup>

Unfortunately, however, regardless of whether a watchdog is domestic or international, this approach would not facilitate equal access to past rulings or the rulings process. It also would not prevent large tax practices from compiling libraries of rulings that their competitors do not have.

### B. Exchanges with Other Countries of Rulings Summaries

An important transparency-fostering approach is disclosure of tax ruling information to other countries’ tax administrations. This remedy is targeted at addressing the risk of a ruling-issuing country imposing negative externalities on other countries.<sup>225</sup> In recent years, both the EC and the OECD have required exchanges of rulings information, as described in this Section. The documents exchanged are not anonymized.<sup>226</sup>

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222. *Id.* “[I]t is certain that the report of the Code of Conduct Group of 1999 was watched closely and followed up by . . . the European Commission (in ascertaining where an investigation into Fiscal State Aid could be done).” Elly Van de Velde, Eur. Parliament Directorate-Gen. for Internal Policies, *Overview of Existing EU and National Legislation on Topics Covered by TAXE Mandate*, at 21, IP/A/TAXE/2015-0 (Oct. 2015), [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/563451/IPOL\\_STU\(2015\)563451\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/563451/IPOL_STU(2015)563451_EN.pdf) [<https://perma.cc/QT67-5F5G>].

223. Mason, *supra* note 100, at 458.

224. See Hans Gribnau, *Soft Law and Taxation: EU and International Aspects*, 2 LEGISPRUDENCE 67, 116 (2008) (“[T]he Code [of Conduct], managed in secret, does not score well in terms of transparency and input legitimacy and perhaps even output legitimacy may be affected.”); Martijn F. Nouwen, *The European Code of Conduct Group Becomes Increasingly Important in the Fight Against Tax Avoidance: More Openness and Transparency Is Necessary*, 45 INTERTAX 138, 139 (2017) (referring to the Group’s “enormous lack of transparency”).

225. See Eur. Comm’n, *Combating Corporate Tax Avoidance*, *supra* note 84, at 2.12 (“Publicly disclosing all tax rulings would not be any more effective than automatic exchange between tax administrations, from the point of view of Member States’ ability to react to abusive practices.”).

226. See *infra* text accompanying note 232 (EC exchanges); OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE, ACTION 5—2015 FINAL REPORT 78 (2015), <https://dx.doi.org/10.1787/9789264241190-en> [<https://perma.cc/CU84-ZX46>] (stating in Annex C, OECD’s “Instruction Sheet for the Template on Exchange of Information on Rulings,” that box 2 “includes all the information necessary to identify the taxpayer and determine its association with a multinational enterprise (MNE) group”).

### 1. *The European Commission's Approach*

Shortly after LuxLeaks, the EC took actions to increase rulings transparency.<sup>227</sup> Before that, a Council Directive<sup>228</sup> “already provided for the mandatory spontaneous exchange of information among EU Member States, but in reality countries shared little data with one another about their cross-border tax rulings.”<sup>229</sup> Then, “[o]n March 18, 2015, Commissioner Moscovici presented the Commission’s package of tax transparency measures designed to address ‘corporate tax avoidance and harmful tax competition in the EU.’”<sup>230</sup> The Tax Transparency Package applies broadly to cross-border advance tax rulings and APAs.<sup>231</sup> Since 2017, it has required automatic exchange of detailed information (including company names and transaction amounts) about both past and future advance rulings among EU members’ tax

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227. See Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT’L L. 353, 371 n.125 (2020) (“The rulings-exchange regime [was] negotiated as part of BEPS [(the Base Erosion and Profit-Shifting project)] and ultimately implemented by the EU . . .”).

228. “A ‘directive’ is a legislative act that sets out a goal that all EU countries must achieve. However, . . . the individual countries . . . devise their own laws on how to reach these goals.” *Types of Legislation*, EUR. UNION, [https://europa.eu/european-union/law/legal-acts\\_en](https://europa.eu/european-union/law/legal-acts_en) [<https://perma.cc/L8A6-P6Y2>] (last visited Apr. 7, 2023).

229. Brodzka, *supra* note 93, at 9. “It was at the discretion of the country itself to decide whether a tax ruling might be relevant to another EU Member State. In practice the efficient spontaneous exchange of information took place rather rarely.” *Id.*

230. Kaye, *supra* note 68, at 1190; see also *id.* at 1191 (adding that “[t]he European Council adopted the Directive to Exchange Cross-Border Rulings on December 8, 2015”).

231. See Council Directive 2015/2376, 2015 O.J. (L 332) 2 (“The scope of these definitions should be sufficiently broad to cover a wide range of situations, including but not limited to the following types of advance cross-border rulings and advance pricing arrangements:—unilateral advance pricing arrangements and/or decisions;—bilateral or multilateral advance pricing arrangements and decisions . . . .”); see also Brodzka, *supra* note 93, at 9 (“New rules define the tax rulings quite widely, in order to capture all similar instruments and irrespective of the actual tax advantage involved, as any communication (or other instrument or action of similar effect), given by or on behalf of a Member State, regarding the interpretation or application of its tax laws. The scope of the automatic exchange includes advance cross-border rulings and advance pricing arrangements, of any material form, irrespective of their binding or non-binding character and the way they are issued.”).

administrations.<sup>232</sup> Rulings information must be shared every six months.<sup>233</sup> Note that what is exchanged is not the full tax ruling. However, Member States can also request the full text of a ruling.<sup>234</sup>

It is important to note the limits to the transparency required by the new procedures. In addition to the fact that the full text of rulings is not automatically exchanged, the EU's ruling exchange process makes use of the EC, but the EC itself can only access limited information.

[T]he EU Member States decided that the Commission should only have access to “a limited set of basic information” about APAs and other advance tax agreements issued by Member States. They also decided that the Commission should not have access to information about which multinational corporations have obtained such agreements, or any summary of the content.<sup>235</sup>

This restriction likely is an effort to try to forestall additional state aid investigations.<sup>236</sup> In fact, “Member States . . . underlined that the Commission may not use [the rulings] information for any other purpose other than to monitor and evaluate the effective application of the automatic exchange between Member States themselves.”<sup>237</sup>

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232. See Council Directive 2015/2376, *supra* note 231, at 6 (“The competent authority of a Member State, where an advance cross-border ruling or an advance pricing arrangement was issued, amended or renewed after 31 December 2016 shall, by automatic exchange, communicate information thereon to the competent authorities of all other Member States as well as to the European Commission, with the limitation of cases set out in paragraph 8 of this Article, in accordance with applicable practical arrangements adopted pursuant to Article 21.”).

The deadline under the EU Council Directive to share information on past rulings (those issued or modified between 2012 and 2016) was December 31, 2017. *Id.* at 7 (“The exchange of information shall take place as follows: . . . in respect of the information exchanged pursuant to paragraph 2—before 1 January 2018.”).

233. *Id.* at 7 (“The exchange of information shall take place as follows: . . . in respect of the information exchanged pursuant to paragraph 1—within three months following the end of the half of the calendar year during which the advance cross-border rulings or advance pricing arrangements have been issued, amended or renewed[.]”).

234. *Id.* at 8 (“Member States may, in accordance with Article 5, and having regard to Article 21(4), request additional information, including the full text of an advance cross-border ruling or an advance pricing arrangement.”).

235. TOVE MARIA RYDING, EURODAD, TAX ‘SWEETHEART DEALS’ BETWEEN MULTINATIONALS AND EU COUNTRIES AT RECORD HIGH 9 (2018), [https://assets.nationbuilder.com/eurodad/pages/261/attachments/original/1588184213/Tax\\_%E2%80%98sweetheart\\_deals%E2%80%99\\_between\\_multinationals\\_and\\_eu\\_countries\\_at\\_record\\_high.pdf?1588184213](https://assets.nationbuilder.com/eurodad/pages/261/attachments/original/1588184213/Tax_%E2%80%98sweetheart_deals%E2%80%99_between_multinationals_and_eu_countries_at_record_high.pdf?1588184213) [https://perma.cc/LPG2-BDYP].

236. Mason, *supra* note 227, at 371 n.125 (“The rulings-exchange regime negotiated as part of BEPS . . .—a regime which the Commission was denied access—can be understood as an effort to ward off further intrusive state-aid investigations of member state ruling practices.”).

237. RYDING, *supra* note 235, at 9.

In addition, the use of rulings information for enforcement purposes by EU countries that feel disadvantaged by rulings issued by other countries may also be limited, despite several high-profile state aid cases.

In its state aid cases, the European Commission has taken several years to investigate even a small number of agreements. . . . It is difficult to imagine that country tax administrations that already struggle with lack of resources will have an easier time challenging the tax practices of other Member States.<sup>238</sup>

Nonetheless, exchanges of tax ruling information with other countries should help decrease the likelihood that a country will use its rulings process to shift tax base away from other countries because of the increased accountability such exchanges foster.<sup>239</sup>

## 2. *The OECD's Approach*

Action 5 of the OECD's Base Erosion and Profit Shifting (BEPS) project (Harmful Tax Practices) requires the exchange of summaries of rulings<sup>240</sup> among the jurisdictions connected to the ruling.<sup>241</sup> The United States is a member of the "OECD/G20 Inclusive Framework on BEPS."<sup>242</sup> BEPS's goals generally are enforced through peer monitoring.<sup>243</sup>

For qualifying rulings issued on or after April 1, 2016, the taxpayer is required to complete a template in conjunction with the ruling request and to provide the taxpayer's view on whether the ruling falls within the transparency framework.<sup>244</sup> Unlike the EC's Tax

238. *Id.* (footnote omitted). State aid is discussed in text accompanying notes 95-106.

239. Countries can cooperate and conduct joint audits. See OECD, JOINT AUDIT 2019—ENHANCING TAX CO-OPERATION AND IMPROVING TAX CERTAINTY: FORUM ON TAX ADMINISTRATION 21 (2019), [https://read.oecd-ilibrary.org/taxation/joint-audit-2019-enhancing-tax-co-operation-and-improving-tax-certainty\\_17bfa30d-en](https://read.oecd-ilibrary.org/taxation/joint-audit-2019-enhancing-tax-co-operation-and-improving-tax-certainty_17bfa30d-en) [<https://perma.cc/7XAX-5ZZQ>] (defining the term "joint audit").

240. See WAERZEGGERS & HILLIER, *supra* note 199, at 9 n.20.

241. OECD, *supra* note 226, at 52.

As a general rule, exchange of information on rulings . . . need to take place with:

- a) The countries of residence of all related parties with which the taxpayer enters into a transaction for which a ruling is granted or which gives rise to income from related parties benefiting from a preferential treatment (this rule also applies in a PE context); and
- b) The residence country of the ultimate parent company and the immediate parent company.

*Id.*

242. OECD, MEMBERS OF THE OECD/G20 INCLUSIVE FRAMEWORK ON BEPS (2022), <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> [<https://perma.cc/TME6-PCG3>] (listing members).

243. See Allison Christians, *BEPS and the New International Tax Order*, 2016 B.Y.U. L. REV. 1603, 1606 (2016) ("The parameters of compliance with many of the BEPS norms will not be clear until countries agree to terms of reference for peer review . . .").

244. OECD 2017, *supra* note 3, at 191.

Transparency Package,<sup>245</sup> the OECD template does not mandate inclusion of monetary figures, such as transaction amounts.<sup>246</sup> An IRS employee has stated that “if, after receiving a template, a country wanted the actual ruling, its tax administration could request it. However, if a country needed to see the actual ruling, it would have to make the request under the regular exchange of information process, subject to the usual treaty requirements . . . .”<sup>247</sup>

Action 5 also applies only to certain types of rulings. There are six categories of rulings requiring automatic exchange, including certain types of letter rulings and “cross border unilateral advance pricing arrangements (APAs) or other *unilateral* transfer pricing rulings.”<sup>248</sup> Accordingly, the IRS does not apply Action 5 to bilateral or multilateral APAs.<sup>249</sup> Bilateral APAs are generally shared only with the other country that is a party to the APA. Most U.S. APAs are bilateral. In 2021, the IRS executed 98 bilateral APAs, 25 unilateral APAs, and only 1 multilateral APA.<sup>250</sup> From 1991 to 2021, those figures totaled 1,483; 687; and 21, respectively.<sup>251</sup>

The OECD may focus on unilateral rulings because bilateral and multilateral rulings presumably involve negotiation by the affected countries over the tax base. However, it is possible for the countries that are parties to the ruling to collaborate to shift tax base out of a country that is not a party to the ruling.

### C. Disclosure to the Public

In contrast with other possible remedies, disclosure to the public would address all of the costs raised in the previous Part, except risks

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245. See Council Directive 2015/2376, *supra* note 231, at 7 (“The information to be communicated by a Member State pursuant to paragraphs 1 and 2 of this Article shall include the following: . . . (g) the amount of the transaction or series of transactions of the advance cross-border ruling or advance pricing arrangement if such amount is referred to in the advance cross-border ruling or advance pricing arrangement; (h) the description of the set of criteria used for the determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement . . . .”).

246. See OECD, EXCHANGE ON TAX RULINGS XML SCHEMA: USER GUIDE FOR TAX ADMINISTRATIONS 55 (2017), <https://www.oecd.org/tax/exchange-of-tax-information/exchange-on-tax-rulings-xml-schema-user-guide-for-tax-administrations.pdf> [<https://perma.cc/Z2RV-FJS4>].

247. Stephanie Soong Johnston, *U.S. to Exchange Only Unilateral APAs Under BEPS Action 5*, 84 TAX NOTES INT’L 1072, 1072 (2016).

248. OECD, *supra* note 226, at 10 (emphasis added). The five items besides unilateral APAs are “(i) rulings related to preferential regimes; . . . (iii) rulings giving a downward adjustment to profits; (iv) permanent establishment (PE) rulings; (v) conduit rulings; and (vi) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns.” *Id.*

249. See IRM 4.60.1.3.3(3) (Oct. 15, 2018) (providing a list similar to that in *supra* note 248 and accompanying text).

250. I.R.S., ANNOUNCEMENT AND REPORT CONCERNING ADVANCE PRICING AGREEMENTS 4 tbl.2 (2022).

251. *Id.*

to countries that can only be addressed by non-anonymized rulings. Those risks to countries are generally addressed by the existing rulings-exchange process. Public disclosure of anonymized rulings would address the remaining problems that nontransparent rulings cause, as it would greatly increase accountability.<sup>252</sup> This has been how the U.S. federal system for private letter rulings has operated since 1976. Many U.S. states follow a similar approach.<sup>253</sup> Of course, transparency has costs as well as benefits. These potential costs are discussed next.

### 1. *Assessing the Possible Downsides of Disclosure*

A 1976 article raised the following concern about the publication of existing IRS letter rulings: “While the information explosion increases the possible service the professional can offer his client, costs will increase as well. Disclosure could mean that only taxpayers with great means could authorize counsel to review all available material.”<sup>254</sup> However, technological developments since then have greatly reduced search costs. In addition, before rulings were published, a taxpayer might have had to incur the expense of hiring a large firm just to have access to a subset of rulings.<sup>255</sup>

C. Thi Nguyen recently argued that transparency can undermine trust because it can “change what experts do, pressuring experts to only act in ways which readily admit of justification in non-expert terms.”<sup>256</sup> However, that concern is unlikely to apply to tax rulings, given the inherent complexity of most rulings topics and the fact that it is difficult to understand the significance of a ruling in isolation from the rest of the applicable tax law. Thus, tax administrators drafting rulings have little incentive to consider possible reactions of non-experts.

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252. See Blank, *supra* note 17, at 458-59 (“A broad definition of ‘tax transparency,’ . . . is that it is the government’s openness regarding its tax rules, agency interpretations, decisionmaking processes, and enforcement practices. Transparency generally serves two functions, which apply equally in the context of tax administration: democratic governance and accountability.”).

253. Cara Griffith et al., *Transparency in State Taxation, Part 2: Legislative Process and Letter Rulings*, 64 ST. TAX NOTES 331, 333 (2012) (“Approximately 45 states and the District of Columbia offer private letter rulings, and of those about 35 make them available for the public, typically by publishing a redacted version on the department of revenue’s website.”).

254. Thompson, *supra* note 196, at 544. Significant quantities of outdated rulings are apparently a problem in Australia. AUSTRALIAN INSPECTOR-GENERAL REPORT, *supra* note 209, at 56 (“[T]here are currently 80,000 edited private rulings on the register, some of which are clearly wrong and out of date. There is therefore a legitimate concern that the current register has created a mass of material for taxpayers and their advisers to decipher.”). The Inspector-General suggested a few methods for addressing this. See *id.* at 22, 56. The Australian Taxation Office could also develop a process for removing withdrawn or superseded rulings.

255. See *supra* text accompanying notes 209-13.

256. C. Thi Nguyen, *Transparency Is Surveillance*, 105 PHIL. & PHENOM. RSCH. 331, 334 (2021).



In the United States, for example, letter rulings have been publicly available since 1976, but they are still written in technical terms that require tax expertise to understand.<sup>257</sup>

Other arguments in favor of keeping tax rulings confidential include the following<sup>258</sup>: (1) they are of limited use because they lack precedential value, (2) taxpayers will rely on them despite their non-precedential nature, (3) disclosure will decrease the volume of ruling requests, (4) published rulings are more costly to produce, and (5) they will reveal confidential taxpayer information. Each of these arguments is discussed, in turn, below.

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257. See, e.g., I.R.S. Priv. Ltr. Rul. 202126005 (Apr. 8, 2021) (“During the section 355(e) comparison period, which begins immediately before the first acquisition of stock of the relevant company made by any shareholder of the relevant company that is part of a plan that includes that Distribution under section 355(e) and Treas. Reg. § 1.355-7, and ends immediately after the later of (i) the last acquisition of stock of the relevant company made by any shareholder of the relevant company that is part of a plan that includes that Distribution under section 355(e) and Treas. Reg. § 1.355-7 and (ii) that Distribution, any increase in ownership of stock, by vote or value, by a shareholder that occurs as a result of any Plan Acquisition during such period will be offset and reduced by any decrease in ownership of stock, by vote or value, by that shareholder during such period.”).

258. A 1976 article lists the following additional concerns about publication of letter rulings: (1) “Increasing Disparity of Service for Taxpayers of Varying Means”; (2) “Reactionary Legislation,” referring to congressional proposals in light of the *Tax Analysts* litigation; (3) “Private Rulings Not [Being] Easily Readable”; (4) “Disagreement Within the Internal Revenue Service On Persuasive Weight of Particular Rulings”; and (5) that “Disclosure Can Impair the Vitality of the Internal Revenue Service Deliberative Process.” Thompson, *supra* note 196, at 544-46. The first issue is addressed in *supra* text accompanying notes 254-55. The second issue was subsequently resolved by Congress’s passage of I.R.C. § 6110. Thompson, *supra* note 196, at 547.

Thompson’s third issue is stated as follows: “[R]esearch into private rulings will be more difficult than research into published rulings, especially if the material is not in printed form. First of all, private rulings are often longer than published rulings. . . . Secondly, private ruling letters, not intended for widespread reading, sacrifice readability in favor of exactness.” *Id.* at 546. Modern computer technology should help both with readability (for example, it is not necessary to access rulings on microfiche) and with searching for relevant content.

The fourth issue should be resolved by I.R.C. § 6110(k)(3)’s statement that letter rulings do not constitute precedent. The fifth concern appears to be with an extreme level of disclosure that did not come to pass. It refers to “seemingly unrestricted disclosure demands upon the Service” and asks, perhaps rhetorically, “Is it possible, ultimately, for every internal memorandum or conversation to be disclosed in the ruling process and for a ruling process to survive in the form we know?” *Id.* By contrast, Oran points out that “[q]uestioning of letter rulings . . . would tend to prevent the perpetuation of mistakes that may creep into the system because of the limited review now available for letter rulings and the limited input received from outside the Service.” Oran, *supra* note 166, at 839 (footnote omitted).

*(a) Are Disclosed Tax Rulings Useless?*

If a ruling applies only to the taxpayer who received it,<sup>259</sup> that may suggest that rulings lack value for other taxpayers. For example, before letter rulings were made public, one commentator reported:

[T]he position of the IRS . . . [is] that a private ruling is of no value to any taxpayer other than the one to whom the ruling is given, because “no unpublished ruling or decision will be relied on, used, or cited, by any officer or employee of the Service as a precedent in the disposition of other cases.”<sup>260</sup>

However, the author questioned the factual premise that the IRS did not rely on previous letter rulings in other cases.<sup>261</sup> As discussed above, the IRS apparently did rely on previous, unpublished letter rulings at least some of the time.<sup>262</sup>

Even if the tax administration does not cite its rulings in other cases, rulings can provide a helpful view into what the tax administration’s position is on the law. It is better to have official, published guidance, but in the absence of such guidance, rulings can provide insights.<sup>263</sup> “[P]ublication is above all important in respect of decisions on the construction of new legislation as it usually takes longer before decisions by the court of supreme instance can be obtained in these cases by normal appellate procedure.”<sup>264</sup> Beyond that, tax administration policy on a particular tax issue can evolve, and private rulings may reveal that trend.<sup>265</sup>

The fact that U.S. tax attorneys tried to obtain others’ rulings even when they were unpublished suggests that they have value.<sup>266</sup> During that period, “lawyers who [were] experienced in obtaining private rulings state[d] that reference to an analogous letter ruling can help in

259. That is the case in the United States. See I.R.C. § 6110(k)(3). Cf. Edward Andersson, *General Report, Advance Rulings by the Tax Authorities at the Request of A Taxpayer*, in 50B STUDIES ON INTERNATIONAL FISCAL LAW: CAHIERS DE DROIT FISCAL INTERNATIONAL 7, 23 (1965) (distinguishing between court precedents and rulings issued “by fiscal authorities or special organs,” which “can never be expressly binding in respect of other similar cases[,]” but observing that, “[i]f the tribunal which gives the advance rulings has sufficient authority and if its decisions are published, its opinions may in fact become precedent and thus unify judicial application”).

260. Reid, *supra* note 26, at 29 (quoting Rev. Proc. 72-1, 1972 I.R.B. No. 1972-1).

261. See *id.* at 29-32; see also Holden & Novey, *supra* note 204, at 345 (“[A]lthough examining agents are instructed not to use such written determinations ‘as precedents,’ they are encouraged to use them ‘as a guide with other research material in formulating a district office position on an issue.’” (citing 41 I.R.M. § 424(14)3(3))).

262. See *supra* notes 201-07 and accompanying text; see also *supra* note 261.

263. It is possible for some issues to have been addressed only in private rulings. Cf. Andersson, *supra* note 259, at 22 (“In Finland it is striking that so many questions have been raised in advance rulings matter which, as far as one knows, have never been brought up for adjudication by the Supreme Administrative Court.”).

264. *Id.*

265. Reid, *supra* note 26, at 33 n.56.

266. See *id.* at 33.

negotiating with the [Internal Revenue] Service for a ruling desired by the client.”<sup>267</sup> Such access to previous rulings helped avoid inconsistent treatment of taxpayers.<sup>268</sup> Others’ rulings were sometimes helpful in litigation as well.<sup>269</sup> Thus, the argument that disclosed rulings are useless to other taxpayers should carry little weight.

(b) *Taxpayer Use of Others’ Rulings*

Another possible concern is that if taxpayers can access others’ letter rulings, they will try to use them.<sup>270</sup> One issue may be that this will prompt taxpayers to incur legal fees charged for searching for relevant rulings.<sup>271</sup> However, such research costs likely are lower than the costs of applying for one’s own ruling (including what may be a large fee charged by the tax administration).<sup>272</sup>

A related issue is what taxpayers will do with others’ rulings. For example, in North Carolina, the Revenue Department reportedly was concerned that if taxpayers and their representatives had access to guidelines regarding when affiliated corporations would be required to be combined, it “would be like handing a gun to the guy that is about to rob us.”<sup>273</sup> The Department was so concerned about this risk that, although its own agents were clamoring for guidelines,<sup>274</sup> it refused to issue them, with one employee claiming that “part of it is also because of a legit fear that if we communicate ‘guidelines’ to our audit staff, these will eventually fall into the hands of the dreaded Jung [sic]

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267. *Id.*

268. *See supra* Section II.B.2.

269. *See* Douglas H. Walter, *The Battle for Information: Strategies of Taxpayers and the IRS to Compel (or Resist) Disclosure*, 56 TAXES 740, 741 (1978) (“In a recent Tax Court case, *Franco Corelli*, . . . the Tax Court ruled that a favorable private ruling and related documents issued to a different party to the same transaction were relevant to whether the taxpayer was liable for the negligence penalty, and hence could be reached by discovery . . . . [I]n *United States v. Wahlin*, . . . the taxpayer had been indicted for failure to pay manufacturers excise taxes and sought copies of a variety of private rulings. The court stated flatly that ‘the defendant here is entitled to rely on the private rulings in defense of his criminal case.’ ” (footnotes omitted)).

270. *See* Cara Griffith, *Oregon DOR Keeps Guidance Secret, Lest Taxpayers Use It*, 65 ST. TAX NOTES 830, 830 (2012); *see also infra* note 276 and accompanying text.

271. This is a problem in Australia due to the disorganization of the rulings register and the lack of a process to remove outdated and superseded rulings. *See* Thompson, *supra* note 196.

272. *See infra* note 316 and accompanying text (regarding the fee in Luxembourg of up to 10,000 euros); Rev. Proc. 2021-1, 2021 I.R.B. 1, 84 (listing a wide range of fees, including a default fee of \$38,000 for a ruling request received after February 3, 2021, as well as reduced fees).

273. *Delhaize Am., Inc. v. Lay*, No. 06 CVS 08416, 2011 NCBC LEXIS 9, at \*53 (N.C. Super. Ct. Jan. 12, 2011) (quoting E-mail from David Simmons [leader of the North Carolina Department of Revenue’s Interstate Group] to Interstate Managers (Mar. 22, 2006, 13:05 EST)).

274. *Id.* at \*52 (“The Department’s lack of guidance made even its own auditors confused. They repeatedly requested guidelines.”).

Hoard [sic] . . . and will be used against us.”<sup>275</sup> Thus, the Revenue Department essentially shot itself in the foot to avoid providing taxpayer representatives with guidance. Moreover, the likely result of failing to have guidelines is inconsistent treatment of similarly situated taxpayers.

Cara Griffith, CEO of Tax Analysts, reported that, in Oregon, a Department of Revenue (DOR) “official responded that if the [Department’s ruling] guidance was publicly available, other taxpayers might use it,” to which Griffith noted being “taken aback by the honesty.”<sup>276</sup> Griffith pointed out that “the DOR’s rationale—that guidance must be kept secret because someone could misunderstand it—could just as easily be offered as an excuse to keep the Oregon Revised Statutes secret or to lock away Oregon Supreme Court decisions.”<sup>277</sup> Although private rulings lack the general applicability that statutes or case law do, such rulings are nonetheless informative, as tax practice reflects.<sup>278</sup> Moreover, even when U.S. letter rulings were not published, taxpayers did occasionally use others’ rulings for support in litigation.<sup>279</sup>

Uniform taxpayer access to letter rulings should be considered a feature, not a bug. Increased transparency of rulings reduces the likelihood that taxpayers will get the wrong signal about how the tax authority interprets the tax law. While entirely secret rulings leave

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275. *Id.* at \*53 (quoting E-mail from David Simmons to Gene Chavis et al. (Mar. 21, 2006, 17:57 EST)). The reference is supposed to be to the Jun horde from the movie *The Beastmaster*. Cara Griffith, *Tax Policy in the Age of Cynicism*, 45 OHIO N.U. L. REV. 577, 588 (2019).

276. Griffith, *supra* note 275, at 588. The Oregon Department of Revenue representative reportedly explained that “We haven’t made private guidance letters publicly available mainly due to the risk of taxpayers relying on the advice that may or may not apply to them based on different circumstances.” Griffith, *supra* note 270, at 831 (quoting DOR Communications Manager Derrick Gasperini).

277. Griffith, *supra* note 270, at 831.

278. *See supra* text accompanying notes 204-05.

279. *See Parnell v. United States*, 187 F. Supp. 576, 580 (M.D. Tenn. 1958), *aff’d*, 272 F.2d 943 (6th Cir. 1959) (quoting from several 1952 unpublished rulings “produced by the defendant in response to interrogatories filed by plaintiff in this case”). It is possible that the plaintiff’s attorney in *Parnell* knew of or suspected the existence of relevant letter rulings. *See supra* text accompanying notes 210-11.

In a subsequent U.S. Supreme Court case on the same issue, the Court quoted one of the same rulings. *See Hanover Bank v. Comm’r*, 369 U.S. 672, 686-87 (1962). Both courts used the rulings as evidence in favor of the taxpayer. The *Parnell* court merely found the taxpayer’s approach to be a “reasonable” one under ambiguous regulations. *Parnell*, 187 F. Supp. at 579. However, the Supreme Court stated that “because the Commissioner ruled, in letters addressed to [other] taxpayers requesting them, that amortization with reference to a special call price was proper under the statute, we have further evidence that our construction . . . is compelled by the language of the statute.” *Hanover Bank*, 369 U.S. at 686-87 (emphasis added) (footnote omitted). The *Hanover* statement is particularly odd in light of the fact that the IRS had revoked those rulings four years later and issued a Revenue Ruling to the contrary. *See id.* at 687 n.21. The rulings also likely were not published by the IRS.

taxpayers guessing<sup>280</sup> and summaries may omit important facts,<sup>281</sup> a disclosed, anonymized ruling contains much more information,<sup>282</sup> while still protecting taxpayer privacy. If the concern is that taxpayers will treat others' rulings as precedential, that can be addressed by statute, as U.S. federal tax law does.<sup>283</sup> Thus, this rationale for keeping tax rulings secret is not convincing.

(c) *Expense of Publishing Rulings*

Another objection to publishing rulings is potential increased cost to the government.<sup>284</sup> In 1965, then-IRS Chief Counsel Mitchell Rogovin stated that “by creating a form of communication which was addressed to an individual taxpayer and concerned one particular transaction[,] . . . [r]esponsibility for issuing rulings . . . could be delegated to lesser officials . . . .”<sup>285</sup> However, it is not clear that actually happened.<sup>286</sup>

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280. See Bert I. Huang, Essay, *Shallow Signals*, 126 HARV. L. REV. 2227, 2239-40 (2013) (providing a hypothetical example involving an undisclosed ruling leading another firm to misperceive the taxpayer's position as aggressive).

281. See *id.* at 2240 (providing a hypothetical example of a summary that omits key facts). Nonetheless, some governments do publish rulings summaries. See Joe Stanley-Smith, *Tax Chiefs Pleased that Netherlands Will Publish Tax Rulings*, 30 INT'L TAX REV. 11 (2019) (discussing the Netherlands); see also *infra* note 342 and accompanying text (discussing Belgium).

282. *But cf.* Huang, *supra* note 280 (arguing that a redacted letter ruling may be “missing the information that would put Firm 2 on notice that its own case is distinguishable from that of Firm 1”). For this reason and more, a pattern of rulings on a transaction is more informative than a single ruling.

283. See I.R.C. § 6110(k)(3). At the U.S. federal level, taxpayer use of rulings issued to other taxpayers seems to have been a bigger issue before 1976 (when they were made public and Congress added § 6110(k) to the Code). For example, *Hanover Bank*, a U.S. Supreme Court case that is sometimes cited with respect to the relevance of letter rulings issued to others, was decided in 1962. See *Hanover Bank v. Comm'r*, 369 U.S. 672 (1962); see also *supra* note 279 (discussing *Hanover*). The *IBM* case, discussed above in text accompanying notes 184-91, also was decided in the 1960s. There was some pressure on the IRS to increase publication of rulings. See *supra* text accompanying notes 144-52.

284. See Rick Handel, *I Look at SALT from Both Sides Now: Departmental Transparency*, 68 ST. TAX NOTES 477, 480 (2013) (“The major and most often given reason that departments provide less transparency than is ideal is lack of resources.”); AUSTRALIAN INSPECTOR-GENERAL REPORT, *supra* note 209, at 53 (addressing the cost of Australia's tax rulings register).

285. Rogovin, *supra* note 20, at 767.

286. An unscientific look at several 1964 rulings on Lexis finds rulings signed by officials with the following titles: “Director, Tax Rulings Division”; “Chief, Individual Income Tax Branch”; “Chief, Excise Tax Branch”; “Chief, Reorganization Branch”; and “Chief, Employment Tax Branch.” A similar look at several rulings from post-publication year 1977 finds rulings signed by such officials as “Director, Exempt Organizations Division”; “Chief, Rulings Section 1 Exempt Organizations Technical Branch”; “Chief, Individual Income Tax Branch”; “Chief, Wage, Excise and Administrative Provisions Branch”; and “Chief, Estate and Gift Tax Branch.” A look at several 1987 rulings finds rulings signed by “Chief, Employee Plans Rulings Branch”; “Chief, Exempt Organizations Rulings Branch”; and “Chief, Branch 3 Corporation Tax Division.”

In the 1970s, Reid argued:

[I]t must be acknowledged that the IRS would be likely to be more cautious in issuing rulings if it were aware of the possibility of public scrutiny. Therefore, a system of public access to IRS rulings would require the Service to commit additional resources to the review of rulings in order to avoid delay and would involve some increase in the cost of the rulings system . . . .<sup>287</sup>

However, IRS rulings volume actually increased after publication, as shown below.<sup>288</sup> In addition, nontransparent rulings also have costs, including (1) possibly duplicative work for the tax administration and (2) reduced tax compliance due to lack of guidance.<sup>289</sup> And the government can pass the cost of producing a ruling onto the taxpayer requesting it via rulings application fees. It is also possible that disclosure of rulings may reduce costs in the long run as some taxpayers and their advisers consult available rulings instead of directing individual questions to the tax authority.<sup>290</sup>

(d) *Decline in Rulings Volume?*

“The most serious objection to making all rulings public is that such a policy might dry up the rulings process . . . .”<sup>291</sup> Reportedly, in the 1970s, “Lester Uretz . . . General Counsel of the IRS, maintain[ed] that publication of all [letter] rulings would cause ‘substantial delay in the ruling process. . . . [I]t would be [] necessary to delete identifying details from thousands of rulings.’ ”<sup>292</sup> That appears to refer to an existing inventory of rulings upon publication, which is a transition issue. Prospectively, taxpayers can propose the deletions themselves.<sup>293</sup>

Beyond a transition issue, a steep reduction in rulings could occur if taxpayers stop requesting them. Some decline in requests could be positive in that it could reflect a decrease in requests for guidance where the tax administration has already issued similar rulings to other taxpayers.<sup>294</sup> However, a complete halt to the guidance provided by rulings would be different. This could occur if taxpayers are deterred by the prospect of disclosure. Another possibility is that the tax

287. Reid, *supra* note 26, at 36 (footnote omitted).

288. See *infra* text accompanying notes 307-10.

289. AUSTRALIAN INSPECTOR-GENERAL REPORT, *supra* note 209, at 53.

290. Handel, *supra* note 284, at 480-81.

291. Reid, *supra* note 26, at 34.

292. *Id.* (quoting Lester R. Uretz, *Freedom of Information Act and the IRS*, 20 ARK. L. REV. 283, 288 (1967)).

293. See *id.* (“To avoid the disclosure of confidential information, Mr. Rogovin [former Chief Counsel of the IRS] would require that the taxpayer himself prepare a ‘Bowdlerized’ version of the ruling with identifying details deleted . . . thus shifting the cost of excising such material to the party who benefits from it.”).

294. See AUSTRALIAN INSPECTOR-GENERAL REPORT, *supra* note 209, at 50 (referring to efficiency gains).

administration would become more reluctant to issue rulings.<sup>295</sup> Relatedly, the tax agency could take more time to issue rulings than it would if the rulings lacked outside scrutiny.<sup>296</sup> However, the prospect of scrutiny is a strong argument in favor of disclosure because scrutiny gives rise to accountability.<sup>297</sup> In addition, if publication deterred the issuance of rulings in the United States, one would expect fewer rulings to be issued by the IRS after its letter rulings were first published. Yet, that was not the case, as shown below.

The shift from a process of largely confidential IRS letter rulings to publication of anonymized versions of all of its letter rulings (and technical advice memoranda<sup>298</sup>) occurred in 1976.<sup>299</sup> The change does not seem to have been followed by a decline in letter ruling volume. First, *requests* for tax rulings and technical advice appear to have gradually increased during most of the decade after 1976, as the chart below showing IRS ruling-request closures reflects.<sup>300</sup>

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295. Reid, *supra* note 26, at 3 (describing in 1972 the argument that “the Service would be reluctant to rule in many situations if the rulings would have universal applicability”).

296. Thompson, *supra* note 206, at 545 (“Longer ruling time was suggested by [IRS] Assistant Commissioner Gibbs in the context of a proposed ruling procedure requiring waiver of the taxpayer’s right to nondisclosure. A reduction in the number and scope of rulings and restriction of the circumstances in which ruling requests will be granted appears inevitable, absent an increase in Service staff, if the Service intends to provide proper review to assure absence of uneven treatment.” (footnote omitted)).

297. This policy underlies the Freedom of Information Act in the United States. See *About the Freedom of Information Act*, DEA, <https://www.dea.gov/foia/about-foia> [<https://perma.cc/T2YK-3Q3M>] (last visited Apr. 7, 2023) (“The main purpose of [FOIA] is to ensure an informed citizenry and provide a check against corruption by holding the government accountable.”).

298. “A technical advi[c]e memorandum is similar to a letter ruling but legally more sophisticated. It is not issued directly to a taxpayer; it is a response to a district director’s request for instructions as to the treatment of a specific set of facts relating to a named taxpayer.” Thompson, *supra* note 196, at 532.

299. Tax Reform Act of 1976, Pub. L. 94-455 § 1201(a)-(b), 90 Stat. 1660; see also COMM’R OF INTERNAL REVENUE, ANNUAL REPORT 1976, at 60 (1976) [hereinafter ANNUAL REPORT 1976], <https://www.irs.gov/pub/irs-soi/76dbfullar.pdf> [<https://perma.cc/MB5Z-SDAN>] (“The Tax Reform Act of 1976 provides for the disclosure of private letter rulings and technical advice memoranda, after deletion of certain information . . .”).

300. The IRS table is called “Requests for Tax Rulings and Technical Advice (Closings)” for the years in the table. See, e.g., COMM’R OF INTERNAL REVENUE, 1978 ANNUAL REPORT, at 48 (1978) [ANNUAL REPORT 1978], <https://www.irs.gov/pub/irs-soi/78dbfullar.pdf> [<https://perma.cc/H3S2-J8FA>]. The figures reported do not include the numbers for “Field Requests,” only “Taxpayers’ Requests.”

Table 1 in the text begins with 1974 because the IRS Annual Reports from the early 1970s do not contain the same categories as subsequent years’ charts. See, e.g., COMM’R OF INTERNAL REVENUE, ANNUAL REPORT 1973, at 7 (1973), <https://www.irs.gov/pub/irs-soi/73dbfullar.pdf> [<https://perma.cc/MX74-78FP>] (listing only nine categories, including two that normally are included instead in an Employee Plans/Exempt Organizations table). Table 1 in the text stops at 1988 because the IRS did not provide 1989 and 1990 figures. See INTERNAL REVENUE SERV., ANNUAL REPORT 1989 (1989), <https://www.irs.gov/pub/irs-soi/89dbfullar.pdf> [<https://perma.cc/QMS6-CHL5>]. Cf. *id.* at 53 tbl.17 (listing 5,319 taxpayer requests for rulings and technical advice related to Employee Plans and Exempt Organizations); see also INTERNAL REVENUE SERV., ANNUAL REPORT 1990 (1990), <https://www.irs.gov/pub/irs-soi/90dbfullar.pdf> [<https://perma.cc/K437-AL5V>]. Cf. *id.* at 37 tbl.23 (listing 4,525 taxpayer requests for rulings and technical advice related to Employee Plans and Exempt Organizations).

**TABLE 1. IRS-REPORTED NUMBER OF TAXPAYER REQUESTS FOR TAX RULINGS AND TECHNICAL ADVICE CLOSED, 1974-1988**<sup>301</sup>

Year	Number of Taxpayer Ruling Requests	Year	Number of Taxpayer Ruling Requests	Year	Number of Taxpayer Ruling Requests
1974	~27,327 <sup>302</sup>	1979	26,585	1984	34,246
1975	23,596	1980	29,869	1985	Not specified
1976	26,080	1981	30,745	1986	Approx. 22,500 <sup>303</sup>
1977	Not specified <sup>304</sup>	1982	31,726	1987	22,165
1978	24,705	1983	34,399	1988	24,699

Second, the volume of tax rulings that the IRS issued also increased after 1976.<sup>305</sup> It began declining years later, in 1983.<sup>306</sup>

301. The figures are taken from the IRS Annual Reports located at <https://www.irs.gov/statistics/soi-tax-stats-archive-1863-to-1999-annual-reports-and-irs-data-books> [<https://perma.cc/E8G2-AM7D>]. For example, for 1975, the statistic is located on a table on page 36 of the Annual Report. See COMM'R OF INTERNAL REVENUE, ANNUAL REPORT 1975, at 36 (1975) [hereinafter ANNUAL REPORT 1975], <https://www.irs.gov/pub/irs-soi/75dbfullar.pdf> [<https://perma.cc/BY97-RXK2>].

302. The IRS report for this year provides the figure of 14,017. COMM'R OF INTERNAL REVENUE, ANNUAL REPORT 1974, at 30 (1974) [hereinafter ANNUAL REPORT 1974], <https://www.irs.gov/pub/irs-soi/74dbfullar.pdf> [<https://perma.cc/KBR9-LU9C>]. However, the IRS chart does not include the category of applications from taxpayers for permission to change accounting period or method, which usually is included. See, e.g., ANNUAL REPORT 1975, *supra* note 301. The 1974 report adds that “[i]n addition, the Service processed 14,329 applications from taxpayers for permission to change their accounting period or method and made 932 earnings and profit determinations.” See ANNUAL REPORT 1974, *supra*, at 30. In addition, it includes “Actuarial Matters,” *see id.*, which usually are not included in the chart, *see, e.g.*, ANNUAL REPORT 1975, *supra* note 301. Table 1 adds the 14,329 to the 14,017 and subtracts 1,019 for actuarial matters.

303. This figure is not reported in a table. See INTERNAL REVENUE SERV., 1986 ANNUAL REPORT 31 (1986), <https://www.irs.gov/pub/irs-soi/86dbfullar.pdf> [<https://perma.cc/JQ4D-QEA5>]. It is not broken out between taxpayer and field requests, so it likely includes some field requests, unlike the other figures in the table. It may also be rounded.

304. The report for this year includes the figure of 10,329. See COMM'R OF INTERNAL REVENUE, ANNUAL REPORT 1977, at 140 tbl.18, <https://www.irs.gov/pub/irs-soi/77dbfullar.pdf> [<https://perma.cc/4PWH-Z96B>]. However, the list of topics covered in that year's chart only includes actuarial matters, exempt organizations, and employee plans. See *id.* That is the list of categories usually included in the chart titled “Requests for EP/EO [Employee Plan/Exempt Organization] tax rulings and technical advice (closings).” See, e.g., INTERNAL REVENUE SERV., ANNUAL REPORT 1987, at 60 tbl.17 (1987), <https://www.irs.gov/pub/irs-soi/87dbfullar.pdf> [<https://perma.cc/WJC4-6Y9Y>]. Usually, the charts omit those categories but include more categories in total. For example, the 1976 chart includes ten other categories. See ANNUAL REPORT 1976, *supra* note 299, at 38. Similarly, the 1978 chart includes ten other categories. See ANNUAL REPORT 1978, *supra* note 300, at 48. The single largest category in the 1976 and 1978 years is “Changes in Accounting Periods,” which exceeds 10,000 requests each year for those two years. The second largest is “Changes in Accounting Methods,” which exceeded 6,000 requests each year. See *id.*

305. Not all ruling requests result in published rulings. The taxpayer may withdraw the request, perhaps to avoid an adverse ruling, *see* Sugarman, *supra* note 22, at 25, or the IRS may decline to rule, *see* Rev. Proc. 2021-1, *supra* note 272, § 6.02 (“[T]he Service may decline to issue a letter ruling . . . when appropriate in the interest of sound tax administration,



**TABLE 2. NUMBER OF PLRs ISSUED  
BY THE IRS PER YEAR, 1972-2019<sup>307</sup>**

Year	Num. of PLRs	Year	Num. of PLRs	Year	Num. of PLRs	Year	Num. of PLRs
1972	564 found <sup>308</sup>	1984	5,402	1996	1,941	2008	1,962
1973	464 found	1985	5,108	1997	2,049	2009	2,039
1974	396 found	1986	4,450	1998	2,143	2010	1,741
1975	399 found	1987	3,932	1999	2,055	2011	1,489
1976	349 found	1988	3,820	2000	1,973	2012	1,351
1977	3,287	1989	3,920	2001	1,999	2013	1,217
1978	4,457	1990	3,193	2002	2,068	2014	1,563
1979	5,120	1991	2,344	2003	1,710	2015	1,075
1980	5,645 <sup>309</sup>	1992	2,172	2004	1,758	2016	1,063
1981	5,782	1993	2,176	2005	1,650	2017	953
1982	5,735	1994	2,076	2006	1,909	2018	836
1983	5,610	1995	1,957	2007	1,467 <sup>310</sup>	2019	815

including due to resource constraints, or on other grounds whenever warranted by the facts or circumstances of a particular case.”).

306. A December 1987 legislative change authorized the IRS to charge a user fee for ruling requests, so the decline predated the fee. Rev. Proc. 88-8, 1988-1 C.B. 628 (citing Revenue Act of 1987, Pub. L. No. 100-203, § 10511). In 1988, the default ruling fee was \$300, and the highest fee was \$1,000. *Id.* at 629-30. The default fee remained at that level for a couple of years. *See* Rev. Proc. 89-1, 1989-1 C.B. 745. In 1990, the IRS increased fees, including raising the default to \$2,500, but it also introduced lower fees for lower-income individuals, trusts, and estates. *See* Rev. Proc. 90-17, 1990-1 C.B. 481-84.

307. The rulings figures in Table 2 were found replicating as closely as possible the methodology used by Givati. *See* Givati, *supra* note 41, at 151 fig.3 (“Search Lexis-Nexis IRS Private Letter Rulings and Technical Advice Memoranda database for ‘private letter ruling and not (technical advice memorandum).’”). Givati provides specific figures for 1981, 1989, 1991, and 2007. *See id.* Where specific figures in Table 2 differ from figures reported in Givati’s article or other sources, the other figures are cited in footnotes.

308. The figures before 1976 are understated because 1976 is the year in which letter rulings were first made public en masse. *See* I.R.C. § 6110(h) (addressing “[d]isclosure of prior [pre-November 1976] written determinations and related background file documents”). The Joint Committee report accompanying the legislation provided ordering rules. *See* JOINT COMM. ON TAX’N, REFORM ACT OF 1976 REPORT, *supra* note 36, at 309-10. In 1979, the IRS stated, “Some 25,000 of the approximately 83,000 issued in answer to [ruling and technical advice] requests made before Nov. 1, 1976, were made available to the public in 1978. During 1979, the remaining 58,000 determinations written in the past were made available to the public, marking the end of the past rulings release program.” COMM’R OF INTERNAL REVENUE, 1979 ANNUAL REPORT 32-33 (1979), <https://www.irs.gov/pub/irs-soi/79dbfullar.pdf> [<https://perma.cc/HA3B-7NG8>]. However, the Joint Committee report cited above refers to “making prior determinations *open to public inspection*,” so many of the documents may not have been published anywhere. *See* JOINT COMM. ON TAX’N, REFORM ACT OF 1976 REPORT, *supra* note 36, at 309 (emphasis added).

309. An article using the *Tax Notes* database reports slightly different PLR figures for 1980 through 2003. *See* Sheryl Stratton & Judy Parvez, *IRS Guidance 1980-2003: An Ever-Changing Landscape*, 105 TAX NOTES 985, 987 tbl.2 (2004) (reporting as follows: 5,526 (1980); 5,789 (1981); 5,791 (1982); 5,735 (1983); 5,474 (1984); 5,200 (1985); 4,514 (1986); 3,940 (1987); 3,965 (1988); 3,958 (1989); 3,418 (1990); 2,537 (1991); 2,217 (1992); 2,174 (1993); 2,026 (1994); 2,005 (1995); 1,986 (1996); 1,946 (1997); 2,041 (1998); 2,018 (1999); 1,978 (2000); 2,028 (2001); 2,064 (2002); 1,805 (2003)).

310. The figure reported by Givati for 2007 is 1,436. *See* Givati, *supra* note 41, at 151 fig.3.

Thus, publication did not end the IRS's letter rulings program, nor did it seem to significantly decrease it. It is also worth noting that when the IRS announced in January 1999 that it would disclose APAs, it found that the announcement "had little impact on the APA program."<sup>311</sup> In fact, year-over-year, APA applications and pending APA requests increased slightly.<sup>312</sup>

In Luxembourg, rulings volume has plummeted in the years following LuxLeaks.<sup>313</sup> For example, requests in 2019 for a Luxembourg APA were less than three percent of the volume of such requests in 2014—the high point of requests for the 2012 through 2019 period.<sup>314</sup> That may seem to provide a data point suggesting that publication of tax rulings will decrease rulings volume. However, Luxembourg's statistics do not show the result of publication of anonymized tax rulings. Luxembourg has never published anonymized tax rulings. (The 2014 LuxLeaks disclosure revealed a set of non-anonymized confidential rulings.)

Moreover, Luxembourg experienced numerous other changes beginning in 2015 that likely discouraged ruling requests. Starting on January 1, 2015, Luxembourg's process became more formal and slower.<sup>315</sup> Luxembourg also began requiring payment of a fee of up to 10,000 euros.<sup>316</sup> In addition, Luxembourg began rejecting an increasing percentage of ruling requests.<sup>317</sup> Moreover, shortly thereafter, the

311. Letter from Paul N. Wojcik, President, Bureau of Nat'l Affs., to Bill Archer, Chairman, House Ways & Means Comm. (May 12, 1999) (on file at <https://www.taxnotes.com/research/federal/legislative-documents/congressional-tax-correspondence/bna-president%27s-letter-to-archer-on-public-access-to-apas/11dcy> [<https://perma.cc/QW4S-GCAU>]) (emphasis omitted).

312. *Id.* The announced release of APAs never occurred. See *supra* text accompanying notes 69-75.

313. See Lederman, *supra* note 174, at 42 tbls.1, 2, & 3.

314. *EU Joint Transfer Pricing Forum: Statistics on APAs in the EU at the End of 2014*, at 1, 2, JTPF/009/2015/EN (Oct. 22, 2015), <https://taxation-customs.ec.europa.eu/system/files/2016-09/jtpf0092015apastatistics2014.pdf> [<https://perma.cc/77FC-GFUP>]; *Statistics on APAs (Advance Pricing Agreements) in the EU at the End of 2019*, at 1, 4, ARES 1802078 (Mar. 2021) [hereinafter *EU APA Statistics 2019*], [https://taxation-customs.ec.europa.eu/system/files/2021-04/apas\\_2019.docx.pdf](https://taxation-customs.ec.europa.eu/system/files/2021-04/apas_2019.docx.pdf) [<https://perma.cc/95N2-BHQW>].

315. See Mischo & Kerger, *supra* note 174, at 1200 (discussing the new fee); Thomas, *supra* note 108 ("En octobre 2013, Marius Kohl est parti à la retraite. Depuis, la machine à produire des rulings s'est enrayée." (meaning "In October 2013, Marius Kohl retired. Since then, the machine to produce rulings has jammed.")).

316. Recueil De Legis., Paquet D'avenir, A-N 257 at 5472 Art. 4 ("Loi Générale des Impôts") (Dec. 24, 2014), [https://impotsdirects.public.lu/dam-assets/fr/legislation/legi14/Memorial-A--N\\_-257-du-24-decembre-2014.pdf](https://impotsdirects.public.lu/dam-assets/fr/legislation/legi14/Memorial-A--N_-257-du-24-decembre-2014.pdf) [<https://perma.cc/T9DZ-J9RD>] ("Cette redevance varie entre 3.000 et 10.000 euros suivant la complexité de la demande et le volume du travail." (meaning "This fee varies between 3,000 and 10,000 euros depending on the complexity of the request and the volume of work.")).

317. For example, while Luxembourg rejected *no* EU APA requests in 2012 and 2013 (granting 2 and 117 in those years, respectively), in 2018, Luxembourg rejected 3 and granted 6, and in 2019 rejected 1 and granted only 3. See *EU APA Statistics 2019*, *supra* note 314, at 4; *EU Joint Transfer Pricing Forum: Statistics on APAs in the EU at the End of 2018*,

EC and OECD began requiring the exchange of rulings summaries.<sup>318</sup> A combination of these factors likely deterred many rulings requests. These factors may also have created demand for a less formal procedure, which, if it existed, would allow taxpayers to substitute away from the expensive, formal procedure if they did not need a formal ruling. As noted above, around the time when Luxembourg's rulings process was formalized, an informal, confidential process known as "information letters" allegedly began.<sup>319</sup>

Thus, the U.S. and Luxembourg examples do not raise a concern that government publication of anonymized tax rulings will call a halt to the rulings process. Luxembourg has not published its rulings, so its data is not relevant on that question. The United States has published its letter rulings, and rulings volume actually increased after that. So, this asserted cost of rulings publication should not carry much weight, at least in countries with strong protections of confidential taxpayer information akin to the U.S. federal regime.<sup>320</sup>

(e) *Would Confidential Taxpayer Information Be Disclosed?*

The privacy of confidential taxpayer information is an important issue that arises in the rulings context. For example, in 1995, the OECD specifically urged, in the APA context, that tax administrations be sensitive to this issue.<sup>321</sup> In the letter ruling context, the United States has addressed the issue via required redactions of such things as identifying information and trade secrets.<sup>322</sup> Even in the 1950s, before all of its letter rulings became public, the IRS determined how to redact confidential taxpayer information from the rulings that it did

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at 3 (July 2019), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/apa-and-map-2019-3.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/apa-and-map-2019-3.pdf) [<https://perma.cc/79TC-3J9R>]; *EU Joint Transfer Pricing Forum: Statistics on APAs at the End of 2013*, at 2, JTPF/007/2014/EN (Oct. 2014), <https://www.ifst.de/images/schriften/2016/APA-Statistik2013.pdf> [<https://perma.cc/42UR-235K>]; *EU Joint Transfer Pricing Forum: Statistics on APAs at the End of 2012*, at 2, JTPF/013/2013/EN (Aug. 2013), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/final\\_apa\\_statistics\\_2012\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/final_apa_statistics_2012_en.pdf) [<https://perma.cc/93CK-RFTQ>].

318. See *supra* Section III.B.

319. See *supra* text accompanying notes 123-26.

320. See generally I.R.C. §§ 6103, 6110, 7431 (providing for protection of confidential taxpayer information and civil remedies for violations); Tax Executives Institute, *Confidentiality of Tax Return Information*, 51 TAX EXEC. 365, 365 (1999) ("Even before section 6103 was enacted . . . the preservation of taxpayer confidentiality was a core value of the American tax system.").

321. See *infra* text accompanying note 335.

322. See I.R.C. § 6110(c) ("Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete," under (c)(1), items on a list that includes "names, addresses, and other identifying details," and, under (c)(4), "trade secrets and commercial or financial information obtained from a person and privileged or confidential.").

publish, while retaining the legal analysis.<sup>323</sup> As this suggests, confidential financial information that should be redacted may well be separable from the legal principles the IRS applies.

An IRS Chief Counsel raised in 1965 the deterrent effect on rulings applications if a “ruling, containing all the facts of the proposed transaction—possibly a highly confidential business deal such as a merger of two listed companies—were to be published by the Service before the transaction was consummated.”<sup>324</sup> The Chief Counsel also raised the question, “What would happen if, after being made public, the proposed transaction were to be cancelled?”<sup>325</sup> This could embarrass the taxpayer and potentially have deleterious economic consequences.<sup>326</sup> Of course, publication of the ruling could be delayed until these issues were no longer raised. Moreover, the Chief Counsel’s questions seem to assume that those accessing the ruling would know the identity of the taxpayer and the counterparty, which should not be the case after redactions.

The United States is large, so it may be easier to obscure the identity of a taxpayer in the United States than it would be in a smaller country. However, U.S. states, which are relatively small, have also confronted this issue.<sup>327</sup> For example, the state of Kentucky was recently required to make its letter rulings public,<sup>328</sup> and it addressed how to maintain taxpayer anonymity. In part, to facilitate redactions, it developed a new format for rulings in which only the “legend,” which is not made public, contains the taxpayer’s identifying details.<sup>329</sup> The taxpayer must also sign a waiver to receive the ruling.<sup>330</sup> According to J. Todd Renner, the executive director of the Kentucky Department of Revenue’s Office of Tax Policy and Regulation:

If a taxpayer reviews the document before signing the waiver and sees a piece of identifying information in the ruling that the taxpayer would

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323. *Hearings*, *supra* note 198, at 1564 (statement of Norman A. Sugarman, Assistant Commissioner, Bureau of Internal Revenue) (“[O]ur first concern in approaching this matter of disseminating rulings, was the problem of being able to disseminate rulings and delete from them the type of confidential information which did not affect the principles involved.”).

324. Rogovin, *supra* note 20, at 767 n.60.

325. *Id.*

326. *See* Oran, *supra* note 166, at 848 (“[T]he contemplated transaction might never occur and disclosure of the letter ruling request could prove embarrassing.”). *Cf.* Blank, *supra* note 17, at 485-86 (describing a situation in which Yahoo Inc. announced a planned spin-off and that it would seek a letter ruling; soon thereafter, the IRS announced that it would not rule on this type of spin-off, and “within minutes of the announcement from the IRS, the stock price of Yahoo plummeted by more than 10%”).

327. *See* Griffith et al., *supra* note 253, at 333.

328. Aaron Davis, *DOR Looks to Revamp Letter Ruling Format*, 94 TAX NOTES ST. 152, 152 (2019) (referencing the litigation).

329. *Id.*

330. *Id.* This is because “Kentucky statutes prevent the release of taxpayer information.” *Id.*

not want published, the department will determine if the issue can be described in a different way or given a pseudonym . . . . The goal is to maintain the confidentiality of the taxpayer . . . .<sup>331</sup>

Kentucky also addressed the issue of what to do if an industry in the state has only a few competitors.

For example, Renner said, there are only three automobile manufacturers in Kentucky, meaning that if a member of the public sees a ruling involving an automaker, he or she would know right away that it must refer to Ford Motor Co., Toyota Motor Corp. or General Motors Co. Thus, rulings will be evaluated and adjusted case by case to ensure that taxpayers are confident of their anonymity in the final document . . . .<sup>332</sup>

There is no reason that such confidentiality can't be paramount while still publishing rulings. In the automotive example, the taxpayer's industry could be redacted, along with any other relevant details. Having some published rulings unclear as to the taxpayer's industry still provides much greater transparency than blanket confidentiality of tax rulings.

## 2. *Special Concerns in the APA Context*

As U.S. practice reflects, disclosure of APAs often is considered to pose a risk that confidential taxpayer information will be disclosed.<sup>333</sup> For example, in the early 2000s, some companies expressed concern that the U.S. statutory scheme would be insufficient to protect information such as trade secrets.<sup>334</sup> In 1995, the OECD cautioned that tax administrations should protect such confidential material. It stated:

Tax administrations also should ensure the confidentiality of trade secrets and other sensitive information and documentation submitted to them in the course of an APA proceeding. Domestic rules against disclosure should be applied where possible. In a bilateral APA[,] the confidentiality requirements on treaty partners would apply, thereby preventing public disclosure of confidential data.<sup>335</sup>

However, disclosure of trade secrets and similar information has not been a problem thus far, including in the decades in which U.S.

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331. Paul Williams, *Ky. Tax Agency to Release Private Letter Rulings, As Ordered*, LAW360 (July 26, 2019, 7:25 PM), <https://www.law360.com/articles/1182602/ky-tax-agency-to-release-private-letter-rulings-as-ordered> [<https://perma.cc/SZ77-TVJ9>].

332. *Id.*

333. See Hickman, *supra* note 43, at 179 ("Because of the sensitivity of the information that must be disclosed to the IRS, participants in the advance pricing agreement program have expressed great concern for the confidentiality of that data.").

334. JOINT COMM. ON TAX'N, EXPLANATION OF TAX LEGISLATION 2001, *supra* note 69.

335. See *OECD Transfer Pricing Guidelines Draft Text of Part II: Applications* ¶ 268, TAX NOTES (Mar. 27, 1995), <https://www.taxnotes.com/tax-notes-international/international/oecd-transfer-pricing-guidelines-draft-text-part-ii-applications/1995/03/27/1tgp> [<https://perma.cc/UM5P-7H75>].

letter rulings have been published.<sup>336</sup> It is also important to note that, unlike tax returns, APAs are not legally required of taxpayers.<sup>337</sup> The taxpayer requests the APA.<sup>338</sup> Taxpayer sign-off on the redacted version of the APA could be a condition of receiving the APA, along the lines of Kentucky's approach.<sup>339</sup> That would result in taxpayer consent both to the disclosure and to the specific redactions.

A country involved in a bilateral or multilateral APA could have concerns about potential disclosures. However, even the countries involved could and should be anonymized,<sup>340</sup> as has been done with published U.S. letter rulings involving transfer pricing issues.<sup>341</sup> It would also be possible to give the tax administration of a country that is party to an APA that would be disclosed a statutory right to review proposed redactions and request additional anonymization. If necessary, publication could be limited to redacted unilateral APAs. For example: "In Belgium, all advance tax rulings and unilateral advance pricing agreements are published individually or in the annual report. Every publication of tax rulings is anonymous and summarized."<sup>342</sup>

It is also worth noting that, in recent years, not only have the OECD and EC required exchanges of summaries of many APAs, the OECD has also required (via BEPS Action 13) Country-by-Country (CbC)

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336. See Martin A. Sullivan, *How to Decode APAs and Still Keep a Secret*, 12 TAX NOTES INT'L 1250, 1255 (2000) ("Occasionally it has been suggested that if APAs were made public, sensitive taxpayer information, such as trade secrets, would be at risk of being revealed to competitors. Based on the record of disclosure to date, that notion is absurd.")

337. Stark et al., *supra* note 53, at 1072.

338. Ring, *supra* note 50, at 192 ("In fact, the entire program has a strong element of taxpayer control and electivity because only the taxpayer can initiate the procedure.")

339. See *supra* text accompanying notes 330-31.

340. Cf. Ring, *supra* note 50, at 212 ("[F]oreign governments may be hesitant to place themselves in the position of confronting taxpayers who treat redacted APAs as virtually binding authority, rather than as simply offering insight with no precedential value. This concern might be satisfied by not specifying the foreign country in a re[d]acted APA.")

341. See John L. Abramic, Note, *Advance Pricing Agreements: Confidential Return Information or Written Determinations Subject to Release?*, 76 CHI.-KENT L. REV. 1823, 1844 n.145 (2001) (noting that a 1999 "PLR states, 'Taxpayer is the principal United States operating subsidiary of Parent, a Country A corporation . . .'" (quoting PLR 99-49027)); see also, e.g., I.R.S. Priv. Ltr. Rul. 81-22-015 (Feb. 24, 1981) (referring in a Technical Advice Memorandum under section 482 to "certain intangible differences between the Country A and the United States automobile markets").

342. Van de Velde, *supra* note 222, at 45. The Belgian rulings are published on the website [www.fisconetplus.be](http://www.fisconetplus.be). In French, the rulings are found under *Fiscalité/Impôts sur les revenus/Rulings*. However, it appears that rulings involving transfer pricing appear to be shorter summaries. Compare *Décision anticipée n° 2020.1541 du 14.07.2020*, <https://eservices.minfin.fgov.be/myminfweb/pages/public/fisconet/document/6a4f7da5-88e0-42cc-9bf1-e15a6ed3eb6e> [<https://perma.cc/F5BU-FYVZ>] (not involving transfer pricing), with *Décision anticipée n° Ci.D134/112 dd. 07.11.2001*, <https://eservices.minfin.fgov.be/myminfweb/pages/fisconet#/document/cfcce25e-3ce8-4b11-9d9d-f229234acfe1> [<https://perma.cc/KG5Z-5WQZ>] (involving transfer pricing).

reporting, which includes transfer pricing documentation.<sup>343</sup> The Action 13 BEPS report and the 2017 OECD guidelines call for the following three-tiered approach to transfer pricing documentation:

- [1] a master file covering the totality of a MNE's operations and its transfer pricing policies;
- [2] a local file providing information about the relevant related-party transactions and amounts involved at the local affiliate; and
- [3] a new CbC template for reporting revenues, profits (or losses), taxes paid and accrued, assets, and employees in every country where the MNE operates.<sup>344</sup>

The “CbC report is shared with tax administrations in these jurisdictions, for use in high level transfer pricing and BEPS risk assessments.”<sup>345</sup> Of course, CbC reporting and exchanges of APAs with other countries are not the same as public disclosure of APAs. They provide some accountability in the APA process but not as much as disclosure of anonymized APAs would.

One response to the proposed publication of anonymized U.S. APAs is that a redacted APA would be unhelpful. For example, a former IRS Associate Chief Counsel (International) claimed that redacted APAs “‘would look like a piece of Swiss cheese’ and, therefore, would ‘not be very meaningful.’”<sup>346</sup> These concerns have led some to suggest disclosure of something less than actual APAs. For example, BNA's lawsuit sought only the transfer pricing methodologies approved by the tax administration.<sup>347</sup> Lorraine Eden and William Byrnes recently advocated for another possibility: “Tax authorities should publish ‘best practice’ templates based on actual APA settlements, which can be suitably disguised to protect the given firm's key information.”<sup>348</sup> Although not as comprehensive as a publication of all of a tax administration's approved transfer pricing methodologies, such templates would at least be based on actual APAs. Eden and Byrnes also argue that, to increase transparency, “[t]ax authorities should also publish stylized

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343. Felgran & Hughes, *supra* note 107, at 960 (“Several BEPS reports are of particular interest: Action 5 is intended to counter harmful tax practices more effectively, actions 8-10 attempt to align transfer pricing outcomes with value creation, and action 13 covers transfer pricing documentation and country-by-country reporting.”).

344. *Id.* at 961.

345. *Action 13 Country-by-Country Reporting*, OECD, <https://www.oecd.org/tax/beps/beps-actions/action13/> [<https://perma.cc/E5JK-X2WU>] (last visited Apr. 7, 2023).

346. Sheryl Stratton, *Competing Interests Snag APA Program Guidance*, 70 TAX NOTES 138, 138-39 (1996). Diane Ring argues that “[t]o the extent their ‘Swiss cheese’ nature would render them less than illuminating, the Service could complement their content with more explanatory general guidance.” Ring, *supra* note 50, at 215. She also notes that without access to many redacted APAs, we have to take the “Swiss cheese” argument on faith. *Id.* at 214-15.

347. Kaye, *supra* note 68, at 1193 (“[T]he Bureau of National Affairs, Inc. (‘BNA’) filed in federal court for the release of the transfer pricing methodologies approved in these APAs . . .”).

348. Eden & Byrnes, *supra* note 58, at 26.

case studies as best-practice templates that are made available on the tax authority website where they could be analyzed and adopted by other tax authorities and MNEs.”<sup>349</sup>

However, the argument that redacted APAs would have so many holes in them as to be useless has been vigorously disputed. For example, Martin Sullivan argued:

In addition to methods and comparables, there is a lot of other useful guidance that could be provided on a case-by-case basis from APAs, such as compensating adjustments, critical assumptions, and adjustments made to comparables. As practitioners well know, all of those items play pivotal roles in APAs. In most cases they could be released to the public in redacted form without any threat to taxpayer privacy.<sup>350</sup>

Joel Kuntz and Robert Peroni make a similar argument,<sup>351</sup> and they further comment that “[m]ost of the taxpayers involved will be publicly traded corporations that already file volumes of information with the Securities and Exchange Commission.”<sup>352</sup> Moreover, as Joshua Blank observed, “in 1999, when the IRS announced its decision to publish Advance Pricing Agreements, it embarked on the process of redacting all previously executed agreements, implying that publication with redaction is possible.”<sup>353</sup> At that time, then-Assistant Treasury Secretary Don Lubick stated: “We at Treasury have confidence that, with respect to any given APA, if we put the taxpayer and the IRS in a room, an appropriately redacted APA could be agreed that would satisfy the public’s reasonable need to know.”<sup>354</sup>

Specific transfer pricing information is also discussed in the redacted versions of the EC’s state aid decisions. For example, the Commission’s Amazon decision summarizes the calculations made in Amazon’s transfer pricing report.<sup>355</sup> And perhaps most telling, before the

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349. *Id.*

350. Sullivan, *supra* note 336, at 1254.

351. JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INT’L TAX’N ¶ A3.11[13][c] (West 2023) (“The Service should be able to strip out enough information so that the taxpayer cannot be recognized, while still releasing a version that is meaningful to other taxpayers.”).

352. *Id.* ¶ A3.11[13][c] (adding that “it seems ironic to withhold agreements from the public while some taxpayers proclaim to the tax press that they have obtained such agreements”); see also Michael J. McIntyre, *The Case for Public Disclosure of Advance Rulings on Transfer Pricing Methodologies*, 2 TAX NOTES INT’L 1127, 1129 (1990) (“The only effective way to let interested parties know the legal standards governing the issuance of ADRs [(Advance Determination Rulings on transfer pricing)] is to make sanitized versions of the ADRs available to the public.”).

353. Blank, *supra* note 17, at 518.

354. Sullivan, *supra* note 336, at 1257.

355. Commission Decision of 4 October 2017 on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon 2017 O.J. (L 153) 1, 19-22 tbl.1.



APA was developed, U.S. letter rulings containing transfer pricing determinations were published, with the redactions required by section 6110,<sup>356</sup> without any apparent problem<sup>357</sup> or lawsuit.<sup>358</sup>

Of course, it is possible that the redacted APAs would contain less information than some would hope. However, having access to individual APAs, even heavily redacted, would provide much more transparency than (or in addition to) general statistics.<sup>359</sup>

## CONCLUSION

Transparency in the law is important for those subject to the law. In 2012, “[s]everal practitioners that spoke with Tax Analysts said that taxpayers crave certainty. They want to know both what the law is and how to follow it, and be comfortable that the law will be consistently enforced. Transparency ensures all three of those things.”<sup>360</sup> When letter rulings are not accessible, the tax administration’s view of the law is not clear to taxpayers, increasing the likelihood of horizontal inequities.

Transparency is also an important value because it facilitates accountability.<sup>361</sup> Accountability matters because people care whether

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356. See, e.g., I.R.S. Priv. Ltr. Rul. 81-22-015 (Feb. 24, 1981) (addressing in a Technical Advice Memorandum issues such as whether “certain intangible differences between the Country A and the United States automobile markets have a ‘definite and reasonably ascertainable effect on price’ so that the comparable uncontrolled price method set forth in section 1.482-2(e)(2) of the Income Tax Regulations can be used to determine an arm’s length price for sales of automobiles by Corp B to Corp A”); I.R.S. Priv. Ltr. Rul. 80-02-009 (Sept. 27, 1979) (addressing the issue of “[w]hether a portion of the sales prices received by Sub. 2B, a wholly owned domestic subsidiary of Corp. 1 qualifying under section 931 of the Internal Revenue Code of 1954, from foreign subsidiaries of Corp. 1 may be recharacterized as income attributable to intangibles and allocated to Corp. 1 under section 482”); see also Abramic, *supra* note 341, at 1843-44.

357. Sullivan, *supra* note 336, at 1254 (“Perhaps the revelation of that type of sanitized information has bothered some taxpayer who has received a PLR, but no case (to the author’s knowledge) has ever been reported.”).

358. Code section 6110 provides a private right of action “[w]henever the Secretary . . . fails to make deletions required in accordance with subsection (c).” I.R.C. § 6110(j)(1)(A). The statute also includes a damages remedy for intentional or willful failure to make deletions. I.R.C. § 6110(j)(2). A search in Lexis turned up no cases alleging failure to make such deletions.

359. See McIntyre, *supra* note 352, at 1129 (“A need for some secrecy . . . does not justify total secrecy. Companies engaged in cross-border transactions ought to know the general guidelines that the IRS is following (implicitly or explicitly) in approving and disapproving the requests of their competitors for [APAs].”).

360. Cara Griffith et al., *Transparency in State Taxation—Part I: Discretionary Authority*, 64 ST. TAX NOTES, 189, 189 (2012).

361. See Blank, *supra* note 17, at 459 (“Transparency generally serves two functions, which apply equally in the context of tax administration: democratic governance and accountability.”); Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1533-34 (2013) (“Transparency is an essential tool for facilitating accountability because it subjects politicians and bureaucrats to the public spotlight.”).

government institutions act responsibly.<sup>362</sup> People may also care about whether other taxpayers are complying with their obligations because if some taxpayers pay less, others will have to pay more in order for the government to meet a revenue target.<sup>363</sup> The perception that others are cheating may also give some taxpayers a rationalization to justify engaging in evasion themselves.<sup>364</sup> Put another way, it is not appealing to feel like a “chump” who pays in full while others free ride.<sup>365</sup>

“In the end, transparency creates a better tax system by creating the certainty that taxpayers crave and enabling a more informed debate about what constitutes fair tax administration.”<sup>366</sup> Disclosure of anonymized tax rulings and APAs would help eliminate the risks that countries, tax advisers, and taxpayers face in nontransparent rulings regimes.<sup>367</sup> The main counterargument is that disclosure may also incur costs. However, those costs are limited and sometimes overstated, as this Article has shown.<sup>368</sup>

The U.S. experience with IRS publication of letter rulings in anonymized form provides evidence that publication of non-APA tax rulings need not occasion the demise of the rulings program. It also reflects an evolution over time towards more transparent practices. Transparency should be considered a best practice that even countries with a strong culture of taxpayer confidentiality—which the United States has—should adopt.<sup>369</sup> The United States should publish redacted APAs, or something as close to that as politically possible. In Luxembourg, the volume of rulings currently is low, but announcing a policy of publishing redacted rulings would provide a highly positive signal. As Maartin

362. See Zarsky, *supra* note 361, at 1533 (“Accountability refers to the ethical obligation of individuals (in this case, governmental officials) to answer for their actions, possible failings, and wrongdoings.”); *id.* at 1534 (“The fear that a broad segment of the public will learn of the bureaucrats’ missteps will deter these decision makers from initially engaging in problematic conduct.”).

363. See Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515, 1517 (2005) (“Compliance is important because when individuals and businesses fail to pay their taxes when due, compliant taxpayers must bear more than their fair share of the costs of government services.”).

364. See Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1201 (2021) (“A knowledge of community norms of honesty may make rationalizations of tax evasion less effective. . . . By contrast, norms of noncompliance may facilitate rationalizations that the violation is not really a crime, or not so bad, or required so as not to be the only chump paying full freight.”).

365. See Richard C. Stark, *A Principled Approach to Collection and Accuracy-Related Penalties*, 91 TAX NOTES 115, 123 (2001) (“The compliant taxpayer does not want to be the chump for someone who does not pay his taxes but nevertheless shares in the collective benefit . . .”).

366. Griffith et al., *supra* note 360, at 192.

367. See *supra* Part II.

368. See *supra* Section III.B.

369. See WAERZEGGERS & HILLIER, *supra* note 199, at 8 (“While not universal, the practice of publishing private rulings in redacted form subsequent to issuance is considered best practice to promote greater transparency and to further support the general objectives of certainty and consistency of the ruling system as a whole.”).

Ellis wrote in 1999 in a General Report to the International Fiscal Association on the topic of “Advance Rulings,” “many of the advantages to be realised by the existence of a well-structured rulings system can only be realised if the rulings are made available to the public.”<sup>370</sup>

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370. Ellis, *supra* note 23, at 50 (adding that “[i]n the countries that do this, protection of taxpayer privacy is not a major problem”).

