PUBLIC INSPECTION OF IRS PRIVATE LETTER RULINGS

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATION OF THE INTERNAL REVENUE CODE

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

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PUBLIC INSPECTION OF IRS PRIVATE LETTER RULINGS

THURSDAY, NOVEMBER 6, 1975

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATION
OF THE INTERNAL REVENUE CODE
OF THE COMMITTEE ON FINANCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:02 a.m. in room 2221, Dirksen Senate Office Building, Senator Floyd Haskell (chairman of the subcommittee) presiding.

Present: Senator Haskell.

Senator HASKELL. The hearing of the Subcommittee on the Administration of the Internal Revenue Code will commence. This morning, the subcommittee is meeting to consider the issue of the disclosure of private letter rulings and technical advice memoranda issued by the Internal Revenue Service. It has been charged that the failure to disclose such information discriminates against taxpayers who do not have access to this important body of private law which is known only to those who are in regular contact with the IRS' ruling branch.

Of particular concern are the procedural issues, which must be resolved to permit publication. The extent to which the public at large is entitled to participate in the private ruling process, whether the procedures established for such disclosure ought to be statutory, ought to be the exclusive means for disclosure of such information; and finally, what should be the timing in connection with the implementation of such procedures. And, gentlemen, I personally consider this a very important issue, and something that, hopefully, we will shortly resolve.

The first witness today is Mr. Martin D. Ginsburg, chairman of the tax section of the New York Bar Association. Mr. Ginsburg, we are pleased to have you.

STATEMENT OF MARTIN D. GINSBURG, ESQ., CHAIRMAN, TAX SECTION, NEW YORK STATE BAR ASSOCIATION

Mr. GINSBURG. Thank you, Mr. Chairman.

On behalf of the tax section of the New York State Bar Association, and personally, I am delighted to be here. As requested by the subcommittee, I have prepared a written statement which responds to a series of questions propounded in the announcement of this hearing. I ask that the written statement be included in the record.

Senator HASKELL. It will be so included.

Mr. GINSBURG. Perhaps the most useful way for me to set forth the essentials of our position as to public disclosure of private rulings and technical advice memoranda, and to indicate the substance of our written response to the questions I and other witnesses have been asked, is briefly to state the conclusions reached in the statement just submitted. They are as follows.

One, private letter rulings should be subject to public inspection and disclosure. Two, the right of personal privacy of a taxpayer and of third parties must be protected. Three, information that is confidential, as distinguished from personal and private, such as business and financial data, ought to be protected, but the degree of protection to be afforded should be established with due regard to competing public and administrative interests.

Four, present statutory law does not appear to furnish an adequate basis for distinguishing different situations in which competing interests should be awarded different weights. Thus, legislation specific to Internal Revenue Service determinations at the least appears highly desirable, and may well be essential, to the creation and implementation of a sound, disclosure policy.

Five, older rulings—those issued prior to a current date to be specified—if issued after July 4, 1967, should be published.

Senator HASKELL. How do you happen to pick July 4, 1967?

Mr. GINSBURG. I believe, Mr. Chairman, that takes us back to the date of enactment of the Freedom of Information Act.

Senator HASKELL. I see.

Mr. GINSBURG. Taxpayer identifying data should be excised, and in light of administrative burden, the Service should not be obliged to communicate directly with taxpayers and taxpayer representatives as a condition of publishing older rulings issued to them. The disclosure of older rulings should be completed over a reasonable period of time, consistent with the public's right to know and the need to protect the administrative process. We recommend that the more recent older rulings be published first.

Six, in seeking a private ruling in the future, the applicant should be required to specify in detail the information for which protection is sought, and subject to any such reservation, the written consent to publish should be obtained from taxpayers and involved third parties. The Service should establish an administrative mechanism for reviewing determinations as to deletion. In the case of a ruling voluntarily sought, when the material is confidential—as distinguished from personal or private—we do not at this time recommend adoption of a procedure for judicial review.

Senatr HASKELL. May I interrupt you there? This would be, you do not recommend judicial review of what should or should not be published? Is that the error we are talking about?

Mr. GINSBURG. Mr. Chairman, the distinction I am trying to make, and the problem I attempt to deal with, relates to a taxpayer who says, I have confidential business information in this ruling request which, if it is material, may well show up in the private ruling. I do not want that portion of the private ruling to be published. Therefore, excise this confidential material or else take my name off when it is published. We believe the Service should establish an internal mechanism for reviewing determinations of this sort.

But if the Service finally concludes that this material really is not confidential business or financial information, we do not think that the taxpayer should have a right to go to court to upset it.

Senator HASKELL. I understand it. I was understanding it, then. Thank you.

Mr. GINSBURG. On the other hand, when the material is personal and private, we believe the opportunity for judicial review is essential.

Seven, when the ruling sought is "mandatory"——

Senator HASKELL. Now, how do we distinguish between confidential and personal and private?

Mr. GINSBURG. Well, Mr. Chairman, I think Congress did it quite effectively last year in the Privacy Act of 1974, enacted on December 31 of that year. The key words are, a clearly unwarranted invasion of personal privacy. It involves only individual privacy. Reference is made in statute to medical data, for example.

Senator HASKELL. The emphasis being on the word "personal."

Mr. GINSBURG. Yes; personal private.

Senator HASKELL. I see. Thank you.

Mr. GINSBURG. Seven. When the ruling sought is "mandatory," such as a ruling under section 367, identifying data should be deleted before publication.

Eight. Technical advice memorandums should be published, with identifying data deleted.

Nine. Present law as to the extent to which a taxpayer may rely upon or gain comfort from private rulings issued to others is well developed and satisfactory. It should be preserved.

Ten. The efficient processing of private rulings and the avoidance of delay are, we believe, matters of first importance. Arrangements for the disclosure of private rulings should be formulated so as not to interfere with the ruling process.

Eleven. The letter ruling, but not the ruling request or the background file, should be the subject of disclosure. Third parties should not have the opportunity to participate in the development of a private letter ruling sought by another.

Twelve and finally, the development and enactment of appropriate legislation should go forward as rapidly as reasonably possible. Although we do not agree with the proposal in all of its aspects, very recently drafted proposed new section 6110, entitled "Public Inspection of Written Determinations," prepared by the House Ways and Means Committee, provides, in our view, a well-developed base from which an immediate legislative effort may proceed. Because we believe prompt enactment of sound private ruling disclosure legislation to be of great importance, and do not consider prompt enactment of the contemplated tax reform bill to be likely, we urge that serious consideration be given to separation and separate enactment of an appropriately amended version of the private ruling disclosure proposal that now is part of the Ways and Means Committee draft of that bill.

Senator HASKELL. I share your pessimism on tax reform bills, generally, but let me ask a few questions. In determining what is confidential—in other words, if somebody asserts a deficiency against me and I choose to litigate, I am then exposed to the public view unless a court would say, "This part of the record should be sealed." Now, would you apply the same test on private rulings?

Mr. GINSBURG. Mr. Chairman, draft section 6110 does react to this concern. I have the November 3 committee print, which I suppose is about as recent as is available, although I have heard that one or two things have happened since that date over at the House. That draft does provide for in camera determinations in the Tax Court, and it also provides that the person who is attempting to protect an interest may go forward without disclosing his other name. There are technical problems with what has been done on the House side. If one is going to go to the Tax Court—and this seems to be what is contemplated—there is a problem under section 7461 of the Internal Revenue Code, which I believe tells us that everything that the Tax Court has in its records is public. But this, I think, is a matter of draftsmanship, and appropriate reaction should be an amendment to that provision of the code.

Senator HASKELL. Really, what I am asking is the applicable test because the normal contention of any business organization is that everything they have is confidential. I am sure that you are familiar with their normal contentions, and there are some reasonably well-developed principles as to under what circumstances the court record can be closed, and I wondered if you would apply those general principles to the claims of confidentiality, vis-a-vis letter rulings.

Mr. GINSBURG. I might well, Mr. Chairman, if I crossed the threshold, but I would not be prepared to cross the threshold; that is, when the issue is confidential information as distinguished from really personal and private——

Senator HASKELL. That is right, that is right.

Mr. GINSBURG [continuing]. I do not think that it is desirable to get the courts involved at all.

Senator HASKELL. No, but what test will the Service apply? Will they apply the same type of test that a court will apply?

Mr. GINSBURG. I have rarely been able to predict what the Internal Revenue Service was going to do on almost anything.

Senator HASKELL. I am with you, too, but what should we ask them to do?

Mr. GINSBURG. I think that the Service ought to be asked to develop, with some basis of experience, whatever guidelines it is going to use. I think it is very difficult to go to the Service now, before they have any experience with the handling of this problem, and say, "Tell us now exactly what you are going to do and let us etch it in granite." I think that would be unfortunate. The process should develop as things generally develop, in courts and elsewhere.

Senator HASKELL. You do not think some statutory guidance is necessary?

Mr. GINSBURG. I think it likely would prove more mischievous than otherwise.

Senator HASKELL. Generally speaking now, Mr. Ginsburg, obviously you have a great depth and breadth of background in tax matters, and I am sure that you have gotten rulings many times. The real thrust—there are two real reasons that people feel that rulings should be known. One, of course, is that this body of law should be available to everybody else. The other one is that when it is done in camera, so to speak, there is a danger of undue influence being asserted upon the Service by people who are in contact with them constantly, and that this fear of undue influence necessitates public disclosure.

Based upon your background of knowledge and experience in this area, do you consider there is, at least either the danger or appearance of danger of undue influence if we keep these things private?

Mr. GINSBURG. I really do not. I realize that there are those who certainly have respectable opinions, having great concern for the second half of the problem. The first half, the secret law problem, I consider to be a real problem, and that is why the tax section of the New York State Bar Association is very much in favor of the disclosure of the private rulings of the substance. But on the question of undue influence—perhaps I have been just unable to exert very much influence, undue or otherwise, on the ruling process—but it never seemed to me a serious problem. The Service people seem to be somewhat interested in the substance of the argument, but not necessarily in who I am or who I represent.

There may be exceptions to that, of course. There also may be exceptions to the correct processing of taxpayer returns on audit, which I view as a significant problem. But I do not think we would suggest that we should all go in and participate in a little town meeting with the Internal Revenue agent when he audits tax returns.

Senator HASKELL. I think the first reason we do not want a secret law, a body of secret law, probably is sufficient, whether or not we feel there would be undue influence.

Now, your remark brings me to something else. It has been suggested that third parties should be able to intervene in the private ruling request process. What are your observations on this viewpoint?

Mr. GINSBURG. Well, Mr. Chairman, I think that if some of the suggestions that have been put forward, with the best will in the world, for how to improve the product of the ruling process were to be adapted, we would have very little to be concerned about in terms of disclosure of private rulings because there would not be very many of them.

This is an enormous concern. The private ruling process is very important to taxpayers in achieving some degree of certainty in a very complex tax world, and it is no less important to the Internal Revenue Service. Back in 1971 Harold Swartz, who was then the Assistant Commissioner, Technical—in charge of rulings—wrote a letter to Senator Ribicoff, which was subsequently published, in which he made the point very well. The private rulings process promotes compliance. It effects a substantial reduction in potential litigation. It increases the voluntary flow of information regarding private tax planning, and that information facilitates the Service's planning of its own audit procedures. It enables the Service intelligently to recommend changes in the statute and in the regulations.

Now, if you are going to have a private ruling process in which the taxpayer is unable to have any assurance at all that the ruling can be obtained before the date that is required—if the transaction is going to close in 3 months, you really need the ruling within 3 months—then there is no point in going to get the ruling. If you are going to have each private ruling potentially be an adversary procedure with, perhaps, the taxpayer on one side, one or more interest groups on another side, and with the Internal Revenue Service performing a function I cannot comprehend, then there is no way that tax rulings are going to issue in a reasonable time.

The net result is, we just are not going to have any sort of efficient process, and the complexity of the tax law, which is horrible enough, will become that much more horrible.

Senator HASKELL. I thought Congress was always very clear.

Mr. GINSBURG. Yes, but, perhaps, Congress is only clear to Congress. The poor people over in the Service, and the taxpayers, are not always certain what is meant. We think this problem, the interference with the ruling process, is, as I indicated before, perhaps the most important concern in all of this. We are anxious to see private rulings published. We would all like to know what is going on, what the law really is, and I think anyone who is nervous would like to have some sense that the Internal Revenue Service really is not engaging in an affirmative action program for the rich and powerful and the well-connected.

Personally, I have no doubt that it is not, but I think the public, in general, would like to know it. But this does not mean that we should take a process that has built up over a great many years and tear it to shreds.

Senator HASKELL. I understand. Just one last question. Some people have suggested that if we adopt statutory provisions for disclosure of private rulings that there should be some amendment to the Freedom of Information Act barring further acquisition of information relating to letter rulings. Do you have any comment on that?

Mr. GINSBURG. Well, this is all a balancing act, Mr. Chairman. You are balancing concerns that are central to the Freedom of Information Act, whether under that act or through, as we think desirable, legislation that deals specifically with Internal Revenue determinations. You have the problems and concerns of the Privacy Act. You have all of the concerns of the practical administration of the tax law.

It would seem to me that if the legislation, when it emerges, adequately deals with the various concerns and balances them properly, it would be sensible to exclude this area from the generality of the Freedom of Information Act.

If that is not done, then I suppose we can look forward to a great many years of interesting litigation in which, for example, someone may well feel that although special legislation enacted here says that only the private ruling is available and not the ruling file, nonetheless the ruling file can be obtained under the Freedom of Information Act. This will raise all of the problems that I hope your committee and Congress will consider and deal with in the legislation that we would like to see.

Senator HASKELL. Thank you very much, Mr. Ginsburg. I appreciate your being here.

Mr. GINSBURG. Thank you, sir.

[The prepared statement of Mr. Ginsburg, and a letter received on November 11 from Mr. Ginsburg, follow. Oral testimony continues on p. 31.]

PREPARED STATEMENT OF MARTIN D. GINSBURG

My name is Martin D. Ginsburg. I am the Chairman of the Tax Section of the New York State Bar Association. The Section, numbering some 1800 tax practitioners among its members, is the largest regional bar association tax section in the nation. On behalf of the Tax Section, and personally, I very much appreciate the opportunity of addressing the Subcommittee this morning.

The Freedom of Information Act became effective on July 4, 1967. Nearly seven and a half years later, on December 6, 1974, the Internal Revenue Service

proposed new procedural rules with respect to public inspection of certain private rulings and determination letters. The proposed procedural rules were published in 39 Federal Register 43087–43090 on December 10, 1974. On March 25, 1975 the Service conducted hearings on the proposed rules. In contemplation of those hearings, the Tax Section filed written comments with the Service and, on its behalf, I testified at the hearings. Subsequent to the March 25 hearings the Tax Section filed supplemental written comments with the Service. To date the Internal Revenue Service has neither adopted nor republished in amended form the proposed procedural rules for inspection of private rulings and determination letters. The Service has, however, been active in court, defending without notable success to date suits brought by Tax Analysts And Advocates, Fruehauf Corporation and Westvaco Corporation seeking disclosure of heretofore unpublished private rulings.[1]

The failure of the Internal Revenue Service to revise or adopt its proposed procedural rules hardly indicates disinterest. Reticence rather seems a troubled and quite understandable reaction to the difficult problems of conflicting policies that are, or at least may be, embodied in the present statutory framework. This Subcommittee's interest in these problems, and in the likely need for further Congressional direction, is both appropriate and timely.

The current controversy over publication of private ruling letters reflects a tenstion between competing policies. On the one hand, the public's right to know: its right to know the law—to have assurance that there does not exist a body of "secret law"—and to know that the law is being applied with an even hand—to have assurance that the rich and the powerful are not the beneficiaries of an affirmative action program sponsored by the Internal Revenue Service. Ranked on the other side are concerns of personal privacy, trade secrets, business confidentiality, and more. Sensitivity to these concerns is heightened by a growing awareness that confidentiality of tax return information has been substantially eroded in recent years, and a manifest intention on the part of an increasing number of senators and representatives to reverse this trend.[2]

In 1973 the Tax Section of the New York State Bar Association was fortunate in having as the principal speaker at its annual meeting Donald C. Alexander, the Commissioner of Internal Revenue. A feature of our annual meeting is a panel discussion of substantively important private rulings recently obtained by members of the Tax Section and other practitioners throughout the country. Having arrived earlier than the hour appointed for his address, Commissioner Alexander sat in the audience and, I noticed, took notes during the private rulings panel discussion. At least two of the private rulings described by the panel were, in any sense of the term, major pronouncements, signaling new departures in Service thinking far more important than the vast majority of rulings that the Service had published during the preceding year. When, later in the day, the Commissioner rose to address the Tax Section, he wryly noted having learned more about current Service ruling policies during the morning panel than he had the prior six months in Washington. Subsequently, the grapevine informed us, the Commissioner obtained from the Rulings Branch and read the more important rulings discussed by the panel, perhaps to determine if the discussion had been accurate, perhaps to discover the identity of the taxpayers who had received the significant favorable rulings, and perhaps for both purposes.

The Commissioner's reaction to our private rulings panel shows why the public has a need to know. Although it is the policy of the Internal Revenue Service to publish rulings of substantive importance, too often the policy is honored in the breach. This is not because the Service does not care. Undoubtedly it does care. But, undoubtedly too, it is a very busy agency and, as important or more, those charged with evaluation responsibility simply may not realize that a private pronouncement is novel or is otherwise of great commercial significance. The sophisticated practitioner who has obtained the private ruling may reveal it to

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[1] *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F. 2d 350 (D.C. Cir. 1974); *Fruehauf Corp. v. Internal Revenue Service*, 75-2 USTC ¶ 16,189 (6th Cir. 1975); *Westvaco Corporation v. United States*, 75-2 USTC ¶ 9537 (Ct. Cl. 1975) (Trial division). See also *Bernard E. Teichgraeber*, 64 T.C. 453 (1975), in which the Tax Court suggests that private letter rulings sought by plaintiff could be obtained in a Freedom of Information Act case brought in the District Court but refused to permit discovery of them under Tax Court Rule No. 70(b).

[2] Among the bills introduced in this Congress are S. 136, S. 199, S. 442, S. 1511, H.R. 616 and H.R. 5299. S. 199 (companion to H.R. 616), as well as the general problem, is analyzed in "The Privacy of Federal Income Tax Returns," a report by the Committee on Civil Rights of the Association of the Bar of the City of New York, 30 Record of the Association 400 (May/June 1975).

his or her similarly sophisticated colleagues, anticipating equal treatment in return, but less specialized practitioners and the taxpayers they represent may not be let in on the secret. And when a private ruling pronouncement appears startling favorable, perhaps reflecting a sudden change in Service attitudes, there may be some concern, however unwarranted, that the result was influenced by the identity of the taxpayer or the identity of the taxpayer's brother-in-law or the close personal or even political relationship that one or the other of them and a notable of government may enjoy.

The Freedom of Information Act responds to these concerns. But it responds, also, to the countervailing considerations of confidentiality and privacy by permitting the government agency to exempt from public disclosure, among other things, certain national defense and foreign policy information, trade secrets, privileged or confidential commercial or financial information, and personal and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This final category, personal privacy material, is also the subject of the Privacy Act of 1974, which in pertinent part became effective September 27, 1975. Under this statute non-disclosure, discretionary in the agency under the Freedom of Information Act, now is obligatory upon the agency unless the concerned individual requests disclosure or grants prior written consent to disclosure.

The proposed procedural rules of the Internal Revenue Service, relating to public inspection of private rulings and determination letters, analyzed in light of the Freedom of Information Act and, separately, in light of the Privacy Act of 1974 were the subject of two reports prepared and submitted by the Tax Section to the Internal Revenue Service earlier this year. Because these reports furnish the background and detail for many of the comments which follow, a copy of each of them is appended to and made part of this submission to the Subcommittee on Administration of the Internal Revenue Code.

In written and spoken testimony before the Internal Revenue Service, the starting place was present statutory law and the issues were what the procedural regulations could say and—within the realm of the permissible—what the procedural regulations should say. The problems were many. Before this Subcommittee the problems deserving exploration are not greatly different, but because the inquiry is framed in legislative terms that which is permissible and that which is appropriate ought to prove the same. I do not, however, mean to suggest that Congress writes on a clean slate. Obviously it does not. The 1967 Freedom of Information Act, the 1974 amendments to the Act, and the Privacy Act of 1974, all of them products of extensive Congressional effort, provide the canvas and the background.

In advance of this hearing, the Subcommittee's staff has taken steps to focus some of the more important problems by preparing a list of major questions and a sub catalog of derivative concerns. In considering whether, when and how Internal Revenue Service private letter rulings should be made available for public inspection, I will attempt to follow the path laid out by the staff of the Subcommittee.

I. SHOULD PRIVATE LETTER RULINGS BE MADE AVAILABLE FOR PUBLIC INSPECTION?

Yes. If the Commissioner of Internal Revenue found some recent private rulings surprising and important, practitioners in the private sector and through them the taxpayers will be no less interested and impressed. The significant question is not "should." The significant questions are "how" and "when." They reflect the tension between the public's right to know and the right of the taxpayer, and indeed of third parties, to confidentiality and privacy.

A. Including all information contained in the ruling file?

No, and for a variety of reasons.

Public disclosure of the entire ruling file would reflect a conclusion that the public's right to know is a right to know everything, without regard to materiality, confidentiality or personal privacy. Where medical data or other highly personal information is involved, a statutory directive of public disclosure would raise the very constitutional issue to which Congress adverted specifically last year in the opening portion of the Privacy Act.

Required public disclosure of the ruling file, even if highly personal and private information were excised, would raise an issue to which Tax Analysts and Advocates already has adverted. At the March 25, 1975 hearings at the Internal Revenue Service it appeared to be the position of TA/A that, under the Freedom

of Information Act, its representative may arrive each Monday morning at the National Office of the Service and demand and receive a copy of every letter ruling request filed the preceding week. TA/A would obtain these ruling requests, it indicated, in order to review them, select the inquiries of substantive significance, and then participate in the ruling process by advising the Service how it should rule and why. Thus, what has been, at most, a dialogue between the taxpayer's representatives and those of the Service would be converted into a little town meeting, or something more than a little town meeting if additional persons should decide to participate. I find this an uncomfortable notion, in part because the procedure almost certainly would foster extensive delays and in part because the function of the Service in the private rulings process is to analyze and decide, not to mediate. It is a function the Service has performed quite well for a great many years. Respect for the public's right to know neither requires nor encourages interference with the private rulings process.

In sum, I favor disclosure of the letter ruling—expurgated if and to the extent necessary to safeguard protectable interests, as discussed hereafter—but I do not favor disclosure of the file. Since it is far from clear that present law supports this difference in disclosure treatment, legislation is desirable.

B. Personal, private and confidential information

B. Personal, private and confidential information

The Freedom of Information Act permits the Internal Revenue Service, or any other governmental agency, to exempt from disclosure a variety of information including certain national defense and foreign policy information, trade secrets, and privileged or confidential commercial or financial information. Public disclosure or not is in the discretion of the agency. The Privacy Act of 1974 forbids unauthorized public disclosure which would constitute a clearly unwarranted invasion of personal privacy. Personal privacy is individual privacy; the concept does not extend to juridical persons such as corporations.

In its proposed procedural rules, the Service reacted to this statutory scheme in an extreme way. The Service was prepared to withhold from public disclosure national defense and foreign policy information and trade secrets. Other than to grant a postponement limited in time, the Service announced that it would not withhold from public disclosure personal private or confidential business information (not rising to the dignity of a trade secret), and would instead require consent to publication as a condition of obtaining a ruling. It seemed clear the Service was motivated by considerations of administrative convenience.

We are by no means insensitive to administrative inconvenience, and are acutely aware of its easy translation into burdensome delay and public inconvenience. But other concerns are hardly of lesser scope. In relating the competing interests one to another, we would treat personal private information as a case apart, and would consider confidential business and financial data in light of the context in which the issue of disclosure arises.

The approach adopted by the Internal Revenue Service, in the proposed procedural rules to the prospect of a clearly unwarranted invasion of personal privacy was, at the least, surprising. Under the proposed procedural rules the taxpayer applying for a letter ruling, and any other person whose privacy might be infringed, was required to waive in writing and in advance his or her right of privacy. This extraordinary proposal is analyzed in the annexed supplemental report of the Tax Section of the New York State Bar Association and the conclusion reached that the "forced waiver" violates the mandate of the Privacy Act of 1974. Were this conclusion in any doubt, as we think it is not, the statute should be amended promptly to make the illegality clear. The idea that a citizen may be entitled to a tax ruling or to the right of privacy, but never to both, is simply offensive. Thus, we are strongly of the view that without regard to the nature of the pronouncement—a ruling sought by the taxpayer for comfort, a ruling sought because a provision of the Internal Revenue Code requires that it be obtained, or a technical advice memorandum—the right of personal privacy of a taxpayer or of a third party must be protected.

The protection of confidential business or commercial data, as distinguished from information personal and private, is a legitimate concern although, in our view, one of different quality. If, for example, the owner of a small corporation who proposes to sell its stock voluntarily applies for a private ruling and discloses confidential financial and business information which may include the proposed purchase price and terms, the transaction later fails for reasons unrelated to the tax ruling that in fact issued, and the data has become public information available to competitors and potential new purchasers, the taxpayer has

been placed at an enormous disadvantage unaccompanied by any discernible advantage to the legitimate public interest. Contrary to the proposed procedural rules, the taxpayer should have the opportunity to convince the Internal Revenue Service that his confidential data should remain confidential and should not be disclosed. Of course, there will be cases in which confidential financial or business information is vital to the resolution of the issue that prompted the ruling request. In that circumstance the data ought to be reflected in the ruling, since by hypothesis the public's interest in knowing is substantial, but it may well be that competing interests can be appropriately balanced by deleting from the published letter ruling the taxpayer's name and other identifying data. The decision, in the case of a ruling sought "for comfort," whether and how to maintain confidence we would be prepared to leave to the Service. But there should be a mechanism in the Service for reaching this determination on the particular facts; public disclosure of confidential information should not be automatic.

When a taxpayer seeks a private ruling because a provision of the Code (e.g. section 367) requires that a ruling be obtained, and confidential business or financial data is in issue, we would resolve the matter differently. It seems to us wrong that the taxpayer be obliged to seek and obtain a private letter ruling and forced to risk injurious disclosure of confidential information. If the information in fact is confidential, it ought to be protectable and the publicly disclosed letter ruling should omit the confidential data or the identifying data. While omission of either might be appropriate in a given case, if a uniform approach is to be taken it is the taxpayer identifying data that should be deleted.

Finally, if technical advice memoranda are to be made public, as we believe they should, in light of the audit process involvement we would afford the taxpayer a high degree of protection. Without regard to the specific factual data disclosed in the technical advice memorandum, we would recommend a uniform approach under which taxpayer identifying data is deleted in all cases.

C. Taxpayer identification

When disclosure of the taxpayer's identity will result in a clearly unwarranted invasion of personal privacy, that disclosure is forbidden by current law. It should remain so. As set out above, in certain other cases non-disclosure of the taxpayer's identity appears appropriate. Should the general rule be that all substantive information will be disclosed, but the identity of the taxpayer will not be disclosed?

Laying aside the case of the taxpayer that is a publicly held corporation, a strong argument for nondisclosure of the taxpayer's identity, even in the case of "voluntary" rulings, was advanced during the course of the March 25 hearings before the Internal Revenue Service on the proposed procedural rules. The proponent of the argument was Mr. Sidney I. Roberts, an eminent tax practitioner. A contrary argument can be, and has been, grounded on the public's right to know who has obtained a favorable ruling, particularly if that ruling is or appears to be specially favorable. The obvious case is the applicant who is an important public figure. The less obvious but no less significant case is the applicant, himself or herself out of the public eye, who is related by blood, marriage, business, friendship or generosity to an important public figure.

In the discussions that led to the filing of reports with the Internal Revenue Service last spring, the Executive Committee of our Tax Section wrestled with this problem. Although recognizing the merits of the argument in favor of never disclosing the taxpayer's identity, we were unable to conclude that the taxpayer's interest outweighs the public's interest in knowing, in the generality of cases. Thus, we did not recommend to the Service, and I do not recommend to this Subcommittee, that the identity of the taxpayer inevitably be reserved from public disclosure.

2. WHAT PROCEDURE SHOULD BE ESTABLISHED CONCERNING THE INFORMATION TO BE MADE AVAILABLE FOR PUBLIC INSPECTION?

A. Delineation by the taxpayer

For the reasons stated in the first of the reports submitted by the Tax Section to the Internal Revenue Service, it should be the taxpayer's obligation to delineate with particularity the information he or she seeks to be withheld from public inspection, and to articulate the reasons for nondisclosure. As a voluntary adjunct to the listing, proposing the form of ruling for publication may be helpful—wholly unrelated to the problem of disclosure, taxpayers today are permitted to submit draft ruling letters and often do so—but it responds to the problem only in part. If the ruling request is itself subject to public inspection, then the

taxpayer must go further and, in effect, submit the request in two forms, one for the public file and the other for the sealed file. This is a possible solution, and one that is discussed in the appended copy of our original report to the Service, but it is awash with difficulty. Again, the better approach, we think, applies the principle of disclosure to the letter ruling or, more accurately, to the version of it that does not contain non-disclosable material (such as the taxpayer's name when the invasion of personal privacy is in issue), and exempts from public inspection the ruling request. The Internal Revenue Service has issued published rulings, on which all taxpayers are encouraged to rely, time out of mind, and the system has worked quite well although the original private ruling request that led to ultimate publication never has been publicly disseminated.

Since it is hardly clear, under the present version of the Freedom of Information Act, that the ruling request is exempt from public inspection, we recommend that the matter be appropriately clarified by legislation.

To protect the Service, and to be sure the taxpayer understands his private ruling will be published, every applicant should be required to file along with the ruling request a written consent to publication (incorporating the taxpayer's requests, if any, for specific nondisclosures, delay in publication, or both).

B. The taxpayer's objections

The proposed procedural rules specify that the taxpayer, at the time the ruling request is filed, may submit with it a claim for non-disclosure. The Service will deal with the claim as a matter of first priority, and if the claim is denied the taxpayer may withdraw the ruling request and the challenged information will not be published. Although we would amend the Service's approach in other respects, we find the Service's approach to this aspect of the matter to be, in general, a reasonable one. There are, however, two classes of cases that present special concerns. One class encompasses cases in which the taxpayer seeks to avoid an unwarranted invasion of personal privacy; here, we think, the taxpayer should be permitted recourse to the courts to review a Service determination that no issue of personal privacy has been presented and that the taxpayer must either permit disclosure or withdraw. The other class involves cases in which the taxpayer seeks a ruling, not for comfort but because a provision of the Internal Revenue Code mandates obtaining a favorable ruling in advance of the transaction. If, for example, the ruling applicant claims trade secret protection and the Service sees no trade secret, the opportunity of immediate judicial relief should be available.

It is not impossible that the approach of the Service to claims of commercial confidentiality in nonmandatory ruling applications will prove unduly restrictive, demonstrating a need for an available expeditious judicial remedy. If so, Congress can provide it. But there is no basis currently to anticipate a rigid or unreasoning Service attitude, and we do not urge that Congress furnish a remedy for which there may be no ill. We would favor adoption by the Service of a reasonable procedure for expeditious internal administrative review of disputes. But we are concerned that a broad invitation to use of the courts may have its primary impact in further delaying the letter ruling process, to the detriment of all taxpayers and the legitimate advantage of very few if any.

C. Timing of dispute resolution

For the reasons indicated under the preceding heading, issues relating to public disclosure ought to be resolved at the threshold whenever possible. Unless it has a desire so to do, the Internal Revenue Service should not be obliged to devote its resources to resolving the merits of requested rulings if, in the final hour, the taxpayer may act to bar public disclosure of the formulated response.

D. Judicial recourse

As indicated above under heading number 2(C), a taxpayer's recourse to the courts would appear appropriate in two classes of ruling cases, when the right of privacy is involved and when an advance favorable ruling is mandatory. A separate class of cases, technical advice memoranda, also merits court consideration. We do not at this time recommend broader access to the courts, for the reasons earlier stated.

E. Request for delay

The proposed procedural rules would permit a ruling applicant to request delay in public inspection not to exceed 18 weeks from issuance of the ruling where earlier public inspection would threaten serious harm or violation of law. Further administrative flexibility as to the period of delayed access may be highly de-

sirable in some cases. On a proper showing, the taxpayer should be able to obtain delay in public disclosure for longer periods of time, in some cases until the transaction has been completed and, in rare cases, beyond. Legislative support would seem desirable.

F. Maintaining information for public inspection

The Internal Revenue Service should be required to index and maintain private rulings and to keep such information available for public inspection for so long as may be reasonable. Factors pertinent to the determination of what is reasonable would include the extent of the burden upon the Service, which may in turn depend upon the extent to which the Service will make use of the index and files in its own processes, and whether the material is available to the public from other sources. For example, if commercial tax services and such specialized services as Lexis become a readily available source of private ruling materials, the public probably will have little occasion to consult directly the index and files maintained by the Service.

3. SHOULD TECHNICAL ADVICE MEMORANDA BE MADE AVAILABLE FOR PUBLIC INSPECTION AND SHOULD PROCEDURES BE ADOPTED FOR MAINTAINING ANONYMITY OF THE TAXPAYER WHO MAY BE THE SUBJECT OF SUCH MEMORANDA?

At first the Internal Revenue Service, in court, succeeded in preserving the confidence of technical advice memoranda. More recently, in the Sixth Circuit in the *Fruehauf* case it failed. Viewed in terms of the policy that underlies the Freedom of Information Act, it is difficult to see why Service determinations of matters of substantive tax law as enunciated in technical advice memoranda should stand on a footing different from determinations made in private letter rulings. A basis for distinguishing one type of pronouncement from the other does, however, reside in the "tax return" concept. We recommend the distinction be honored by excising identifying data and, as appropriate, numerical information from published technical advice memoranda.

4. WHAT INTERIM RULES SHOULD BE ADOPTED FOR THE PROCESSING AND DISCLOSURE OF RULINGS ISSUED PRIOR TO THE EFFECTIVE DATE OF ANY PUBLICATION PROCEDURE WHICH MAY BE FINALLY ADOPTED?

A. Disclosure

The important private letter rulings, discussed at the 1973 annual meeting of the Tax Section, that interested both the practitioners in attendance and the Commissioner of Internal Revenue, to this date remain unpublished. The Freedom of Information Act became law in 1967. Subject to adequate taxpayer safeguards, discussed below, letter rulings issued since the time the Act became law ought to be public information.

B. Extent of disclosure

Taxpayers and their professional representatives filing ruling requests today are fully aware of the potential of public disclosure. For many and probably most, this is a recent awareness. Taxpayers who requested and obtained rulings in earlier times, even though subsequent to the promulgation of the Freedom of Information Act, are not undeserving of protection. There is, also, a significant interest in avoiding the placing of an undue administrative burden upon the Internal Revenue Service, as regards the enormous number of private rulings, lest the disclosure of old rulings substantially impair the processing of current ruling requests. While it is not surprising the Service, at least at one time, apparently wished to place the burden of objection upon the taxpayers and taxpayer representatives who obtained the older rulings, one may legitimately question the fairness of the procedure.

Quite apart from the issue of fairness, there is good reason to wonder whether the Service could protect itself in this manner. Given the vast number of private rulings that issued since July 4, 1967, inevitably there must be a number that contain information the disclosure of which would constitute—or might be held to constitute—a clearly unwarranted invasion of the personal privacy of an applicant or of a third party. Under the Privacy Act of 1974, it would seem, disclosure by the Service, not pursuant to prior written consent, would be illegal. It is of some comfort to the Service to realize that information that was commercially confidential a few years ago is less likely to be so today,

but highly personal and private information is quite likely to remain personal and private.[3]

The factors pertinent to disclosure—the public's right to know, the taxpayer's (and third parties') right to privacy and confidentiality, the Service's administrative concerns and everyone's interest in the efficiency of the letter ruling process—remain the same, but when the focus is upon publication of tens of thousands of older rulings these factors take on different weights. We believe the substantive content of the earlier letter rulings ought to be disclosed,[4] but recommend deletion of all taxpayer identifying data. We recommend against adoption of any procedure under which the Internal Revenue Service would be obliged to communicate with the enormous number of taxpayers who obtained letter rulings in the past. Adoption of such a procedure, we believe, would excessively burden the Service and, if the objective were to disclose taxpayer identity and confidential information unless objection is lodged, magnify opportunites for unfairness and dispute.

C. Contact with ruling recipients

For the reasons stated, we recommend against adoption of a procedure that would require the Internal Revenue Service to communicate with taxpayers (or taxpayer representatives) who earlier sought and obtained a letter ruling.

D. Resolution of disputes

If, contrary to our recommendation, older rulings may be published with names or identifying data disclosed therein, and the taxpayer (or a third party) objects to the inclusion of specific information on grounds that are acceptable under the Freedom of Information Act, the potential of serious difficulty will be presented. The person seeking disclosure, whether Tax Analysts and Advocates or anyone else, may challenge a Service determination that bars full disclosure. If, on the other hand, the Service refuses to grant exemption from disclosure, the taxpayer will have recourse to the courts if the right of personal privacy is in issue and conceivably may have judicial recourse if any of the discretionary exemptions enunciated in the Freedom of Information Act is in issue. The potential of extensive litigation and of conflicting resolutions argues in favor of a uniform approach under which substantive information is published but identifying data is not.

5. ONCE IT IS DECIDED THAT PRIVATE RULINGS SHOULD BE OPEN TO PUBLIC INSPECTION, WHAT KIND OF PRECEDENT SHOULD SUCH RULINGS BE ACCORDED FOR THE PURPOSES OF OTHER RULING REQUESTS?

A. Similar transactions

It has been reported that the Internal Revenue Service initially took the position that, if private letter rulings are to be published, the Service will have the obligation of being right the first time. If the Internal Revenue Service succeeds in being right the first time every time, it will have managed to reverse the whole trend of human experience.

It would seem more realistic to suggest that the Service has the obligation of trying to be right the first time. Even this more modest goal generates concern. As was pointed out in "A Report on Complexity and the Income Tax," prepared by the Committee on Tax Policy (1970–1971) of the Tax Section of the New York State Bar Association, published in 27 Tax L. Rev. 325 at 363–365 (1972), there is an overriding need for expeditious treatment of private ruling requests. It was the conclusion of the Report that the desirability of certainty, manifested in the expeditious issuing of private rulings, outweighs the possibility of error in a few cases resulting from incomplete consideration of the issues presented. The private ruling process already encompasses unpalatable delays; a belief that every ruling is etched in granite and must be "right" can only exacerbate that situation, to the disadvantage of taxpayers in general and of the overall tax system in which the rulings process plays a major role.

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[3] Indeed, it has been held by the Court of Appeals for the Second Circuit that privacy may be invaded by fresh disclosure of sensitive information that was known to others at one time but since has been forgotten. See *Rose v. Department of the Air Force*, 495 F. 2d 261 (2d Cir. 1974).

[4] It has been suggested that change of accounting method rulings issued under section 446(e) of the Internal Revenue Code, which comprise a significant percentage of the older letter rulings, generally are routine in nature and might be excluded from public disclosure without measurable disadvantage to the public's right to know. Particularly as the disclosure will be of the letter rulings only and not of the ruling files, we would agree with this suggestion.

A brief review of the current state of the law may be useful.

It is conventionally, and in general accurately, stated that a private letter ruling cannot be used or relied upon by a taxpayer other than the one to whom it was issued.[5] Only in the rarest case of extreme competitive disadvantage coupled with a showing of knowledge and diligence on the part of the aggrieved taxpayer has a court refused to sanction differential treatment.[6] In all other circumstances, determinative reliance upon another's private letter ruling is not available.[7]

In some situations under current law, however, a taxpayer who did not obtain a favorable private ruling of his own may gain advantage from favorable private rulings issued to others, at least if there are enough of them and their existence well known. In *Hanover Bank, Exr. v. Commissioner*, 369 U.S. 672 (1962), the United States Supreme Court was asked to rule on the meaning of a provision of the 1939 Code that had been the subject of a series of private letter rulings. The private rulings were uniformly favorable to the taxpayers who sought them. The taxpayer at bar had not obtained a private letter ruling but had known of the series of favorable pronouncements at the time he engaged in the transaction in question. The Court stated:

> Persuasive evidence that we are correct in our interpretation of Section 125 [of the 1939 Code], as bolstered by its legislative history and subsequent amendments, may be found in the respondent's own prior construction of the statute.... Furthermore, although the petitioners are not entitled to rely upon published private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws. And, because the Commissioner ruled, in letters addressed to taxpayers requesting them, that amortization with reference to a special call price was proper under the statute, we have further evidence that our construction of allowable bond premium amortization is compelled by the language of the statute.

We believe the law as it has developed to date—except in the rarest of circumstances one taxpayer may not rely directly upon a private ruling issued to another, but may gain comfort (although not assurance) from a publicized body of consistent private ruling pronouncements—is sound and accords with the reasonable expectations of taxpayers and their representatives. The burden of changing the law, we think, should be upon the proponent.

If present law is confirmed in an era of private ruling disclosure, it should be made clear that, notwithstanding the prior issuance of contrary letter rulings or technical advice memoranda to other taxpayers (or to the same taxpayer in another transaction), the Internal Revenue Service—except in the rarest case of extreme competitive disadvantage—may adopt a different position in a ruling, in a technical advice memorandum, on audit or in litigation if it concludes that its prior position was incorrect as a matter of law. If, prior to changing its mind, the Service has issued a substantial number of consistent favorable private rulings to all who sought them, the Service must anticipate heightened judicial scrutiny if correctness of the new position is tested in litigation. But if the Service was wrong in the past, it must be allowed to be right in the future.

In sum, we urge that the well recognized distinction between private letter rulings, no matter how well known to practitioners, and published revenue rulings be maintained. Private letter rulings do not and should not set the law as to those taxpayers who have not themselves obtained private rulings. A contrary approach, requiring that the Service be right the first time, would greatly delay and in our view irreparably injure the private ruling process.

B. Correction of error.

The taxpayer who has obtained a favorable private letter ruling and relied upon it is entitled to a high degree of protection. Under current law, if a private ruling later is found by the Service to have been legally wrong (not as the result of an omission or misstatement of material facts or of a change in applicable law), the power retroactively to revoke or modify normally will not be exercised against the taxpayer who has relied in good faith provided the facts as sub-

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[5] Treas. Reg. § 601.201(l)(1). See also Proposed Procedural Rule § 607.703(e).

[6] See *International Business Machines Corp. v. United States*, 343 F. 2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966). *Cf. Queen's Way to Fashion, Inc. v. United States*, 749 CCH ¶ 7905 (Ct. Cl. 1974) (Trial Commissioner's Report), *vacated*, 74-1 USTC ¶ 9387 (Ct. Cl. 1974).

[7] See, e.g., *Weller v. Commissioner*, 270 F. 2d 294 (3d Cir. 1959); *Carpenter v. Commissioner*, 322 F. 2d 733 (3d Cir. 1963); *Bornstein v. United States*, 345 F. 2d 558 (Ct. Cl. 1965); *Knetsch v. United States*, 348 F. 2d 932 (Ct. Cl. 1965); *Shakespeare Co. v. United States*, 389 F. 2d 772 (Ct. Cl. 1968); *Bernard E. Teichgraeber*, 64 T.C. 453 (1975).

sequently developed do not prove materially different from the facts on which the ruling was based.[8] This is a formulation that has worked well. It should not

6. WHAT CHANGES WOULD BE APPROPRIATE CONCERNING THE PUBLICATION OF REVENUE RULINGS IF PRIVATE LETTER RULINGS ARE HELD TO BE OPEN FOR PUBLIC INSPECTION? SHOULD THERE BE GREATER RELIANCE ON GUIDELINE TYPE REVENUE PROCEDURES?

Consistent with the previously expressed view that private letter rulings, although subject to public disclosure under the Freedom of Information Act, should not qualify as precedent upon which other taxpayers may fully rely, it is urged that the publication of revenue rulings be continued. I would add that public disclosure of private rulings may improve the revenue ruling process. Knowledgeable and concerned tax practitioners, it is to be hoped, will inform the Service that specific private rulings are of substantial commercial importance, thus encouraging the Service to focus upon these significant pronouncements and, with such revisions or additions as further consideration produces, to publish them as a revenue ruling.

Publication by the Service of guideline type revenue procedures seems worthy of encouragement, whether as part of or independent of the public disclosure of private letter rulings.

7. SHOULD THIRD PARTIES BE GRANTED A RIGHT TO QUESTION THE RESULTS REACHED IN SPECIFIC RULINGS? SHOULD THIS RIGHT BE EXERCISED THROUGH A HEARING PROCEDURE WITHIN THE IRS OR THROUGH A JUDICIAL PROCEEDING? WHAT PARAMETER SHOULD BE PLACED ON PERSONS AUTHORIZED SO TO INTERVENE?

Third parties do not have the right to challenge the results reached in tax return audits. Nor may third parties intervene as of right in the Service's internal process of developing revenue rulings for publication. On relatively rare occasions the Service may solicit suggestions and comments as an aid in the development of a revenue procedure, but the use of the information obtained and the final product are up to the Service.

I can conceive no sufficient reason why third parties should have greater rights of challenge and intervention in the formulation of private letter rulings than they have in the audit process or the revenue ruling process. Here again the risk of delaying the private ruling process is patent, and whatever questionable advantage might accrue to the taxing system through permitting third parties to challenge and intervene would, in my judgment, be vastly outweighed by the delays that would attend. If, when a published revenue ruling has issued, someone finds it an incorrect interpretation of law, he or she is free to communicate the basis of displeasure to the Service. If the commentator is correct and the ruling wrong, in a reasonable world we may expect the Service to confess error.[9] But the taxpayer who obtained and in good faith relied upon the private ruling, upon which the later corrected revenue ruling was based, normally is not adversely affected by the change. There is no reason why a different procedure should apply in the case of disclosed private rulings.

8. WHAT WOULD BE MY ASSESSMENT OF THE IMPACT OF PUBLIC DISCLOSURE OF PRIVATE LETTER RULINGS UNDER THE PRECEDURES MENTIONED ABOVE ON THE EXISTING IRS RULING SYSTEM?

The answer, I think, in large part depends upon the Service's attitude toward the precedential value of the private letter rulings. Undoubtedly the Service will, as undoubtedly it should, make strong efforts to issue private rulings that are correct and consistent with other pronouncements of the Service. This, after all, is what the Service has been attempting to do, with reasonable but not invariable success, for decades. But probably it will try a little harder, perhaps layering another level of review into the system for some or even all types of rulings. This may improve the product to some extent and more probably will delay the process to some greater extent. Modest additional delay, in my judgment, is more than merely undesirable. It is a gross misfortune.

And if the Service truly perceives a need to be inevitably correct the first time out, even though that goal cannot conceivably be attained, there will be more than

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[8] Statement of Procedural Rules § 601.201(l)(5).

be changed.

[9] This does in fact occur. Rev. Rul. 73-53, 1973-1 Cum. Bull. 219, revoking Rev. Rul. 72-60, 1972-1 Cum. Bull. 139, is a case in point.

modest delay. The system cannot afford more delay. Too many taxpayers will conclude that a private ruling that cannot with assurance be obtained by the day it is required is a private ruling not worth seeking. The Internal Revenue Service relies upon the private ruling process as a major source of invaluable information concerning the commercial world, and as a vital mechanism whereby burdensome controversies are avoided and reasonable certainty is afforded to taxpayers and the Revenue alike. It is a matter of the first importance that public inspection of private letter rulings not be allowed to impair a heretofore successful system.

SUMMARY

The following is a summary of our main conclusions.

1. Private letter rulings should be subject to public inspection.

2. The right of personal privacy of a taxpayer and of third parties must be protected.

3. Information that is confidential (as distinguished from personal and private) such as business and financial data, ought to be protected, but the degree of protection to be afforded should be established with due regard to competing public and administrative interests.

4. Present statutory law does not appear to furnish an adequate basis for distinguishing different situations in which competing interests should be awarded different weights. Thus, legislation specific to Internal Revenue Service determinations at the least appears highly desirable and may well be essential to the creation and implementation of a sound disclosure policy.

5. Older rulings—those issued prior to a current date to be specified—if issued after July 4, 1967 should be published. Taxpayer identifying data should be excised and, in light of administrative burden, the Service should not be obliged to communicate directly with taxpayers and taxpayer representatives as a condition of publishing older rulings issued to them. The disclosure of older rulings should be completed over a reasonable period of time, consistent with the public's right to know and the need to protect the administrative process. We recommend that the more recent older rulings be published first.

6. In seeking a private ruling in the future, the applicant should be required to specify in detail the information for which protection is sought and, subject to any such reservation, the written consent to publish should be obtained from taxpayers and involved third parties. The Service should establish an administrative mechanism for reviewing determinations as to deletion. In the case of a ruling voluntarily sought, when the material is confidential (as distinguished from personal and private) we do not at this time recommend adoption of a procedure for judicial review. When the material is personal and private, we believe the opportunity for judicial review is essential.

7. When the ruling sought is "mandatory," identifying data should be deleted before publication.

8. Technical advice memoranda should be published, with identifying data deleted.

9. Present law as to the extent to which a taxpayer may rely upon or gain confort from private rulings issued to others is well developed and satisfactory. It should be preserved.

10. The efficient processing of private rulings and the avoidance of delay are, we believe, matters of first importance. Arrangements for the disclosure of private rulings should be formulated so as not to interfere with the ruling process.

11. The letter ruling, but not the ruling request or background file, should be the subject of disclosure. Third parties should not have the opportunity to participate in the development of a private letter ruling sought by another.

12. The development and enactment of appropriate legislation should go forward as rapidly as reasonably possible. Although we do not agree with the proposal in all of its aspects, very recently drafted new section 6110 entitled "Public Inspection of Written Determinations," prepared by the House Ways & Means Committee[10] provides, in our view, a well developed base from which an immediate legislative effort may and should proceed. Because we belive prompt enactment of sound private ruling disclosure legislation to be of great importance, and do not consider prompt enactment of the contemplated Tax Reform Bill to be likely, we urge that serious consideration be given to separation and separate enactment of an appropriately amended version of the private ruling disclosure proposal that now is part of the Ways & Means Committee draft of that bill.

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[10] § 1210(a), House Ways and Means Committee Print of Draft Tax Reform Bill.

PUBLIC INSPECTION OF INTERNAL REVENUE SERVICE LETTER RULINGS

APPENDIX TO PREPARED STATEMENT OF MARTIN D. GINSBURG

1. Comment on Proposed Procedural Rule § 601.703 and Proposed Amendments to Procedural Rules Sections 601.201 and 601.702, Relating to Public Inspection of Rulings and Determination Letters.
2. Supplemental Comment on Proposed Procedural Rule § 601.703 and Proposed Amendments to Procedural Rules Sections 601.201 and 601.702, Relating to Public Inspection of Rulings and Determination Letters.

NEW YORK STATE BAR ASSOCIATION—TAX SECTION

Comment on Proposed Procedural Rule § 601.703 and Proposed Amendments to Procedural Rules Sections 601.201 and 601.702, Relating to Public Inspection of Rulings and Determination Letters.

(By M. Carr Ferguson, Chairman, Committee on Practice and Procedure)

The decision of the Court of Appeals for the District Columbia in the case of *Tax Analysts and Advocates, Thomas F. Field, et al.* vs. *Internal Revenue Service, et al.*, F.2d (D.C. Cir., 1974), 74-2 USTC ¶ 9635, held the past private rulings procedures of the Internal Revenue Service inconsistent with the requirements of the Freedom of Information Act (FOIA), 5 USC § 552. The proposed amendments to Procedural Rules §§ 601.201 and .702 and the proposed new procedural rule Section 601.703 are designed to respond to *Tax Analysts* and to make certain other incidental changes in the private rulings procedures. While recognizing the necessity of conforming these regulations to *Tax Analysts* and the FOIA, we believe the proposed rules overreact to the judicial decision in some respects and would unnecessarily discourage taxpayers from seeking private rulings where they are unable or unwilling to make a blanket waiver of confidentiality and rights of privacy. Such a broad invasion of privacy rights seems quite unintended either by the Court of Appeals or Congress. See S. Rep. No. 93-854, 93d Cong., 2nd Sess., p. 32.

In offering the following specific comments and recommendations, we have to bear in mind that the balance struck by Congress and the Courts between the public's right to know and individual taxpayers' right to confidentiality must be articulated in rules capable of efficient administration. We recognize that the administrator's task is necessarily complicated, however, by these competing interests and that some additional burden and delay in issuance of rulings is probably unavoidable in the case of several of our suggestions. We have felt, however, that such burdens are a lesser evil than the exaction of unjustifiably broad waivers of confidentiality as the price of obtaining a letter ruling.

Waiver of Confidential Treatment.—Proposed Rule § 601.201(e)(16)(i) and (17)(i) would require a request for a ruling or determination letter to contain a blanket waiver of confidential treatment with respect to all information "contained in the ruling, determination letter or acknowledgement of withdrawal issued" and "*all other materials included in the file connected with the request.*"[1] An exception is provided only to the extent information is furnished in a separate document with respect to which the taxpayer claims confidential treatment on the grounds that the information constitutes a trade secret or is to be kept secret as a matter of national defense or foreign policy under criteria to be established under appropriate executive order. No such waiver seems required either by the FOIA or the decision in *Tax Analysts*.

Requiring it of ruling applicants would seem to aggravate unnecessarily the problems foreseen by the Government in its brief to the Court of Appeals in *Tax Analysts*: (1) hesitancy of taxpayers to seek guidance; (2) burdensome administrative procedures for sorting accessible from privileged material and its storage, and (3) decline in the willingness of the Service to rule on points which have not been subjected to timely (and expensive) review. See Government's Court of Appeals Brief in *Tax Analysts* at pp. 43-45. See also the summary of benefits of the private rulings program by Harold Swartz; former Assistant Commissioner (Technical) in his letter of August 15, 1971 to Senator Ribicoff,

[1] Extending the waiver beyond rulings, determination letters and acknowledgments of withdrawals of ruling requests seem to ignore Proposed Reg. § 601.703(b)(1), which restricts public inspection to the texts of these documents—a restriction consistent with FOIA § 522(a)(2). See pp. 5-6, *infra*.

quoted in Reid, "Public Access to Internal Revenue Service Rulings," 41 George Washington Law Review 23, 33–34 (1972), where Commissioner Swartz emphasized the desiderata of permitting taxpayers to rely upon the tax consequences of proposed transactions, promoting of compliance and reduction of litigation as well as benefitting the Service by increasing the voluntary flow of information regarding private tax planning which facilitates the Service's planning its own audit procedures and recommending appropriate changes in the laws or regulations.

Because of the chilling effect of a waiver of privacy on the private rulings program, we recommend elimination of the waiver requirement and its replacement by a formal acknowledgement that any information contained in the application (or attachments or exhibits thereto) *incorporated* in the requested ruling, determination letter or acknowledgement of the withdrawal of the request therefor is subject to disclosure under the provisions of the FOIA, except as to those facts which the applicant specifically claims to be exempt. Even as to these, the applicant can only request the Service to *attempt* to insulate them from disclosure and alert the applicant of attempts to discover them, but this would be a substantial improvement. The language of the proposed rule, requiring the waiver of "any right to confidential treatment" is simply too broad. There seems no good reason why the Internal Revenue Service should extend access to its files beyond the rights of access already conferred by the FOIA itself. The waiver would obviously remake any defense or obligation the Service or the applicant might otherwise interpose to a contested claim to access. We recognize the Service's legitimate concern that it not be placed in the position of resolving conflicting claims by a ruling applicant and a party seeking access to information in the ruling. A simple acknowledgement should both accomplish this and alert the applicant and the Service to any area of claimed privilege without the undesirable consequences of the blanket waiver.

Whether an acknowledgement or a waiver is required, however, the Regulation should describe the permitted exceptions thereto by a simple reference to *all* of the exemption provisions in the FOIA. The proposed blanket waiver seems to recognize only the "trade secrets" and "national defense or foreign policy" exemptions of FOIA Section 552(b) (1) and (4). It does not take note of the exemptions for privileged or confidential commercial or financial information in Section 552(b)(4); personnel, medical or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy in (b)(6); the exemption for matters specifically exempted from disclosure by other statutes in (b)(3); regulatory agency condition reports and similar documents exempted in (b)(8); geological data concerning wells in (b)(9), or other matters which from time to time may fall within one or more of the other exemptions in Section 552(b). Under a simple acknowledgement, the burden would still be upon the applicant to specify those materials or data which he claimed fell within one of the exemptions, and the process for resolving disagreements betweeen the rulings division and the applicant in this regard could proceed under the balance of the proposed rule as is already anticipated in connection with the blanket waiver. The Court of Appeals decision in *Tax Analysts* noted the availability of the commercial information and trade secrets exceptions to the FOIA disclosure requirements as necessary guarantys against unwarranted and damaging invasions of a taxpayer's privacy. The best interests of both applicants and the Service is clearly served by interpreting these exceptions liberally in establishing regulatory guidelines for disclosure. If we are correct in our belief that the private rulings program is in the public interest, it should not be unduly crippled by requiring a waiver of confidentiality exceeding that necessitated by the FOIA.

Requirement of such a broad waiver as a condition to a ruling seems particularly questionable in the case of so-called "mandatory" ruling requests, such as those under §§ 367, 442 and 446(e) which are covered explicitly by the Proposed Regulations. In these areas, the Service's private ruling function can not be regarded as a gratuitous, discretionary consideration to taxpayers to which the Service may attach unilateral conditions not required by statute. Just as taxpayers are compelled to apply for such rulings before legislatively intended tax consequences flow from transactions, so the Service has an affirmative duty under these sections to rule. Requiring an unnecessarily broad waiver of confidentiality in such cases would do much more than simply deny taxpayers needed guidance; it would force them to the choice of unintended tax penalties or a public exposure of information which may be even more damaging or embarrassing.

Discoverability of the Ruling Request and File.—Proposed Reg. § 601.703(b)(1) provides generally for disclosure of the full text of all rulings, determination letters, acknowledgements of withdrawals of requests therefor and an appropriate index thereto. No mention is made of public inspection or copying of the ruling request or file papers. Disclosure of ruling applications does not seem required by FOIA § 522(a)(2), since they do not constitute Service "opinions, . . . statements of policy and interpretations" or "identifying information . . . as to any matter issued." A more difficult question is whether they constitute "records" independently discoverable under FOIA § 522(a)(3). The comments on these Proposed Regulations submitted by *Tax Analysts* and Advocates ("TAA") January 10, 1975, at p. 7, argue that they constitute "identifiable records," a phrase which was removed from the FOIA by P.L. 93–502 on November 21, 1974, effective February 19, 1975. The legislative history of this change, however, makes it clear that the amendment was intended to liberalize disclosure. See S. Rep. No. 93–854, 93d Cong., 2d Sess., pp. 9–10 and H. Rep. No. 93–576, 93d Cong., 2d Sess., pp. 5–6.

The foundation of TAA's claim for support for this argument in the district court opinion in *Tax Analysts* is doubtful. The district court did treat letter rulings themselves as "records" but did not similarly characterize applications therefor, nor even deal specifically with the issue. Disclosure of ruling requests as § 522(a)(3) "records," (which, unlike the § 522(a)(2) rulings, are not required to be indexed by the FOIA) is not compelled by the language of the Act, and would seem feasible only if no preliminary questions of privilege or privacy had been raised by the applicant. We therefore support the proposed Regulation; we recognize, however, that the TAA's position may ultimately prevail. Accordingly, we suggest within immediately following paragraphs that a rulings applicant be accorded the option of submitting a parallel ruling request with identifying data removed.

Anonymity. The proposed rule does not provide a vehicle for excluding names, addresses and other identifying data from public inspection. While this may be relatively unimportant in the case of publicly held companies, it can be extremely detrimental to individuals. Section 552(a)(2) of the FOIA provides for the deletion of "identifying details" to prevent a clearly unwarranted invasion of personal privacy. Standards for what constitutes a "clearly unwarranted invasion" have been slow to develop.

The SEC, whose jurisdiction runs primarily to publicly held taxpayers, has routinely disclosed all interpretative requests with the parties identified and permitted delay in disclosure only for a maximum of 120 days. See SEC Reg. § 200.81. Individual anonymity, however, would certainly seem to be warranted if public ridicule, economic loss or embarrassment seemed a likely consequence of publication. There seems no reason to expose to public inspection the details of a named individual's divorce, medical history, philanthropic activities or casualty losses for example. Of particular concern to many individual ruling applicants is disclosure of their social security number, with the access to other information which this affords.

The possible range of subject matter for a ruling request is so broad and unpredictable that we recommend that a procedure be made generally available whereby a rulings applicant may request anonymity. We suggest that if this is done, the taxpayer be required to submit in a separate document his reasons for requesting anonymity together with a rulings request and supporting documents for which identifying data have been removed. If the request is honored, the ruling must obviously be based upon the request from which such data has been deleted. This procedure does not depart substantially from the procedure presently followed, and thus should interpose no cumbersome administrative task. Further, it would seem to be fully in accordance with the purpose of the FOIA and the requirements of the *Tax Analysts* opinion, which focus upon full disclosure of the *precedential* aspects of rulings and applications.

Affirmation of Applicant.—Proposed Section 601.201(e)(16)(iv) and (18) require that each request for a ruling or determination letter and any subsequent submission contain a verification by the applicant as to the truth and accuracy of the representations under penalties of perjury and, where the application is prepared by an attorney or other authorized representative, the representative is also required to verify the accuracy of the application and accompanying exhibits. This procedure is presently required in some areas such as Section 367 rulings. It is a cumbersome requirement and has no discernible value. We would recommend its removal from the final regulation.

Withdrawal of Request for Ruling.—Proposed Section 601.201(j) provides that when a taxpayer's request for a ruling or determination letter is withdrawn on grounds other than a disagreement over availability of certain material for public inspection, the application and exhibits will be retained by the Service and available for public inspection. We do not take issue with the expressed reservation by the Service of the right to discuss the issues raised and indicate the proposed response with regard to withdrawn requests for ruling or to the communication of those views to the District Director whose office has audit jurisdiction of the taxpayer's return. A taxpayer who chooses to go forward with a proposed transaction after receiving a negative preliminary response should be prepared to accept the consequences of an informed audit of his return. We do recommend, however, that the indicated retention by the Service of all correspondence and exhibits be restricted to situations in which such a final formulation of a view is made and communicated to the District Director and that otherwise, since the application has not resulted in a Service formulation of opinion having precedential effect, the application and exhibits be returned to the taxpayer.

Notification to Taxpayer of Challenge to Claimed Exemption From FOIA.—Proposed Section 601.703(b)(4) correctly points out the inability of the Service to guarantee that its decision to withhold material from public access may not be overturned judicially or otherwise. We suggest it would be appropriate in cases where the Service has accepted the applicant's request for confidentiality to set forth a procedure whereby the Service would furnish notice to a taxpayer of any challenge to his request for confidentiality and provide an opportunity for an intervention by the rulings applicant in any proceeding instituted to gain access to the material under the FOIA, if permitted by the forum having jurisdiction. Since the taxpayer's name and address will be on file with the rulings application, such a notice procedure would seem to create no significant administrative burden. Such a procedure might also serve to encourage submission of requests and supporting material which might be withheld. On the Service's side, issues as to the scope of claimed exemptions might well be of less significance if it could be left to the taxpayer on subsequent challenge to substantiate his claim to exemption.

Delay of Public Inspection.—Proposed Section 601.201(e)(16)(vi), (19) and 601.703(b)(1)(ii) would permit a rulings applicant to request delay in public inspection not to exceed thirteen weeks from issuance of the ruling where earlier public inspection would threaten serious harm of violation of law. We submit that further administrative flexibility as to the period of the delayed access may be highly desirable in rare cases. On a proper showing, we believe that it may be necessary to delay public inspection for longer periods of time—perhaps until the transaction has been completed or even until the time for filing the return for the year in which the proposed transaction is consummated. We recognize, of course, that delay should be avoided or minimized in the absence of an appropriate showing, since rulings may be issued during the intervening period on the basis of the first ruling, but the thirteen-week period seems an undue limitation on administrative discretion.

Request for Opportunity to Appear.—In the event a public hearing is held on these proposed rules, we request the opportunity to appear.

NEW YORK STATE BAR ASSOCIATION—TAX SECTION

Supplemental comment on proposed Procedural Rule Section 601.703 and proposed amendments to Procedural Rules Sections 601.201 and 601.702, relating to public inspection of rulings and determination letters.

(By Martin D. Ginsburg, chairman)

The new and amended procedural rules above referenced, relating to public inspection of letter rulings and determination letters, are intended to meet the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Prior to March 25, 1975 the Tax Section submitted written comment in some respects supportive, and in others critical of the proposed procedural rules. On March 25 a public hearing was held at the Internal Revenue Service in Washington. Interested individuals and representatives of various groups, including the Tax Section of the New York State Bar Association, testified at the hearing.

In its prior written comment and in the testimony given by its representative at the March 25 hearing, the Tax Section focused upon the individual's right of personal privacy. It was and remains the position of the Tax Section that the proposed procedural rules are improper in requiring that a taxpayer must expressly waive in advance his or her right of privacy in order to obtain a letter ruling or determination letter.

Only one other person who testified at the March 25 hearing focused primarily on the right of personal privacy and the concern expressed by him, directed to an anticipated disclosure of individual taxpayer names in the generality of cases, concentrated upon an aspect of the matter distinguishable from that which principally troubles the Tax Section. While no one who spoke at the hearing denigrated the importance of the right of privacy, some appeared to believe that issues involving personal privacy rarely if ever arise in the ruling process. Thus, one speaker expressed a personal view that if the right of privacy is not a Red Herring, certainly it is a "Pink Herring."

The Internal Revenue Service officials who conducted the March 25 hearing, Commissioner Alexander, Assistant Commissioner Gibbs, Chief Counsel Whitaker and Assistant Director Bley, in their questioning of certain of those who testified indicated concern with aspects of the privacy issue. Reference was made to 18 U.S.C. § 1905, a statute of historic vintage, and to the recently enacted Privacy Act of 1974, 5 U.S.C. § 552a, pertinent portions of which will become effective September 27, 1975. However, nothing occurring at the March 25 hearing suggested the Service as yet has concluded that its original proposal, requiring an individual taxpayer expressly to waive in advance his or her right of personal privacy as a condition of obtaining a ruling or determination letter, should be discarded.

The Tax Section is submitting this additional comment, in support of the written comment it earlier submitted and of the testimony given by its representative on March 25, to encourage the Service to reverse its proposed position with regard to the individual's right of personal privacy. Specifically, and for the reasons set forth below, the Tax Section believes that the proposed procdeural rules in forcing an individual expressly to waive in advance his or her right of personal privacy, is contrary to the intention of and improper under the Privacy Act of 1974, 5 U.S.C. § 552a.

The Tax Section accordingly renews its recommendation, contained in the written comment earlier submitted, that the procedures adopted by the Internal Revenue Service respect the individual's right of personal privacy and have as their objective the publication of all precedential material after the deletion, as appropriate in the specific case, of their the privacy invading information or the individual's name and identifying data.[1]

1. PRIVACY ISSUES ARISE IN THE RULING PROCESS

At the March 25 hearing the suggestion was made that, in the context of the ruling process, concern for the right of privacy is, at best, a "Pink Herring."

The Tax Section strongly disagrees with this view. The many thousands of letter ruling requests annually filed span the breadth of human experience. It is not merely likely, but inevitable that information of a personal and private nature will be included in this mass of data.

Responding specifically to the "Pink Herring" appellation, at the hearing the Tax Section's representative gave the following illustrative case and commentary.

Assume the taxpayer is sole owner of a corporation that has just completed or shortly will complete construction of a major property. During the past two years the taxpayer received and rejected a number of offers to purchase his stock at a substantial gain. Last month, in the course of a routine annual medical examination, the taxpayer was informed that he is suffering from a hithero undiagnosed dread disease that may well prove life shortening. The taxpayer is approached by a new potential purchaser of his stock and decides to accept the offer and retire.

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[1] In its prior written submission commenting on the proposed procedural rules, at page 7, the Tax Section urged that public disclosure of social security numbers be avoided. In support of that recommendation, we note that § 7 of P.L. 93-579 (a part of the Privacy Act not codified in Title 5), effective December 31, 1974, demonstrates serious Congressional concern with "the need for constraints on the use of the [social security] number and on its dissemination." S. Rep. No. 93-1183, 93d Cong. 2d Sess. [accompanying S. 3418], reprinted in the January 30, 1975 (No. 14) U.S. Code Congressional and Administrative News 8038, 8065-8068 (1974).

Counsel advises that a ruling be sought from the Internal Revenue Service confirming that the corporation is not collapsible. The ruling request will advance two bases for a favorable determination, either of which is sufficient. First, that there exists no "unpermitted view" and hence the corporation is not collapsible within the meaning of the section 341(b)(1) definition. Second, that section 341(e)(1) applies to avoid collapsible status. Under the first approach the medical history clearly is vital. Under the second approach the medical history is, or at the least counsel reasonably may deem it to be, of substantial significance.

Now, whether the taxpayer is suffering from leprosy, tertiary syphilis, cancer of the liver or advanced renal failure is his business. More pointedly, the fact that he is suffering from anything is his business. It is appropriate that he disclose and document illness to the Internal Revenue Service in order to obtain a letter ruling. But if the taxpayer—who may not have told his wife, children or friends—does not wish the fact that he is ill to become a matter of public record, it is hard to believe anyone would seriously argue that public disclosure constitutes other than a clearly unwarranted invasion of his personal privacy.

Letter ruling information of a personal and private nature by no means is limited to medical data. In particular circumstances, other cases might include information concerning marital disharmony or dissolution, past or present political affiliation, charitable donations or the absence thereof, racial or religious origins or affiliation, and the amount and specifics of intra-family gifts and bequests. For some individuals, public disclosure of their home address might pose a threat not only to their privacy but to their safety or peace of mind.

It is not an adequate response to suggest that some of this information may be contained in state court records, e.g., divorce hearings and probate files, or may at an earlier time have been known to persons other than the ruling applicant, e.g., 25 years ago the applicant was accused of a subversive political affiliation. For one thing, the suggestion may be factually incorrect; if a state court record does exist, it may not contain pertinent private information or, if it does, it may be a sealed record. More importantly, personal data does not lose its character as private simply because that data may be discoverable from another source or may once have been known. The Court of Appeals for the Second Circuit, interpreting the privacy exemption of 5 U.S.C. § 552(b)(6), has so held:

> A person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information.

Rose v. *Department of Air Force*, 495 F.2d 261, 267 (2d Cir. 1974).

2. SCOPE OF THE PRIVACY EXEMPTION IN FOIA

5 U.S.C. § 552(b)(6) exempts—the "(b)(6)" exemption—from mandatory public disclosure matters that are "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(a)(2) similarly provides that "to the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes" materials required to be disclosed under that provision, provided "the justification for the deletion shall be explained fully in writing." Additionally, § 552(b)(7)(C) establishes an exemption from disclosure for investigatory records compiled for law enforcement purposes if production would "constitute an unwarranted invasion of personal privacy."

The (b)(6) disclosure exemption has paramount importance since, where applicable and invoked, it renders the FOIA inapplicable to the exempt portion of an otherwise disclosable record.

The (b)(c) disclosure exemption to date has been the subject of five significant Court of Appeals decisions. In chronological order they are *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973); *Rose v. Department of Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted; Rural Housing Alliance v. U.S. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974); and *Wine Hobby USA, Inc. v. Internal Revenue Service*, 502 F.2d 133 (3d Cir. 1974). One of these decisions, *Robles*, announced a restrictive interpretation of the exemption, limiting it to "intimate details of a highly personal nature." 484 F.2d at 845. The other appellate tribunals awarded a more expansive scope to the (b)(6) exemption. Thus, the Second Circuit in

Rose, quoting in part from the decision of the D.C. Circuit in *Getman*, stated (495 F.2d at 269–70):

> [T]he language of the [(b)(6)] exemption requires a court to exercise a large measure of discretion.*** Any discretionary balancing of the competing interests will necessarily be inconsistent with purposes of the [FOIA] to give agencies, and courts as well, definitive guidelines in setting information policies. . . . But Exemption (6), by its explicit language, calls for such balancing and must therefore be viewed as an exception to the general thrust of the Act. S. Rep., at 9, explains:
>
> "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.***"
>
> We note in passing that no other exemption specifically requires balancing. In view of the Act's basic purpose to limit discretion and encourage disclosure, we believe that Exemption (6) should be treated as unique. . . .

The Privacy Act of 1974, enacted after the cited Court of Appeals decisions were rendered, fully supports the majority judicial view. Only part of the Act, P.L. 93–579, is codified in 5 U.S.C. § 552a. The part that is uncodified law, as well as the part included in Title 5, bears on the issue.

Section 2(a)(4) of the Privacy Act flatly states the congressional finding that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." Section 2(b) states that the "purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to . . . (4) collect, maintain, use, or *disseminate* any record of *identifiable personal information* in a manner that assures that such action is for a *necessary and lawful purpose* . . . [and] (5) permit exemptions from the requirements with respect to records provided in this Act *only in those cases where there is an important public policy need [to disclose]* as has been determined by specific statutory authority." [Emphasis supplied]. Clearly, the provision of the Privacy Act last quoted contemplates a balancing in each case of the individual's right to privacy—a right Congress has declared to be fundamental and of Constitutional dimension—against a showing of important public policy need to disclose. Clearly, also, the reference in Privacy Act § 2(b)(4) to "identifiable personal information" is expansive in scope.

Section 3 of the Privacy Act adds § 552a to Title 5. § 552a(e)(10), in imposing upon federal agencies the duty to maintain records in confidence, is similarly expansive in its scope. The agency is obliged, among other things, to establish administrative safeguards to protect against unauthorized invasion or dissemination of records "which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." Embarrassment, inconvenience and unfairness are words that connote something far different from "intimate details of a highly personal nature," the term used by the *Robles* court. Finally, the provision for civil remedies, § 552a(g)(1)(D), refers to an agency's failure or compliance "in such a way as to have an adverse effect on an individual," and does not quantify that adversity in "substantial" or other limiting terminology.

The legislative history of the Privacy Act directly supports the analysis earlier quoted from the opinion in *Rose*. Specifically, the report of the House Committee on Government Operations on H.R. 16373 (one of the two bills that gave rise to the Privacy Act), H.R. No. 93–1416, 93d Cong. 2d Sess. 4 (1974), states:

> H.R. 16373 attempts to strike that delicate balance between two fundamental and conflicting needs—on the one hand, that of the individual American for a maximum degree of privacy over personal information he furnishes his government, and on the other hand, that of the government for information about the individual which it finds necessary to carry out its legitimate functions.

And on page 10 of the House report:

> While there can be no right of *absolute* privacy in our complex civilization, there is an urgent need today to assert the fundamental right of privacy for all Americans to the maximum extent consistent with the overall welfare of our Nation.

And on page 14 of the House report:

> The Committee intends that restrictions on the transfer of individually-identifiable data be as strong as they can be without impairing the ability of government agencies to perform their duties.

In sum, notwithstanding the narrow view taken in the Fourth Circuit's 1973 decision in the *Robles* case, we believe it should today be clear that the concept of a "clearly unwarranted invasion of personal privacy" is not limited to an unjustified publication of intimate details of a highly personal nature. Rather, in each case the information must be analyzed to determine whether, on balance, the interest of the public in knowing the workings of government outweighs the individual's fundamental right to privacy.

3. ADMINISTRATIVE CONVENIENCE IS NOT A FACTOR IN THE BALANCING EQUATION

At the hearing of March 25, Internal Revenue Service representatives expressed understandable concern that the processing of any significant number of disclosure exemption requests would impose an excessive burden upon the Service and interfere unduly with the letter ruling process.

Whatever validity these concerns may have for other exemptions from required public disclosure that are set forth in FOIA § 552(b), as regards the (b)(6) privacy exemption they are irrelevant.

As the next section of this report confirms, on and after the effective date of § 552a, the pertinent portion of the Privacy Act, the (b)(6) exemption no longer will be applicable in the discretion of the agency, but will instead be a mandatory exemption from public disclosure in any case to which the stricture of the Privacy Act applies.

The Privacy Act requires a balancing of interests. But the interests to be balanced do not include administrative convenience. The legislative history of the Privacy Act is specific.

> We start with the premise that exemptions from the provisions of this bill [H.R. 16373] and of any bill designed to protect individual rights of privacy are justified only in the face of overwhelming societal interests. Never should economy or efficiency or administrative convenience be used to justify the exemption from or modification of any of the safeguard requirements set forth in this bill. Moreover, when exemptions must be made, they must be defined in very specific terms.

Additional views of Representative Abzug, concurred in by 9 other members of the House Committee on Government Operations, H.R. Rep. No. 93-1416, 93d Cong. 2d Sess. 37 (1974).

4. RELATIONSHIP OF FOIA AND THE PRIVACY ACT

Considered without reference to the Privacy Act of 1974, § 552(b)(6) of FOIA permits—but does not require—the agency, the Internal Revenue Service or any other, to exempt from disclosure "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." If the Privacy Act merely exempted this class of data from disclosure, without more, its impact upon the agency's discretion would be unclear since FOIA § 552(b)(3) permits—but does not require—the agency to exempt from disclosure matters that are "specifically exempted from disclosure by statute."

But the Privacy Act does much more, as the legislative history of that statute makes clear.

§ 552a(b) specifies:

> No agency shall disclose any record [defined to mean information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions and medical history, and that contains his name, identifying number or the like] which is contained in a system of records [a group of any records under the control of the agency, from which information is retrieved by the name, identifying number or other identifying particular of or assigned to the individual] by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless the disclosure of the record would be—
> (2) required under section 552 of this title [5 U.S.C. § 552, the FOIA].

Putting aside for the time "prior written consent," the Privacy Act forbids public disclosure of letter rulings (which undoubtedly qualify as records con-

tained in a system of records) unless that disclosure is *required* under FOIA. Under that statute the Service is required to disclose letter ruling information that does not constitute matters exempted from disclosure by § 552(b), but it is *not* required—it is merely permitted—to disclose exempt portions of the records.

With respect to information, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," a report of the Association of the Bar of the City of New York has summed up with precision:

> The agency would not be *required* to disclose the data, in terms of the Freedom of Information Act, because it would be a matter "specifically exempted from disclosure by statute" (5 U.S.C. § 552(b)(3)). It would not be *permitted* to disclose, by force of the new legislation [5 U.S.C. § 552a(b)].

See report entitled "Government Databanks and Privacy of Individuals (H.R. 16373 and S. 3418)," by The Committee on Federal Legislation of The Association of the Bar of the City of New York, reprinted in 30 Record of the Association 55, 105 n. 132 (January/February 1975) (emphasis in the original).

The legislative history of the Privacy Act of 1974 renders this conclusion abundantly clear. The Privacy Act was enacted December 31, 1974 as P.L. 93-579. The bills that became this law were H.R. 16373 and S. 3418, each of which contributed to the final legislation.

In developing the respective bills, both houses of Congress perceived the potential conflict between the contemplated Privacy Act and the FOIA. The Senate bill, § 202(c) of S. 3418, proposed to resolve the issue in favor of broad disclosure and subordination of the right of privacy by providing that the disclosure restrictions "shall not apply when disclosure would be required *or permitted*" pursuant to FOIA [emphasis supplied].

The House bill, H.R. 16373, did not contain any provision similar to 5 U.S.C. § 552a(b)(2) designed to resolve explicitly the potential conflict between the Privacy Act and FOIA. However, the report on H.R. 16373 of the Committee on Government Operations, H.R. Rep. No. 93-1416, 93d Cong. 2d Sess. 13 (1974), made clear the intention of the House bill: The agency should not make disclosures that would constitute "clearly unwarranted invasions of personal privacy."

> This legislation [the Privacy Act] would have an effect upon subsection (b)(6) of the Freedom of Information Act (5 U.S.C. section 552), which states that the provisions regarding disclosure of information to the public shall not apply to material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." H.R. 16373 would make all individually-identifiable information in Government files exempt from public disclosure. Such information could be made available to the public only pursuant to rules published by agencies in the Federal Register permitting the transfer of particular data to persons other than the individuals to whom they pertain.
>
> The Committee does not desire that agencies cease making individually-identifiable records open to the public, including the press, for inspection and copying. On the contrary, it believes that the public interest requires the disclosure of some personal information. Examples of such information are certain data about government licensees, and the names, titles, salaries, and duty stations of most Federal employees. The Committee merely intends that agencies consider the disclosure of this type of information on a category-by-category basis and allow by published rule only those disclosures which would not violate the spirit of the Freedom of Information Act by constituting "clearly unwarranted invasions of personal privacy."

Both the Senate and House bills were the subject of published criticism. See, e.g. the above referenced report of the Association of the Bar of the City of New York which was issued prior to the Conference Committee deliberation. The Senate bill was criticized because, in employing the term "required or permitted," it "rendered the protections provided in other provisions [of the proposed Privacy Act] almost totally ineffective." Report of the Association of the Bar, at 87-88. The House bill was criticized for failing to state explicitly in the proposed Privacy Act that which the House Committee articulated in its report.

As enacted, the Privacy Act responds to both criticisms. The Senate bill terminology, "required or permitted," does not appear and, instead, the House Committee Report concept—agencies are not to make disclosures that "constitute a clearly unwarranted invasion of personal privacy"—is mandated by § 552a(b)(2). Unconsented disclosure of private information is not permitted unless *required* by the Freedom of Information Act.

Individual circumstances vary as greatly as the tax issues which may become the subject of a ruling request. Guidelines as to what disclosures constitute "clearly unwarranted" invasions of personal privacy will doubtless emerge slowly, case by case. In the meantime, the proposed procedural rules should be sufficiently flexible to protect both the taxpayer's rights to privacy and the Service from unintended violation of those rights.

5. A FORCED WAIVER IS NOT PROPER "PRIOR WRITTEN CONSENT"

The Internal Revenue Service's proposed procedural rules require that a request for a ruling or determination letter, filed after the date the rules are published as a final document, "must also contain . . . a waiver of confidential treatment in the manner described in subparagraph (17)(i). . . ." Proposed procedural rule § 601.201(e)(16). Proposed subparagraph (17)(i) reads as follows:

> The waiver of confidential treatment referred to in subparagraph (16)(i) of this paragraph shall be made by written statement in the request signed by or for the person making the request and all other persons whom the Internal Revenue Service shall determine may have a direct interest in maintaining the confidentiality of information in the request. The waiver shall state that each such person "expressly waives" any right to confidential treatment with respect to the request, oral information and correspondence in connection with the request, oral information contained in the ruling, determination letter or acknowledgement of withdrawal issued, and all other materials included in the file connected with the request, the ruling, the determination letter or acknowledgement of withdrawal.

The quoted provision then goes on to specify that a waiver of confidential treatment is not required with respect, and only with respect, to trade secrets or to national defense or foreign policy information (if specifically authorized under criteria established by an Executive order to be kept secret).

It is thus the position of the Internal Revenue Service, enunciated in its proposed procedural rules, that the taxpayer and all other interested persons must "expressly waive" the right—explicitly granted by Congress and confirmed by Congress to be a fundamental Constitutional right—to prevent a public disclosure that constitutes "a clearly unwarranted invasion of personal privacy." Under the proposed procedural rules, the taxpayer may be entitled to a ruling or to the right of privacy, but never to both.

The Privacy Act, § 552a(b), forbids any such public disclosure, by the Internal Revenue Service or any other federal agency, unless the disclosure is made "pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." Obviously, the contemplated "forced waiver" is not a taxpayer's "request" that his privacy be violated. The issue, and the only possible basis for concluding that the proposed procedural rules do not violate the Privacy Act, is whether the "forced waiver" appropriately qualifies as the "prior written consent" that is contemplated by the Privacy Act.

The term "consent" is synonymous with the words "permit" and "approve." All of them bear the strongest connotation of voluntary action or agreement. We think it evident that Congress employed the term "consent" in the light of its accepted meaning. We find it inconceivable that Congress would have enacted the detailed restrictions of the Privacy Act and simultaneously provided for the frustration of that statute by permitting a federal agency to force the citizens with which it deals to abandon the rights confirmed to them under the statute and by the Constitution.

The argument that the Service could eliminate its rulings program altogether and thus should be able to require waiver of privacy rights as a condition to granting a ruling runs afoul of the doctrine of unconstitutional conditions. The power to *regulate* availability of rulings does not carry with it power to condition availability upon waiver of constitutional rights. Cf. *Frost & Frost Trucking Co.* v. *Railroad Commissioner*, 271 U.S. 583, 593–4 (1926); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155–56 (1946), and note, 73 H.L. Rev. 1595 (1960).

In searching the legislative history of the Privacy Act of 1974, we have found nothing in any report, testimony or written submission that in any way suggests a "forced waiver" of the right to personal privacy will constitute the "prior written consent" required by the statute. It seems clear that no one who sponsored, developed, analyzed or testified with respect to this legislation contemplated so peculiar and internally inconsistent an interpretation.

The "consent requirement" was, however, focused during the course of the legislative process, and the nature of that focus is inhospitable to the idea of a

"forced waiver." Thus, the report of the House Committee on Government Operations, *supra* at page 12, states:

> Section 552a(b) provides that no Federal agency shall disclose any record containing personal information about an individual without his approval to any person not employed by that agency or to another agency except under certain special conditions.
>
> The consent requirement may well be one of the most important, if not the most important, provisions of the bill. No such transfer could be made unless it was pursuant to a written request by the individual or by his prior written consent.

It is impossible to believe that the Committee, in so conjoining (as does the statute itself) the alternate procedures of "a written request by the individual" and "his prior written consent," envisioned anything other than parallel routes to the same voluntary end. The Committee perceived the "consent requirement" to be supremely important in that it placed in the hands of the individual citizen the choice of allowing or forbidding an otherwise improper invasion of his privacy. It would be strange indeed to suppose the Committee thought the "consent requirement" supremely important as constituting a means whereby the agency could force the individual citizen to suffer without recourse a clearly unwarranted invasion of his personal privacy.

All other segments of the legislative history that we have found to bear in any way upon the issue support the sensible notion that consent must be voluntarily given. Thus, the cited Committee report, at page 14, announces, "The Committee intends that restrictions on the transfer of individually-identifiable data be as strong as they can be without impairing the ability of government agencies to perform their duties." And, at page 37, the earlier quoted additional views of Representative Abzug, concurred in by 9 others, commence:

> We start with the premise that exemptions from the provisions of this bill and of any bill designed to protect individual rights of privacy are justified only in the face of overwhelming societal interests. Never should economy or efficiency or administrative convenience be used to justify the exemptions from or modification of any of the safeguard requirements set forth in this bill.

The provision for "required consent," we think it clear, is intended as a "safeguard requirement." It is not an invitation to a federal agency, concerned with administrative inconvenience, to frustrate the purpose of the statute.

One final reference to legislative history appears warranted. The immediate predecessor bills to the Privacy Act of 1974 were S. 3418 and H.R. 16373, but a privacy protecting statute had been a matter of Congressional concern—in significant part engendered by Representative Edward I. Koch of New York—for a number of years. On January 2, 1974 Mr. Koch had introduced two bills, H.R. 12206 and H.R. 12207, proposing the enactment of different versions of a new § 552a as an amendment to Title 5. These bills, together with four others, were the subject of a series of hearings during the period February 19 through May 16, 1974, before a Subcommittee of the House Committee on Government Operations. The 338 page record of those Hearings provided the testimonial background for the statute that was enacted December 31, 1974.

H.R. 12206 did not provide that the written request or prior written consent of the concerned individual was a condition precedent to agency disclosure. Instead, it provided for notification of the person concerned that disclosure was being made. The notification proposal attracted adverse testimony the thrust of which supported the concept of voluntary consent or, at the least, a citizen's right to object to unwarranted disclosure and to prosecute his objection in the courts. Other bills considered in the hearings—and ultimately the statute as enacted—discarded the notification procedure and embraced "prior written consent." See Hearings entitled "Access to Records," before a Subcommittee of the Committee on Government Operations, House of Representatives, 93d Cong. 2d Sess. on H.R. 12206 and Related Bills (February 19, 26; April 30; and May 16, 1974) at, *inter alia*, 111 (Representative Abzug: "[I]t really makes very little sense to us to talk about notifying individuals . . . without requiring their consent. Informed consent, I believe, constitutes the backbone of any disclosure statute."), 193 (Representative Goldwater, Jr.: "There should be a clearly prescribed procedure for an individual to prevent personal information collected for one purpose from being used for another purpose without his consent. . . ."), 198 (précis of proposed Koch-Goldwater bill, H.R. 14168, "[P]ersonal information must not be given to third parties without the individual's consent."), 201

(Representative Goldwater responding to a question from Representative Abzug regarding a requirement of the individual's consent: "Any Federal agency maintaining personal information shall request permission of a data subject to disseminate part or all of this information to another organization or system not having regular access or authority."), 205 (Representative Goldwater responding to a question from Representative McCloskey concerning medical and other personal information: "[W]hen something is of a personal nature, it is up to that individual whether he wants to release that to the public or not.").

For all of the reasons stated, the Tax Section is strongly of the belief that the "forced waiver" procedure of the proposed procedural rules will not satisfy the § 552a(b) requirement of prior written consent and, accordingly, that public disclosure of letter ruling information that constitutes a clearly unwarranted invasion of personal privacy, contrary to the desire of the concerned individual, will violate the Privacy Act of 1974.

6. THE PROPOSED PROCEDURAL RULES ARE INCONSISTENT WITH THE TREASURY'S POSITION BEFORE CONGRESS

On April April 30, 1974 Edward C. Schmults, General Counsel of the Treasury Department, appeared before the House Foreign Operations and Government Information Subcommittee of the Committee on Government Operations, submitting a prepared written statement and testifying orally on behalf of the Treasury Department with respect to the then proposed privacy bills. Mr. Schmults demonstrated his understanding of the importance of balancing competing interests and a keen awareness of the significance of the right of privacy (page references below are to the above referenced Hearings):

> The Treasury has sought a perspective for addressing the situation and believes that some of the broader elements that should be balanced are the right of an individual to personal privacy, the needs of the Government to obtain and use information about individuals and other legal entities in executing the laws, the right of the public to know what its Government is doing and how the Government is carrying out its responsibilities under the law and, the right of individuals to be secure in their persons and property [page 209].
>
> Concomitantly, we have a high obligation to perform our governmental duties as effectively as possible for the public good. This often requires the collection and use of personal data. Thus, a careful balancing of the Government's need to know with the individual's right of privacy is continually in process [page 210].
>
> Continuing, affirmative efforts should be made toward an optimum balance between an individual's right of privacy and the Government's need for information [page 210].
>
> [W]e are vigorous participants in the executive branch's actions to control and direct information processing so that the individual can retain his right of privacy while legitimate information needs are achieved [page 216].
>
> The Treasury Department shares the keen interest in the right of privacy which so many in Congress have exhibited [page 216].
>
> We are reviewing operational aspects of the privacy situation, including . . . who should have access to the information [page 216].
>
> The Department and certain of its constituent agencies have adopted regulations governing the disclosure of information in their custody, and they also have internal instructions limiting access to information in their respositories. Our studies will examine all of these regulations and instructions to see if they sufficiently protect the individual's right of privacy. Where disclosures are allowed, even on a limited basis, we are reexamining the propriety of disclosures even though legitimate under Federal law; and if warranted and authorized by law, we will make further restrictions on dissemination of personal records maintained by the Treasury Department and its component agencies [page 217].
>
> Certainly, every agency which collects personal information has an obligation to collect only what is necessary for the proper and effective performance of its duties and to safeguard the information from abuse [page 217].
>
> Well, we are not cavalier. We are concerned about the privacy of citizens, and we have set up within the Treasury Department a Committee on Privacy made up of representatives of our various components. We are addressing these problems. We are going to review our own regulations; and where they can be improved we are going to improve them; and we will take the neces-

sary steps. . . . At no time in my knowledge has the Treasury Department displayed a cavalier attitude in regard to the privacy of individuals. We are concerned about the same problems that this committee is addressing, and we think the right to privacy is important . . . [page 227].

I do not believe the Treasury Department should be the judge of its own actions and we do want to work with the Congress. We do want to work with others who are concerned about privacy because we are concerned about privacy [page 228].

It is difficult to believe that the Congress to which these statements were made could have any anticipation that the Internal Revenue Service, a constituent agency of the Treasury Department, would manifest its concern with the right of privacy by forcing every rulings applicant to waive it.

7. PROCEDURE INVOLVING OMB

§ 6 of the Privacy Act (not codified in Title 5), a portion of the Act that currently is in effect, provides as follows:

The Office of Management and Budget shall—

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

We believe that the Internal Revenue Service, before it promulgates in final form the procedural rules under consideration, should obtain and attend to the view of OMB with regard to any rule provision that would or might impact adversely on the individual right of privacy.

8. CONCLUSION

The proposed procedural rules were released December 6, 1974 and published in 39 Federal Register 43087–43090 on December 10, 1974. They thus were conceived prior to the enactment of the Privacy Act on December 31, 1974. Obviously, the Service cannot be taken to task for having proposed rules that do not accord with the subsequently enacted federal statute.

But the proposed rules, we believe, are contrary to the mandate of the Privacy Act, and, while the substantive provisions of that Act will not come into force until September 27, 1975, it would be unwise and inappropriate for the Service to adopt the proposed rules now only to change them on that date. The protection of personal privacy that will be mandatory on and after September 27 is permissible under 5 U.S.C. § 552(b)(6) today. The Service ought to adopt procedures viable for the future. Recognizing the tension between the policies of the Freedom of Information Act and of the Privacy Act, the objective of these procedures should be publication of all precedential material after the deletion, as appropriate in the specific case, of either the privacy invading information or the individual's name and identifying data.

A "forced waiver" of the right of privacy will not withstand scrutiny under the Privacy Act. A government agency which, less than a year ago, before Congress forcefully proclaimed its concern with the individual's right of personal privacy should not now conclude that the best way to deal with that right is to disregard it. The position is untenable and the prospect for embarrassment of the Service is overwhelming.

NEW YORK STATE BAR ASSOCIATION,
New York, N.Y., November 11, 1975.

Hon. FLOYD K. HASKELL,
Chairman, Subcommittee on Administration of the Internal Revenue Code, Senate Finance Committee, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR HASKELL: On November 6, 1975, representing the Tax Section of the New York State Bar Association, I was privileged to testify to the Subcommittee on Administration of the Internal Revenue Code, on the subject of public inspection of IRS private letter rulings. In my testimony I attempted to stress the importance of dispatch in the issuance of private rulings, and urged that publication of private rulings—a course we favor—not be allowed to affect adversely the efficiency of the private ruling process.

A later witness, Mr. Thomas Fields of Tax Analysts and Advocates, asked that private rulings be processed as precedent, binding and benefiting all taxpayers, a procedure that necessarily will occasion great delay in the issuing of these rulings.

Because of the overriding importance we attach to this matter, the Administrative Committee of our Tax Section has asked me to prepare and furnish to the Subcommittee a supplemental written statement of the Tax Section's position. I enclose (in 10 copies) that supplementary written statement and respectfully request that it be made part of the record of the hearing of November 6.

Yours sincerely,

MARTIN D. GINSBURG,
Chairman, Tax Section.

MDG/ry.
Enclosures.

SUPPLEMENTARY WRITTEN STATEMENT OF MARTIN D. GINSBURG

PUBLIC INSPECTION OF INTERNAL REVENUE SERVICE LETTER RULINGS.

At the invitation of the Subcommittee on Administration of the Internal Revenue Code, as Chairman of the Tax Section of the New York State Bar Association I addressed the Subcommittee on November 6, 1975. The topic was Public Inspection of IRS Private Letter Rulings. A prepared written statement was submitted to the Subcommittee adjunct to oral testimony.

A witness who addressed the Subcommittee later in the session, both in oral presentation and in written submission raised important matters that were not fully covered in the testimony I earlier had given. Because of the significance we attach to these matters, with the permission of Senator Haskell, Chairman of the Subcommittee, I am submitting this supplemental written statement for the record.

Formulation of sensible rules governing the disclosure, or nondisclosure, of private letter rulings and technical advice memoranda must be based upon a threshold determination of policy. We are all aware of the existence of important and often competing interests—

The public's right to know: to know the law as it is actually practiced; to know the Internal Revenue Service is not promoting an affirmative action program for the rich, for the powerful, for the well-connected.

The individual's right to personal privacy: to be free from unwarranted invasion of his or her personal privacy; to be accorded protection of a right that Congress last year confirmed in the Privacy Act of 1974 and declared to be of constitutional dimension.

A person's justifiable and appropriately protectable interest in confidential commercial information: in trade secrets, and in business and financial data the disclosure of which reasonably may be expected to occasion financial injury.

Everyone's interest, the government's and the taxpayer's alike, in maintaining and promoting the efficiency of the private ruling process.

I would dwell in particular on this last.

The taxpayer's interest in the process by which he or she can obtain the assurance of a timely advance determination of the tax consequences of a proposed transaction is obvious. Our tax law, like our economic society, is inordinately complex and all too often the only route to knowledge is an advance private ruling.

It may not be quite as obvious, but the government's interest in a properly functioning private ruling process is equally great. No less an authority than the then Assistant Commissioner of Internal Revenue, Harold Swartz, for many years the official in direct charge of the Rulings Division, in a letter dated August 15, 1971 to Senator Ribicoff, subsequently published,[1] made the point. The Service has a vital interest in permitting taxpayers to rely upon the tax consequences of proposed transactions, thereby promoting compliance and the reduction of litigation, and increasing the voluntary flow of information regarding private tax planning, which facilitates the Service's planning of its own audit procedures and enables the Service intelligently to recommend changes in the statute and regulations.

In 1971 the Committee on Tax Policy of the Tax Section of the New York State Bar Association produced a report entitled "Complexity and the Income Tax."

[1] Reid, Public Access to Internal Revenue Service Rulings, 41 Geo. Wash. L. Rev. 23 at 33–34 (1972).

Published in 1972 the Complexity Report has truly become a succès d'estime. Complexity has not been reduced, but Secretaries of the Treasury cite to the Complexity Report in appearances before Congress and the House Ways & Means Committee has twice—most recently in June of this year—caused the Report to be reprinted in its entirety in the record of Tax Reform Hearings.

The Complexity Report focused in part on the private ruling process. It concluded that the process fails adequately to perform the vital function described by Assistant Commissioner Swartz in large part because too often there are inordinate delays in issuing private rulings.

We are greatly concerned with the problem of "Secret law." Before this Subcommittee, as we did last March before the Internal Revenue Service at its disclosure hearings and as we did in written submission to the Ways and Means Committee last summer, we strongly urge publication of private rulings, rulings issued in the past and rulings that will be issued hereafter.

But we are greatly concerned, also, with rights of personal privacy and interests in commercial confidentiality, be sought in part because the experienced practitioner reasonably believes the desired pronouncement can be obtained within three months.

And he or she is likely correct in this belief because, as currently and as historically conducted, the private ruling process is not designed to produce and does not produce regulations clothed with the dignity of the Administrative Procedure Act or anything like them. The process produces a private ruling, on which the particular taxpayer is entitled to rely and strangers are not. It thus produces a rather unique product, the special justification for which is that it is the only product a functioning private ruling system can—and, in light of strictures of time, should—be allowed to produce.

The men and women at the Internal Revenue Service who are charged with private ruling responsibility in the main are intelligent, honest, decent, hard working and concerned. They attempt ot apply precedent and to deal in a consistent manner with the law of Congress sends them. They employ review procedures. And, unfortunately but inevitably, they are subject to a case load and legitimate pressures of time and a lack of infallible wisdom. Mistakes are made. Rather few, I think, relative to the volume and difficulty, but a few are more than enough. Ultimately, many of these mistakes are perceived and corrected as the Service gains experience. Corrections are, as they must be, prospective as respects the taxpayers who obtained the erroneous rulings.

If every private ruling were treated as a Treasury Regulation, layered with review and redraft and public comment, the risk of error no doubt would be reduced. Private rulings might then be found "reliable," in that all taxpayers would be permitted to rely on the presumptively coherent body of administrative law that this very different process would be expected to develop.

But it would be a rather slender body of law, I think. Elapsed time between request and ruling would be far greater than any normal commercial transaction could allow. The private ruling process as it has functioned with reasonable success for many years simply would not exist. We would be a good deal less concerned with the disclosure of private rulings, for there would be far fewer of them.

This, I firmly believe, would be a gross misfortune. We urge the Subcommittee to adopt as basic policy a recognition that the private ruling process is highly important to taxpayers and the government; that the process works only if and only so long as excessive delay is avoided; and that the need for disclosure of the results of the existing *private* ruling process should not be confused with a desire to cause rulings to have the force of law with the attendant increased delay that this would occasion.

Respectfully submitted.

MARTIN D. GINSBERG,
Chairman, Tax Section.

Senator HASKELL. Our next witness is Mr. William C. Penick, chairman, Division of Federal Taxation, American Institute of Certified Public Accountants. I understand he is accompanied by Mr. R. Eugene Holloway, Director, Privacy Disclosure Task Force, and also Mr. Joel M. Forster, Director of the Federal Tax Division.

Good morning, gentlemen. Could you identify yourself for the reporter?

STATEMENT OF WILLIAM C. PENICK, CHAIRMAN, DIVISION OF FEDERAL TAXATION, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ACCOMPANIED BY R. EUGENE HOLLOWAY, CHAIRMAN, TAXPAYERS PRIVACY-DISCLOSURE TASK FORCE, AND JOEL M. FORSTER, DIRECTOR, FEDERAL TAX DIVISION

Mr. PENICK. Mr. Holloway is on my immediate left and Mr. Forster is seated beyond him.

We appreciate the chance to be with you today. This certainly is an important subject, and it deserves the careful attention of your subcommittee.

We have submitted a written statement which expresses our views in some detail.

Senator HASKELL. It will be reproduced in full in the record.

Mr. PENICK. Thank you.

In the interest of time this morning, I would like to just touch on a few high spots of our position in this area, and then try to respond to questions that you may have with respect to our positions.

The private rulings program has been good for our tax system, both from the taxpayers' and the Internal Revenue Service viewpoint for many years. The complexity of our tax laws and the dollars involved make advance assurance of the tax consequences of many proposed transactions highly desirable.

As Mr. Ginsburg noted, the Internal Revenue Service benefits greatly from the entire rulings program by becoming more aware of developing business practices and tax issues and, by ruling in advance on major transactions, the audit process and the examination of returns is much more effective.

The public clearly has a right to know how our tax laws are being interpreted. There should be no significant body of secret law in any facet of our society. To some extent this is now being accomplished through the publication of revenue rulings and other informational releases by the Internal Revenue Service. On the other hand, each taxpayer has the right to privacy in his tax affairs.

In your consideration of the issues involved in the disclosure of private rulings, there seems to be a basic conflict between the public's right to know and the individual's right to privacy. How to resolve this conflict seems to us the key question.

After carefully considering the issues that we think are involved in this area, our tax division has reached the following conclusions.

First, preserving the anonymity of the taxpayer is essential if rulings are to be made available to the public. In many cases it is almost impossible to distinguish data included in rulings from tax return information, and we think the same standards of confidentiality should apply.

Senator HASKELL. Now, may I just interrupt? I think it is easier, if you do not mind, if I interrupt and ask a question.

Mr. PENICK. Sure, fine.

Senator HASKELL. You say that the taxpayer should be anonymous. On the other hand, if he gets a deficiency asserted against him, or if he sues for refund, he is no longer anonymous and, really, a private letter ruling is a semijudicial determination; at least, it is binding

or has been considered—I do not know whether legally, I think the Service could go back on it, but they do not, and it is considered a precedent for the taxpayer, something he can rely on. So, it sort of partakes of a semijudicial function, and that is why I have a little difficulty with his remaining anonymous. He is getting a special break, in a sense. He has gotten an advance ruling, and he has presented his facts. Now, why should he remain anonymous?

Mr. PENICK. I think there is a distinction between litigation and contesting an assessed deficiency. The determination of how the deficiency is resolved is not presently made available to the public.

Senator HASKELL. If it goes to the tax court, or goes to the Federal district court, it is a matter of public record.

Mr. PENICK. That is the next step. If he chooses to litigate the issue, then you are correct. I would say he is giving up his rights to privacy, if he chooses to contest it through the courts.

Senator HASKELL. You would not say that when he goes and asks for this privilege, which he is, of getting an advanced ruling, you would not say that that means he gives up his privacy the way he does, in your view, when he goes to court?

Mr. PENICK. That is correct; yes, sir. I think the point that we start from is that if the primary objective—and we agree with this objective—is to inform the public how the tax laws are being interpreted, in other words, to disclose—if this is a good way to describe it—the body of presently secret law, secret tax law, then we think that objective can be accomplished while still preserving anonymity of the taxpayer.

Senator HASKELL. There is a problem, though, and I mentioned it to Mr. Ginsburg. There really are two reasons put forth for publishing a ruling. One is so that you will know what the law is, and the other one is so that you will know that somebody is not getting a special deal because they happen to know it. Now, if we keep the names anonymous, how can the public be assured that the administration of the law is being applied evenhandedly?

Mr. PENICK. This is a difficult one to contend with. That is a point I will get to later.

Senator HASKELL. Go ahead. Sure.

Mr. PENICK. Continuing on our first basic point. In many ruling areas, substantial amounts of financial information are required. The public disclosure of this information can be particularly damaging for individual taxpayers and closely held businesses. Publicly held companies are not affected as much, since they are already required to make substantial disclosures of their operations to various regulatory agencies and to the public generally.

Second, if proper precautions for observing the confidentiality of taxpayer names and identifying data can be observed, we have no objection to the disclosure of private rulings. However, the practicalities of accomplishing and preserving this confidentiality present real problems.

Now, with respect to prior rulings, and this is certainly a very critical area in your consideration of this whole problem, there have been literally hundreds of thousands issued over the years. Taxpayers have requested these rulings in the past, on the assumption that information provided by them would remain confidential.

If past rulings are to be made public, the taxpayers who are affected or may be affected should be given the opportunity to advise the Revenue Service of information that they feel should be deleted. The administrative problems in identifying and locating taxpayers are staggering. Unfortunately, with the tremendous number of rulings that must be dealt with, the Service might not be able to locate many thousands of taxpayers.

Because of the incredible administrative problems that we think would be involved in deleting identifying data and confidential information from prior rulings, it seems to us that the practical answer is legislation that would establish a cutoff date and rulings issued before that date would not be made available to the public.

With respect to rulings issued in the future, and the disclosure of such rulings, the name of the taxpayer and other identifying information contained in the rulings should not be disclosed. In the mechanical processing of a ruling request, a taxpayer should be given the right to indicate to the Service the data that he thinks should be exempt from disclosure. If the Revenue Service disagrees with a taxpayer's request for deletion, there should be some procedure for review of that decision.

In certain areas of taxation, taxpayers are required to obtain rulings to comply with specific provisions of the Internal Revenue Code. Such things as section 367 rulings and changes in accounting methods and periods would be included in this category. Since these requests are mandatory, we believe that they should be exempted from disclosure completely. This seems clearly to fall in the same category as tax return data and should be accorded the same degree of privacy.

Senator HASKELL. I think that is a good point. Where you are required by law to go in for a ruling, I do think that falls in somewhat of a different category.

Mr. PENICK. There is a difference. The taxpayer has really no choice in these areas. He has to comply with the provisions of the law, and in many cases, advance ruling or advance determination is mandatory.

With respect to prior rulings, we would like to call to your committee's attention the amicus curiae brief filed by the American Institute of CPA's, in the second *Tax Analysis* and *Advocates* case. We decided too late to include this in our testimony to give you copies in advance. I did deliver six copies this morning to some of your staff. If you need additional copies, we would be pleased to furnish them.

This case, as I am sure you will recall, demanded that the Internal Revenue Service release all rulings and technical advice memoranda issued after July 4, 1967, which, as Mr. Ginsburg has indicated, was the effective date of the Freedom of Information Act. Because of the tremendous problem that this would create from an administrative viewpoint, and more importantly, because of the need to preserve the confidentiality of information provided when rulings were requested in the past, the Board of Directors of the American Institute authorized the filing of this brief. There is not sufficient time today to outline all the arguments presented in the brief, but it does present, in our view, a number of legal and equitable arguments against the indiscriminate release of prior rulings.

In substance, our position is that if prior rulings are made available to the public, the identifying data and information that could damage taxpayers who have provided it with the understanding that it remain confidential should be deleted.

The brief also gets to the basic point of the objective of the release of private rulings. If that objective is to inform the public how the laws are being interpreted—and we think this is a legitimate public interest objective—this factor should be balanced against other public interest factors, such as the right of the individual to privacy in his tax affairs, and also the right of the individual who has requested a ruling in the past and relied on the representations and the regulations of the Internal Revenue Service that the data he furnished would remain confidential. We think there is a basic public interest right here which really gets to the integrity and credibility of the whole tax system.

For that matter, I think it has some bearing—and this is brought out in our brief—on those of us who are in professional practice, both attorneys and accountants. We have advised our clients for many years that certain ground rules would apply in the processing of private rulings, and in effect, I think if this is all changed and the rules are now changed after the fact, this certainly could affect our practice.

Now, this is obviously a very brief summary of our views on a very broad issue. We hope that these comments, together with our written statement, cover most of the questions that your committee has asked us to respond to. But as I said at the outset, if there are others, we will surely try to answer them.

Senator HASKELL. Well, I think I see your viewpoint. I think I probably know the answer to this question, but I will ask you the same question that I asked Mr. Ginsburg. What is your reaction to third parties' having a right to appear in the ruling process?

Mr. PENICK. I would agree with his position on this, and for pretty much the same reasons. If third parties are permitted to appear before the merits of a ruling request are considered, I think it is going to basically call to a halt almost the ruling process, and I think this would work to the detriment of the entire tax system which certainly has a public interest factor involved.

I do think that after a ruling has been issued and is available to the public that any party would have the right, as has occurred before, to—I would say, challenge its validity, and there should be some appropriate mechanism to consider further arguments at that time. But I do not think that at the time the ruling is under consideration by the Internal Revenue Service that other parties should be permitted to intervene.

Senator HASKELL. Let me see if I see what your view is, one step further. After the ruling is issued, and then is published, you say, at that point, third parties should have a right to challenge it. Now, what do you mean? Do you mean, get the Internal Revenue Service to reverse their position? What do you mean by reverse?

Mr. PENICK. Or present arguments that should be considered; yes. Now, the mechanism for doing this—there are different ways that this could be done. We have suggested in our testimony—our written statement, rather—that perhaps the joint committee might be an appropriate body to review this type thing.

Senator HASKELL. One further question—do you feel that the taxpayer's name should be deleted from rulings? Do you also feel that in addition to deleting the taxpayer's name, there should be deleted "confidential" information?

Mr. PENICK. Information that might indirectly identify or information, I might say, that might reflect on a particular business; yes, I think this certainly should be deleted. It is hard to distinguish between confidential financial information or financial information that might be required to be included in a request for a ruling. It is really hard to foresee how that might indirectly identify a company or a particular taxpayer.

Senator HASKELL. Now, in connection with mandatory—that is, where you are required to go in and get a ruling—your position there is that they should not be public, because it is like having to file a tax return?

Mr. PENICK. Yes, sir.

Senator HASKELL. And I think that has a certain validity to it. On the other hand, those rulings, even though they are mandatory, do form a body of law, in a sense. Now would not the deletion of names in that category perhaps avoid the problem of a secret body of law and at the same time protect the taxpayer's right of privacy?

Mr. PENICK. I do not think we would object too strenuously to that. There is a definite correlation to tax return information, but our principal concern is the identification of data that could damage taxpayers, and so long as the confidentiality and the position of the taxpayer can be protected, I do not think we would object too much to that.

Senator HASKELL. There is a big problem, you know, in publishing the prior rulings. And certainly, prior rulings were obtained with the thought that they would remain private, but on the other hand, we do want this body of law published, so this is a balancing act, as Mr. Ginsburg said.

Now, the problem is going to be, in publishing prior rulings, to balance and perhaps to delete confidential information from those. There is going to be a problem of giving notice so that people can come in and say, look, such and such part of that ruling was part of my confidential information. Would you consider public notice by the Internal Revenue Service in the public media—I mean really public media—I do not mean bury it in some out-of-the-way paper—would you consider that to be adequate type of notice?

Mr. PENICK. I would say that the Service should first attempt to contact the specific taxpayers who were involved, and that should be the primary way of giving them notice. Obviously, if they are unable to contact them, and I suspect, as I indicated in my testimony, there may be perhaps thousands of cases where taxpayers have moved and for various reasons cannot be contacted. In those cases, I would say some sort of a public media or published media approach would be just about the only alternative.

Senator HASKELL. Well, I think it is.

I have just been informed that taxpayers who have moved and who cannot be found might run into several hundred thousand.

Mr. PENICK. It would be a very large number, but of course, the Internal Revenue Service——

Senator HASKELL. The people who have to be contacted perhaps could be several hundred thousand. Now, theoretically, I suppose you could send a notice return receipt requested, and if it came back, then you could rely on public notice.

It is a real problem in contacting them, and I think we want to make this administratively as easy as possible.

Mr. PENICK. The Internal Revenue Service does have, through its massive computers a much better system now for trying to locate taxpayers than was true 5 years ago, 10 years ago, but nevertheless, I think there will be some real problems in this area.

Senator HASKELL. And the problem is, how much try do they have to make? I mean, if they could send something to the last known address and then rely upon publication in the media, that is not too difficult. On the other hand, if they have to go much further than that in trying to locate them, you have got a real administrative problem.

Mr. PENICK. That is correct.

Speaking of the problem that this creates for the Service, the administrative problems, again, your committee—and I would say, Congress generally—has to balance other factors not directly relevant to the private rulings area. The Internal Revenue Service is already—and I am sure Mr. Alexander will appreciate my saying this—overworked. I do know that in many areas of our practice, and I am sure it is not unique to our practice, we are having extreme difficulties in getting interpretations of laws in the form of regulations and published rulings; interpreting in some very important areas, and with their critical manpower situation and budget restraints, if a significant additional burden is going to be placed upon them to somehow process prior rulings for publication, I think this is going to work to the detriment of the entire operation of the Internal Revenue Service and I do not think this is in the public interest at all.

Senator HASKELL. Thank you, Mr. Penick.

Thank you, gentlemen.

I think we have covered most of the questions that I had in mind.

You have submitted that brief. You say you have given it to staff?

Mr. PENICK. Yes, sir. We provided six copies this morning. If you need others, we will be glad to furnish them.

Senator HASKELL. Thank you gentlemen very much indeed.

[The prepared statement of Mr. Penick and the brief referred to follow:]

STATEMENT OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, FEDERAL TAX DIVISION

The American Institute of Certified Public Accountants is pleased to present the following comments and recommendations concerning the disclosure of private rulings. The Institute is the sole national organization of professional CPAs. It was established in 1887 and currently has more than 110,000 members, over 50,000 of whom are engaged in tax practice.

The disclosure of private ruling letters and technical advice memoranda issued by the National Office of the Internal Revenue Service has been a subject of increasing interest over the last few years. The public has the right to know how our tax laws are being interpreted. On the other hand, each taxpayer has the right to privacy in his tax affairs. The critical problem is how to reconcile these apparently conflicting considerations.

Private ruling letters are issued by the National Office in response to formal written requests submitted by taxpayers, and generally relate to transactions that are still in proposed form and yet to be consummated. The private ruling letter briefly summarizes a specific set of facts describing a proposed transaction, and sets forth ruling paragraphs detailing the tax consequences that flow from the transaction. A copy of each ruling letter is provided to the district director having jurisdiction over the taxpayer in question, and a copy of the private ruling letter generally accompanies the taxpayer's return for the year in which the transaction is consummated.

Technical advice memoranda are issued by the National Office upon the request of a District Director in connection with the examination of taxpayers' returns

or claims for credit or refund. As in the case of private ruling letters, technical advice memoranda interpret and apply the tax laws to a specific set of facts, but involve completed transactions with respect to which tax returns have already been filed by a specific taxpayer. Technical advice memoranda are furnished to district directors, who may provide a copy to the taxpayer being examined, unless instructed otherwise by the National Office.

THE CONFLICT OVER PRIVATE RULINGS

Both private ruling letters and technical advice memoranda could be considered part of a taxpayer's tax return information which should be exempt from disclosure, but both have been the subject of recent litigation involving requests to compel Internal Revenue Service disclosure of these documents under the Freedom of Information Act. [See *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350 (CA-D.C., 1974), mod'g and rem'g. 362 F. Supp. 1298 (DC, D.C., 1973); *Robins & Weill, Inc. v. U.S.* 74–1 USTC 9299 (DC, N.C. 1974); and *Freuhauf Corp. v. IRS*, 75–2 USTC 9554 (CA–6, 1975). See also second Tax Analysts and Advocates case against the Internal Revenue Service, demanding release of all rulings issued after July 4, 1967 (DC, D.C. No. 75–0650, 4/28/75)].

Because of the potential overlap between the Freedom of Information Act and our concern over the confidentiality of tax information, we believe that additional legislation is necessary to insure that the mandates of the Freedom of Information Act are invoked without infringing upon the fundamental rights of taxpayers to have remain confidential their tax return information submitted to the Internal Revenue Service.

To the extent that disclosure is required by the Freedom of Information Act, the Institute has no objection to private ruling letters and technical advice memoranda in the possession of the Internal Revenue Service becoming available and open to public inspection. However, where making such ruling letters and memoranda available for public inspection would reveal directly or indirectly, the identities of the taxpayers to whom those documents relate or were issued, we do not support actions that would permit their disclosure.

THE AICPA BELIEVES LEGISLATION IS REQUIRED

The private rulings program, in particular, has been a valuable aid in the past to both taxpayers and the Internal Revenue Service in its administration of the tax laws. It has permitted taxpayers to obtain advance assurance as to the tax consequences of their proposed transactions, while affording the National Office the opportunity both to keep abreast of current business practices and to review transactions which might not otherwise be examined by Internal Revenue agents. It has also helped to streamline the tax audit process by permitting Internal Revenue agents to spend time on other matters, after confirming that the actual transactions conform to the facts set forth in the private ruling letters.

There seems little question that taxpayer use of the private rulings program will be severely curtailed if the information which must be submitted to obtain private ruling letters will be disclosed to the public without any deletion of details which identify the taxpayers to whom the letters are issued. Such information is presently omitted from the private ruling letters and technical advice memoranda which are selectively published as revenue rulings on a weekly basis by the Internal Revenue Service, without detracting from the substance of the tax issues which have been resolved in those documents. We believe there is little to be gained and much to be lost if taxpayer information submitted in connection with private ruling letters is not accorded the same degree of confidentiality as other forms of tax information. Accordingly, we strongly oppose measures that would permit disclosure of this information without the deletion of identifying details.

It is the position of the Institute that private ruling letters, technical advice memoranda and other documents which disclose the intimate details of a taxpayer's personal, commercial and financial affairs should not be indiscriminately provided to anyone requesting such information from the Internal Revenue Service, any more than such information should be provided to the general public if it were contained solely within the four corners of that taxpayer's tax return.

To date, the Internal Revenue Service has been unable to prescribe regulations that would accommodate the provisions of the Freedom of Information Act while preserving the fundamental confidentiality of taxpayer information.

Indeed, the only proposal thus far issued by the Internal Revenue Service has been in the form of proposed regulations that would require virtually unqualified waivers of confidentiality from taxpayers seeking to secure private ruling letters. This proposal seems not only at odds with preserving the confidentiality of tax information, but it effectively places access to the private rulings program beyond the reach of taxpayers other than those whose affairs are already matters of public record. It would be particularly detrimental to small, closely-held businesses and individual taxpayers.

AICPA RECOMMENDATIONS

Accordingly, in the light of the recent developments referred to earlier, we recommend that legislation be enacted to insure that, to the extent private ruling letters and technical advice memoranda are opened to public inspection by reason of the Freedom of Information Act, the identity of the taxpayers to whom or for whom the documents were issued will be preserved as confidential. Specifically, it is suggested that section 6103 of the Internal Revenue Code be amended to provide that no documents which are made available for public inspection under the provisions of the Freedom of Information Act shall disclose, directly or indirectly, the identity of any taxpayer. Such amendment to section 6103, we believe, would be adequate to exempt from disclosure taxpayer identifying information contained in private ruling letters and technical advice memoranda. (See 5 U.S.C. 552(b)(3), relating to matters specifically exempted from disclosure by statute.)

In the alternative, a similar amendment could be made directly to the Freedom of Information Act, specifically exempting identifying details from documents which the Internal Revenue Service is required to make available for public inspection. It is additionally recommended that the provisions of section 7213 of the Internal Revenue Code be expanded to clarify that the sanctions of that provision will apply to the disclosure of any such information so exempted.

We are aware that adherence to the foregoing principles may well entail additional manpower requirements for the Internal Revenue Service, and could prolong the period of time which would otherwise be necessary to make private ruling letters and technical advice memoranda available for public inspection. However, we strongly believe that confidentiality of taxpayer information must take precedence over other competing considerations, and that the expense and effort required of the Internal Revenue Service in sanitizing these documents are more than justified in comparison to the great harm which could result to both taxpayers and tax administration if taxpayers' privacy is not respected. Taxpayers who requested and received private ruling letters in the past submitted the information contained in those documents to the Internal Revenue Service with the clear understanding that such information would remain confidential. Taxpayers who desire to request private rulings in the future should not be deterred because they fear revealing to the general public information not elsewhere available.

We believe that there are viable measures which could be taken to simplify and facilitate the task of deleting taxpayer identifying details from documents required to be made available for public inspection by the Freedom of Information Act. The clerical function of striking identifying details from private ruling letters issued in the future, for example, could be performed by the taxpayers to whom these letters are issued, with a right retained by the Internal Revenue Service to make appropriate deletions in the event that a taxpayer's deletions are either unsatisfactory or are not made within a prescribed period of time.

With regard to the thousands of private ruling letters issued in the past, there are many practical problems in deleting identifying information. Furthermore, many of them have little or no relevance to present tax laws. Accordingly, we think the most practical solution is legislation that would exempt from disclosure all documents issued prior to a specific date. If identifying data is deleted, however, we do not object in theory to the disclosure of prior rulings.

Alternatively, the Internal Revenue Service could be required to publish an index detailing the subject matter of past rulings, deferring sanitization until such time as interested persons request their disclosure. Adequate time should be provided for the Service to make the necessary deletions after a specific request is received.

There are, of course, other alternatives, but we are merely attempting by the foregoing suggestions to illustrate our belief that complicated measures are not essential to insure fulfillment of both the intent of the Freedom of Information Act and the need for confidential treatment of taxpayer information.

In considering which rulings should be released, whether past or future, it should be recognized that in certain areas the taxpayer has no choice as to whether or not to request a ruling. There are certain rulings such as those under section 367 of the Code or involving changes in accounting methods and periods where advance permission from the Commissioner is required by law before taxpayers can enter into certain transactions or make changes in their accounting procedures. It seems unfair to require disclosure of any information supplied by those taxpayers in complying with the law. The IRS has, in earlier actions under the Freedom of Information Act, attempted to equate rulings with income tax returns. It seems to us that in the area of mandatory rulings the distinctions are particularly difficult to draw, in addition to the fact that the equities on behalf of the taxpayers are particularly strong. We hope that Congress would distinguish these rulings and would consider them so intertwined with taxpayers' tax returns as to render them confidential under section 6103(a) of the Internal Revenue Code.

As a final observation regarding the confidentiality of private ruling letters and technical advice memoranda, we recognize that there is some concern with respect to the possibility of political favoritism being exercised by the Internal Revenue Service unless there is an overseer to insure that such malfeasance is not taking place. This appears to be the concern of those interested persons who have insisted that the identity of taxpayers be disclosed when private ruling letters and technical advice memoranda are made available for public inspection. We believe that the potential harm which such disclosure could bring to both taxpayers and our system of taxation far outweighs the need for detection of political favoritism, if indeed it does exist. However, there may be a need for an oversight function which is accessible to all interested persons, in order to insure equal application of the tax laws to all taxpayers, and we think that this function should be implemented through the Joint Committee on Internal Revenue Taxation. Specifically, we recommend the enactment of legislation that would extend to the Joint Committee the authority to pursue formal inquiries of interested persons as to the propriety of any private ruling letter or technical advice memorandum issued to any taxpayer.

In summary, we recognize that the task of weighing the right of the public to know how the tax laws are being interpreted against the individual's right to privacy in his tax affairs is a difficult undertaking. If our system of self-assessment is to survive, however, it is essential that the balance struck between these competing considerations offer taxpayers assurance that their government will not permit indiscriminate disclosure of their identities and information on personal and financial matters.

IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. No. 75-0650

TAX ANALYSTS AND ADVOCATES, ET AL., PLAINTIFFS,

v.

INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS

BRIEF OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE*

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(41)

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PRELIMINARY STATEMENT

The American Institute of Certified Public Accountants (the "Institute") submits this brief as *amicus curiae* in order to present its views regarding the plaintiffs' request for public access to the approximately 160,000 unpublished private letter rulings issued by the Internal Revenue Service (the "Service") on or after July 4, 1967. This brief urges that plaintiffs' request as framed be denied; or, in the alternative, if publication of such rulings is required, that this Court order substantial deletions be made of identifying details, including names, on one or more of the grounds hereinafter set forth. It further urges that the Court not establish any procedure for determining plaintiffs' access to the information contained in those rulings until it has decided what grounds and standards should be used in making deletions.

INTEREST OF THE INSTITUTE AS AMICUS CURIAE

The Institute is the sole national organization of professional certified public accountants, with more than 100,000 members. The substantial majority of its practicing members are engaged in tax practice, and it is highly likely that such members in their professional capacity deal more often than any other group with the private rulings process.[1] Moreover, the Institute believes that its members are much more likely than lawyers to request rulings for individuals or businesses not otherwise required to disclose their affairs to the public.

This case concerns access only to unpublished rulings which have already been issued, as to which professional tax practitioners and their clients—relying on the Service's regulations—had expected that the identifying details would remain private. Owing to that expectation and to the professional interest of the Institute's members, on June 6, 1975, William C. Penick, Chairman of the Institute's Federal Tax Division, wrote to Donald C. Alexander, Commissioner of the Service, setting forth a summary of the Institute's views about disclosure of private rulings.[2]

[1] Paragraph 24(b) of Defendants' Answer indicates that perhaps 80,000 of the 160,000 rulings in question concern changes in accounting periods.

[2] A copy of that letter was submitted to the Court as Exhibit B of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") filed with the Court on July 15, 1975.

The Institute is concerned in this brief with the interests of the public as taxpayers and citizens.[3] Although plaintiffs argue in support of one claimed public interest, that of unrestricted disclosure, there are other vital public interests which the Institute feels should be represented in this litigation:

the interest of every taxpayer, fundamental in our society, that his affairs not be disclosed to his neighbors; and

the interest of every citizen that our tax system not suffer because of lack of trust in its administrators. By administrators we mean not only the Service, but also—because we have a self-assessment system—the entire body of professional advisers who, through interpretation and explanation of the tax law, establish the standards of public compliance.

SUMMARY OF THE INSTITUTE'S POSITION

Plaintiff has brought suit against the Service under the Freedom of Information Act, 5 U.S.C. § 552, to compel publication of the approximately 160,000 unpublished private letter rulings issued by the Service on or after July 4, 1967. Although plaintiffs recognize that the Freedom of Information Act requires deletions "to the extent necessary to protect trade secrets, to protect confidential, privileged, commercial or financial information or to prevent a clearly unwarranted invasion of personal privacy," plaintiffs have asserted that deletion may not be made of the names of (i) persons requesting rulings, (ii) their attorneys,[4] (iii) third parties commenting thereon, or (iv) the signatory of the ruling.[5]

The Service's regulations have assured taxpayers and their advisers that this type of information would not be made public. In reliance on the Service's assurances, ruling requests were submitted with confidence in continued anonymity with respect to sensitive financial and personal information. Taxpayers relied on their advisers who, in turn, relied on the Service for such assurances. The Institute believes that the shattering of the privacy thus promised should not be ordered except for the most compelling reasons, and that the Freedom of Information Act does not require the result sought by plaintiffs.

The Institute submits that identifying details in the unpublished rulings requested by the plaintiffs should be deleted when one or more of the following grounds is found to apply:

1. When the identifying details fit within those of an already published ruling;

2. When the publication of identifying details would be a clearly unwarranted invasion of personal privacy;

3. When the identifying details are income tax information exempt from disclosure pursuant to Section 7213(a)(1) of the Internal Revenue Code[6] and Section 552(b)(3) of the Freedom of Information Act; or

4. When the identifying details constitute information concededly exempt from disclosure under Section 552(b)(4) or (b)(6) of the Freedom of Information Act.

The Institute recognizes that in making those determinations, particularly as to privacy, there must be a balancing of interests, with the benefit of disclosure weighed against the potential of harm to the taxpayer and the reliance of taxpayers and their advisers on the government's promise of confidentiality. For the reasons stated in the discussion below the Institute believes that the identifying details of the rulings covered by plaintiffs' request should not be published.

ARGUMENT

I. *Plaintiffs' Contention That Publication Is Necessary To Permit the General Public to Have Full Access to the Law Is Overstated*

Plaintiffs contend that private rulings constitute a secret body of law which "is accessible to knowledgeable tax practitioners and those able to afford their

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[3] We recognize the governmental interest in the effective administration of the tax laws. The defense of that interest in this case is left to the Service. This brief will not attempt to deal with legal issues covered by the Service, except incidentally as they relate to the arguments made herein.

[4] The requested relief does not specify that the names of accountants not be deleted; but an accountant must obtain a power authorizing him as attorney-in-fact to represent a taxpayer in a ruling request before the Service, 26 C.F.R. 601.201(e)(6).

[5] Plaintiffs Motion, paragraph (a)(1).

[6] 26 U.S.C. § 7213(a)(1).

services. It is only the general public which has been denied access to the IRS' private rulings." [7]

As a matter of principle, the Institute opposes governmental secrecy in the form of *any* body of "secret law." The law applies to all, and knowledge of its provisions should be available to all. Membership of the Institute ranges from sole practitioners to partners in large firms; but the entire Institute finds abhorrent the notion of a secret law available only to clients of large or specialized firms.

The Institute believes, however, that plaintiffs exaggerate the existence of "secret law" and also overstate the justification for disclosure of unpublished rulings as based on a need to help the sole practitioner or general public understand tax law, as the following points illustrate:

First, it is the Service's stated policy to publish in the weekly Internal Revenue Bulletin "all rulings . . . involving substantive tax law." [8]

Second, the information about unpublished rulings which is "accessible to knowledgeable tax practitioners and those able to afford their services" comes primarily from public sources. Many of the significant rulings involving, for example, corporate reorganizations and distributions, are obtained by widely-held corporations precisely in *order* to tell their shareholders with certainty, by means of a prospectus or proxy statement, the tax effect of a transaction. Another principal source of information about private rulings is professional tax publications, such as the the "Shop Talk" section of *The Journal of Taxation*, the "Points to Remember" section of *The Tax Lawyer*, published by the American Bar Association, the "Tax Clinic" section of *The Tax Adviser*, published by the Institute, and the "Tidbits" section of the *BNA Tax Management Memorandum*. Excerpts from those publications, which are readily available to anyone, are the Exhibit to this brief.

Third, any taxpayer who wishes to find out what position the Service will take as to his own contemplated transaction can do so by requesting a ruling. The Service has instituted procedures whereby persons requesting rulings in certain areas of law will be notified within a period of about fifteen days as to any obvious difficulties the Service would have in ruling favorably on their request.[9] This primarily benefits persons with little knowledge of the Service's probable position, since it gives them an early opportunity to amend the transaction.

Fourth, the usefulness of private rulings even to practitioners is limited. One reason is that unpublished rulings do not bind the Service as precedent, even with respect to similar transactions by the same taxpayer.[10] Thus, a tax practitioner who acts on the basis of an unpublished ruling issued in respect of another transaction runs the risk that, if either the Service changes its position or local field agents disagree with the ruling (which is issued by the Service's National Office and is not binding on them), the ruling will not afford him protection before a court. Because of that fact, many advisers recommend that a specific ruling be obtained for each transaction.[11]

Moreover, as stated in the Introduction to each weekly Internal Revenue Bulletin, published rulings "represent the conclusions of the Service on the application of the law to the entire state of facts involved." We understand that the

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[7] Statement of Material Facts as to Which There Is No Genuine Issue, p. 3. The Court made that finding in its opinion in *Tax Analysts and Advocates* v. *Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C. 1973), *modified* and *remanded*, 505 F. 2d 350 (D.C. Cir. 1974). That case will hereinafter be referred to as *Tax Analysts I*.

[8] 26 C.F.R.; 601.601(d)(2)(iv). Although there are exceptions to that policy, the only one relevant to understanding tax law is nonpublication of rulings involving the disclosure of secret formulas, processes, business practices, and other similar information. 26 C.F.R. 601.601(d)(2)(iv)(*h*). In any event, under the exemption set forth in 5 U.S.C. § 552(b)(4), the Freedom of Information Act would not require publication of such information.

[9] Revenue Procedure 75-23, I.R.B. 1975-17, 20.

[10] 26 C.F.R. § 601.201(l) (1) and (6). For example, in *Bornstein* v. *United States*, 345 F. 2d 558 (Ct. Cl. 1965), a ruling obtained in respect of one of seven corporations owning part of the same multi-unit apartment project was not applied in respect of the six other corporations, despite overlapping ownership and substantially identical facts. *Dale R. Richardson, et al*, 64 T.C. ——, No. 63 (July 23, 1975), is a more recent decision to the same effect.

[11] A good example occurred in the case of so-called finance subsidiaries of United States corporations, formed during the period of the President's Balance of Payments Program to borrow funds abroad without the necessity of withholding United States tax on interest payments. Although public corporation after public corporation formed subsidiaries in an identical manner, each company found it necessary to secure a private ruling until in 1969 the Service published Revenue Ruling 69-477, 1969-2 C.B. 231, now revoked by Revenue Ruling 74-464, I.R.B. 1974-38, 10.

facts set forth in a published ruling are selected with great care; and, unlike most unpublished rulings, are reviewed by the Office of the Chief Counsel of the Service. By contrast, most routine private rulings, and even some significant ones, contain many facts which are irrelevant to the legal determination. There is often substantial difficulty in determining which facts in an unpublished ruling the Service considers decisive, especially since they are presented in a manner never intended for publication and frequently derived from the less than lucid language of a ruling request. This, coupled with the fact that a practitioner cannot rely on such a determination as a basis for giving advice, makes the advantage to be gleaned from indiscriminate publication rather marginal.

Appendix A of Plaintiffs' Motion lists, as an example of the need to publicize "secret law" among tax practitioners, the refusal by the Service to grant requests by several individuals for access to specific unpublished rulings. More representative of the views of the profession, however, is that neither the Institute nor the American Bar Association, both of whose members range from sole practitioners to partners in large firms and whose combined membership represents perhaps the bulk of tax practitioners in this country, has urged complete disclosure of unpublished rulings.[12]

The above discussion is not intended to suggest that the Service's interpretations of tax law remain secret. It *is* intended to show that the public interest in knowing those interpretations does not essentially lie in their illumination of the tax law to the occasional practitioner or general public.

II. Granting Plaintiffs' Motion Is Not Necessary to Assure Consistency And Impartiality in the Service's Interpretation of Tax Law

We see no real purpose to be served by plaintiffs' request for disclosure of identifying details, except perhaps the implicit suggestion that complete disclosure will more likely assure that the Service interprets the tax law *consistently* and *impartially*.

Consistently means that, given similar sets of facts, the Service should come to similar conclusions. Impartially means that the Service's conclusions should not be affected by personal or political considerations. The two terms differ, in that although inconsistency can result from favoritism, it can also arise because of human fallibility; and, contrary to widespread impression, it is not always the weak and disadvantaged who are aggrieved by inconsistent treatment.[13]

It is submitted that disclosure of identifying facts in the requested rulings, when balanced against the public interest as advocated by the Institute, will not materially advance the public's capacity to judge the consistency and impartiality of the Service's action.

A. *Deletion of Identifying Facts Other than Names, Addresses, and Taxpayer Identification Numbers.*—The significance of a ruling, whether published or unpublished, lies in the Service's application of law to specifically stated facts. The Service's regulations state that:

> "It will be the practice of the Service to publish as much of the ruling . . . as is necessary for an understanding of the position stated." [14]

The controversy arises not with respect to such publication, but with respect to the language immediately following:

> "However, in order to prevent unwarranted invasions of personal privacy and to comply with statutory provisions, such as . . . 26 U.S.C. 7213, dealing with disclosure of information obtained from members of the public, identifying details, including the names and addresses of persons involved, . . . and information of a confidential nature are deleted from the ruling." [15]

As discussed below, the legal issues with respect to facts (other than names, addresses and taxpayer identification numbers) which could reveal a taxpayer's personal life or business affairs ("identifying facts."), are as follows:

> In what circumstances 5 U.S.C. § 552(a)(2) permits deletion of identifying facts; and
>
> What exemptions are available under 5 U.S.C. § 552(b).[16]

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[12] See Exhibits A and B of Defendants' Opposition to Plaintiffs' Motion.

[13] In *International Business Machines Corporation* v. *United States*, 343 F. 2d 914 (Ct. Cl. 1965), the plaintiff complained that the Service had given Remington Rand a ruling that Remington's Univac computer devices were not subject to an excise tax, but did not give a similar ruling with respect to plaintiff's competing computer, which was identical in all significant respects with Univac.

[14] 26 C.F.R. 601.601(d)(2)(v)(b).

[15] *Ibid.*

[16] The plaintiffs concede the availability of 5 U.S.C. § 552(b)(4) and (6).

It is the Institute's position that in seeking to answer those questions, the public interest to be considered is the degree to which nondisclosure will inhibit the public's capacity to judge the consistency of the Service's actions.

B. *Deletion of the Names of Persons Who Received Rulings, of Their Accountants or Attorneys, and of Third Parties.*—The legal issues as to names are similar to those as to identifying facts. However, disclosing names [17] of persons who have participated in the rulings process serves one, but only one, important public interest: affording an opportunity to scrutinize the Service's impartiality. Accordingly, in balancing interests, any argument against disclosure must be considered with reference to the possibility of favoritism.

C. *Authority in Support of the Institute's Position.*—

1. *Deletions in Previously Published Rulings.*— 5 U.S.C. § 552(a)(2) states, in relevant part, that each agency shall make its interpretations available for public inspection and copying "unless the materials are promptly published and copies offered for sale." Rulings published in the weekly Internal Revenue Bulletin have had identifying facts deleted. Plaintiffs have not requested the identifying facts of those rulings, presumably because the interpretations have been "promptly published and copies offered for sale." In that event, a showing that the material identifying facts of any "routine" [18] ruling fit within the prototype facts of a published ruling (which could well be why the ruling was considered routine) should remove that ruling from the scope of the plaintiffs' requested relief. Clearly, there could be no secret law or inconsistency involved.

2. *Personal Privacy.*—5 U.S.C. § 552(a)(2) states that:

> "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes [a] . . . statement of policy [or] interpretation . . . However, in each case the justification for the deletion shall be explained fully in writing." [19]

The scope of privacy is determined by a "balancing of interests." [20] The taxpayer's interests in privacy, in declining order of importance, are of three types:

(i) he might well wish to keep private such specific identifiable information as the balance sheet of his proprietorship, the names of people with whom he does business, or the charities to which he contributes;

(ii) he might not wish to be publicly associated with the legal issues in a ruling, since his tax or personal affairs might be inferred from, say, rulings about alimony payments or medical expenses;

(iii) his name, address and taxpayer identification number.[21]

Getman v. *National Labor Relations Board*, *supra*, dealt with the (iii) level of disclosure. In that case the court found that employees would "suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in connection with [a] voting study" of N.L.R.B. eletcions.[22] The resulting loss of privacy was characterized as "relatively minor," since a name and address was considered a low form of disclosure. Nevertheless, the court permitted it only after reviewing the impeccable credentials and disinterestedness of those who would obtain the information, as well as the limited and nonprofit use to which it would be put. By contrast, *Wine Hobby USA, Inc.* v. *Internal Revenue Service*, 502 F.2d 133 (3rd Cir. 1974), dealt with the (ii) level. In that case the names and addresses were associated with a legal issue, registration for the home produc-

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[17] For this purpose, the term "names" includes addresses and taxpayer identification numbers.

[18] The term "routine" ruling is intended to have the same meaning as in *Tax Analysts I*.

[19] The difference between this exception and the exemption in 5 U.S.C. § 552(b)(6) is that (b)(6) exempts certain types of "files" from all disclosure, whereas (a)(2) permits identifying details to be deleted from any records upon written justification. The standards of a "clearly unwarranted invasion of personal privacy", however, should be the same for both sections; and authority under (b)(6) will be considered equally applicable to the meaning of that phrase under (a)(2).

[20] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), cited in *Getman* v. *National Labor Relations Board*, 450 F. 2d 670, 674 (D.C. Cir. 1971).

[21] A fourth type of information is that which a taxpayer might not want disclosed even though not identifiable with him. Examples are manufacturing processes, statistical analyses or trade secrets, facts which although referred to for ease of discussion as identifying facts, relate not to privacy but to the exemption set forth in Section 552(b)(4). *But cf.* Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rec. 761, 780–81 (1967). Professor Davis states that an agency should clearly have the power to delete identifying details in order to prevent disclosure of confidential information described in Section 552(b)(4).

[22] 450 F. 2d at 674–75.

tion of wine; and the court considered disclosure of the names an unwarranted invasion of privacy.

Congress has shown its sensitivity even to level (iii) disclosure. Just four months after enactment of the Freedom of Information Act, it amended Section 6103(f) of the Internal Revenue Code[33] to prevent the public from learning a taxpayer's identification number by inspection of the Service's list of those who file returns. The Senate Report on the amendment states:

> "[U]der the Service's automatic data processing system the income tax return lists will show the taxpayer's identification number which in most cases is also his social security number. Your committee, like the Committee on Ways and Means, does not believe that it is desirable to make these social security numbers generally available to the public because they can be used to obtain information from the social security offices relative to the wages of the individual."[34]

Therefore, although *Getman* holds that level (iii) information is available to responsible people for an approved purpose, Congress has indicated its intention that such information should not be made available where the possibility of abuse exists. At the (ii) level, *Wine Hobby* denied a legitimate commercial use—to forward catalogs of wine-making equipment to people who, by registering with the government as wine producers, had indicated an interest in such activity.

At level (i), in which specific facts can be linked with individuals, a court has indicated that even deletion of the names and identifying details may not sufficiently protect privacy. In *Rose* v. *Department of the Air Force*, 495 F. 2d 261 (2d Cir. 1974), plaintiffs requested case summaries of Honor and Ethics Code Adjudications of the United States Air Force Academy. The majority opinion states that:

> "[I]dentification of disciplined cadets—a *possible* consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends. Viewing this potential for serious harm from the perspective of our society's expanding concern for the protection of privacy, . . . to hold that [defendants] must now, without any prior inspection by a court, turn over the summaries to [plaintiffs] with only the proper names removed . . . might 'constitute a clearly unwarranted invasion of personal privacy.'"[35] (Emphasis added.)

The Court ordered an *in camera* proceeding to delete personal references and all other identifying information; and if *that* were not sufficient to safeguard privacy, then the summaries would not be released. In *Rose*, as in *Getman*, the parties requesting information were responsible persons, and they intended to use the information for a legitimate academic purpose. However, the potential for harm of disclosing specific facts is so great that the *Rose* court ordered safeguards[36] even though the identifying facts were otherwise available to a limited group—cadets at the Academy.

Although the disclosure of identifying facts in an unpublished ruling may well not be as disabling as those of the disciplinary proceedings involved in *Rose*, the potential for harm is greater in other respects—the Court's lack of control over both how and by whom the information may be used. Harm cannot always be predicted, particularly since the Service requires the names, addresses, and taxpayer identification numbers of "all interested parties" to a ruling request.[37] For example, this could disclose financial relationships which the taxpayer for valid reasons does not wish to be generally known. An individual might, say, have a financial interest in a business which was politically or personally unpalatable to his friends and neighbors. Again, the contributors to a public interest law firm which espoused unpopular causes might not wish their contributions to become common knowledge. In view of possible boycotts, disclosure of certain persons as directors, officers or shareholders of a business could damage its commercial prospects in ways perhaps not foreseen either by plaintiffs or even by the individuals involved.[38]

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[33] Act of November 2, 1966, Pub. L. 89-713, § 4(a), *amending*, 26 U.S.C. 6103(f).
[34] S. Rep. No. 1625, 89th Cong., 2d Sess. 8 (1966).
[35] 495 F. 2d at 267-68.
[36] One way suggested by *Rose* to protect privacy was that used by the Service in publishing rulings. See 495 F. 2d at 268 n. 18.
[37] 26 C.F.R. 601.201(e)(2). This does not include the shareholders of a widely-held corporation.
[38] The right of privacy, in general, has recently been the subject of great public concern; see "Government Databanks and Privacy of Individuals (H.R. 16373 and S. 3418)," the

Opposed to this public interest in protecting privacy is the public interest asserted by plaintiffs in ascertaining both the exact facts on which a ruling is based (presumably in order to judge the consistency of the Service's interpretations) and the names of the parties involved (presumably in order to judge the Service's impartiality). The Institute suggests that both interests can be taken into account. To begin with, the privacy excpetion would not apply to any information of public record, such as that contained in prospectuses, offering circulars, and court records, or data about municipalities and public officials.

Next, it may be considered that the right of corporations and other business enterprises to keep confidential their trade secrets, organizational and operating procedures, and other commercial and financial information essential to their economic welfare is available under 5 U.S.C. § 552(b)(4) rather than under the privacy exception. Even as to an enterprise that may not have a right of privacy,[29] however, statements about corporations may be identifying facts coming within the privacy right of individuals.[30] It is difficult to see why, if a sole proprietor or partner has the right to keep his earnings from becoming public knowledge, he loses that right by incorporating to limit his liability.

Accordingly, except for matters of public record, a showing that the features which make the facts identifiable can be deleted without in any way diminishing the reader's ability to understand the legal conclusion would satisfy any public interest in consistency.[31] When that can be done, it is submitted that only if the Service's position in a ruling is not consistent—that is, explicable in terms of its conclusions in other rulings or its position before the courts—does the question of impartiality arise. If the question of impartiality does not arise, the Institute cannot conceive of any public interest in disclosing the names of the persons to whom rulings are issued. Thus, there could initially be a determination of the ruling's consistency. If the conclusion of the ruling is clearly explicable, whether it is a "routine" or "reference" ruling,[32] there is no reason to disclose either the taxpayer's name or identifying facts. On the other hand, if there is reasonable doubt as to the ruling's consistency, then there should be a specific determination of the strength of the taxpayer's claim to privacy as to disclosure of his name[33] and, if (but only if) the ruling cannot be understood without identifying facts, as to those facts.

In assessing the validity of this approach, the court should take into account whose privacy it will be primarily protecting if it decides disclosure is not necessary. It will not be affording much protection to widely-held corporations in cases where their rulings are made public. In all likelihood most of the people as to whom facts are deleted will be individuals and business to quote Mr. Penick's letter,

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Committee on Federal Legislation of the Association of the Bar of the City of New York, reprinted in 30 Record of the Association 55 (January/February 1975). See also, "The Privacy of Federal Income Tax Returns," the Committee on Civil Rights of the Association of the Bar of the City of New York, reprinted in 30 Record of the Association 400 (May/June 1975).

[29] *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 366 F. Supp. 929 (D.D.C. 1973), *aff'd* in part and *rev'd* in part, 504 F. 2d 238 (D.C. Cir. 1974), holds that no corporation has a right to privacy. (366 F. Supp. at 937.) That holding relies on Davis, *supra*, pp. 781 and 799. Although Professor Davis states that the congressional committees' failure to think of corporations as having privacy was "probably an inadvertence," he concludes that " 'personal privacy' always relates to individuals." He finds the statutory definition of "person" in 5 U.S.C. § 551(2) irrelevant, distinguishing the phrase "personal privacy" in the exception from the phrase "privacy of any person" used in the Attorney General's Memorandum on Public Information Section of the Administrative Procedure Act. 5 U.S.C. § 551(2) defines the term "person" for purposes of the Freedom of Information Act as including a partnership or corporation. 5 U.S.C. § 552(a)(2) refers to "personal privacy." Since Webster's Third New International Dictionary (1971) defines "personal" as "of . . . a particuluar person," a literal reading of the statute would indicate a conclusion contrary to that of Professor Davis. For example, if a statute defined a corporation as including a business trust, the adjective "corporate" would refer to such a trust. Furthermore, by its terms, the Privacy Act of 1974, 5 U.S.C.A. § 552a,applies solely to individuals, an unnecessary limitation if only individuals can have privacy.

[30] Except in the case of a widely-held corporation requesting a ruling relating to a reorganization, the Service's regulations consider shareholders as "interested parties" to the ruling. 26 C.F.R. 601.201(a)(2).

[31] This might well not be possible in the case of one category of rulings the Service does not publish, those involving "[i]ssues not likely to arise again because of unique or specific facts." 26 C.F.R. 601.601(d)(2)(iv)(*c*).

[32] The terms "routine ruling" and "reference ruling" are intended to have the same meaning as in *Tax Analysts I*.

[33] In view of Congress's amendment of Section 6103(f) of the Internal Revenue Code, there would never appear to be any justification for disclosing taxpayer identification numbers. *Cf.* Section 7 of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1897 (1974).

"have only infrequent or isolated relationships with the . . . rulings program and who, undoubtedly, are not even aware of the present action which conceivably could cause them great and irreparable harm."

The question of whether the name of an accountant or attorney should be disclosed depends in large measure upon whether the name of his principal need be disclosed. If for any reason the principal's name need not be disclosed, the only conceivable reason for wanting to know the name of the attorney would be to determine if certain representatives have received preferential treatment from the Service. Again, if the ruling is consistent, there is no reason to disclose the name of the accountant or attorney.[34]

3. *Written Justification.*—In permitting deletion of identifying details for privacy reasons, 5 U.S.C. § 552(a)(2) provides that "in each case the justification for the deletion shall be explained fully in writing." Once rulings involving matters of public record and any corporations as to which privacy cannot be claimed have been winnowed, it is submitted that the Service should be permitted to make a wholesale justification of deletions on the basis of taxpayer reliance upon its regulations.[35] As previously stated, those regulations even today promise taxpayers who request rulings that in publishing

"as much of the ruling . . . as is necessary for an understanding of the position stated . . . identifying details, including the names and addresses of persons involved, and information of a confidential nature [will be] deleted . . . ." [36]

The above discussion of deletion on privacy grounds applies a generalized public interest to the area of tax rulings; but, with respect to the justification for such deletion, the Institute also embodies a particular interest of the tax profession that it and its clients be able to rely on the regulations and promises of the Service. Indeed, it is the keen feeling of practitioners that their reliance on the Service's regulations has been misplaced which more than any other factor motivates this brief.

This Court, in *Tax Analysts I*, in effect rejected this reliance as unjustified once the Freedom of Information Act became law. Language in the committee report of the House of Representatives [37] indicating that private rulings were exempt from disclosure was not considered controlling, on the basis, in part, of a preference for the Senate Report stated by the *Getman* court four years after passage of the act. Perhaps the reliance by the tax profession and the Service on the Service's regulations and the House committee report was misplaced, but understandably so. They may also have been misled by the decision in *Shakespeare Company* v. *United States*, 389 F.2d 772 (Ct. Cl. 1968), which apparently held that the Freedom of Information Act does not require the Service to grant access to unpublished rulings. *Robins & Weill, Inc.* v. *United States*, 63 F.R.D. 73 (M.D.N.C. 1974), evidently came to the same conclusion even after *Tax Analysts I*.[38] We urge this Court to agree that language in a House Report, regulations of the Service, and a decision by the Court of Claims before *Tax Analysts I* constitute the very strongest basis for reliance.

The interest of the tax practitioner in this question rests on the obvious adverse effects that unwanted and unexpected disclosures could have upon relationships of its members with their clients. It is important that people trust their tax advisers, since such advisers function by pointing out the facts material to a determination of the client's liability. If people consider that they have been misled, in the sense that information which their tax advisers and the Service promised would be kept confidential is now to be disclosed, they will be understandably more reluctant in the future to make proper disclosure either to the Service or to their advisers. Again, this is most relevant to the situation of the individual or private businessman, who—together with his tax adviser and conscience—determines what information will be voluntarily furnished to the Service.

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[34] No discussion is presented with regard to the disclosure of the names of third parties who have communicated with the Service regarding a ruling request, since the interests of the Institute do not embrace such third parties.

[35] The decision of the Court of Appeals in *Robles* v. *Environmental Protection Agency*, 484 F. 2d 843 (4th Cir. 1973), indicates that the unpublished decision of the District Court considered a promise of confidentiality material in determining whether an invasion of privacy had occurred. The Fourth Circuit did not decide the question. See 484 F. 2d at 846.

[36] 26 C.F.R. 601.601(d)(2)(v)(b).

[37] H. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

[38] But *cf. Queen's Way to Fashion, Inc.* v. *United States*, 749 CCH Stand. Fed. Tax Rep. ¶ 7905 (Ct. Cl. Trial Judge's Report 1974), *vacated*, 74-1 USTC ¶ 9387 (Ct. Cl. 1974); *Westvaco Corporation* v. *United States*, 1975-2 USTC ¶ 9537 (Ct. Cl. Trial Judge's Report, June 18, 1975); and *Teichgraeber* v. *Commissioner*, 64 T.C. ——, No. 48 [CCH Dec. 33,274] (June 19, 1975).

The question therefore goes beyond a concern of the profession to an interest of every citizen in the functioning of our tax system. Our self-assessment system rests ultimately on the people's faith in their government. The Institute believes that whatever the courts, the Service, or Congress might do about *future* ruling letters, the consequences of disclosing what the government has promised not to disclose would shake public faith in a system and agency already beleaguered by criticism.

Recognition of this reliance interest would not materially prevent plaintiffs from learning how the Service has been operating. It would limit inquiry only into how taxpayers have been operating. It is submitted that the purpose of the Freedom of Information Act *is to permit citizens to monitor their government, no to permit them to monitor each other.*

4. *Exemptions.*—5 U.S.C. § 552(b) sets forth various exemptions from disclosure, of which the brief will discuss subsections (b)(3), (b)(4), and (b)(6).[39]

a. Statutory Exemption: (b)(3)

The (b)(3) exemption applies to matters specifically exempted from disclosure by statute. Section 7213(a)(1) of the Internal Revenue Code[40] provides, in relevant part, that:

> "It shall be unlawful for any officer or employee of the United States . . . to make known in any manner whatever not provided by law . . . the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return. . . ."

Regardless of whether Section 6103 of the Internal Revenue Code[41] applies to tax return information or only to the returns themselves,[42] Section 7213(a)(1) assures the confidentiality of information set forth in an income tax return. In *Association of American Railroads* v. *ICC*, 371 F. Supp. 114 (D.D.C. 1974), the plaintiff argued successfully that allowing the Interstate Commerce Commission to make public schedules of the railroads' taxable income, gains, investment tax credit and other items contained in their income tax returns would contravene Section 7213(a)(1). A three-judge panel of this court sustained plaintiff's position against the defense that the Freedom of Information Act permitted such disclosure. What is particularly relevant is that the plaintiff did not object to giving the Interstate Commerce Commission the information, but merely to the making public of that information by the Commission. In that case, as in this one, the tax return information was given to the government in a form other than a return; but, significantly, that fact did not remove the information itself from the protection of Section 7213(a)(1).

Another case, *ISI Corporation* v. *United States*, 73-1 USTC ¶ 9251 (N.D. Cal. 1972), extended the protection of Section 7213(a)(1) not only to information *contained* in income tax returns but also to materials relevant to the information contained in such returns which could bear on income tax liability. That case concerned the proper allocation of a $500,000 purchase price paid by a buyer to a seller for certain assets. The buyer, which was the plaintiff in the case, sought to compel the Service to produce

> "all documents, writings and tangible things [the seller] furnished to the Internal Revenue Service . . . , other than [the seller's] income tax returns, which in any way refer to, mention, or state the value of any of the assets in question."

The court refused the request, holding that such items fall within the protection of Section 7213(a)(1) of the Code.

Under the *American Railroads* case, any information in a letter ruling which must also appear on the income tax return—independent of the ruling's attachment to that return—would be exempt from disclosure pursuant to Section 7213(a)(1) and thus fall within the (b)(3) exemption. In addition, under *ISI Corporation*, there would also be exempt information contained in a letter ruling which would bear on the income tax liability issue with which that ruling is concerned. In the case of a business, *American Railroads* would require deletion of most of the financial information in question, since an income tax return ordinarily requires a balance sheet of the business. Furthermore, *ISI Corporation* would indicate that the other identifying facts in the ruling would be

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[39] The Institute does not take any position as to the availability of other exemptions, such as (b)(7) with respect to rulings issued before December 31, 1974.

[40] 26 U.S.C. § 7213(a)(1).

[41] 26 U.S.C. § 6103.

[42] Section II B of this court's opinion in *Tax Analysts I* stated that Section 6103 provides confidentiality for returns, whereas Paragraph 14 of Defendants' Answer alleges that Section 6103 applies to tax return information.

exempt from disclosure, since the Service requires information from the taxpayer only to the extent necessary to determine his income tax liability.

Since it is clear that the (b)(3) exemption may be satisfied by deleting identifying facts, the result of following *American Railroads* and *ISI Corporation* as to income tax rulings would not substantially prevent the plaintiffs in this case from obtaining the legal conclusion and reasoning of such rulings. Moreover, since Section 7213(a)(1) does not apply to the names of taxpayers, there would be no statutory bar under this exemption to the release of names in order to determine impartiality.[43]

b. Confidential Business Information: (*b*)(*4*)

Since plaintiffs concede the availability of the (b)(4) exemption, the only question is the standard for deleting "trade secrets and [confidential] commercial or financial information...."[44] In relevant part, *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), holds that information is confidential if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.[45]

The Institute suggests a fairly simple standard: disclosure of information should be considered as substantially harmful to the competitive position of a taxpayer if he can show a reasonable possibility that someone would pay for the information. If someone would pay to have it disclosed, then he has lost money by having it disclosed for nothing; and such loss is the best demonstration of how his competitive position could be harmed.

In making the above showing, a business should not be held to an exacting burden of proof, because information-gathering on competitors "is very much a piecing together of bits of information—it is not an exact science."[46] As stated in *Business Week*, corporations are increasingly paying to obtain information about the competition;[47] and what can be of value to a competitor may depend upon what the competitor already knows, a fact which is not within the taxpayer's capacity to demonstrate.

c. Privacy Exemption: (*b*)(*6*)

The considerations which determine the exemption from disclosure under (b)(6) are similar to those discussed previously on the question of deleting identifying details pursuant to 5 U.S.C. § 552(a)(2).

CONCLUSION

The Institute agrees that legal conclusions of the Service should be made public, although primarily for reasons other than that advanced by plaintiffs. Such publication, with deletion of names and identifying facts, does no more than what the Service's regulations commit it to do—to publish "all rulings... involving substantive tax law."

However, this brief has attempted to show that the interests of taxpayers in privacy, when coupled with their *past* justified reliance on the Service's promise of deletions, should in all but the most exceptional cases outweigh the interests served by disclosure; and even in those cases various statutory exemptions are applicable. We do not recommend any procedures for deletion at this time, since the Institute believes that such procedures should await the Court's decision as to the grounds and standards for deletions. For example, in terms of the ability to consider large groups of rulings, rather than each ruling individually, the grounds set forth in this brief for deletion may be ranked as follows: 1. all income tax information; 2. all facts fitting within those of published rulings; 3. privacy; and 4. confidential business information.

A decision that information in all income tax rulings should be deleted would vastly simplify the procedure, by eliminating the need to consider other grounds

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[43] Since Section 6103(f) of the Code permits the public to learn the names and addresses of persons filing returns, we do not believe that Section 7213(a)(1) would prevent the disclosure of names which cannot be linked with identifiable tax return information.

[44] In *Tax Analysts I*, the court held that the Service's promise of confidentiality was not sufficient to preclude disclosure, but that the information must be "independently" confidential.

[45] The question of competition in *National Parks* was relatively clear-cut, since the competitive position of concessionaires in national parks—whose financial information the plaintiff requested—is determined by the government.

[46] Edward W. Smith III, vice-president for corporate marketing at Arthur D. Little, Inc., quoted in "Business Sharpens Its Spying Techniques," *Business Week*, August 4, 1975, at 60.

[47] *Ibid.*

for deletion in respect of those rulings; and a decision that facts fitting within those of published rulings should be deleted would eliminate consideration of the third and fourth grounds as to those rulings.

Accordingly, we suggest that decisions as to deletion, in recognition that they apply to rulings issued under the Service's present regulations, be based wherever possible on the most broadly applicable grounds; and we respectfully request that the Institute be afforded the opportunity to present its views as to any release procedures.

Respectfully submitted,

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EXHIBIT 1

"SHOP TALK," 42 THE JOURNAL OF TAXATION 63 (JULY 1975)

NEW RULING APPROVES CBOE RULES ON OTHER OPTIONS

In our February 1975 column we described certain uses of the Chicago Board of Options (CBOE) tax rules pertaining to holders and writers of options. These uses were based on options developed in conjunction with various commodities, especially silver, and were not options traded on the CBOE with respect to publicly traded stocks.

We have now been advised that the IRS has issued a favorable ruling to a limited partnership proposing to engage in a series of transactions involving purchase, sale, and writing of option contracts in the form of both puts and calls, with regard to the tax consequences to it both as "holder" and "writer" of options with respect to silver and other metals. The specific rulings are as follows:

"With respect to those transactions where [x] in the *holder* of a silver put or call:

1. Upon the sale of the put or call prior to exercise, any gain or loss recognized by [x] constitutes capital gain or loss, and is short-term or long-term, depending upon the holding period of the option, pursuant to Sections 1234(a) and 1222 of the . . . Code. . . .

2. The loss resulting from the expiration of a put or call will be treated as a sale or exchange of an option on the expiration date resulting in a capital loss and is short-term or long-term, depending on the holding period of the option pursuant to Sections 1234(b), 1234(a), and 1222. . . .

3. Upon exercise of the call, its cost will be added to the basis of the silver purchased. Upon exercise of the put, its cost reduces the amount realized upon the sale of the underlying silver in determining gain or loss. *Revenue Ruling* 58-234, 1958-1 CB 279 and *Revenue Ruling* 71-521, 1971-2 CB 313.

"With respect to those transactions where [x] is the *writer* of a silver put or call.

1. The premium received for writing the put or call is not included in income at the time of receipt. The premium is includable in [x's] income whenever any of the following occur: the obligation expires through the passage of time; [x] sells or purchases the underlying silver pursuant to the exercise of the call or put; or [x] engages in a closing transaction. *Revenue Ruling* 58-234, 1958-1 CB 279 at page 283.

2. Upon the expiration of [x's] obligation through the passage of time, the premium constitutes ordinary income upon such expiration, pursuant to [Reg.] 1.1234-1(b). . . .

3. Upon [x's] engaging in a closing transaction by payment of an amount equivalent to the value of the put or call at the time of such payment, the difference between the amount so paid and the premium received is ordinary income or loss. The termination of the writer's option does not involve the sale or exchange of a capital asset."

"POINTS TO REMEMBER," 28 THE TAX LAWYER 626 (SPRING 1975)

8. SECTION 302(b)(1): ISSUANCE OF PRIVATE RULINGS

Since the Supreme Court decision in *United States v. Davis*, 397 U.S. 301 (1970), there has been much uncertainty as to the continuing viability of section 302(b)(1). That section permits "sale or exchange" treatment of a redemption which is "not essentially equivalent to a dividend." *Davis* holds that in order for section 302(b)(1) to apply, there must be "a meaningful reduction of the shareholder's proportionate interest in the corporation."

It is understood that he Service has been issuing favorable private rulings under section 302(b)(1) on the basis of the "meaningful reduction" test even though the redemption in question does not meet the "substantially disproportionate" test of section 302(b)(2).

Practitioners should also note that the First Circuit Court of Appeals has recently refused to read *Davis* as requiring application of the section 318 attribution rules in all cases for purposes of the "meaningful reduction" test. *See Robin Haft Trust v. Comm'r*, 75-1 USTC ¶ 9209 (1st Cir. 1975), *rem'g* 61 T.C. 398 (1973), supplemental opinion 62 T.C. 145 (1974).

"TAX CLINIC," 5 THE TAX ADVISER 281-2 (MAY 1974)

DISSOLUTION NOT NECESSARY IN CORPORATE LIQUIDATION

Under Sec. 332 and Regs. Sec. 1.332-4, in order for a subsidiary to be liquidated tax free into its parent, the subsidiary must distribute all its property not later than three years from the close of the taxable year in which the first of the series of distributions under the plan is made. Generally, the liquidation is accomplished within one taxable year.

In certain cases, however, for legal or other reasons, it may be necessary to continue the corporate existence of the subsidiary indefinitely. Will this make such liquidation taxable?

A wholly-owned subsidiary sold its business and assets, subject to long-term lease obligations for which the subsidiary remained contingently liable. It was proposed to distribute the entire proceeds received to its parent within the required three year period. However, in order to avoid the parent directly taking over the contingent lease liability, it was decided not to dissolve the subsidiary until the lease was terminated.

A favorable ruling was received that the liquidation would qualify under Sec. 332(a) and that the three-year liquidation requirement would be met even though the subsidiary was not dissolved by the end of such period. This is in accord with Regs. Sec. 1.332-2(c) which provides in part that legal dissolution is not required. (*From George Mandel, CPA, White Plains, N.Y.*)

"TIDBITS," BNA TAX MANAGEMENT MEMORANDUM 8 (APRIL 28, 1975)

3. IRS PERMITS LIFO ELECTION IN YEAR AFTER CHANGE TO FIFO INVENTORY COSTING WITHOUT TRIGGERING 10 YEAR ADJUSTMENT

Tax Management understands that at least one corporate taxpayer has received a favorable ruling under the following circumstances: In calendar year 1973, the taxpayer made an election to change from an "erroneous" method of inventory costing to an acceptable FIFO method and was permitted a ten-year spreadforward of the adjustment under the provisions of Rev. Proc. 70-27, 1970-2 C.B. 509. One of the conditions under which the Service permitted the use of the ten-year spreadforward was that the taxpayer continue to use the FIFO method of inventory costing during the spreadforward period. Despite the written condition, however, there was no further express provision that the taxpayer could not elect LIFO during the same period. In calendar year 1974, the taxpayer requested a ruling that it be permitted to elect the LIFO method of inventory costing, without having to take into income in that year the remaining amount of the adjustment resulting from its FIFO election in 1973. The Service granted the ruling request. At present, and for at least the past several months, when a taxpayer elects to change from an erroneous method of inventory accounting to an acceptable FIFO method, the Service adds an explicit condition that if the taxpayer elects LIFO during the spreadforward period, then the adjustment is taken into income when the change to LIFO is made. (§ 472)

Senator HASKELL. Our next witness is Sherwin P. Simmons, chairman, Section of Taxation of the American Bar Association, accompanied by William S. Corey, chairman of the Administrative Practice Committee, Section of Taxation. Gentlemen, I appreciate your being here.

STATEMENT OF SHERWIN P. SIMMONS, ESQ., CHAIRMAN, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY WILLIAM S. COREY, CHAIRMAN, ADMINISTRATIVE PRACTICE COMMITTEE

Mr. SIMMONS. We have prepared a written statement which we request be included in the record.

Senator HASKELL. It will be so included.

Mr. SIMMONS. The Section of Taxation of the American Bar Association very much welcomes this opportunity to appear before your committee to present its views on the publication of private letter rulings by the Internal Revenue Service.

The section's interest in the subject is founded on the belief that the private rulings process is an essential ingredient in the administration of our tax laws, a feature which greatly enhances voluntary compliance with these complex laws. Indeed, it is the section's view that the very early resolution of the disclosure question is essential. Only the legislative process can resolve this important issue with the speed and uniformity which is essential if the current rulings program is not to suffer.

If personnel of the Internal Revenue Service are assigned to the publication of rulings without any kind of legislative guidelines and, perhaps, without additional funding, we believe that the current rulings program, including the required rulings, will suffer.

As you are aware, there are several cases pending before the various courts involving different aspects of this proposal. Indeed, a conflict already exists between two Federal courts of appeals. It is entirely likely that additional conflicts in court decisions will occur, and, therefore, there will be additional uncertainties for taxpayers and the Internal Revenue Service.

We believe that this conflict and this uncertainty would not be resolved in the courts for several years. We think that the legislative process could provide immediate and uniform guidelines for this problem, and we therefore urge that irrespective of what happens to the other phases of tax reform legislation, the Congress will consider this issue sufficiently nonpolitical and therefore noncontroversial to expedite its consideration and processing.

In earlier testimony before a subcommittee of the Ways and Means Committee and in correspondence with the chairman of the Senate Finance Committee, the Section of Taxation has recommended that letter rulings already issued be exempt from public disclosure. There are two reasons for this.

First, the information contained in past rulings and in the ruling requests were submitted by taxpayers with the understanding that that information would be held in confidence. We believe that the publication of this information would be a breach of faith with those taxpayers.

Senator HASKELL. Now, may I interrupt you there? It would be easier than waiting for the end.

Mr. SIMMONS. Yes.

Senator HASKELL. Mr. Ginsburg mentioned, going back to July 4, 1967, on the theory that that was when the Freedom of Information Act was enacted. It is my understanding that the courts have said that these rulings are available to the public under the Freedom of Information Act. Now, correct me if I am wrong, in these assumptions. If that assumption is correct, what the ABA is asking Congress to do is to, in effect, put further restrictions on the Freedom of Information Act?

Mr. SIMMONS. That is correct.

Senator HASKELL. And that is what your position is?

Mr. SIMMONS. Yes, sir. That action and these requests are pursuant to the existing regulations of the Internal Revenue Service. Now, we think that——

Senator HASKELL. Now, what was that?

Mr. COREY. The existing statement of procedural rules of the Service indicate that letter rulings are not the type of interpretations which are subject to disclosure under the Freedom of Information Act.

Senator HASKELL. The courts disagreed.

Mr. COREY. They did, but these were preexisting regulations. The courts have subsequently disagreed with that interpretation, but I think taxpayers were relying on the statement of procedural rules in good faith.

Senator HASKELL. What you are asking to do in this is to further narrow the scope of the Freedom of Information Act because the Freedom of Information Act has been interpreted to require the publication of these rulings, right?

Mr. COREY. As to the past, yes.

Senator HASKELL. OK, fine. I just wanted to get the issue straight.

Mr. SIMMONS. Should it be determined that past rulings are to be published, we think they should be published only after all identifying details are deleted, thereby, in effect, respecting in large part, the taxpayer's understanding of confidentiality.

We also think that the publication of past rulings should not jeopardize the current rulings program. We believe that only adequate staffing and adequate funding will permit the avoidance of the jeopardy that we fear. We believe also that adequate time should be given to the Internal Revenue Service to sanitize, if you will, these past rulings to comply with any publication requirements.

Now, turning to future rulings, we believe that future rulings should not be published without broadening the exemptions contained in the Freedom of Information Act by requiring the deletion of all commercial, financial, or other information which could reasonably be expected to cause material financial harm to any person. We believe that all information the disclosure of which could reasonably cause, or be expected to cause, an unwarranted invasion of personal privacy should also be deleted.

We believe there should be a delay in the publication of these rulings in order to permit the consummation of the transaction there covered.

Senator HASKELL. Basically, you take the same position as Mr. Pennick then. You do not feel that getting a ruling is a special privilege on which you waive your right to confidentiality?

Mr. SIMMONS. That is correct. We believe that the rulings process works both for the taxpayer and for the Internal Revenue Service.

Senator HASKELL. Thank you, sir.

Mr. SIMMONS. We think that appropriate procedure should be established for resolving disputes as to what should be disclosed. We would envision this as being some kind of review board within the Internal Revenue Service, itself. We would also anticipate that, if a dispute cannot be resolved, the taxpayer would have the right to request the withdrawal of his ruling request without any fear that any portion of the file would be disclosed to the public.

We think it unfair that a taxpayer should be subjected to any risk of disclosure, where he believes that the publication of the data is more hurtful to him than the failure to get the ruling.

We think, in the case of required rulings, that all identifying details should be deleted prior to publication.

Lastly, we would expect that the rulings would have no precedential value except for the taxpayer involved.

Senator HASKELL. Well, now, wait a minute. You would want something in the statute to that effect? Is that what you are saying?

Mr. SIMMONS. Yes, sir.

Senator HASKELL. OK. I just wanted to be sure I understood you, that is all.

Mr. SIMMONS. Yes, sir, and I should add that the Ways and Means Committee draft law is to that effect.

Senator HASKELL. All right, go ahead.

Mr. SIMMONS. As you are aware, there currently is a split between two courts of appeals as to whether technical advice memorandums should be obtained, as available under the Freedom of Information Act. The section has not taken any position with respect to technical advice memorandums because we did not believe that the publication was contemplated, nor did we think that these memorandums should be published.

However, I would like to offer my personal view—and I believe the section would concur in these remarks—I believe that technical advice memorandums are essentially tax return information. They are developed on facts arising in an audit only after a tax return is filed. These memorandums, in my view, should be exempt from disclosure, even where all identifying details are omitted.

The disclosure of this type of information runs counter to the concept that tax return information should be confidential. I see substantial risk to the successful functioning of the voluntary self-assessment system if that concept is eroded.

However, if the Congress should determine that technical advice memorandums are to be published, I suggest that all identifying details be removed so as not to disclose the identity of the taxpayer. By the same token, I do not think that any part of the underlying file relating to the technical advice memorandum or, indeed, relating to a request for ruling, should be the subject of disclosure. As you are aware, these files are extremely voluminous sometimes. It is entirely likely, more likely, that more exempt information would be included in these

files, and the sanitation burden would be substantial if this material were to be disclosed.

We believe that the exclusive statutory treatment for the disclosure of private rulings should be in the Internal Revenue Code and not mixed between the Code and the Freedom of Information Act.

We believe that if there is to be certainty and national uniformity in the laws dealing with publication of private letter rulings, there must be one set of standards for this disclosure. The appropriate place, in our view, for these standards is in the Internal Revenue Code. We think that it would be a serious mistake to include minimal standards in the Internal Revenue Code and then to permit additional disclosures, perhaps of the underlying file, under the Freedom of Information Act.

We fear that the private rulings process will be substantially jeopardized as a result of taxpayers and the Internal Revenue Service having to litigate questions of disclosure under two sets of standards.

We are also concerned with the question of judicial review of the judgments involved in determining what is to be published. In the interest of certainty and uniformity, we think that this review should be centralized, perhaps in the Tax Court and/or in the District Court for the District of Columbia.

The opportunity for suits to be brought in Federal courts throughout the Nation will necessarily result in lack of uniformity and in lack of certainty in the rules of disclosure. We believe that one set of standards is essential to strike a balance between the public's right to know and the continued operation of the private rulings process.

As I said at the outset, the section views the resolution of the disclosure question important to the continuation of the current rulings program. We hope that the Congress shares our concern and will give this matter expeditious consideration and processing without regard to the other aspects of tax reform.

Senator HASKELL. Thank you, Mr. Simmons. I think I have asked my questions as you went along, but suppose the IRS and the taxpayer cannot agree on what is confidential and what is not confidential? What would be your resolution of the problem?

Mr. SIMMONS. As to a requested ruling?

Senator HASKELL. Yes.

Mr. SIMMONS. We would, as I said, there would be a review process within the Service and then, if that dispute cannot be resolved, I believe that we would leave the decision to the Internal Revenue Service without judicial review, if that is the point of your question, and give the taxpayer the option to withdraw the request for ruling.

Senator HASKELL. What you would do—the ruling would not be issued and the taxpayer could withdraw his request. Is that basically your position?

Mr. SIMMONS. Yes. Now, as to the required rulings——

Senator HASKELL. Why, I know your position on that.

Thank you gentlemen very much indeed. I appreciate your being here.

[The prepared statement of Mr. Simmons follows:]

STATEMENT OF SHERWIN P. SIMMONS, CHAIRMAN OF THE SECTION OF TAXATION, AMERICAN BAR ASSOCIATION

The Section of Taxation, American Bar Association, is pleased to submit to the subcommittee the views of the Section on the publication of private letter rulings by the Internal Revenue Service. Our interest in this subject of vital

importance is demonstrated by our consideration last year of the Administration's bill dealing with disclosure of past rulings and confidentiality of tax returns (S. 4116 and H.R. 17285) and of the overall subject earlier this year in connection with hearings held by the Subcommittee on Oversight of the Ways and Means Committee. My predecessor, Richard H. Appert, testified on the latter occasion after forwarding our recommendations on the cited bills on December 3, 1974, to the Chairman of the Senate Committee on Finance and to other interested officials of the Congress and the Executive Department.

On those occasions, the Section recommended that letter rulings already issued be exempt from public disclosure for two reasons: first, because the information contained in past rulings and in the requests for those rulings was submitted by taxpayers with the clear understanding that it would be held in confidence, and because it would be a breach of faith to violate that understanding; and, second, because the current letter rulings program might well be seriously impaired by the tremendous administrative burden on the Internal Revenue Service to prepare those rulings (numbering several hundred thousand) for publication by deleting information exempt from disclosure under the Freedom of Information Act.

The Section recommended that, if future rulings are to be published, adequate statutory provisions be enacted to exempt from the disclosure requirements certain commercial, economic and financial information and other information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of the taxpayer. In its recommendation the Section made clear that it viewed the private rulings program as a most important part of the administration of our tax laws—a feature which greatly enhances voluntary compliance with those complex laws.

The Ways and Means Committee, in the general context of tax reform legislation, has considered the subject of disclosure of letter rulings, has reached tentative decisions on the subject, and has received from the Staff of the Joint Committee a draft of proposed legislation embodying those tentative decisions. We have seen that draft and are generally familiar with its contents but we have not as yet had an opportunity to analyze it in detail. We shall, of course, do that as soon as possible and shall submit our suggestions and comments to the appropriate committees.

It does seem apparent, however, that in general the draft bill is in accord with our earlier recommendations with respect to future rulings. Thus, in critical part, it provides for (a) the deletion of commercial, financial or other information which could reasonably be expected to cause material financial harm to any person, and of information the disclosure of which would reasonably be expected to constitute an unwarranted invasion of privacy, (b) delay in the publication of rulings in order to avoid upsetting pending transactions, (c) procedures for resolving disputes with respect to whether certain information should be exempt from disclosure and (d) deletion of appropriate identifying details in the case of the so-called "required" rulings (such as those issued pursuant to Section 367).

The proposed legislation also requires the disclosure of technical advice memoranda, albeit with the identifying details deleted. The Section did not address itself to the subject of technical advice memoranda last year because we did not believe that disclosure of such memoranda was contemplated or that they should be disclosed. I would like to offer my personal view because I believe it is widely shared within the Section. That view is premised on the clear facts that such memoranda are based on actual tax return information and indeed arise only out of an audit of a tax return already filed. Accordingly these memoranda should be exempt from disclosure pursuant to Section 6103 of the Code. Despite the deletion of identifying details, it seems to me that the disclosure of such information runs counter to the concept that tax return information should be confidential. I see a substantial risk to the successful functioning of our voluntary compliance system if this concept is eroded.

With respect to past rulings, the Ways and Means proposal partially satisfies the two principal concerns which led us earlier to recommend that such rulings not be disclosed. It provides that all identifying details will be deleted, thereby largely respecting taxpayers' justifiable expectation that their rulings would remain confidential. It also seems to provide—and we hope this will be made clear—that publication of such past rulings is contingent upon the availability of funds appropriated specifically for the purpose of processing such rulings for publication. Hopefully, this will avoid any impairment of the current letter rulings program by reason of monetary or manpower shortages.

However, since receiving a copy of the initial draft of the bill of the Ways and Means Committee, we have learned that the Committee has decided to permit publication under the Freedom of Information Act of rulings issued prior to the

enactment of that statute as well as the publication of taxpayer's requests for rulings and related data.

These recent changes in the (Committee's) bill appear to detract from, if not destroy, an essential ingredient of our self-assessment system—namely, the need for certainty and national uniformity. The initial draft of the bill appeared to achieve this goal by providing for exclusive statutory treatment in the Internal Revenue Code of the whole subject of disclosure. Although the Section has not formally acted, I believe it is fair to say that the Section would feel that one set of standards set out in one statute is critical to certainty and uniformity of disclosure. However, I understand that changes made earlier this week have the effect of violating this fundamental approach with the result that the standards now being proposed would constitute only a minimum set of standards; and that, any person could use the Freedom of Information Act as a vehicle for requiring the disclosure of more information than just that of private rulings and technical advice.

In more specific terms, this would mean that materials submitted in support of a ruling request or of a request for technical advice would be subject to disclosure. We respectfully suggest that that destroys one of the main purposes of the bill since the Freedom of Information Act could be used to require disclosure of information which, we believe, as noted above, is really part of tax return information. We fear that the private ruling process—an important part for all taxpayers, of our self-assessment system—is exposed to failure as the result of the burdens of time, money and manpower placed on the Service and taxpayers alike is likely having to litigate questions of disclosure.

Another specific source of concern is the question of judicial review of the judgments involved in the decision as to matters to be disclosed. The earlier version of the Ways and Means Committee's bill provided for exclusive jurisdiction of that function in the Tax Court and the District Court for the District of Columbia. That centralization would have provided a highly desirable level of uniformity. However, I understand that a recent change extends review jurisdiction to all federal courts under the Freedom of Information Act. I submit that, consistent with the concept that the Internal Revenue Code should be the sole source of statutory authority in this area, and also in the interest of uniformity, the earlier provisions for centralized judicial review were reasonable and workable.

I find and believe that the Section would find these changes very disturbing and violative of a fundamental concept, the recognition of which is essential to a fair and workable solution of the disclosure problem. That concept calls for the establishment of a set of fair and reasonable rules designed to provide uniformity in the disclosure of tax information, which would strike an appropriate balance between the public's right to know and the continued operation of an important segment of the critical function of the Internal Revenue Service.

The importance of this subject suggests one final comment, namely, the particular timeliness of the proposed legislation. As you know, litigation is now pending in several courts involving various aspects of this problem, and indeed a conflict exists currently between two federal circuit courts of appeal. Uncertainty stems also from likely future differences in attitudes on the part of different courts as to various aspects of the question. In these circumstances timely legislation is important to provide sound policy decisions on a nation-wide basis and to do so at the earliest possible time. We would hope therefore that regardless of the ultimate disposition of other phases of tax reform legislation, the proposals regarding disclosure of letter rulings be considered as sufficiently non-political and therefore non-controversial to warrant expeditious consideration and processing.

If we can be of further assistance to your Committee in its consideration of this important matter, we would consider it a privilege to be called upon.

Senator HASKELL. Our next witness is Tom Field, executive director, Tax Analysts and Advocates.

STATEMENT OF THOMAS F. FIELD, EXECUTIVE DIRECTOR, TAX ANALYSTS AND ADVOCATES

Mr. FIELD. Good morning, Mr. Chairman.

Mr. Chairman, as you know, I have prepared a written statement.

Senator HASKELL. And it will be included in the record in full.

Mr. FIELD. Thank you very much.

I would also like to ask the chairman's permission to place in the record the statement of Prof. L. Hart Wright, which has been written on the precise subject on which the committee is holding hearings today, and which is referred to several times in the course of my statement.[1]

Senator HASKELL. It will be included immediately following your statement in the record.

Mr. FIELD. Thank you, sir.

Rather than read my statement, I would like to summarize some of the essential issues that seem to me important for consideration by this subcommittee.

I think, however, that the very first point that needs to be made is that no one appearing before this subcommittee today has any objective other than preserving and strengthening the IRS rulings process. We, as you know, have been pressing for more disclosure for rulings, but the objective and purpose of that activity on our part has been not to destroy the rulings process, but to strengthen it, to preserve it, and to increase public confidence in the integrity of that process.

But disagreements, as the chairman's questions clearly indicated to me as I listened to them earlier this morning, have developed over how the rulings process is to be strengthened and what the problems are that need correction.

My view—and this is a view that I have come to only very slowly, Mr. Chairman, over a period of more than 4 years of struggling with questions relating to rulings disclosure—is that the basic underlying problem, and the problem with which I think Congress should be most particularly concerned, is not the secrecy problem. The secrecy problem is difficult in itself, but it is only a surface problem. The basic underlying problem is the failure of the IRS rulings program to develop into a coherent body of administrative law on which the entire public can rely.

That is the underlying problem, and I think it is a very serious one.

The secrecy question is one of the contributing causes to this failure of the IRS to develop a coherent body of administrative law in the form of IRS rulings. And so the secrecy problem does have to be resolved. But the basic point that I want to make to the subcommittee this morning is that the secrecy problem is only the start of the difficulty.

Much more important is attention to the question of how to make IRS rulings a body of precedent on which tax attorneys and the public in general can rely with assurance, so that a firm or an individual which has a question about the way in which the tax law applies to its particular facts can consult a public body of administrative precedent and will not necessarily be forced to request what we call in the tax bar, an "insurance" ruling, just in case the IRS may have changed its mind in a particular area since similar rulings were issued in the past.

Senator HASKELL. May I interrupt and ask a few questions?

Mr. FIELD. Yes, sir.

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[1] See p. 70.

Senator HASKELL. In developing private rulings as a body of administrative law, would you give them the same weight that regulations are now given?

Mr. FIELD. No. I think that the hierarchy that tax lawyers commonly recognize, with maximum weight being given to the statute, secondary weight being given to regulations published in the Federal Register, and tertiary weight being given to rulings and similar administrative interpretations is the appropriate one.

Senator HASKELL. Now the Internal Revenue Service, like all of us, is entitled to change its mind. So let us assume these private rulings are precedent and put them on a tertiary level, as you talk about. Well, you certainly would not—well, I should not say you certainly would not—would you object to the IRS changing its mind and publishing that the following rulings are no longer applicable?

Mr. FIELD. Absolutely not; and indeed, they ought to revise their decisions as new facts and arguments appear and are presented to them, in exactly the same way that a court or any other judicial body changes its mind when new facts and arguments appear. And indeed the Service has, on occasion, done that. The problem, however, is that most of the time legislation has been required to reverse a ruling which the Service recognizes at a later date to have been erroneous.

Senator HASKELL. But you would allow the Service, for instance, to change its mind, just the way the Service changed its mind in regulation and issues new regulation.

Mr. FIELD. Exactly. And it seems to me that the working out of the details of this procedure is certainly something which is fully within the administrative capability of the attorneys within the IRS.

When a ruling is changed, consideration should necessarily be given to the reliance of individuals and firms in the past, and prospectivity should be given in most cases to any change of decision.

Senator HASKELL. That is what I was going to ask you.

Mr. FIELD. Yes; it seems clear that when anybody issuing a changed determination—and I think that we can properly look on rulings as, in effect, advance declaratory judgments by the administrative agency—ought to very seriously consider whether any change of policy should be made prospective only.

In any event, it is this problem of developing IRS rulings into a coherent body of administrative law which I think this subcommittee and the tax bar, and, indeed, administrative lawyers in general, should be thinking about. Unless we take steps to encourage the IRS to develop a coherent body of administrative law on the basis of IRS rulings, I am afraid that the future holds a constant increase in the IRS workload with respect to rulings, because everyone who wants assurance with respect to the way in which the tax law applies to his particular transaction will have to go to the Service for a ruling if there is no reliable body of precedent in the rulings area.

Another problem which the committee faces is the question whether or not the public ought to be invited to participate in the dialog with respect to proposed rulings. Now this is an issue on which I disagree with the prior witnesses.

The prior witnesses' concern is that the process of issuing rulings not be slowed down. I understand that concern. I appreciate the need of business firms and tax practitioners for promptness in resolving

a question which is presented to them, and on which their business decisions very often have to depend.

On the other hand, I know that rulings requests are often used as a means of conducting a policy dialog with the IRS and with Treasury on important tax policy issues. And it seems to me that the public should have an opportunity on important issues to participate in that dialog.

A very important question is who determines what is important. I am willing to leave that determination to the IRS. It seems to me that IRS officials know when they have an important question before them, and indeed the tax bar here in Washington knows when an important rulings question is before the IRS. I have been carrying around in my briefcase for a few days a letter from the American Petroleum Institute to Assistant Secretary of the Treasury Hickman, dated July 3, 1975. The letter outlines how the American Petroleum Institute sent Mr. Hickman what amounted to a legal brief concerning the tax treatment of expenditures for offshore drilling rigs. The petroleum industry wants to expense those expenditures immediately. The IRS, as this letter outlines, has ruled in a technical advice memorandum, also enclosed with this body of documents, that these expenses must be capitalized and written off over the life of the property.

Now that is an important issue. I would guess that there is somewhere between $100 and $200 million a year at stake, because more and more of our petroleum is coming from offshore locations. Rather than having to rely upon a friend in the Washington grapevine to send these documents along to me and saying, "Hey, Tom, you really ought to speak out on this issue," the IRS, for its own protection and also to increase the quality of the input of material that it gets and the variety of viewpoints it gets on an important rulings question such as this, ought to publish a little one-line notice in the Federal Register: "We are considering the following questions which we consider to be of importance," and those questions would be public notice to those who wanted to comment. Now the dialog might still be one sided. Those who are intensely interested in the question from a financial point of view will obviously comment. Those who might be inclined to comment from the university community, for example, might not want to do so or might not find the time to do so.

But it seems to me that at least the opportunity to comment ought to be provided. So that is one point on which I respectfully but sharply differ with those who have testified earlier today.

A second point—and this is the last of the basic points that I would like to make for the subcommittee—on which I differ with the witnesses who have appeared earlier today is the question whether the rulings process should, to the maximum extent possible, operate in a fish bowl; and particularly, whether the underlying file, with respect to IRS rulings, ought to be opened to public scrutiny, with the safeguards—let me emphasize—with the safeguards for privacy that already exist under the Freedom of Information Act.

I think, by the way, Mr. Chairman, that the existence of Freedom of Information Act privacy safeguards is a point that has been consistently missed in the entire congressional debate on the question of rulings disclosure. The Freedom of Information Act was 10 years in the legislative mill and is a result of a very careful working out of the

interests of the citizen and the interests of the business community, on the one hand, and the public's need to know, on the other hand. The statute protects personal privacy and provides confidentiality for commercial or financial data and confidentiality for trade secrets, and seeks to avoid any clearly unwarranted invasion of personal privacy. Every single one of the phrases that I have just used are statutory phrases from the Freedom of Information Act, protecting material from public disclosure. Those safeguards are already fully applicable to IRS rulings, and no one is attempting to violate them. And, indeed, no one could violate them, given the command of the statute that personal privacy is to be carefully safeguarded, and that trade secrets, commercial data, and financial data, are all to be safeguarded. The statute already does that, as part of the Freedom of Information Act.

On the other hand, the Freedom of Information Act also makes very clear that interpretations adopted by the agency—again a statutory phrase—are to be made public. We talked a week or two ago with Prof. Kenneth Culp Davis, who is the author of "Davis on Administrative Law" and the spiritual father of the Freedom of Information Act. I was asking him for his advice on the pending rulings disclosure proposals before the Ways and Means Committee. And he said, "Look, the law is very clear: interpretations of the law adopted by the agency should be open to the public and indexed. The command of the statute has been clear since July 4, 1967. A clear statute should not be violated. Will Congress acquiesce in a continued violation of the law?" Those are paraphrases, but very close to quotations, from Professor Davis. Now Professor Davis does not mince words, as you can perhaps tell from what I have just paraphrased of the phone coversation. It is Professor Davis' view that there are very strong arguments for prompt compliance by the IRS with the Freedom of Information Act.

In my view, compliance with the Freedom of Information Act also includes access to the underlying facts and the ruling request in particular, as well as ex parte approaches, letters, telephone memos, and the like, so that if there is threat that some favor will be withheld if a favorable ruling does not issue, the telephone memo in which that threat is recorded by an honest and loyal employee will be part of the public file. That is a protection for the honest employee. That is not an attack upon the ruling process. That is a way of maintaining the integrity of the rulings process.

I note that Professor Weidenbruch, who will be testifying later today, points out that, from its infancy, the rulings program has been subject to criticism because it is what he describes as an excessively tempting vehicle for favoritism; and that it is subject to the dangers of improper political or personal influence. Well, that is true, and the best protection that we can give the Internal Revenue Service, in my opinion, under those circumstances is an open record; so that if an inappropriate or questionable or improper approach is made, or if facts are misrepresented to the Internal Revenue Service, the press, the public, and the public interest groups will have access to the basic file making those facts clear.

Now that does not mean—and I want to emphasize this point again—that does not mean that we are interested in prying into individuals' personal business. We are not; and furthermore, we cannot. The Freedom of Information Act clearly states that matters involving personal

privacy, matters involving a clearly unwarranted invasion of personal privacy, to use the statutory phrase, are protected from disclosure. The IRS has a serious obligation under the Freedom of Information Act to protect personal privacy, business secrets trade secrets, and the like.

In closing, there is one question which the chairman has asked, to which I would like to provide an answer, and that is the question whether legislation is needed in this area at the present time. My answer is that, as to the secrecy issue, it seems to me that legislation is likely to be premature. We have pending in court the case that is known as *Tax Analysts II*. We brought *Tax Analysts I* as a test case. We intentionally restricted the scope of the case to only a few rulings. And we also asked for technical advice requests, but that issue was lost. What we ultimately ended up with was two rulings. But we thought we had an important precedent that the IRS would promptly move to obey and implement.

In fact, however, the IRS has apparently been subjected to conflicting pressures, other than the pressures coming from courts. And as a consequence, there has been very long delay in implementation of the promise of the Commissioner of Internal Revenue of July 1974, to begin to make rulings public; and an equally long delay in any move toward compliance, with respect to the decision in *Tax Analysts I*.

Meanwhile, litigation has begun to spring up in other circuits, as other witnesses have correctly pointed out. And indeed, one case, the *Fruehauf* case has gone to final judgment in the sixth circuit, holding that *Tax Analysts I* did not go far enough and that technical advice—subject to the safeguard of in camera inspection—ought also to be made public.

For the reasons I have just outlined, principally the delay in obtaining a start toward compliance with the obvious implications of the first *Tax Analysts* decision with respect to IRS rulings, we went back to court last spring with what is called *Tax Analysts II*. My feeling is that the Government has done its best to delay judicial resolution of that case. I could be wrong on that, however. The case is now fully briefed and awaiting decision on cross motions for summary judgment. And there is every indication that this month, November 1975, the court will probably be issuing a declaratory judgment establishing rules with respect to IRS rulings issued since July 4, 1967.

Now, it is my hope, and indeed, it is our request that the court rule in two stages; that the ruling at stage 1 should be a simple declaration of the public's right of access to unpublished IRS rulings. We thought that was established by the decision in the first suit. Since it is not, we feel that it should be clearly established as a preliminary matter in the second suit.

Then will ensue what I regard as the most difficult portion of the case, which will involve sitting down with the Government attorneys to draft for submission to the court of a proposed order, taking into account all of the intricate and difficult problems with which this subcommittee is concerned, with which I am concerned, with which the tax bar is concerned; issues such as, "Should names be associated with rulings and under what circumstances?" And "Should mandatory rulings be treated in a way different than discretionary rulings?" I want to make a pledge to this subcommittee and to those

here present today, and that is that we will seek to obtain the very best input, from administrative lawyers and from the tax bar, that we possibly can obtain in making our suggestions with respect to the form that the court order should take.

So it is my belief and hope that by the end of this year we ought to have, first, a clear judicial declaration of the public's rights with respect to IRS rulings as distinguished from technical advice, because that issue is not involved in the second case). And second, we ought to have a detailed judicial working out of the appropriate rules for disclosure under the Freedom of Information Act—that is to say, under existing law.

Now, for better or for worse, we are locked into the schedule that we have just outlined. It may be, of course, that in view of the pendency of legislation, the court will decline to rule or will delay ruling. I certainly cannot speak for the court. But as an attorney on the case, I can say that there is every indication that the court is moving expeditiously. Just this morning we received the order permitting the AICPA to intervene. We had not opposed that. We had encouraged it and welcomed it.

In any event, I suspect that this subcommittee of Congress, the tax bar, administrative lawyers, and interested parties will all have, by the end of this year, some judicial guidance which may prove very valuable. I cannot guarantee that it will. But, because the courts are now considering the secrecy issue, legislation may well be premature, as to that issue, which is of course the focus of this hearing.

However, I would like to suggest to the subcommittee that I think the important underlying problem is the problem of creating a coherent body of administrative law on the basis of IRS rulings, a body of administrative law on which the whole public and the whole business community can rely, so that taxpayers are not in every instance forced to come and ask for a ruling and worry over whether they will get a timely ruling from the Service. That is the underlying problem, and the secrecy issue is only a symptom of that problem. This underlying problem may well require legislative consideration.

Senator HASKELL. Is that the problem of precedent?

Mr. FIELD. The precedent issue is a very important aspect of that problem. It also goes, Senator Haskell, to the question of the adequacy of the appropriations for the rulings division, the Office of the Assistant Commissioner, Technical. Because if that Office is to be required to publish in writing every important ruling that they issue, including what Prof. L. Hart Wright calls an institutional interpretative position approved by a senior official, added appropriations may be needed.

If Professor Wright's suggestion were to be accepted, that would, initially at least, require more manpower for the IRS. And it would be irresponsible to adopt Professor Wright's proposal without at the same time considering the serious burden that would be placed upon the office of Assistant Commissioner, Technical, if it were adopted.

What I am trying to suggest is that the underlying problem is difficult and intricate and one on which I strongly suggest that the subcommittee obtain not just the views of tax lawyers, like myself, or of the interested parties and the tax bar, but also the views of those who have devoted their life to the study of administrative law. Because what we are dealing with is the question of how to get the IRS

to develop a coherent body of administrative law, similar to that developed by many other executive agencies.

Senator HASKELL. Mr. Field, I am going to have to interrupt you, but I would like you to stay. That one bell is a vote. I have to go over to the floor and I will be back.

Thank you.

[A brief recess was taken.]

Senator HASKELL. Mr. Field, it is hard to reconstruct the questions that I had for you.

Your view, though, as you expressed it last was that the secrecy issue—or let us put it this way—the availability issue should await a judicial determination. This was both as to prospective and prior rulings.

Was that your view?

Mr. FIELD. The pending Freedom of Information case, which I termed *Tax Analysts II*, Mr. Chairman, necessarily applies only to rulings issued in the past back to 1967. The reason for that is that the freedom of information suit necessarily relates to existing documents. But it is obvious, I think, to all of us that the implementing order, which I hope we will be working on later this fall with Government attorneys——

Senator HASKELL. Will operate prospectively.

Mr. FIELD [continuing]. Will set the pattern for the future, yes, sir.

Senator HASKELL. Then it was your view—I am just trying to recollect—that, as you put it, the larger issue was the precedential value or system to be accorded rulings.

Mr. FIELD. Yes, sir. The way I would phrase it is to say that we should assist and encourage the IRS to develop a coherent body of administrative law on the basis of IRS rulings. And one aspect of this is give IRS rulings status as precedents, and that, in turn, means that those rulings must be much more carefully reviewed. And, as Prof. L. Hart Wright points out in the article I have referred to several times, precedent rulings must be reviewed by fairly senior officials, so that we do not have a junior individual making a mistake which will commit the IRS to a mistaken position for a long period of time.

Senator HASKELL. Are you saying that the IRS should go back to all of its rulings?

Mr. FIELD. No, sir.

Senator HASKELL. We are talking prospectively, then.

Mr. FIELD. It seems to me that the changes necessary to make rulings a body of law on which the public at large can rely should be, must necessarily be, implemented gradually and prospectively.

Senator HASKELL. Now, you mentioned that, in this whole business of precedent—well, somewhat related, you did mention that you thought third parties should have an opportunity to be heard on so-called important issues.

Now, I can see some difficulties arise. Should the important issues, the way you describe it, like this addressed to the ABA, not basically be the subject of a regulation. And, of course, as the subject of a regulation, you have to publish notice and comment.

Would that not be a better way to do it?

Mr. FIELD. Basically, the question you ask, Mr. Chairman, is one that the Service constantly has to wrestle with. The dividing line

between cases in which a ruling is appropriate and instances in which a regulation becomes appropriate is sometimes a difficult one. The fact of the matter is that, when regulations are developed, representatives of the Office of Assistant Commissioner, Technical, often sit in when the rules are being drafted, because they know that those regulations will determine in large part the way in which they will be ruling with respect to cases that they have on their desks at that very moment. So the rulings and regulations processes are somewhat intertwined.

In general, however, they can be pretty clearly distinguished. A ruling, like a court judgment, states the way in which the law applies to a particular individual and to the facts of his particular case. The emphasis is usually on the facts of his particular case, whereas in the case of a regulation, the whole objective is to develop a rule of general applicability.

Senator HASKELL. A broader brush.

Mr. FIELD. Yes, sir. With respect to important rulings, the Service might profitably give notice of what it is working on. During conversations during the intermission, I was chatting with friends, and a thought occurred to me that I had meant to mention earlier. Until recently, the Office of Assistant Commissioner, Technical in the Service published a listing for internal use of important technical projects. Typically, there were from 10 to 20 such projects on that list, without any reference to specific taxpayers. The list would simply say that branch so-and-so was working on the following problem. That list of important technical projects was designed to give other branches within the Service notice, so that if they were working on something similar, they could coordinate with the branch that had the problem before it.

Now, that list was not a large or elaborate project. The list was updated quarterly. Sometimes new projects were added; sometimes existing projects were continued; sometimes others dropped out. If that list, or something similar to it, could be published on a quarterly basis in the Federal Register, I think that the Service would have gone a long way toward obtaining the kind of public interest input that is available to it, if it would let people know in advance what it is working on in the rulings area.

Senator HASKELL. I see.

Mr. FIELD. And I might add, Mr. Chairman, that if this proposal were adopted, it would be highly important that the Service continue to rule, even though it is publishing this list, because the problem that tax practitioners and business people legitimately fear is delay in the issuance of a ruling which they need in order to proceed with a business transaction.

Senator HASKELL. Let me ask a couple of other questions.

This is in the area of secrecy. Obviously, I guess, your view is that the name of the recipient of the ruling should be published along with the ruling—why do you consider that necessary?

Mr. FIELD. Let me distinguish between past and future on this, Mr. Chairman. It seems to me that the questions are more difficult when you look to the past, and it may be that one appropriate means of preserving personal privacy as to the past, at least in some cases, will be deletion of the individual's name.

I have outlined in my statement four basic reasons why it seems to me names should be associated with rulings. In general, it seems to me that rulings are an important public benefit, just as, say, the awarding of a Government contract is an important public benefit. If one wants to know who has obtained a contract to build facilities for the Government, one can consult a public list. If one wants to know who has obtained a ruling in a particular area, it seems to me the same should be true. For example, the Philadelphia Inquirer, which is doing an investigative series on Mr. Howard Hughes, wants to know what rulings Mr. Hughes has obtained from the IRS in the past 10 years, subject to deletions necessary to preserve Mr. Hughes' personal privacy, just as they have obtained from the Central Intelligence Agency, in response to a Freedom of Information Act request, the contracts between Mr. Hughes and his Summa Corporation and Hughes Tool, on the one hand, and the Central Intelligence Agency, on the other. If in response to a FOA request, the CIA is willing to release its contracts to a newspaper reporter with appropriate deletions, the IRS ought also to be willing to release to the Philadelphia Inquirer the rulings that it has requested, even though they relate to a named individual and his firms.

Furthermore, I must confess that I think my judgment on the "names issue" is colored by my experience with the ITT ruling. I worked with a number of the people who were involved in the long discussion of the propriety of that ruling, which culminated, as the chairman undoubtedly knows, in what I regard as a prompt, correct, courageous revocation of that technical advice by the current Commissioner of Internal Revenue about two years ago. But unless we knew that ITT was the firm involved, it would have been impossible for the investigative reporters from the Wall Street Journal to have concluded that there was apparent impropriety. So it seems to me that associating names with rulings is a method of insuring that press scrutiny of the rulings process, which is important in maintaining the integrity of that process, goes forward.

I recognize, however, that, as to the past, there have been expectations of confidentiality, and that one way of respecting those past expectations is to delete names. On that point, however, I would like to emphasize a related matter.

It seems to me, Mr. Chairman, that the very first step that the IRS should take as to past rulings is to contact by mail the ruling recipients to see whether or not they have any objection to release of the ruling. We have had to go through this ourselves in connection with *Tax Analysts I* on a very limited basis, and our conclusion has been that, by and large, particularly with respect to the older rulings, the recipients are perfectly happy to have the ruling come out with their name on it.

Now, I recognize that there are problems finding the names and addresses of some recipients of past rulings. We are dealing, however, with corporations in many cases, and corporations are generally more permanent at a particular address than are individuals. There are cases, however, in which the Service will not be able to locate ruling recipients at all. In those cases, deletion of names could be used to preserve their expections of personal privacy. But it does not seem to me to be wise to go through the tremendous job of censoring out identifying details in all past rulings, all of them, as the Ways and Means

proposal would require be done, unless or until an attempt has been made to contact the recipient to see whether he cares.

Senator HASKELL. It would certainly facilitate matters if the recipient said sure, publish them.

Mr. FIELD. And I would not make this recommendation if my own experience did not indicate that in most cases, with respect to rulings that are two, three, four years old, the recipient is going to say just that. It is a make-work project to require the IRS to go through all of those past rulings and excise names, addresses, and other identifying details, which is what the current Ways and Means proposal would do. It seems to me the proper procedure is find out whether the rulings recipients care. If you cannot find them or cannot contact them, then and only then, go to the bother of excising identifying details.

Senator HASKELL. It sounds like a commonsense view.

Thank you very much, Mr. Field.

I think that probably concludes any questions that I have. I have to go over and vote. I would like to hear from Mr. Worthy upon return.

Thank you, Mr. Field, very much.

[A brief recess was taken.]

[The prepared statement of Mr. Field and an article referred to, follows:]

TESTIMONY BY THOMAS F. FIELD, EXECUTIVE DIRECTOR, TAX ANALYSTS AND ADVOCATES, REGARDING CURRENT LEGISLATION WITH RESPECT TO UNPUBLISHED IRS RULINGS

Mr. Chairman and Members of the Subcommittee on Administration of the Internal Revenue Code:

Thank you for your invitation to testify regarding the IRS rulings program. I would like to confine these comments to the legislative proposals with respect to unpublished rulings that were adopted last week by the House Committee on Ways and Means.[1] In my opinion, these proposals are seriously defective for two reasons:

First, the proposals will substantially increase the secrecy surrounding the IRS rulings process. In particular, the proposals will make it far more difficult to detect instances in which improper pressures have bene brought to bear to obtain a favorable ruling. This, in turn, is bound to lessen public confidence in the integrity of the rulings process.

Second, and even more serious, these proposals, by focusing on the secrecy issue, miss the basic question on which Congress should be concentrating—whether the rulings program will continue to operate as a means of conferring what amount to ad hoc favors on rulings applicants, or whether IRS rulings will be permitted to develop into a coherent body of administrative law on which the entire public can rely.

I. SECRECY AND THE IRS RULINGS PROGRAM

The IRS rulings program, in substantially its present form, originated during World War II, in an atmosphere of wartime secrecy. After the war, the secrecy surrounding the rulings process remained in effect. Not only were ruling requests and the supporting briefs kept under wraps, but—despite IRS promises to the contrary—the flow of published rulings slowed to a mere trickle. After some scandals, and a Congressional investigation in 1953 and 1954, the Service reorganized its rulings program and again promised that all significant rulings would be published. But in fact only a tiny fraction of the IRS rulings issued each year are published, and this has led to the creation of a body of secret administrative law, known only to the IRS and to knowledgeable tax practitioners.

Until recently, it appeared that the Freedom of Information Act would provide a partial solution to this problem. Two courts of appeal have recently ruled that unpublished IRS rulings must be opened to public scrutiny, and one has also

[1] In response to the Subcommittee's request, I have prepared written answers to the questions propounded in the announcement of this hearing (see attachment). I would like to request that these answers be included in the record at the conclusion of these remarks.

ruled that the taxpayer's portion of the IRS response to a so-called "technical advice request" must similarly be made available for public inspection.[2] In addition, the courts have ruled that documents in the rulings file, including the ruling request, supporting briefs, and letters from third parties must be open to public inspection, thus enabling the press, the tax bar, and the public to scrutinize the ruling process and detect and publicize mistakes, improper pressures, or fuzzy legal reasoning.

The legislative proposals recently adopted by the Ways and Means Committee are designed to overturn substantial portions of these court decisions. In particular, the Committee voted to shroud in secrecy the ruling request, supporting briefs, ex parte letters, and (in many cases) the names of the rulings recipients. I am convinced that it took this action only because the procedures used to present the rulings question to the Committee left most members in the dark about the real issues.[3] It is therefore especially important for this Subcommittee (and the Finance Committee as a whole) to insure that its consideration of the rulings question gives all sides, including the press, a fair opportunity to present their arguments, and to rebut the claims made by others, including the Internal Revenue Service. Significantly, the two members of the Oversight Subcommittee who had followed the rulings disclosure question most closely, Congressmen Pickle and Vanik, voted against adoption of the secrecy proposals.

In any event, if the rulings proposals that are now part of the Ways and Means bill become law, there will be two main effects:

1. There will be a substantial increase in the secrecy surrounding the IRS rulings process, because although rulings themselves will become public (in a "sanitized" form), the process by which a ruling was obtained will be shrouded in secrecy. Mistakes, misrepresentations, and improper pressures can all be swept under the rug, and the employee who reveals them will be guilty of a crime.

2. A secondary effect will be to destroy the ability of Congress, the press, the public, and public interest law groups such as Tax Analysts and Advocates to scrutinize the work of the IRS in issuing rulings, so as to assist IRS employees in resisting improper pressures.

Under these circumstances, it is important to ask who is pushing the rulings proposals before the Ways and Means Committee and why. The answer is that the only proponent of these provisions is the Internal Revenue Service, which is seeking to preserve as much as possible of the secrecy that has surrounded the rulings process since World War II. The losers if this legislation becomes law will be the press, and particularly the Philadelphia Inquirer, which will be legislated out of court[4]; the public interest groups, which scrutinize the rulings process to detect and expose impropriety[5]; and small tax practitioners in Kansas, Texas and elsewhere, whose Freedom of Information requests for access to specific rulings will be indefinitely delayed[6].

II. MAKING RULINGS A COHERENT BODY OF ADMINISTRATIVE LAW

Unlike the decisions of other federal agencies, IRS rulings have never developed into a coherent body of administrative law. The principal reason for this

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[2] *Tax Analysts and Advocates* v. *IRS*, 505 F. 2d 350 (D.C. Cir. 1974); *Fruehauf Corp.* v. *IRS*, 30 A.F.T.R. 2d 75-5089 (6th Cir. 1975).

[3] Although the Subcommittee on Oversight of the House Ways and Means Committee did conduct what Professor L. Hart Wright has called "an abbreviated hearing" on the rulings question on July 10, 1975, serious consideration of the rulings issue by the full Ways and Means Committee did not take place until the markup session of September 25, 1975, at which time the Commissioner of Internal Revenue was able to dominate the presentation, without any opportunity for effective response by other interested parties. The same was true during the Committee's final consideration of the issue on October 30. Moreover, the shape of the proposals placed before the Committee was withheld until the last possible moment in each instance. Even the July 10 Oversight Committee hearings were unavailable to the full Committee, since they had not been printed. While these unfortunate circumstances are doubtless a result of the pressures under which the Ways and Means Committee has been working, the net result was less than thorough consideration of many facets of an intricate and difficult question.

[4] The Philadelphia Inquirer is investigating the business operations of Howard Hughes and his Summa Corporation. Their suit requesting recent IRS rulings issued to Hughes and Summa is now pending in court. Under the proposed legislation, the IRS would be prohibited from supplying past rulings issued to named individuals and firms.

[5] Tax Analysts and Advocates is the principal such group, and it recently won a landmark court case declaring Revenue Ruling 72-355 null and void, for failure to comply with the applicable Supreme Court cases.

[6] Although the legislation provides for eventual opening of censored versions of past rulings to public scrutiny, the legislation makes this depend on the availability of appropriations for that purpose. Hence, the IRS can indefinitely delay disclosure of past rulings by not requesting, or not pushing vigorously, the request for the allegedly needed funds

is the secrecy in which rulings and the rulings process have been shrouded. No body of administrative law can develop unless:

(1) the decisions adopted by an agency are made public, together with a statement of the pertinent facts and the legal reasoning on which the decision was based,

(2) those decisions are made on the basis of an open record, so that other interested parties can later examine the underlying facts and arguments,

(3) all affected parties are given notice of the pendency of a decision and an opportunity to present arguments, and

(4) the decisions are carefully indexed and widely published.

In the case of IRS rulings, substantially all of these conditions have been absent. As a consequence, the IRS has failed to create a reliable body of administrative precedent through the rulings program. As a further consequence, it has become necessary for every individual and firm concerned about the tax consequences of a particular transaction to request his own ruling. The result is a burgeoning IRS rulings bureaucracy which struggles with a constantly increasing workload. Like the kings of old, whose word was law and who therefore had to be consulted about everything, the IRS has produced a chaotic situation in which the public, and particularly the business community, doesn't dare make a move without consulting the IRS first. There is no body of coherent administrative law to which a businessman can appeal, and on which he can rely. Moreover, there is no assurance that similarly situated taxpayers will be treated in the same way, and even the Commissioner of Internal Revenue apparently admits that the rulings program has sometimes been characterized by a lack of uniformity in the treatment of taxpayers with similar problems.

In my opinion, the failure of the IRS to develop the rulings program into a coherent body of administrative law is the real problem with which Congress should be concerned. An end to the secrecy surrounding the rulings process is certainly a prerequisite to creating a useful body of administrative precedent, but secrecy is not in itself the main issue. The more basic question is whether the IRS should be required to take the steps necessary to create an organized body of administrative precedent on which the entire public can rely. If the answer to that question is "no," then inevitably the IRS rulings bureaucracy, and that bureaucracy's workload, will continue to grow beyond all bounds, since in the absence of a reliable body of precedent, everyone concerned about the way in which the tax law applies to his case will necessarily have to ask the Service for a ruling.

Precisely how we should go about creating a reliable body of IRS administrative precedent is not an easy matter. Certainly the rulings secrecy proposals now before the Ways and Means Committee cut in precisely the wrong direction. And certainly this problem should not be approached in the slap-dash fashion that has characterized its consideration, to date, by Ways and Means. If nothing more, the experience of other federal administrative agencies should be studied and the opinions of administrative lawyers (not just tax lawyers like me) should be obtained.

One of the most thoughtful articles that I have seen on this subject will appear this month in the University of Oklahoma Law Review (28 Oklahoma Law Review 701, November 1975). It has been written by Professor L. Hart Wright, a distinguished teacher of tax law and a member of our Legal Activities Policy Board.[7] In brief summary, Professor Wright urges that Congress adopt a "comprehensive statutory provision mandating the Service itself "(i) to *publish* in writing; (ii) an *institutional* interpretative position *approved* by *senior* officials; (iii) on which the entire *public* could *rely*; (iv) setting forth *only* the *pivotal* facts involved in every *significant* letter ruling; and (v) articulating *expressly* therein the *reasoned analysis* on which the result is predicated."

The more I have thought about Professor Wright's proposal, the more I have become convinced that his points are well taken. I am quite certain, of course, that the Service and the tax bar will promptly pronounce this proposal to be "administratively unworkable," since its initial result would be to require more work by the IRS, and more assistance from professionals than is currently required to operate the rulings program. But the current IRS rulings workload would not exist today if the IRS had begun, 30 years ago, to develop a coherent body of administrative precedent on the basis of IRS letter rulings.

[7] Professor Wright and the Board of Editors of the Oklahoma Law Review have given permission to insert this article in the record of this hearing, and I would like to ask the Subcommittee to do so.

In any event, no matter what you think of Professor Wright's proposal, it is clear that the rulings secrecy proposals now before the Ways and Means Committee cut in precisely the wrong direction. They will impede rather than encourage the development of an orderly body of administrative precedent, because they will shroud in secrecy the record on which rulings are issued, if not the rulings themselves. The result will be made known, but not procedure and reasoning which produced that result.

III. SPECIFIC PROBLEMS IN THE PENDING WAYS AND MEANS LEGISLATION

I would like to list for the Committee some of the problems in the proposed Ways and Means legislation that seem immediately obvious:

1. *Secrecy of Ruling Request and Related Documents.*—As it stands, the Ways and Means rulings proposal turns into secret documents the ruling request sent to the IRS by outside parties, the supporting briefs, letters and other ex parte communications by third parties, and similar documents. Thus, if improper pressures are brought to bear on the Service to obtain a ruling, the documents recording those pressures will become secret, and any IRS employee who reveals them will commit a crime.[8] And if a firm like ITT misrepresents the facts in a ruling request, the public and the press will have no way of learning that.[9]

And the Committee should make no mistake about it, improper pressure is sometimes brought to bear when rulings are under consideration by the IRS. I have been repeatedly informed of that by IRS employees in a position to know. The best safeguard that an honest employee has in these circumstances is an open record, so that those who exert questionable or improper pressures will face the danger that their pressures will be exposed. The Ways and Means proposals would turn the honest employee into a criminal if he follows his conscience and reveals documents that demonstrate the existence of improprieties.

2. *Secrecy of Legal Arguments Underlying Rulings.*—The Ways and Means proposals are not clear on the point, but they may be intended to encompass not just rulings and the related files, but also General Counsels Memoranda (GCM's), which contain the legal reasoning underlying IRS rulings. These documents are highly important to anyone seeking to understand the significance of rulings, and the legal premises on which they are based. GCM's were once public, but they are now secret, and there is a danger that the Ways and Means proposals may provide a legal basis for that secrecy. It is hard to imagine a step that will do more to impede development of an orderly body of IRS administrative law than a statutory rule imposing secrecy on the basic legal opinion that explains why the IRS ruled in a particular way.

3. *Classification of Rulings as Tax Returns.*—The Ways and Means proposals, under the guise of "coordination with Section 6103," classifies as a 'tax return' any ruling "and any data or information which is received, recorded, or collected by the Secretary with respect to such determination or statement." The obvious purpose is to make the civil and criminal penalties that protect the privacy of tax returns apply with equal force to any and all information relating to IRS rulings. But two courts of appeal have already held that IRS rulings are not tax returns.

Among other things, this "tax return" provision would appear to prevent publication of statistics about the rulings program. More important, it would permit rulings applicants to exert improper pressures on the Service with the assurance that those pressures would never become known to the public. It is hard to imagine a provision less likely to protect the integrity of the rulings process. Why, for example, should a rulings applicant be permitted to threaten to withhold campaign contributions unless a favorable ruling is issued, and not have the telephone memo recording that threat made a part of the public record with respect to the ruling in question?

4. *Depriving Rulings of Precedential Status.*—The Ways and Means proposals seek to deprive rulings of precedential status. This reflects prior IRS practice,

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[8] The proposed legislation does contain a provision permitting the Commissioner to promulgate regulations permitting "additional disclosure" and providing for judicial review. But this is simply a halfhearted attempt to give back the rights guaranteed by existing law, which the proposed legislation would abrogate. The right solution is not to abrogate those rights in the first place.

[9] During the Ways and Means Committee markup sessions, IRS representatives dealt with this objection by promising that they would put "all the pertinent facts" into the published rulings. As those promises were being made, I sat in the hearing room with two skilled tax lawyers from prominent Washington firms. They greeted the IRS promises with utter cynicism. One went so far as to liken the IRS selection of facts for publication in rulings to the procedures used by the White House in connection with the Nixon tapes.

which sought to limit the damage that an erroneous ruling could do. The idea was that by refusing precedential status to any ruling, a mistake made in the issuance of a ruling to a particular taxpayer would apply in the case of only that one taxpayer. But in practice erroneous IRS rulings—especially those that lose revenue—are quickly cast in stone, as they circulate among knowledgeable members of the tax bar who are swift to demand similar treatment for their own clients.

Furthermore, it is hard to imagine a provision more likely to impede the development of an orderly body of administrative law that one which deprives administrative decisions of precedential significance. This provision of the rulings proposals now before Ways and Means is an obvious reflection of the view that rulings are some sort of ad hoc favor, rather than a type of advance declaratory judgment and an element in an important body of administrative law.

5. *Censorship of the Names and Rulings Recipients.*—The Ways and Means proposal also provides that the names of the recipients of past rulings (and some future rulings as well) should be excised before the ruling is published, along with all identifying details. This provision was apparently adopted mainly because those advising Ways and Means felt that it would be easier to publish rulings if names and identifying details were deleted. Our experience shows that precisely the opposite is the case, as I will outline in a moment.

The names of the recipients of rulings and technical advice should be associated with the documents made available to the public for the following reasons:

A. Virtually our entire body of Anglo-American law, including our administrative law, is identified by reference to the names of the parties involved in a particular decision. Thus, for example, ICC reports are described and indexed in terms of the railroads or truckers involved in a particular case. There does not appear to be any reason for departing from this practice in the case of IRS rulings.

B. Excision of names from rulings enormously complicates the task of making rulings public, seince it is not enough to excise the name itself. Addresses, telephone numbers, locations, and dozens of other identifying details must also be excised to keep the identity of a rulings recipient secret. A decision to excise names means that the IRS must censor *every* ruling prior to release, not just some of them. It also means that the scope of the censorship must be much broader with respect to each ruling. Exact figures are obviously not available, but I think it is likely that it will require from 25 to 50 times more manpower to release IRS rulings if names are excised than if they are not.

C. Most important of all, the cleansing effects of public scrutiny of the IRS rulings system cannot operate if the identities of the rulings recipients are hidden. For example, the ITT-Hartford ruling, now revoked after a storm of public outcry, could never have been questioned if the name of the ruling recipient had not been revealed along with the ruling.

D. Finally, it is important to remember that rulings are a form of government benefit, often with a very tangible dollar price tag. I think that the public has a right to know who is getting these benefits and that the tax bar has a duty to scrutinize the IRS's rulings to make sure that the process is run cleanly and without favoritism. Excision of names would leave the public in the dark and would hamstring efforts by the tax bar to critique rulings decisions and suggest needed changes.

Accordingly, except in those rare instances in which personal privacy would be jeopardized by associating names and rulings, I believe that the names of rulings recipients should be made public. In this connection, I think it may also be helpful to point out that, although the right of privacy has been clearly established over the past two generations in the case of individuals, no similar right has grown up in the case of corporations.

A related question is whether names should be deleted from those portions of technical advice memos that are supplied to taxpayers, since such memos are prepared with respect to questions that arise on audit. The Ways and Means Committee decided to delete names in this case, because it would reveal that a firm or individual has been audited. But since it is common knowledge that random computer selection is one of the bases on which returns are selected for audit, there is no moral stigma in revealing that an individual or firm has been audited. Accordingly, the way in which the questions raised in tech memos arise does not appear to justify an additional measure of secrecy in the case of such memos.

6. *Failure to Produce the Index to IRS Rulings.*—The proposed legislation fails to make any provision for public availability of the IRS rulings index. This omission can only impede orderly development of IRS rulings as a coherent body of administrative law. Trying to locate an unpublished ruling without these indexes will be like trying to locate a needle in a haystack.

The IRS rulings indexes are of two types: subject matter and name. Thus, if a person wants to see the rulings relating to charitable contributions, he looks in the index under Code Section 170. If he wishes to see the rulings issued to the Hughes Tool Company, he looks in the name index.

It appears that the pending legislation omits any reference to the rulings index because the index has been poorly maintained, despite the command of the Freedom of Information Act that an index be prepared and made available with respect to all interpretations adopted by a federal agency. This is hardly an excuse for failing to make public any index that does exist. An inadequate index is better than none at all. Court testimony indicates that the existing IRS rulings index is used by thousands of employees annually. That is certainly some indication of its usefulness.

7. *Effective Date.*—The pending Ways and Means rulings proposals provide for full disclosure of rulings requested on and after September 25, 1975. A strong argument can be made that the date ought to be July 4, 1967, the effective date of the Freedom of Information Act. But in no event should the date be set later than July 31, 1974, which is the date on which the Commissioner of Internal Revenue promised the Senate Subcommittee on Administrative Practice that the IRS would begin to make rulings public.

IV. AN EMERGING CONSENSUS REGARDING RULINGS DISCLOSURE?

Despite all that I have just said, I nevertheless feel that there is some hope for consensus regarding the question of disclosure of IRS rulings. The last three years of debate litigation, and discussion seem to have produced agreement between the IRS and some of its critics on at least the following matters:

1. The dangers of secret law that are inherent in the rulings process as presently conducted.
2. The need for greater publicity with respect to rulings, so as to insure more uniform treatment of similarly situated taxpayers.
3. Agreement that steps need to be taken to strengthen public confidence in the rulings process.

The missing element in the debate, to date, is common realization that many, perhaps most, of the problems in the current rulings program stem from failure to permit the development of rulings as a coherent body of administrative law. That, more than anything else, is the defect in the present Ways and Means proposals. By seeking to shore up the secrecy in the present rulings program, those proposals can only impede development of rulings as a body of administrative law on which the entire public can rely. That, in my opinion, is a serious mistake, and I hope that this Subcommittee will help to correct it.

Mr. Chairman, that concludes my prepared remarks. I will be glad to answer any questions the Subcommitte may have.

Attachment: Answers to Subcommittee's questions.

APPENDIX

ANSWERS TO SPECIFIC QUESTIONS IN HEARING ANNOUNCEMENT

1. *Should private letter rulings be made available for public inspection?*

Answer: Yes. Unpublished rulings are "interpretations adopted by the agency" within the scope of the Freedom of Information Act, and, as such, must be made available to the public and indexed by the IRS.

1(a) *Including all information contained in the ruling file?*

Answer: No. Material specifically exempted from disclosure by the Freedom of Information Act should not be revealed. In general, this includes trade secrets, confidential commercial or financial data, and material the publication of which would involve a clearly unwarranted invasion of personal privacy.

1(b) *The identity of the taxpayer, representatives of the taxpayer, third parties commenting on the rulings, IRS personnel responsible for the ruling and other relevant information, excluding all information exempt under the Freedom of Information Act?*

Answer: Yes. The "names question" has already been considered and decided by the Court in *Tax Analysts I*, and the government, after filing an appeal from the decision that "names must be revealed," abandoned its appeal in April 1975. Under the final decision of the Court, the names of the recipient and signatory of a ruling, and the names of taxpayer representatives and third parties must be revealed. The only names that need not be revealed are those of the IRS subordinates who prepared the ruling in question for signature by their superior.

1(c) *All information necessary to adequately explain the result reached in the ruling, including the ruling request and relevant documentation, with the identity of the taxpayer and others as well as other information which would permit persons without intimate knowledge of the taxpayer's business to identify the taxpayer-ruling recipient deleted?*

Answer: For the reasons outlined in the prepared statement to which this answer is appended, deletion of the names of rulings recipients is unsound as a matter of public policy. And for the reasons outlined in answer to question 1(b), *supra*, deletion of the names of recipients of rulings is unlawful under the Freedom of Information Act as interpreted by the decided cases.

1(d) *What additional limitations might also be considered?*

Answer: The limitations on disclosure provided in the Freedom of Information Act are a result of long and careful consideration by Congress, and they appear fully adequate to safeguard any legitimate interest that taxpayers may have in connection with public inspection of IRS rulings. Accordingly, there does not appear to be any need for additional limitations on disclosure, over and above the detailed limitations already provided in the Freedom of Information Act.

2. *What procedures should be established concerning information to be made available for public inspection?*

Answer: This is a question to which the IRS should have devoted attention when the Freedom of Information Act first became law. The intransigence of the IRS in refusing to obey the command of that statute has naturally made compliance more difficult. However, useful precedents have been established by the Securities and Exchange Commission with respect to "no action" letters and by the Antitrust Division of the Department of Justice with respect to its so-called "clearance letters." In addition, we suggested to the IRS more than three years ago that the procedures of the Federal Reserve Board in complying with the Freedom of Information Act also provided a helpful pattern for consideration by the IRS. Similarly, the Office of the Assistant Secretary for Tax Policy in the Department of the Treasury has established a helpful set of Information Act compliance procedures, as a result of a suit by Tax Analysts and Advocates. Accordingly, helpful precedents are not lacking if the IRS at last decides to comply with the Freedom of Information Act with respect to IRS rulings.

2(a) *Should the taxpayer be required to request deletion of information he believes to be exempt from disclosure by specifically requesting deletion or by proposing the form of the ruling for publication?*

Answer: It is not entirely clear what procedures are contemplated in this question, but it appears that either or both of the procedures suggested would be helpful. The point is that the taxpayer is in the best position to determine whether anything in his ruling request, or in the IRS response, falls within one of the disclosure exemptions provided by the Freedom of Information Act. Accordingly, it makes sense to ask the taxpayer in the first instance whether he believes any of these exemptions to be applicable, and, further, to ask him to propose a form of ruling that will make it unnecessary to invoke these exemptions.

2(b) *Should taxpayer suggestions be advisory only, with responsibility for publication of proposed rulings on the IRS, and the taxpayer retaining a right to object to specific information proposed to be disclosed?*

Answer: Yes. The Freedom of Information Act makes the IRS responsible for public availability and indexing of its interpretations of the law, including IRS rulings. Accordingly, the final decision-making authority should be the IRS, since the statute places the responsibility for disclosure on that agency. Of course, common sense indicates that the maximum assistance possible should be solicited by the IRS from the taxpayers to whom a ruling has been issued, but the final decision in the event of dispute should rest with the IRS, since it is the responsible agency which must answer in court for mistakes made in the disclosure process.

2(c) *Should disputes over information to be made public be resolved prior to consideration of the ruling on the merits or after the determination of the issues raised has been made?*

Answer: This question concerns a housekeeping matter, which the IRS is probably best able to answer for itself. However, common sense would seem to indicate that consideration of "disputes over information" should go forward concurrently with consideration of the merits of the ruling itself. Not only will this expedite issuance of the ruling, but it is also likely that consideration of the merits of the ruling will shed light on any "information" question, and vice versa.

2(d) *Should disputes concerning information to be disclosed be resolved by simply refusing to rule where agreement cannot be reached? Should a limited judicial proceeding to resolve such controversies be established providing for publication of the originally requested ruling even where the taxpayer, after judicial determination, disagrees concerning the disclosure of certain information and would choose to rescind the ruling request?*

Answer: It is hard to believe that this question relates to real, as distinct from theoretical problems. However, assuming that the theoretical situation described someday becomes reality, and cannot be reconciled by a display of common sense and good will by the parties, then it seems to me (a) that the Service should rule, (b) that it should inform the taxpayer in advance what disputed material it proposes to place on the public record, and (c) that the taxpayer should be invited to make use of the normal equitable remedies that the courts and the Privacy Act already provide. If the taxpayer feels genuinely aggrieved, he would doubtless seek a temporary restraining order or permanent injunction under these circumstances. Thus, there does not appear to be any need for special judicial proceedings, over and above the normal processes already provided by law.

2(e) *Should taxpayers have the right to request delay of the issuance of a ruling until the proposed transaction is completed?*

Answer: Yes, provided that the delay is not unreasonably long. What is reasonable will obviously depend on the circumstances, and the legitimate needs of the tax bar and the public for information about the interpretations adopted by the IRS must be weighed against the needs of the taxpayer. If a delay is requested, the IRS should require the taxpayer to justify it.

2(f) *Should the IRS be required to index and maintain ruling files and how long should such information be kept available for public inspection?*

Answer: The Freedom of Information Act makes it very clear that interpretations adopted by an agency, such as IRS rulings, must be indexed from July 4, 1967 forward, and that any preexisting indexes must be made available to the public. The question of retention can be resolved by remembering that IRS rulings constitute an important body of administrative law. Accordingly, important decisions should be retained indefinitely, and even seemingly unimportant decisions should, like Tax Court Memorandum Decisions, be retained to the maximum extent possible, so that they will be available for use in resolving similar questions in the future.

3. *Should technical advice memoranda be made available for public inspection and should procedures be adopted for maintaining anonymity of the taxpayer who may be the subject of such memoranda?*

Answer: There is a conflict in the judicial precedents regarding this question. The Court of Appeals for the District of Columbia Circuit has ruled in *Tax Analysts I* that technical advice memoranda should not be made public, but the Sixth Circuit Court of Appeals in *Fruehauf* has ruled that they should, at least in limited circumstances. In practice, rulings and technical advice memoranda are very similar. In particular, both provide official IRS interpretations of the tax law. Accordingly, it appears that both should be made available under substantially the same conditions. There seems to be no more reason for deleting the names of the recipients of technical advice than for deleting the names of recipients of rulings. The public policy arguments against anonymity, as set forth in the text of my statement, *supra*, are equally compelling in both cases.

4. *What interim rules should be adopted for the processing and disclosure of rulings issued prior to the effective date of any publication procedure which may finally be adopted?*

Answer: This question seems to assume that the pertinent legal authority is a "publication procedure," presumably one promulgated by the IRS. While any such procedure is entitled to respect, it cannot override the command of the statute, in this case the Freedom of Information Act, as amended. That Act became effective on July 4, 1967, and it must be given uniform application to all periods after that date. Nor does it appear that any special "interim rules" are required. The IRS has been revealing unpublished post-1967 rulings for some time now, in response to our suits and requests. When doing so, it has checked with the rulings recipient to see whether there is any information in the ruling that is arguably exempt from disclosure under the Freedom of Information Act, and has made

such deletions as are necessary. It has been produced the ruling for our inspection and copying. There does not seem to be any reason why essentially similar techniques cannot continue to be employed in the future with respect to post-1967 rulings.

4(a) *Should such rulings be exempt from disclosure?*

Answer: No. To exempt them from disclosure would be a gross violation of the Freedom of Information Act as interpreted and applied by the courts.

4(b) *Should they be fully disclosed, with information exempted under the Freedom of Information Act deleted, or with only the name of the recipient deleted?*

Answer: All rulings issued after July 4, 1967 must, under the applicable statutes and cases, be treated in the same way. There is no legal basis for distinguishing rulings to be issued in the future from post-1967 rulings that have already been issued. In this connection, it is important to remember that the Court of Appeals decisions in *Tax Analysts I* and *Fruehauf* both related to post-1967 rulings that had already been issued. Accordingly, the answers supplied above in response to questions 1 through 3, inclusive, are fully applicable to both future rulings and post-1967 rulings.

4(c) *Should ruling recipients be contacted if disclosure is to be made, apprising them of their right to object to the inclusion of information in the publication ruling? If ruling recipients can not be located, how should the publication of such rulings be processed?*

Answer: As outlined above in response to question 4, *supra*, the IRS has already worked out an ad hoc procedure for contacting rulings recipients prior to making their ruling public. This procedure seems to be working reasonably well, and there does not appear to be any reason for abandoning it. In the case of rulings recipients who cannot now be located, the law provides some helpful precedents. For example, in the case of lost heirs, unclaimed bank accounts, notices of foreclosure, and the like, all that is required is a reasonable effort to locate the missing individual or firm. The mailing of one or at most two letters to the last known address of a rulings recipient would seem to be all that could be reasonably required in the circumstances.

4(d) *Should disputes concerning information to be disclosed be resolved by IRS personnel? Should a judicial proceeding be provided for making such determinations and in what way should that procedure be limited?*

Answer: Again, there is no legal justification for treating future rulings differently from already issued post-1967 rulings. Accordingly, the answers to questions 1(b) through 1(d), *supra*, are fully applicable in answer to this question.

5. *Once it is decided that private rulings should be open to public inspection, what kind of precedent should such rulings be accorded for the purposes of other ruling requests?*

Answer: The curious phrasing of this question seems to assume that the IRS is not yet obligated, as a result of the Freedom of Information Act and the decisions of two courts of appeal, to make rulings public. The production of rulings for public examination is not a matter of IRS discretion; it is a matter of legal obligation.

As for the precedential value to be accorded rulings, the key point to remember is that rulings constitute an important body of administrative law. Accordingly, rulings should be treated in the same way as other legal materials. Thus, a well reasoned priod decision on substantially the same facts should be regarded as determinative of an issue; a poorly reasoned prior decision should be given less weight; a well reasoned decision on somewhat different facts should be regarded as furnishing only helpful analogies; any decision should be regarded as open to challenge and revision as new facts and arguments appear.

For administrative convenience, it may be helpful to separate rulings into one or more categories, much as Tax Court decisions are separated from Tax Court Memorandum decisions. But this is probably not a good idea. Such a separation would create an additional workload for the IRS (since a procedure would have to be established to separate "precedent" rulings from other rulings). In addition, it would inevitably happen in a particular case that the only ruling in point would fall in the "general" or "nonprecedent" category. In such a situation, there would be ambiguity about how the normal rules for use of legal materials should apply, much as there is now some ambiguity about the weight to be given to Tax Court

Memo Decisions that are squarely in point, as contrasted with regular Tax Court decisions that are not so squarely in point. These needless problems and ambiguities can be resolved by following the pattern established in our handling or ordinary case law established by the courts. In the courts, all cases, whether they seem important or not, are collected in the casebooks, and are equally available for use as precedent as need arises.

5(a) *How should such rulings affect transactions similar to those involved in the ruling, but for which no ruling request has been made?*

Answer: Again, the key to answering this question is recognition that IRS rulings constitute a body of administrative law. Just as a published ICC or NLRB decision provides guidance to both the agency and the public, so an IRS ruling does the same. And just as agency decisions by the ICC, NLRB, or other agency immediately bind only the parties to the decision, and others only more remotely, so IRS rulings immediately bind only the IRS and the rulings recipient. In the case of others, the precedential significance of the ruling, as with other legal materials, depends upon the clarity of the reasoning in the ruling and the similarity of its fact pattern to other cases.

5(b) *Should the IRS be provided with a statutory right to rescind or modify rulings subsequently determined to be misleading, inaccurate or incorrect?*

Answer: As with any agency that has created a body of administrative law, the IRS has inherent power to rescind or modify its rulings if they are determined to be misleading, inaccurate, or incorrect. The most prominent recent example of a modification of this sort was the revocation of the ITT-Hartford Fire Insurance merger ruling. An attempt to codify what already exists would simply cast doubt on existence of this inherent agency power, especially if Congress were slow to enact the requested legislation. Accordingly, a request for legislation in this area does not seem necessary or advisable.

6. *What changes would be appropriate concerning the publication of revenue rulings if private letter rulings are held to be open for public inspection? Should there be greater reliance on guideline type revenue procedures?*

Answer: If unpublished rulings are at last opened to public scrutiny, there will be less need for the revenue ruling publication program, since private publishers are already planning to publish IRS rulings at no expense to the government. Accordingly, a duplicative publication program under government auspices would seem unnecessary. As for "guideline type revenue procedures," it appears that these would constitute agency rule making, and that the better procedure is therefore to publish such guidelines in the form of proposed regulations. Thus, the Office of Assistant Commissioner (Technical) could, if it chose, abolish its publication program, with no loss to the tax bar or the public.

7. *Should third parties be granted a right to question the results reached in specific rulings? Should this right be exercised through a hearing procedure within the IRS or through a judicial proceeding? What parameters should be placed on persons authorized to so intervene?*

Answer: Third parties already comment on specific rulings, to the extent that they learn of them. Frequently, for example, professors of law and other individuals interested in the integrity of the tax laws write to the Internal Revenue Service to bring to its attention what appear to be errors in rulings that are circulating through the tax bar's underground rulings grapevine. Such comments, at present, are sometimes garbled because the ruling in question is not available to the writer, who must rely on hearsay regarding its actual content. Public availability of rulings should therefore improve the quality and frequency of public comments, and thus assist the IRS in administering the revenue laws.

At present, there is no "right" to submit such comments, other than the right granted by the First Amendment to petition the government for the redress of grievances, which seems entirely adequate in the circumstances.

Whether the IRS wishes to develop a hearings procedure with respect to important rulings, or in response to a request from the public, is an interesting and important question, but it does not have much to do with the question whether IRS rulings must be made public under the Freedom of Information Act. My personal view is that the IRS would have avoided some very serious mistakes in the past decade if it had called for hearings and public comments, prior to the issuance of rulings, on such subjects as bank bad debt reserves, deductibility of antitrust treble damages, and production payment transactions.

As it was, Congress ultimately determined in each of these cases that the IRS had ruled incorrectly—but this determination was not made until literally billions of dollars of revenue had been lost as a result of those rulings. A hearing procedure, at least in cases in which the IRS feels that a ruling presents an important or difficult question, is a cheap price to pay to avoid future mistakes of this sort.

8. *What would be your assessment of the impact of public disclosure of private letter rulings under the procedures mentioned above on the existing IRS ruling system?*

Answer: For the reasons outlined in the text, *supra*, public availability of unpublished rulings will be of substantial benefit to the public, the tax bar, and the IRS itself. Furthermore, as former IRS Commissioner Mortimer Caplin, former Assistant Commissioner (Technical) Peter P. Widenbruch, Jr.,. and others have pointed out, the impact of public disclosure on the operation of the existing rulings system will be minimal.

STATEMENT OF L. HART WRIGHT, PROFESSOR OF LAW, LAW SCHOOL, UNIVERSITY OF MICHIGAN, ANN ARBOR, MICH., BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF THE COMMITTEE ON WAYS AND MEANS, JULY 10, 1975

SHOULD ALL PRIVATE LETTER RULINGS BE EXPOSED TO PUBLIC VIEW?

Introduction

Persons deeply interested in our tax system should be dedicated, *inter alia*, to the two following propositions: (i) That all taxpayers, with respect to any given substantive issue arising under our tax law, should be treated alike, i.e., with *uniformity*, and (ii) that the uniform result thus reached should coincide with a *just or proper* interpretation of the tax law.

However, in practice, there is an inherent or inevitable conflict between those two goals when we seek to achieve them in an exceedingly complex society composed of over 200,000,000 people and of about 12,000,000 enterprises, It is this inherent or inevitable conflict that prompts me to question the advisability of requiring the Internal Revenue Service to expose to public view *all* private or letter rulings. Instead, I would urge the Congress to begin now to do something which Congress, by statute, directed itself to do over 50 years ago, that is, to engage in truly meaningful oversight of our tax administration's work. For example,.in the rulings area, I would urge the Congress to use the professional staff of the Joint Committee on Internal Revenue Taxation to see to it, through sampling techniques, that the Service lives up to its oft repeated and often broken promise to publish in a meaningful form the interpretative position it intends to foster nationwide on the truly *significant* issues that emerge from the private rulings program.

The inherent conflict: In practice

Return now to the earlier mentioned inherent conflict between our effort to assure (i) that tax results are uniform *and* (ii) that issues are decided *properly* under the law. Observe, as to the former—the matter of uniformity, that thousands of revenue agents are now scattered across hundreds of widely separated posts of duty. While the audit program seeks uniformity in its compliance effort, if one revenue agent should, for example, mistakenly allow a given taxpayer to deduct a non-deductible item, not one of us would argue that thereafter all other taxpayers across the land should be entitled to like treatment. To argue otherwise would be tantamount to concluding, foolishly—because of an overly zealous interest in uniformity—that each individual in lower IRS echelons, and there are thousands in the audit force, has the power to convert his single mistake into a veto (with *nationwide* impact) over a congressionally enacted law, and that he—though in error—has the authority to fix the nationwide stance of this government.

In short, it is for this obvious very profound reason that we cannot allow mistakes, which lower-echelon IRS personnel make in dealing with *one* taxpayer, to be relied upon by yet other taxpayers however much the latter might prefer that the agent's error in the earlier case be perpetuated by being extended also to their cases. In consequence of this, plus a complementary desire not to extend this computerized age's massive assault on individual privacy, no one seriously argues that tax interpretations made by revenue agents in individual cases—

thousands daily, and many involving large amounts—be published or be otherwise accessible to the public.

A letter ruling, though issued by someone in the very large Washington office, is simply a *pre-audit*, a determination typically made in advance before a given prospective transaction is consummated and covering the legal tax issue involved in that prospective transaction. The volume of such requests is so large that, not surprisingly, it can be accommodated only if the power to rule on a case-by-case basis is delegated by the Commissioner to his immediate subordinates and then re-delegated by them to yet lower echleons in the IRS's Washington bureaucracy. Thus, most such rulings will never be seen by the Commissioner himself, nor by the Assistant Commissioner (Technical), nor even by a Division head, being issud instead by reviewers at the lower branch levels. And those persons involved at the lowest levels face the fact that *timeliness*, reasonable speed, is an essential quality of the private letter rulings program if that program is to fulfill a *meaningful* role, for it deals with prospective transactions which, if they are te be consummated at all, cannot always be held in abeyance for long.

Assume in this context that a favorable private ruling has been issued by branch officials to a given taxpayer, and that the latter then concluded his transaction, relying on that ruling. Assume further that, in the context of *later* requests for rulings from *other* taxpayers somewhat similarly situated, the Service concludes that the first ruling was in error, that is, rested on an *improper* interpretation of the tax law as duly passed by Congress, Argument by this second group of taxpayers, to the effect that the earlier erroneous interpretation should be extended to them, would, if respected by the Service, be tantamount to a conclusion that lower branch officials, who issued the first ruling, had the power to fix the *nationwide* interpretative stance of our government even though the Service as an institution, albeit belatedly, subsequently believed that the earlier interpretation was contrary to the law as passed by Congress. To accord mistakes of lower echelon personnel such great influence and impact would be a most unfortunate state of affairs in a nation where each of us should strive to fit within the contours of law *as fixed by Congress*.

In my view, it is proper for the tax system itself to absorb the cost of its own complexity, and of the substantive doubts this generates, by absorbing the risk of *individual* mistakes that may be involved when lower echelon personnel—in a timely manner—rule on the tax effects of prospective transactions. But it is one thing for the system to absorb the cost of a mistake as applied to the *single* case on which they may work, and it is quite another to fix, as the price to be absorbed perpetuation of that error, extending that erroneous interpretation throughout the nation. To make accessible, for public screening, *all* such private letter rulings will surely tend to facilitate that unfortunate net effect. Taxpayers who can afford to scrounge through that mass will surely argue that they must be treated exactly like some earlier taxpayer was treated by lower echelon personnel even where the Service, belatedly as an institution, believes that the earlier letter ruling, issued to a different taxpayer, was in error. Indeed, this apparently is the reason why, in a case just decided by the Sixth Circuit, the Frauhauf Trailer Corporation sought, and has obtained, access to earlier private letter rulings. In my view, we should not facilitate such efforts to induce the Service to perpetuate error.

Proper method of resolving the inherent conflict

Instead of mandating, as the Freedom of Information Act apparently does, exposure to public view of all letter rulings issued by these diverse lower echeleons, how much better it would be, once a letter ruling has been issued by such echelons, for the Service, then to take the time to decide whether the issue was of sufficient importance to warrant more painstaking study and higher level review, to the end of then publishing, if warranted, a particularly well reasoned opinion—a publishing ruling. It is by reference to this second stage that we can make the greatest contribution to uniformity, for publication of well reasoned opinions, approved as to their contours by the Service's highest technical officials, can then properly fix, hierarchically speaking, the interpretative stance to be adopted by the 1000's of otherwise scattered revenue agents and advice also taxpayers throughout the land of the Service's *institutional* interpretation.

In other words, over the long haul, instead of exposing to public view in one fairly inaccessible Washington office the mass of work product emanating predominantly from the lower echelons, our tax system would be better off if some-

how we could assure that the Service—in a second stage after a timely letter ruling has gone out—would isolate those of more general significance and then bring to bear only on these—a manageable task—the talents of the best top people, to the end of publishing a thoughtfully reasoned and just result.

But even as to this arrangement, there is an obstacle to be surmounted. Fifty years ago, in 1924, in connection with a formal special congressional investigation of what we then called the Bureau of Internal Revenue, the Service did formally promise to publish, as I have suggested, a position on all *significant* issues raised in the letter rulings program. And it repeated that promise annually, on the flyleaf of its annual bulletin. Nevertheless, 30 years later, following some scandals, another special congressional committee found that published rulings had dropped to a trickle. Indeed, the then Assistant Commissioner (Technical) admitted to a special congressional investigating committee that he didn't even know whether any one within the Service had actually been assigned the responsibility to see to it that such rulings were published. But he stated that this would be corrected immediately, and renewed the earlier promise.

But all who are at all close to the tax scene know that in the 20 years since then, the publication effort has had its ups and downs.

The fault in my view, but also the remedy, can be laid partially at the door of this Congress. Almost 50 years ago, you created the Joint Committee on Internal Revenue Taxation, endowed it with a professional staff, and charged that committee with the statutory duty not only to investigate the effects of the tax laws, but also to study "administration" of the tax system, and to make recommendations to Congress with respect to both.

But with respect to tax *administration*, for the following 40 years, about all the Congressional staff did was to do a case-by-case review of all refund cases exceeding $100,000. And for most of those years, until 1965, everyone knows you were looking at a mere display window, that is, at cases to which the Service devoted unusually great effort knowing full well those would be the matters you would see and would use as a basis in evaluating the quality of our tax administration. Fortunately, in 1965, the Chief of that professional staff had the good sense to agree that the Service should whittle down its efforts to improve the appearance of this mere display window.

If freed of a special responsibility to review this small segment of the Service's work, the committee's staff could devote more of its attention to the Joint Committee's older and more sweeping statutory responsibility, to study *all* administrative procedures. And in fulfilling this obligation, the committee's aim should be to determine whether the Service's administrative procedures are *reasonably calculated* to achieve a *proper balance* in accommodating four ultimate goals: (1) justice in each individual case; (2) uniformity in results among cases; (3) convenience in resolving cases (that is, through expenditure of no more than a reasonable amount of time, effort, and money by taxpayers and government alike); and (4) a reasonable degree of certainty.

This is no small task. As I indicated in an earlier published study of this problem,[1] the staff would need (i) to study every single general practice and procedure followed in every Service echelon; (ii) to understand each to a point that the whole can also be viewed in proper perspective; (iii) to sample a few cases of all sorts and at all levels, not to determine whether the Service was right or wrong in a particular case but rather to understand how the practice or procedure works and the likelihood that the procedure is *reasonably calculated* to satisfy the above-mentioned goals; and (iv) to talk with personnel in diverse grades and echelons, from office auditors up, to gain their impressions and an appreciation of the personnel situation within which procedures actually work. Included in this sampling effort should be the letter rulings and published rulings programs. One aim would be to determine whether the Service lives up to its commitment to publish a position—previously reviewed at the highest level—regarding all truly significant issues that emerge from the letter rulings program.

This overall proposal should not be interpreted to mean, however, that the Joint Committee should attempt to "administer" the Service. That is the responsibility of the Commissioner. But even so, under our traditions ample room still exists for the type of independent inquiry described, and for discharge by the committee of its responsibility to propose corrective legislation where thoughtful inquiry reveals that existing administrative procedures are not cal-

[1] Wright, Needed Changes in Internal Revenue Service Conflict Resolution Procedures (American Bar Foundation: 1970).

culated to attain a *proper balance* among the goals Indeed, such a legislative inquiry seems far more defensible than either the case-by-case review now conducted with respect to large refunds or the case-by-case audit and settlement function performed for Congress in other departments by the General Accounting Office.

Further, this more sweeping inquiry will enable the committee's staff better to understand the extent to which problems of administration should affect the shape of substantive provisions—for which it also bears a statutory responsibility.

Assume this committee, because of a not surprisingly national mood to expect government "to let everything hang out," deems unacceptable my view of what is the proper balance between two otherwise seemingly conflicting but legitimate goals of tax administration. In that event, I would hope you at least would do three things.

First, seek to amend the Freedom of Information Act so as to limit public accessibility to those letter rulings which were approved at least by a Division Director's Office, or the office of a higher official, though even this will generate some obvious problems.

Second, that you would seek to provide, by statute, that no taxpayer, other than the taxpayer to whom a given letter ruling is addressed, is entitled to rely on that letter ruling. Reliance by others should be limited to rulings actually published in the Internal Revenue Bulletin for one and all to see.

Third, that you would seek to relieve the Joint Committee of the narrowly focused function it now performs as to tax administration, and thus enable its staff to perform the long neglected broader or more sweeping charge described earlier.

Neutralizing the Freedom of Information Act's Inadequacies as Applied to IRS Letter Rulings

(By L. Hart Wright*)

INTRODUCTION

Marked escalation a decade ago in our skepticism toward governmental institutions[1] contributed both to the 1966 adoption of the Freedom of Information Act (hereinafter, Information Act)[2] and to the creation of so-called public interest law firms.

After the Information Act was passed, not surprisingly, one Ralph Nader was among the first to complain that federal agencies were inclined, through narrow construction of the act's sweeping literal language, to convert that congressional effort into a "Freedom *from* Information" Act.[3] An example: Internal Revenue Service officials had promptly and publicly stated that the act would not be con-

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[1] E.g., see Robinson *et al., Measures of Political Attitudes* (1968).

[2] 5 U.S.C.A. s552, as amended by Pub.L. No. 93-502 (Nov. 21, 1974). For a general discussion of the act, see Davis, *Administrative Law Text* 68 (1972). While he notes that the recorded hearings on this Act span a 10-year period and are voluminous (*id.* at 69), observe that by the mid-sixties the mood of the country and of Congress was such that the sponsoring Senate committee was content to telescope its supporting analysis into a 10-page report. See S. Rep. No. 813, 89th Cong., 1st sess. (1965).

[3] Nader, *Freedom from Information: The Act and the Agencies*, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 1 (1969). (Italics added.) That agencies would tend to react in that negative fashion should have come as no surprise. In fact, the House committee which fostered enactment of the Information Act itself observed that an even *earlier* law actually had been passed to assure public access, but observed: "Section 3 of the Administrative Procedure Act (5 U.S.C. 1002), though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding rather than disclosing information." H. Rep. No. 1497, 89th Cong., 2d sess. 4 (1966). Recorded history demonstrates that the IRS itself is a perfect example reflecting the reluctance of agencies, when not constrained by law, to provide information about their decisions. See text *infra* at note 55 regarding the Service's repeated failure to fulfill its own self-imposed but publicly made commitment to publish its position on all significant issues considered in its letter rulings program. Relatively, however, an even greater tendency toward secrecy in decision-making exists in the major tax sytems of Western Europe. See Wright *et al., Conervative Conflict Resolution Procedures in Taxation* 34 *et seq.* (1968).

strued to reach the thousands of "letter" rulings[4] that agency issues annually, on a private basis, to diverse individual taxpayers.[5]

Other agencies aside, the Service did have some arguable basis for its view which, incidentally, was shared then and later supported by the Attorney General.[6] More specifically, apart from any possible interpretative difficulty having to do with the *literal* language of the act, the legislative *process* itself had generated some doubt as to whether the act's fairly sweeping literal language did reach letter rulings.

The Senate, which first passed the bill, had before it at that point its own committee's interpretative and favorable report.[7] Thereafter, the responsible House committee endorsed the bill but, without modifying any of its relevant language, did insert new language in its own accompanying report tending to suggest that the bill's otherwise fairly broad language was not intended to reach letter rulings.[8]

This was certain to generate uncertainty if only because the sponsoring Senate committee's earlier report did not include that restrictive language,[9] and because the Senate had passed the bill relying on its own committee's report.[10]

Once the bill itself had become law and Service officials had indicated their reaction, not surprisingly one of the then new public interest law firms (Tax Analysts and Advocates) responded to the obvious challenge by triggering judicial resolution of what became a much-debated question: Whether the Act should be construed to require a reluctant Internal Revenue Service to provide, in its Washington office, public access to all letter rulings and to an index applicable thereto?[11]

Now that this purely technical legal question has been resolved affirmatively (against the Service) by two different courts of appeal,[12] the time is ripe for the consequent policy implications of the Act, as applied in this particular context, to be considered more carefully by both congressional chambers.[13]

In aggregate, and on balance, congressional review should lead to amendment of the Information Act so as to substitute, when applied to IRS letter

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[4] A private "letter" ruling typically is issued to a single taxpayer, setting fourth the tax effect of a prospective transaction which the taxpayer had previously described in writing and in detail to the IRS Washington office. See text *infra* following note 30; Wright *et al., op. cit. supra* note 3, at 19; Rev. Proc. 72-3, 1972 *Int. Rev. Bull.* No. 1, 9. A "Revenue Ruling" is distinguishable in that it is published by the Service in the Internal Revenue Bulletin and ultimately in the Cumulative Bulletin, to provide guidance to all taxpayers *and* to all IRS personnel. See Wright, *supra,* and Rev. Proc. 72-1, 1972 *Int. Rev. Bull.* No. 1, 4. A distinguishable third category involves internal guidance furnished from Washington to district directors, and officially is characterized as "Technical Advice." See Rev. Proc. 72-2, 1972 *Int. Rev. Bull.* No. 1, 5.

[5] Uritz, *Freedom of Information and the IRS,* 20 Ark L. Rev. 283 (1967); Uritz, *Remarks before the A.B.A. Section of Taxation,* 21(1) Tax Lawyer 17 (1967); *Panel Discussion on Freedom of Information Act,* 20(3) Tax Lawyer 43 (1967).

[6] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, *re-printed* 20 Ad. L. Rev. 263 (1968). The Justice Department subsequently represented the IRS in the cases cited *infra* note 12..

[7] S. Rep., *op. cit. supra* note 2.

[8] H. Rep. No. 89-1497, 89th Cong., 2d sess. (1966).

[9] See S. Rep., *op. cit. supra* note 2.

[10] Perhaps also relevant is the fact that the Treasury, in testimony before the Senate committee, had argued, *enter alia,* that such an act would cripple its letter rulings program. See Statement of G. d'Andelot Belin, *Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 88th Cong., 1st sess. 176 and 268 (1963) and *id.,* 88th Cong., 2d sess. 168, 177E (1964). And the Treasury there reflected its opposition to such acts, though obviously to no avail. *Ibid.* Also see Statement of Edwin Rains in hearings before the same subcommittee, 89th Cong., 1st sess. 30 (1965) and Treasury Department exhibit, *id.* at 441.

[11] E.g., see Asbill, *Freedom of Information Act and the IRS,* 26 So. Calif. Tax Inst. 1037 (1974); Oran, *Public Disclosure of IRS Private Letter Rulings,* 40 Chi. L. Rev. 832 (1973); Reid, *Public Access to Internal Revenue Service Rulings,* 41 Geo. Wash. L. Rev. 23 (1972); and comment, *Scope of Disclosure of Internal Revenue Communications and Information Files Under the Freedom of Information Act,* 8 Mich. Jour. L. Ref. 329 (1975).

[12] Freuhauf Corporation v. IRS, F.2d, 36 AFTR 2d 75-5089 (6th Cir. 1975); Tax Analysts and Advocates v. IRS, 505 F.2d 350 (D.C. Cir. 1974). There has been at least a preliminary indication that, as to *future* letter rulings, the Service, with certain limitations, might capitulate, though its still is preparing to defend its position (regarding *previously issued* letter rulings) in a raft of pending cases which have not yet reached a final decision. See proposed amendments to the Service's Statement of Procedural Rules, 39 Fed. Reg. No. 238, 43087 (Dec. 10, 1974). However, the real theme of this article is that the Information Act should be amended, whatever be the decision in these cases, the aim being to substitute a quite different arrangement for the mere access requirement generally imposed by the present Information Act.

[13] The Subcommittee on Oversight of the House Ways and Means Committee did hold at least an abbreviated hearing on July 10, 1975, involving, as to this matter, four invited witnesses, of whom the author was one.

rulings, a much more meaningful, though different, type and degree of access than that now required by the Act.

The later, as now judicially construed, is grossly inadequate in the letter rulings context, not for a single reason, but rather because of the cumulative effect of several considerations interacting on each other. Nevertheless, here, initially, each of those considerations must be considered separately.

Thereafter, it will be indicated why their cumulative adverse effects can be neutralized only by substituting for the Information Act's present more access requirement a more comprehensive statutory provision mandating the Service itself (i) to publish in writing (ii) an institutional interpretative position approved by senior officials, (iii) on which the entire public could rely, (iv) setting forth only the pivotal facts involved in every significant letter ruling, and (v) articulating expressly therein the reasoned analysis on which the result is predicated.

In contrast to the beneficial effects this proposed arrangement would generate, most taxpayers will now find on confronting a tax problem that the only access prescribed by the Information Act itself is actually beyond reach if only because of the costly inconvenience associated with its invocation—a cost which would be neutralized by the first of the five proposed requirements enumerated above (a statutarily mandated major publication program carried on by the Service itself).

More important, even if taxpayers were not thwarted by the costly inconvenience of the access presently prescribed, they would find that most letter rulings to which they gained access would now be virtually meaningless to them. This is because most do not satisfy a single one of the four other above described proposed requirements. And it is this letter devastating difficulty which, unfortunately, cannot effectively be overcome by any outside commercial publishing enterprise.

In essence, the burden of this article is to demonstrate (i) that the Information Act, in providing mere access, albeit to all letter rulings, actually requires, with respect to those rulings, far too little, and (ii) that only through the quite feasible overall solution proposed here can any significant contribution be made to what, in this technical context, should be considered the two prime objectives of the Information Act.

Some may think that the aims of that act, even as applied to technical tax rulings, should not, in a democratic society, go beyond fulfilling the public's "right to know" what its government has done. Proponents of that view presumably would begin and end with a simple proposition, that the long acknowledged "right to speak and the right to print, without the right to know are pretty empty . . ."[14] The press, for example, and apparently it was the first to trigger congressional interest in this matter,[15] would be content to achieve parity for that third right.[16]

But this all too narrow perspective overlooks the duality of citizenship: each adult citizen, though, yes, a voter, also must help support his government and, thus, is also a taxpayer. Because of this duality of roles, the citizen's interest, at least in fostering governmental dissemination of technical tax information, transcends a mere limited "right to know." He properly expects such dissemination to help eliminate administrative favortism in tax treatment and arbitrariness in decision-making, which is to say, from his standpoint, that the Information Act's objectives should be to help assure uniform treatment of all taxpayers,[17] with that uniform result being geared to justice in accordance with law.

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[14] Pope (1953 Chairman of the American Society of Newspaper Editors' Freedom of Information Committee), in the Foreword to Cross, *The People's Right to Know* (1953), quoted in H. Rep. No. 1497, *op. cit. supra* note 3, at 2.

[15] It expressed a major concern and interest back in 1953 by commissioning the study by Cross, *id.* note 14, and received credit from a congressional committee which sponsored the Information Act for having triggered congressional concern and interest. H. Rep. No. 1497, *op. cit. supra* note 3, at 2.

[16] *Ibid.*

[17] The consequent difference between the perspective and interests of the press, and those of taxpayers as such, was most recently illustrated by the different interests and reactions of the two different plaintiffs who emerged victorious in the two Information Act court of appeals decisions cited *supra* note 12.

The first, Tax Advocates and Analysts—a public interest law firm—sought only to assure that the public would have the right "to know." And subsequently its able Executive Director, in testifying before a congressional committee, suggested that once this right was established through access by commercial publishers, the Service itself might then properly abandon publication of all Revenue Rulings (even though, observe, these *alone* (i) represent carefully contoured institutional precedents, approved by high officials (ii)

And if it is feasible for such an act to make a substantive contribution to those two ends, and it is—under the proposal to be made here, those two aims should be the Act's objective in the tax context, for those goals happen also to be two of the most important criteria quite generally associated with sound tax administration.

But while the present mere access arrangement cannot contribute significantly to those criteria, it is otherwise with respect to the substitute proposed here. However, this will be so only if, to the above proposed five requirements, an indispensable sixth is added, calling for continuing congressional oversight (using the staff of the congressional Joint Committee on Internal Revenue Taxation) primarily to police the integrity of the above enumerated fourth proposed requirement. For, if history reflects anything, it is that without such continuing congressional oversight, accomplished by random sampling methods, the Service itself cannot be trusted to publish its position on all significant letter rulings.[18]

I

OFFICIALLY PRESCRIBED ACCESS FORMULA WHOLLY INADEQUATE IN FOSTERING THE ACT'S PROPER OBJECTIVES

Too expensive and inconvenient for most taxpayers absent a bail-out by commercial publishers

The Information Act, since addressed to "any person," [19] i.e., to the "public," [20] obviously was not passed just to enable a corporate giant such as IBM to determine whether another company sufficiently large to be a competitor, say, Sperry Rand, had previously received a favorable letter ruling on a tax problem also of concern to IBM.[21]

Nor in theory was the act designed to benefit only the 14,000 other taxpayers who in any given year can afford and do absorb the indirect cost (legal briefs, conference in Washington, etc.) involved in obtaining a letter ruling.[22] They could no doubt individually also afford to tack on an additional preliminary cost—that of invoking the Information Act's prescribed type of access to earlier issued rulings. But officially to accord access only to files located in a geographically remote Washington office is, in net effect, officially to provide no access at all to the great majority of the taxpaying public.

The tax issues confronting that great majority, while perhaps involving in each case a fairly significant sum when compared to that given taxpayer's resources, generally do not, in absolute dollar terms, generate a sufficient individual potential tax liability in any given year to warrant the expense of examining those distant files. But, of the 1,328,209 taxpayers who actually suffered income, estate, or gift tax deficiencies when audited in fiscal '74,[23] would not many have been interested in knowing whether a favorable letter ruling previously had been issued from Washington to other taxpayers on similar issues? Yet relatively few could afford to invoke the type of public access officially accorded by the Information Act. After all, the great majority of the deficiency returns involved average deficiencies of not over $300.[24]

And what did happen to those taxpayers at the Audit Division level was peculiarly important. Though there is, in theory, a right of appeal from that level,

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on which the entire public is entitled to rely; (iii) do bind all revenue agents and, thus, do alone contribute substantially to uniformity). Statement of Thomas F. Field before *Subcommittee on Oversight of the House Committee on Ways and Means*, his Appendix p. 7, July 10, 1975.

The other plaintiff was a *taxpayer*, and that taxpayer's obvious interest in gaining access was to isolate earlier issued letter rulings which had accorded more favorable tax treatment to other taxpayers, the purpose of access being to enable the plaintiff to argue for similar *uniform* treatment.

[18] See text *infra* at note 55.

[19] 5 U.S.C.A. s552(a)(3).

[20] 5 U.S.C.A. s552(a).

[21] That, on an earlier occasion, IBM was interested, see International Business Machines Corp. v. U.S., 343 F. 2d 914 (Ct. Cl. 1965).

[22] Of the 28,346 such letter rulings in 1974, 14,329 concerned changes in accounting methods or accounting years, leaving only 14,017 *substantive* letter rulings. 1974 *Comm'r. of Int. Rev. Ann. Rep.* 30. And that is a fairly typical number.

[23] 1974 *Comm'r. of Int. Rev. Ann. Rep.* 106 (Table 16).

[24] Of the total income, estate, and gift tax returns examined in 1974 (2,030,665), about 65% suffered an adjustment. *Id.* note 23 *supra*. Since 72% were examined by the office audit force, and since the aevrage deficiency, if spread across all their examinations, was $230, that average deficiency would be closer to $300 if spread across only the proportion of examined returns actually adjusted. Data derived from the 1974 *Comm'r. of Int. Rev. Ann. Rep.* 19, 20, 21, and 106.

the determinations made there, in fact, proved to be the final determination in almost 97% of all deficiency cases.[25]

Later it will be noted that at least the current access' costly inconvenience to all taxpayers could be reduced if, as might be expected, commercial publishers seek to provide some kind of connecting link between special subscribers and the Washington-located file of letter rulings. But also observed will be the fact that, even with the greatest effort, commercial publishers cannot effectively overcome a second and third problem, discussed immediately below, which alone prevent a mere access arrangement from making any significant contribution to uniformity and justice, and in the end simply will escalate the number of controversies at lower IRS echelons regarding a needless non-substantive side-issue which those lower echelons cannot solve.

Too difficult to ascertain the dimensions of most letter rulings

A taxpayer who does obtain access to the file of previously issued letter rulings will find that, compared with a typical appellate court opinion, the substantive contours or dimensions of most such rulings are very much more difficult to determine. The consequent almost certain uncertainty which emerges if that person tries to apply an earlier letter ruling to his own transaction (which, in this complex society, seldom will be more than somewhat similar), limits significantly the usefulness of the access otherwise obtained.

The exceptional degree of difficulty encountered on trying to extract a principle from most letter rulings is immediately traceable to the particular manner in which most are drafted. But acquaintance also with the reasons why they are drafted in such manner will suggest that the drafting technique employed actually is unavoidable in a letter rulings context and, thus, inevitably, will reduce, as applied to letter rulings, the value of the Information Act's mere access arrangement.

In short, the Service simply cannot mandate a structural change in letter rulings if it also is to maintain a viable letter rulings program.

To appreciate all this, it is necessary at the outset to recognize that practically all letter rulings are directed to what then were prospective live transactions, the terms of which had been worked out, but the consumation of which had been held in abeyance by the taxpayer, contingent on obtaining a favorable tax ruling.[26] For quite understandable reasons, most such rulings do, and no doubt will continue to, reach just such a result—one favorable to the taxpayer in question.[27] That unadorned result itself, plus speed in reaching it,[28] were two of only three matters of any interest whatever to that original taxpayer to whom the letter ruling was issued. His third interest concerned reliability. He wanted assurance that, after consumating the transaction, he could depend on the earlier advance ruling. To this end, the factual statement he submitted earlier on requesting the ruling typically included any and all facts he believed might conceivably be deemed material by the rulings specialist or by any agent who later might audit the return (covering the transaction once it was consumated).

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[25] *Id.* at 106.

[26] In this respect, most letter rulings are distinguishable from so-called written "technical advice" rendered directly by the same Washington officials to District Directors regarding issues arising during audits of previously filed returns covering, obviously, previously *consumated* transactions. Cf. Rev. Proc. 72–2 and Rev. Proc. 72–3, 1972 *Int. Rev. Bull. No.* 1, 5 and 9.

However, the number of substantive letter rulings to taxpayers far exceeds the number of responses to interim requests for technical advice, by 14,017 to 1,602 in 1974. 1974 *Comm'r. of Int. Rev. Ann. Rep.* 30.

[27] This is primarily because most taxpayers either (i) do not ask for a favorable ruling unless they believe there is at least a reasonable chance they are entitled to one, or (ii) on learning that the rulings' specialist tentatively thinks an adverse ruling would issue, they try to modify the prospective transaction in a manner which then can induce a favorable final ruling. Regarding this latter possibility, observe that the real purpose of the oral conference held with the taxpayer before a ruling is finally issued is to enable the parties to discuss the significance of any feature of the transaction which may appear troublesome to the rulings' specialist. See Rev. Proc. 72–3, *op. cit. supra* note 4 at ss6.09 and 7. Cf. Rev. Proc. 74–19, s3.02, 1974 *Int. Rev. Bull.* No. 26, 22, as modified by Rev. Proc. 1975–23, 1975 *Int. Rev. Bull.* No. 17, 20.

[28] The need and the pressure to respond in a timely manner, the difficulty of doing so, and the problem all this generates is considered in Wright, *Needed Changes in Internal Revenue Service Conflict Resolution Procedures*, 47 *et seq.* (1970). Recently, to try to accommodate cases involving a peculiarly urgent need for speed, the Service established on an experimental basis an informal or non-binding advisory program. For the most recent version, see Rev. Proc. 1975–23, *op. cit. supra* note 27.

The temptation and tendency to indulge in such factual overkill resulted from the fact that neither rulings personnel nor an agent on a subsequent audit would deem the ruling binding if the practitioner's earlier statement of the facts had omitted, or incorrectly described, a fact they later deemed material.[29] Since it is the applicant-taxpayer, and not the Service, who must suffer the adverse consequence of material omissions or misstatements, obviously also the Service cannot, by rule, outlaw the taxpayer's tendency to include some facts which actually may not have been material.[30]

Further, that taxpayer's own needs (speed, and reliability in the event of a subsequent audit) are satisfied by the typical letter ruling, which does nothing more than restate verbatim all the facts which the taxpayer himself had set forth in his submission, and articulate in very summary fashion the result itself—typically favorable. In other words, the Service employee who issued the favorable ruling made no attempt in the ruling letter itself (i) to isolate the irrelevant from the relevant facts, or (ii) to expressly articulate the carefully reasoned analysis which actually led to the favorable result. The omission of those two features explains why, in contrast to properly structured appellate court opinions which do include them, a letter ruling is so difficult to apply to transactions other than the exact single transaction intended to be covered.

However, it must be understood that most letter rulings are drafted in the fashion indicated not just because the recipients themselves, having held their proposed transactions in abeyance, are far more interested in obtaining a reliable, favorable result speedily than they are in having the issuing IRS employee delay issuance for a substantial time in order also to prepare carefully drafted, learned essays (i) explaining why certain of the submitted facts are material, while others are not, and (ii) setting forth expressly the carefully reasoned legal analyses which prompted the favorable results. Omission of those two enumerated features is due also to yet larger perceived concerns of the Service itself, as indicated below.

One taxpayer cannot rely on a letter ruling issued to another taxpayer

The in-Service concerns to which reference has just been made are significantly responsible not only for the manner in which most letter rulings are structured, but also for the fact that, should a given taxpayer actually obtain access to an earlier issued letter ruling, usually he has no right to rely on it even if he could ascertain its dimensions and fit his transaction within it. Why?

Originally Congress empowered the Service to react to a prospective transaction only through a bilateral closing agreement, i.e., a contract with that specific taxpayer, and then only if each agreement was approved by a policymaking official of such high rank [31] that eventually the Commissioner himself also was certain to be involved.[32]

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[29] See Rev. Proc. 72–3, *op. cit. supra* note 4, at ss6.02 and 13.05. Occasional exposes, such as the widely reported ITT affair, are dramatic reminders of the disastrous consequence of a possible omission or misstatement, and in themselves—for a long period—will tend in other cases to elicit even more extensive factual recitations from cautious practitioners who seek a letter ruling for a client.

[30] The Service has tried to get at this problem by setting up an alternative arrangement, but necessarily on an elective basis. In addition to submitting a copy of all relevant documents and a complete statement of all relevant facts, the taxpayer *may also* attach a "summary statement" of the facts "he considers controlling the issue," and *if* there is "agreement" by the Service "with the taxpayer's summary statement, the Service will use it as the basis for the ruling." Rev. Proc. 72–3, *op. cit. supra* note 4, at s6.03.

This writer has been informally advised that, to date, relatively few taxpayers have invoked this elective procedure. But this is hardly surprising. Perhaps one reason relates to the Service's failure in the above cited Revenue Procedure to state *unequivocally* that its ruling, though literally addressed only to the summary, will in fact also bind the Service with respect to the "complete statement of facts" otherwise furnished.

But even if that problem is neutralized, relatively few practitioners will invoke this selective procedure if only because (i) preparation of the additional summary requires additional careful, time-consuming draftsmanship, and (ii) invites needless controversy at the outset regarding the mere side issue of whether the additional summarized version fairly reflects the material facts.

[31] Originally, by not less than an Assistant Secretary of the Treasury. Rev. Act of 1938, s802, though this is no longer required. Int. Rev. Code (1954), s7121.

[32] At that early point when the document had to be approved by an Assistant Secretary of the Treasury, one could be certain that such an official would formally approve only if his subordinate, the Commissioner, had previously approved and recommended approval by the Assistant Secretary. And, of course, the Commissioner would not have approved unless his own subordinates, down through several layers to those who had dealt with the taxpayer, first approved and recommended approval up the line.

However, almost overnight, that depression-born, cumbersome, and time-consuming format [33] became completely unworkable in the context of prospective transactions which, if they were to be consumated at all, could not be long delayed. Indeed, escalation of tax rates and of the economy at the beginning of World War II, together with significant war-generated changes in the substantive tax law, generated a felt need on the part of the Service to find a substitute device which would enable it to respond in a timely manner to an also rapidly escalating number of requests for closing agreements. To this end, the Service, on its own accord, more or less substituted for the bilateral closing-agreement arrangement, the more easily accommodated unilateral letter rulings process.

But even with this substitute device, to accommodate the workload, two further inter-dependent steps quite literally had to be taken.

First, since a letter ruling, at least in theory, was not a "closing agreement," [34] the Service on its own accord felt it could delegate and re-delegate down the line, to lower echelon employees in its Washington office, the power to approve and issue letter rulings.[35]

Second, this degree of delegation and re-delegation obviously was at some risk. A less experienced, or less well educated lower-echelon employee might grant a favorable ruling to which the top policy-making officials would not have subscribed had they personally known about or issued the ruling. Indeed, though all such employees are civil servants and presumably conscientious, any given favorable ruling could also involve what proves to be an erroneous interpretation af a law duly enacted by Congress.[36] To reduce the otherwise possibly wide-ranging impact of the risks just described, the Service—shortly after announcing adoption of the letter rulings program [37]—also stated that a letter ruling issued with respect to a particular transaction would be respected by the Service only, generally speaking, in the case of that one transaction and only as to that one particular taxpayer.[38]

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[33] *Ibid.*

[34] But because they are not "closing agreements," and because the Service, rather than Congress, is responsible for the program, no Commissioner has ever been willing to state *unequivocally* that, if a taxpayer has complied with all requirements and consumates the transaction, the Service is absolutely bound by a letter ruling. At most, the Service has said its policy in such cases is to respect the ruling "except in rare and unusual circumstances." Rev. Proc. 72–3, *op. cit. supra* note 4 at 13.05.

[35] To suppose that the Commissioner, or an Assistant Commissioner, otherwise responsible for the whole tax system and for the work of the more than 75,000 IRS employees, could immerse themselves in the separate facts associated with each of the 14,000 substantive rulings each year, to the end of ruling favorably or unfavorably, is to imagine the unimaginable. The yet lower Division Director who heads the rulings branches covering just income tax questions also, for the same reason, literally has no choice but to re-delegate approval authority, as must yet lower branch chiefs heading up the larger branches.

Data now several years old indicated that at least 75% were issued within the branch level, with relatively few going higher than the Division level. See Wright, *op. cit. supra* note 3, at 23 note 63. For comparable data of a yet earlier period, see Caplin, Taxpayer Rulings Policy of the Internal Revenue Service, *N.Y.U. 20th Inst. on Fed. Tax* 1. 28 (1962).

In 1974, only 124 letter rulings (or less than 1%) were referred to the Chief Counsel's office for a formal opinion. See 1974 *Comm'r. of Int. Rev. Ann. Rep.* 50.

Unfortunately, the extent to which a ruling, on average, involves time-consuming work is seldom fully recognized by persons outside the Service.

[36] Obviously, to suppose anything other than that each such employee, in due course, would in fact make a mistake would be to suppose such employees are other than human. But this trite truism, in the immediate context, only obscures the unusual complexities which here peculiarly will tend to contribute to mistakes.

For example, the employee, though judge, must alone compensate for the "one-sided presentation of the issues" by the taxpayer *and* his practitioner, whose brief will emphasize arguments favoring the taxpayer. In such circumstances, nuances which actually support the government may be overlooked or may not be adequately developed.

Also, lower ranking employees, accustomed to working in narrowly defined substantive areas, more easily overlook possible far-reaching implications than do top-ranking officials who habitually deal with a broad range of problems. What may appear to be a correct result when narrowly viewed may, in fact, be quite wrong in light of its total implications.

Again, in practically all circumstances, work on requests for rulings will at least begin in lower echelons. And thus, lower echelon employees will be the first to face, *inter alia*, transactions which appear to fit within an old tax mold, but which actually involve the first factual variation of what the private sector will evolve—sometimes imperceptibly—into a wholly new or frontier type of transaction. But that employee must rule on the first such submitted variation (squeezing it perhaps into an old mold favorable to the taxpayer), long before he, as a decision-maker, has the opportunity to learn, from later submitted requests for rulings, the infinite variations or twists which that transaction can take. Only later may he recognize that the old mold was a misfit from the beginning.

That mistakes will emerge because of these and other circumstances is a fact all too well known to Service officials. *E.g.*, see Statement of Peter W. Weidenbruch, Jr. (an able former Assistant Commissioner (Technical)), before the *Subcommittee on Oversight of the House Committee on Ways and Means*, July 10 (1975).

[37] Rev. Rul. 54–172, 1954—1 *Cum. Bull.* 394.

[38] Rev. Proc. 62–28. 1962–2 *Cum. Bull.* 496. This also seemed to be implicit from the beginning (*id.* note 37 supra) and continues to be the administration's view. Rev. Proc. 72–3, *op. cit. supra* note 4.

The Service previously had learned to live with that limited consequence; it had long done so in connection with the work of its large and scattered audit force. But it was one thing to absorb the limited cost of a mistake favoring just one taxpayer, whatever made by a field agent during audit or by lower echelon employees in Washington in issuing a ruling. It would have been something else—to have elevated that lower-echelon employee's mistake into an institutional precedent, creating in all taxpayers a right to similar and uniform treatment. To have gone that far would have had the effect of elevating that subordinate employee's mistake (i) into an advance veto over subsequent attempts by his seniors, including the Commissioner, to conform to the law, and (ii) into a post-veto over the particular Congress which had enacted the statutory provision in question.

All this was avoided by the limited effect the Service accorded letter rulings. In turn, that limited effect furnishes two separate reasons why mere access to letter rulings has at most only limited usefulness in contributing to one of what should be the two prime objectives of the Information Act—here, uniformity among taxpayers.

The first such reason is that the limited effect itself, reinforced by the Service's felt need to be *efficient*, helps explain why favorable rulings are devoid of legal analysis and do not separate the pivotal from the immaterial facts, thus making it very difficult for other taxpayers, on gaining access, to apply those ruling to their own somewhat similar transactions.

The second reason is more obvious. The limited effect alone, since respected by the judiciary,[39] demonstrates that uncertainty will *not* be neutralized even for that taxpayer who, on gaining access, finds a ruling which he can fit his transaction. In short, it does *not assure* him of *uniform* treatment.[40]

II

INFORMATION ACT'S SHORTCOMINGS REQUIRES ITS AMENDMENT: SUBSTITUTING A PROPERLY DESIGNED IRS PUBLICATION PROGRAM FOR THE ACT'S MERE ACCESS REQUIREMENT

Commercial publishers cannot effectively overcome the access requirement's inadequacies

Obviously, more than one commercial publisher will have the physical and financial resources, and perhaps the interest, necessary to reduce throughout America the otherwise geographical remoteness of the voluminous files of letter rulings otherwise maintained only in the IRS's Washington office. In consequence, the remoteness problem may prove by great odds to be the most easily dealth with shortcoming of the several associated with the Information Act's access requirement. But even *its* mitigation by commercial publishers will leave much to be desired.

Only the more affluent and most interested practitioners are likely to feel they can afford annual commercial subscriptions entitling them to verbatim copies of *all* letter rulings issued in a given year—to say nothing of the impact on them of the ever-mounting storage cost encountered as yearly accessions are added to a firm's library.

Some notion of the yearly output's magnitude can be derived from the experience of one commercial publisher which re-publishes the modest number of

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[39] Bookwalter v. Brecklin, 357 F. 2d 78 (8th Cir. 1966) and Knetsch v. U.S., 348 F. 2d 932 (Ct. Cl. 1965) reflect views coinciding with the philosophy in Dixon v. U.S., 381 U.S. 68 (1965).

A contrary decision, in International Business Machine Corp. v. Commissioner, 343 F. 2d 914 (Ct. Cl. 1965), hardly proves that the general rule is otherwise, for that case can be easily explained by reference to the particularly abusive manner in which the Service responded to that taxpayer's problem. See *Knetsch* case *supra*, at 940 note 4.

Also, in any given criminal fraud tax case, reliance on another's letter ruling might negate fraudulent intent. See Fruehauf Corporation v. IRS, 369 F. Supp. 108 (D.C. E.D. S.D. 1974) aff'd., *op. cit. supra* note 12; U.S. v. Wahlin, 384 F. Supp. 43 (D.C. W.D. Wis. 1974).

In view of the intended judicially respected limited effect, some strong supporters of the Information Act's access arrangement, in referring to letter rulings as "secret law," tend only to confuse the issue See, *e.g.*, Statement of Thomas F. Field *op. cit. supra* note 17, at his p. 2, and statement of Peter P. Weindenbrush, Jr., *op. cit, supra* note 36 at his p. 11.

In truth, a letter ruling, in view of its limited intended and judicially respected effect is more closely akin to a contract with a given taxpayer, than it is to law as such. Indeed, the letter rulings program began life as a mere substitute for the more cumbersome closing-agreement arrangement. See text *supra* at note 31 *et seq.*

[40] But see note 46 *infra.*

Revenue Rulings[41] and Revenue Procedures now released annually by the Service. While Revenue Rulings do reflect the legal theory on which the result rests, they otherwise include only a very abbreviated version of the original facts as set forth in the particular letter ruling on which they are based. Nevertheless, in 1974, that commercial publisher utilized 828 pages[42] to accommodate the 680 Revenue Rulings and Revenue Procedures released that year.[43] At that same rate, similar commercial coverage of all the 14,017 substantive letter rulings issued to taxpayers in 1974 would have required 17,073 pages! And there would be far more than that if the full texts of those letter rulings were published.[44]

Obviously, at the other extreme, arrangements also could be developed enabling a less affluent or less interested practitioner to subscribe, on an ad hoc basis, to copies of just those letter rulings which the commercial publisher believes might bear on the type of transaction with which that practitioner is then concerned. And a raft of variations between the above two extremes also could be developed.

But commercial publishers will find it far more difficult to overcome effectively a second shortcoming of the access requirement, will not be able to do anything whatever about the act's third and most serious inadequacy, and will simply exacerbate a fourth.

As to the second, verbatim copies of favorable rulings, when obtained by subscribers from commercial publishers, will be as difficult to aply as the originals. As previously explained, because of the manner in which the latter are drafted, the subscribers, on obtaining copies, still will be left in doubt regarding the dimensions of the principles involved. And no commercial publisher's added analysis is likely to neutralize an able, cautious practitioner's uncertainty.[45]

Completely beyond the neutralizing capability of any commercial publisher, as to any practitioner, is a third difficulty. Publishers hold no veto power over the IRS. And the latter no doubt will continue to confine the binding effect of such rulings to original recipients. Thus, to subscribe to commercially supplied copies will provide no assurance of equally favorable or uniform tax treatment.[46]

Nor, given the previously recited reasons for the restricted effect of letter rulings, is it likely that the Service will encourage its field offices to become commercial subscribers.[47] Nor will the large revenue agent force which populates those offices be officially encouraged to conform to such rulings.[48] And should a subscribing taxpayer, as to a question raised during audit, display his subscription copy of a previously issued letter ruling, the initial effect may be to escalate needless controversy. If the agent indicates disagreement, or that he tends to disagree, with what seems to be the apparent substantive thrust of that ruling, the display of that ruling is most likely, for a time, to shift attention away from the substantive issue to a procedural side issue: Should a mere revenue agent attach significance, and if so—how much, to a copied letter ruling which the Service, as an institutional norm, asserts is not substantivey relevant in this taxpayer's case?[49] Given that institutional norm, in the end, to expect the agent to capitulate, will be to expect too much.

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[41] For the difference between a "letter" ruling and a "Revenue Ruling," see note 4 *supra*.

[42] 1974 CCH *Stand. Fed. Tax Rep.* 71,059–3 to 71,888.

[43] 1974 Comm'r. of Int. Rev. Ann. Rep. 31.

[44] For one reason why a letter rulings is often spread across many pages, see text *supra* at note 26 *et seq.* Further, while true copies of all contracts, wills, deeds, agreements and other documents involved in the transaction must be submitted with the request, the "relevant facts reflected in the documents submitted must be included in the taxpayer's statement and not merely incorporated by reference . . ." Rev. Proc. 72–3, *op. cit. supra* note 4 at s5.02.

[45] For a contrary view, see Statement of Peter P. Weidenbruch, Jr., *op. cit. supra* note 36 at his p. 18.

[46] Of course, lawyers, on learning of another's favorable ruling, are and will be prompt to demand similar treatment for their own clients. One knowledgeable person even asserts that, in consequence, "mistaken rulings are swiftly 'cast in stone,' at least when they lose revenue, and there is no realistic opportunity for the Service to alter its position." Statement of Thomas F. Field, *op. cit. supra* note 17 at his p. 3. Even a powerful corporate giant such as IBM would assert that recorded experience demonstrates that this overstates the fact. See International Business Machine Corp. v. U.S., *op. cit.* supra note 21. See also other cases cited in note 39 *supra*.

[47] To permit such surely would create the impression among practitioners that the Service in fact contemplates that letter rulings are to have nationwide significance, a position it must resist officially and in fact. See text *infra* at note 51 *et seq.* Also see note 35 *supra*.

[48] *Ibid.*

[49] For details regarding this procedure, see Rev. Proc. 72–2, *op. cit. supra* note 4.

At most the taxpayer properly might expect the agent to initiate an internal request for technical advice from Washington, citing the possible absence of uniformity as a reason for the request. But this would only assure the taxpayer that his question would be reviewed at the higher level; given the intended limited effect of the earlier letter ruling, this taxpayer is not assure of uniform treatment. The same will be true if another taxpayer, because his transaction is only prospective in character, seeks a letter ruling from Washington, citing an earlier letter ruling issued to another.[50]

The ultimate point not to be overlooked is that mere re-publication by commercial publishers cannot, standing alone, assure one of the two broad objectives of the Information Act (uniformity) unless the Service is institutionally prepared to attach nationwide significance to each letter ruling. And this it simply cannot do for the reasons reflected below.

Mere access to letter rulings only "reveals" rather than "resolves" an inherent conflict between what should be the Act's two prime objectives

Unfortunately, there is an inherent conflict in our tax system between what should be the Information Act's twin goals—helping assure uniformity, but with that uniform result reflecting justice as determined by law. At least that conflict is inherent when we aspire to attain both goals in a tax system applicable to a society composed of over 200 million people, 12 million enterprises, and an infinite variety of complex transactions.

Even more unfortunately, the Information Act's mere access requirement, when applied to letter rulings, serves only to reveal that conflict; it does not help resolve it.

Of course we hope that most tax results are uniform, and that most issues are decided properly under the law. And while the audit program seeks uniformity in its compliance effort, it must be remembered that the size and complexity of our society now requires that thousands of revenue agents be scattered across hundreds of widely separated posts of duty. We also know that, as is true of any professional, each one is capable of making a mistake at any time—for example, mistakenly allowing a given taxpayer to deduct a non-deductible item.[51] But no sensible person would argue that thereafter all other taxpayers across the land should be entitled to a similar improper deduction. As previously noted, to argue otherwise would be tantamount to concluding, foolishly—because of an overzealous interest in uniformity at the expense of seeking justice under law—that each individual in lower IRS echelons has the power to convert his single mistake into a veto (with nationwide impact) over a congressionally enacted law and that he, though in error, has the power to fix the nationwide interpretative stance of the entire government.

To have conceded such power to lower echelon personnel, by creating a right for like tax treatment on the part of all other taxpayers confronted with an identical transaction, would also have had the secondary effect of contributing to a yet wider dimensional conflict between uniformity and justice. Since subsequent interpretations of that same statutory provision normally would have proceeded through the process of analogy, IRS employees, through that process, would have had to extend the earlier mistake by reference to rational analogies into yet other factual terrain, or arbitrarily would have had to restrict the mistake to identical transactions.

These foolish consequences, plus perhaps a complementary desire not to extend the massive assault of this computerized age on individual privacy,[52] help explain why no knowledgeable person has seriously argued that all tax interpretations made by revenue agents in individual cases—in aggregate, thousands weekly—be made accessible to the public. But while the present access requirement has no effect on work or results at that level, the amendment of that act proposed infra will contribute substantially to both uniformity and justice at that level.

The foregoing recital regarding the IRS' field forces is also relevant here for another reason. A letter ruling, to which the present access requirement apparently does apply, is simply a pre-audit, a determination typically made in advance before a given transaction is consumated, and covering the legal tax issue involved in that prospective transaction.[53] while issued from Washington, rather than in the field, it also is true, as previously noted, that the volume of requests

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[50] But see note 46 *supra*.
[51] For some data on this, see Wright, *op. cit. supra* note 28 at 35.
[52] See Miller, *Assault on Privacy* (1971).
[53] But see note 27 *supra* regarding the added opportunity here to *reshape* the prospective transaction.

for letter rulings is so great that it can be accommodated only if the power to rule on a case-by-case basis is delegated by the Commissioner to his immediate subordinates and then re-delegated by them to yet lower echelons in IRS' Washington bureaucracy. Thus, most such rulings will never be seen by the Commissioner himself, nor by the Assistant Commissioner (Technical), nor even by a Division head,[54] being issued instead by reviewers within lower Branch levels. And those persons, however conscientious, face the additional fact that timeliness (reasonable speed) is an essential quality of the private letter rulings' program, if that program is to fulfill a meaningful role, for it deals primarily with prospective transactions awaiting consumation. And consumation—if it is to take place at all—cannot always be held in abeyance for long.

Obviously, in this context and as before noted, those persons also will arrive at some interpretations with which the Service's policy-making officials might not have agreed, and which may be erroneous interpretations of statutory laws passed by Congress. The range of significance accorded determinations of those lower echelons obviously generates the same unfortunate but inevitable conflict between the goals of (i) uniformity, and (ii) justice under law, as that ascribed supra to the work of revenue agents. One difference, however, is that only in the letter rulings context will the Information Act's access requirements apply and, equally important, even in that context it only reveals, rather than resolves, the inevitable conflict between uniformity and justice.

The solution: A mandated, properly designed IRS publication program coupled with legislative oversight

It is possible to so amend the Information Act that it will make a substantial contribution to what should be its twin objectives in the tax context. Instead of requiring mere public exposure of all letter rulings (the bulk of which spring from lower, albeit Washington based, IRS echelons), the Service should be induced, once a letter ruling has been issued, to then take the time to decide whether the issue is of sufficient importance to warrant more painstaking study and higher level review, to the end of then publishing, if warranted by such study, a particularly well reasoned opinion reflecting a truly reliable institutional position.

It is by reference to this second stage that the greatest possible contribution can be made to uniformity. For publication of a well reasoned opinion, with even its carefully reflected contours being approved by the Service's highest technical officials, can then properly fix, heirarchically speaking, the interpretative stance to be adopted thereafter by all rulings personnel and by the thousands of otherwise scattered revenue agents. It would simultaneously advise all taxpayers throughout the land of a truly institutional interpretation upon which they could rely.

Further, this type of reliable information, in comparison to the typical favorable letter ruling addressed to a single taxpayer, would be so much easier to apply to yet other transactions, if only because of its structure—a carefully reasoned opinion responding to the significance of only expressly articulated material facts.

The key is to isolate those letter rulings having substantial significance, and then to bring to bear only on these—a manageable task—the talents of the Service's best top technical people, to the end of publishing a thoughtfully reasoned and just result.

But even as to this arrangement, there is an obstacle to be surmounted. Fifty years ago, in 1924, in connection with a formal special congressional investigation [55] of what we then called the Bureau of Internal Revenue, the Service did formally promise to publish, as suggested here, a position on all significant issues raised in the then rulings program.[56] And it repeated that promise annually, on the fly-leaf of its annual bulletin.[57] Nevertheless, 30 years later, following some scandals, another special congressional committee found that published rulings had dropped to a trickle.[58] Indeed, the then Assistant Commissioner (Technical)

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[54] See note 35 *supra*. Given this, it hardly can be said that a letter ruling "obviously did reflect the *best* thinking of the *National Office* as of the date of its issuance." Cf. Statement of Peter P. Weidenbruch, *op. cit. supra* note 36 at his p. 15.

[55] Pursuant to S. Res. 168, 68th Cong., 1st sess. Mar. 12, 1924. See *Cong. Rec.* 4014–4023 (1924).

[56] See fly-leaf, III—1 *Cum. Bull.* (1924).

[57] *E.g.*, see fly-leaf, 1951–2 *Cum. Bull.*

[58] See *Hearings Before a Subcommittee on Administration of the Internal Revenue Laws, of the House Committee on Ways and Means*, 82d Cong., 2d sess. 1340, 1566, and 1571 (1953).

admitted to a special congressional investigating committee that he did not even know whether any one within the Service had actually been assigned the responsibility to see that such rulings were published. But he stated that this would be corrected immediately,[59] and the earlier promise was renewed.[60]

But those who are at all close to the tax scene know that in the 20 years since then, the publication effort has had its ups and downs. Indeed, a former Assistant Commissioner (Technical) recently indicated that the Reorganization Branch, "which year-in and year-out issues some of the most complicated and important rulings emanating from the Service, in a recent year issued over 2100 private letter rulings but published as revenue rulings a mere seven."[61]

What causes these repeated defaults? There is a simple answer. Historically, there has been great pressure to expedite letter rulings. Also in that context, there is a human element; the mail (requests for rulings) arrives, and it is only human to try to answer it. But over the years, only congressional investigations, and these widely spaced in time, have put any pressure on the Service to publish Revenue Rulings. In consequence, during the more peaceful long interludes, there is a natural tendency to deflect attention to other work subject to daily pressures.[62]

A part of the fault, but also the only remedy, can be laid at the door of Congress. About 50 years ago, it created the Joint Committee on Internal Revenue Taxation,[63] endowed it with a professional staff, and charged that committee with the statutory duty not only to investigate the effects of the tax laws, but also to study "administration" of the tax system, and to make recommendations to Congress with respect to both.[64] In the period since then, the professional staff of that committee has justly earned great respect for its professional studies and work in substantive tax matters. But with respect to tax administration, historically that staff has done little except engage in case-by-case reviews of all refund cases exceeding $100,000. And it did this because the committee itself was charged with this special obligation by a second statutory mandate dealing just with such reviews.[65]

Even if that committee's staff is never used, as it should be in response to the older more sweeping statutory duty, to determine whether *all* the Service's administrative procedures are fairly calculated to achieve in proper balance the various goals of sound tax administration, it is now time to single out, by statute, another specific aspect of tax administration—publication of rulings, to which some attention must be devoted. If history proves anything, it is that the Joint Committee's special function here should be not more nor less than to provide the continuing outside pressure which is so essential in assuring that the Service does fulfill a proper publication commitment.

To these ends, the first step is to amend the Information Act. Instead of prescribing mere exposure through mere public access to a "morass" (all letter rulings), that act should mandate the Service to publish, in the manner previously described, an institutional position on the significant issues emerging in its letter rulings and technical advice programs. Furthermore, "significant" could be statutorily defined to include, *inter alia*, not just those issues likely to recur with some frequency,[66] but also those issues involved in any letter ruling with which senior officials of the Service had become involved, directly or indirectly. For is it not likely, over the long haul, that *unbecoming* favoritism, if any, will spring from those quarters rather than from lower echelons composed entirely of long-time civil servants?

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[59] *Id.* at 1566.

[60] See Remarks of Commissioner Andrews, *Hearings Before a Subcommittee on Administration of Internal Revenue Laws, of the House Committee on Ways and Means*, 83d Cong., 2d sess. 51 (1954).

[61] See Statement of Peter P. Weidenbruch, *op. cit. supra* note 36 at his p. 9. See also p. 8.

[62] For earlier data reflecting the intermittent slippage, see Wright, *op. cit. supra* note 28 at 54.

[63] Rev. Act of 1926, s1203, now Int. Rev. Code (1954), s8022.

[64] Rev. Act of 1926, s1203(c), now Int. Rev. Code (1954), 28022(1)(B).

[65] Int. Rev. Code of 1954, s6405(a).

[66] It is not enough to publish a ruling dealing with the first factual pattern generating that issue. Important new applications also must be published so as to identify with greater precision the dimensions of the Service's interpretative stance. On the other hand, quite obviously, "significant" should not include questions clearly and specifically covered by (i) the code itself, (ii) the regulations, (iii) prevously published revenue rulings, (iv) court decisions to which the Service publicly has agreed to conform by publishing them in the Internal Revenue Bulletin. Obviously, not to be published are (i) the so-called "insurance policy" rulings which some overly cautious lawyers seek, though the matter clearly fits within one of the above categories, and (ii) rulings on facts so peculiar that the issue is not likely to arise again (except where senior IRS officials involved themselves in such a ruling). Cf. Rev. Proc. 724, *op. cit. supra* note 4, at s5.

A second equally important step, to be taken concurrently, would require amendment of those statutory provisions in the Internal Revenue Code dealing with the duties of the Joint Committee. More specifically, that committee (though the staff would do the work) should be required to determine, through periodic sampling methods, whether the Service is conforming in a reasonable way to its legal obligation (as proposed here) to publish rulings on all significant issues arising in the letter rulings and technical advice programs.

There will be occasions, understandably so—given what has been said here, where the institutional position approved for publication by the Service's most talented senior officials will be less favorable to directly effected taxpayers than was the result a lower echelon had earlier reached in the previously issued letter ruling which originally generated the issue. But is it not wiser, in trying to achieve a proper balance between the twin objectives (uniformity, but with justice as determined by law), to help all other effected taxpayers conform uniformly to a standard deemed by the Service's best professionals to represent the law, than it would be to ignore the law by perpetuating what is believed to be an error made earlier by a lower echelon?[87] And is not the limited cost, confined here to the earlier error, simply an overhead cost, like that arising from errors made by field agents, properly to be borne by any tax system which must be applied to a very large, scattered and complex society?

To conclude instead that the foregoing differences in result should be avoided by delaying issuances of any significant letter ruling until a published version covering that issue has been approved by senior officials, could in effect neutralize the most meaningful purpose of the letter rulings program. In ultimate effect, for reasons noted below, this solution would involve "throwing out the baby with the bath water," leaving nothing meaningful to publish, thereby substantially prejudicing uniformity.

Taxpayers, concerned with prospective transactions as to which all details have been worked out by the parties, seldom could delay consummation for what in this context would be the inordinate delay required by the above practice.

It is easy enough, because of the drafting technique employed, to prepare a letter ruling once the result has been decided.[88] But much more time is required to prepare a carefully structured, easy-to-apply, published version. As before noted, the total facts (material and immaterial) must be reduced to just the material facts, and complemented by the type of carefully couched legal analysis which helps give ascertainable dimensions to the published ruling. And that version would have to wind its way, through intermediate reviews, to senior officials who, before approving, do need the carefully thought out perspectives of the various echelons below. After all, a ruling which is intended to effect the entire nation simply cannot be wrong.

Once it became known that the more time-consuming practice above described would be followed as to letter rulings, otherwise interested taxpayers faced with some doubt regarding the tax effect of prospective transactions would tend (i) to forego requesting letter rulings, and instead would either (ii) avail themselves of the informal oral but non-binding advice now available in the rulings branches,[89] (iii) run the risks involved by simply consummating the transaction, (iv) try, if possible, to reshape the transaction so as to avoid doubt regarding the tax issue, or (v) foregoing consummating the transaction.

The first three of these enumerated consequences—drying up the well of letter rulings, relying instead on oral advice, or taking the risks involved, drain even the Information Act's present accessibility requirement of its vitality and quite obviously would not contribute to uniformity (among taxpapers or audit personnel), in contrast to the proposals advanced here.

And, of course, all five consequences viewed in aggregate generate a separate and broader question beyond the scope of this article: Is it appropriate for the tax system of a complex society to maintain a viable letter rulings program to alleviate, as to prospective transactions, doubts the tax system itself generates? An affirmative answer to that question was properly assumed here, if only because otherwise there would be no reason to deal with the Information Act itself in this context.[90]

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[87] Over the long, but not the short, haul—and then only in a large sense—this is comparable to what happens when the Service, by a new Revenue Ruling, modifies prospectively a position taken in an earlier published ruling. This latter right clearly is reserved by the Service in Rev. Proc. 72–1, *op. cit. supra* note 4 at s6, and is generally recognized by the courts pursuant to the principle in Dixon v. U.S., 381 U.S. 68 (1965).

[88] See text *supra* following note 30.

[89] See Rev. Proc. 1975–23, *op. cit. supra* note 27.

[90] For the author's view that such a program should be maintained, see Wright *et al. op. cit. supra* note 8 at 34 *et seq.*

[A brief recess was taken.]

Senator HASKELL. Mr. Worthy, proceed in any way you desire. Your full statement will be included in the record.

STATEMENT OF K. MARTIN WORTHY, ESQ., PARTNER IN THE LAW FIRM OF HAMEL, PARK, McCABE & SAUNDERS, WASHINGTON, D.C.

Mr. WORTHY. Thank you, Mr. Chairman. My name is K. Martin Worthy. I am a partner in the law firm of Hamel, Park, McCabe & Saunders of Washington, D.C.

I served from 1969 to 1972 as Chief Counsel for the Internal Revenue Service. Except for my Government service, I have been engaged in practice, primarily in the field of taxation, in Washington since 1948.

I very much appreciate your invitation to appear here on a matter of very great concern to me and many of my professional colleagues, both in and out of the Government.

Our tax system is not a simple system. It is extremely complex, but it raises far more money for every dollar expended on tax administration than that of any other country in the Western World. The primary reason for this is that the system rests on the principle of voluntary compliance. Roughly, 98 cents out of every dollar of tax is collected without compulsion, without distraint, without prior assessment at all. And voluntary compliance rests, in turn, on the expectation that the taxpayer will either include in his tax return, readily make available for audit, or disclose to Government agents in advance, a full and complete accounting and explanation of every fact which has any bearing on the correctness of his tax liability.

In turn, in exchange for this free and voluntary disclosure of information by the taxpayer to the Government, it has long been understood, and generally recognized by law, that the information given the Government by the taxpayer—whether relating to sources of income, names and relations of dependents, nature of deductions, business purposes, motives, hopes and expectations, terms of negotiation with other persons, valuations, family disputes, or legal relationships, or mistakes of judgment in conducting one's affairs—is highly confidential, and not subject to disclosure to neighbors, the public, the press, competitors, others with whom the taxpayer does business, or ordinarily even to other Government agencies.

This, in my opinion, is a highly valuable and necessary adjunct of a successful, voluntary compliance system of taxation in a free society, and I strongly believe that disclosure of such tax information should, if anything, be tightened, not loosened, and greater safeguards provided to insure that such private information is made available, even to other officers and agencies of the Government, only under very carefully prescribed safeguards.

As a part of this program for a free interflow of information between the taxpayers and the Government, the Internal Revenue Service has agreed for more than 30 years to issue a private ruling in advance of the filing of a taxpayer's return as to the tax consequences of almost every conceivable type of transaction, and promised that, in the absence of a change in the statute or a failure of the taxpayer to make a full disclosure of all the pertinent facts, as disclosed by

subsequent audit, the Service will follow that ruling on audit of the taxpayer's return. I might add, Mr. Chairman, that private rulings do not always reflect the answer the taxpayer wants. Even if the taxpayer becomes concerned that he will receive an adverse answer and even withdraws his request, the file will nevertheless, very likely be sent to the field for consideration on audit.

I am much concerned by recent efforts through litigation or legislation to deprive taxpayers of continued assurance of longstanding regulations that the disclosure of their private affairs to the Government for tax purposes will be confidential.

I do not believe that private letter rulings—any more than tax returns, audit reports, closing agreements, or technical advice memoranda—should be made available for public inspection unless there is first deleted all information from which the identity of the particular taxpayer can be determined; all commercial, financial and other information, the disclosure of which could be reasonably expected to cause serious financial or personal harm or embarrassment; information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy; and, of course, any other information specifically exempted from disclosure by law.

This is not to say that I believe that there should be a large body of secret law as to the Service's position on particular legal issues. Already court decisions in some 1,800 cases a year tell taxpayers not only how the IRS has proposed to treat, perhaps, 5,000 items put in issue, but also whether its contentions are likely to be accepted in litigation. And following a practice of over 50 years, the Service publishes in the weekly Internal Revenue Bulletin revenue rulings stating its official position on numerous issues. These published rulings are based almost entirely on private rulings, but there are big differences. Not only is the taxpayer's identification and other confidential information carefully removed—even changed, if not material—but a published ruling is reviewed and examined at several levels, including the Office of the Chief Counsel, to make sure that it reflects a carefully considered view of the Service on the issue involved which can be relied on in all similar cases.

I might say that I am glad that Mr. Field called attention to the views of Prof. Hart Wright in the "Oklahoma Law Review" in which he urges that the Service be required to publish in writing a greater number of rulings than are published today but he emphasizes—and I want to emphasize this—that these published rulings should be, and I quote, "an institutional interpretative position approved by senior officials." That is what is done in published rulings today and not done, of course, with all private rulings.

I do hope the Congress will provide the Service with additional manpower so it can publish, and publish promptly, many, many more rulings on which the public generally may rely as precedents. But this is not to say that it is practical to make public every decision interpreting a provision of the Internal Revenue Code.

There obviously would be an advantage to me and each of my clients if he or I could find out how the Service has treated every transaction, similar to that of my client, involving every other taxpayer in the country. This is obviously possible, however, only if I have available not only every private ruling, but every one of the 1 million revenue agents reports and office audit reports issued each

year and every one of the 75,000 district and appellate conference memoranda written by reviewers reversing or sustaining an agent's original determination. And, I suppose, that to really know of every instance in which the Service has agreed to accept the way in which another taxpayer reported a transaction like my own, I need a copy of every taxpayer's return, reporting a similar transaction for which no adjustment was proposed on audit.

Senator HASKELL. Now, Mr. Worthy, do you not make some distinction between a request for a determination prior to entering into a transaction, as opposed to the post transaction review?

Mr. WORTHY. I do not think any such distinction is sound, Mr. Chairman. It has been suggested that because private ruling requests, unlike tax returns and audit reports, are entirely voluntary, except in a few limited instances, that a taxpayer should be required to waive confidentiality as to any information he furnishes in connection with a ruling request, but I find it unthinkable, Mr. Chairman, that the law on confidentiality would favor the taxpayer who gives himself the benefit of the doubt on his return over the taxpayer who specifically asked in advance—and answered all the questions the Government asked at that time—as to how a particular transaction should be reported.

One reason frequently urged for publication of all private rulings is that there should be a public oversight of the private ruling process, so that errors in such rulings can be promptly given critical attention. I suggest that to the extent errors are made in administering the Internal Revenue Code, there are many times more such errors in the audit process in the field than in the rulings process in the national office.

To turn to some of the committee's prepared questions, I think that it would be reasonable that at the time of the filing of a ruling request or any supplemental information the taxpayer identify information which he does not believe should be disclosed. If there are adopted the four specific limitations on disclosure which I have endorsed—which are similar to the limitations now imposed on published rulings—there will be little controversy between taxpayers and the Government as to what should be disclosed.

If, however, the limitations are narrowed so as to require disclosure of some confidential data, the difficulty of drawing a dividing line will become more difficult, the burden on the Service in making fine-line distinctions will be greater, and more controversy will ensue. In either event, the taxpayer should be given a copy of the material to be disclosed and an opportunity to object administratively and, if necessary, through an in camera proceeding in court, if he believes the requirements of the statute are not being followed. If identifying information and other confidential data are deleted, I see no reason for delay of public release of a ruling until the proposed transaction is completed.

On the other hand, if any of such information is to be disclosed, the taxpayer should be able to require delay in issuance of the ruling until the transaction is completed, or otherwise his competitors or persons with whom he is negotiating a transaction may obtain factual advantages to which they are not morally entitled.

To the extent that private rulings are required to be disclosed, the IRS should certainly be required to index such rulings by subject matter. Such index should be maintained indefinitely. Unless all identifying information and confidential data are excluded, I do not think

there is any greater justification for publishing technical advice memorandums than reports of disposition in the field of issues on audit. It would certainly be most unfair in my judgment for confidential data relating to one taxpayer to be disclosed publicly simply because a particular revenue agent thought an issue should be submitted to the national office for advice, while similar data relating to another taxpayer having an identical issue which the agent decided to resolve without national office advice should be protected from disclosure.

While I strongly advocate the continuance of the present practice by which identification of the taxpayer and other confidential data submitted by the taxpayer have not been subject to public disclosure, if a decision is made to modify such practice, I think it would certainly be a breach of faith at this time to disclose such material as to past rulings in light of the regulations which provided in very specific terms—sections 601.601(d)(2)(iv)(h), and (v)(b), and 601.702(b)(1)—that confidential information submitted in connection with past ruling requests would be held in confidence.

Senator HASKELL. Mr. Worthy, would you apply your thoughts to all past rulings and would you draw a line at July 4, 1967?

Mr. WORTHY. I would apply that to all past rulings, Mr. Chairman. Despite the 1974 decision of the U.S. Court of Appeals for the District of Columbia circuit, in the *Tax Analysts* case and the 1975 *Fruehauf* decision (which I might add are contrary to decisions of the Court of Claims and a district court in North Carolina) the law is not entirely settled in this area. The Service certainly, in good faith, believed that pursuant to the Freedom of Information Act, taxpayers were entitled to have the confidentiality of information submitted in connection with ruling requests protected from disclosure. They led the public to think that, and it seems to me the Government, having taken that position, it would be most unfair, regardless of what the law may have later been held to be, it would be most unfair to those taxpayers to lure them into an expectation that this information would be private and then turn around and disclose it to the general public.

And I might say there is a case in the District of Columbia circuit, the name of which I do not readily recall, that indicates that where a Government agency has obtained information from private enterprise on the expectation and promise that it will be confidential, that it cannot be disclosed under the Freedom of Information Act. I believe that case involves the Financial Accounting Standards Board. I am not certain. I would be glad to furnish that to the committee, if you would like.*

Senator HASKELL. Yes; I would appreciate it if you would. And your thought is that rulings should not be published, but we do have a problem or at least the appearance of undue influence in obtaining rulings, and how do we get rid of at least that appearance, in the absence of full disclosure?

Mr. WORTHY. Well, Mr. Chairman, I do not think you could ever completely destroy some skepticism on some part of the public that some Government agencies operate in response to undue pressures, rather than in response to the law of the land.

Senator HASKELL. You could try.

Mr. WORTHY. If we knew any way to do that, democracy would certainly work much better. But I do not believe that can ever be done, and we can have a really true, successful, functioning democracy.

*See *Charles River Park "A", Inc., v. Department of Housing and Urban Development*, 360 F. Supp. 212 (1973) remanded 519 F. 2d 935. (U.S.C.A., D.C. 1975).

Mr. WORTHY. And I believe, if I may suggest it——

Senator HASKELL. Have you not—if I may interrupt you—have you not ever heard, in talking with various practitioners, have you not ever heard people say, well, I tell you now, such-and-such a firm, they are the ones to go to for a ruling on that subject? Have you not ever heard that rumored around?

Mr. WORTHY. I believe that happens less often in the Internal Revenue Service than almost any agency of the Government there is. I believe the integrity of the people in the Internal Revenue Service is as high as you can find in any governmental organization.

Senator HASKELL. I am not saying anything about the integrity or lack of integrity. I am talking about the appearance, which, in my view, could be just as bad as the actuality. But possibly, you do not feel there is even the appearance.

Mr. WORTHY. I think there can always be the concern, and as a matter of fact, I think that there is another side to that. I think that actually there would be a great danger, if the identity of the taxpayer is disclosed, that some people will be tempted in the case of an unpopular taxpayer to bend over backward to rule against him, and then in the case of a popular taxpayer, to bend over backward to rule in his favor. And I think that would be most unfortunate. And I think that is a concern that I have heard expressed repeatedly at the bar, in connection with these proposals, that if the taxpayer happens to be one which is in public disfavor at the moment, that he would find it much more difficult to get a ruling, for fear that there will be criticism that the revenues have not been protected, regardless of what the law is.

Every taxpayer ought to be treated alike. It should not make any difference whether the taxpayer is popular or unpopular, big or small, from New York or——

Senator HASKELL. I do not think anyone would argue with that.

Mr. WORTHY. He ought to get the—or from Colorado, and the taxpayer ought to get the benefit of the tax law, regardless of where he is.

Senator HASKELL. Well, a little bit better from Colorado. OK, I do understand your viewpoint.

Mr. WORTHY. Now, regardless of the extent to which private rulings are henceforth disclosed, I do not believe that any taxpayer has the right to rely on the treatment given another taxpayer if such treatment is wrong as a matter of law. This principle was emphasized by the Supreme Court as recently as 1962 in the *Hanover Bank* case.

The Commissioner has always made clear that one taxpayer may not rely on another taxpayer's private ruling, and while I would hope that every effort would be made by the Commissioner to apply the law with an even hand, I do not believe that the only way in which the Commissioner can correct a mistake is by recourse to the Congress.

The situation with respect to rulings published in the Internal Revenue Bulletin is, of course, different; they are given precedental value today, but as I have previously indicated, these decisions are carefully reviewed to make sure they are right prior to publication and are subject to correction simply by publishing a new ruling in the Internal Revenue Bulletin having prospective effect only as the Commissioner is permitted to do under section 7805 of the Code.

I do not believe that third parties should be granted a right to intervene in ruling matters any more than they should be given a right

to intervene in the audit process. I do not think the system would be workable if every citizen had a right to participate prior to the issuance of any private ruling. This is not to say, of course, that private citizens should not have the right to make known their criticisms, both by letters to the Commissioner and in professional or public media, following the issuance of private rulings. If such criticisms prove to be valid they will, no doubt, be taken into account by the Commissioner in any subsequent matter involving the same issue.

I might add, Mr. Chairman, I welcome the suggestion of Mr. Field that it would be helpful if the Internal Revenue Service should publish, from time to time, areas in which they have problems of technical concern, and invite public comment. At least twice I can recall, when I was in the Government, when we planned to publish a ruling in the Internal Revenue Bulletin, I insisted that the ruling be made public, in tentative form, prior to its final promulgation, because I had serious doubt—some concern at least—as to whether we were right, and I wanted to get the benefit of public criticism, just as we always got on regulations. And I do think there are times when, regardless of what the technical distinction between a ruling and a regulation may be, that the Service should encourage public comment prior to the promulgation of a ruling in the Internal Revenue Bulletin, and I think Mr. Field's suggestion in that connection is very worthwhile.

Unless steps are taken to prevent disclosure of the identity of taxpayers filing ruling requests, and confidentiality of other information they submit, I believe that the private letter ruling process will be less widely used and of far less value than it is today. I also think, as I have suggested, that greater caution will be taken by those involved in the ruling process; while this may to some extent be healthy, it is also going to slow down the ruling process, add to levels of review, and result inevitably in the exercise of less real responsibility in applying the law as Congress intended—particularly in the case of well-known taxpayers—for fear of public criticism that there has been an inadequate effort to protect the revenues.

Some taxpayers will not seek rulings at all because they cannot afford disclosure of confidential information; some of these will abandon the transactions they propose; more will probably take a chance and give themselves the benefit of the doubt on their returns and many such transactions will escape tax, even though they ought to be taxed, because revenue agents are not sophisticated enough to see the very subtle problems of legal construction which concern their tax advisers.

In summary, Mr. Chairman, I have a very strong civil libertarian point of view. I believe that the privacy of taxpayers should be protected and respected, and I do not believe that we can count on the continued success of the voluntary assessment system if we begin to erode on the concept that the taxpayer should not only be free but should be encouraged to be completely candid in disclosing his private affairs to the tax administrator.

Thank you very much.

Senator HASKELL. Thank you very much, Mr. Worthy.

I think I probably asked my questions by interrupting you, so I have no more, and I thank you very much for appearing, sir.

Mr. WORTHY. Thank you, sir.

[The prepared statement of Mr. Worthy follows:]

STATEMENT OF K. MARTIN WORTHY

SUMMARY

Success of the voluntary compliance system depends upon the necessity that taxpayers be completely candid in disclosure of their private affairs to the tax administrator.

Taxpayers have a right to expect, in turn, that the confidentiality of such information will be fully and completely respected by the tax administrator.

Neither private letter rulings, tax returns, audit reports, closing agreements, nor technical advice memoranda should be publicly disclosed unless there have first been deleted the identity of the taxpayer; commercial, financial and other information, disclosure of which could cause personal or financial harm or embarrassment; and any information containing an unwarranted invasion of personal property.

The law on confidentiality should not penalize those who ask the Service to rule in advance as to how a transaction must be treated for tax purposes over those who give themselves the benefit of the doubt on their returns. It also should not penalize those whose cases are referred to the National Office for Technical Advice over those whose cases involving identical issues are disposed of in the field without such advice.

IRS should be given more manpower so that it can review and publish as precedents (without identifying and confidential data) many times more published rulings than it now publishes.

In no event should material which IRS promised in the past would be treated as confidential when it was submitted, now be disclosed.

Permitting the public to intervene in ruling matters or the audit process would be totally unworkable.

Disclosing the identity of taxpayers or other confidential data will reduce use of the ruling process, delay such rulings, cause less objectivity, and result in ultimate loss of revenue from more taxpayers giving themselves the benefit of the doubt on their returns.

STATEMENT

My name is K. Martin Worthy. I am a partner in the law firm of Hamel, Park, McCabe & Saunders in Washington, D.C.

I served from 1969 to 1972 as Chief Counsel for the Internal Revenue Service. Except for my Government service, I have been engaged in practice—primarily in the field of taxation—in Washington since 1948. Taxation has also been the principal area of practice of my firm, which is now in its fiftieth year.

I very much appreciate the invitation of the Subcommittee to appear before you this morning on a matter of very great concern to me and many of my professional colleagues—in and out of the Government.

For decades the United States has had the most effective tax system in the world. It is not a simple system; on the contrary, it is extremely complex, but it raises far more money for every dollar expended on tax administration than in any other country in the Western World. The primary reason for this is that the system rests on the principle of *voluntary compliance*. Roughly 98 cents out of every dollar of tax is collected without compulsion, without distraint, without prior assessment at all. And voluntary compliance rests, in turn, on the expectation that the taxpayer will either include in his tax return, readily make available for audit, or disclose to Government agents in advance, a full and complete accounting and explanation of every matter which has any bearing on the correctness of his tax liability.

In turn, in exchange for this free and voluntary disclosure of information by the taxpayer to the Government, it has long been understood and generally required by law that the information given the Government by the taxpayer—whether relating to sources of income, names and relations of dependents, nature of deductions, business purposes, motives, hopes and expectations, terms of negotiation with other persons, valuations, legal relationships, or mistakes of judgment in conducting one's affairs—is highly confidential, and not subject to disclosure to neighbors, the public, the press, competitors, others with whom the taxpayer does business, the states (except in connection with their own tax collection activities) or even to other Government agencies except in rare circumstances. This, in my opinion, is a highly valuable and necessary adjunct of

a successful, voluntary compliance system of taxation in a free society, and I strongly believe that not only in the area tax administration which is the subject of today's hearing, but in other areas as well, the rules on disclosure of such information as to taxpayer's private affairs should, if anything, be tightened—not loosened—and greater safeguards provided to insure that such private information is made available—even to other officers and agencies of Government—only under very carefully prescribed safeguards.

As a part of this program for a free interflow of information between the taxpayers and the Government, and in recognition of the fact that the meaning of the Internal Revenue Code is not always entirely clear, the Internal Revenue Service has agreed for more than 30 years to issue a private ruling in advance of the filing of a taxpayer's return as to the tax consequences of almost every conceivable type of transaction and promised that, in the absence of a change in the statute *or a failure of the taxpayer to make a full disclosure of all the pertinent facts, as disclosed by subsequent audit*, the Service will follow that ruling on audit of the taxpayer's return—even despite some intervening court ruling adverse to the taxpayer, or change of heart or mind by the Commissioner.

I am much concerned by recent efforts through litigation or legislation to deprive taxpayers of continued assurance of longstanding regulations that the disclosure of their private affairs to the Government for tax purposes will be confidential.

I do not believe that private letter rulings—any more than tax returns, audit reports, closing agreements, or technical advice memoranda—should be made available for public inspection unless there is first deleted (1) all information from which the identity of the particular taxpayer can be determined; (2) all commercial, financial and other information, the disclosure of which could be reasonably expeted to cause serious financial or personal harm or embarrassment to the taxpayer or any other person, including trade secrets; (3) information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy; and, (4) of course, any other information specifically exempted from disclosure by law.

This is not to say that I believe that there should be a large body of private law as to the Service's position on particular legal issues. Already, published decisions of the courts in some 1,800 or so cases a year tell taxpayers and their advisers not only how the IRS has proposed to treat perhaps 5,000 items put in issue, but also whether its contentions are likely to be accepted in litigation. And, for over fifty years, since at least 1919, the Service has published in the weekly Internal Revenue Bulletin revenue rulings stating its official position on hundreds of issues every year. The 700 rulings the IRS now publishes each year are based almost entirely on private rulings. But there are big differences: Not only is the taxpayer's identification and other confidential information carefully removed—even changed, if not material—but a published ruling is reviewed and examined at several levels—including the Office of the Chief Counsel—to make sure that it reflects a carefully considered view of the Service on the issue involved which can be relied on by taxpayers and field agents alike in all similar cases. I do hope that the Congress will see fit to provide the Service with additional manpower so that it can publish—and publish promptly—many, many more rulings on which the public generally may rely as precedents. But this is not to say that I think it is practical to make public every decision made by the Service interpreting a provision of the Internal Revenue Code.

There obviously would be an advantage to me and every one of my clients if he or I could punch a computer button and find out how the Service has treated every transaction, similar to that of my client, involving every other taxpayer in the Country. This is obviously possible, however, only if I have available not only every private ruling, but every one of the 1,000,000 Revenue Agents reports and office audit reports issued each year and every one of the 75,000 District and Appellate conference memoranda written by reviewers reversing or sustaining an agent's original determination. And, I suppose, that to really know of every instance in which the Service has agreed to accept the way in which another taxpayer reported a transaction like my own, I really need not only these reports disclosing items in the taxpayer's return an agent thought should be adjusted, but a copy of every taxpayer's return reporting a similar transaction disclosing items for which no adjustment was proposed.

There has been no serious suggestion that all of these items be subject to public disclosure; on the other hand it has been suggested that because private ruling requests—unlike tax returns and audit reports—are entirely voluntary on the part of the taxpayer (except in a few limited instances), the taxpayer

should be required to waive confidentiality as to any information he furnishes in connection with his ruling request. As a matter of policy, I *find it unthinkable that the law on confidentiality would favor the taxpayer who gives himself the benefit of the doubt on his return over the taxpayer who specifically asks in advance as to how a similar transaction should be reported.* And I also find it unthinkable that the law on confidentiality should favor the taxpayer who furnishes the Service as little information as he thinks he can get away with, in his request for ruling, over the taxpayer who bends over backwards to disclose to his Government every conceivable fact bearing on the issue to be ruled on.

One reason frequently urged for publication of all private rulings is that there should be a public oversight of the private ruling process, so that errors in such rulings can be promptly given critical attention. I suggest that to the extent errors are made by the Internal Revenue Service in administering the Internal Revenue Code—and they are great in number, though small in relation to the total number of matters considered—there are many times more such errors in the audit process in the field than in the rulings process in the National Office.

I do not think that it would be unreasonable that at the time of the filing of a ruling request or any supplemental information the taxpayer identify information which he does not believe should be disclosed. If there are adopted the four specific limitations on disclosure which I have endorsed—which are similar to the limitations now applicable to published rulings—while I anticipate there will be some burden on the Internal Revenue Service in deleting such information, there will be little controversy between taxpayers and the Government as to what should be disclosed. If, however, the limitations are narrowed so as to require disclosure of some confidential data, the difficulty of drawing a dividing line will become more difficult, the burden on the Service in making fine-line distinctions will be greater, and more controversy will ensue. In either event the taxpayer should be given a copy of the material to be disclosed prior to its becoming public information, and an opportunity to object administratively and, if necessary, through an *en camera* proceeding in court, if he believes the requirements of the statute are not being followed. If a dispute arises as to the information to be disclosed, I think it should be resolved after the Service has decided how it will rule (though not necessarily after it has advised the taxpayer how it will rule), since it is often impossible to determine what information, if any, need be disclosed to make disclosure of a ruling meaningful until after a decision has been made as to what the ruling should be. Often in my experience a technician—particularly an inexperienced one—will ask a taxpayer for information he does not really require; I have always favored the practice of furnishing whatever information the Government thinks it needs, but I would strongly resist furnishing irrelevant information if I thought I must do so at the expense of its public disclosure.

If identifying information and other confidential data are deleted prior to public disclosure of a ruling, I see no reason to require that there be a delay in the issuance of a ruling until the proposed transaction is completed: on the other hand, if any of such information is to be disclosed, the taxpayer should be able to require delay in issuance of the ruling until the transaction is completed, for otherwise his competitors or persons with whom he is negotiating a transaction may obtain an advantage to which they are not morally entitled merely by reason of the fact that a private ruling has been requested.

To the extent that private rulings are required to be disclosed, the IRS should certainly be required to index such rulings by subject matter. Such index should be continuously kept up to date and maintained indefinitely. Even sometimes when a provision is dropped from the law, it is readopted many years later by Congress in substantially the same form, and rulings involving interpretations of the earlier law would certainly be of significance in interpretation of a later similar law.

Unless all identifying information and confidential data are excluded, I do not think that there is any greater justification for publishing technical advice memoranda than reports of disposition in the field of issues on audit. It would certainly be most unfair in my judgment for confidential data relating to one taxpayer to be disclosed publicly simply because a particular revenue agent thought an issue should be submitted to the National Office for advice, while similar data relating to another taxpayer having an identical issue which the agent decided to resolve without National Office advice should be protected from disclosure.

While I strongly advocate the continuance of the past practice by which identification of the taxpayer and other confidential data submitted by the taxpayer have not been subject to public disclosure, if a decision is made to modify such practice, I think it would certainly be a breach of faith at this time to disclose such material as to past rulings in light of the regulations—Sections 601.601(d)(2), (iv)(h) and (v)(b), and 601.702(b)(1)—which provided in very specific terms that confidential information submitted in connection with past ruling requests would be held in confidence. If despite this promise of confidence, a decision is made to disclose any such information, I believe that the IRS has a duty (1) to advise the person or persons to whom each such ruling was originally addressed, and (2) the public generally, at least three months prior to disclosure of any such information, that disclosure is contemplated in order that appropriate steps may be taken to convince the Service—or if necessary the courts—that such information should not be disclosed.

Regardless of the extent to which private rulings are henceforth disclosed, I do not believe that any taxpayer has the right to rely on the treatment given another taxpayer if such treatment is wrong as a matter of law. This principle was emphasized by the Supreme Court as recently as 1962 in the *Hanover Bank* case. The Commissioner has always made clear that one taxpayer may not rely on another taxpayer's private ruling, and while I would hope that every effort would be made by the Commissioner to apply the law with an even hand, I do not believe that the only way in which the Commissioner can correct a mistake is by recourse to the Congress. The situation with respect to rulings published in the Internal Revenue Bulletin is, of course, different; they are given precedental value today, and will be followed by the Commissioner in similar factual situations, but—as I have previously indicated, these decisions are carefully reviewed to make sure they are right prior to publication and are subject to correction—when the Commissioner believes he has made a mistake—simply by publishing a new ruling in the Internal Revenue Bulletin having prospective effect only as he is permitted to do under Section 7805 of the Code. I would certainly hope that if a decision is made to make private rulings available for public inspection, the publication of carefully considered revenue rulings in the Internal Revenue Bulletin will be continued.

I do not believe that third parties should be granted a right to intervene in ruling matters anymore than they should be given a right to intervene in the audit process. I do not think the system would be workable if every citizen had a right to participate prior to the issuance of any private ruling. This is not to say, of course, that private citizens should not have the right to make known their criticisms—both by letters to the Commissioner and in professional or public media—following the issuance of private rulings. If such criticisms prove to be valid they will, no doubt, be taken into account by the Commissioner in any subsequent matter involving the same issue.

Unless steps are taken to prevent disclosure of the identity of taxpayers filing ruling requests, and confidentiality of other information they submit, I believe that the private letter ruling process will be less widely used and of far less value than it is today. I also think that greater caution will be taken by those involved in the ruling process; while this may to some extent be healthy, it is also going to slow down the ruling process, add to levels of review, and result inevitably in the exercise of less real responsibility in applying the law as Congress intended (particularly in the case of well-known taxpayers) for fear of public criticism that there has been an inadequate effort to protect the revenues. Some taxpayers won't seek rulings at all because they can't afford disclosure of confidential information; some of these will abandon transactions; more will probably take a chance and give themselves the benefit of the doubt on their returns and many such transactions will escape tax, even though they should be taxed, because revenue agents are not sophisticated enough to see the very subtle problems of legal construction which concern their tax advisers.

In summary, Mr. Chairman, I believe that the privacy of taxpayers should be respected, and I do not believe that we can count on the continued success of the voluntary assessment system if we begin to erode on the concept that the taxpayer should not only be free—but should be encouraged—to be completely candid in disclosing his private affairs to the tax assessor.

Senator HASKELL. Our last witness is Peter P. Weidenbruch, Jr., Georgetown University Law School.

STATEMENT OF PETER P. WEIDENBRUCH, JR., PROFESSOR OF LAW AND ASSOCIATE DEAN (GRADUATE STUDIES), GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. WEIDENBRUCH. Mr. Chairman, thank you for the opportunity to appear.

I too have a prepared statement which I have submitted.

Senator HASKELL. It will be reproduced in full.

Mr. WEIDENBRUCH. Thank you.

If I may, Mr. Chairman, I would like to lay the foundation for my testimony very briefly by reviewing several items of my background. I was for a year and a half Assistant Commissioner, Technical, the official in charge of the office issuing rulings at the Internal Revenue Service. Since that time, although I have returned primarily to my position as a professor of law at Georgetown, I have also been engaged in the private practice of tax law, with a large law firm, and indeed at this moment, have somewhere between 10 to 20 ruling requests pending with the Internal Revenue Service. In short, I do have some experience in private practice as well as Government experience.

I am also a member, incidentally, of Mr. Field's Legal Activities Policy Board. I am very interested in and proud of the work that his organization has done, and of course I am connected with Mr. Simmons' organization, the Tax Section of the American Bar Association, as well.

I would like to respond to whatever questions you have, sir, but I do have a number of items that I have jotted down during the prior testimony, and I will be happy to comment there, if I may.

Senator HASKELL. Go right ahead.

Mr. WEIDENBRUCH. First of all, I would like to say that I am glad to see that virtually all of the witnesses are in agreement, basically, that more must be done insofar as publication is concerned. The district court here in the District of Columbia has told us that there is a body of secret law that has been developed and that this is highly improper.

I believe that public moneys have been expended to develop rulings positions at the Internal Revenue Service. These positions are known by some practitioners but not by all, and it seems to me it is a matter of public right that these be available to all.

You raised the question earlier, Senator, whether there are not some firms that are better than others, insofar as securing rulings. My own experience is that this very definitely is the case. Some firms do have better access than others. I experience it myself occasionally at a meeting, where there arises a legal issue as to which there is no published IRS position, and as to which, if I were to seek an answer in accordance with the Service's rules, it would take me 2 months to find the answer. Occasionally, a gentleman will excuse himself from the room and come back 10 minutes later with an answer that he has secured through an informal contact with personnel of the Internal Revenue Service.

This kind of access contravenes published IRS procedures. It is something that I doubt very few people around the country are able to do, but some are able to do it, for one reason or another, typically stemming from prior service as an employee in the Internal Revenue Service.

Not only do I think it important that all have access to what some have now, but I think it is important that this process be opened up, so as to maintain the integrity of the decisional process itself. Originally, the commitment that the Service made 20 years ago to publish the content, the basic content, of all letter rulings arose out of an investigation by the Congress of certain scandals or alleged scandals. This commitment by the Service has never been fulfilled, even from the first day after it was issued. And we are again in a period today where the suggestion is made that some improper influences occasionally have been brought to bear.

I believe this danger is sufficiently great that we should, through full exposure of decided cases, decided precedents, attempt to avoid some taxpayers' getting secret rulings. Indeed, I can go back to another period in my own private practice experience where I recall attempting to seek from the Internal Revenue Service a ruling on a certain point, and indeed, we had several influential Members of the Congress assisting us in that effort. One of the very strongest arguments that the officials of the Service were able to make against the effort we were making was that they would have to publish the position, if they were to give us the ruling we sought. Well, the fact of the matter is that they do not publish at all or anywhere near all of the cases they decide.

In my prepared testimony, I noted that the Reorganizations Branch, which I think most practitioners in this room and outside it would agree is the single most important rulings Branch of the Service, in my statement I mentioned in a recent year, that Branch issued 2,100 rulings and published only 7. That is 0.4 of 1 percent. Last year, they increased that up to 1.4 percent.

Now, it is certainly true that not all, 100 percent, are on novel issues and warrant publication, but it is just patently obvious that far more than 1 percent of the Reorganization Branch's rulings should be published.

The example I mentioned a few minutes ago about the practitioner leaving the room and getting the informal advice involved the Reorganizations Branch. During my period of service at the Internal Revenue Service, practitioners from outside the Washington area complained to me—these were law practitioners—complained to me that whereas they were unable to advise clients as to the Service position because there had been nothing published, the accountants who may have been present in the room were able, through recourse to their own firm's national office, and the files that had been developed there in the case of other taxpayers who had secured private rulings through personnel in the Washington office of the firm, the accountants were able to get the answer to the questions that the lawyers could not answer for their clients.

This is a source of embarrassment to people who do not have this kind of access. I heard this on numerous occasions during my period of service at the Internal Revenue Service, during which, I might also say, I made every effort to secure approval of an opening up of this area that we are discussing.

There has been reflected, in a number of discussions this morning, and in other discussions of this issue, what I believe is a failure to perceive one important point, and that is that technical advice memorandums should be published, just as private letter rulings should be

published. Much is made of the fact that these memorandums arise in audit circumstances, as distinguished from advanced ruling situations, but when I urge publication of technical advice memorandums, I am really urging nothing more than is done today. Technical advice memorandums are today published.

Revenue rulings published in the Internal Revenue Bulletin are basically one of two things, censored into a sanitized form. They are either letter rulings or they are technical advice memorandums.

If the legislation that your committee is developing should not include technical advice memorandums within its scope, it would be a backward step, Mr. Chairman. We now have access to these, but not to the full extent that we should have.

Senator HASKELL. Would you explain to me the circumstances under which technical advice memorandums are issued?

Mr. WEIDENBRUCH. Yes, sir. As has been explained this morning, these arise only after a taxpayer has filed his return and a challenge by a revenue agent has arisen in the audit. If the dispute cannot be resolved between the taxpayer and the revenue agent, and if the appeal process in the local office fails to achieve agreement, then either the revenue agent or the taxpayer may seek the advice of the national office in Washington, and the answer that the National Office gives to that request from the field office, that is a technical advice memorandum. When identifying details and confidential information are deleted out, it is just every bit as bland as a sanitized letter ruling, and I stress, every bit as important.

It was pointed out this morning, and it is brought out at every one of these hearings and by every opponent of greater disclosure—the point is made, my golly, we cannot open up a million revenue agents' reports and hundreds of thousands of appellate division reports. But Mr. Chairman, I believe that misses the mark. Those of us who want more rulings published are not talking about conclusions reached by revenue agents in the Fresno, Calif., or any other local IRS office. We are talking only about national office determinations made by the experts in the Technical Branch, frequently with consultation all the way up to the Commissioner, or even into the Office of the Assistant Secretary for Tax Policy. We are talking only about national interpretations that will be adhered to on subsequent occasions when national office advice is sought, unless conscious decisions are made to overturn them.

It is frequently contended that there is no precedential value to these private letter rulings, but commonsense tells us, and the facts clearly warrant it, that if you and I were the leadership of a given Rulings Branch, and we adopted a position in response to Taxpayer A's ruling request, we would do that only after giving it the fullest attention we thought it warranted, and then, even though we did not publish it, even though it did not have formal precedential value, surely you and I would decide that issue the same way the next time, and the next time, and the next time. And that is exactly what IRS does.

So these are important determinations, and in no way comparable to these million revenue agent reports that are sometimes raised for an in terrorem effect with the implicit suggestion that you ought to do nothing in this area.

Another point made this morning where I think it might be helpful to bring out a second viewpoint, has to do with required rulings. The section 367 area is the principal one that comes to mind here. Section 367, as you know, is a section that must be complied with. A ruling must be sought in advance of the transaction before certain favorable effects can be had in the case of foreign corporations owned by U.S. taxpayers. These are oftentimes very, very important rulings. They can involve huge amounts of money and can involve very important substantive issues. Indeed, this is one of the most important areas that the national office handles. The fact that it is required that you have one of these rulings in advance by no means suggests the inadvisability of letting the public know the substance of that ruling after it has been rendered; in fact, quite the opposite conclusion is in order.

Senator HASKELL. Let me ask you regarding section 367, what type of transaction—I realize you say a foreign subsidiary of a domestic parent, but what type of transaction is involved in that request?

Mr. WEIDENBRUCH. Corporate reorganizations are a typical example.

Senator HASKELL. Where you have an overseas corporation?

Mr. WEIDENBRUCH. Yes; if you have two overseas corporations and wish to merge the two, there is very little substantive effect. You are just putting together two corporations you already own, and now you have one. But you cannot do that without a possibly very detrimental tax effect, unless you first have an advance ruling from the Service. They have published guidelines telling you the circumstances under which they will give these advance rulings, but unfortunately, these guidelines still are not comprehensive enough. This is the very situation I was alluding to before, as a matter of fact, Senator. Let me tell you a little more about it.

Last summer, we had a very important transaction. There was no way I could get an answer from the Service. They had not yet taken a public position on a particular issue. However, one of the gentlemen with whom I was working in that case—he was representing another taxpayer—he was able to get that answer. We adjourned one afternoon at 4 o'clock, and the next morning at 9 o'clock, he came back and he had the answer. I find this disturbing, that some have this kind of privileged access and others do not.

This is a very important area, this section 367 area, simply because taxpayers are required to have that ruling in advance. But the fact that an advance ruling is required is irrelevant, when we are discussing the question of whether, in a sanitized version, a completely non-privacy-breaching version, the substance of that ruling should be made public.

Let me make clear how far I would go, and this does deviate somewhat from my prepared statement, because in my statement I express support for the position that the Service has urged of requiring a waiver of confidentiality by the taxpayer. If that is seen fit as the best way, that is fine by me, too, but I would be perfectly content to have no identifying details at all, to have no private information, to have no confidential, commercial, or private information. In short, I would be content to have, in the case of all rulings, what is now published 700 times a year in the form of revenue rulings. For example, in an eight-page ruling, if you give me the last few paragraphs of that ruling, that would give me 90 percent of what I am looking for.

But the fact is, now, I cannot get that 90 percent. At least I cannot get it without breaching the rules, and I am not at all enthusiastic about breaching the rules, because I believe that the more that is done, the more that weakens our tax system. But it does occur. The proposal that I hope this subcommittee will give favorable consideration to will eliminate what I regard as a cancerous weakness in our revenue administration system.

There are several less important points that I would like quickly to touch upon, if I may.

Oh, incidentally, Senator, you asked about a technical advice memorandum. If I might just mention one factual point, to put our discussion into perspective, frequently it is mentioned that there are 30,000 letter rulings issued each year. That is true. It is also true that there are about 1,600 technical advice memoranda issued each year, so the IRS issues 18 times as many letter rulings as technical advice memoranda. But as soon as one talks about these 30,000, he can start cutting that number down. Half of these, for example, merely involve accounting method and accounting period changes, and surely almost another half, or certainly a quarter, involve what people call insurance policy rulings, rulings where everyone knows the answer, but they want it in writing, signed and sealed, so that some revenue agent at a later point will not be able to challenge the taxpayer on that issue.

When you boil the whole thing down, probably there are about an equal number of truly significant letter rulings and technical advice memoranda each year. A technical advice memorandum will not arise unless the issue is fairly important and unique, that is, these come up only in cases that are not covered in a prior ruling, whereas letter rulings, as discussed a moment ago, can arise in numerous unimportant contexts, that is, unimportant from a precedential standpoint. But virtually every technical advice memorandum is important.

That is why, incidentally, when you pick up copies of some tax journals, or when you attend luncheon meetings of commercial or private tax groups, very frequently a choice tidbit will be, "here is a technical advice memorandum that the Service issued recently." I picked up one of these recently at a luncheon, and I mailed it down to my law firm. It is a very important technical advice memorandum. But now we have it, and your firm, sir, if you are a lawyer—I do not even know—your firm does not have it. And that is why some firms have more access than others.

I did not weasel this out of the Service. Neither did the fellow who gave it to me. He got it for his client, and as part of our luncheon group arrangement, he passed it to me, because occasionally, I will pass something to him. This is perfectly proper, but it does give him and me certain advantages that you, if you practice law in Colorado, do not have. I think everyone should have access to these, but not with the identifying details in them. Indeed the identifying details were deleted out before this particular one was handed to me. That is how simple it is to do.

I might interject, too, that during the time I was Assistant Commissioner and attempting to get this process opened up, I raised with the then-Chairman of the Tax Section of the American Bar Association the question of how he felt about deletion of identifying details. He told me that he thought to publish all rulings, without deletion of any information in them would not be any real inconvenience to

him, to his clients, or to the practice of tax law. This is the Chairman of the Tax Section, 15,000 members. He was not speaking on behalf of them, but he is a man who is not inexperienced in these areas.

My own law firm has 215 members, and they know I am very interested in this topic, and for the past 10 months, the Internal Revenue Service has had a proposal pending that would require the waiver of confidentiality. Not one member of my law firm has suggested to me, in my capacity here of counsel to the firm in Washington, not one member has suggested to me that they would find this troublesome.

Mention was made earlier today of the desirability of an index being created if the Service does make more rulings public. I am very pleased to see the draft section 6110, that the Ways and Means Committee released a week ago. I am disappointed that there is no reference in there to a requirement of indexing. I believe that the Service is in the best position of all to index these. I am told that it is understood that they will index them, but it seems to me at a time when a detailed statutory framework is being created, that that would also be a good time to nail down that one final point, that the Service should be responsible for creating this index.

A point that I would like to mention has been alluded to this morning several times, but not with great specificity. The draft bill that the Ways and Means Committee came forward with included a provision that, in effect, divested the Freedom of Information Act of jurisdiction in this area and substituted for it the new procedure contained in the Ways and Means draft bill.

I am told that within the last 2 days or so the section that divests the Freedom of Information Act of jurisdiction was deleted. I think that is unfortunate. As strongly as I feel that there should be much greater disclosure in this area, I cannot help but feel, on the basis of my experience in a position of responsibility in the Internal Revenue Service, that the substitution of a limited orderly procedure for doing this in place of the present, disorganized access that every member of the public apparently has under the Freedom of Information Act would be a highly desirable change.

It is difficult enough to handle the tremendous volume of work that the Internal Revenue Service is faced with, without having to drop it every few days to respond to a lawsuit that seeks hundreds or thousands of pages of background information on a private ruling issued in the past. These are very, very time consuming. Surely they are not instituted in an attempt to harass, but the effect upon the Service's working level personnel is as close to harassment as it can be.

I hope that when the Congress gives us a new procedure here, it will consider the desirability of barring the virtually indiscriminate public access that some courts, at least, seem to be approving in this area. I share the feeling of those who say, the more we open it up, the more we are assured of absolute integrity. That is certainly clear, but there must be some balance between efficiency of operation and assurance of integrity, and I believe that doing what was proposed in the original Ways and Means Committee draft, of doing what most in this room have recommended will provide adequate assurance of integrity, without destroying the very effective, very helpful advance ruling system that has been developed by the Internal Revenue Service.

A point that I would like briefly to mention has to do with the right of reliance. I believe it important to retain in the draft bill, or in a bill

that this committee might bring forth, a provision that private rulings made public under the new procedures would not carry a right of reliance on the part of any other taxpayer. The purpose of making these public is to inform as to what the position of the Service was in that particular case. It should not lock the Service into that position vis-a-vis every other taxpayer.

One of the real advantages of this proposal is that it brings this determination to light for public comment and scrutiny. It allows different viewpoints to be presented, so that the Service can get better educated as to the issue that it considered there, and so it can modify or revoke that position quickly, if it turns out that it was an incorrect one.

Senator HASKELL. Mr. Field was the one who argued that it would be questioned, but in response to questions, it seemed to me he said the Service could change its minds in the private ruling field, just as it could change its mind in the field of regulations. Does that not take care of your problem?

Mr. WEIDENBRUCH. Yes, it does, Senator, but I think one has to view the theoretical correctness of that point against practicalities. If that ruling can be relied upon by 200 million taxpayers until it is revoked, as distinguished from the contrary where only the one receiving it can rely upon it, almost certainly this whole rulings process is going to be faced with a great slowdown. The Service's people will be gun-shy. They will be afraid to rule in novel areas without checking this decision all the way up the line. Very frequently the group chiefs or section chiefs, who presently sign off on these rulings, are a number of levels removed from the top level within the Service.

If the effect of that ruling is such that until it is formally revoked everybody else in the country can rely upon it, the Service is going to be slower in issuing it, and I think it should be uppermost in Congress' thinking here, that the great service both to the taxpayer receiving it and to the rest of the public, that the present ruling system now gives, not be destroyed. I am afraid we are going to destroy it if we insist that every ruling carry a right of reliance for every other taxpayer until it is revoked.

It may be a rather modest distinction between having right of reliance with complete privilege on the Service to revoke it on the one hand, and doing it the way I propose it on the other, but I think there is a very, very great practical difference.

There is one other point where I have some disagreement with some of my colleagues in the room. Unlike some, I do not find it terribly important that we open up past rulings to public disclosure. We are talking about half a million rulings. We are talking about special appropriations to fund additional people to do this.

Frankly, I think the benefit to the public from going through all of that effort would be minimal. Worse yet, I think it will tend, if the Service has to do that retroactively for the last 8 or 9 years, I think it will tend to impinge upon the effective working of the current rulings process.

What is important to me is that a change in policy be adopted so that henceforth what the Service does for one becomes known to all, and if we do that only starting tomorrow morning, I would be very, very satisfied with that.

Let me be sure, Senator, that I have made one point quite clear. I am arguing much, much greater disclosure, but I have no particular interest in knowing who got any particular ruling. I have no interest in knowing anybody else's confidential commercial or financial information. I have no interest in reading in the Philadelphia Inquirer about what rulings Howard Hughes got or what rulings a Senator from Colorado got, or any other taxpayer got. I am not sure that is any of my business. Oh, probably sometimes it is, if taxpayer X or taxpayer Y has improperly gotten himself a ruling. I hope that does not happen. I suppose occasionally in our history it is going to happen, but I think the price of having each of us know what rulings each of the others got is far too great to pay.

The committee conducts oversight of the Internal Revenue Service's operations. The comparable committee on the House side does that, too. The GAO is going to be doing that. I really feel that there are sufficient protections to avoid improper political or other types of influence having any significant role in this process, and I think that the preservation of the personal privacy of the 99.99 percent of honest taxpayers who do not have to be policed that way, is a far more important right for this Congress to preserve.

Senator, those are the points that I had jotted down that I wanted to cover. I have the feeling I am holding you up and I did not want to do that, so let me defer to you.

Senator HASKELL. Well, thank you very much. You have summarized it very well. I have asked you, I think, all of the questions I had in mind during the course of your discussion so I have nothing further except to thank you very much for coming.

Mr. WEIDENBRUCH. Thank you for the opportunity, sir.

[The prepared statement of Mr. Weidenbruch follows:]

STATEMENT OF PETER P. WEIDENBRUCH, JR., PROFESSOR OF LAW AND ASSOCIATE DEAN (GRADUATE STUDIES), GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C., BEFORE THE SUBCOMMITTEE ON ADMINISTRATION OF THE INTERNAL REVENUE CODE, SENATE COMMITTEE ON FINANCE, NOVEMBER 6, 1975

SUMMARY

IRS should, in the future, make public all advance letter rulings and technical advice memoranda issued by its National Office. In the case of technical advice memoranda, any information identifying the taxpayer involved should be deleted. In the case of letter rulings, either the same deletions should be made or else the Service should condition the issuance of such letters upon a waiver of an applicant's right of confidentiality.

These improvements in present procedures will increase sagging public confidence in the integrity of our tax system and will inform all taxpayers of official interpretations developed through the expenditure of public funds. They will assure greater accuracy and consistency in official interpretations of the law and will better inform IRS' own field agents as to the interpretations adopted by its National Office.

The present system of secrecy unfairly discriminates against those taxpayers not having access to the important body of private law presently known only to those in regular contact with the Service's ruling branches. This discrimination causes unnecessary and duplicative expenditures of legal and accounting fees. The proposed changes can be made easily and without any significant disruption of the desirable features of the present system.

STATEMENT

Mr. Chairman and Members of the Subcommittee, I am Peter P. Weidenbruch, Jr., Professor of Law and Associate Dean (Graduate Studies), of Georgetown

University Law Center, Washington, D.C. I am also of counsel to the Houston, Texas law firm of Fulbright and Jaworski. During the period January 1, 1972 through July 8, 1973, while on leave from Georgetown, I served first as Assistant to the Commissioner and then as Assistant Commissioner (Technical) of the Internal Revenue Service. I am very pleased to have the opportunity to appear before you to discuss possible improvements in the Internal Revenue Service's advance letter ruling and technical advice programs.

NEED FOR INCREASED PUBLIC ACCESS

My purpose in coming before you is to urge your support for increased public access to the substantive and procedural rules applied by the Internal Revenue Service in its dealings with taxpayers. I believe that our nation's voluntary self-assessment system of tax reporting is best served by maximizing the public's knowledge and understanding of the rules with which it is expected to comply.

If a particular statutory or regulatory requirement has been the subject of interpretation by the tax authorities, all taxpayers should have the benefit of, or be aware of the constraints of, that interpretation. Moreover, maximum disclosure will best assure the highest degree of integrity both of the decision-making process itself and of the individuals involved in that process. By convincing all taxpayers, through the fullest disclosure of pertinent rules and procedures, that their tax administrators are treating them fairly vis-a-vis similarly situated taxpayers, and by openly demonstrating that neither political nor other forms of influence are involved in individual case determinations, maximum confidence in our tax system and maximum voluntary compliance under it will be promoted.

IRS ADVANCE RULING PROGRAM

The particular subjects I would like to focus upon are the Service's advance letter ruling and technical advice programs. The advance letter ruling program was instituted in the early 1940's and has grown at a steady pace ever since. Under it, the national office of the Service will issue to a taxpayer, prior to his entry into a specific proposed business or personal transaction, a letter ruling stating the views of the Service as to the effects of the Internal Revenue Code upon that transactions. This ruling generally will be given binding effect if the taxpayer enters into the transaction in reliance upon it, unless the transaction is not carried out in the manner represented in the taxpayer's request for the ruling. As is obvious, here is great benefit to a taxpayer in thus being able to achieve a high degree of certainty as to the prospective tax consequences of his actions. Indeed, as a result of the Service's willingness to grant this advance clearance, relatively few substantial business transactions are entered into without first securing an advance ruling.

IRS TECHNICAL ADVICE PROGRAM

The technical advice program likewise is one in which IRS's national office decides a technical legal question, but in this case the determination is made during the course of an audit after the transaction has been entered into, rather than before. Agents in local offices, and sometimes taxpayers themselves, can refer doubtful substantive issues to the national office for resolution. In the case of both the advance letter ruling and the technical advice memorandum, it is logical to expect, and it is in fact the case, that a national office position, once taken, will be adhered to in identical future cases unless a conscious decision is taken to overturn the earlier interpretation. Because the two programs raise basically the same policy issues, I will concentrate my discussion primarily upon the advance letter ruling program.

IRS PUBLICATION COMMITMENT

The advance ruling program was still in its infancy when criticisms first began to be levelled against it. These arose primarily out of contentions that some rulings had been issued as a result of improper political or personal influence. An investigation by a House Ways and Means Subcommittee corroborated the fact that abuses had indeed occurred. The "secret ruling" was identified as an excessively tempting vehicle for favoritism and the question was raised whether the practice of issuing advance rulings ought to be abandoned.

Wisely, the subcommittee did not recommend that course. Instead, recognizing that the advance ruling program benefited not only the particular taxpayer seeking its issuance, but the Service and the general public as well, it was agreed that what should be abandoned was not the program, but only the secrecy surrounding it. The then Commissioner of Internal Revenue in 1952 publicly pledged (and his pledge has been reaffirmed by each subsequent Commissioner), that "all rulings and other communications to taxpayers or field offices (thus encompassing technical advice memoranda within the orbit of the pledge) involving substantive tax law [or] procedures affecting taxpayers' right or duties" would thereafter be published in the Internal Revenue Bulletin. The only exceptions to be made were for those rulings or technical advice memoranda dealing with "(1) issues specifically and clearly covered by statute or regulations; (2) issues specifically covered by rulings, procedures, opinions, or court decisions previously published in the Bulletin; (3) issues not likely to arise again because of unique or specific facts; and (4) determinations of fact rather than interpretations of law."

FREEDOM OF INFORMATION ACT

Although the emphasis at the time this pledge was given was more in the direction of prevention of wrongdoing than in achieving a fully informed citizenry, the basic objectives sought to be achieved by it, and the vehicle chosen for their attainment, i.e., complete openness of action, were fundamentally the same as those underlying the enactment of the Freedom of Information Act 14 years later, in 1966. In the area of tax administration, the principal effect of the act to date has been to achieve greater publicity as to axpayers' procedural, as disinguished from substantive, rights. Recent court decisions make it clear, however, that the major thrust of the act in tax maters, now that IRS has made public most of its procedural manuals, henceforth will be in the area of substantive policy determinations, e.g., such unpublished interpretations as letter rulings and technical advice memoranda.

FAILURE TO MEET COMMITMENT

Enactment of the FOI Act would have been unecessary in the area of substantive tax law if IRS had followed through on its commitment to make public all letter rulings and technical advice memoranda dealing with novel and recurring issues. The problem is that the Service has not fulfilled this commitment. Given the constraints of time, money and manpower, it is perhaps remarkable that the Service has done as well as it has. Nevertheless, the evidence is clear that the objectives sought to be achieved both by the 1952 commitment of the Commissioner and the 1966 Freedom of Information Act are not being generalized insofar as substantive interpretations of the tax law are concerned.

Let us examine the record in this regard. In recent years, the Service has been issuing approximately 30,000 letter rulings and approximately 1,500 technical advice memoranda each year. Of this number, less than 700 are being published in the Internal Revenue Bulletin. This is not to say that anywhere near all of these interpretations should have been published under the commitment. At least half of the total number of rulings are in the area of accounting method or accounting period change approvals. For the most part, these are utterly routine and of little interest to other taxpayers. A substantial proportion of the remaining 15,000 rulings likewise are of little interest because they are what tax practitioners call "insurance policy" rulings, that is, rulings where the taxpayers were not really in doubt as to the IRS' current position, but the taxpayer nevertheless wanted to "get it in writing" both to protect against a possible future change in attitude on the par of the Service and to foreclose the issue's becoming troublesome in a later year upon audit if a Revenue Agent in the field should turn out to be of a different mind as to the transaction. Finally, there are some rulings that involve factual situations so unusual as to be of no interest to any other taxpayer. There nevertheless remains, however, a substantial but undeterminable number of rulings that undoubtedly do warrant publication in the Bulletin. It should be noted, too, that inasmuch as technical advice memoranda arise only upon audit and therefore do not include any accounting change consents or "insurance policy" cases, a substantially higher proportion of these would fall into the publishable category. Some few observers may contend that the total number of "publishable" rulings and technical advice

memoranda does not exceed the number actually published in the Bulletin. Most tax practitioners, however, would find it impossible to agree with that view, particularly in the light of several recent prominent incidents where novel rulings issued some years previously were published in the Bulletin only after a considerable public outcry had developed.

PUBLIC CRITICISM OF BREACH OF COMMITMENT

The American Bar Association Section of Taxation has properly lent its authoritative voice to those protesting the inadequacy of the Service's publication record. Early in 1972, the Section pointed out to the Service a number of unpublished letter rulings that it felt should have been published. In the following year, a single highly specialized subcommittee among the more than one hundred active in the Section furnished the Service with a list of a dozen unpublished rulings in its narrow subject area that it deemed publishable under the Service's standards. The ABA Tax Section's quarterly publication, *The Tax Lawyer*, regularly features a selection of "Points to Remember," often bringing to light for the first time anywhere detailed information as to the Service's ruling position on specific matters of interest to the Section's 15,000 members. A leading proprietary tax service helps to attract and maintain its readership by publishing summaries of significant unpublished letter rulings and technical advice memoranda unearthed by it. An article in a leading monthly tax journal several years ago offered a list of 33 significant letter rulings known to its authors from their own experience that had not been published by the Service. The recitation of such incidents could go on and on. Perhaps most startling and persuasive of all is the fact that the Reorganization Branch, which year-in and year-out issues some of the most complicated and important rulings emanating from the Service, in a recent year issued over 2,100 private letter rulings yet published as revenue rulings a mere seven! Surely no tax practitioner who has handled even a single reorganization ruling request would agree that less than four-tenths of 1 percent of the Reorganization Branch's output meets the Service's standards for publication!

IRS REJECTS FOI ACT APPLICATION

It might have been expected that whatever shortfall existed in IRS' fulfillment of its commitment prior to the enactment of the Freedom of Information Act would be eliminated following its enactment. The subcommittee will recall that, upon signing the act in 1966, President Lyndon B. Johnson reaffirmed its basic premise:

> A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . Freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

Notwithstanding this optimistic baptismal pronouncement, the FOI Act to date has had no apparent effect upon the Service's rulings publication program. On the contrary, the Service has vigorously resisted in the courts any and all attempts to apply the act to letter rulings and technical advice memoranda on a retrospective basis. While this official resistance as to disclosure of prior actions is gradually being overridden by those Federal courts in which it has been urged, the more important policy question facing this subcommittee today is the extent to which advance ruling letters and technical advice memoranda issued in the future should expressly be made subject to full or partial public disclosure so as to leave no uncertainty as to the potential applicability of the FOI Act or its exceptions. When the issue is viewed solely from this prospective standpoint, the principal policy objection to retrospective disclosure, that is, breach of faith with those taxpayers who may have divulged personal information in the expectation it would remain confidential, obviously is rendered moot.

RECENT IRS PROPOSALS

As the subcommittee knows, the Service itself has within the past year published a series of proposed amendments to its procedural rules that, prospectively from the date of their final adoption, would require taxpayers requesting advance rulings to waive their statutory right of confidentiality except for trade, national defense or foreign policy secrets, as the price of securing IRS consideration of

their requests. The basic thrust of this proposal, if not necessarily all of its details, surely is reasonable and is to be welcomed. I believe, however, that the proposed new procedure should be approved and expanded, legislatively, so as to assure the public's right of access not only to letter rulings (the only documents covered by IRS' proposed amendments) but to technical advice memoranda as well. (The reasons for equating technical advice memoranda with letter rulings were detailed earlier and will not be repeated here.)

Prompt legislative action is essential if the substantial gap presently existing between the Service's promised publication performance and its actual performance is to be closed. There is simply no justification for the maintenance of a body of "secret law" known only to those who are in regular contact with the ruling branches of the Service or who are able to secure copies of unpublished rulings through exchanges with other offices of their own organization or with other tax practitioners. The U.S. District Court for the District of Columbia has expressed its concern over the fact that there has been created "a body of 'private law' . . . which is accessible to knowledgeable tax practitioners and those able to afford their services. It is only the general public which has been denied access to the IRS' private rulings. . . . Publication would simply make available to all what is now available to only a select few, and subject the rulings to public scrutiny as well." *Tax Analysts and Advocates* v. *Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C. 1973)

In my judgment, it is impossible to quarrel with this statement of existing fact.

IMPLEMENTATION OF PROPOSED GOAL

The implementation of the goal of greater openness need not be difficult. One way, and probably the simplest, would be (in the case of letter rulings) to adopt IRS' proposal that taxpayers be required to give advance consent to full publication without deletion of identifying details. Another method, which while somewhat more cumbersome would overcome the objections to a mandatory loss of privacy, would be for the Service to give the taxpayer a draft of a proposed sanitized version of his ruling, i.e., with identifying details deleted, upon which he would be invited to indicate any further deletions he wished to suggest. No ruling would be issued until the taxpayer's concurrence in a proposed publishable version was had, thus leaving final authority to decide what is publishable to the Service. The choice between these two methods calls for an evaluation of the relative desirability of the goal of complete privacy as against that of speed of issuance. In view of the importance attached by most businessmen to speed of issuance, the proposal calling for full publication would be preferable to the more cumbersome process of negotiated deletion. On the other hand, as suggested below, the development of a procedure whereby confidential commercial or financial information, or information whose disclosure would intrude upon a taxpayer's personal privacy, would be deleted would not seem to impose an undue burden upon the smooth and expeditious working of the system.

ADVANTAGES OF INCREASED PUBLICATION

In addition to eliminating doubts as to the integrity of the federal tax system (which unfortunately seem to be higher now than at any time since the scandals of the 1940's) and fully informing all members of the public regarding IRS interpretations of law now known only to a few, a further significant benefit would result from increased public disclosure. Under the present system of issuing rulings, the proponent of a given interpretation naturally sets forth his suggested interpretation of the law in terms most favorable to his economic or personal interest. The request may, however, be handled on behalf of the Service by persons having little or no familiarity with the particular business context within which the legal issue arises. While the Service specialist and his reviewers do the best they can in the limited time available to develop a full understanding of the case, they nevertheless have had the benefit of only a one-sided presentation of the issues by an admittedly interested party and thus may not fully understand the merits of the opposing position. A program of expanded publication surely would bring to light much more quickly than is presently the case any errors or oversights that may have grown out of this less-than-perfect process. The Service undoubtedly would be the first to admit that some errors and oversights do now occur in its programs involving the issuance of more than 32,000 interpretations of the law. Just as public-spirited and other interested parties have in the past assisted the Service in correcting errors that may have

crept into published revenue rulings, so this same process of greater and earlier clarification would be brought to bear upon the entire advance letter ruling and technical advice programs. The dollar benefit to the public in preventing the issuance of additional erroneous rulings beyond the first one surely could be considerable.

IRS FIELD AGENTS WOULD BENEFIT

A further point that has been touched upon only indirectly is worth bringing out. Not infrequently, a Revenue Agent conducting an audit in an IRS field office will encounter a legal issue as to which there has not yet been published a Service position. The Agent may consequently devote a substantial amount of time to research and analysis of the issue and may then propose a deficiency. Upon being presented with the Agent's report, the taxpayer may be able to produce a favorable but unpublished letter ruling or technical advice memorandum that was issued by the IRS National Office to another taxpayer. Although it is true that this ruling technically has no precedential value in other cases, it obviously did reflect the best thinking of the National Office as of the date of its issuance. Knowing that a technical advice request would be directed to the same National Office personnel who handled the earlier ruling, the Revenue Agent in such situations often will accede to the prospect of an adverse decision and simply drop the matter, but only after a substantial and demoralizing waste of his time. By publishing all letter rulings and technical advice memoranda as soon as they are issued, the National Office can bring the level of knowledge of the Service's own field personnel up to that of those tax practitioners who now have access to unpublished National Office opinions through the highly refined files and indexes of accounting firms, law firms, or other informal sources.

UNNECESSARY DUPLICATION OF COSTS

A final but very important point remains to be made in favor of greater disclosure. At present a substantial amount of a practitioner's time and his client's money may be spent in "re-inventing the wheel." Surely there can be no possible justification for Taxpayer B's having to pay his tax adviser to research, analyze and draft a legal brief on points that already have been decided by the Service, at public expense, in connection with Taxpayer A's prior ruling request or technical advice memorandum. Nevertheless, such duplication occurs regularly and will continue to exist unless and until the general public is afforded the opportunity to know what has and what has not been decided by the Service. This Subcommittee can perform a significant public service by recommending legislation that will open up the government's files and thus eliminate this unnecessary and wasteful duplication of effort.

ARGUMENTS AGAINST PUBLICATION

A number of arguments have been made in opposition to a policy of greater disclosure. I would like now to examine some of these and show that they do not come close to outweighing the arguments in support of expanded publication.

One argument frequently made by both private and governmental sources is that after deletion of all identifying details so as to assure the requesting taxpayer's privacy, a letter ruling would become "completely meaningless." This comment is somewhat startling in view of the fact the Service already annually publishes more than 600 rulings that have undergone precisely this process. While it is true that letter rulings generally are re-worked before they are published as revenue rulings, a changed format in the composition of letter rulings surely could be devised so as to leave them meaningful documents even after deletion of identifying details. If, for example, a hypothetical Ajax Chemical Corporation were in all succeeding paragraphs of a letter ruling referred to as "X Corporation" after being so identified in the first or second paragraph of the ruling, rather than as "Ajax" or some similar description as is now done, the deletion process not only would become much simpler, but the end product would be more readable and helpful to the public. Of course, if the Service proceeds, as it has proposed, in the direction of requiring a waiver of confidentiality as the price of issuance of an advance letter ruling, the deletion process could then be limited to technical advice memoranda, thus largely negating the effect of this first criticism.

"SLOWDOWN" ARGUMENT REBUTTED

A second argument voiced in opposition to the proposal for expanded publication is that such a program would slow down the letter ruling process. Again, this criticism would be substantially negated if the Service implements its proposal requiring waivers of confidentiality. On the other hand, it must be acknowledged that a deletion process would take some time, but if the above suggestion of substituting letter designations for corporate or individual taxpayers' names were adopted, this process would be substantially simplified. There is, however, another factor involved here in that working-level tax law specialists and their supervisors may well become increasingly reluctant to sign off on cases without higher-level review once they realize that their oversights and mistakes will achieve widespread publicity. There is, of course, nothing surprising or unusual about this. This is simply a management problem; in the ordinary case, the work can and will be kept moving if management insists that it be. On the other hand, those cases where genuine uncertainty as to the validity of a proposed Service position exists should receive a higher level of review and indeed should have been receiving it in the past. The prevention of embarrassing and costly mistakes such as might readily be cited from recent past experience ought to be regarded as one of the advantages of the proposal and not a disadvantage.

"MORASS" ARGUMENT IS INVALID

A third argument raised in opposition to the proposal is the suggestion that publication of an additional 15,000 or 30,000 rulings each year would create a morass of additional material to be waded through before a practitioner could safely advise his client with respect to any proposed transaction. This undoubtedly would be true if the method chosen to implement the proposal were simply to dump 30,000 rulings and technical advice memoranda on a table in an IRS reading room each year. But surely no one would seriously propose or consider adopting such a system. If, as the courts have held, the Service's rulings constitute "interpretations" under the FOI Act, then the IRS is required by law also to prepare an index. Moreover, whether or not the law requires such indexing, commercial publishers at this very moment stand ready, willing and able to review, analyze, publish and index such materials, the same as they do with the output of the Federal courts, the NLRB, the SEC and other federal agencies. Just as legal encyclopedias have removed the "morass" element from the entire body of American law, so the publishing houses and hopefully the IRS itself will remove it from this tiny subcategory of the law.

RELIANCE BY THIRD PARTIES

A fourth argument against the proposal, unsually made by the Internal Revenue Service, is to the effect that if greater dissemination is made of heretofore unpublished rulings, third parties will begin to rely, and courts may sustain them in so doing, upon those interpretations even though they have not had the full, high-level review normally accorded revenue rulings published in the Internal Revenue Bulletin. There are two answers to this contention. First, by publishing appropriate caveats both on the newly disclosed rulings themselves and in the applicable published procedural rules (as the Service has done in its recently proposed procedural amendments), it can be made clear that no taxpayer may rely upon any ruling unless it was issued directly to him. The courts have sustained this position in the past and there is no reason to think they would not do so in the future. Secondly, if, as may happen, this position becomes difficult to maintain in the case of Taxpayer J after he has become aware of, and tenders to a court, favorable rulings issued to Taxpayers A, B, C, D, E, F, G, H, and I, the question might very well be asked, "Why shouldn't J be accorded the same treatment as the other taxpayers received?" Indeed, why wasn't Taxpayer A's ruling, or B's, formally published in the Internal Revenue Bulletin so that all members of the public might rely upon it? Doesn't the 1952 commitment in fact require precisely that?" In short, the criticism here made of the proposal for increased publication really may be demonstrating another of its advantages rather than a disadvantage.

RELUCTANCE TO SEEK RULINGS

A final argument occasionally heard in opposition to the proposal suggests that, if letter rulings are required to be made public, some taxpayers will be reluctant to seek advance rulings because of the prospective loss of privacy. This argument obviously lacks validity to the extent the proposal calls for publication only after deletion of identifying details, inasmuch as the process envisioned by the proposal entails exactly the same assurance of confidentiality as does the system presently in effect. Every taxpayer seeking a ruling knows that his ruling letter is prospectively subject to publication, with all identifying details deleted, in the form of a revenue ruling. To my knowledge, there has not been a single complaint, in the many years of the present program's operation, that a published ruling breached the right of privacy of the taxpayer involved in the underlying letter ruling. Indeed, it should logically be expected that, once the Service shifts from a program of publishing 600 rulings per year to a program of publishing thousands, the degree of expertise in recognizing and deleting confidential information would be greater than it is at present.

If, on the other hand, the Service should adopt the method of requiring an advance waiver of a taxpayer's right of confidentiality I think a strong argument can be made that this would be a modest price to ask in return for the substantial expenditure of public funds being made so as to give the taxpayer the benefit of advance assurance of a particular tax result. This price is no different from that exacted in a court of law when a citizen seeks a declaratory judgment as to a particular legal interpretation. Where public funds are being expended, prospective benefit to the public as a whole should be given priority over the rights of a single taxpayer.

In conclusion, I believe our federal tax system is at the threshold of a refreshing new era of communication between the taxpaying public and its government. The new spirit of openness symbolized by the FOI Act has understandably been somewhat slower to develop at the Internal Revenue Service than at other agencies because of the Service's overriding commitment to the principle of confidentiality in its dealings with taxpayers. I hope it will soon become clear, however, that neither the Service nor the public need sacrifice any of the advantages of the present highly successful rulings program as the price of achieving a new level of taxpayer confidence, understanding and pride in our tax system. This Subcommittee can assume a leadership role in this effort by reporting out appropriate remedial legislation at an early date.

Senator HASKELL. We will adjourn the hearing.

[Whereupon, at 12:58 p.m., the subcommittee recessed subject to the call of the Chair.]

Appendix

Communications Received for the Record Expressing an Interest in These Hearings

Statement of Jay W. Glasmann on Public Disclosure of Private Rulings

SUMMARY

A. Only expurgated copies of private rulings should be available for public inspection.

1. All identifying details regarding taxpayers should be deleted.

2. All material exempt under the Freedom of Information Act should be deleted from private rulings:

(*a*) A special branch should be created in the National Office to review proposed expurgated rulings.

(*b*) Taxpayers should be permitted to submit proposed expurgated form to this branch.

3. Ruling requests and accompanying data should be exempt from disclosure.

B. Technical advice memoranda and private rulings which a taxpayer is required to obtain should be exempt from public disclosure.

C. Previously issued private rulings should either be exempt from disclosure or available only in expurgated form.

D. Publicly available private rulings should not have substantial precedent value.

E. No changes should be made in the rulings publication procedure if private rulings are made available for public inspection.

F. Third parties should not be permitted to question the results reached in specific private rulings.

G. Unless legislation along the above lines is adopted, the private rulings program may be substantially curtailed.

STATEMENT

The following statement responds to eight specific questions posed by the Subcommittee.

1. Should private letter rulings be made available for public inspection?

Subject to the limitations hereinafter discussed, unpublished letter rulings should be made available for public inspection. The disclosure of such rulings should result in taxpayers being better able to determine, prior to seeking private rulings, the Service's probable ruling policy in a particular area. In addition, the availability to the public of private rulings covering tax problems common to a particular industry should tend to equalize the competitive positions of all taxpayers in that industry from a tax standpoint. Finally, the public disclosure of private rulings would make the Service's ruling procedures consistent with the spirit of the Freedom of Information Act ("FOIA") and should eliminate any possibility of the appearance of secret law.

In my opinion, however, it is imperative that information exempt from disclosure under the FOIA not be made available for public inspection. In its proposed procedural rules dealing with the public disclosure of private rulings published in the Federal Register on December 10, 1974, 39 F.R. 43087, the Service proposes to recognize only the FOIA exemptions for trade secrets and national defense or foreign policy secrets. It proposes to require a waiver of all other FOIA exemptions as a condition to obtaining an advance ruling. Such a procedure, if adopted, would require in all instances that taxpayers seeking advance rulings waive the FOIA exemption for confidential commercial and financial information contained in 5 U.S.C. § 552(b)(4), which is without ques-

tion the most important FOIA exemption in the rulings' context. The protection of confidential commercial and financial data is very important both in those instances in which taxpayers are required to seek advance rulings and in most instances in which taxpayers voluntarily seek advance rulings. Taxpayers are often required to submit confidential financial information in support of ruling requests involving corporate reorganizations and changes in periods and methods of accounting, and the public availability of such information could cause substantial harm to their competitive positions.

In addition to the information specifically nondisclosable under exemptions contained in the FOIA, I would hope that disclosure procedures could be worked out that would call for the elimination of the identity of the taxpayer and his representatives, as well as the names of other parties, from the copies of the private rulings made available for public inspection. The policies underlying public disclosure can be accomplished, I believe, by requiring the disclosure of only such information as is necessary adequately to explain the result reached in the ruling. Identifying information with respect to a specific taxpayer would seem to be unnecessary for this purpose. In the case of individuals, both the FOIA and the Privacy Act of 1974, 5 U.S.C. § 552a, support the deletion of names and all identifying details in order to protect the privacy of individuals who seek private rulings on financial matters. The shareholders of closely held corporations are entitled to similar treatment. In the case of public corporations, the disclosure of the taxpayer's name or the names of parties with whom it proposes to transact a particular business arrangement could in many cases result in substantial harm to the parties. There are various reasons to support the deletion of identifying details with respect to a particular taxpayer. For example, disclosure of the taxpayer's name in private rulings obtained pursuant to the requirements of section 367 of the Code could prove a source of embarrassment or friction for corporate taxpayers operating abroad, inasmuch as in many instances the business reason for the corporate reorganization on which a section 367 ruling is sought may be the minimization of foreign taxes or fear of future changes in foreign law or in attitudes of foreign governments.

To summarize at this point, I believe legislation should be enacted providing for the deletion from the copies of private rulings which are to be made available for public inspection of (1) the names and other identifying information pertaining to the taxpayers, their representatives, and other parties, and (2) all material specifically exempt from disclosure under the FOIA.

In my opinion, the ruling request and other documents submitted by the taxpayer in connection with the ruling should not be required to be made available for public inspection. With some 30,000 private rulings being issued each year, the administrative problems involved in complying with the FOIA will be overwhelming if such material has to be disclosed. In fact, disclosure in this area, with taxpayers' FOIA rights being protected, could increase the administrative burden on the IRS so much that the private rulings program itself may be in jeopardy.

2. What procedures should be established concerning information to be made available for public inspection.

The right of the public to know the Service's ruling position on a particular set of facts should be implemented in a manner which will best protect the confidentiality of taxpayers and best preserve the viability of the private rulings process. It is imperative that the procedure for making private rulings available to the public be a simple one which will not result in long delays in obtaining private rulings and which will not require that taxpayers waive their right to confidentiality. To accomplish these objectives, legislation should be enacted limiting the public disclosure of private rulings to the expurgated form outlined above. Such legislation should specifically prohibit the Service from releasing the name or other identifying details of a taxpayer, such as taxpayer identification or Social Security number, address and/or state of incorporation. The Service should also be prohibited by statute from requiring taxpayers to waive FOIA exemptions as a condition to obtaining a ruling. In like fashion, the legislation should bar public inspection of ruling requests and supporting documentation.

In view of the importance of the FOIA exemption for confidential financial data in the private rulings process, the legislation might enumerate specific types of financial information which should be deleted from the copies of the private rulings that are to be disclosed to the public. Items that come to mind are financial data of closely held corporations, financial data of wholly owned subsidiaries which are made available to the public only on a consolidated basis, and inven-

tory figures, pricing information and data regarding sales, operating costs and other expenses, and levels of profits in particular segments of a taxpayer's business.

If legislation along the above lines were enacted, the Service should probably set up a special branch in the National Office to review proposed expurgated rulings, the employees of which would gain special expertise in analyzing FOIA exemption claims. Taxpayers receiving private rulings might be given 15 days to submit their own form of expurgated ruling to this branch, with some form of judicial review being possible in the event of disagreement between the Service and the taxpayer with respect to any FOIA exemptions he might claim in preparing his version of the expurgated copy of the private ruling. Taxpayers might also be permitted to request that the private ruling not be made public until the transaction has been consummated.

Some of the above procedures are similar to the published ruling procedure of the Service at this time, inasmuch as the name of and identifying details about a taxpayer are eliminated. Few taxpayers are deterred from obtaining a private ruling because the Service may later publish the ruling as a revenue ruling. The major difference in the two procedures would be that the taxpayer asserting confidentiality exemptions would be required to submit an edited version of the private ruling to the National Office and to carry the burden in court if the Service refused to honor his confidentiality claims. A taxpayer who did not assert confidentially with respect to any material in the private ruling as issued would take no action, and the ruling (with identity and certain financial data eliminations) would become available for public inspection.

Consistent with the requirements of the FOIA, the Service should be required to index and maintain files of all private rulings. The index should be organized by Code section, and should be maintained until at least 10 years after the Code section involved has been repealed.

3. Should technical advice memoranda be made available for public inspection and should procedures be adopted for maintaining anonymity of the taxpayer who may be the subject of such memoranda?

The Court of Appeals for the District of Columbia has held that technical advice memoranda are parts of "returns" and exempt from disclosure by statute. More recently, the Sixth Circuit reached a different conclusion, at least with respect to "those portions of responses to technical advice requests that are or were intended for issuance to taxpayers". My own view is that such memoranda are sufficiently distinguishable from private rulings to merit their being made specifically exempt from disclosure by legislation adopted at this time to avoid further controversy on the point. Although both private rulings and technical advice memoranda contain the Service's interpretation of the tax consequences of a particular set of facts, the private ruling usually deals with a proposed transaction, whereas the technical advice memorandum deals with specific facts contained on a tax return and usually results from a controversy between a taxpayer and the Service on audit.

If legislation is considered to exempt technical advice memoranda from public disclosure requirements, it would also be desirable to include in a similar exempt category private rulings which a taxpayer is required to obtain before proceeding with a transaction, such as those involving § 367 of the Code, or applications to change accounting methods. If technical advice memoranda are to be opened to the public, procedures for protecting the anonymity of the taxpayer along the lines suggested under 2 above should certainly be adopted.

4. What interim rules should be adopted for the processing and disclosure of rulings issued prior to the effective date of any publication procedure which may be finally adopted?

One solution would be enactment of the Treasury's proposed legislation, introduced last Fall, which would exempt from disclosure all unpublished letter rulings issued to taxpayers prior to the date of enactment of such legislation. This legislative proposal would protect the confidentiality of taxpayers who, prior to the *Tax Analysts & Advocates* decision in the Court of Appeals for the District of Columbia and the recent *Fruehauf* decision in the Sixth Circuit, have submitted details on their business or personal activities to the Service on the assumption that such information would remain confidential.

A second possibility would be to apply the procedures outlined under 2 above to all private rulings issued since July 4, 1967, giving the Service perhaps a year to index and maintain files by Code section. A middle ground that would be more feasible administratively would be to require such action only with respect to private rulings issued in the past one, two, or three years.

If legislation along these lines is not adopted, there is a strong possibility that the Service will be required to make available for public inspection all or a majority of the private rulings issued after July 4, 1967, with taxpayers' names intact, and with all accompanying data, subject, however, to the deletion of all material determined by a court to be exempt from disclosure under the FOIA. This possibility results from the recently filed *Tax Analysts* suit pending in the United States District Court for the District of Columbia (Civil Action No. 75–0650), in which the Plaintiff is seeking public disclosure of approximately 160,000 private rulings issued on or after July 4, 1965. Although taxpayers who received private rulings during that period could seek to intervene in that suit in an effort to protect confidential data previously submitted to the Service, as a practical matter, a favorable ruling for the Plaintiff in the suit will probably require that the Service seek to protect taxpayers' confidentiality, which will impose an almost impossible administrative burden on the Service and the courts.

5. Once it is decided that private rulings should be open to public inspection, what kind of precedent should such rulings be accorded for the purposes of other ruling requests?

Such rulings, if the facts involved are similar to those in a transaction on which a taxpayer is seeking a ruling, should serve as persuasive authority that the Service should issue a similar ruling to the taxpayer. However, a taxpayer who consummates a transaction similar to the transaction covered in a previously issued private ruling should not be entitled to rely on such private ruling as being determinative of the tax consequences of his transaction. The disclosure of private rulings should not result in their being accorded any greater precedent value than they have at the current time.

The Service's authority to revoke or modify retroactively a ruling which is subsequently determined to be based on an incorrect interpretation of the law, or which is based on misleading facts, is not subject to question. Accordingly, there appears to be no need to amend section 7805 to provide specifically that the Service has such authority. Sound tax administration and general fair play principles would ordinarily call for the revocation to be on a prospective basis for a taxpayer receiving a private ruling, unless he has made a material misrepresentation to the IRS in the process of obtaining the ruling.

6. What changes would be appropriate concerning the publication of revenue rulings if private letter rulings are held to be open for public inspection?

No change should be made in the rulings publication procedure. This program provides the public with the Service's official interpretation of various Code sections based on specific facts, and involves lengthy review at various levels in the National Office. Private rulings, which are issued at the rate of 30,000 a year, cannot ordinarily be subject to the same tedious and time-consuming review procedure without causing a breakdown in the entire private ruling program, which is of such great importance to the sound administration of the tax laws.

7. Should third parties be granted a right to question the results in specific rulings?

The public disclosure of private rulings should provide a means for the interested public to make their views known to the Service, the Congress and the public, in the event serious errors on the part of the Service in the issuance of private rulings become apparent. However, the private ruling procedure could easily fall apart if the Service has to defend itself in court whenever it issues a ruling with which someone disagrees. Consequently, I would not grant third parties the right to question the results reached in specific private rulings.

8. What is your assessment of the impact of public disclosure of private letter rulings under the procedures mentioned above on the existing IRS ruling system?

It is probable that public disclosure of private rulings in the form I have suggested will result in the Service issuing less private rulings because of the manpower demands placed upon it by disclosure procedures. However, the cutback should be minimal. On the other hand, if public disclosure in this area is left to the FOIA rules currently developing in the courts, I very much fear that the private rulings program at the National Office will be substantially curtailed.

CATERPILLAR TRACTOR CO.,
Peoria, Ill., July 3, 1975.

MR. MICHAEL STERN,
Staff Director, Committee on Finance, Dirksen Senate Office Building, Washington, D.C.

FREEDOM OF INFORMATION ACT (FOIA) INTERNAL REVENUE SERVICE PRIVATE RULINGS AND TECHNICAL ADVICE MEMORANDUM

DEAR MR. STERN: Caterpiller Tractor Co. appreciates this opportunity to express its views to the Senate Financial Subcommittee on Administration of the Internal Revenue Code regarding public inspection of IRS private letter rulings precipitated by certain court interpretations of the FOIA.

We certainly agree that the time has come for more openness in the administration of the tax laws of this country to assure taxpayers that, in fact, these laws are being administered fairly and equitably to all concerned. Allegations that a "secret body of law" exists—partly because of the private letter ruling process—have probably contributed to some taxpayer discontent and to a weakening of our system of voluntary compliance.

On the other hand, the assurance of taxpayer privacy has been a contributing factor to the high level of voluntary compliance with U.S. tax laws. Therefore we believe that financial information and other material which a taxpayer considers to be confidential for various business reasons should be treated as private and not available for public inspection, absent some clear and convincing public necessity.

In interpreting the FOIA as it might apply to the private letter ruling area, the courts have not been able to find a reasonable solution to the twin desires to avoid secret law and yet preserve the privacy of financial information. For this reason Caterpillar applauds Senator Haskell's subcommittee for holding hearings on this subject and giving taxpayers the opportunity to submit comments in the hope that this dilemma can be resolved satisfactorily to all concerned.

Caterpillar supports the view that all rulings and technical advice memoranda issued should be made available to the public with all identifying material expunged therefrom, and we would support appropriate legislation to achieve this result. If such is enacted, those who worry about secret law will be able to examine all rulings at their leisure and those who have a legitimate interest in the interpretation of a particular section of the Code or Regulations will be able to ascertain the views of the Treasury officials, yet no one need fear that his particular financial affairs will be open to public scrutiny because of the necessity of obtaining a ruling. Neither will anyone be able to utilize the FOIA as a vehicle for conducting a personal vendetta against a particular taxpayer or a fishing expedition into his private affairs for personal gain.

Although we prefer to leave the details of administration to those better able to advise the Congress, we would offer the following additional suggestions:

1. The expenditure of time, effort and money necessary to open the *entire* rulings file (which would include the request for ruling and any pertinent correspondence or notes) while preserving the identity of the taxpayer and other confidential material from disclosure would appear to outweigh any possible benefit from this degree of openness.

2. Provision for a complete index by Code and Regulation section should be made, and the rulings should be obtainable by the public for as long as the section remains a part of our tax law.

3. The cost of utilization of the index and a reading room should be borne by the Government, and the cost of copies of the material made available should be borne by those requesting such copies.

4. The law should clearly provide that certain information should be expunged from any rulings or technical advice memoranda prior to being made available for public inspection. For example, the statutes should provide for deletion of the name, address, and identification number of the taxpayer, representatives of the taxpayer, third parties involved, and IRS personnel responsible (to the extent

such might be contained in the rulings or technical advice memoranda). Beyond this, the taxpayer requesting the ruling, or who is the subject of technical advice, should be required to specify the information he feels should be deleted, and disputes on these points should be resolvable through administrative appeal, with the taxpayer retaining the right to withdraw the ruling request if the disclosure is not agreeable to him. Such withdrawal should prejudice neither the taxpayer or the Government as to the substantive issues and result in the Government's file being closed and destroyed or otherwise made unavailable to the public. Where technical advice memoranda are involved, disputes as to matters to be disclosed should be resolvable, if necessary, by judicial proceedings with such proceedings not being within the public domain. No substantive issues should be resolvable at such hearings, however.

5. Public disclosure of rulings and technical advice issued prior to the effective date of any corrective legislation now under consideration should be specifically made discretionary with the Commissioner of Internal Revenue, but with ample safeguards (similar to those outlined above) for protection of the identities of the recipients should the Commissioner elect to make any or all of such items part of the public records. To do otherwise would impose a virtually insurmountable burden upon the Commissioner or, in the alternative, do violence to the privacy taxpayers believed they enjoyed at the time they filed their requests.

6. So-called "private rulings" and technical advice memoranda not officially published as Revenue Rulings should, by law, carry no precedent value in court for other taxpayers. The Commissioner should be responsive, however, to citations of private rulings and should be required by law to either rule consistently with or to revoke prospectively any private rulings issued not consistent with the position then being taken. The recipient of the ruling under consideration for revocation should be given the right to intervene prior to the final decision, and ay such revocation should be referenced in the public index. Such revocation should be strictly prospective and care should be exercised to prevent injustice due to contracts negotiated, reorganizations underway, etc. in reliance on the ruling.

It is hoped that the above comments will prove useful to the committee in its consideration of this important matter.

Very truly yours,

ALBERT C. GREER,
Manager—Tax Department.

LAW OFFICES OF MILLER & CHEVALIER,
Washington, D.C., November 12, 1975.

Hon. FLOYD K. HASKELL,
Chairman, Subcommittee on Administration of the Internal Revenue Code,
Committee on Finance,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: I request that this letter be incorporated in the record of your hearings on public inspection of IRS private letter rulings. Since its formation in 1920, the practice of this firm has been largely in the area of federal taxes. I have actively participated in that practice for over 38 years, with respect to both pre-audit problems resulting in letter rulings and post-audit problems resulting in revenue agents' reports. I have been chairman of the Section of Taxation of the American Bar Association.

1. The current policy of the Internal Revenue Service to issue letter rulings to taxpayers, stating pre-audit determinations of the tax consequences of proposed transactions, is a wise and important exercise of the Commissioner's discretion. The continuation of this policy is essential to the effectiveness of the system of revenue collection in the United States. The high tax rates and the complexities of the federal tax law make it imperative that taxpayers be able to obtain letter rulings regarding proposed transactions; otherwise, the economic uncertainty may make the proposed transaction impossible.

2. Some publishers of tax information are urging that *all* letter rulings and technical advice memoranda should be published. There is no essential difference between the information contained in letter rulings and technical advice memoranda and the information contained in revenue agents' reports. All three contain determinations by authorized Service personnel of the tax

consequences of one or more transactions; the only difference is that the letter rulings are issued before the transaction is carried out while technical advice memoranda and revenue agents' reports are issued after the transactions have been carried out. While I do not know that the suggestion has been seriously made that revenue agents' reports be published, it is evident that if the Service should publish all of its agents' reports, tax publishers would be busier and many curious people would know more about the business and personal lives of other taxpayers. This would be another—and unwarranted—invasion of the privacy of taxpayers. In this connection, it must be remembered that most letter rulings conclude with the admonition by the Service that the letter or a copy should be attached to the taxpayer's return. There is no more reason—or excuse—for requiring the disclosure of the letter ruling than there is for requiring the disclosure of the return itself or any of the other papers which must be included in it.

3. There is a suggestion that the fact that all letter rulings and technical advice memoranda are not published just as they are written indicates that a favored few are getting preferential treatment from the Service. Apart from the unwarranted reflection on the integrity of the Service inherent in the suggestion, it must also include the thought that because revenue agents' reports are not published, many taxpayers get preferential treatment from the Service in those reports. Even if this suggestion were sound—and I am sure it is not, I believe Congress would not give a second thought to requiring the publication of all tax returns or all revenue agents' reports. In a country our size with a diverse economy, millions of tax returns and an audit force of thousands, some disparity of treatment of similar transactions among taxpayers is unavoidable. Certainly publication of tax returns or agents' reports is not a solution.

4. This is not to say that no positions taken in letter rulings issued in response to requests of taxpayers or technical advice memoranda issued in response to requests by Service audit personnel should be published. It is desirable that the positions taken by the Service in letter rulings and technical advice memoranda be published if they will serve as significant precedents for Service action in similar circumstances. This is the practice today. This publication, however, is only *desirable* in contrast with the issuance of letter rulings and technical advice memoranda which I believe is *essential*. Obviously, the early publication of Service positons, based on letter rulings or technical advice memoranda is helpful as a guide to taxpayers and to Service personnel. If letter rulings can be issued promptly and ruling positions having precedential force can be published promptly, the situation will be ideal. It is unlikely, however, that the Service will have the resources (people and money) to perform both functions promptly. That being the case, it is clear to me that priority must be given the issuance of letter rulings and technical advice memoranda in order properly to serve the taxpayers.

5. The publication of the positions taken in all letter rulings and technical advice memoranda is neither wise nor necessary; moreover, the publication of more rulings is not necessarily desirable. The fact that there are some 28,000 letter rulings issued in a year while only about 600 numbered revenue rulings are published in a year does not necessarily indicate that the publications aspect of the rulings program is deficient. There are about 13,000 letter rulings issued with respect to accounting changes which have no precedential aspect. Many taxpayers obtain letter rulings to be sure that a given Service position applies to their peculiar fact situations; these letter rulings are in the nature of insurance regarding the Service position and have no added precedential value. A number of taxpayers from different locations and at different times may ask substantially the same question, resulting in the issuance of a number of letter rulings. When the Service deems it appropriate, the positions reflected by these rulings may be stated in a single published ruling. The Service issues many letter rulings to unsophisticated taxpayers which merely apply to given fact situations the Service positions already clearly stated in published rulings or in the regulations; there is no reason for publishing the positions again.

6. It may well be that the Service, in its zeal to carry out what it considers its commitment to Congress to publish the positions taken in all letter rulings which may be useful to the taxpayers or to Service personnel as precedents, publishes too many rulings. Published rulings could be cited which are based on letter rulings having such peculiar facts that they really cannot be said to have precedential value; publication of these rulings is sometimes confusing rather

than helpful to taxpayers. Greater care in the selection of rulings which have real value as precedents to the taxpayers and Service audit personnel may well be in order. The result, however, may be the publication of fewer rather than more rulings. In any event, the question whether enough rulings are being published is not to be answered by a mere comparison between the number of letter rulings and the number of published rulings in a given year.

I submit that a letter ruling is really a part of the taxpayer's return or at least on a par with a revenue agent's report. As long as the privacy of tax returns and agents' reports is maintained—and I am sure the Congress intends to maintain it, the privacy of letter rulings and technical advice memoranda should also be maintained.

Respectfully,

DAVID W. RICHMOND.

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