WINNING BY LOSING: THE STRATEGY OF ADVERSE PRIVATE LETTER RULINGS

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Abstract: Every year, the Internal Revenue Service (IRS) issues hundreds of Private Letter Rulings (PLRs) responding to formal taxpayer inquiries about how tax law will apply to their proposed situations and transactions (which functionally bind the IRS with respect to the taxpayer). Although the Internal Revenue Code formally forbids relying on PLRs as precedent, taxpayers and practitioners closely monitor and structure their operations and advice around PLRs.

Taxpayers can withdraw a PLR request at any time for any (or no) reason. Furthermore, requesting taxpayers know far in advance whether the PLR will be favorable or adverse. Because taxpayers typically do not want a formal government letter presumptively committing to an adverse position, it is assumed that only a handful of adverse PLRs exist and, in theory, none should exist. But in fact, a significant number of adverse PLRs do exist, and this Article is the first systematic empirical analysis of them. It examines a unique dataset of 473 adverse PLRs, stretching from 1977 through 2024, drawn from review of approximately 10,000 PLRs. Only ninety-five (20.1%) can be explained by human foibles like taxpayer apathy and mistakes. The rest—a significant majority—appear to be strategic actions by requesting taxpayers. Notably, sixty-five (13.7%) likely were obtained for highly strategic reasons motivated by PLRs' normative force: to generate backlash against the IRS and to level competitive playing fields.

Examining adverse PLRs begins to map the substantive world of PLRs and leads to several normative implications for PLRs and the tax system. Such impli-

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cations include broadening and formalizing third-party input and feedback on PLRs and modifying processes to avoid inequitable access to consequential guidance. Finally, based on the parallels between the highly strategic uses of adverse PLRs and impact litigation, this Article proposes using PLRs to pursue public interest, pro-fisc policies that counteract aggressive and even abusive tax positions.

INTRODUCTION

This Article explores the perplexing phenomenon of adverse private letter rulings, or PLRs. A PLR is a letter written by the IRS that reads like a judicial opinion and responds to a taxpayer's questions about how tax law applies to the taxpayer's situations.[1] PLRs are "an indispensable tool in the modern world of tax administration and compliance"[2] because they "insulate" requesting taxpayers "from tax risk."[3] Specifically, PLRs give them virtual certainty, in advance, about the IRS's position on a contested, unclear question of tax law.

Each year, the IRS issues hundreds of PLRs—in the recent past, more than a thousand annually, and in the more distant past, thousands annually—and has done so for eight decades.[4] Although not directly comparable, it is striking that in 2023, the IRS issued eleven final Regulations and two substantive Revenue Rulings but released 899 PLRs. The number of PLRs, combined with the fact that many PLRs address issues of first impression, means that PLRs have "a broad impact on our national economy and on proper and reasonable tax administration."[5]

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[1] *See, e.g.*, Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 TAX LAW. 245, 261 (2020); Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 139 (2009).

[2] Leandra Lederman, *Avoiding Scandals Through Tax Rulings Transparency*, 50 FLA. ST. U. L. REV. 219, 225 (2023) (quoting Maartin Ellis, *General Report, Advance Rulings*, *in* 84B IFA CAHIERS DE DROIT FISCAL INTERNATIONAL 24 (1999)). This is particularly true given that the Declaratory Judgment Act excludes controversies "with respect to Federal taxes." 28 U.S.C. § 2201(a); *see also* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1165–74 (2008) (discussing the scope of this exclusion).

[3] William E. Foster, *Reckoning with Tax Risk*, 42 VA. TAX REV. 473, 475, 488–89 (2023) ("[P]rivate letter rulings (PLRs) can give taxpayers a relatively high level of security on a desired tax position. . . . If the Service blesses a position in a PLR, the taxpayer generally can rest assured that it will not subsequently be challenged on audit."); *see also* Dale F. Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse?*, 28 N. KY. L. REV. 50, 51 (2001) ("Taxpayers voluntarily seek [PLRs] in advance of completing a transaction in order to obtain some measure of certainty or security with respect to the position of the Service.").

[4] *See infra* Part II.A.

[5] Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 343 (2008).

In most PLRs, the IRS agrees with requesting taxpayers and confirms desirable tax treatment. For example, in PLR 202342014 the IRS agreed that the requesting taxpayer was engaged in a qualified trade or business under Section 1202(e)(3) of the Internal Revenue Code (Code).[6] As a result, the requesting taxpayer's stock could be "qualified small business stock" and its shareholders could avoid paying tax on gain realized from such stock.[7] PLRs are mostly favorable because they are voluntary and the PLR process is collaborative. Specifically, taxpayers typically do not have to request PLRs to proceed with their transactions and can withdraw their PLR requests at any time for any (or no) reason.[8] Furthermore, during the PLR process taxpayers communicate extensively with the IRS and therefore know (usually long) before the IRS issues a PLR whether the IRS is going to agree or disagree with their positions. In fact, the IRS goes out of its way to warn taxpayers before it issues an adverse PLR and give them additional opportunities to withdraw their PLR requests.[9]

Accepting an adverse PLR has undeniable negative consequences. It puts an audit target on the requesting taxpayer's back,[10] functionally precludes the requesting taxpayer from advocating its desired position to the IRS agent pro-

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[6] I.R.S. Priv. Ltr. Rul. 202342014 (July 24, 2023). PLR numbers encode their release date: [year] [week of year] [order in week's written determinations]. *See* IRM 4.10.7.2.9.2 (Jan. 1, 2006); IRM 11.3.8.6(2) (obsoleted Oct. 29, 2021); Peter A. Lowy, *Legal Authorities in U.S. Federal Tax Matters—Research and Interpretation*, 100-3d Tax Mgmt. Portfolio (BNA) pt. III.E.5; GAIL LEVIN RICHMOND & KEVIN M. YAMAMOTO, FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES ch. 9, pt. D.2 (12th ed. 2024). Section references are to the Internal Revenue Code of 1986 as amended (Code), and Regulation references are to the Treasury Regulations promulgated under the Code, unless otherwise specified.

[7] *See* I.R.C. § 1202(a)(1).

[8] *But see infra* Part II.A (discussing certain situations where PLRs are mandatory).

[9] *See infra* Part I.A.

[10] Audit selection is based on strictly confidential metrics. *See* Hadi Elzayn et al., *Measuring and Mitigating Racial Disparities in Tax Audits*, 140 Q.J. ECON. 113, 121 (2024); *see also* I.R.C. § 6103(b)(2) (flush language) ("Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws."). Nevertheless, it is assumed—reasonably—that PLRs increase audit risk. *See, e.g.*, Foster, *supra* note 3, at 493 (flagging increased inspection and detection as risks of PLR requests); Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421, 452 ("[G]iven that the taxpayer has identified itself to the IRS and flagged the potential tax issues inherent in a contemplated transaction, the chances of IRS detection are much higher [after the PLR]."); United States v. All Assets Held at Bank Julius Baer & Co., 315 F.R.D. 103, 111 (D.D.C. 2016) (highlighting the likelihood of audit litigation following PLR process); Union Pac. Res. Grp., Inc. v. Pennzoil Co., No. 97-64 JJF, 1997 U.S. Dist. LEXIS 24216, at *26 (D. Del. Sept. 2, 1997) (same); *see also* Elizabeth Devos et al., *IRS Private Letter Rulings: Initial Evidence on Determinants and Consequences*, 46 J. FIN. RSCH. 849, 871 (2023) (observing that firms likely to otherwise trigger IRS audit flags are less likely to receive PLRs).

cessing (and auditing) its tax returns, and results in an undesirable tax reserve on financial statements.

Given IRS warnings, procedural off-ramps, and these consequences, adverse PLRs perhaps should not exist at all. As one seasoned practitioner put it, "if the Service informally tells a taxpayer that it does not like the taxpayer's proposed solution to a problem, why would that taxpayer want a formal letter to the same effect?"[11] Indeed, the conventional wisdom is that, faced with an imminent adverse PLR, taxpayers should withdraw their PLR request, avoid voluntarily guaranteeing the government's presumptive disagreement, and live to fight another day, raising their arguments anew on audit. The handful of adverse PLRs one encounters are often assumed to be aberrant one-offs.

My research challenges the conventional wisdom that adverse PLRs are extremely rare and accidental. Through hand review and coding of approximately 10,000 PLRs, I generated a unique dataset of 473 adverse PLRs.[12] They stretch from 1977 (when PLRs were first systematically published) through 2024. The substantial number of adverse PLRs,[13] along with the fact that sophisticated, presumably well-counseled taxpayers receive them, means something more must be happening. And indeed, examining my dataset reveals that, counterintuitively, requesting taxpayers can often find adverse PLRs strategically desirable.[14]

Despite being redacted to hide taxpayer-identifying information,[15] publicly accessible PLRs are particularly helpful (and are often the only) indications of the IRS's position on obscure—and not so obscure—questions of tax law.[16]

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[11] Louis S. Weller, *Early Distributions from 1031 Exchange Accounts—Another Look at a Strange New Ruling*, 93 J. TAX'N 73, 77 (2000); *see also* JOSEPH BANKMAN, DANIEL N. SHAVIRO, KIRK J. STARK & ERIN A. SCHARFF, FEDERAL INCOME TAXATION 514–15 (19th ed. 2023) ("[I]f the IRS view is unfavorable, then, while the taxpayer may benefit from knowing this, the PLR's issuance does not provide any benefit. Likewise, the IRS gains nothing from issuing unfavorable PLRs. If it wants to signal its legal views more broadly, it can issue a public Revenue Ruling that has precedential value as evidence of its views."); Robert W. Wood, *Tax Opinion or Private Letter Ruling? A 12-Point Comparison*, 149 TAX NOTES 835, 836 (2015) ("[O]ne generally does not want a 'no' answer on the books.").

[12] *See infra* Part II & Appendix.

[13] *See infra* notes 169–174 and accompanying text (discussing adverse PLR incidence).

[14] For the purposes of this Article, I am using strategic to mean actions intentionally taken to result in economic or political benefit (broadly defined). *See generally* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1409 n.7, 1425–29 (2000) (defining "legal strategy" and distinguishing it from "strategy" as used in economic modeling, game theory, and gaming).

[15] I.R.C. § 6110(c); *see also infra* note 103 and accompanying text.

[16] *See, e.g.*, Cauble, *supra* note 10, at 451 ("[T]he answers to questions addressed by a private letter ruling cannot be found in other sources upon which the taxpayer could rely."); Jeesoo Nam, *Lenity and the Meaning of Statutes*, 96 S. CAL. L. REV. 397, 426 (2022) ("Practitioners (or indeed anyone familiar with the tax system) would vouch for the importance of informal, nonbinding IRS guidance on tax matters.").

Accordingly, although the Code expressly forbids relying on PLRs as precedent,[17] in reality, practitioners pay close attention to PLRs, taxpayers structure their operations based on PLRs, and nearly every tax treatise extensively cites PLRs.[18] In other words, PLRs have normative force. Logically, one might expect that to be especially true for adverse PLRs because they are surprising and adverse authority is crucial to identifying legal boundaries. My dataset provides evidence to support this intuition.[19] Examining reactions to adverse PLRs highlights how accountant auditors notice and enforce them on third parties. Adverse PLRs are also significantly more likely to be cited (generally by treatises, CLE materials, articles, and other secondary sources), and to be cited frequently, than favorable PLRs. In addition, favorable PLRs tend to beget more favorable PLRs: once taxpayers know the IRS approves of something, they want to lock in that benefit for themselves. But even a single adverse PLR can dramatically decrease PLRs on a given topic.

With that context in mind, this Article then turns to the particulars of why adverse PLRs exist. Based on qualitatively examining and coding each adverse PLR in my dataset to identify patterns, I delineate four different, mostly strategic reasons why requesting taxpayers accept adverse PLRs. The first, human foibles, is associated with ninety-five adverse PLRs (20.1% of the dataset) and includes apathy (or stubbornness) and counsel errors.[20] These adverse PLRs are generally consistent with the conventional wisdom that adverse PLRs are essentially mistakes, but many of them could instead be somewhat strategic. Namely, when requesting taxpayers abandon the transaction in question, taking the time to withdraw a PLR request imposes some (albeit small) costs.

The second explanation is the presence of external forces and facts that make withdrawing a PLR request less compelling or even unavailable.[21] I identify 220 adverse PLRs (46.5% of the dataset) that match this pattern. For example, obtaining a PLR, regardless of its conclusion, could be mandatory for a non-federal tax reason (such as to facilitate an IPO or to comply with a court order or a regulator's requirement).[22] Likewise, the requesting taxpayer might not bear the burden of the adverse PLR (perhaps due to indemnification), or

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[17] I.R.C. § 6110(k)(3).

[18] *See infra* Part I.C.

[19] *See infra* Part III.B.

[20] *See infra* Part IV.A.

[21] *See infra* Part IV.B.

[22] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201828010 (Apr. 17, 2018) (request ordered by a state agency in a ratemaking proceeding); I.R.S. Priv. Ltr. Rul. 201240001 (July 5, 2012) (request mandated by class action settlement agreement); I.R.S. Priv. Ltr. Rul. 200821021 (Feb. 19, 2008) (request made to facilitate IPO). In addition to legal obligations, this category also includes contractual obligations and functionally mandatory situations. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201825003 (Mar. 9, 2018) (contractual arrangement); I.R.S. Priv. Ltr. Rul. 201722014 (Mar. 2, 2017) (change in state law).

the adverse PLR might merely confirm the status quo rather than impose a burden itself.[23]

The third explanation is the assurance value adverse PLRs provide.[24] In ninety-three adverse PLRs (19.7% of the dataset), requesting taxpayers appear to obtain strategically useful marginal certainty. For example, an adverse PLR may not be as adverse as it could be, so accepting it locks in the moderately adverse outcome and avoids the downside risk of the IRS coming later, on audit, and pursuing a worse result.[25] Similarly, PLRs provide the IRS's answer to novel issues, which is particularly useful when available guidance is sparse or entirely absent. Such answers could resolve commercial disputes or quell internal dissent.[26]

The fourth explanation, leveraging adverse PLRs' particular normative force, is the primary focus of this Article.[27] The sixty-five PLRs (13.7% of the dataset) where requesting taxpayers appear to have this highly strategic motivation are distinct from the other adverse PLRs in the dataset. These PLRs appear to impose significant adverse consequences on seemingly sophisticated requesting taxpayers without any third party bearing the economic burden. Further setting them apart, these adverse PLRs make a splash: practitioners and sometimes even the public react strongly, claiming that the PLRs violate social values and expectations, upend settled practitioner consensus on questions of tax law, or impact cutthroat business competition. This reaction indicates that these PLRs exist because of their normative force.

In thirty-seven of these highly strategic adverse PLRs, taxpayers and practitioners seem to seek or at least accept them to instigate backlash.[28] This backlash could come from the public writ large, as happened in the 1990s when PLRs held that LGBTQIA+ employees had to pay extra income tax on their employers' cost of providing health insurance to their domestic partners (despite employers' ability to provide such benefits tax free to heterosexual married couples).[29] This repeated in 2021, when the IRS ruled that a same-sex

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[23] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201532026 (Apr. 23, 2015) (confirming the status quo annuity payment schedule was required by the Code).

[24] *See infra* Part IV.C.

[25] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200532025 (May 3, 2005) (allowing a middle ground approach for reporting income from online gaming).

[26] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201034007 (May 18, 2010) (whether a forklift is a motor vehicle for Section 30C tax credit purposes); I.R.S. Priv. Ltr. Rul. 200234012 (May 7, 2002) (whether a graphic design office is a facility "used in the manufacturing or production of tangible personal property" under Section 144(a)(12)(C)).

[27] *See infra* Part IV.D.

[28] *See infra* Part IV.D.1.

[29] I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018 (Jan. 22, 1997); I.R.S. Priv. Ltr. Rul. 9603011 (Oct. 18, 1995).

male couple's surrogacy expenses were not deductible medical expenses.[30] Alternatively, the backlash could come from tax practitioners if the adverse PLR contravenes their settled expectations. For example, in 2020, the IRS ruled that a tax-exempt hospital could not have a for-profit subsidiary form a political action committee to lobby and intervene in elections.[31] Prior to that PLR, such arrangements were relatively common—many hospital systems used them—and were generally considered feasible. Predictably, practitioners loudly protested the PLR.[32] In the wake of backlash, the IRS not infrequently reverses itself, and sometimes Congress steps in to revise the Code.[33]

The remaining twenty-eight highly strategic adverse PLRs (including nineteen released since 1999) are distinct. They arise specifically in competitive contexts, and they answer technical questions that are unlikely to spark backlash. Rather, the requesting taxpayers are repeat players in a competitive marketplace who seem to be trying to impact their commercial playing fields.[34] That is, the requesting taxpayers are likely at a competitive disadvantage relative to others in the market who are taking more aggressive or even abusive tax positions. By seeking a PLR, the IRS could sign off on the tax position, allowing requesting taxpayers to match their competitors while being fully protected by the PLR. Alternatively, the IRS could reject the tax position. Because PLRs have de facto normative force, such rejection will likely result in competitors aligning with the requesting taxpayer's more conservative position. Indeed, secondary sources describe these PLRs as shutting down certain maneuvers and advise all taxpayers to modify their structures to avoid the rejected conduct.[35]

The varied and impactful strategic uses of adverse PLRs add significant depth and nuance to traditional understandings of the PLR program. Accordingly, this Article proceeds to take a fresh look at PLRs' substantive importance within tax law.[36] First, it considers whether taxpayers' strategic use of adverse PLRs is inconsistent with the IRS's mission of providing guidance and

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[30] I.R.S. Priv. Ltr. Rul. 202114001 (Jan. 12, 2021).

[31] I.R.S. Priv. Ltr. Rul. 202005020 (Oct. 31, 2019).

[32] *See infra* Part IV.D.1.

[33] Sometimes, however, the IRS doubles down and issues precedential guidance reaffirming the adverse PLR. *See infra* Part IV.D.1.

[34] *See infra* Part IV.D.2.

[35] *See, e.g.*, *infra* notes 333, 347–348, 358 and accompanying text.

[36] *Cf.* Emily Cauble, *Questions the IRS Will Not Answer*, 97 IND. L.J. 523, 550–54 (2022) (discussing the importance of PLRs through the lens of the topics on which the IRS will not issue PLRs); Givati, *supra* note 1, at 152–69 (discussing requesting taxpayers' considerations when deciding whether to pursue a PLR); Judy S. Kwok, Note, *The Perils of Bright Lines: Section 6110(k)(3) and the Ambiguous Precedential Status of Written Determinations*, 24 VA. TAX REV. 863, 864–65 (2005) (discussing the meaning of Section 6110(k)(3), which prohibits PLRs from being used or cited as precedent).

administering a fair and just tax system for all taxpayers. Even though it concludes that PLRs remain generally consistent with that mission, strategic, adverse PLRs helpfully highlight areas where the PLR program falls short.[37] This Article then turns to potential interventions to mitigate those shortfalls. To do so, it compares PLRs with two other procedural frameworks, collaborative rulemaking and litigation, and each comparison yields an important and desirable modification to the PLR process. The collaborative rulemaking literature suggests that increasing input from third parties (both those directly impacted by a particular PLR and third parties in general) would appropriately reflect PLRs' normative force.[38] Comparing PLRs to litigation highlights that the current PLR process results in inappropriately hidden guidance. Specifically, when the IRS develops and conveys concrete positions to requesting taxpayers and such taxpayers withdraw their PLR requests and walk away knowing the IRS's positions, all taxpayers deserve to know such positions instead of being left in the dark.[39]

Finally, building on the litigation comparison, this Article highlights the parallels between the highly strategic uses of adverse PLRs and impact litigation. This is particularly notable because various structural and doctrinal factors severely limit challenging others' aggressive and even abusive tax positions, making traditional public interest litigation difficult, if not impossible, in tax. I argue that public interest organizations and like-minded individuals should mimic how highly strategic taxpayers leverage adverse PLRs and use PLRs themselves to attack certain aggressive (and even abusive) tax positions and loopholes.[40]

This Article proceeds in five Parts. Part I provides background on PLRs, focusing on their basic features, the PLR process from taxpayer request through public release, their formal legal and de facto treatment, and how they further the IRS's mission.[41] Part II briefly summarizes the methodology I employed to identify adverse, discretionary PLRs, which is fully described in the Appendix.[42] Part III contains a high-level summary of the dataset and examines the particular importance of adverse PLRs.[43] Part IV presents my four explanations for adverse PLRs, focusing on requesting taxpayers' strategic con-

[37] *See infra* Part V.A.
[38] *See infra* Part V.B.1.
[39] *See infra* Part V.B.2.
[40] *See infra* Part V.C.
[41] *See infra* notes 47–131 and accompanying text.
[42] *See infra* notes 132–174 and accompanying text.
[43] *See infra* notes 175–204 and accompanying text.

siderations.[44] Part V draws out several normative implications of strategically obtained adverse PLRs.[45] A conclusion follows.[46]

I. Background on Private Letter Rulings

PLRs are letters addressed to a particular taxpayer, responding to their questions about the tax consequences of their planned transactions.[47] Like judicial opinions and published Revenue Rulings, PLRs present the relevant facts, state the requesting taxpayer's question, set forth applicable law, and then apply law to facts.[48] PLRs are prepared and issued by the central IRS Office of Chief Counsel,[49] which leads some to conclude that they reflect sophisticated expertise (as compared to local offices).[50] Section A of this Part describes the process of obtaining PLRs.[51] Section B briefly highlights the PLR program's history and place within the tax system.[52] Section C discusses access to and reliance on PLRs.[53]

A. The PLR Process

To request a PLR, taxpayers must meet various IRS requirements, many of which resemble Article III standing. Requesting taxpayers must pay the user fee (in 2025, typically $43,700, though it is lower for taxpayers with gross income below $10 million[54]) and attest (under penalties of perjury[55]) that their

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[44] *See infra* notes 205–358 and accompanying text.

[45] *See infra* notes 359–473 and accompanying text.

[46] *See infra* notes 474–476 and accompanying text.

[47] *See* IRM 32.3.1.6 (Aug. 11, 2004). Taxpayers can request PLRs for completed transactions, but they rarely do so (only approximately 1,000 post-1976 PLRs (<1%) on Westlaw contain the phrase "completed transaction"). PLRs for completed transactions provide no protection from retroactive revocation or modification. Rev. Proc. 2025-1 § 11.10, 2025-1 I.R.B. 66; *see also infra* note 90 and accompanying text (describing the potential for retroactive revocation).

[48] *See* Treas. Reg. § 601.201(a) (1967); Rev. Proc. 2025-1 § 2.01, 2025-1 I.R.B. 6.

[49] *See* IRM 1.1.6.1(7) (June 18, 2015).

[50] *See, e.g.*, Givati, *supra* note 1, at 140; Foster, *supra* note 3, at 493 n.101; Cauble, *supra* note 10, at 462. *See also generally* IRM 1.1.1.5(4)(a) (July 29, 2019). Others are less sanguine. *See, e.g.*, Jasper L. Cummings, Jr., *Chief Counsel Legal Advice Questions and Answers*, 102 Tax Notes 1291, 1292 (2004) ("A letter ruling is typically nothing more than the opinions of two attorneys at the IRS: the primarily responsible docket attorney and one reviewer in her branch. Generally neither the associate chief counsel nor anyone else in the front office has reviewed the ruling."); Daniel I. Halperin, *Citing Letter Rulings: Ships Pass in the Night*, 12 Tax Notes 928, 928 (1981).

[51] *See infra* notes 54–77 and accompanying text.

[52] *See infra* notes 78–101 and accompanying text.

[53] *See infra* notes 102–131 and accompanying text.

[54] *See* I.R.C. § 7528(a)(1); Rev. Proc. 2025-1 § 15, 2025-1 I.R.B. 71–77; *id.* app. A, at 84–88. Specifically, the typical user fee is $3,450 for persons with gross income under $400,000 and $9,775 for persons with gross income between $400,000 and $10 million. Rev. Proc. 2025-1 app. A § A(4), 2025-1 I.R.B. 85.

PLR request addresses their own tax questions (there is no associational PLR standing[56]) and that they are within a defined time window.[57] That window ends when the taxpayer's tax returns reflecting the answer(s) to their question(s) are due.[58] The window begins when the situation raising the taxpayer's question(s) shifts from "hypothetical" to "prospective,"[59] where "prospective" means that all predicate facts must exist.[60] In other words, the scenario presented in a PLR request cannot be pure conjecture.[61]

For most transactions, PLRs are voluntary.[62] Taxpayers can withdraw requests for any (or no) reason at any time before the IRS signs the PLR.[63] Likewise, the Code virtually never requires the IRS to issue a PLR, even when taxpayers must obtain PLRs to proceed with their transactions.[64] Rather, the

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[55] *See, e.g.*, Rev. Proc. 2025-1 §§ 7.01(16), 8.05(4), 8.07, 2025-1 I.R.B. 31, 42, 43.

[56] *See* Treas. Reg. § 601.201(b)(4) (1967); *see also* Rev. Proc. 2025-1 § 6.05, 2025-1 I.R.B. 19; IRM 32.3.1.4.5(1) (Aug. 11, 2004).

[57] That is, their own tax status, tax liability, or reporting obligations. *See* Treas. Reg. § 601.201(a)(1) ("[The IRS answers] inquiries of individuals and organizations . . . as to *their* status for tax purposes and as to the tax effects of *their* acts or transactions." (emphases added)).

[58] *Id.* § 601.201(b)(1)–(3). This reflects prudential concerns regarding resource allocation and forum shopping. *See* J.P. Wenchel, *Taxpayers' Rulings*, 5 TAX L. REV. 105, 110 (1950) ("[A] taxpayer cannot merely set forth the general outline of what he hopes to accomplish and then expect the Bureau to advise him as to the cheapest method taxwise of carrying out those objectives.").

[59] *Compare* Treas. Reg. § 601.201(d)(2) ("A ruling or determination letter is not issued on alternative plans of proposed transactions or on hypothetical situations."), *with id.* § 601.201(b)(1), (3) ("[T]he National Office issues rulings with respect to prospective transactions . . . .").

[60] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200230018 (Apr. 22, 2002) (refusing to rule on the tax consequences of one of two living people outliving the other).

[61] *See, e.g.*, L.W. Kasischke, *When and How to Obtain an IRS Ruling*, 58 MICH. BAR J. 98, 99 (1979) (noting that the proposed transaction must be "real" and have a "reasonably good chance" of occurring).

[62] *See infra* Part II.A & Appendix. The handful of instances where the Code or Regulations require PLRs do, however, make up a disproportionate portion of the PLR universe. *See infra* Part II.A & Appendix.

[63] Treas. Reg. § 601.201(j). The Tax Court once cited withdrawal to support an accuracy penalty. Roco v. Comm'r, 121 T.C. 160 (2003). This was generally criticized as chilling the PLR process, and commentators have argued that the case is limited to its facts. *See, e.g.*, Sheldon I. Banoff & Richard M. Lipton, *Shop Talk: Will Withdrawal of a Letter Ruling Request Lead to Section 6662 Penalties?*, 99 J. TAX'N 316, 317 (2003).

[64] *See* Treas. Reg. § 601.201(d)(2) ("[T]he Service may decline to issue rulings . . . whenever warranted by the facts or circumstances of a particular case."). Regulation Section 601.201(d)(3) (promulgated in 1967) states that the IRS *will* issue prospective PLRs "in all cases on prospective or future transactions when the law or regulations require a determination of the effect of a proposed transaction for tax purposes" and enumerates five such instances (i.e., Sections 367, 1491, 1492, 4216(b), and 4218(e)). However, two of those have been repealed (Sections 1491 and 1492), *see* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1131(a), 111 Stat. 788, 978, and Section 367 has been amended to remove the PLR requirement, *see infra* note 164. And while the IRS continues to commit to issuing rulings under Sections 4216(b) and 4218(c) (formerly subsection (e)), *see* Rev. Proc. 2025-1 § 5.13, 2025-1 I.R.B. 17, it does not appear to extend it further other than with respect to retirement plans, *see* Rev. Proc. 2025-4 § 25.06, 2025-1 I.R.B. 228.

IRS issues PLRs "whenever appropriate in the interest of sound tax administration" and may "decline to issue" PLRs "whenever warranted by the facts or circumstances of a particular case," as determined in its sole (and for practical purposes, unreviewable) discretion.[65] To facilitate the PLR process, each year the IRS releases lists of contexts in which it "ordinarily" does not issue PLRs and questions it will not (or "ordinarily" will not) answer through PLRs.[66] For example, since the IRS first formally described the PLR process in 1953, taxpayers cannot ordinarily request PLRs answering questions of fact (such as applying facts and circumstances tests).[67]

The PLR process is also collaborative. After submitting a formal PLR request, the IRS and the requesting taxpayer work closely throughout the months-long process of producing a PLR, including on drafting the PLR itself.[68] Typically, taxpayers prepare numerous detailed written submissions lay-

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[65] Treas. Reg. § 601.201(d)(1)–(2); Rev. Proc. 2025-1 §§ 2.01, 6.02, 2025-1 I.R.B. 8, 19; *see also, e.g.*, Treas. Reg. § 601.201(f)(2) ("No taxpayer has a 'right' to appeal the action of a branch to a division director or to any other official of the Service, nor is a taxpayer entitled, as a matter of right, to a separate conference in the Chief Counsel's office on a request for a ruling."); Rev. Proc. 2025-1 § 10.02, 2025-1 I.R.B. 60–61 (same); IRM 32.3.1.3 (Aug. 11, 2004) (discussing how the IRS exercises its discretion); S. REP. NO. 95-1263, at 150 (1978) (discussing the lack of practical appeal options from PLRs or the IRS's failure to issue a PLR). IRS inconsistency in the PLR process could theoretically be an abuse of discretion. BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 110.6.3 (West 2024); *see also* Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1243 n.48 (1974) ("Absent a showing verging on arbitrariness, however, it does not follow that the agency will be any more bound by its unpublished opinions than a private party."). But the only case finding such abuse is *International Business Machines Corp. v. United States*, 343 F.2d 914, 921 (Ct. Cl. 1965), which was almost immediately limited to its facts. *See* Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Statutory Solution*, 77 TENN. L. REV. 563, 578 (2010); Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to Be Consistent?*, 40 TAX L. REV. 411, 420–22 (1985); *see also* Action on Decision, 2012-40 I.R.B. 416 (IRS Commissioner's nonacquiescence in *IBM*).

[66] *See* Rev. Proc. 2025-1 § 6, 2025-1 I.R.B. 18–21; Rev. Proc. 2025-3 §§ 3–5, 2025-1 I.R.B. 143–56; Rev. Proc. 2025-7 §§ 3–4, 2025-1 I.R.B. 301–04; *see also* Jasper L. Cummings, Jr., *Ruling by No Rule*, 142 TAX NOTES 1485, 1487 (2014) ("At the level of chief counsel letter ruling practice, it is better to expand the no-rule list than to pursue the next alternative. The next alternative is for the IRS not to tell you when it won't rule but rather decide not to rule on a case-by-case basis, which usually costs you a trip to Washington to find out the sad news.").

[67] *See, e.g.*, Rev. Proc. 2025-1 § 6.02, 2025-1 I.R.B. 19; Rev. Proc. 2025-4 § 25.01, 2025-1 I.R.B. 228; Rev. Rul. 10 § 4, 1953-1 C.B. 489. *See also generally* Cauble, *supra* note 36 (examining this rule in detail).

[68] *See* Treas. Reg. § 601.201(e)(3); Rev. Proc. 2025-1 § 8.07, 2025-1 I.R.B. 43. Before filing a formal PLR request, taxpayer representatives can discuss PLR procedures on a no-names basis, can (after revealing the taxpayer's name) ask the IRS whether the IRS will issue a PLR on a particular issue, and can request a formal "pre-submission" conference with the IRS. *See* Treas. Reg. § 601.201(k); Rev. Proc. 2025-1 § 10.07, 2025-1 I.R.B. 62–63; *see also, e.g.*, Kristen A. Parillo, *Letter Rulings May Be Used to Answer Cryptocurrency Questions*, 2020 TAX NOTES TODAY FED. 9-2 (urging use of PLRs and pre-submission conferences regarding taxation of cryptocurrency).

ing out their request(s) and advocating for their desired answer(s), and they meet with IRS staff multiple times to discuss their submission and answer IRS questions.[69] Crucially, the IRS shares its tentative position and conclusions with requesting taxpayers several times,[70] culminating in orally confirming the precise rulings immediately before a PLR is signed.[71]

If the IRS expects to rule against a taxpayer, it will pointedly do its best to meet with the taxpayer at least once and make its position crystal clear.[72] The IRS will also outline any factual changes to the taxpayer's situation or transaction that would allow the taxpayer to obtain a "fully favorable" PLR. And before issuing the PLR, if the IRS's conclusions remain adverse, the IRS will affirmatively offer taxpayers an opportunity to withdraw their request.[73] Unsurprisingly, practitioner guides consistently recommend withdrawing to avoid an adverse PLR.[74]

The PLR process from request to issuance typically takes approximately six months.[75] Taxpayers with "compelling needs" can also, in "rare and unusual cases," receive expedited handling.[76] The Associate Chief Counsel (Corporate) also provides corporate taxpayers with "fast-track," twelve-week processing of PLR requests, provided they meet various procedural requirements, including submitting a complete draft PLR with their request.[77]

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[69] Taxpayers have one guaranteed meeting with the IRS, *see* Treas. Reg. § 601.201(f)(2), but in practice, there are repeated communications with the IRS throughout the PLR process, *see, e.g.*, *id.* § 601.201(f)(3); Lawrence M. Garrett, *Seeking Private Letter Rulings from the IRS Corporate Division: Choices, Challenges, and Opportunities*, NEW YORK UNIVERSITY PROCEEDINGS OF THE SEVENTY SIXTH ANNUAL INSTITUTE ON FEDERAL TAXATION pt. 3.06 (2018), *reprinted in* 31 THE CORPORATE TAX PRACTICE SERIES: STRATEGIES FOR ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS ch. 858 (Practising Law Institute, No. 343260, Eric Solomon & William D. Alexander eds., 2d ed. 2023 update).

[70] Treas. Reg. § 601.201(f)(1); *cf.* Lawrence A. Sannicandro, *IRS National Office Procedures—Rulings, Closing Agreements*, 621-4th Tax Mgmt. Portfolio (BNA) pt. III.F [hereinafter PLR TM Portfolio].

[71] *See* Rev. Proc. 2025-1 § 8.06, 2025-1 I.R.B. 43. A taxpayer may initially decline to withdraw despite a tentative adverse IRS position, in case the drafting process and/or supplemental submissions change the IRS's mind. But even those taxpayers, once the adverse position is solidified and issuance is imminent, would presumably withdraw.

[72] *See id.* § 10.05, at 61; Treas. Reg. § 601.201(f)(3); IRM 32.3.2.4(3) (Aug. 11, 2004). Taxpayers ignore the request at their peril. *See infra* Part IV.A.2.

[73] Rev. Proc. 2025-1 §§ 8.03, 8.06, 2025-1 I.R.B. 41, 43 (describing ten-day window for withdrawal).

[74] *See, e.g.*, Garrett, *supra* note 69, pt. 1.06[4]; BITTKER & LOKKEN, *supra* note 65, ¶ 110.6.2.1; PLR TM Portfolio, *supra* note 70, pt. III.H.2.

[75] *See* PLR TM Portfolio, *supra* note 70, pt. III.D. Given the pre-submission conference, *see supra* note 68, it can be difficult to precisely and accurately measure the overall process duration.

[76] Rev. Proc. 2025-1 § 7.02(4), 2025-1 I.R.B. 33–34.

[77] Rev. Proc. 2023-26, 2023-33 I.R.B. 486.

B. The PLR Program's History and Importance

The PLR program developed in approximately 1940.[78] Other than systematic public disclosure of PLRs starting in 1977 and the imposition of user fees in the late 1980s,[79] the program has remained essentially unchanged since then.[80] Throughout, taxpayers, practitioners, and the IRS have acclaimed PLRs as a "vital part" of the tax system.[81]

For requesting taxpayers, PLRs give virtual certainty, prospectively, about how the IRS will treat their proposed transactions and situations.[82] In other words, PLRs function "as an insurance policy" that provides requesting taxpayers with "audit protection against future controversies during IRS examinations."[83] Indeed, the IRS Office of Chief Counsel sends each issued PLR to the IRS office that will process (and, as applicable, audit) the requesting taxpayer's tax returns.[84] When that office processes those tax returns, once it confirms

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[78] In 1938, Congress created prospective, formal, binding closing agreements between the IRS and taxpayers. Revenue Act of 1938, Pub. L. No. 75-554, § 801, 52 Stat. 447, 573; *see* I.R.C. § 7121. By 1940, request volume made them cumbersome. Mortimer M. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, *in* NEW YORK UNIVERSITY PROCEEDINGS OF THE TWENTIETH ANNUAL INSTITUTE ON FEDERAL TAXATION 4–5 (Henry Sellin ed., 1962). Thanks to Stanley Surrey, the IRS began treating inquiries as *potential* requests for closing agreements and resolved them with his invention, PLRs. *See id.* at 5; A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY 30 (Lawrence Zelenak & Ajay K. Mehrota eds., 2022).

[79] *See* I.R.C. § 6110 (public disclosure of PLRs); *id.* § 7528 (user fees for PLR requests); *see also supra* note 54, *infra* notes 165 & 168 and accompanying text. One other meaningful change was the IRS discouraging (starting in 1989) and then ultimately precluding (in the 1990s) so-called "comfort" PLRs, or PLRs where binding authorities directly answer the question. *See* Rev. Proc. 89-34, 1989-1 C.B. 917; Rev. Proc. 2025-1 § 6.11, 2025-1 I.R.B. 21 (stating that, with limited exception, the IRS does not issue PLRs on "an issue that is clearly and adequately addressed" by precedential authority).

[80] *See* Rogovin & Korb, *supra* note 5, at 342 (referring to the PLR program as an "example of man's inventive genius operating in response to his needs" and "one of the largest and oldest programs in the Government").

[81] Norman A. Sugarman, *Tax Ruling Procedure Revisited*, 9 WM. & MARY L. REV. 1011, 1012 (1968); *see also* Richard W. Bailine, *The Curtailment of Letter Rulings—A Bad Deal for All*, 30 J. CORP. TAX'N 40, 45 (2003); Caplin, *supra* note 78, at 1 (referring to the issuance of PLRs as "one of the major functions" of the IRS and one of its "most effective tools").

[82] At the same time, PLRs are issued with respect to a particular transaction or situation. The IRS is not bound by requesting taxpayers' PLRs when evaluating their other, similar transactions (except if the original PLR was "issued covering a continuing action or series of actions"). Treas. Reg. § 601.201(l)(6)–(7) (1967).

[83] George White, *The PLR Program, Then and Now*, 141 TAX NOTES 657, 685 (2013); *see also* William H. Volz, Deborah Jones & Rachel E. Wisley, *Practitioner Reliance on Private Letter Rulings as Legal Authority*, 27 TAX PRAC. 257, 258 (2000) ("A favorable [PLR] from the IRS indicates to the taxpayer that the intended transaction is a safe harbor."); Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, TAXES, Dec. 1965, at 756, 757 (explaining that a PLR "has the effect of an advance audit determination as to that taxpayer and that particular transaction").

[84] IRM 32.3.2.7(1)–(2) (June 14, 2022); IRM 4.8.8.12.2.3(5) (Dec. 16, 2013). The Internal Revenue Manual sections dealing with PLRs have not been updated to reflect the removal of district offices in 2000. *See* MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE ¶ 1.02[2]

that the taxpayer was honest in the PLR process, the office must apply the PLR's holdings.[85] That is, although the IRS has broad authority to modify or revoke PLRs at any time,[86] local offices cannot exercise that authority.[87] Rather, if IRS line agents conclude that a PLR should be reconsidered, they notify the IRS Office of Chief Counsel (and the requesting taxpayer),[88] which in turn considers the matter following particular procedures that include input from the requesting taxpayer.[89] And even where the IRS Office of Chief Counsel ultimately decides to revoke or modify a PLR, such actions are only retroactive "in rare or unusual circumstances."[90]

Unlike the IRS, requesting taxpayers are *not* required to adhere to their PLRs.[91] Rather, they are free to file tax returns reflecting their preferred position(s).[92] Doing so, and defending their position(s) on audit, is the only way requesting taxpayers can challenge PLRs;[93] there is no way to appeal a PLR's

(2024). For clarity, however, I use "office" to refer to the local IRS field offices, service centers, and campuses that process tax returns. *See id.* ¶ 14A.02[1] (explaining IRS office organization and operation).

[85] *See* Treas. Reg. § 601.201(l)(2); Rev. Proc. 2025-1 § 11.03, 2025-1 I.R.B. 64. PLRs protect requesting taxpayers even when the IRS later issues contrary precedential guidance (including Regulations). Treas. Reg. § 601.201(l)(6).

[86] *See* Treas. Reg. § 601.201(l)(1); Rev. Proc. 2025-1 § 11.04, 2025-1 I.R.B. 64–65. Revocations and modifications of PLRs are technically presumptively retroactive to all open tax years. *See* Treas. Reg. § 601.201(l)(1). *But see infra* note 90 and accompanying text.

[87] Treas. Reg. § 601.105(b)(5)(i)(c) (1967); *see also id.* § 601.201(l)(2); IRM 33.2.1.9(5) (Aug. 11, 2004).

[88] *See* Treas. Reg. § 601.105(b)(5)(i)–(iii); *id.* § 601.201(l)(2)–(3).

[89] *See id.* § 601.105(b)(5)(iii). Requesting taxpayers have successfully litigated to force IRS auditors to adhere to their PLRs unless the IRS follows this procedure. *See* Petition, Sirius XM Connected Vehicle Servs. Holdings Inc. v. Comm'r, No. 17641-18 (T.C. Nov. 21, 2019); Raj Madan, SKADDEN, https://www.skadden.com/professionals/m/madan-raj [https://perma.cc/W47L-VG89] (website biography for the attorney for Sirius, indicating that the "IRS conceded the case in full").

[90] Treas. Reg. § 601.201(l)(5); *see also* Rev. Proc. 2025-1 §§ 11.05–11.10, 2025-1 I.R.B. 65–66; IRM 32.3.2.3.5.2(4) (July 9, 2014). *See generally* BITTKER & LOKKEN, *supra* note 65, ¶ 110.6.3 (providing historical context for IRS practice); Rogovin, *supra* note 83, at 769 (shift to "rare or unusual circumstances" encourages reliance). In those rare circumstances, the taxpayer can further petition for relief under Section 7805(b). *See* Rev. Proc. 2025-1 § 11.11, 2025-1 I.R.B. 66–67; IRM 32.3.2.3.5.2(5) (July 9, 2014).

[91] This fact may explain why PLRs include the IRS's analysis rather than just the bottom-line result. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995) (highlighting that reason-giving can support voluntary compliance).

[92] *See, e.g.*, Donald E. Osteen, Nelson F. Crouch & Phoebe Bennett, *Obtaining Private Guidance from the Internal Revenue Service*, *in* U.S.C. LAW SCHOOL TAX INSTITUTE ¶ 1705.4 (2002). The IRS tells taxpayers they must attach PLRs to their tax returns, Rev. Proc. 2025-1 § 7.06, 2025-1 I.R.B. 39; IRM 32.3.2.3.2.2(3) (Aug. 11, 2004), but technically doing so is only encouraged, *see* Treas. Reg. § 601.201(e)(18) (taxpayers "should" do so). Of course, there is no reason taxpayers would avoid attaching *favorable* PLRs to their tax returns.

[93] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 8524071 (Mar. 20, 1985) (outlining this "appeals" process).

holding.[94] (Taxpayers have, on an ad hoc basis, filed a new PLR request seeking reconsideration of a PLR.[95]).

For the IRS, PLRs meaningfully further its mission of providing "taxpayers top quality service by helping them understand and meet their tax responsibilities" and enforcing "[tax] law with integrity and fairness to all."[96] As described above, PLRs enable the IRS to, "within a short period of time, [resolve] a case of first impression in a gray area,"[97] and accordingly they play "a significant role in assisting taxpayers and their advisors in coping with the complexity of the tax system."[98] But PLRs are not mere IRS benevolence. Rather, the IRS derives significant benefits from the PLR program, including invaluable insight into "the kinds of transactions which are being consummated or considered by taxpayers."[99] By resolving questions of tax law ex ante, PLRs also facilitate compliance, preempt resource-draining audit litigation, and simplify return processing.[100] Finally, recurring PLR requests highlight significant areas of ambiguity within tax law, allowing the IRS to "develop a mature view" on such areas incrementally and focus its resources on developing useful precedential guidance.[101]

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[94] *See, e.g.*, Treas. Reg. § 601.201(f)(2). Limited exceptions exist. *See* SALTZMAN & BOOK, *supra* note 84, ¶ 3A.03[5][b] ("There is no judicial review of an adverse ruling, except in those limited cases where a declaratory judgment procedure has been provided."); Stephen M. Goodman, Note, *The Availability and Reviewability of Rulings of the Internal Revenue Service*, 113 U. PA. L. REV. 81, 96–109 (1964); I.R.C. § 7428; Rev. Proc. 2023-5 § 9, 2023-1 I.R.B. 265 (tax exemption); Daktronics v. Comm'r, 61 T.C.M. (CCH) 1896, 1899 (1991) (Regulation Section 301.9100-1 for requesting an extension of time); Treas. Reg. § 601.201(e)(19) (Section 367(a); promulgated prior to Section 367(a)'s amendment in 1984, *see infra* note 164); Rev. Proc. 2021-10, 2021-4 I.R.B. 1 (tax-exempt bonds).

[95] *See* Rev. Proc. 2025-1 § 15.02(4), 2025-1 I.R.B. 71 (referencing PLR reconsideration requests implicitly as a new PLR request); IRM 32.3.2.8.3.1(3) (Aug. 11, 2004) (same); *see also* I.R.S. Priv. Ltr. Rul. 8236080 (June 14, 1982) (new PLR denying requested reconsideration of prior PLR because the taxpayer "offered no new information or arguments"). PLR 200532061 is the most recent PLR referencing reconsideration. I.R.S. Priv. Ltr. Rul. 200532061 (May 19, 2005).

[96] *The Agency, Its Mission and Statutory Authority*, INTERNAL REVENUE SERV., https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority [https://perma.cc/AM85-KZXC] (Apr. 16, 2024); *see also* I.R.C. § 7803(a)(3) ("[T]he Commissioner shall ensure that employees of the [IRS] are familiar with and act in accord with taxpayer rights . . . ."); IRM 32.2.1.1(2) (Nov. 12, 2019) ("It is the responsibility of each person in the IRS charged with the duty of interpreting the law to try to find the proper interpretation of the statutory provision and not to adopt a strained construction in the belief that he or she is 'protecting the revenue.' The revenue is properly protected only when we ascertain and apply the proper interpretation of the statute.").

[97] Rogovin & Korb, *supra* note 5, at 346.

[98] Osteen et al., *supra* note 92, ¶ 1700.

[99] Rogovin & Korb, *supra* note 5, at 344.

[100] *Id.*

[101] *Id.* at 346; *see also* Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 485 (2017) ("As a result of its unique bargaining position, the IRS has greater freedom to express and apply its own interpretation of the tax law when issuing advance tax rulings than when challenging a tax position ex post.").

C. Access to and Reliance on PLRs

Section 6110 governs public access to PLRs. The IRS publicly releases PLRs approximately ninety days after issuance to requesting taxpayers.[102] To preserve taxpayer confidentiality, public PLRs redact any identifying details. This hides, among other things, the names of both the requesting taxpayer and counsel, particular quantities, and time durations.[103] Redactions make for choppy and rather abstract reading, but most PLRs retain sufficient unredacted facts to understand their basic parameters and question(s).[104]

Section 6110(k)(3) formally limits the use of PLRs: they "may not be used or cited as precedent."[105] Although the borders of this prohibition are fuzzy,[106] the core congressional intent is that PLRs not receive stare decisis treatment (despite their reason-giving content and effect on the requesting taxpayer's transaction).[107] Regulations echo this,[108] as does more informal IRS guidance,[109] including boilerplate language in every PLR.[110] The Tax Court,

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[102] I.R.C. § 6110(g)(1); *see also* Anonymous v. Comm'r, 134 T.C. 13, 19 (2010) (finding that neither the Administrative Procedure Act (APA) nor Section 6110 grants the Tax Court jurisdiction to prevent release of a PLR).

[103] I.R.C. § 6110(c); *see also* Treas. Reg. § 301.6110-3(a) (1977); IRM Exhibit 33.1.3-6 (July 5, 2011) (listing types of taxpayer-identifying information to be redacted). The IRS and the taxpayer collaborate regarding redactions. *See* I.R.C. § 6110(f).

[104] Taxpayers (and/or attorneys) may disclose their PLRs in legal documents or secondary sources. *See, e.g.*, Joel E. Miller & Martin B. Miller, *Cooperative and Condominium Apartments*, 596-3d Tax Mgmt. Portfolio (BNA) pt. VII.D.2; AmerGen Energy Co. v. United States, 779 F.3d 1368, 1371 (Fed. Cir. 2015). Sometimes, despite redactions, the requesting taxpayer can be identified with reasonable certainty. *See, e.g.*, David S. Neufeld, *The "Keyport Ruling" and the Investor Control Rule: Might Makes Right?*, 98 TAX NOTES 403, 411–12 (2003) (discussing the party involved in a PLR despite its redactions).

[105] I.R.C. § 6110(k)(3) applies to everyone, including the IRS and requesting taxpayers. Treas. Reg. § 601.201(l)(6) (1967). *But see id.* § 1.6662-4(d)(3) (as amended in 2003); *id.* § 601.201(l)(7) (two limited exceptions to Section 6110(k)(3)).

[106] *See* Kwok, *supra* note 36, at 864–65 (noting that this "deceptively simple provision" is not accompanied by any "guidance as to what it all means"); James P. Holden & Michael S. Novey, *Legitimate Uses of Letter Rulings Issued to Other Taxpayers—A Reply to Gerald Portney*, 37 TAX LAW. 337, 344–48 (1984) (evaluating the possible meanings of this prohibition).

[107] *See* STAFF OF JOINT COMM. ON TAX'N, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 309 (Comm. Print 1976) (explaining that "if the IRS issued a written determination to a taxpayer with respect to a specified transaction which occurred in a particular year, and that taxpayer or any other taxpayer engages in the same transaction in a subsequent year, the earlier determination could not be used by the taxpayer or the IRS as a precedent for the subsequent year unless the determination specifies that it applies to a series of such transactions").

[108] *See* Treas. Reg. § 601.201(l)(1); *id.* § 601.601(d) (as amended in 1987).

[109] *See* Rev. Proc. 2025-1 § 11.02, 2025-1 I.R.B. 63–64; IRM 32.3.1.6(2) (Aug. 11, 2004); *Understanding IRS Guidance—A Brief Primer*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer [https://perma.cc/XDD4-HP5U] (Dec. 30, 2024).

[110] *See* IRM 32.3.2.3.2.2(1)(a) (Aug. 11, 2004).

which hears the bulk of federal civil tax cases, interprets Section 6110(k)(3) to bar litigants from citing or relying on PLRs.[111]

Nevertheless, since the early years of the PLR program, practitioners have paid close attention to PLRs.[112] PLRs therefore "exist[] in a twilight zone where the IRS could disavow [them] . . . but in fact, taxpayers [do] rely on them."[113] Because PLRs both delineate the relevant law (i.e., confirm the absence or presence of intervening authority) and answer granular, unclear real-world questions,[114] such reliance (and de facto normative force) is unsurprising.[115] Indeed, PLRs are often the only source of guidance on a question,[116]

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[111] *See, e.g.*, Liljeberg v. Comm'r, 148 T.C. 83, 94 n.4 (2017), *aff'd*, 907 F.3d 623 (D.C. Cir. 2018); *see also* Kwok, *supra* note 36, at 873–75 (discussing the prevalence of this "total rejection approach" in the Courts of Appeals and the Tax Court).

[112] *See, e.g.*, Thomas Greenaway & Edward M. Robbins, *Types & Uses of Authority in Federal Tax Practice*, *in* INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE DESKBOOK ch. 3, § 3:4.3[A] (Practising Law Institute, No. 397746, 2024); Holden & Novey, *supra* note 106, at 349; William D. Elliott, *Goodbye to Darkness: The Landmark Tax Analysts FOIA Litigation—Part 1*, TAXES, Jan. 2022, at 13, 19 ("Tax practitioners today study the private rulings assiduously for inklings of IRS attitudes and policy on a given tax consequence. Though not legal precedent, the private letter rulings are practical precedent."); Gregg D. Polsky & Brant J. Hellwig, *Taxing Structured Settlements*, 51 B.C. L. REV. 39, 75–83 (2010) (closely parsing PLR 200836019 to illuminate the IRS's position on Section 104(a)(2)'s applicability to structured settlements for non-physical injuries); David W. Richmond, *How to Read a Ruling*, TAXES, Dec. 1961, at 1054, 1055–56 (recognizing that practitioners follow PLR releases, but warning against reliance).

[113] Jasper L. Cummings, Jr., *Our Guidance Drought*, 157 TAX NOTES 565, 575 (2017); *see also, e.g.*, Devos et al., *supra* note 10, at 853 ("[W]e observed a significant number of firms that cited PLRs issued to other taxpayers."); Givati, *supra* note 1, at 159–60 ("[I]t is clear that private letter rulings have a precedential value in practice."); Volz et al., *supra* note 83, at 259 ("[L]etter rulings are much valued by tax professionals.").

[114] *See supra* notes 47–48 and accompanying text; Volz et al., *supra* note 83, at 257 (PLRs interpret the Code "for a very specific fact situation"); Cummings, *supra* note 50, at 1292 ("On the other hand, practitioners (and publishers who sell to them) want the private guidance to be public for three principal reasons: (1) it usually reflects or contains good research, and thereby saves time for would-be researchers; (2) it may in fact show how the Service would view a similar case, because other chief counsel attorneys will tend to give credence to previously issued private guidance under a don't-recreate-the-wheel view, *if they know about it*; and (3) practitioners can use a heads-I-win-tails-you-lose approach with private guidance to which they have access, in that they can rely on it if it suits them and distinguish it as a 'mere letter ruling' if it does not.").

[115] *See* Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. 1615, 1617 (2024) ("When agencies make statements about the law, people listen."); Jasper L. Cummings, Jr., *Is Guidance Failing "The Taxpaying Public"?*, 168 TAX NOTES FED. 1247, 1249 (2020) ("However, once the [Freedom of Information Act (FOIA)] effort was successful, . . . practitioners (although not so much the letter-ruling-reading public) inevitably began to treat the internal and private guidance as law."); Schauer, *supra* note 91, at 649 ("Giving reasons induces reasonable reliance."); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 620–21, 626 (2014) (highlighting analogous features of Federal Trade Commission (FTC) settlement agreements, which accordingly "serve as the functional equivalent to a body of common law").

[116] *See, e.g.*, Bruce A. Wolk, *The Golden Parachute Provisions: Time for Repeal?*, 21 VA. TAX REV. 125, 172 (2001) ("The authority . . . is so sparse that practitioners will seize upon any favorable

making them "addictive" to practitioners trying to figure out taxpayer obligations.[117] It is "almost irresponsible" to not consult PLRs when doing research,[118] and in at least one instance, failure to do so was evidence of malpractice.[119] Reflecting this reality, practitioner-oriented publications routinely synthesize and summarize PLRs. Some compile every PLR;[120] others focus on synthesizing all PLRs within a substantive area.[121] Needless to say, the IRS is well aware of taxpayers' de facto reliance on PLRs.[122]

Congress also pays attention to PLRs: legislative history draws on PLRs in its explanations of current law and in describing the rationale for changing it.[123] The IRS does too: the Internal Revenue Manual counsels IRS agents to review and use PLRs as guides to formulate positions.[124] In fact, it instructs

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statement in a letter ruling . . . ."). PLRs also may be leading indicators of future precedential guidance. *See, e.g.*, Jasper L. Cummings, Jr., *Why Not Revenue Rulings?*, 150 TAX NOTES 1305, 1306–07 (2016) ("Back in the day, letter rulings were often turned into revenue rulings, which may then have been turned into regulations. . . . [L]etter rulings . . . may [also] advance directly to regulations without passing through a revenue ruling.").

[117] Jasper L. Cummings, Jr., *Legal Research in Federal Taxation*, 109 TAX NOTES 335, 341 (2005).

[118] Lee A. Sheppard, *How Private Are IRS Letter Rulings?*, 23 TAX NOTES 902, 902 (1984); *see also, e.g.*, CHRISTOPHER C. DYKES, FEDERAL INCOME TAX LAW: A LEGAL RESEARCH GUIDE 2–3 (2d ed. 2021) (including PLRs in the "Steps for Conducting Primary Tax Law Research").

[119] *See* Merchant v. Kelly, Haglund, Garnsey & Kahn, 874 F. Supp. 300, 304 (D. Colo. 1995).

[120] *See, e.g.*, TAX NOTES, TAX NOTES FEDERAL; BLOOMBERG TAX, DAILY TAX REPORT.

[121] *See generally, e.g.*, Thomas F. Wessel, Stephen G. Charbonnet, M. Todd Prewett & Joseph M. Pari, *Corporate Distributions Under Section 355: Part 1 of 2* (June 2024) (compiling PLRs on Section 355), *in* 15 THE CORPORATE TAX PRACTICE SERIES: STRATEGIES FOR ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS ch. 390 (Practising Law Institute, No. 343260, Eric Solomon & William D. Alexander eds., 2d ed. 2023 update).

[122] *See, e.g.*, Jasper L. Cummings, Jr., *Deep State Revenue Rulings*, 166 TAX NOTES FED. 545, 550 (2020) ("The IRS . . . can't deny that it intends at least some letter rulings . . . to affect the behavior of taxpayers other than the addressees and taxpayers involved."); Lee A. Sheppard, *A Reprise: Interview with Assistant Secretary Chapoton*, 23 TAX NOTES 769, 771 (1984) (quoting the Assistant Secretary as stating that "the present system works pretty well; we say [PLRs] don't have precedential value, and in fact everybody cites them"); *see also* Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003) (providing that PLRs can constitute substantial authority for a tax position, abating tax penalties). In fact, the IRS website even compiles PLRs on certain topics to assist taxpayers. *See, e.g.*, *Private Letter Rulings, Technical Advice Memoranda and Field Service Advice Memoranda Involving Tax-Exempt Bond Issues*, INTERNAL REVENUE SERV., https://www.irs.gov/tax-exempt-bonds/private-letter-rulings-technical-advice-memoranda-and-field-service-advice-memoranda-involving-tax-exempt-bond-issues [https://perma.cc/8M75-43EU] (Dec. 27, 2024); *Private Letter Rulings*, INTERNAL REVENUE SERV., https://www.irs.gov/government-entities/indian-tribal-governments/private-letter-rulings [https://perma.cc/7KDY-TG5C] (Aug. 19, 2024).

[123] *See, e.g.*, S. REP. NO. 114-25, at 6 (2015).

[124] *See, e.g.*, IRM 31.1.1.1.1(3) (Aug. 11, 2004); IRM 4.10.7.2.9(3)–(4) (Sept. 12, 2022); IRM 4.46.4.4(1)(g) (Dec. 13, 2018); *see also* Timothy J. McCormally, *The Devil Citing Scripture: Reflections on Taxpayers' Use of Private Letter Rulings*, 36 TAX EXEC. 263, 267 (1984); Thomas R. Reid III, *Public Access to Internal Revenue Service Rulings*, 41 GEO. WASH. L. REV. 23, 30–33 (1972) (describing the myriad ways the IRS uses PLRs internally).

agents to copy legal citations from PLRs and paste them (without attribution) into explanations given to taxpayers under audit.[125] The IRS also tells agents to consult with the Office of Chief Counsel before taking a position contrary to a PLR.[126] Finally, following the Supreme Court's lead,[127] courts sometimes use PLRs to illuminate IRS positions.[128]

* * *

The PLR process and the impact of an adverse PLR combine to result in taxpayers "almost always" withdrawing PLR requests before the IRS rules adversely.[129] Practitioners and academics believe that adverse PLRs are exceptionally rare[130] and arguably should not exist at all.[131] But, as shown below, a significant number of adverse PLRs do exist—and not by accident. The following Parts describe the dataset of adverse PLRs, the strategic reasons why they exist, and the implications of those reasons.

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[125] IRM 4.70.14.2.1.1 (Nov. 24, 2023); *see also* IRM 4.75.15.7.1.3 (obsoleted Jan. 29, 2024).

[126] *See* IRM 31.1.1.1.1(3) (Aug. 11, 2004); *see also* IRM 33.2.1.4 (Aug. 11, 2004).

[127] Hanover Bank v. Comm'r, 369 U.S. 672, 686–87 (1962); *see also* Advoc. Health Care Network v. Stapleton, 581 U.S. 468, 473 (2017); United States v. Windsor, 570 U.S. 744, 773 (2013); Mayo Found. v. United States, 562 U.S. 44, 59 (2011).

[128] *See* Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 RUTGERS U. L. REV. 281, 322–23 & nn.302–05 (2020) (collecting examples).

[129] Banoff & Lipton, *supra* note 63, at 316; *see also, e.g.*, *Extension to Elect Disregarded Entity Status Denied*, 104 J. TAX'N 312, 312 (2006) (taxpayers withdraw in the "vast number of cases"); Osteen et al., *supra* note 92, ¶ 1705.4 (taxpayers withdraw "in virtually all situations"); Weller, *supra* note 11, at 77 (taxpayers "invariably" withdraw).

[130] *See* Michael Bolotin, *Why Private Investment Funds Are Using REITs to Invest in Real Estate*, 166 TAX NOTES FED. 1087, 1098 (2020) ("It is rare for a private letter ruling to reach a result that's unfavorable to the taxpayer."); Jasper L. Cummings, Jr., *Relief for Late Regulatory Elections*, 139 TAX NOTES 743, 747 n.27 (2013) (referring to adverse PLRs as "rare"); Victoria B. Bjorklund, *Spinoffs: Bob Jones University Museum and Beyond*, 16 EXEMPT ORG. TAX REV. 57, 59 n.16 (1997) (same); ABA Exempt Orgs. Comm., Remarks at the ABA Tax Section May Meeting (May 6, 2016) ("There have been a few PLRs where we were adverse to the taxpayer. And as you know, when we're adverse, taxpayers usually withdraw; it's rare that you see an adverse PLR out there." (quoting Janine Cook, deputy associate chief counsel)), *in* 76 EXEMPT ORG. TAX REV. 95 (2016).

[131] *See, e.g.*, Blake D. Rubin, Jill E. Darrow, Robert D. Schachat & Sanford C. Presant, Panel at the Practising Law Institute 20th Annual Real Estate Tax Forum: Transactions Involving Real Estate—Practical Solutions to Everyday Problems (No. 241260, Jan. 29, 2018) (describing adverse PLRs as "rare" and "[v]ery unusual" events "which you would never get ordinarily"); Joel S. Newman, *Rabbi Trusts for Indian Children: The Story of a Revenue Procedure*, 110 TAX NOTES 265, 267–68 (2006) ("[I]t is hard to imagine why a taxpayer would ever allow an adverse ruling to be published.").

II. ASSEMBLING A DATASET OF ADVERSE PLRS

This Part describes how I built my dataset of adverse PLRs. Section A addresses three threshold considerations.[132] Section B discusses my identification of sources of PLRs.[133] Finally, Section C explains how I operationalized searching and categorizing PLRs.[134] This Part briefly describes each of those decisions and processes; the Appendix discusses my approach in detail.

A. Threshold Considerations

Before pulling and coding PLRs, I had to define the universe of PLRs, exclude mandatory PLRs, and determine what it means for a PLR to be "adverse." Each of these threshold considerations is described below. The following Section considers the logistics of actually accessing PLRs.

First, I defined temporal boundaries. PLRs have been issued since approximately 1940,[135] but the IRS first formalized the process in the early 1950s and only started publicly releasing them in 1977.[136] Accordingly, before 1977, PLRs existed under different procedural mechanics and confidentiality assumptions.[137] And although the IRS likely issued hundreds of thousands of PLRs before 1977,[138] they are difficult, if not impossible, to access,[139] and even if accessed they are not infrequently illegible or heavily redacted.[140] I

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[132] *See infra* notes 135–158 and accompanying text.

[133] *See infra* notes 159–168 and accompanying text.

[134] *See infra* notes 169–174 and accompanying text.

[135] *See supra* note 78.

[136] *See supra* Part I.B. In the mid-1970s the IRS lost two cases seeking PLRs as FOIA material. *See* Fruehauf Corp. v. IRS, 522 F.2d 284, 286–87 (6th Cir. 1975); Tax Analysts & Advocs. v. IRS, 505 F.2d 350, 351–52, 355 (D.C. Cir. 1974). To preempt unredacted disclosure, *see infra* note 163; William D. Elliott, *Goodbye to Darkness: The Landmark Tax Analysts FOIA Litigation—Part 2*, TAXES, Mar. 2022, at 11, 11–12, Congress enacted Section 6110, displacing FOIA and mandating that the IRS publicly release redacted PLRs, *see* I.R.C. § 6110(a), (c), (h), (m); *see also* IRM 11.3.13.5.2.6(13) (Apr. 19, 2017); IRM 11.3.13.7.1(1) (Oct. 5, 2021).

[137] *See* Sheryl Stratton, *Federal Bar Association Meeting—IRS Information Disclosure—Balancing Openness and Privacy*, 90 TAX NOTES 1460, 1462 (2001) (former IRS official: publicly releasing PLRs "added a layer of concern and care that has turned out to be a good thing for both the system and taxpayers").

[138] *See* Caplin, *supra* note 78, at 9 (172,832 separate rulings from 1958 to 1962); Rogovin, *supra* note 83, at 770 (40,000 requests in FY1964); Meade Whitaker, *Ruling Letters and Technical Advice: The Disclosure Crossroads*, TAXES, Dec. 1975, at 712, 714 (IRS files contain approximately 400,000 written determinations; 150,000 post-July 4, 1967); Reid, *supra* note 124, at 24 (32,297 PLRs in FY1971).

[139] For example, as of January 22, 2025, Westlaw has 2,454 PLRs dated between January 1, 1970, and December 31, 1975; Checkpoint has 2,441; Tax Notes has 0; and Lexis has 3,192. *Cf. infra* note 163. This is consistent with the fact that very few pre-1977 PLRs were publicly released. Reid, *supra* note 124, at 25 (stating that less than 3% of PLRs were released each year between 1968 and 1972).

[140] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 7012300100A (Dec. 30, 1970).

therefore limited my universe to PLRs released publicly on or after January 1, 1977. Using the approach described below in Part II.B, I estimate that the IRS released approximately 124,500 PLRs from 1977 through 2024.[141]

Second, I excluded mandatory PLRs. Paradigmatically, PLRs arise from taxpayers voluntarily requesting a PLR to resolve their tax uncertainty. But in certain instances, tax law requires that taxpayers receive a PLR before taking a certain action or obtaining a particular status. For example, a taxpayer who has missed a deadline can only mitigate that by applying for a PLR and receiving a favorable PLR.[142] When tax law requires taxpayers to obtain a favorable PLR to proceed, it is unsurprising that sometimes they end up with adverse PLRs.[143] To focus on the puzzle of *voluntary* adverse PLRs, I excluded mandatory PLRs using both term exclusions and manual review, as detailed in the Appendix.[144] Applying term exclusions resulted in a set of approximately 81,000 PLRs.[145]

Third, I needed to decide whether a PLR was adverse or favorable. PLRs are written through a decentralized process within the IRS Office of Chief Counsel, and as described above in Part I, requesting taxpayers also participate in drafting PLRs. As a result, beyond the high-level approach of describing facts, summarizing applicable law, and applying law to facts,[146] there is little global consistency in PLR structure or format.[147] PLRs do, however, often specify the rulings the taxpayer requested and the rulings the PLR contains, making it easy to identify adverse ones.[148] To exclude complicating variables, I

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[141] Although many agencies have similar informal guidance mechanisms, PLRs are at least an order of magnitude more prevalent. For example, in 2023 the Securities and Exchange Commission (SEC) issued twenty-three no-action letters (excluding 186 Rule 14a-8 shareholder proposal no-action letters), the Federal Aviation Administration issued three legal interpretations, the Department of Labor issued two opinion letters, and the Federal Communications Commission issued eight declaratory rulings. *See also* Rogovin & Korb, *supra* note 5, at 342 ("The Service's letter rulings program is one of the largest . . . programs in the Government."); Solove & Hartzog, *supra* note 115, at 610–11 & nn.119–20 (2014) (analyzing all 148 FTC settlement agreements entered into over fifteen years).

[142] *See* Treas. Reg. § 301.9100-3(e)(5) (as amended in 2024).

[143] Where taxpayers require a PLR to proceed, the marginal cost of an adverse PLR is minimal and sometimes taxpayers must receive a PLR to challenge the decision. *See, e.g.*, I.R.C. § 7478(b)(2) (exhaustion of administrative remedies); *see also supra* note 94.

[144] References herein to "adverse" PLRs refer to discretionary adverse PLRs under federal tax law unless otherwise specified.

[145] The term-exclusion subset of PLRs is under inclusive (not all mandatory contexts have particular unique terms) and could be over inclusive. *See* Appendix.

[146] *See* IRM 32.3.2.3.2(8) (Oct. 6, 2017).

[147] That being said, PLRs from a particular office within the IRS Office of Chief Counsel (and therefore dealing with the same substantive area of tax law, *see* IRM Exhibit 1.1.6-1 (Jan. 17, 2023)), tend to be quite similar.

[148] I classified PLRs as adverse even in the rare instances when the IRS ruled more favorably than the taxpayer requested. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201943020 (July 25, 2019) (ruling that a transfer to the taxpayer's account was not taxable in response to a request for a ruling that a tax obligation was triggered); I.R.S. Priv. Ltr. Rul. 201543001 (July 17, 2015) (ruling that taxpayer's property was

only treated a PLR as adverse if it was entirely adverse[149] (i.e., I excluded PLRs adverse on one or more, but not all, of the taxpayer's requested rulings).[150]

Sometimes, however, PLRs just state that the taxpayer requested a PLR regarding "certain tax consequences" of a given situation.[151] Because the taxpayer's requested ruling was not explicit, I had to make certain assumptions to determine if a PLR was adverse: I assumed that requesting taxpayers want to defer (and, if possible, avoid) taxes. Likewise, I assumed that they would want to have tax statuses that achieve those goals (for example, that the taxpayer would want to be an S corporation) and that they would want to avoid filing obligations.[152] At the same time, I compared the facts and representations in the PLR to those assumptions, and revised them when they did not appear to be accurate. For example, PLR 200946023 just states that the taxpayer "request[ed] rulings" under Sections 301 and 305.[153] The PLR holds that, where a real estate investment trust (REIT) gave shareholders a choice to receive a distribution of stock or of cash (of equal value), the total value of the distribution would be treated as a distribution of property with respect to stock under Section 301 (due to Section 305).[154] Given that REITs receive a deduction for dividends paid,[155] I could infer that PLR 200946023 was not adverse.[156]

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five-year property for depreciation purposes in response to a request for a ruling that the property was seven-year property).

[149] I treated PLRs with one independent request and a preemptive request for Section 7805(b) relief against retroactive effect as entirely adverse even if the IRS granted such relief. This appears in seventeen dataset PLRs. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 8328038 (Apr. 11, 1983).

[150] Partially adverse PLRs could be explained by a taxpayer's calculation that the favorable rulings outweigh the adverse consequences of the unfavorable rulings. *Cf.* ABA Exempt Orgs. Comm., *supra* note 130 (noting taxpayers often withdraw individual requests to avoid partially adverse PLRs). Excluding partially adverse PLRs skews my dataset toward single, and otherwise simpler, requests, but request complexity should not change the calculus on adverse PLRs. I intend to explore partially adverse PLRs in future work.

[151] These PLRs often involve Section 368 reorganizations. Although taxpayers typically seek confirmation of tax-free reorganization treatment, sometimes they try to avoid it. *See generally, e.g.*, Lawrence Zelenak, *The Story of* Seagram*: The Step Transaction Doctrine on the Rocks* (describing one such situation), *in* BUSINESS TAX STORIES 263 (Steven A. Bank & Kirk J. Stark eds., 2005); I.R.S. Chief Couns. Mem. 200515019 (Dec. 3, 2004) (discussing another). For these PLRs, I examined the transaction's structure for steps that would be unnecessary if the taxpayer wanted to avoid a Section 368 reorganization. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 202339009 (Oct. 17, 2022) (ruling that "F" reorganization treatment was available where the taxpayer redomiciled through complex mergers and new entities).

[152] *Cf.* Blank, *supra* note 101, at 504 n.318.

[153] I.R.S. Priv. Ltr. Rul. 200946023 (Aug. 11, 2009).

[154] *See* I.R.C. § 305(b)(1); Treas. Reg. § 1.305-1(b)(2) (1973); *id.* § 1.305-2(b) (example 2) (1973).

[155] I.R.C. § 561(a)(1).

If the question of adverseness remained unanswered after thorough review, I classified the PLR as favorable. This ensures that the adverse PLRs in my dataset are clearly adverse, allowing the analysis to focus on the puzzle of adverse PLRs. For example, in PLR 9034004, the taxpayer requested a ruling "concerning whether and to what extent" a trust beneficiary was treated as the owner of trust assets for income tax purposes.[157] The PLR specifies the ratio that applies to determine the portion of the trust assets the beneficiary owns for income tax purposes.[158] But, without more indications about relative tax rates and desires, there was no basis to confidently classify the PLR as adverse. I therefore classified it as favorable.

B. Sources of PLRs

This Section describes my sources of PLRs. Although Section 6110 requires the IRS to make PLRs publicly available, the IRS only posts PLRs released since January 1, 1999, on its website (with limited search capabilities and other wrinkles described in the Appendix).[159] Physical copies of earlier PLRs are available in the IRS reading room in Washington, D.C., with access rules that presume discrete, rather than bulk, requests.[160] Accordingly, following best practice,[161] I relied on commercial databases and, in particular, Westlaw with Checkpoint as a backup and comparator.[162] Pulling the identification numbers of PLRs on Westlaw and Checkpoint indicates that there have been approximately 124,500 PLRs released between January 1, 1977 and December 31, 2024. Figure 1 below displays the number of PLRs released each year in that date range, along with the subset of PLRs each year (totaling ap-

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[156] This requires parsing because taxpayers often request PLRs ruling that Section 305(b) does not apply and Section 302, rather than Section 301, applies to a distribution. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201918009 (Jan. 31, 2019).

[157] I.R.S. Priv. Ltr. Rul. 9034004 (May 17, 1990).

[158] *Id.* Specifically, the PLR dealt with lapses of *Crummey* powers. *See generally* Robert T. Danforth & Howard M. Zaritsky, *Grantor Trusts (Sections 671–679)*, 819-2d Tax Mgmt. Portfolio (BNA) pt. X (discussing *Crummey* powers, derived from *Crummey v. Commissioner*, 397 F.2d 92 (9th Cir. 1968), in detail).

[159] *See Written Determinations*, INTERNAL REVENUE SERV., https://www.irs.gov/written-determinations (last visited Feb. 23, 2025); *Directory irs-wd*, INTERNAL REVENUE SERV., https://www.irs.gov/downloads/irs-wd (last visited Feb. 23, 2025).

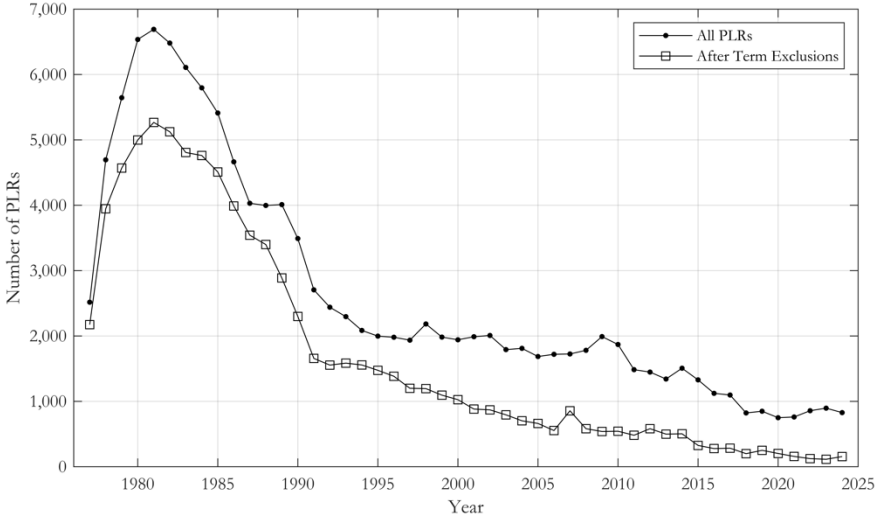
[160] *See* Treas. Reg. § 301.6110-1(c) (as amended in 2012); *see also* Scott v. I.R.S., No. 18-CV-81750, 2021 WL 256418, at *2 ¶ 10 (S.D. Fla. Jan. 26, 2021) (statement from IRS confirming discrete rather than bulk requests).

[161] *See, e.g.*, DYKES, *supra* note 118, at 24–25; Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183, 220 (2012).

[162] Westlaw and Checkpoint are both owned by Thomson Reuters, but their PLR databases are (seemingly) independent.

proximately 81,000) remaining after applying the term exclusions referenced above and specified in the Appendix.

Figure 1: PLRs Over Time (1977–2024)



Fully examining PLRs over time is beyond the scope of this Article, but overall trends, and some initial hypotheses about their causes, merit brief mention. The initial steep increase in the late 1970s could reflect increased awareness of PLRs resulting from the push to make them public.[163] The subsequent decrease in the mid-1980s might be a byproduct of redacted PLR releases along with Code revisions that eliminated significant ambiguity.[164] The declines in the early 1990s may well be due to the imposition of user fees[165] and the IRS discouraging "comfort" PLRs (PLRs where binding authorities direct-

[163] The IRS apparently issued approximately 10,000 substantive PLRs in 1974. *See* STAFF OF JOINT COMM. ON TAX'N, *supra* note 107, at 301–02. Accordingly, the steep increase could also reverse a temporary decline in PLRs following the IRS's proposal to disclose unredacted PLRs in December 1974. *See* Proposed Procedural Rules with Respect to Public Inspection of Certain Rulings and Determination Letters, 39 Fed. Reg. 43087 (Dec. 10, 1974) (withdrawn on November 5, 1976, following Section 6110's enactment, *see* 41 Fed. Reg. 48746 (Nov. 5, 1976)). Alternatively, it could reflect database data limitations. *Cf.* INTERNAL REVENUE SERV., 1979 ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE 33 (1979), https://www.irs.gov/pub/irs-soi/79dbfullar.pdf [https://perma.cc/2S5U-2BL9] (stating the IRS resolved over 7,000 PLR requests in FY1979).

[164] In 1981, Congress enacted standard depreciation rules. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 201(a), 95 Stat. 172, 203 (adding Section 168). In 1984, Congress revised Section 367(a), removing mandatory PLRs for outbound property transfers. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, § 131(a)–(c), 98 Stat. 494, 662; H.R. REP. NO. 98-432, pt. 2, at 1307–08, 1319–20 (1984) (discussing ruling requirement and its elimination).

[165] *See* Rev. Proc. 88-8 § 4.03, 1988-1 C.B. 628, 629 (imposing user fees of up to $1,000; fees for typical PLRs were either $300 or $400).

ly answer the question).[166] The decrease in the early 2010s perhaps is attributable to IRS resource constraints, which dampened IRS guidance across the board.[167] Finally, the continued decrease in discretionary PLRs in recent years (even as overall PLR numbers have increased slightly) may follow from further significant user fee increases.[168]

C. Finding Adverse PLRs

Applying the decisions described in Sections A and B, I used three different techniques to delineate convenience samples of PLRs. The PLRs in each sample were manually reviewed to identify adverse PLRs.

The first two approaches rely on Westlaw's approximately 81,000 PLRs that do not include terms indicating they were mandatory. First, to thoroughly investigate contemporary incidence and trends with respect to adverse PLRs, I reviewed every PLR in that subset released between January 1, 2015, and December 31, 2024 (2,068 PLRs).[169] This group contained forty-one adverse PLRs (2%).[170] Second, from the remaining approximately 79,000 PLRs, I randomly selected 5,000 to review (and confirmed that my sample was qualitatively representative).[171] This group contained 172 adverse PLRs (3.4%).

Third, I used targeted terms and connectors searching, both of PLRs and of secondary sources, to identify adverse PLRs. Although adverse PLRs do not all contain any magic words, some phrases (like "adverse ruling") are associated with adverse PLRs.[172] In addition, while doing further research for this Article, I

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[166] *See* Rev. Proc. 89-34, 1989-1 C.B. 917; *see also supra* note 79.

[167] *See* Cummings, *supra* note 113; *see also* Nicholas R. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4872670 [https://perma.cc/UX4Y-UQUL] ("For example, the IRS has experienced a sharp decline in [policymaking] capacity since the early 2010s, which corresponds to reports of a 'brain drain' within the agency.").

[168] *See* Rev. Proc. 2015-1 app. A, 2015-1 I.R.B. 80 (raising user fee to $28,300 from $19,000); Rev. Proc. 2019-1 app. A, 2019-1 I.R.B. 82 (raising user fee to $30,000); Rev. Proc. 2021-1 app. A, 2021-1 I.R.B. 84 (raising user fee to $38,000); Rev. Proc. 2025-1 app. A, 2025-1 I.R.B. 85 (raising user fee to $43,700).

[169] I also reviewed any PLRs released between 2015 and 2024 that appeared in Checkpoint but not in Westlaw.

[170] Only the percentages for the first and second approach (which are out of a subset of the PLR universe) give a rough indication of adverse PLRs' incidence; the third approach was self-selecting.

[171] Intrepid research assistants reviewed 1,800 of these PLRs (overlapping 20% for reliability). In addition to reviewing the other 3,200, I reviewed the PLRs they identified as adverse or as requiring additional examination. I confirmed that my sample was qualitatively representative by comparing its distribution by year against the year-by-year distribution of the broader scraped PLR dataset of approximately 79,000 PLRs.

[172] *See* Appendix.

reviewed approximately 1,000 PLRs.[173] All told, this resulted in review of over 3,000 additional PLRs and yielded 311 adverse PLRs (approximately 10%).[174]

III. EXAMINATION OF ADVERSE PLRS

The three approaches described in Part II.C yielded a dataset of 473 adverse PLRs, which the remainder of this Article examines.[175] Section A of this Part presents the basic parameters and characteristics of these adverse PLRs.[176] Section B considers the particular importance of adverse PLRs based on evidence developed using this dataset.[177]

A. The Basic Attributes of the Adverse PLR Dataset

The 473 adverse PLRs includes a variety of fact patterns spanning substantive areas of tax law[178] and types of taxpayers.[179] The dataset includes at least one adverse PLR released each year from 1977 through 2024, and the dataset's distribution of adverse PLRs is consistent with the distribution of all PLRs over that period.

An overwhelming majority of the adverse PLRs in the dataset—401 (84.8%)—include income tax questions and provisions. A distinct minority involve estate tax (30, 6.3%), gift tax (29, 6.1%), and excise taxes (23, 4.9%).[180] Given that income taxes are more common than other taxes, this is unsurprising. In terms of the specific tax questions addressed, seventeen adverse PLRs (3.6%) involve reporting obligations, twenty-nine (6.1%) involve withholding obligations, and seventy-five (15.9%) involve retirement plans (including ERISA).

Nearly half of the PLRs in the dataset (229, 48.4%) involve businesses, and approximately a third (158, 33.4%) involve individuals. Another thirty-six (7.6%) involve tax exempt organizations (including churches), nine (1.9%)

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[173] For example, I investigated the prevalence of favorable PLRs begetting nearly identical favorable PLRs, *see infra* notes 197–203 and accompanying text, examined PLRs linked on the IRS website as aids to taxpayers, *see supra* note 122, and reviewed myriad PLRs discussed and/or cited in secondary sources that address and/or cite the adverse PLRs in my dataset. For further details, see the Appendix.

[174] Random sampling and targeted searching overlapped for fifty-one PLRs. Table 3 in Part IV classifies those overlapping PLRs as being found through random sampling.

[175] Research assistants helped code the adverse PLRs, and I confirmed each one fully met the requirements described in Part II.A and the Appendix.

[176] *See infra* notes 178–181 and accompanying text.

[177] *See infra* notes 182–204 and accompanying text.

[178] Income, gift, estate, and excise taxes.

[179] Individuals, businesses, corporations, S corporations, partnerships, unincorporated businesses, tax-exempt organizations, insurance companies, government entities, and non-U.S. residents.

[180] Some PLRs involve more than one of these categories and are counted in each.

involve S corporations, seven (1.5%) involve partnerships, thirty-six (7.6%) involve government entities, thirty-one (6.6%) involve public utilities, and fifty-one (10.8%) involve trusts or estates.[181]

B. Adverse PLRs Are Particularly Important

As described in Part I.C, despite Section 6110(k)(3)'s prohibition on using PLRs as precedent, taxpayers and practitioners pay close attention to PLRs. Because adverse PLRs are comparatively rare and buck conventional wisdom, logically they should attract disproportionate attention. Anecdotally, this is certainly the case.[182] This Section uses insights from the dataset to highlight three additional indications of adverse PLRs' outsized import.

First, large accounting firms should be aware of adverse PLRs and their audits are structurally likely to account for adverse PLRs. Accounting firms examine financial statements and determine whether they are "fairly stated and comply in all material respects" with U.S. generally accepted accounting principles (GAAP).[183] Unsurprisingly, taxes are "always" material,[184] and in any event GAAP requires evaluating whether tax positions are uncertain and reporting the business's tax benefits associated with any uncertain positions.[185] Furthermore, a handful of accounting firms audit the vast majority of commercial wealth in the United States,[186] those accounting firms have central teams

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[181] A handful of adverse PLRs (fewer than five each) involve cooperatives, REITs, unincorporated associations, and tribes.

[182] *See, e.g.*, Jerald David August, *LTR 9113009: An Ailing Ruling in Need of a Cure (What Is the Proper Diagnosis for Guarantees?)*, 54 TAX NOTES 215, 216 (1992) ("Although private letter rulings . . . generally do not receive much notoriety and attention[,] . . . [c]omments immediately appeared in professional publications expressing both surprise and concern over the conclusions reached in the [adverse] ruling . . . .").

[183] *All About Auditors: What Investors Need To Know*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/reportspubs/investor-publications/investorpubsaboutauditors [https://perma.cc/PEL5-SC7V] (June 24, 2002).

[184] Kiridaran Kanagaretnam, Jimmy Lee, Chee Yeow Lim & Gerald J. Lobo, *Relation Between Auditor Quality and Tax Aggressiveness: Implications of Cross-Country Institutional Differences*, AUDITING: J. PRAC. & THEORY, Nov. 2016, at 105, 109.

[185] Michael C. Swenson, *Understanding the Mechanics of FASB ASC Subtopic 740-10*, TAX ADVISER (Jan. 1, 2020), https://www.thetaxadviser.com/issues/2020/jan/fasb-asc-subtopic-740-10.html [https://perma.cc/GYE9-V225]. Since 2011, many audited businesses must also file Form 1120 (Schedule UTP) with the IRS describing these tax positions. *See Uncertain Tax Positions—Schedule UTP*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/corporations/uncertain-tax-positions-schedule-utp [https://perma.cc/MA65-BZXH] (Sept. 11, 2024).

[186] *See generally* AUDIT ANALYTICS, WHO AUDITS PUBLIC COMPANIES (2023), https://auditanalytics.com/doc/2023_Who_Audits_Public_Companies_Report.pdf [https://perma.cc/D9ZW-9XHJ]; *Fortune 500 Auditors List*, BIG4 ACCT. FIRMS, https://big4accountingfirms.com/fortune-500-auditors-list/ [https://perma.cc/JL4N-9ZMR].

of experts advising on the details of tax law,[187] and IRS audit rates are quite low.[188] Accordingly, accounting firms are a primary enforcement mechanism for tax law and the existence of a PLR adverse to businesses should be quickly recognized and disseminated throughout the commercial ecosystem.[189] For example, in 2008 the IRS released a PLR holding that paying incentive compensation to involuntarily terminated, highly compensated employees would typically not be deductible.[190] In the wake of that PLR, a leader of Ernst & Young LLP warned that it could make contrary reporting positions uncertain, requiring financial statement disclosure.[191]

Second, third parties are more likely to cite adverse PLRs.[192] As elsewhere, citations are a rough proxy for significance and impact.[193] Because of Section 6110(k)(3), citations are predominantly in secondary sources like articles, practitioner guides, CLE materials, and treatises. Table 1 and Table 2 below compare the citation rates of the adverse PLRs to the favorable PLRs in the 5,000 PLR random sample (1977–2014) and the chronological set of PLRs (2015–2024).[194]

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[187] *See, e.g.*, Sanaz Aghazadeh, Mary Kate Dodgson, Yoon Ju Kang & Marietta Peytcheva, *Revealing Oz: Institutional Work Shaping Auditors' National Office Consultations*, 38 CONTEMP. ACCT. RSCH. 974, 978 (2021).

[188] *See* INTERNAL REVENUE SERV., DATA BOOK 2023, at 33 (2024), https://www.irs.gov/pub/irs-pdf/p55b.pdf [https://perma.cc/5Y9T-4ZNZ] ("[T]he IRS has examined 0.44 percent of individual returns filed and 0.74 percent of corporation returns filed . . . ."); *see also* Kathleen DeLaney Thomas, *The Psychic Cost of Tax Evasion*, 56 B.C. L. REV. 617, 619 (2015) ("[R]aising the audit rate beyond its current level is generally seen as politically infeasible.").

[189] *See* Lee A. Sheppard, *The Fashion in Partners' Inside Basis Audits*, 181 TAX NOTES FED. 387, 390 (2023) ("But the handful of large accounting firms that sign hedge fund tax returns all agree on these positions, and what is the IRS going to do about it?"); Leigh Osofsky, *Some Realism About Responsive Tax Administration*, 66 TAX L. REV. 121, 153–54, 163 (2012); Luigi Alberto Franzoni, *Independent Auditors as Fiscal Gatekeepers*, 18 INT'L REV. L. & ECON. 365, 370–71 (1998). A similar dynamic occurs with tax return preparers, who have independent obligations of care and knowledge of tax law (including PLRs). *See, e.g.*, I.R.C. § 6694; Treas. Reg. § 1.6694-1(b)(2) (as amended in 2009).

[190] I.R.S. Priv. Ltr. Rul. 200804004 (Sept. 21, 2007).

[191] Sam Young, *Accounting Standards Complicate Compensation Ruling*, 118 TAX NOTES 1284, 1284–85 (2008).

[192] Citation data pulled from Westlaw on January 20, 2025.

[193] *See, e.g.*, W. Michael Schuster & Kristen Green Valentine, *An Empirical Analysis of Patent Citation Relevance and Applicant Strategy*, 59 AM. BUS. L.J. 231, 239–40 (2022); Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1515 (2012) (noting that citation counts, unlike download numbers, indicate that "the paper was actually read, thought well of, and used"); Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 416 (2010) ("Citations function as the 'currency of the legal system,' so that their measure represents a central measure for the legal system.").

[194] To avoid skewing the data, this excludes PLRs found exclusively through targeted searching, which included secondary sources. In addition, for consistency (since the citations data are pulled from Westlaw) this omits the (approximately) nine PLRs between 2015 and 2024 that (1) do not in-

Table 1: Random Sample of 5,000 1977–2014 PLRs[195]

Cited	Adverse (n=172)	Non-Adverse (n=4,828)
Zero Times	44.19%	63.4%
1–5 Times	33.72%	27.28%
6–10 Times	9.88%	4.52%
11–25 Times	5.23%	3.25%
26–50 Times	6.4%	1.06%
>50 Times	0.58%	0.5%
Mean	4.87	2.19
Median	1	0
Mode	0	0

Table 2: 2015–2024 PLRs[196]

Cited	Adverse (n=41)	Non-Adverse (n=2,027)
Zero Times	0%	5.13%
1–5 Times	46.34%	70.99%
6–10 Times	17.07%	12.88%
11–25 Times	29.27%	10.26%
26–50 Times	7.3%	0.74%
>50 Times	0%	0%
Mean	9	4.5
Median	6	3
Mode	1	2

These data demonstrate that it is more likely that an adverse PLR will be cited frequently and much more likely that it will be cited very frequently. By implication, any given adverse PLR will likely be more significant and impactful than a favorable PLR.

Third, adverse PLRs can dramatically change third-party taxpayer behavior regarding subsequent PLRs. Within the universe of PLRs, some PLRs ap-

clude any of the excluded mandatory terms, *see supra* Part II.C & *infra* Appendix, and (2) are on Checkpoint but are not on Westlaw.

[195] Statistically significant using two-sided Kolmogorov-Smirnov test at 1% level ($p<0.00001$), applied to dataset of citations (unbinned). These citations data are also statistically significant using a one-sided t test (two-sample, unequal variance) at 1% level ($p=0.000271$).

[196] Statistically significant using two-sided Kolmogorov-Smirnov test at 1% level ($p=0.0012$), applied to dataset of citations (unbinned). These citations data are also statistically significant using a one-sided t test (two-sample, unequal variance) at 1% level ($p=0.0011$).

pear to be carbon copies of prior PLRs.[197] For example, wealthy individuals carefully form and structure trusts so that when they transfer their property to the trusts, they are no longer subject to income tax with respect to the property, the transfer does not trigger federal gift tax, and the property remains in their estate (receiving a basis step-up at death).[198] The IRS first released a PLR blessing this technique in 2001.[199] Over the next nineteen years, the IRS released approximately 150 additional PLRs to the same effect.[200] This is not surprising—once there is one favorable PLR, other taxpayers can confidently request PLRs to lock in the full benefit of the favorable ruling (and there is some de facto safety in numbers).[201]

If PLRs were all given the same weight, one adverse PLR would not outweigh tens or hundreds of favorable PLRs. Furthermore, to the extent that an adverse PLR reveals where the IRS draws a line, one adverse PLR should not preclude taxpayers from continuing to request and receive favorable PLRs with facts that mirror previous favorable PLRs and shy away from the facts of the adverse PLR.[202] But instead, the issuance of an adverse PLR dramatically reduces, and in some instances eliminates, PLRs on the matter. For example, between 1977 and 2011, the IRS released over fifty overwhelmingly favorable PLRs confirming that taxpayers who met a technical requirement needed to be able to issue tax-exempt bonds. In 2011, the IRS released an adverse PLR holding that the requesting taxpayer did not meet the technical requirement; since then, the IRS has only released two PLRs on the requirement.[203] Despite

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[197] *Compare, e.g.*, I.R.S. Priv. Ltr. Rul. 201908003 (Oct. 10, 2018), *with* I.R.S. Priv. Ltr. Rul. 201925005 (Dec. 17, 2018). Fully examining this dynamic is beyond the scope of this Article, but it merits further exploration.

[198] *See, e.g.*, Aaron T. Anderson, Note*, Resolving Unfairness in a Fair Way: How the Grantor Trust Rules Should Be Reformed*, 48 BYU L. REV. 2311, 2323–25 (2023); Grayson M.P. McCouch, *Adversity, Inconsistency, and the Incomplete Nongrantor Trust*, 39 VA. TAX REV. 419, 425–48 (2020).

[199] I.R.S. Priv. Ltr. Rul. 200148028 (Aug. 27, 2001).

[200] *See* Rev. Proc. 2021-3 § 5.01(9)–(10), 2021-1 I.R.B. 154 (adding technique to no-rule list).

[201] Similarly, in 2007, the IRS released a PLR broadly construing the worthless stock deduction. I.R.S. Priv. Ltr. Rul. 200710004 (Dec. 5, 2006). In the following twelve years, before the IRS added it to the no-rule list in 2018, Rev. Proc. 2018-3 § 3.01(31), 2018-1 I.R.B. 133, the IRS had issued at least ten additional PLRs to the same effect.

[202] *See* Cummings, *supra* note 117, at 341 ("[I]ndicators that a ruling may not be bankable: . . . (3) multiple rulings on the same issue for other taxpayers; if you don't find them, the one you did find may be an anomaly . . . ."); *see also* Christina Arumi & Kendal Sibley, Panel at the Practising Law Institute Real Estate M&A and REIT Transactions 2020: Tax Reform a Year Later: What's Changed and What's Stayed the Same; Evaluating the Current Tax Landscape for REITs and Dealing with the Issues (No. 294546, Jan. 7, 2020); Gregg Polsky & Kathleen DeLaney Thomas, *Taxing Compensatory Stock Rights Transferred in Divorce*, 93 N.C. L. REV. 741, 773 (2015).

[203] A similar pattern occurred with PLRs under Section 118: 110 overwhelmingly favorable PLRs between 1977 and 2014, an adverse PLR in 2014, I.R.S. Priv. Ltr. Rul. 201451007 (Sept. 5, 2014), and no subsequent PLRs (other than requests predating PLR 201451007).

both subsequent PLRs being favorable, neither negated the adverse PLR's chilling effect.

Risk aversion explains some, but not all, of this pattern. After all, by issuing an adverse PLR, the IRS publicly disagrees with practitioner views on a question and naturally gives practitioners pause about future requests.[204] But the extent of this dynamic indicates that taxpayers and practitioners treat adverse PLRs as more functionally precedential than favorable PLRs (or even numerous favorable PLRs). Given the significant structural forces that make adverse PLRs rare, third parties reasonably attribute particular significance to the IRS staking out a position contrary to their expectations and taxpayers accepting a PLR reflecting such position.

IV. STRATEGIC USES OF ADVERSE PLRS

With the particular importance of adverse PLRs in mind, I qualitatively examined and coded each adverse PLR in the dataset to identify patterns and trends. From this, I identified four plausible explanations for why adverse PLRs exist, which this Part presents. First are human foibles, discussed in Section A,[205] including apathy (and/or stubbornness)[206] and counsel oversights.[207] Second are external forces and facts, presented in Section B,[208] including situations where PLRs are mandatory for non-federal tax reasons[209] and where requesting taxpayers have low personal stakes.[210] Third, presented in Section C,[211] is the assurance value requesting taxpayers obtain through adverse PLRs' incremental clarity. This includes PLRs that reflect sub-optimal but not awful outcomes[212] and situations where forcing guidance could resolve disagreements.[213] Fourth, Section D addresses the "highly strategic" leveraging of the de facto normative force of adverse PLRs.[214] This includes taxpayers accepting adverse PLRs to instigate public backlash[215] or to level competitive playing fields.[216] Part V considers the implications of these explanations.

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[204] *See, e.g.*, Robert W. Wood, *Were Sex Abuse Payments for Physical Injuries or Sickness?*, 104 TAX NOTES 56, 57 (2004).

[205] *See infra* notes 220–237 and accompanying text.

[206] *See infra* notes 220–231 and accompanying text.

[207] *See infra* notes 232–237 and accompanying text.

[208] *See infra* notes 238–251 and accompanying text.

[209] *See infra* notes 239–244 and accompanying text.

[210] *See infra* notes 245–251 and accompanying text.

[211] *See infra* notes 252–273 and accompanying text.

[212] *See infra* notes 254–257 and accompanying text.

[213] *See infra* notes 258–273 and accompanying text.

[214] *See infra* notes 274–358 and accompanying text.

[215] *See infra* notes 274–311 and accompanying text.

[216] *See infra* notes 312–358 and accompanying text.

Before diving in, Table 3 below presents how many adverse PLRs I assigned to each explanation and the method used to find them. At the same time, I want to emphasize that this is a descriptive project that illuminates the existence of a significant number of adverse PLRs and highlights that many of them seem to strategically benefit the requesting taxpayer. My research and qualitative analysis, including inferences and subject to my personal biases,[217] delineated each explanation. Corresponding to the nature of this project, the dataset of adverse PLRs is also not a representative sample because of term exclusions and the use of terms and connectors sleuthing.[218] For these reasons, how many PLRs are categorized in each explanation is directionally relevant and significant, but the precise numbers are inherently tentative and are based primarily on inferences from redacted PLRs. I am also not making causal claims regarding the PLR universe; percentages throughout this Article are for reference and do not support any global inferences regarding PLRs or the general prevalence of any particular strategic behavior.[219]

Table 3

	Random Sample (n=172)	**Chronological** (n=41)	**Terms and Connectors** (n=260)	**Total**
Human Foibles	**55 (32%)**	**3 (7.3%)**	**37 (14.2%)**	**95**
Apathy (or Stubbornness)	51 (29.7%)	3 (7.3%)	32 (12.3%)	86
Counsel Oversights	4 (2.3%)	0 (0%)	5 (1.9%)	9
External Forces and Facts	**77 (44.8%)**	**24 (58.5%)**	**119 (45.8%)**	**220**
Non-Tax Mandatory	22 (12.8%)	5 (12.2%)	37 (14.2%)	64
Low Personal Stakes	55 (32%)	19 (46.3 %)	82 (31.5%)	156
Assurance Value	**30 (17.4%)**	**6 (14.7%)**	**57 (21.9%)**	**93**
Sub-Optimal but Not Awful	8 (4.7%)	4 (9.7%)	19 (7.3%)	31
Forcing Guidance	22 (12.8%)	2 (4.9%)	38 (14.6%)	62
Normative Force	**10 (5.8%)**	**8 (19.5%)**	**47 (18.1%)**	**65**
Inciting Backlash	6 (3.5%)	2 (4.9%)	29 (11.2%)	37
Impacting Competitors	4 (2.3%)	6 (14.6%)	18 (6.9%)	28

[217] Given that PLRs are redacted, such inferences are necessary and unavoidable.

[218] *See supra* note 145.

[219] The one narrow exception is the analysis in Part III.B, *supra*, analyzing the comparative importance of adverse and favorable PLRs. *See also supra* note 170.

A. Human Foibles

The default explanation for adverse PLRs is that they are aberrant one-offs resulting from apathy or mistakes. Examining my dataset indicates that this assumption is not wrong, but it is far from the whole story. This Section briefly considers these fairly unsurprising explanations.

1. Apathy (or Stubbornness)

Facing an imminent adverse PLR, perhaps the simplest thing taxpayers can do is forgo the transaction or tax position.[220] Once the PLR request is moot, the cost of an adverse PLR is dramatically lower, logically making taxpayers indifferent.[221] Taxpayers are likely most comfortable walking away when the PLR request impacts them alone, where they are individuals not subject to fiduciary duties or accountant auditors (and who do not compile or release financial statements), and where a favorable PLR would essentially be a pleasantly surprising windfall.[222]

Although PLRs would not state that a transaction or position has been abandoned,[223] eighty-six PLRs (18.2%) in the dataset involved situations where the law seemed to be particularly clear.[224] In addition, these PLRs typically do not contain any legal arguments supporting the taxpayer's position.[225] For example, PLR 201741012 holds that an individual recognized income when corporations controlled by the individual declared dividends, even

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[220] *See* Givati, *supra* note 1, at 162. Walking away is probably even easier than taking the time to withdraw.

[221] Given audit risk, *see supra* note 10, the cost is probably not eliminated entirely. *See also* SALTZMAN & BOOK, *supra* note 84, ¶ 3A.03[5][b] ("[I]f the transaction proposed in the request has been completed or canceled, it may be appropriate to withdraw the request because the harm of an adverse ruling may outweigh the benefit of a favorable ruling."). Nevertheless, any audit would likely be brief because the transaction did not occur and/or the taxpayer did not take the position. *See* Treas. Reg. § 601.201(l)(2) (1967) (limiting local office's examination to confirming factual accuracy); *supra* note 85 and accompanying text.

[222] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 202311001 (July 15, 2022) (denying deduction for standard infant formula); I.R.S. Priv. Ltr. Rul. 201706006 (Nov. 7, 2016) (rejecting taxpayer's requested ruling that, despite divorce judgment stating that payments are non-deductible, such payments are deductible alimony).

[223] When submitting a PLR request, taxpayers must swear under penalties of perjury that their questions are not "hypothetical," *see* Rev. Proc. 2025-1 § 7.01(16), 2025-1 I.R.B. 31, but there appears to be no obligation to reaffirm that during the PLR process, *see id.* §§ 8.05–8.07, at 41–43 (describing post-request submissions and attestations by requesting taxpayers without requiring reaffirmance of initial attestations before PLR issuance); SALTZMAN & BOOK, *supra* note 84, ¶ 3A.03[5][b] (stating that withdrawal of a PLR request "may," in the requesting taxpayer's discretion, be appropriate if the transaction is cancelled); *see also supra* Part I.A.

[224] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200029018 (Apr. 18, 2000) (applicable law is "well established").

[225] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200129021 (Apr. 19, 2001) ("[Taxpayer] cites no authority for the ruling requested.").

though the dividends were not distributed until several years later.[226] The taxpayer cited no legal authority supporting income deferral, and constructive receipt (the underlying controlling doctrine) had been black letter law for decades.[227] This combination—an individual requesting taxpayer, clear law, and minimal legal basis for an aggressive position—is consistent with being willing to walk away after rolling the dice by submitting a request. Unsurprisingly, seventy-one of these eighty-six PLRs involve individuals, who tend to be less risk averse than commercial enterprises and tend to ask questions that solely implicate their tax positions, making it easy to drop the position.[228]

Additionally, some of these PLRs have sympathetic facts and equities supporting the taxpayers (even if the law does not). For example, in PLR 200129021, a wholly owned S corporation requested a PLR exempting sales proceeds from Section 7519's punitive regime because the sale was a one-time event (and to avoid purported over-taxation).[229] And in PLR 8934014, the taxpayer wanted to avoid reducing her social security benefits so she asked her clients to donate the consulting fees they owed her to charities (the IRS held that she still had taxable income).[230] In these situations, taxpayers may, rather than being apathetic, be stubborn and/or emotionally committed to completing the PLR process.[231] A stubborn taxpayer and an apathetic taxpayer could well receive the same redacted PLR, so stubbornness could also explain some of these PLRs.

2. Counsel Oversights

Sometimes, adverse PLRs exist because lawyers mess up. Perhaps the most straightforward error is ignoring IRS communications. Nine PLRs (1.9%) stated that the attorneys failed to respond to IRS warnings that it was prepared

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[226] I.R.S. Priv. Ltr. Rul. 201741012 (July 11, 2017).

[227] *See* Treas. Reg. § 1.301-1(c) (2021) (originally enacted as Regulation Section 1.301-1(b) in 1955, T.D. 6152, 20 Fed. Reg. 8875, 8877 (Dec. 3, 1955)); BORIS BITTKER & JAMES EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 8.05[2] (West 2024) ("Distributions are includable in the shareholder's gross income on the earlier of actual or constructive receipt.").

[228] *Cf.* Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 116 n.178 (2015) ("But on net, economically motivated and sophisticated providers are less likely to be susceptible to behavioral bias than patients."). Although rarer, (human-controlled) businesses can be apathetic (or stubborn) too. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200041023 (July 17, 2000) (requesting taxpayer, a corporation, concedes that its proposed transaction will be taxable, contrary to its requested ruling).

[229] I.R.S. Priv. Ltr. Rul. 200129021 (Apr. 19, 2001).

[230] I.R.S. Priv. Ltr. Rul. 8934014 (May 23, 1989) (the public, redacted PLR is silent on the taxpayer's gender). Another example of this is PLR 8851022, which held that damages arising from employer's age discrimination are income. I.R.S. Priv. Ltr. Rul. 8851022 (Sept. 23, 1988).

[231] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 202311001 (July 15, 2022) ("Taxpayer's representative informed us that Taxpayer wants an adverse ruling letter.").

to issue adverse PLRs (unless the requests were withdrawn).[232] Other missteps are unlikely to be memorialized in PLRs, but one could imagine several possibilities. Attorneys may be unaware that standard practice is to withdraw a request for a PLR once the IRS makes its unfavorable position known. They may also fear that withdrawing could annoy the IRS, increasing the odds of an audit or other retaliation.[233]

Attorneys may allow clients to accept adverse PLRs because, as formally described, the consequences of an adverse PLR are not meaningfully different than those upon withdrawal. In both cases, the local office that will process the taxpayer's return could be notified.[234] In practice, however, tax practitioners intimately familiar with PLR procedures doubt that the notification process is effective (or occurs at all) for withdrawn PLRs.[235] By contrast, like all PLRs, adverse PLRs are always sent to local offices,[236] where, given their obligation to follow PLRs, adverse PLRs are much less likely to be overlooked.[237]

B. External Forces and Facts

A significant number of adverse PLRs—220 (46.5%)—involve situations where external forces and facts explain their existence. For example, obtaining a PLR could be mandatory for some non-federal tax reason.[238] Likewise, various factors reduce a PLR's adverse impact on a requesting taxpayer, including arrangements like indemnification where requesting taxpayers do not bear much (or any) of the economic burden of the adverse PLR. This Section presents these explanations.

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[232] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 9031033 (May 8, 1990); I.R.S. Priv. Ltr. Rul. 8243053 (July 26, 1982); I.R.S. Priv. Ltr. Rul. 7837034 (June 15, 1978).

[233] *See* Maureen J. Power, *ABA Tax Section Meeting—Letter Ruling Process Isn't Ticket to Audit, Officials Say*, 83 TAX NOTES 794, 794 (1999) (noting that, despite IRS statements that they "do[] not use the PLR process as a way to single out taxpayers for audit," "[p]ractitioners . . . suspected otherwise"); *see also supra* note 10 (discussing PLRs and the likelihood of subsequent audit).

[234] *Compare* Treas. Reg. § 601.201(j) (1967) (local office notified if PLR request is withdrawn), *with id.* § 601.201(l)(2) (local office must determine whether taxpayer has acted in accordance with existing PLRs). *See also* Wood, *supra* note 204, at 57 ("[T]he local IRS field office will frequently (if not always) be notified of a ruling request withdrawal."); Cauble, *supra* note 10, at 452.

[235] *See* Power, *supra* note 233, at 794 (describing IRS Official's statement that "the field tends not to follow up on that information" and "there are no procedures" to follow up with field agents); PLR TM Portfolio, *supra* note 70, pt. III.H.3 cmt. ("The general understanding is . . . the Associate Office rarely furnishes its views to a field office after a withdrawal."); *see also infra* Part V.B.2.

[236] *See* Rev. Proc. 2025-1 § 8.09, 2025-1 I.R.B. 44 ("The Associate office *will* send a copy of the letter ruling, whether favorable or adverse . . . ." (emphasis added)); IRM 32.3.2.7(1)–(2) (June 14, 2022).

[237] *See supra* Part I.A.

[238] *Cf. supra* Part II.A (discussing situations where federal tax law requires PLRs).

1. Mandatory for Non-Federal Tax Reasons

There are many non-federal tax reasons why a PLR may not be voluntary.[239] Of the PLRs in the dataset, sixty-four (13.5%) had statements indicating that they were mandatory for non-federal tax reasons.

Some statements are quite direct.[240] For example, PLR 201408001 involves a class action settlement agreement that required the financial institution paying claimants to request a PLR holding that such payments did not trigger reporting obligations (the IRS disagreed). The judicial order finalizing the case incorporated the agreement, giving the obligation to request a PLR the force of law.[241] Similarly, PLR 201825003 involved a transfer agreement memorializing an art donation to a museum. The donors intended to avoid gift tax by reserving a life interest in the artwork (thereby purportedly retaining dominion and control). But creatively, the transfer agreement stated that the transfer would be deemed to take effect only once the donors obtained a favorable PLR confirming that the transfer would not trigger gift tax. When PLR 201825003 held that gift tax *was* triggered, the transfer agreement's condition precedent—obtaining a favorable PLR—was not met, meaning there was not a transfer (or gift tax owed) at all.[242]

Other times, there is no direct statement that the PLR is required but instead context indicates that the taxpayer nonetheless feels compelled to obtain the PLR. For example, at least eight PLRs in the dataset involve a special accounting method that public utilities use to receive accelerated depreciation deductions.[243] PLRs considering whether the method's requirements are met often indicate that state-level regulation instigates the request. For example, in PLR 200004038, a public utility sought a PLR in the wake of state deregulation; the IRS held that complying with state law would violate the method's requirements.[244]

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[239] *See, e.g.*, Linda Galler, *Tax Opinion Policies and Procedures*, 75 TAX LAW. 443, 450–51 (2022) (PLRs can satisfy Regulation S-K).

[240] *See* I.R.S. Priv. Ltr. Rul. 201240001 (July 5, 2012) ("The [Settlement and Release] Agreement provides that Entity 1 will request a Private Letter Ruling from the IRS supporting the parties' position."); I.R.S. Priv. Ltr. Rul. 201217001 (Jan. 27, 2012) (using the same language).

[241] I.R.S. Priv. Ltr. Rul. 201408001 (Nov. 13, 2013).

[242] I.R.S. Priv. Ltr. Rul. 201825003 (Mar. 9, 2018); *see also* Sanford Schlesinger & Andrew S. Katzenberg, Panel at the Practising Law Institute 49th Annual Estate Planning Institute: Estate Planning with Artwork (No. 260313, Sept. 24, 2018) (transcript of discussion regarding PLR 201825003).

[243] *See* I.R.C. § 168(i)(9)(A).

[244] I.R.S. Priv. Ltr. Rul. 200004038 (Oct. 26, 1999).

2. Low Personal Stakes

Sometimes, requesting taxpayers do not bear the consequences of adverse PLRs or the adverse PLRs merely confirm, rather than cause, those consequences. Where adverse PLRs impose minimal burden on the requesting taxpayers, requesting taxpayers are incentivized to request a PLR taking an aggressive, favorable position and there is much less reason to withdraw (or even an affirmative desire not to withdraw) despite IRS warnings. This was a particularly common pattern within the dataset, applying to 156 PLRs (33%).

One straightforward situation where requesting taxpayers do not bear the consequences of adverse PLRs is where others indemnify them.[245] For example, at least fifteen dataset PLRs involve utilities agreeing to expand capacity or upgrade equipment at the behest of customers or regulators. Typically, the customers or regulators agree to reimburse the utility's expenses, so when the utility requests a PLR that the reimbursements are nontaxable contributions to capital but the IRS disagrees,[246] the utility is no worse off.[247] Without the PLR, the utilities may face an open dispute with customers or regulators about honoring the indemnification obligation. Other examples do not directly involve indemnification, but nevertheless the tax burden falls on a third party, so the analysis is substantively the same. Examples include banks receiving PLRs stating that they are subject to reporting obligations,[248] estate trustees receiving PLRs stating that estate beneficiaries cannot obtain favorable tax treatment and defer taxes,[249] and employers receiving PLRs regarding the tax consequences that apply to employees as a result of receiving various payments.[250]

A related common situation is where the PLR confirms existing adverse consequences, lowering the stakes on requesting taxpayers' acceptance of adverse PLRs. For example, in PLR 9329016 a retired worker received a pension from a company that declared bankruptcy.[251] In the bankruptcy process, the company purchased an annuity to cover his pension, reported taxable income to him for the cost of the annuity, and withheld income taxes on that amount. The worker asked the IRS to rule that he was not subject to income tax on the

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[245] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 9728052 (Apr. 16, 1997) (taxpayer ultimately indemnified by attorney's malpractice insurer).

[246] *See* I.R.C. § 118.

[247] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201503001 (Sept. 5, 2014); I.R.S. Priv. Ltr. Rul. 201451007 (Sept. 5, 2014).

[248] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201927005 (Apr. 5, 2019); I.R.S. Priv. Ltr. Rul. 201543004 (July 27, 2015).

[249] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201628004 (Mar. 30, 2016); I.R.S. Priv. Ltr. Rul. 200415011 (Jan. 16, 2004).

[250] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 202344010 (Aug. 9, 2023); I.R.S. Priv. Ltr. Rul. 200027059 (Apr. 11, 2000).

[251] I.R.S. Priv. Ltr. Rul. 9329016 (Apr. 26, 1993).

cost of the annuity, but the IRS held that such cost was taxable income subject to withholding. Given that withholding had already occurred, the adverse PLR merely confirmed the already-adverse status quo.

C. Assurance Value

Ninety-three dataset adverse PLRs (19.7%) involve situations where requesting taxpayers obtain valuable incremental clarity, albeit adverse clarity, from adverse PLRs.[252] In other words, adverse PLRs counteract uncertainty.

As an initial matter, it is important to underscore that an adverse PLR's "certainty" is much weaker than a favorable PLR's certainty. Although favorable PLRs and adverse PLRs have the same literal effect—they presumptively bind IRS offices when processing requesting taxpayers' tax returns—only favorable PLRs provide an obvious, guaranteed safe path forward (i.e., following the PLR). Adverse PLRs, by contrast, leave requesting taxpayers with numerous uncertain decisions to make: proceeding with the transaction as is, modifying the transaction,[253] or abandoning the transaction; if they proceed as is, reflecting the adverse PLR's consequences on their tax returns or instead reporting as they initially desired; if they report as they initially desired, attaching or not attaching the contrary PLR to their tax returns; if they reflect the adverse PLR's consequences on their tax returns, filing an amended tax return and claim for refund to challenge the PLR; and if audited, challenging the audit determination (and deciding how to do so).

Nevertheless, even if an adverse PLR brings only weak certainty, it does bring some clarity and insight by providing an answer—the IRS's answer—to the requesting taxpayers' questions. Two paradigms emerged where this valuable assurance seemed to explain taxpayers' acceptance of an adverse PLR: first, the PLR was adverse but not as bad as it could have been and second, the adverse PLR provided guidance on open questions with otherwise extremely limited guidance, thereby potentially resolving (or preempting) concrete disagreements. This Section considers each paradigm in turn.

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[252] A few others have suggested this rationale in passing. *See* Goodman, *supra* note 94, at 94 ("[T]he effect of an adverse ruling stems from the certainty that the taxpayer will have to litigate in order to obtain favorable tax consequences."); Norman A. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 4 (1954) (discussing how adverse PLRs "at least eliminate[] the surprise" years later on audit, make taxpayers "more fully aware . . . of the risks or problems," and give them time to prepare for litigation). I thank Emily Cauble for highlighting this.

[253] Requesting taxpayers are unlikely to have a workable alternative structure unless the law or facts have changed. *See* Rev. Proc. 2025-1 § 8.03, 2025-1 I.R.B. 41 (considering alternatives in PLR process).

1. Sub-Optimal but Not Awful

Sometimes, the adverse PLR served up by the IRS is entirely adverse but does not take a maximally unfavorable position.[254] As a result, accepting the PLR leverages the IRS's being (presumptively) bound to their PLRs. That is, the adverse PLR locks in an only moderately negative outcome and protects the requesting taxpayer against the risk of additional liability, even if the IRS office processing (and auditing) the requesting taxpayer's tax return might have pursued a worse characterization. Depending on the aggressiveness of the taxpayer's position and the downside risk of a maximal position relative to a moderately negative one, the adverse PLR could be quite valuable.

There are thirty-one PLRs in the dataset (6.6%) where the adverse outcome is not maximally unfavorable. For example, PLR 201811002 holds that a disproportionate split of a gift by parents to their children is not respected for generation-skipping transfer tax purposes, but confirms that it is respected for general gift tax purposes.[255] Similarly, PLR 200532025 holds that a casino cannot deduct all of a winner's entry fees from a year when determining reportable income but can deduct all of the entry fees associated with tournaments in which the payee received a prize.[256] And PLR 9546022 rejected a long-haul trucking company's requested ruling that it could use the federal per diem rate to determine expenses that drivers were deemed to have substantiated (and, therefore, were deductible), but provided that the company could use the federal meal and incidental expense rate instead.[257] These taxpayers likely would have *preferred* favorable PLRs, but the adverse PLRs they received were probably better than no PLR at all.

2. Forcing Guidance (Perhaps) to Resolve Disagreements

Where PLRs address issues of first impression, even adverse insight may well be especially valuable.[258] Scholars have recognized that tax law uncertain-

[254] These PLRs are distinct from partially adverse PLRs. *Cf. supra* Part II.A (discussing partially adverse PLRs). In a partially adverse PLR, the requesting taxpayer had more than one request, and the IRS was favorable to some and adverse to the rest. In these PLRs, by contrast, the IRS's position on each taxpayer request is adverse (i.e., it disagrees with the taxpayer on everything) but, crucially, the IRS could have taken a different, equally adverse position that would have had even worse tax consequences for the requesting taxpayer.

[255] I.R.S. Priv. Ltr. Rul. 201811002 (Nov. 27, 2017).

[256] I.R.S. Priv. Ltr. Rul. 200532025 (May 3, 2005).

[257] I.R.S. Priv. Ltr. Rul. 9546022 (Aug. 22, 1995).

[258] PLR requests can also encourage the IRS to consider a question. *See generally, e.g.*, Michelle M. Kwon, *Easing Regulatory Bottlenecks with Collaborative Rulemaking*, 69 ADMIN. L. REV. 585 (2017) (advocating for the tax bar to take an active, formal role in regulatory prioritization and formulation).

ty, which is ubiquitous,[259] imposes costs on taxpayers who struggle to plan their affairs in the face of unknown liabilities.[260] Where the taxpayer and either internal stakeholders or external counterparties disagree on the applicable tax rules, and there is minimal (if any) guidance on the question, obtaining an adverse PLR can efficiently resolve those differences and thereby remove the cost of uncertainty (and attendant disputes).

PLRs stand out as a particularly fruitful source of guidance for two reasons, even though PLRs provide formally limited guidance[261] and the IRS provides more precedential guidance in a vast array of formats.[262] First, as the IRS has shifted in the past decade or two away from precedential guidance and toward modern informal resources like website FAQs and AI-powered chatbots,[263] the (albeit limited) binding effect of PLRs has become more valuable.

Second, PLRs empower taxpayers to (for a fee) demand IRS attention and receive (presumptively binding) answers to their concrete tax law questions.[264] In contrast, the formal mechanism through which outsiders can influence other IRS guidance is the formulation of Treasury and IRS's annual Priority Guidance Plan.[265] Each year (since before 2000), the IRS publicly solicits comments regarding identifying and prioritizing guidance projects.[266] Once issued by Treasury's Office of Tax Policy, the Priority Guidance Plan is intended to be a roadmap that makes the agency's areas of focus transparent and predicta-

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[259] *See* Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489, 494 (2011) ("For [complex] taxpayers, uncertainty abounds throughout the tax law."); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 363, 369–70 (2005) (discussing the uncertainty that results from inevitable standards, as opposed to rules, in the tax system).

[260] Leigh Osofsky, *Who's Naughty and Who's Nice? Frictions, Screening, and Tax Law Design*, 61 BUFF. L. REV. 1057, 1113–15 (2013) (analyzing the costs imposed by uncertainty in the tax system and noting asymmetry in the distribution of these costs).

[261] *See supra* note 82 and accompanying text (describing how PLRs are formally binding only on the particular transaction or situation in question).

[262] *See, e.g.*, Rogovin & Korb, *supra* note 5, at 324–25 (reviewing types of "substantive guidance . . . published with the intent that taxpayers can rely upon them" that "represent the collective and considered view" of the IRS, as well as publications that "have a very limited value in predicting the Service's future responses to similar situations").

[263] *See, e.g.*, Blank & Osofsky, *supra* note 115, at 1629.

[264] For example, consider PLR 9043066, in which the IRS held that a tribe was not a "state" for employment tax purposes, so FICA applied to its casino, despite the IRS previously orally telling the tribe FICA did not apply and issuing a refund. I.R.S. Priv. Ltr. Rul. 9043066 (Aug. 2, 1990); *cf.* I.R.C. § 3121(b)(7); Treas. Reg. § 601.201(k) (1967) ("[O]ral opinions or advice are not binding on the Service.").

[265] *See* Emily Shi & Chye-Ching Huang, *Who Speaks Up About the Tax Regulatory Agenda?*, 182 TAX NOTES FED. 2337, 2340–41 (2024).

[266] *See, e.g.*, I.R.S. Notice 2024-28, 2024-13 I.R.B. 720 (inviting recommendations for the 2024–2025 Priority Guidance Plan). Notably, petitions for rulemaking under 5 U.S.C. § 553(e) are routed to this process. IRM 32.1.1.4.1(2) (Aug. 2, 2018).

ble.[267] At the same time, the Priority Guidance Plan process is discretionary and Treasury is under no obligation to respond to submissions or explain its decisions. The Priority Guidance Plan is also not binding on Treasury or the IRS, there is no duty to accomplish the items therein within any amount of time, and it is widely acknowledged that the IRS has a substantial backlog of guidance projects.[268]

One example of taxpayers using PLRs to force guidance is PLR 201034007. In that PLR, the IRS ruled that a hydrogen refueling station used to refill forklifts was not "qualified alternative fuel vehicle refueling property" because forklifts primarily operate in factories and warehouses, not on public roads.[269] Therefore, the requesting taxpayer was not entitled to a tax credit under Section 30C, which was enacted in 2005 and on which there are no Regulations. Although seemingly undesirable, obtaining the adverse PLR could have quieted internal disagreement regarding expense allocation and tax credit eligibility. The adverse PLR also could have resolved an external dispute between the requesting taxpayer and the manufacturer of the refueling station. The manufacturer could have been demanding a higher price based on tax credit availability; with the adverse PLR in hand, the requesting taxpayer could counter with a lower price.[270]

Sixty-two (13.1%) adverse PLRs in the dataset address questions on which there seems to be minimal guidance. Those are the situations where intractable uncertainty could well arise. Some of these PLRs expressly indicate that there is minimal guidance on the taxpayer's question, whereas others only include Code provisions when reciting the applicable law.[271] For example, PLR 200234012 holds that a facility "used in the manufacturing or production

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[267] Beth Shapiro Kaufman, *Demystifying the IRS Guidance Process*, 40 EST. PLAN. 33, 33 (2013).

[268] *See* Shi & Huang, *supra* note 265, at 2341.

[269] I.R.S. Priv. Ltr. Rul. 201034007 (May 18, 2010).

[270] Another example is PLR 202440007. I.R.S. Priv. Ltr. Rul. 202440007 (June 25, 2024). The requesting taxpayer intended to be a REIT since formation, *see infra* notes 326–329 and accompanying text, but its accountant auditor raised concerns that its unexpected lack of assets or income in its first tax year jeopardized such status. The PLR held, for the first time, that lack of assets and gross income does not preclude REIT status (contrary to the taxpayer's requested rulings, which were predicated on its accidental failure to be a REIT). *See, e.g.*, *REIT PLR Clarifies That Lack of Assets and Income in REIT's Initial Year Does Not Lead to REIT Qualification Failure*, PWC (Oct. 24, 2024), https://www.pwc.com/us/en/services/tax/library/reit-plr-clarifies-that-lack-of-assets-and-income-in-reits-initi.html [https://perma.cc/L6E6-EAJ2] ("This has been a lingering question raised over the years . . . . The ruling is welcome guidance and may provide comfort to REITs and tax advisors to the extent a REIT does not have income or assets for a particular year or quarter."); Chandra Wallace, *REITs Can Qualify in Year 1 Despite Lack of Assets and Income*, 185 TAX NOTES FED. 360, 360, 361 (2024) (stating that the PLR "lays [the] issue to rest" and highlighting the helpfulness of the PLR's clarification of the law).

[271] A taxpayer may also want to clarify proposed or temporary Regulations (which could provide regulatory arbitrage opportunities). *See, e.g.*, I.R.S. Priv. Ltr. Rul. 9642041 (July 18, 1996).

of tangible personal property"[272] (a phrase the IRS admits has "no authority" interpreting it) does not include a publisher's graphic design office used to prepare the content of telephone directories.[273]

D. Normative Force

The fourth explanation for adverse PLRs, which I characterize as "highly strategic," involves leveraging PLRs' de facto normative force. In total, sixty-five dataset adverse PLRs (13.7%) are consistent with this explanation, which includes two paradigms. As discussed below, some requesting taxpayers accept an adverse PLR to cause backlash and others do so to level a competitive playing field.

1. Instigating Public Backlash

Adverse PLRs can engender public backlash and ultimately pressure the IRS to change its mind and/or Congress to act.[274] Various IRS positions are out of step with general society, (apparently) fail to account for a significant consequence, or contravene overarching principles of tax law. But to make those positions most salient, taxpayers need a concrete target to highlight the undesirability. In other words, they need the IRS to release an adverse PLR.[275] And once the adverse PLR exists, requesting taxpayers can publicize it and facilitate backlash.[276]

Reaction to adverse PLRs has caused the IRS to withdraw (or revise) controversial holdings[277] or even reverse itself.[278] It has also caused Congress to

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[272] I.R.C. § 144(a)(12)(C)(i).

[273] I.R.S. Priv. Ltr. Rul. 200234012 (May 7, 2002).

[274] *See, e.g.*, Myreon Sony Hodur, Note, *Ball Four: The IRS Walks the Kansas City Royals*, 19 HASTINGS COMMC'N & ENT. L.J. 483, 502 (1997) (describing backlash to PLR 9530024's holding that retaining a professional sports team was part of traditional governmental responsibilities); *cf.* Wood, *supra* note 204, at 56 (describing a PLR holding that sexual assault and harassment recoveries were taxable unless there was observable bodily harm as being "exceptionally unjust" and encouraging the IRS and/or Congress to provide special relief for the victims of the Catholic Church's sex abuse scandal).

[275] *See, e.g.*, Jasper L. Cummings, Jr., *A Profile in IRS Courage*, 88 EXEMPT ORG. TAX REV. 263, 263 (2021) (observing that the requesting taxpayer's lawyers "cannily foresaw that publicity was its best tool to get what it wanted" and "[t]he publicity campaign worked brilliantly").

[276] Consequentialist arguments naturally have more purchase when made through broad backlash than just from the requesting taxpayer.

[277] *See, e.g.*, Michael DeHoff, *Mutual Holding Company Ruling: A Death Knell for Section 809?*, 82 TAX NOTES 42, 42–43 (1999); Keith E. Engel, *Deducting Interest on Federal Income Tax Underpayments: A Roadmap Through a 50-Year Quagmire*, 16 VA. TAX REV. 237, 256 n.87 (1996) ("The Service's reversal may have been prompted by the controversy surrounding a 1992 private letter ruling."); Susan K. Smith & Alfred J. Olsen, *Family Business Succession: Value-Packing "The Freezing Techniques" by Leveraging Valuation Adjustments* (ALI-ABA Continuing Legal Education, July 24, 1997), SC12 ALI-ABA 607, 625; Michael G. Schwartz, *The Gift Tax Consequences of Loan Guaran-*

step in and change the Code.[279] But of course, this strategy is risky, because the government may instead double down and confirm the controversial or adverse holding in universally applicable precedential guidance.[280]

One powerful example of this strategy involves LGBTQIA+ rights.[281] In the late 1990s, the IRS released three PLRs holding that, if employers expanded their insurance coverage to cover employees' domestic partners, the cost of the coverage would be taxable wages to their employees (although the cost of covering heterosexual spouses was not taxable income).[282] Tax experts saw these PLRs as applying settled law.[283] But academics, commentators, and activists seized on them as evidence of discrimination, calling on the IRS to reconsider and Congress and/or the judiciary to intervene.[284] One of these PLRs was even cited by the U.S. Supreme Court in *United States v. Windsor* in 2013 as evidence of the harm caused by the Defense of Marriage Act.[285] More re-

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tees, 58 TAX NOTES 357, 357 (1993) (describing how the IRS had announced plans to revise a controversial, surprising PLR holding that making a loan guarantee would trigger gift tax consequences).

[278] *See, e.g.*, Dustin Stamper, *Treasury Considering Principle-Based Approach to Continuity Regs*, 117 TAX NOTES 665, 665 (2007); LAWRENCE AXELROD, CONSOLIDATED TAX RETURNS § 14:9 (4th ed. 2022) (describing how the IRS promulgated a Regulation that overrode a controversial PLR).

[279] *See, e.g.*, N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON PROVISIONS OF THE NEW TAX LAW AFFECTING TAX-EXEMPT ORGANIZATIONS, REPORT NO. 1396, at 42 (2018), https://nysba.org/NYSBA/Sections/Tax/Tax%20Section%20Reports/Tax%20Reports%202018/1396%20Report.pdf [https://perma.cc/N8Z2-L8VR] (discussing how Section 512(b)(17) sought to reverse PLR 9043039, a partially adverse and "anomalous" PLR). Other adverse PLRs that similarly leverage their normative force but seemingly to impact competitors can also spur congressional action. For example, PLR 201120011, holding that elective, percentage-based payments were not "substantially equal periodic payments" within the meaning of Section 72(q)(2)(D), arose in a competitive context, *see infra* Part IV.D.2, but also generated significant criticism, *see, e.g.*, Susan E. Schechter, *Life Insurance and Annuity Products: Federal Tax Developments (2011)* ("This [PLR's] conclusion is contrary to the widely held view in the industry . . . . The 2011 private letter ruling has drawn criticism."), *in* SECURITIES PRODUCTS OF INSURANCE COMPANIES AND EVOLVING REGULATORY REFORM 2012 ch. 14, 772, 773 (Practising Law Institute, No. 35143, 2012), and was legislatively overruled in 2022, *see* SECURE 2.0 Act of 2022, Pub. L. No. 117-328, § 323(d)(2), 136 Stat. 5356.

[280] *See, e.g.*, *Compensation Failed to Be Performance-Based Under Section 162(m)*, 108 J. TAX'N 183, 183 (2008) (discussing how the IRS issued a precedential Revenue Ruling confirming a PLR's controversial position on performance-based incentives); *see also* Joseph DiSciullo, *Attorneys Concerned About Ruling on Executive Pay Deduction Limit*, 118 TAX NOTES 911, 911 (2008) (describing the uncertainty in the wake of such PLR that prompted this Revenue Ruling).

[281] Another example is PLR 200941003, which denied a taxpayer who had had a double mastectomy a medical expense deduction for infant formula. I.R.S. Priv. Ltr. Rul. 200941003 (July 1, 2009).

[282] I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018 (Jan. 22, 1997); I.R.S. Priv. Ltr. Rul. 9603011 (Oct. 18, 1995). Regulation Section 1.106-1(a) excludes from employee taxable income employer expenses providing health insurance for employee spouses, and Revenue Ruling 58-66, 1958-1 C.B. 60, held that applicable state law governs whether someone is a spouse.

[283] *See, e.g.*, Ryan J. Donmoyer, *Domestic Partner Benefits Ruling Reflects IRS Reliance on State Law*, 70 TAX NOTES 789, 789 (1996).

[284] *See, e.g.*, Patricia A. Cain, *Relitigating* Seaborn*: Taxing the Community Income of California Registered Domestic Partners*, 111 TAX NOTES 561, 562 n.8 (2006) (collecting articles).

[285] 570 U.S. 744, 773 (2013).

cently, in 2021, the IRS released a PLR holding that most of the expenses associated with surrogacy for a male same-sex couple were not deductible medical expenses.[286] This did not go unnoticed; the PLR has been cited as evidence of (continued) discrimination against same-sex couples.[287]

PLR 8913008 provides an example of backlash that caused the IRS to reverse itself.[288] There, a company was planning to lay off employees and wanted to give them an option between receiving cash severance or partial cash severance plus company-sponsored job placement assistance. The IRS held that the company's cost of providing the job placement assistance was taxable income and did not qualify as a non-taxable working condition fringe benefit.[289] Although this was (arguably) a non-controversial application of black letter law,[290] it "predictably resulted in immediate controversy" from the general public, including "outplacement services firms, . . . companies offering such services, and . . . employees."[291] Arguably, given the "obvious social goals" served by outplacement services, the Code should not disincentivize them.[292] Fifteen months later, the IRS withdrew the PLR[293] and subsequently issued binding guidance that outplacement assistance was non-taxable.[294]

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[286] I.R.S. Priv. Ltr. Rul. 202114001 (Jan. 12, 2021); *see also* I.R.C. § 213(d)(1) (defining "medical care"). Technically, PLR 202114001 is only mostly adverse, but the ruling focuses on direct, apparently non-deductible surrogacy expenses.

[287] *See, e.g.*, Jessica Shillings-Barrera, Note, *It Costs What!? To Start a Family? Infertility and the Constitutional Right to Procreate*, 62 SANTA CLARA L. REV. 683, 705 (2022); Natalie Packard, Comment, *IRS Inconsistencies: Section 213 and the Deductibility of Assisted Reproductive Technology*, 54 ARIZ. ST. L.J. 1421, 1423–24 (2022); *cf.* Katherine Pratt, *The Curious State of Tax Deductions for Fertility Treatment Costs*, 28 S. CAL. REV. L. & SOC. JUST. 261, 278–80 (2019) (discussing state of law before PLR 202114001).

[288] I.R.S. Priv. Ltr. Rul. 8913008 (Dec. 21, 1988).

[289] *See* I.R.C. § 132(d) (defining "working condition fringe" benefit).

[290] *See* Temp. Treas. Reg. § 1.132-5T(a)(2) (1985); Wayne M. Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX REV. 977, 1014 (2006); Brant J. Hellwig, *Additional Thoughts on the* Biehl *Decision*, 98 TAX NOTES 1417, 1418–19 (2003); Robert J. Werner, *Tax Consequences of Employer-Paid Outplacement Services*, 71 J. TAX'N 164, 166 (1991).

[291] Mary B. Hevener, *The Administrative "Employer Benefit" Exclusion*, 92 TAX NOTES TODAY 225-85 (1992); *see also* Letter from Ray Rossi and Ed Hatcher, Am. Elecs. Ass'n, to Fred T. Goldberg, Comm'r of Internal Revenue, Internal Revenue Serv. (Feb. 15, 1990), *in* 90 TAX NOTES TODAY 63-24 (1990).

[292] Letter from Patrick E. White, Senior Tax Att'y, Alexander & Alexander Servs., to Kenneth Klein, Assoc. Chief Couns. (Tech.), Internal Revenue Serv. (May 16, 1990), *in* 90 TAX NOTES TODAY 217-20 (1990).

[293] I.R.S. Priv. Ltr. Rul. 9040025 (July 6, 1990).

[294] Rev. Rul. 92-69, 1992-2 C.B. 51; *see also* Carol Susko, *IRS' Pavel Says Two Revenue Ruling Projects Opened on Benefits*, 46 TAX NOTES 887, 887 (1990) (highlighting IRS attorney's announcement of the project that would result in Revenue Ruling 92-69).

In addition to public backlash, PLRs can spark practitioner criticism.[295] For example, on January 31, 2020, the IRS released a PLR holding that a tax-exempt hospital (subject to strict limits on intervening in political campaigns) jeopardized its tax exemption by owning a for-profit subsidiary that established and operated a political action committee.[296] Critical reaction to this ruling was swift, noting in particular that the IRS had previously blessed these arrangements, assuming arms-length dealings and compliance with corporate formalities.[297] And in the (literal) hours and months following the PLR's release, IRS officials repeatedly reassured practitioners that the ruling arose from unique facts and did not jeopardize a widespread corporate structure in healthcare.[298] In an interview, the attorney who represented the healthcare system before the IRS indicated that they did not withdraw the PLR precisely because of how commonplace the arrangement was and the fact that the ruling portended a sea change (despite the IRS's protests to the contrary).[299]

The reactions to PLR 200804004 provide another example of practitioner backlash.[300] There, a company incentivized its executives with performance-based awards and wanted to entice executives by deeming the performance goals to be met if the executives were terminated without cause (or if they left the company on their own volition for "good reason"). Under then-applicable law, performance-based awards of any amount were deductible expenditures for companies,[301] but the IRS held that if the awards were deemed met at separation, they would not be performance-based and would be subject to capped deductibility. Practitioners swiftly protested, focusing on the PLR's inconsistency with the IRS's previous position on performance-based award provi-

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[295] The propriety of IRS responsiveness to the tax bar is beyond scope of this Article but merits further consideration. *See generally, e.g.*, Lee A. Sheppard, *News Analysis: The IRS Should Require Corporate Structure Charts*, 147 TAX NOTES 139 (2015).

[296] I.R.S. Priv. Ltr. Rul. 202005020 (Oct. 31, 2019).

[297] *See, e.g.*, Jasper L. Cummings, Jr., *Charitable Politicking*, 166 TAX NOTES FED. 1883, 1883, 1883–85, 1890–92 (2020).

[298] Fred Stokeld, *Concerns Persist About Ruling on Shared Services Agreements*, 85 EXEMPT ORG. TAX REV. 199, 199 (2020); Paul Streckfus, *EO Tax Journal 2020-100*, EO TAX J. (May 22, 2020), http://eotaxjournal.com/eotj/?m=202009 [https://perma.cc/9D8K-AC9P].

[299] Paul Streckfus, *EO Tax Journal 2020-170*, EO TAX J. (Sept. 1, 2020), http://eotaxjournal.com/eotj/?m=202009&paged=5 [https://perma.cc/ZXZ6-M4LS] (quoting James Joseph (Arnold & Porter, LLP), who requested the PLR, as saying, "both I and the client felt very strongly that if this is what the IRS feels . . . . we don't want people to be caught unexpectedly"); Streckfus, *supra* note 298.

[300] I.R.S. Priv. Ltr. Rul. 200804004 (Sept. 21, 2007).

[301] I.R.C. § 162(a)(1), (m)(4)(C) (2007).

sions.[302] But within a month, because of the backlash, the IRS issued Revenue Ruling 2008-13, codifying PLR 200804004 (albeit prospectively).[303]

For thirty-seven (7.8%) adverse PLRs in the dataset, sparking backlash likely counseled in favor of accepting them. Unsurprisingly, many have meaningful citation counts,[304] and commentary often describes them as controversial.[305] As discussed throughout this Article, PLRs function as semi-precedential common law in tax,[306] bridging the gap between the Code and Regulations and concrete situations.[307] Therefore, just as in litigation, adverse PLRs can "raise[] awareness about existing contradictions between substantive rights, on the one hand, and private or public norms, on the other."[308] By concretizing abstract rules, adverse PLRs can cause people "to recognize gaps that exist between their own normative conceptions of [rules] and the legal status quo" and, as a result, mobilize public pressure and political attention.[309] It is therefore not surprising that requesting taxpayers sometimes accept adverse PLRs to leverage these powerful effects.

Finally, it is worth comparing using adverse PLRs to create backlash with a more traditional route: filing an amended tax return reflecting the desired position, suing if (when) the IRS denies the refund, and publicizing the lawsuit along the way. This approach includes intervention and amicus practice, each of which harness backlash during, rather than just after, the proceedings. Nevertheless, using PLRs to highlight undesirable IRS positions and create backlash is at least as good as the traditional approach for four reasons. First, adverse PLRs are significantly faster than refund litigation. Second, to the extent

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[302] *See, e.g.*, Andrew L. Oringer & Stacy L. DeWalt, *An Encore "Performance" from the IRS—Severing Deductions Under § 162(m)*, 36 COMP. PLAN. J. 52 (2008) (describing "substantial outcry" from practitioners), *reprinted in* 49 TAX MGMT. MEMORANDUM 379, 384 (2008).

[303] Rev. Rul. 2008-13, 2008-1 C.B. 518; *see* Sean M. Donahue, *Section 162(m): Executive Compensation and the Implications of Revenue Ruling 2008-13*, 8 APPALACHIAN J.L. 89, 98 (2008).

[304] The average number of citations is thirty-seven, with a median of twenty-six (as of January 22, 2025). Only four were cited zero times (each released before 1985) and only three others were cited fewer than five times.

[305] *See, e.g.*, Peter Chadwick & Jennifer M. Pagnillo, *Charitable Giving Outright and in Trust* (describing PLR 8824039's view as "controversial" and noting that it has been "roundly criticized"), *in* A PRACTICAL GUIDE TO ESTATE PLANNING IN CONNECTICUT ch. 6, § 6.4.14(a) (B. Dane Dudley ed., 2024).

[306] *Cf.* Solove & Hartzog, *supra* note 115, at 619–23 (delineating attributes of common law in the context of FTC settlement agreements).

[307] Given language's inherent ambiguity, this is unsurprising. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 889 n.37 (1996) ("[T]he interpretation of certain statutes (old statutes or those with relatively open-ended phrasing) resembles the common law more than interpretation of others."); Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 11 (1982) ("[T]he draftsman can control and select *what* will be left ambiguous, but he cannot banish or control the aggregate *amount* of ambiguity.").

[308] Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 834 (2013).

[309] *Id.* at 834–36.

the tax positions are contrary to settled authority and interpretations, filing tax returns that reflect them opens taxpayers up to accuracy penalties.[310] Third, unlike PLRs, litigation is binding on the taxpayer, making the downside risks for the taxpayer more acute and, on the flip side, potentially leading the government to settle (or not deny the refund in the first place). In addition to preempting potential backlash, settlements pointedly do not necessarily represent the IRS's position, muddying the waters of (residual) backlash.[311] Fourth, there is no reason taxpayers cannot use adverse PLRs and subsequent refund litigation to get two bites at the backlash apple. Obtaining adverse PLRs first even lets taxpayers test the backlash waters and perhaps avoid the cost, time, and uncertainty of litigation altogether.

2. Impacting Competitors

Twenty-eight adverse PLRs in the dataset (5.9%) stand out because they do not easily fit into the above patterns. The taxpayers requesting these PLRs are overwhelmingly businesses, represented by seemingly sophisticated counsel.[312] Unlike other strategic PLRs, the questions addressed are generally technical with arguments going either way (so they are not significant deviations from practitioner expectations), the answers are entirely adverse rather than merely suboptimal, and by every indication the requesting taxpayers bear the consequences of the adverse PLR themselves. Their common thread, notably, is that they arise in competitive contexts. That is, there is a marketplace in which the requesting taxpayers are repeat players who—depending on which tax position they take—obtain a competitive advantage or are stuck at a competitive disadvantage.[313] Accordingly, these adverse rulings are described as shutting down industry-specific aggressive tax positions and structuring techniques.[314]

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[310] *See* I.R.C. § 6662.

[311] *See* IRM 31.1.1.1.3 (Aug. 11, 2004) (listing strategic considerations, not present in PLRs, which influence the IRS's litigation positions).

[312] *Cf.* I.R.S. Priv. Ltr. Rul. 9501004 (Sept. 29, 1994) (requesting taxpayer is individual, but PLR directly speaks to business practices in a competitive marketplace); I.R.S. Priv. Ltr. Rul. 9342053 (July 28, 1993) (same).

[313] *See, e.g.*, Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 698 & n.65 (2003) ("When a firm invests in a complicated tax avoidance scheme, its competitors do not benefit. In other words, investments in avoidance mechanisms create excludable, rivalrous goods.").

[314] *See, e.g.*, Steve Howenstein, Lynn Kawaminami, Andrew K. Maude & Mark C. Van Deusen, *Real Estate Investment Trusts*, 742-4th Tax Mgmt. Portfolio (BNA) pt. V.C.7.c [hereinafter REIT TM Portfolio] (suggesting that REITs "should consider the impact" of an adverse PLR on their structures and commercial arrangements); Trevor Potter, Matthew T. Sanderson & Bryson B. Morgan, *IRS Rules Against Deductibility of Charitable Donations Made as Part of PAC Matching Program*, CAPLIN & DRYSDALE (Apr. 27, 2016), https://www.caplindrysdale.com/publication-irs-rules-against-deductibility-of-charitable-donations-made-as-part-of-pac-matching-program [https://perma.cc/FK5X-WLXX]

And therein lies the rub: taxpayers are seemingly using PLRs to negate competitive disadvantages.[315] Imagine a taxpayer losing business to a competitor that offers its customers or counterparties more favorable terms, where the taxpayer (and/or its accountant auditors) believes tax law prohibits those more favorable terms. The taxpayer submits a request for a PLR, asking for permission to provide such favorable terms—but expecting the answer will be "no."[316] By obtaining a PLR, the taxpayer will either receive direct assurance that it can conform its conduct to its competitor or cause the IRS to publicly release its opinion that the conduct is forbidden. Given the normative force of adverse PLRs discussed above, the PLR will likely cause the competitor to cease its conduct (or at least bear adverse financial statement consequences). Either way, the competitive disadvantage will be negated.[317]

At the same time, the fact that taxpayers *could* leverage PLRs' third-party impact to negate competitive disadvantage does not make PLRs an ideal vehicle for achieving that goal. After all, they are formally nonprecedential and are redacted.[318] Tax law's particular features, however, make PLRs a least-worst option for this strategy. Even those who reject tax exceptionalism recognize that myriad tax-specific doctrines limit taxpayers' ability to challenge, directly or indirectly, other taxpayers' aggressive tax positions and tax compliance.[319] For example, the Declaratory Judgment Act excludes federal tax questions[320] and Section 7421 categorically precludes injunctions against the "assessment or collection of any tax."[321] Likewise, unlike other statutory regimes, the Code

("With the issuance of [PLR 201616002], however, it appears the IRS is likely to disagree with taxpayers taking the position that they are deductible as business expenses.").

[315] *See* SALTZMAN & BOOK, *supra* note 84, ¶ 3A.03 ("[O]btaining an unfavorable ruling may be advantageous if it means that other similarly situated taxpayers will also be constrained by the unfavorable ruling.").

[316] These taxpayers could instead request a PLR confirming the unfavorable position, but although they expect an adverse PLR they would benefit from a favorable PLR and the IRS is unlikely to reject a taxpayer-unfavorable request. Furthermore, the culture of PLRs is taxpayers pursuing favorable outcomes, and doing otherwise could be a red flag.

[317] *Cf.* Solove & Hartzog, *supra* note 115, at 625 (flagging risk of FTC engaging in such behavior through settlement agreements).

[318] Additionally, nothing prevents third parties from requesting their own PLRs. *See supra* Part III.B; *infra* note 384 and accompanying text.

[319] *See, e.g.*, Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 709 (2019) ("[B]ecause of the Anti-Injunction Act and the Declaratory Judgment Act taxpayers ordinarily can 'challenge Treasury Regulations only post-enforcement.'" (quoting James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1074 (2015)); Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 630–31, 633 (2016) (standing doctrine); Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1719–20 (2014) (discussing the Anti-Injunction Act and other "tax deviations from general administrative-law norms"); Hickman, *supra* note 2, at 1164–68 (discussing the Anti-Injunction Act and the Declaratory Judgment Act.).

[320] 28 U.S.C. § 2201(a).

[321] I.R.C. § 7421(a).

"lacks any meaningful citizen suit or citizen petition provisions."[322] It has also been black letter law for over a century that taxpayers lack standing to challenge the government's tax enforcement or other taxpayers' compliance.[323] And if taxpayers want to challenge a tax as "erroneously or illegally assessed or collected," they cannot directly access an Article III court unless they have the means to prepay the contested tax and sue to recover the payment.[324] Finally, the IRS whistleblower program is extremely slow and, due to taxpayer confidentiality and nondisclosure rules, is not a meaningful tool for systemic impact.[325] Against the backdrop of these numerous dead ends, PLRs and their de facto normative force stand out as a way to (for a fee) get the IRS's attention and obtain a statement of its position (implicitly) regarding third-party taxpayers' conduct.

An example of this strategy is PLR 201444022.[326] The requesting taxpayer was a privately-held REIT, which is a preferred investment vehicle for real property.[327] All REITs receive preferential tax treatment[328] but are subject to various technical rules, including that they only make dividend distributions pro rata on all their shares.[329] In addition to protecting shareholders, this distribution rule prevents the tax arbitrage of REITs preferentially distributing cash to shareholders based on shareholders' tax brackets.[330]

Investors in private REITs pay a management fee to the REIT's sponsors.[331] Sponsors compete for large investors by, among other things, giving them a break on management fees. In PLR 201444022, the requesting taxpayer asked the IRS for permission to implement an aggressive structure to achieve

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[322] Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645, 1677 (2023).

[323] Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 847 (2012).

[324] I.R.C. § 7422(a); *see also* 28 U.S.C. § 1346(a)(1) (providing original jurisdiction for the District Courts, concurrent with the Court of Federal Claims, only for tax refund claims).

[325] *See also* I.R.C. § 7623 (authorizing awards to whistleblowers); *infra* Part V.C.

[326] I.R.S. Priv. Ltr. Rul. 201444022 (July 21, 2014).

[327] As of Q3 2024, REITs owned over $4 trillion of gross real estate assets, $1.5 trillion of which were held by private, rather than publicly traded, REITs. *REITs by the Numbers*, NAREIT, https://www.reit.com/data-research/data/reits-numbers [https://perma.cc/2CJW-CZ5M].

[328] *See* I.R.C. § 857(b)(2)(B).

[329] *Id.* § 562(c).

[330] *See* Aresh Homayoun, *It's Time to Repeal the Preferential Dividend Rule for Private REITs*, 108 TAX NOTES STATE 425, 425–33 (2023) (describing the history and rationale of this rule).

[331] The management fee is typically a percentage of invested capital. *See* Jonathan R. Talansky, *Private REITs in the Public Sphere*, THE TAX CLUB (Jan. 30, 2017), *reprinted in* 3 THE CORPORATE TAX PRACTICE SERIES: STRATEGIES FOR ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS ch. 29, pt. II.D (Practising Law Institute, No. 343260, Eric Solomon & William D. Alexander eds., 2d ed. 2023 update).

that goal.[332] The IRS refused, holding that dividends paid under the structure would impermissibly constitute preferential dividends. The fallout from PLR 201444022 was significant, with commentary describing it as shutting down a technique used by comparatively aggressive REIT sponsors.[333] That, along with the competitive context of private REITs, the fact that the REIT seemed to have sophisticated counsel raising nuanced arguments in support of its position, and the fact that the question of the exact limits imposed by the REIT rules was a contested, unclear question in tax law,[334] all support the conclusion that PLR 201444022 was obtained strategically, to negate a competitive disadvantage.[335]

A second example of this strategy is PLR 200027028.[336] To avoid imposing taxes on illiquid gains,[337] federal income tax law has long avoided taxing exchanges of one piece of property for another piece of like-kind property.[338]

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[332] The REIT proposed creating two classes of shares, with only one class bearing investment management advisory fees. Only large investors could opt into the other class.

[333] *See, e.g.*, REIT TM Portfolio, *supra* note 314, pt. V.C.7.c; Melanie Gnazzo & Christie Galinski, *New REIT Ruling on Preferential Dividends Pulls Back from Prior Ruling*, 42 REAL EST. TAX'N 55, 59 (2015) (warning REITs to "exercise caution" and "carefully consider[]" the "particular facts of proposed dividend plans"); Christian Brause, *Federal Income Tax Aspects of REITs*, THE PARTNERSHIP TAX PRACTICE SERIES: PLANNING FOR DOMESTIC AND FOREIGN PARTNERSHIPS, LLCS, JOINT VENTURES & OTHER STRATEGIC ALLIANCES ch. 179A (Jan. 21, 2015) ("[P]ractitioners have started to wonder whether it is a problem in light of this ruling if a real estate investment partnership holds investments through a private REIT and there are, as usual in today's market, management fee breaks on the partnership level for large investors."), *reprinted in* THE PARTNERSHIP TAX PRACTICE SERIES: PLANNING FOR DOMESTIC AND FOREIGN PARTNERSHIPS, LLCS, JOINT VENTURES & OTHER STRATEGIC ALLIANCES ch. 290, pt. III.C.9 (Practising Law Institute, No. 386149, Clifford M. Waren & Eric B. Sloan eds., 2d ed. 2024); Letter from Jeffrey D. DeBoer, President & Chief Exec. Officer, Real Est. Roundtable, to Steven T. Mnuchin, Sec'y of the Treasury, Dep't of the Treasury (Apr. 7, 2017) (highlighting that the PLR "discourages the formation of new [REITs] that rely heavily on institutional investors for capital"), *in* 2017 TAX NOTES TODAY 67-34; Letter from Jeffrey DeBoer, President & Chief Exec. Officer, Real Est. Roundtable, to William J. Wilkins, Chief Couns., Internal Revenue Serv. (Jan. 23, 2015) ("[PLR 201444022] is having a chilling effect on important segments of the real estate market."), *in* 2015 TAX NOTES TODAY 72-14; Amy S. Elliott, *REIT Industry Troubled Over Preferential Dividend Ruling*, 147 TAX NOTES 58, 58 (2015) ("[T]he ruling 'has created a lot of consternation in the industry.'" (quoting Jennifer H. Weiss (Greenberg Traurig LLP))).

[334] *See, e.g.*, REIT TM Portfolio, *supra* note 314, pt. V.C.7.

[335] Commentary also expresses confusion about why this PLR exists. *See, e.g.*, PETER M. FASS, MICHAEL E. SHAFF & DONALD B. ZIEF, REAL ESTATE INVESTMENT TRUSTS HANDBOOK § 5:69 (2023); Brause, *supra* note 333, pt. III.C.8 ("This ruling is remarkable because it is an adverse ruling, which raises the question why the taxpayer did not withdraw its ruling request . . . .").

[336] I.R.S. Priv. Ltr. Rul. 200027028 (Apr. 10, 2000); *see also Safe Harbors*, CHI. DEFERRED EXCH. CO., https://cdec1031.com/forward-exchanges/safe-harbors.html [https://perma.cc/8YJB-RFQ9] (stating they sought PLR 200027028).

[337] *See, e.g.*, Howard J. Levine & Aaron S. Gaynor, *Tax-Free Exchanges Under Section 1031*, 567-5th Tax Mgmt. Portfolio (BNA) pt. I.C.

[338] I.R.C. § 1031 (originating in the Revenue Act of 1921). The current version of Section 1031, revised in 2017, limits its scope to exchanges of real property.

Although the paradigmatic exchange is simultaneous between two property owners, various factors might make that impossible, so to facilitate these transactions, Regulations allow for a "qualified intermediary" to stand in the middle of the exchange.[339] For example, the owner of "Property *A*" can enter into an exchange agreement with a qualified intermediary pursuant to which the owner transfers Property *A* to the qualified intermediary and the qualified intermediary sells Property *A* for cash to a third party. Then, the qualified intermediary uses the cash to purchase "Property *B*" (like-kind property identified by Property *A*'s former owner) from another third party within 180 days and transfers Property *B* to Property *A*'s former owner. These steps shield the owner from paying tax on any built-in gain in Property *A*.[340] Qualified intermediaries must be third parties unrelated to the property owners,[341] and unsurprisingly, a professional cadre of commercial qualified intermediaries has developed to facilitate these exchanges.[342]

Professional qualified intermediaries compete on price and other commercial terms. One area where they compete involves the fact that, to avoid recognizing income, the owner of Property *A* must have no rights to the cash proceeds held by the qualified intermediary at any point during the 180-day period.[343] Regulations, however, contain an exception for "material and substantial" contingencies.[344] If such an event occurs, the qualified intermediary can release the proceeds from the sale of Property *A* to Property *A*'s former owner without retroactively triggering tax as of the sale of Property *A*.[345] Because taxpayers would prefer to receive the cash proceeds promptly if the overall transaction is stymied, there is natural commercial pressure on qualified intermediaries to expand the range of (purportedly excepted) contingencies under which they allow customers to demand release of the sale proceeds.

In PLR 200027028, a qualified intermediary asked the IRS whether Property *B*'s owner's refusal to sell such property "for a fair price under fair terms" qualified as a material and substantial contingency.[346] The IRS held that such refusal did *not* qualify for the exception and exchange agreements permitting early release of sale proceeds on such grounds did not facilitate tax-free exchanges. Coverage of PLR 200027028 emphasizes its broad impact on all pro-

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[339] Treas. Reg. § 1.1031(k)-1(g) (as amended in 2020).

[340] *Id.* § 1.1031(k)-1(g)(8)(iii) (example 3).

[341] *See id.* § 1.1031(k)-1(g)(4)(iii).

[342] *See, e.g.*, *IPX1031 Essentials*, IPX1031, https://www.ipx1031.com/ipx-essentials/ [https://perma.cc/DRK2-J3MR].

[343] Treas. Reg. § 1.1031(k)-1(g)(6)(i).

[344] *Id.* § 1.1031(k)-1(g)(6)(iii)(B).

[345] *Id.* Instead, the release of the funds would trigger taxation.

[346] I.R.S. Priv. Ltr. Rul. 200027028 (July 21, 2000).

fessional qualified intermediaries[347] and, prior to the PLR's release, certain professional qualified intermediaries were almost certainly losing clients to others who offered friendlier terms regarding early return of sale proceeds.[348] In fact, the lawyer who apparently obtained PLR 200027028—one of the foremost experts in these tax-free exchanges[349]—was described as intentionally seeking out an adverse PLR based on commercial considerations.[350] That is, obtaining an adverse PLR established a floor below which professional qualified intermediaries would (likely) not go.

A third example, PLR 200244001, involves private placement life insurance contracts, which are "almost irresistible" to high-net-worth individuals.[351] Specifically, a wealthy individual pays an insurance company for a life insurance policy and the insurance company invests the money, which grows tax free. Once the individual dies, the policy's payout is not taxable to the heirs, and in the meantime, the individual can borrow against the value of the insurance policy without recognizing income.[352] The key to obtaining this tax-free investment growth is that the individual cannot control the insurance company's investment decisions with the money. If the individual could control the investment decisions, the life insurance policy would just be an end run around direct investment. The IRS enforces this by, as appropriate, ignoring the insurance policy and taxing the individual as if the individual made the investments directly. One proxy for whether the insurance policy is an end run around direct investment is whether the individual could have made the investments di-

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[347] *See generally, e.g.*, Louis S. Weller, *Selected Like-Kind Exchange Issues*, *in* REAL ESTATE TAX FORUM (5TH ANNUAL) ch. 87 (Practising Law Institute, No. 541, 2003); Howard J. Levine, *Premature Distributions from 1031 Exchange Accounts—New Ruling Provides Guidance*, 93 J. TAX'N 7, 7, 11 (2000).

[348] *See* Terence Floyd Cuff, *Tax-Free Real Estate Transactions: Issues in Cashing Out of an Exchange*, 28 J. REAL EST. TAX'N 68, 73–74 (2000) ("[T]axpayers may seek to convince or to bully their intermediaries into disgorging the unexpended exchange balance. Some intermediaries will be compliant; others will not."), *reprinted in* REAL ESTATE TAX FORUM (4TH ANNUAL) ch. 89 (Practising Law Institute, No. 406, 2002); Levine, *supra* note 347, at 11 ("Taxpayers are well advised to be particularly careful in the selection of the qualified intermediary when planning a deferred exchange.").

[349] Howard Levine, an author of the BNA Tax Management Portfolio on Section 1013, *see supra* note 337, wrote an article indicating he represented the taxpayer. Levine, *supra* note 347, at 8 n.9; *see also* Weller, *supra* note 11, at 76 n.15 (stating that Howard Levine was counsel to the requesting taxpayer); Howard J. Levine, ROBERTS & HOLLAND LLP, https://www.robertsandholland.com/HLevine [https://perma.cc/3MPQ-WKYE].

[350] Cuff, *supra* note 348; Rubin et al., *supra* note 131; Weller, *supra* note 11, at 73 ("[T]he innocence of the question in [PLR 200027028] masks an ingenious maneuver to establish rules protective of the [qualified intermediary] industry . . . .").

[351] Neufeld, *supra* note 104, at 403.

[352] *Id.* at 403–04.

rectly, that is, whether the investments are available to the public. If they are, then the individual is deemed to have control over investment decisions.[353]

But of course, people are reticent to give up control over their investments and assets.[354] Such reticence creates commercial pressure between insurance companies to give wealthy customers increased visibility into and control over investments. One of those insurance companies, Keyport Life, asked the IRS to bless giving customers the ability to invest their insurance contract money into hedge funds.[355] The IRS disagreed, holding in PLR 200244001 that, because the customers could have invested in the hedge funds directly, the customers would be deemed to control the investments and recognize income from them.[356] Significant (often critical[357]) coverage of PLR 200244001 followed, with several commentators highlighting its broad impact: more aggressive private placement insurance companies would have to unwind their investment offerings.[358] By obtaining an adverse PLR, Keyport Life established that a refusal to offer investments in general hedge funds would probably not be a competitive disadvantage.

V. IMPLICATIONS FOR PLRS (AND BEYOND)

This Part considers the normative implications of the gap between the PLR program's premises and the nuanced, complex reality that adverse PLRs reveal. Specifically, the PLR program assumes three things: each requesting taxpayer asks purely independent, individual questions; requesting taxpayers solely bear the economic burdens of the IRS's answers; and resulting PLRs are

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[353] The contours of the doctrine were murky. *See, e.g.*, *id.* at 404 (describing the doctrine as "inconsistent and oblique, at times going in one direction only to head-fake and move in the opposite direction without explanation").

[354] *See* Jasper L. Cummings, Jr., *Investor Control of Life Insurance*, 148 TAX NOTES 1539, 1545–49 (2015) (analyzing the investor control doctrine and various attempts by investors and insurance companies to circumvent it).

[355] Among other things, Keyport argued that securities laws made hedge funds unavailable to the public. *See also* Jon Almeras, *Treasury Official, Practitioners Discuss Hedge Fund Letter Ruling*, 2002 TAX NOTES TODAY 222-4 (discussing IRS's analysis in PLR).

[356] I.R.S. Priv. Ltr. Rul. 200244001 (May 2, 2002).

[357] *See, e.g.*, Neufeld, *supra* note 104, at 403 ("[PLR 200244001] is a result-oriented ruling founded, in this author's view, not on properly interpreted or applied precedent, but simply on the ability of the IRS to flex its muscle.").

[358] *See, e.g.*, Charlene Davis Luke, *Beating the "Wrap": The Agency Effort to Control Wraparound Insurance Tax Shelters*, 25 VA. TAX REV. 129, 175–78 (2005) (discussing the PLR and methods to avoid its effects); David S. Neufeld, *New Guidance on Investor Control Rule: Road Map or Roadblock?*, 100 TAX NOTES 1191, 1191–92 (2003) (explaining the reactions of "most reputable insurance companies" in response to PLR 200244001); Lee A. Sheppard, *Hedge Fund Wrapper Ruling Complicates Reaching Smaller Investors*, 2002 TAX NOTES TODAY 214-2 ("And it means that the aggressive planners . . . will have to unwind their arrangements.").

irrelevant to everyone else.[359] Yet, sophisticated requesting taxpayers ask questions that directly implicate third parties, shift the economic aftermath of their PLRs onto third parties, and leverage PLRs' de facto normative force on other taxpayers and practitioners. Section A of this Part examines whether this gap undermines the PLR program and concludes that although strategic, adverse PLRs highlight some ways that the PLR program falls short, overall, even those PLRs are mostly consistent with and further the IRS's mission.[360] Section B turns to potential modifications to the PLR process, including expanding input[361] and revealing currently hidden guidance,[362] to address those ways the PLR program falls short.[363] Such modifications develop from comparing PLRs to two analogous procedural frameworks: collaborative rulemaking and litigation. Finally, building on the highly strategic uses of adverse PLRs discussed in Part IV.C and their resemblance to impact litigation, Section C considers how PLRs can be used to pursue public interest goals in tax.[364]

A. Strategic, Adverse PLRs Generally Do Not Negate PLRs' Promise and Purpose

Before considering modifications to the PLR program, it is important to step back and examine whether the strategic uses of adverse PLRs identified in Part IV undermine the purposes or promises of the PLR program. For the reasons discussed below, even strategic, adverse PLRs mostly align with PLRs' purposes and support the program's existence. Nevertheless, where the strategic uses of adverse PLRs (and their prevalence and significance) deviate from the PLR program's goals, such deviations indicate places to target modifications and improvements.

As discussed in Part I.B, the PLR program benefits requesting taxpayers and the IRS alike. PLRs provide requesting taxpayers with timely and useful guidance about their obligations and the meaning of tax law. By doing so, they further the IRS's mission to inform taxpayers, encourage taxpayer compliance, and facilitate fair and just tax administration.[365]

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[359] These premises—that each taxpayer and the IRS are a siloed dyad—are not unique to PLRs. *See* Sugin, *supra* note 319, at 617 (describing the tax system's paradigm of the taxpayer-government dyad in which "[e]veryone outside the dyad is invisible to the legal system; they are faceless taxpayers without enforceable rights in the administrative or judicial structure").

[360] *See infra* notes 365–367 and accompanying text.

[361] *See infra* notes 368–390 and accompanying text.

[362] *See infra* notes 391–435 and accompanying text.

[363] *See infra* notes 368–435 and accompanying text.

[364] *See infra* notes 436–473 and accompanying text.

[365] *See* I.R.C. § 7803(a)(3).

Simply put, the strategic uses of adverse PLRs identified in Part IV achieve the PLR program's intended benefits to requesting taxpayers. Having a strategic motivation does not negate the fact that the resulting PLRs provide guidance. Furthermore, the PLR standing requirements discussed in Part I.A ensure that such guidance is actually timely and useful, and those rules pointedly do not require requesting taxpayers to promise (or maintain) any particular motivation whatsoever.

For the same reasons, even strategic, adverse PLRs advance the IRS's mission of informing taxpayers and furthering tax compliance. Yet, some of the explanations identified in Part IV, and in particular the use of adverse PLRs to negate competitive disadvantages in Part IV.D.2, seem to unilaterally (and likely covertly) weaponize PLRs and hijack the process.[366] Consider one taxpayer who, through confidential proceedings, instigates IRS guidance that primarily has adverse impacts on others and perhaps does not even change the taxpayer's status quo at all. Using PLRs this way clashes with fundamental notions of transparency and equality. It is hard to say that the IRS producing PLRs in that context facilitates a *fair and just* tax system.

These concerns suggest the need for interventions, and because they center on transparency and input, procedural modifications are likely sufficient and appropriate. Because PLRs are overall a particularly useful and responsive program and even strategic, adverse PLRs mostly further the IRS's mission, attempting to improve PLRs is appropriate in the first instance.[367] The following Section presents ways to do so.

B. Opportunities to Improve the PLR Process

Although there are many possible procedural modifications to the PLR program, comparing the PLR process with other similar procedural frameworks helps focus the inquiry. Other models can highlight both granular areas where PLRs may fall short and particular procedures that can be adapted to PLRs. This Section draws on collaborative rulemaking and litigation to identify interventions that could help PLRs advance fair and just tax administration. As discussed below, insights from the collaborative rulemaking literature suggest that the PLR process should include more third-party input,[368] and com-

[366] *Cf.* Mark K. Neville, Jr., *Some Thoughts on Ruling Requests*, 33 J. INT'L TAX'N 27, 28 (2022) (characterizing an analogous strategy with customs ruling letters as "weaponization").

[367] *See also* Benjamin Alarie, Kalmen Datt, Adrian Sawyer & Greg Weeks, *Advance Tax Rulings in Perspective: A Theoretical and Comparative Analysis*, 20 N.Z. J. TAX'N L. & POL'Y 362, 388 (2014) (noting political blowback from discontinuing an existing advance tax rulings program).

[368] *See infra* notes 370–390 and accompanying text.

paring PLRs to litigation suggests the need for more transparency,[369] particularly when requesting taxpayers withdraw their PLR requests.

1. Expanding Input (Ex Ante and Ex Post)

Over the past three decades, scholars have called for more collaborative approaches to regulation as one thread in the broader "new governance" movement.[370] Collaborative rulemaking proponents urge "democratiz[ing] the rulemaking process by facilitating more participation and collaboration between the agency and affected parties."[371] "Ideally, all affected constituencies will be represented" in rule development and have a "meaningful opportunity to voice concerns and make recommendations."[372] Such a process, they argue, should produce "effective, implementable, and legitimate rules."[373]

Aspects of the formal, narrow view of PLRs align with collaborative rulemaking.[374] For example, in the PLR process, requesting taxpayers and the IRS literally collaborate regarding the IRS's position on their question(s), iterating on each other's analysis and conclusions, and endeavoring to get to the right answer. In addition, PLRs are structurally responsive guidance (as the IRS does not sua sponte initiate PLR requests or issue PLRs[375]) so they functionally help the IRS focus on resolving real, live questions for real taxpayers.

PLRs and collaborative rulemaking, however, diverge once we account for the normative force of PLRs, the particular importance of adverse PLRs highlighted in Part III.B, and the strategic uses of adverse PLRs. In particular, the explanations in Part IV highlight that the PLR process plainly does not include all *actual* stakeholders. This is most clearly the case where one or more

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[369] *See infra* notes 391–435 and accompanying text.

[370] *See, e.g.*, Kwon, *supra* note 258, at 601–07 (summarizing collaborative rulemaking research and "applying collaborative governance theories to tax rulemaking"); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345, 379–80 (2004) (introducing a new governance paradigm that "aims . . . to promote diversification, pluralization of solutions, and increased competition" by embodying "the principles of collaboration and participation").

[371] Kwon, *supra* note 258, at 600–01; *see also* Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 445 ("New governance regulation, unlike command-and-control regulation, is regulation based on an iterative process between private-party experience and a regulator that serves variously as clearinghouse, catalyst, monitor, prod, and coordinator.").

[372] Danshera Cords, *"Let's Get Together": Collaborative Tax Regulation*, 11 PITT. TAX REV. 47, 71 (2013).

[373] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11 (1997).

[374] *See, e.g.*, Rachelle Y. Holmes, *Forcing Cooperation: A Strategy for Improving Tax Compliance*, 79 U. CIN. L. REV. 1415, 1426–28 (2011) (characterizing PLRs as collaborative rulemaking).

[375] *See, e.g.*, Treas. Reg. § 601.201(a)(1) (1967).

particular third parties, such as employees, regulators, and counterparties, bear the direct costs of an adverse PLR and/or are the reason for the adverse PLR in the first place.[376] This is also the case for the highly strategic uses of adverse PLRs described in Part IV.D because there is no public transparency before PLRs are issued and there is no formal mechanism to voice reactions, disagreement, or suggestions after issuance (for example, backlash often comes through news coverage and conference proceedings).[377]

In addition to underscoring the concerns identified in Part V.A, the collaborative rulemaking lens highlights that the timing of participation is a critical variable.[378] Indeed, participating in the PLR process pre-issuance, when the content of a PLR is still in flux and input can influence it, is meaningfully different than submitting reactions after a PLR is released. Although post-release input can influence the IRS's position going forward, the IRS is unlikely to retroactively modify or revoke a PLR.[379]

At the same time, collaborative rulemaking emphasizes maximizing meaningful participation while balancing efficiency. In the PLR context, this means being mindful that pre-issuance input would impose significant costs. Integrating any additional steps or participation pre-issuance would introduce (possibly significant) delays, undermining one of the PLR program's most attractive features: the ability to provide (relatively) prompt guidance to taxpayers to facilitate, rather than delay, their transactions. Furthermore, third-party participation would implicate complex issues of taxpayer confidentiality because third parties would need access to the requesting taxpayer's arguments that hinge on the underlying facts. Inviting broad input before PLR issuance would also require a publicity mechanism not unlike proposed Regulations. In contrast, input post-PLR release could leverage the IRS's existing mechanisms for making PLRs publicly available and would not implicate taxpayer confidentiality.

Given the cost of pre-issuance input, any such input should be narrowly tailored to protect third-party interests that are concrete, particularized, and cannot be vindicated post-PLR release. The strategic explanations in Part IV often implicate third parties but do so in various ways. Certain third parties are directly, concretely, and disproportionately impacted by a particular PLR be-

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[376] *See supra* Parts IV.B & IV.C.2.

[377] *Cf.* Solove & Hartzog, *supra* note 115, at 623 (discussing significant opportunities for public input on FTC settlement agreements).

[378] *See* Freeman, *supra* note 373, at 27–29 (noting that "[r]ules are not one-time transactions," and that "solutions that foster *continued engagement* . . . are preferable to those that . . . encourage [parties] to disengage after a single interaction" (emphasis added)).

[379] *See supra* note 90. One exception is taxpayer fraud, but reactions to a redacted, public PLR are unlikely to surface a requesting taxpayer's misrepresentations during the PLR process.

cause of their relationship with the requesting taxpayer.[380] For example, consider the numerous adverse PLRs requested by employers regarding their withholding obligations that primarily implicate their employees' economics.[381] For these third parties, once the PLR is issued, the die is cast, and there are at best only limited opportunities to contest the IRS's position.[382]

In contrast, other third parties are only indirectly impacted by PLRs by virtue of being similarly situated to the requesting taxpayer. Even post-PLR release, these third parties retain control over their tax destinies because other taxpayers' PLRs do not (formally) constrain or even directly impact their tax return positions.[383] For example, consider the competitor of an employer who requests a PLR regarding such employer's withholding obligations—the resulting PLR does not impose any direct economic burden on the competitor. Third parties also can request their own PLRs, and they can do so without noting the existence of the earlier PLR.[384]

What direct third parties have at stake justifies their pre-issuance participation in the PLR process while post-release input is sufficient for third parties in general. Limiting the pre-issuance universe to directly impacted third parties is administrable (and minimizes delays) because such participants are knowa-

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[380] *See, e.g.*, Application for Leave to File Amicus Curiae Brief & Proposed Amicus Curiae Brief of the Cal. Tax Reform Ass'n & the Asian Law All. in Support of Petitioners / Respondents Janet Cleary & Zackery Chappell at 16–17 (highlighting that the county government had seemingly requested a PLR after litigation commenced to leverage the ex parte nature of PLR proceedings and disadvantage the taxpayer challenging the county's policy), Cleary v. County of Alameda, 196 Cal. Rptr. 3d 340 (Ct. App. 2011) (No. A127935), 2010 WL 4214572, at *16–17.

[381] *See supra* Part IV.B.2.

[382] To avoid IRS inconsistency, requesting taxpayers must disclose if they (or a related party) have filed another PLR request on the same factual issue. *See* Rev. Proc. 2025-1 § 7.01(5), 2025-1 I.R.B. 24–25. As a result, directly impacted third parties are unlikely to be able to use the PLR process themselves to push back on the IRS's position. In many instances, these third parties may not even have a tax return on which they can take a contrary position. One narrow exception is workers whose bosses obtained PLRs confirming withholding obligations; the workers could file a return asking for a refund of (purportedly) erroneously withheld taxes.

[383] In 2022, the IRS proposed requiring corporate taxpayers to disclose return positions that are contrary to PLRs on Form 1120 (Schedule UTP). *See supra* note 185. After backlash, the IRS backed down, limiting such disclosure to positions inconsistent with precedential IRS guidance. *See IRS Statement About Uncertain Tax Positions (UTP) Reporting*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/irs-statement-about-uncertain-tax-positions-utp-reporting [https://perma.cc/KAA4-HBJW] (Nov. 8, 2024); *see also* Chandra Wallace, *Tax Pros Balk at Disclosing "Contrary Authorities" for UTPs*, 177 TAX NOTES FED. 1292, 1292–93 (2022). Although the IRS agents processing other taxpayers' tax returns could access on-point PLRs in the course of research, *see, e.g.*, IRM 4.10.7.2.9(3)–(5) (Sept. 12, 2022), there is no mechanism to proactively flag those PLRs.

[384] Although the IRS encourages requesting taxpayers to disclose contrary authorities, PLRs are not included in the list of authorities, which is limited to precedential guidance. *See* Rev. Proc. 2025-1 § 7.01(10), 2025-1 I.R.B. 26–27; *see also supra* note 65 (discussing an IRS duty of consistency (or lack thereof) across PLRs).

ble.[385] It also protects requesting taxpayer confidentiality because such third parties likely already know the underlying facts.[386] At the same time, participation by parties with direct skin in the game should improve the IRS's decision-making and increase the legitimacy of the resulting PLRs. Importantly, this intervention will require minimal structural change, in contrast with adopting a more fulsome notice-and-comment-like regime. The PLR process already contemplates narrow third-party input: Section 6110(d) requires public disclosure of any third-party participation.[387] In fact, the IRS has previously, albeit informally, implemented similar procedures for PLRs that examine employee versus independent contractor classification. There, the IRS always solicits input from supervisors and workers, regardless of which one is the requesting taxpayer.[388]

Regarding post-release participation for third parties in general, an elaborate process is not needed. Rather, the IRS should expressly invite correspondence challenging its analysis and conclusions in publicly released PLRs and should (at minimum) confirm receipt of such correspondence.[389] The reactions to the highly strategic adverse PLRs discussed in Part IV.D are communicated to the IRS through inherently exclusionary ad hoc and informal mechanisms, like practitioner conferences and news articles. Instead, the IRS should develop a mechanism that is public and accessible, and the IRS should draw on the public's collective expertise to evaluate and, as necessary, modify its PLR output.[390]

2. Revealing Currently Hidden Guidance

At first glance, litigation seems far afield from PLRs. Litigation's hallmarks are adversarial proceedings before a neutral adjudicator whose rulings are binding on the parties, precedential, and subject to appellate review. PLRs have none of that. Subject to the proposals in Part V.B.1, PLR proceedings are not adversarial; the IRS is half-adversary and half-judge and jury; PLRs do not

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[385] For example, the IRS could require requesting taxpayers to either attest that no direct third parties are relevant to the PLR request or provide third parties' contact information and authorize IRS communications with them. *Cf.* Rev. Proc. 2025-1 app. C, 2025-1 I.R.B. 92–96 (checklist of attestations).

[386] It would not be unreasonable for requesting taxpayers to require non-disclosure agreements in connection with participation if direct third parties are not already subject to such obligations by virtue of their relationship with the requesting taxpayer.

[387] Third parties currently rarely participate. Only ten PLRs on Westlaw cite Section 6110(d).

[388] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 9137021 (June 11, 1991).

[389] The Joint Committee on Taxation is one potential third party who could frequently participate in a process akin to its review of significant tax refunds. *See* George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 866–73 (2013).

[390] *Cf.* Cummings, *supra* note 122, at 545 (discussing how President Trump's Executive Order 13891 would have required the IRS to accept public submissions urging withdrawals of PLRs).

bind requesting taxpayers; Section 6110(k)(3) precludes PLRs from having any formal precedential effect; and requesting taxpayers have no appeal right.[391]

But in other ways, PLRs resemble litigation. For example, discovery and the attendant information disclosure is a widely acknowledged risk in litigation,[392] and taxpayers requesting PLRs face the strategic disadvantages of increased exposure to the IRS.[393] PLRs also allow the IRS to consider various rules iteratively before releasing precedential guidance.[394] This aligns well with the values ascribed to judicial percolation, namely information accretion, argument honing, and institutional legitimacy.[395] Additional similarities appear after accounting for the strategic uses of PLRs described in Part IV and PLRs' functional role in the tax system discussed in Part I.C. For example, various scholars have highlighted formally non-precedential judicial output such as district court opinions and unpublished appellate decisions that, nevertheless, have extensive practical import.[396] Indeed, unpublished court of appeals opinions are arguably one of the best analogs to publicly released, redacted PLRs. Both include only summary facts, streamlined analysis, and have, at most, limited formal precedential value.[397]

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[391] *See supra* Part I.B.

[392] *See, e.g.*, Kevin Nachtrab, *To Arbitrate or to Litigate: That Is the Question*, 42 LES NOUVELLES 295, 295, 298 (2007).

[393] *See* Givati*, supra* note 1, at 156–57 (noting that requesting a PLR guarantees IRS inspection of a transaction and increases the chance of IRS detection of tax issues); *see also, e.g.*, United States v. All Assets Held at Bank Julius Baer & Co., 315 F.R.D. 103, 115 (D.D.C. 2016) ("It is important to appreciate the unique circumstances present in the case of a PLR request: a taxpayer voluntarily disclosing information to the federal agency that enforces tax laws in order to receive tax guidance from the most knowledgeable source for such advice. When doing so, the taxpayer knows that he or she is courting danger by revealing information to the IRS, which may disagree with the views regarding tax liability expressed in the PLR request. That is the price to be paid for such advice.").

[394] *See supra* Part I.B.

[395] *See, e.g.*, Kip M. Hustace, *Counting Is Hard! A Theory of Doctrinal Expansion*, 28 LEWIS & CLARK L. REV. 51, 102–03 (2024) (defining percolation as "the expected—or just hoped-for—emergence of answers to legal questions by awaiting multiple courts to weight in"); Ronald A. Cass & Jack M. Beermann, *Interpretation, Remedy, and the Rule of Law: Why Courts Should Have the Courage of Their Constitutional Convictions*, 74 ADMIN. L. REV. 657, 696–97 (2022) (outlining potential benefits of the Supreme Court denying certiorari and instead allowing percolation in the lower courts); *cf.* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 368–69 (2021).

[396] *See, e.g.*, Hillel Y. Levin, Iqbal*,* Twombly*, and the Lessons of the* Celotex *Trilogy*, 14 LEWIS & CLARK L. REV. 143, 147 n.18 (2010) (collecting sources).

[397] *See, e.g.*, Ninth Circuit Rule 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent . . . ."). *See also generally* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) (examining these "short, perfunctory, unsigned opinions drafted for the benefit of the parties, not the public"); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988).

The litigation comparison also illuminates one of the more surprising aspects of PLRs: requesting taxpayers' carte blanche withdrawal rights.[398] Withdrawing with virtually no adverse consequences can make the PLR program seem like basically a one-way ratchet in taxpayers' favor.[399] Broad withdrawal rights, however, are somewhat akin to plaintiffs' ability to terminate their cases (including appeals) through voluntarily dismissals and settlement.[400] There is, though, one big difference. Typically, terminating litigation occurs in the shadow of probabilistic forecasts regarding ultimate outcomes; only rarely do courts share their fully baked rulings in advance of public issuance.[401] For PLRs, by contrast, that is standard operating procedure. That is, taxpayers routinely request PLRs, are told the IRS's positions, and then withdraw their requests, walking away knowing the IRS's positions on their legal questions—but no one else does.

Given the importance of PLRs, this asymmetric access to the IRS's guidance conveyed during the PLR process is unfair and undermines the IRS's goal of a just tax system. Others have estimated that hundreds of requests for PLRs are withdrawn each year.[402] Because PLR requests are time consuming and expensive,[403] and because the PLR process includes extra nudges toward withdrawal to avoid receiving an adverse PLR, at least a majority of withdrawals are likely because the IRS's ruling would have been adverse. Therefore, far more potential adverse PLRs are likely withdrawn than are issued. Given that adverse PLRs are particularly important,[404] the fact that most of what could be conveyed in adverse PLRs is instead hidden from most but not all taxpayers is even more concerning.[405]

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[398] *See supra* Part I.A.

[399] *See supra* note 235 and accompanying text.

[400] To be sure, both the presence of an adverse party that must consent to settlements and the role of courts in policing dismissals and settlements deviate from requesting taxpayers' unilateral, categorical withdrawal right.

[401] For similar reasons, *Munsingwear* vacatur does not apply to settlements. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) ("We hold that mootness by reason of settlement does not justify vacatur of a judgment under review.").

[402] *See* Givati, *supra* note 1, at 150–51 n.48 (observing that on average, 320 out of 1,652 PLR requests were withdrawn annually between 2002 and 2006 (19%)); Burton W. Kanter & Sheldon I. Banoff, *Shop Talk: Associate Chief Counsel Speaks Out on Letter Rulings*, 76 J. TAX'N 63, 63 (1992) (reporting statement by IRS official that taxpayers withdraw less than 10% of PLR requests).

[403] There is no refund of the user fee upon withdrawal. *See* Rev. Proc. 2025-1 § 15.10, 2025-1 I.R.B. 76–77; IRM 37.1.1.8.2(1) (Aug. 11, 2004).

[404] *See supra* Part III.B.

[405] It is worth noting that, from the IRS's perspective, its work on withdrawn PLR requests likely informs future PLR requests on similar topics as well as the prioritization and formulation of precedential guidance.

Scholars have recognized that litigation settlement skews common law development,[406] and the same is true for withdrawal rights and PLRs. The bias toward favorable PLRs means that observable trends and predictions are distorted and misleading,[407] likely resulting in incorrect inferences of broad permissibility and undermining taxpayer compliance.[408] For example, numerous Reddit threads reference and discuss PLR 201809003,[409] which considered whether batteries connected to solar panels qualify for the tax credit under Section 25D.[410] Reddit readers have no way to know that PLR 201809003 is perhaps a skewed indication of the scope of Section 25D. Only practitioners focused on PLRs would be aware of released PLRs' bias toward pro-taxpayer positions. And even when practitioner resources point out the bias in PLRs, they are left making inferences from silence.[411]

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[406] *See, e.g.*, Edward K. Cheng, *Detection and Correction of Case-Publication Bias*, 47 J. LEGAL STUD. 151, 152–54 (2018); Andrew J. Trask, *Litigation Matters: The Curious Case of* Tyson Foods v. Bouaphakeo, 2015–2016 CATO SUP. CT. REV. 279, 293 ("Settlement early in a case influences legal development by ending the litigation; if a case does not proceed to some judicial disposition, the law will not develop from where it is."); Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1460–61; Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 104 (2008) ("There is slippage at each point in the litigation process: most human interactions do not produce disputes, only some disputes result in legal claims, many claims are settled, and many trial decisions are not appealed."). Publication bias is another example of this phenomenon. *See, e.g.*, Elissa Philip Gentry, *Disregarding Uncertainty, Marginalizing Patients*, 57 IND. L. REV. 357, 387 (2023).

[407] *See* Jasper L. Cummings, Jr., *Who Has Discretion in Tax Opinions?*, 172 TAX NOTES FED. 431, 431–32 (2021) ("[P]ractitioners are just weather forecasters—trying to predict what the IRS and courts will do."). *See generally* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 653 & n.6 (1995) (collecting sources in support of Oliver Wendell Holmes's "aphorism that law consists of '[t]he prophecies of what the courts will do in fact, and nothing more pretentious'" (quoting OLIVER W. HOLMES, *The Path of Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920))).

[408] *Cf.* Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2279 (2013) (highlighting this as a consequence of the opposite phenomenon: overdisclosure of prohibitions and underdisclosure of permissions).

[409] *See, e.g.*, u/SirMontego, REDDIT: R/SOLAR, https://www.reddit.com/r/solar/comments/10biouw/i_think_the_irs_effectively_said_that_everyone/ [https://perma.cc/4HL3-353E]; u/Rem221, REDDIT: R/SOLAR, https://www.reddit.com/r/solar/comments/17aeloj/tax_credit_question/ [https://perma.cc/4PVF-TVKA]. *See also generally* Shu-Yi Oei & Diane M. Ring, *The Tax Lives of Uber Drivers: Evidence from Internet Discussion Forums*, 8 COLUM. J. TAX L. 56 (2017) (leveraging Reddit as a source of insight about tax knowledge).

[410] I.R.S. Priv. Ltr. Rul. 201809003 (Nov. 27, 2017).

[411] *See, e.g.*, Lauren Azebu, Art Gertel & Eric Solomon, *Satisfying the ATB Requirement: Is Income Collection Necessary?*, 167 TAX NOTES FED. 2101, 2111 (2020) ("Unfortunately, because of the nature of the private letter ruling process, we will not see the IRS's analysis or reasoning in situations in which it refuses to rule favorably."); Sukbae David Gong, Steven R. Schneider & Shelbi Smith, *Excuses, Excuses: Popular Excuses in Missed REIT-Related Elections*, 160 TAX NOTES 1705, 1708–09 (2018) (reviewing a study in which "[a]ll 95 letter rulings were granted relief by the IRS," but noting that this does not indicate a "100 percent acceptance rate" due to withdrawn requests); Benjamin N. Feit, *What IRS Private Letter Rulings Reveal About Program-Related Investments*, 23 TAX'N

Further underscoring the importance of this currently hidden guidance, consider the handful of times third parties have gotten word that someone withdrew a PLR request to avoid an adverse ruling. For example, before Section 409A, practitioners knew for years that loans (and loan offsets) from nonqualified deferred compensation plans triggered current taxation only because it was known that taxpayers had withdrawn PLR requests in the face of an adverse IRS position.[412] Similarly, practitioners were aware of the IRS's reevaluation of what constitutes "real property" for REITs only based on an SEC disclosure that the IRS was "tentatively adverse" to a PLR request on the topic.[413] Several other examples follow this pattern.[414]

EXEMPTS 3, 8 (2011) ("Only twice did the IRS actually issue a ruling that a proposed investment failed to satisfy the 'primary purpose' test (though it is possible that others chose to withdraw their requests before the IRS issued a formal denial)."); John B. Magee & F. Scott Farmer, *Failing to Talk to Yourself—A FIRPTA Tax Trigger*, 53 TAX NOTES INT'L 169, 179 (2009) ("We assume that if there have been unsuccessful requests for relief . . . they were withdrawn before the public benefited from the publication of a negative private letter ruling."); Michael G. Pfeifer & Joseph S. Henderson, *Expatriation: The Ultimate Estate Planning Tool?* (flagging that universally favorable PLRs under Section 877 reflect, at least in part, requesting taxpayer withdrawals), *in* INTERNATIONAL ESTATE PLANNING 2003: STRATEGIES & TECHNIQUES FOR MAXIMUM ADVANTAGE ch. 7, pt. III.J n.49 (Practising Law Institute, No. 480, 2003); Mary Lee Moseley, *Will Modification of a Grandfathered GST Trust End Its Exempt Status?*, 26 EST. PLAN. 223, 229 (1999) ("The Service has issued negative rulings in only a handful of instances. The taxpayer has an opportunity to withdraw the ruling request after verbal indication of the Service's position, but before a written ruling. Therefore, the issued rulings give an accurate picture only as to the type of actions involving grandfathered GST trusts which have been approved."); Matthew W. Lay, Eric B. Sloan & Amy L. Sutton, *Publicly Traded Partnerships*, 723-1st Tax Mgmt. Portfolio (BNA) pt. II.D.1.b ("The vast majority of private letter rulings . . . have been taxpayer-favorable. In the authors' experience, the lack of adverse letter rulings is principally the result of taxpayers' withdrawing of their letter ruling requests . . . .").

[412] *See* A. Thomas Brisendine, *Current Issues in Section 457 Deferred Compensation Plans* (ALI-ABA Continuing Legal Education, Sept. 11, 1997), SC14 ALI-ABA 263, 270.

[413] *See* Amy S. Elliott, *Companies Report IRS May Have Suspended REIT Conversion Rulings*, 2013 TAX NOTES TODAY 111-4.

[414] *See, e.g.*, Conrad Teitell, *Charitable Income Tax and Estate Planning Strategies* (observing that, based on IRS statements during PLR process for an ultimately withdrawn PLR request, trust distribution to private foundation would be impermissible, but distribution to public charity would be permissible), *in* 53RD ANNUAL ESTATE PLANNING INSTITUTE ch. 12, pt. I.JJ (Practising Law Institute, No. 334669, 2022); Sam Young, *Service Will Rule on Decedent Income Used to Satisfy Pecuniary Bequests, Devises*, 119 TAX NOTES 661, 661 (2008) ("Several private letter rulings have been issued that seem to support the idea that sections 72, 402, and 408 have exclusive control over transactions in which [income in respect of a decedent (IRD)] is used to fund a pecuniary bequest or devise. Sections 691(a)(1) and (2), which address recipients of IRD, therefore would not apply. . . . [Although a] taxpayer finally asked, . . . because that taxpayer would have received an adverse result, the taxpayer withdrew the private letter ruling request."); Joseph DiSciullo, *Final Regs on U.S. Possessions Address Residency, Not Sourcing*, 110 TAX NOTES 599, 602 (2006) ("The taxpayer relied on Article 18 of the Australia-U.S. tax treaty to claim that death benefits paid from the fund aren't subject to U.S. income taxation. . . . The taxpayer requested a private letter ruling to that effect but withdrew the request after being informed of a tentative adverse ruling."); Louis A. Prosperi, *Service Opposes Tax-Free Use of Parent Stock by Subsidiary's Rabbi Trust*, 86 J. TAX'N 96, 96 (1997) ("In response to a recent private ruling request, the IRS, after a lengthy review, indicated its intention to issue an adverse

Notably, the IRS has occasionally acknowledged the unfair impact of withdrawn PLR requests and proposed ad hoc solutions.[415] But the significance and systemic impact of this asymmetric access to IRS guidance calls for a global solution. Specifically, the IRS should turn to the PLR's sibling, the Chief Counsel Advice memorandum (CCA).

CCAs are written documents issued by the IRS Office of Chief Counsel's national office conveying a legal interpretation of tax law to IRS employees.[416] To the public, CCAs and PLRs are functionally equivalent. Like PLRs, CCAs typically include facts, question(s) presented, applicable law, and analysis. CCAs are also subject to Section 6110, including required redacted public disclosure.[417] To the particular taxpayer whose situation gave rise to the CCA, however, CCAs are significantly different from PLRs.[418] Unlike PLRs, CCAs do not bind the IRS with respect to such taxpayer; they are not sent specifically to the IRS agents who will process the taxpayer's tax returns; and the taxpayer need not attach the CCA to their tax returns. CCAs are accordingly issued in the IRS's unilateral discretion; they do not depend on taxpayer consent.[419]

When taxpayers withdraw PLR requests after the IRS has conveyed its concrete opinion(s) to them, the IRS should always release a CCA conveying such opinion(s) alongside stylized facts and applicable law. This rule appropriately balances mitigating the concerns raised above with preserving the voluntary, taxpayer service-oriented features of the robust PLR program. In contrast, more aggressive approaches like curtailing withdrawal rights or issuing involuntary PLRs would fundamentally change the PLR program and unnecessarily intrude on taxpayer agency and confidentiality. These aggressive interventions would solve the problem of hidden guidance, but at the cost of significantly fewer PLRs. Undercutting the PLR program would, on balance, reduce guidance, increase uncertainty, hurt the tax system, and make compliance more difficult.

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ruling on the issue of gain recognition to a subsidiary whose rabbi trust uses previously contributed parent common stock to pay compensation.").

[415] *See, e.g.*, Fred Stokeld, *IRS Might Release Information from Withdrawn EO Ruling Requests*, 2017 TAX NOTES TODAY 92-19; Sam Young, *Controversy Continues Over Performance-Based Compensation Letter Ruling*, 118 TAX NOTES 1195, 1195 (2008).

[416] I.R.C. § 6110(i)(1). The precise form of CCAs vary, *see* IRM 33.1.3.1.1 (Jan. 25, 2011); IRM 33.1.2.2.3.1 (Apr. 12, 2013), but generic legal advice is most likely what the IRS would use to implement this proposal, *see* I.R.S. Notice, Off. of Chief Couns., CC-2009-002 (Oct. 10, 2008).

[417] The IRS posts CCAs on its written determinations websites alongside PLRs. *See supra* note 159.

[418] Although not all CCAs arise with respect to a particular taxpayer's inquiry or situation, these CCAs would be taxpayer specific. *See* I.R.C. § 6110(i)(4).

[419] Nevertheless, if the CCA involves a particular requesting taxpayer, as would be the case here, such requesting taxpayer retains Section 6110's procedural redaction rights. *See id.* § 6110(i)(4)(B); *see also supra* notes 102–103 and accompanying text.

There is good reason to believe that this CCA requirement would be administrable. First, a closely related aspect of the PLR process for handling withdrawals already includes the distinction between whether or not the IRS has "formed" an opinion on the taxpayer's request (and has done so for decades),[420] making it easy to extend to all PLR withdrawals. Second, whether a position is "conveyed" is objectively knowable. The CCA requirement will typically attach at the formal conference between the requesting taxpayer and the IRS, where IRS officials explain their "tentative decision on the substantive issues and the reasons for that decision."[421] Third, the CCA requirement builds on the IRS's existing (albeit discretionary and rarely used) practice: when a taxpayer withdraws a PLR request, the IRS Office of Chief Counsel "generally" notifies the IRS agents that will examine the taxpayer's return and "may" also convey its views in a memorandum.[422] If that memorandum contains "more than the fact that the request was withdrawn" or "more than the fact that [the IRS] declined to issue" a PLR, it "may" constitute a CCA.[423]

The CCA intervention also does not require legislation. Rather, the IRS can fully implement it by releasing updated PLR procedures. Although such implementation relies on good faith execution, I am optimistic that it can be sold as simply furthering the PLR program's purposes (i.e., providing guidance) and advancing the IRS's mission of administering a fair and just tax system. Nevertheless, to the extent the IRS or its employees resist, Congress should revise Section 6110 to require the preparation and release of CCAs when requesting taxpayers walk away after the IRS conveys its concrete positions to them.[424]

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[420] Specifically, requesting taxpayers can preempt notification about the withdrawn PLR request to the IRS agents who will process their return if (1) they inform the IRS in writing that they are abandoning (or have abandoned) the transaction *and* (2) the IRS "has not already formed an adverse opinion" on their request. *See, e.g.*, Rev. Proc. 2025-1 § 7.08(2)(a), 2025-1 I.R.B. 39. This has appeared in each annual PLR Revenue Procedure since 1997. *See* Rev. Proc. 97-1 §§ 8.07(2), 16.09, 1997-1 C.B. 433, 455, 474.

[421] Rev. Proc. 2025-1 § 10.04, 2025-1 I.R.B. 61; *cf. id.* §§ 8.02(1)(a), 8.06, at 40, 43. Such conferences typically occur after the IRS has considered the request and are intended to be a "thorough and informed discussion of the issues." *Id.* § 10.02, at 60–61.

[422] *Id.* § 7.08(2)(a), at 39; *see also* Treas. Reg. § 601.201(j) (1967); IRM 32.3.1.11(2) (Aug. 11, 2004); IRM 32.3.2.7(3) (June 14, 2022); IRM 33.1.3.1.1(2)(h) (Jan. 25, 2011); *supra* Part IV.A.2.

[423] Rev. Proc. 2025-1 § 7.08(2)(b), 2025-1 I.R.B. 40; *see also* IRM 32.3.2.4.2(2) (Aug. 11, 2004). Notably, under current procedures requesting taxpayers can avoid notification, if, among other things, the taxpayer "submits a written statement that the transaction has been, or is being, abandoned." Rev. Proc. 2025-1 § 7.08(2)(a), 2025-1 I.R.B. 39; *see also supra* note 420.

[424] IRS agents could undercut a legislative enactment by refusing to rule. Although administrability concerns counsel against expanding the CCA requirement to no-rule instances (which also do not pose the same hidden guidance concerns), IRS compliance should be monitored, and the obligation revised, if appropriate.

At the same time, changing the PLR process to implement the CCA rule is not costless: it imposes a burden on the IRS and may well chill the PLR process. For the reasons discussed below, these concerns are not compelling and do not outweigh the benefits of eliminating hidden guidance.

Regarding the burden on the IRS, it would undeniably take time and effort to reduce IRS positions into a publicly released CCA. The IRS's current standard practice of not issuing CCAs for withdrawn PLR requests arguably underscores this.[425] The burden imposed by the CCA requirement could concretely manifest in cultural resistance within the IRS and increased processing time for PLRs.[426] At the same time, I am optimistic that the PLR program's overall culture, focused on customer service and providing guidance, would help sell the CCA requirement. Furthermore, most of the time, the IRS should be working from extensive written materials prepared for the formal conference that would lessen the burden. And to the extent that the IRS finds that its position "won't write," it should reevaluate its position, notify the requesting taxpayer, and at the requesting taxpayer's discretion reopen the PLR process, ultimately resulting in better IRS guidance.[427]

Chilling PLR requests is also possible.[428] For instance, the CCA requirement would increase the chance that details of requesting taxpayers' affairs are publicly released and would increase public adverse guidance from the IRS. Fewer PLR requests mean less IRS guidance and fewer opportunities for the IRS to receive insight into practitioner transactions and questions. I am skeptical, however, that the disclosure fear will meaningfully chill PLR requests because taxpayers request PLRs expecting to receive a PLR, including the same, if not more, disclosure. As for the increased likelihood of adverse guidance, that will likely give requesting taxpayers pause. Nevertheless, because the IRS gives early indications of its lean before communicating a concrete position

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[425] I found only seventy-nine CCAs for withdrawn PLR requests between 1977 and 2024 (seventy-seven from 1992 to 2010). *See* Blank, *supra* note 101, at 506 (estimating they occur for less than 1% of withdrawals). At the same time, the infrequency of such CCAs is not surprising because issuing a CCA is some quantum of work, the rules contain a double-layer "may," and taxpayer actions can preempt it. *See supra* notes 420, 422–423 and accompanying text. Accordingly, infrequent CCAs under current rules does not necessarily indicate that the CCA requirement would impose a significant burden on the IRS.

[426] This would likely also cause PLR user fees to rise, because they are keyed to the IRS's expenses. *See* I.R.C. § 7528(b)(1)(B).

[427] *See* Schauer, *supra* note 91, at 652–53 (unpacking the so-called "it won't write" phenomenon and arguing the practice of written opinions leads to better judicial decision-making).

[428] A separate form of chill could manifest in the interactions between requesting taxpayers and the IRS during the PLR process, as one or both sides try to avoid triggering the CCA requirement. Given that the IRS gives early indications of how it is leaning, *see, e.g.*, Rev. Proc. 2025-1 §§ 8.02(1)(a), 10.07, 2025-1 I.R.B. 40, 62–63, I expect this chill to manifest in shifting withdrawals earlier, which I address in this paragraph.

(and before the formal conference),[429] it is more likely to shift withdrawals to earlier in the PLR process (before the CCA requirement is triggered) than to reduce requests entirely. Because requesting taxpayers submit a significant portion of their information when filing the initial formal PLR request, this chill should not significantly undermine the IRS's desirable information gathering. Ultimately, if these earlier withdrawals reduce guidance a bit, that is a price worth paying because, on balance, the CCA requirement will significantly reduce hidden guidance and meaningfully benefit the tax system.[430]

Finally, Joshua Blank, also motivated by concerns about hidden guidance,[431] has made a similar proposal to increase transparency around PLRs. He has proposed that the IRS should publicly disclose all PLR request materials (regardless of whether the government came to or conveyed a position).[432] This is not inconsistent with my proposal, but having a single document memorializing the government's position avoids taxpayers having to piece it together (perhaps incorrectly or incompletely) and forces the government to explain itself.[433] Furthermore, before the IRS has conveyed a position, taxpayer submissions are more akin to tax returns, which are strictly confidential,[434] and informal taxpayer inquiries to the IRS which are not logged or released.[435] Forcing disclosure only when there is concrete IRS guidance that would otherwise remain hidden appropriately balances fair tax administration and taxpayer privacy.

C. PLRs to Pursue the Public Interest?

The litigation comparison yields an additional significant insight. Namely, the highly strategic uses of adverse PLRs, instigating backlash and impacting

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[429] *See id.* Such indications are substantively different from the IRS's concrete, considered conclusion, so this shift will not circumvent the CCA requirement and continue to hide adverse IRS positions.

[430] Any reduction would likely be significantly less than the reduction discussed above that would occur if the IRS removed the withdrawal right or issued PLRs involuntarily.

[431] *See* Blank, *supra* note 101, at 507 (highlighting that non-disclosure deprives taxpayers of "a complete understanding of the IRS's legal interpretation" and prevents Congress from confirming the IRS's compliance with congressional intent in enacting the Code).

[432] *Id.* at 508. Once my CCA proposal is adopted, the PLR request materials will be available under Section 6110. I.R.C. § 6110(b)(2), (e).

[433] An additional benefit is increased government deliberation and care. *See* EDWARD H. STIGLITZ, THE REASONING STATE 139–40 (2022) (discussing "how reason-giving conditions the behavior of the reason-giver"); *see also supra* note 427 and accompanying text.

[434] *See* I.R.C. § 6103. *But see* George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1140 (2014) ("[T]he restrictions placed on access to tax return information conflict with the public's right to know and subvert public confidence in the tax agency and system.").

[435] *See* Cauble, *supra* note 10, at 431–37 (discussing taxpayers' inability to rely on oral advice from the IRS).

competitors,[436] resemble impact litigation. Impact litigation is characterized by developing and leveraging "test cases" and incremental decisions to effect systemic change.[437] This mimics what competitors facing competitive disadvantages do by requesting PLRs. Likewise, scholars have highlighted that unfavorable judicial decisions in the course of impact litigation can nevertheless advance systemic change by triggering backlash.[438]

The parallels between impact litigation and the highly strategic uses of PLRs are particularly interesting given that, as others have recognized, traditional public interest impact litigation is often not possible in tax.[439] The formal legal rules identified above in Part IV.D.2, and in particular Article III standing, block such efforts, reflecting the "implicit assumption . . . that no taxpayer is affected by anyone else's package of taxes and tax benefits."[440] Those rules, the limited ability to influence IRS guidance,[441] and various structural forces[442] combine to create "tax tilt": entrenched bias in tax law and tax administration toward aggressive (and even abusive) pro-taxpayer positions that erode the fisc.[443]

But PLRs may actually provide a path for pursuing public interest, procompliance, and pro-fisc goals within tax. Interested taxpayers and good government advocacy groups could request PLRs countenancing known abusive positions and techniques, expecting and inviting an adverse result.[444] There are two structural advantages to this approach. First, because PLR proceedings are

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[436] *See supra* Part IV.D.

[437] *See, e.g.*, Noah A. Rosenblum, *Power-Conscious Professional Responsibility: Justice Black's Unpublished Dissent and a Lost Alternative Approach to the Ethics of Cause Lawyering*, 34 GEO. J. LEGAL ETHICS 125, 131–32 (2021); Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. & SOC. SCI. 301, 304 (2014); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 220–22 (1999).

[438] *See, e.g.*, Emily Chiang, *Institutional Reform Shaming*, 120 PENN ST. L. REV. 53, 69 (2015); Depoorter, *supra* note 308, at 833–37; Douglas NeJamie, *Winning Through Losing*, 96 IOWA L. REV. 941, 1002 (2011) ("[A]ctivists might mobilize popular support by constructing courts as countermajoritarian, elitist, and out of touch with mainstream society.").

[439] *See, e.g.*, Ira L. Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NAT'L TAX J. 373, 376–77 (1974) (evaluating potential limitations, including sovereign immunity, the Anti-Injunction Act, and Article III standing); Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 53–61 (1972) (same).

[440] *See* Sugin, *supra* note 319, at 630.

[441] *See supra* Part IV.C.2.

[442] *See* Galle & Shay, *supra* note 322, at 1677, 1679–80, 1683, 1687 ("[P]olitics is stacked in favor of tax breaks: concentrated interest groups can easily organize for their own benefit, while the costs of the breaks (lower revenues) are spread thinly across the general population, which will rationally ignore or free ride on the efforts of others to identify revenue-losers.").

[443] *See id.* at 1675–81; Sugin, *supra* note 319, at 633–34 (discussing standing); Zelenak, *supra* note 323, at 847 (same).

[444] *See also supra* note 316.

private and PLRs cannot be formally challenged, lobbyists and interest groups would only be able to push back after the PLR is released.[445] Second, although agency inaction is diffuse and typically invisible,[446] the PLR process is not confidential, so if the IRS refuses to rule on the PLR request, such concrete inaction can be publicized to provoke focused backlash.

To be clear, PLRs are not a silver bullet that can solve tax tilt. For one thing, because PLRs are not formally binding, an adverse PLR on an aggressive tax position will cast doubt on it but will not stop determined taxpayers. (At the same time, the number of companies using adverse PLRs in this manner indicates that it is worth pursuing.) PLRs are also expensive, so even the most well-funded advocacy group will need to triage tax abuses and consider whether the outlay is justified for each one.[447] Most significantly, PLR standing will limit the universe of tax abuses that this strategy can counteract.[448] As discussed above in Part I.A, PLR requests must involve "prospective" and not merely "hypothetical" tax positions, so certain positions would require significant or even prohibitive up-front investment and contortion. For example, imagine wanting to challenge private equity funds' carry waiver[449]—a taxpayer would have to set up a whole private equity fund and receive investor commitments to plausibly request a PLR. In addition, because there is no associational PLR standing, public interest organizations would need to recruit taxpayers to formally request these PLRs.[450] Take a different example: to rein in aggressive interpretations of not taxing employees on meals provided for their employers' "convenience,"[451] public interest organizations would need to find an employer who is not providing those benefits based on their (or their ac-

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[445] Under current law, such pushback would be informal. My proposals in Part V.B.1 would not result in ex ante intervention because there would typically not be any third parties directly and particularly impacted by these PLRs. Instead, my proposals would only formalize the currently informal ex-post pushback.

[446] *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1664–75 (2004) (discussing nonreviewability and standing as bars to judicial review of agency inaction).

[447] The PLR user fee is lower for certain comparatively low-income taxpayers, *see supra* note 54, but it still is a not-insignificant sum, particularly when combined with the opportunity cost and legal time required to prepare a PLR request.

[448] The IRS's discretion to refuse to rule is another limitation. Accordingly, this proposed strategy depends on the IRS's good faith cooperation and cannot counteract positions on the no-rule list, *see supra* Part I.A; Rev. Proc. 2025-1 § 6, 2025-1 I.R.B. 18–22, or blessed by directly applicable IRS guidance, *see* Rev. Proc. 2025-1 § 6.11, 2025-1 I.R.B. 21.

[449] *See, e.g.*, Michelle M. Jewett, *The Crystallization of Carried Interests*, 175 TAX NOTES FED. 1335, 1343 (2022).

[450] *See also* Rosenblum, *supra* note 437, at 143–47 (evaluating potential ethical issues arising from a divide between the cause lawyer's goals and the individual client's goals).

[451] I.R.C. § 119(a).

countant auditors') interpretations of the Code and convince them to request a PLR.[452]

Nevertheless, this strategy could be fruitful for counteracting certain tax abuses. Consider as an example the "wash sale" rules. The Code forbids taxpayers from deducting losses from sales of securities if, in the sixty-one day window around such sale, the taxpayers acquired "substantially identical stock or securities."[453] It is unclear how to apply that rule to shares of exchange-traded funds (ETFs), which are funds "that own[] underlying assets (typically stocks, bonds, or commodities) and divide[] ownership of those assets into shares."[454] Aggressive taxpayers often take the position that no ETF is "substantially identical" to any other ETF, even if the underlying assets are the same, circumventing the wash sale rules.[455] To combat that technique, a civic-minded taxpayer could, without too much effort, purchase shares of one ETF tracking the S&P 500, sell them at a loss, purchase replacement shares from another ETF that also tracks the S&P 500 five days later, and then request a PLR confirming that the triggered loss is allowed for tax purposes.[456] The answer *should* be no, and if the IRS issues a PLR to that effect, given its de facto normative force, the technique will be stymied.[457]

A second example involves the federal income tax deduction for state and local taxes (SALT Deduction). Since 2018, Section 164(b)(6) has capped the deduction available to individuals at $10,000. In response, certain high-tax states have enacted "pass-through entity taxes" (PTET) as a way to allow certain taxpayers to deduct state taxes over $10,000. At a high level, the PTET is an election whereby a pass-through entity, which typically would not bear state income tax, can elect to be subject to state income tax (often at the highest individual income tax rate in the state). Amounts that the entity pays in state income tax reduce taxable income allocated to the owners of the entity (and reduce, via credits, owners' state income tax obligations). This allows, in substance, individuals who receive income through pass-through entities to re-

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[452] An employer who reluctantly provides the benefits because of a competitive labor market could also be interested in pursuing a PLR on the point.

[453] I.R.C. § 1091(a).

[454] Daniel W. Matthews, *Tax Loss Harvesting: Can Robo-Advisers Navigate Wash Sale Rule?*, 153 TAX NOTES 1345, 1346 (2016).

[455] *See id.* at 1347; Lee A. Sheppard, *Money Market Funds, Wash Sales, and Liquidity Fees*, 181 TAX NOTES FED. 209, 213 (2023).

[456] *See* Anna-Louise Jackson & Alana Benson, *Top S&P 500 ETFs for June 2024: SPY, VOO and More*, NERDWALLET, https://www.nerdwallet.com/article/investing/sp-500-etfs [https://perma.cc/3XPQ-NAHE] (Feb. 3, 2025) (listing exchange-traded funds tracking the S&P 500 and noting "small differences" between them).

[457] The PLR request should present the best arguments for the aggressive position. Taxpayers could dismiss PLRs as outliers or mistakes if they ignore arguments rather than affirmatively reject them.

ceive unlimited SALT Deductions, circumventing the statutory limit.[458] The IRS acquiesced to this workaround in the final months of the first Trump administration in Notice 2020-75, and (somewhat surprisingly) the Biden administration left it in place.[459]

The merits of the workaround are beyond the scope of this Article,[460] but I would like to focus on one particular abuse. The PTET workaround hinges on the partnership's PTET payment reducing the partnership's overall net income. As a doctrinal matter, PTET payments should only reduce overall net income if they constitute a trade or business expense.[461] Therefore, an operating partnership should be able to implement the PTET workaround, but an investment partnership with passive income should not be able to do so. Notice 2020-75 is silent on this point, stating instead that PTET payments categorically reduce net overall partnership income.[462] Relying on Notice 2020-75's overly-broad statements, some aggressive taxpayers disregard the Code and make PTET payments from investment partnerships.[463] This outcome seems particularly odious and severely violates horizontal equity—individuals who drop their investments into a partnership can circumvent the SALT Deduction cap; those who do not cannot. The IRS also appears unlikely to formalize Notice 2020-75 into Regulations (which would possibly allow public-interest-minded stakeholders to challenge its implicit breadth), leaving it virtually unchallengeable.

A strategic, impact adverse PLR could enforce Section 164(b)(6)'s statutory text. In particular, a civic-minded taxpayer and their spouse could drop their personal investments into a passive limited liability company taxed as a partnership and request a PLR holding that, if it made the applicable PTET election, it would be able to deduct all state taxes even in excess of $10,000.[464] Given the clear statutory text, the IRS should rule that the deduction is limited to $10,000. This would be meaningful a step toward shutting down this aggressive tax maneuver.

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[458] *See* Daniel J. Hemel, *The Passthrough Entity Tax Scandal*, 26 FLA. TAX REV. 87, 89–90 (2023).

[459] I.R.S. Notice 2020-75, 2020-49 I.R.B. 1453.

[460] *See* Hemel, *supra* note 458, at 116–26.

[461] Section 162 deductions net out from aggregate partnership income, but non-business PTET payments are deductible only under Section 212 and are separately stated. *See* Treas. Reg. § 1.702-1(a)(8)(i) (1960).

[462] I.R.S. Notice 2020-75 § 3.02, 2020-49 I.R.B. 1453.

[463] Loredana Scarlat, *Decoding PTET: The IRS-Approved SALT Deduction Workaround for Pass-Through Entities*, MARCUM (Nov. 15, 2023), https://www.marcumllp.com/insights/decoding-ptet-the-irs-approved-salt-deduction-workaround-for-pass-through-entities [https://perma.cc/KE26-TVJ8]; Allen Schaefer, *State Pass-Through Entity Taxes (PTET)—The Effect on Tiered Partnerships and Investment Partnerships*, PERELSON WEINER LLP (July 6, 2022), https://www.pwcpa.com/state-ptet-effect-tiered-investment-partnership [https://perma.cc/Q7XA-WMS3].

[464] *See also* Rev. Proc. 2002-69, 2002-2 C.B. 831 (holding that spouses can own 100% of an entity in community property states and have it respected as a partnership for federal tax purposes).

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Three additional considerations deserve mention. First, as mentioned briefly above, the IRS may not cooperate with this strategy. For example, because this is a procedural intervention to the substantive problem of tax tilt, the resulting PLR could bless the abusive practice. In the short term, if the abusive position is not already pervasive, this could increase its prevalence and erode the fisc. Nevertheless, a favorable PLR would provide a target to criticize and could highlight an unintended tax loophole for Congress to fix.[465] Organizations employing this strategy should be ready to generate and leverage backlash as a backup. Furthermore, although a favorable PLR could erode the fisc, publicly documenting the IRS's position and making it accessible to taxpayers broadly advances a fair tax system.[466]

Second, one risk of this approach is that it could devalue (or taint) PLRs. Although possible, it is important to note that requesting taxpayers already have an array of motivations and may lack confidence in their requested positions. That has not undermined the impact or importance of PLRs because regardless, the resulting PLR reflects the IRS's position. That same reason should apply to PLRs obtained to vindicate the public interest and protect the fisc. That is, even if it were generally known that a given PLR was obtained strategically, there is no reason to believe external accountant auditors would devalue it as evidence of tax law.

Finally, it is worth briefly examining whether this approach overlaps or clashes with existing whistleblower mechanisms. Notably, while PLRs are expensive, whistleblowers can receive financial rewards.[467] But four other factors favorably distinguish PLRs: speed, collaboration, likelihood of success, and scope. First, because the PLR process is comparatively quick,[468] it is more likely to keep up with ever-changing tax techniques and schemes. Second, the PLR process is quite collaborative, allowing requesting taxpayers the opportunity to allay IRS concerns and advocate for their desired position, whereas whistleblowing is a one-way street without any IRS feedback or collabora-

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[465] *See* Depoorter, *supra* note 308, at 834–36.

[466] The IRS could also not cooperate with this strategy by tightening PLR standing rules. Nevertheless, because the usefulness of PLRs hinges on their prospective guidance, the IRS is unlikely to curtail PLR standing too much.

[467] *See* I.R.C. § 7623 (providing that a whistleblower may receive between 15% and 30% of the taxes recovered).

[468] *Compare* IRM 32.3.2.3(1) (July 9, 2014) (PLR process generally takes 180 days), *and supra* note 75, *with* INTERNAL REVENUE SERV., WHISTLEBLOWER OFF., PUB. NO. 5241, FISCAL YEAR 2022 ANNUAL REPORT 9 (2022), https://www.irs.gov/pub/irs-prior/p5241--2023.pdf [https://perma.cc/4AYT-KRGX] (whistleblower payments made in minimum of twenty-two to fifty months).

tion.[469] Third, although the IRS has no obligation either to issue a PLR or to act on whistleblower information,[470] public-interest minded PLRs are structurally more likely to be successful. PLRs emerge from a taxpayer service-oriented process that is financed by the requesting taxpayer's user fee and is structured to conclude with a signed PLR.[471] Fourth, although whistleblowing is functionally limited to comparatively clear-cut violations of tax law,[472] PLRs can tackle a significantly broader array of tax techniques, including those based on colorable, but aggressive, interpretations of tax law.[473]

CONCLUSION

From the outside, it is easy to dismiss private letter rulings. Their content can be inscrutable, and the Code forbids them from having precedential effect. But PLRs are quite important to taxpayers and practitioners—in many cases, they are the only indication of what the IRS thinks about a given tax law question. PLRs are also the most granular guidance the IRS publicly releases, analyzing real-world situations and answering unclear questions of law. This disconnect between PLRs' formal legal status and their de facto normative force alone makes them interesting and worthy of study.

This Article begins that work by focusing on adverse PLRs. Analyzing a unique dataset of hundreds of adverse PLRs is a particularly fruitful window into PLRs (and the tax system more broadly) precisely because the conventional wisdom is that, because PLRs are collaborative and voluntary, adverse PLRs should not exist. The significant number of adverse PLRs and how requesting taxpayers find them strategically beneficial starkly undermines the traditional dyad model of a siloed taxpayer and the IRS. Instead, the particular normative force of adverse PLRs exemplifies taxpayers' interconnectedness.

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[469] *See* INTERNAL REVENUE SERV., PUB. NO. 5251, THE WHISTLEBLOWER CLAIM PROCESS (2022), https://www.irs.gov/pub/irs-pdf/p5251.pdf [https://perma.cc/5WRH-PMRA] (describing the very limited, one-way flow of information from the IRS to whistleblowers after claim submission).

[470] *See, e.g.*, Stone v. Comm'r, 86 F.4th 1320, 1324 (11th Cir. 2023) (holding that the IRS's failure to act on whistleblower information is unreviewable under the APA), *cert. denied*, 144 S. Ct. 1119 (2024).

[471] *Cf.* Dean Zerbe, *A Legislative History of the Modern Tax Whistleblower Program*, 169 TAX NOTES FED. 561, 563 (2020) ("[T]he prevailing culture at the IRS made it clear that whistleblowers were neither encouraged nor welcome."); Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321, 334–36 (2015) ("Whistleblower cases are not a policy priority and may encounter cultural resistance within the Service.").

[472] *See* Treas. Reg. § 301.7623-1(c)(1) (2014). For many aggressive tax positions, concrete proof may well exist only in confidential, inaccessible materials (e.g., PPMs and LPAs), precluding whistleblowing.

[473] *Cf.* Rev. Proc. 2025-1 § 6.11, 2025-1 I.R.B. 21. Adverse PLRs also can support whistleblower claims.

Taxpayers who strategically use adverse PLRs leverage the gap between the PLR program's premises and its reality. To narrow that gap, I propose procedural interventions for the PLR process drawn from comparing PLRs to collaborative rulemaking and litigation. Collaborative rulemaking suggests the need for increased stakeholder input, both as PLRs are formulated and after their release. Litigation highlights that the PLR process creates significant hidden guidance because requesting taxpayers can walk away after the IRS conveys its position to them. Modifying the PLR process to increase transparency and input will advance the IRS's mission of administering a fair and just tax system.

Taxpayers' highly strategic uses of PLRs, to generate backlash and level competitive playing fields, aligns closely with the strategies behind impact litigation. Accordingly, I suggest that public-minded stakeholders follow highly strategic taxpayers' lead and leverage PLRs to tackle aggressive (and abusive) tax positions. Such a mechanism is sorely needed, because various doctrines and rules preclude traditional impact litigation within tax and, in turn, tilt the tax system toward aggressive (and abusive) taxpayer behavior.

More broadly, PLRs are one example of the many ways that the IRS provides guidance to taxpayers (and, in so doing, interprets the Code and Regulations). Although such guidance can be categorized based on numerous dimensions including intended audience, precedential value, and specificity, the whole picture is needed to draw conclusions about the nature of tax law and tax statutory interpretation.[474] The IRS is also far from unique in publicly releasing formally non-precedential, factually granular guidance. For example, the SEC publicly releases its no-action letters, which generally apply only to particular parties and transactions, but have de facto impact on regulated parties writ large.[475] Comparative analysis and a government-wide understanding of these practices could reveal a more nuanced picture of administrative agencies, functionally precedential guidance, and statutory interpretation.

The world of PLRs is vast and consequential. Taxpayers, their advisors, and the IRS take them seriously; academic analysis and theorizing about the tax system ought to do so too.[476] This Article begins to do exactly that.

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[474] *Cf., e.g.*, Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363, 394 (2020); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 502–09, 529, 531, 543 (2013).

[475] *See* 17 C.F.R. § 140.99 (2025); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 924 (1998) ("Notwithstanding their status as unofficial and informal pronouncements, SEC no-action letters have assumed a considerable degree of importance to market participants and their counsel in planning transactions and conducting business.").

[476] As but one small example, regardless of one's theories or normative preferences regarding tax exceptionalism, one should account for the extent to which PLRs are (or are not) in fact exceptional in their quantity, scope, entrenchment, or regulated-party reactions.

APPENDIX—METHODOLOGY DETAILS

This Appendix details the process of creating my dataset of adverse PLRs. Tracking Part II, it considers (1) identifying PLRs, (2) accessing PLRs, (3) excluding non-discretionary PLRs, (4) the scope of my review, and (5) identifying adverse PLRs. Finally, it lists the primary searches executed to find adverse PLRs through terms and connectors sleuthing.

Identifying PLRs

1. PLR Numbers

    a. The IRS generally releases written determinations, including PLRs, weekly.[a] As referenced in the Introduction, based on their release date and release order, PLRs receive a nine-digit release number.[b]

    b. The IRS also assigns PLRs one or more classifying "Uniform Issue List" (UIL) numbers. UIL numbers are a Code-based index of issues and sub-issues maintained by the IRS Office of the Chief Counsel. Although UIL numbers theoretically enable researchers to quickly find all PLRs addressing a particular issue,[c] in practice they are obscure and are inconsistently applied.[d]

2. PLR Dates

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[a] PLRs on a given substantive topic tend to clump, with multiple PLRs on the topic being released in a given week, followed by none for several subsequent weeks.

[b] PLRs also have an internal IRS number. Unfortunately, I have not been able to find any documentation of the provenance or meaning of such number, which is not used by commercial databases or literature to reference PLRs. The last two digits of such number, however, appear to correspond with the year in which the taxpayer requested the PLR. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200119014 (Feb. 5, 2001) (referring to PLR 200004022 as "PLR-111497-99"); *cf.* IRM 37.1.2.8(2) (Aug. 11, 2004) (appearing to reference the release number).

[c] IRS Publication 1078 is an index of PLRs by Code section (and UIL number). The current version includes PLRs from 2012 to the present (it is updated weekly). *See* INTERNAL REVENUE SERV., PUBL'N NO. 1078, SECTION 6110 INDEX (2024), https://www.irs.gov/pub/irs-wd/202451_idx.pdf [https://perma.cc/N4X4-5FVZ].

[d] *Compare, e.g.*, I.R.S. Priv. Ltr. Rul. 201327006 (Apr. 3, 2013) (examining whether a REIT has preferential dividends under Section 562(c), coded with UIL "562.03-00 Preferential Dividends"), *with* I.R.S. Priv. Ltr. Rul. 201244012 (Aug. 2, 2012) (same, coded just with UIL "562.00-00 Dividends Eligible v. Not Eligible for Dividends-Paid Deduction"). *See also* Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183, 220 n.141 (2012) ("While the [IRS] website makes it possible to sort determination letters by something called the UILC number, the letters are coded in obscure and unhelpful ways. . . . Moreover, categorical assignments do not seem to be made with great care."); GAIL LEVIN RICHMOND & KEVIN M. YAMAMOTO, FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES ch. 9, pt. M (12th ed. 2024).

a. PLRs have two associated dates—the issuance date (when the IRS signed the PLR to the requesting taxpayer) and the release date (when the IRS publicly released the PLR).[e] Unfortunately, commercial databases have only one "date" field, and they vary internally and between themselves regarding whether the issuance date or the release date is used.[f]

b. Accordingly, I relied on release numbers, which objectively hard-code the year of release, to assign PLRs to years (and weeks therein).[g]

3. Modified PLRs, Revoked PLRs, Pulled PLRs

a. To modify or revoke PLRs, the IRS issues a separate PLR. I classified these as separate PLRs. Modification PLRs typically respond to factual changes in the transaction and functionally do not undermine the original PLR's analysis. Likewise, revocation PLRs contain independent information describing the basis of the revocation.

b. Although the IRS makes written determinations available to commercial databases in advance of public release, sometimes in the intervening time the PLR is pulled. Pulled PLRs are entirely absent from the IRS website, and commercial databases tend to contain no information for them.[h] Accordingly, I ignored pulled PLRs.

Accessing PLRs

1. IRS

a. The IRS has made PLRs publicly available since 1977 but only has posted them on its website since January 1, 1999.[i]

b. Pre-1999 PLRs are in the IRS reading room in Washington, D.C., but access implicitly precludes bulk requests.[j] (Section 6110 displaces FOIA, so standard FOIA procedures do not directly apply.[k])

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[e] Although typically there is a lag of ninety days, *see* I.R.C. § 6110(g), sometimes it stretches to years.

[f] For example, Westlaw classifies recent PLRs by release date but older PLRs by issuance date. This is one reason why scholars struggle to reproduce others' numbers of PLRs per year.

[g] Sometimes, Westlaw does not record a date for a PLR, which defaults to assigning it January 1 of the applicable year (even though PLRs are generally not released on federal holidays).

[h] Occasionally, the pulled PLR remains on the commercial database, in which case I treated it as a PLR.

[i] IRM 11.3.7.3(2) (Aug. 8, 2008); *see also* I.R.S. Announcement 99-4, 1999-1 C.B. 324, 324.

[j] *See* Treas. Reg. § 301.6110-1(c) (as amended in 2012).

c. Post-1998 PLRs are posted on two IRS websites:

i. The main IRS Written Determinations page allows sorting by release date, release number, UIL number, and subject (pulled from UIL number titles). It is searchable, but not with Boolean operators and is in my experience unreliable. There is also one list entry for each UIL number associated with each PLR, so individual PLRs are listed numerous times.[l]

ii. The IRS Written Determinations download folder displays each PDF for each written determination as a single entry.[m] But there is no search functionality, only rudimentary sorting capabilities, and PLRs are listed by the filename for each PDF, which often (but not always) is the release number.[n]

d. Accordingly, given the limitations and drawbacks of the IRS website,[o] following others' lead,[p] I relied on commercial databases to locate and analyze PLRs.

2. Commercial Databases

a. Westlaw allows querying PLRs solely by date; lists of results can be downloaded in sets of 1,000; PLRs themselves can be downloaded in sets of 100; and there are comprehensive Boolean search-within-search capabilities.[q]

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[k] *See* I.R.C. § 6110(m) (stating that, except as provided in the Code, "the Secretary shall not be required by any Court to make any written determination or background file document open or available to public inspection"); IRM 11.3.13.5.2.6(13) (Apr. 19, 2017); IRM 11.3.13.7.1(1) (Oct. 5, 2021).

[l] *See Written Determinations*, INTERNAL REVENUE SERV., https://www.irs.gov/written-determinations (last visited Feb. 23, 2025).

[m] *See Directory irs-wd*, INTERNAL REVENUE SERV., https://www.irs.gov/downloads/irs-wd (last visited Feb. 23, 2025).

[n] The page can also be sorted by date of upload, size of file, and a "Description" field, which typically is the release number.

[o] *See* Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. 1, 20 n.91 (2016) (noting drawbacks of the IRS website for research).

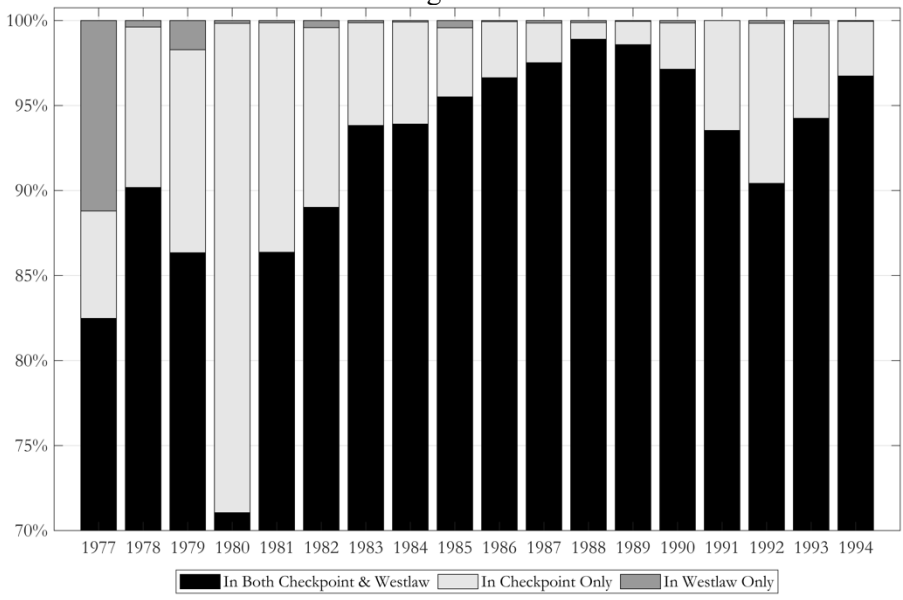
[p] *See, e.g.*, KRESGE L. LIBR., UNIV. OF NOTRE DAME, GUIDE TO BASIC TAX RESEARCH 9 (2019), https://law.nd.edu/assets/303312/tax_research_guide_2019.pdf [https://perma.cc/X6U9-FVZW] ("IRS rulings of various kinds are the most difficult materials to locate. . . . However, the online databases (Lexis Advance, Westlaw, and Bloomberg Law) have extensive collections of these materials."); CHRISTOPHER C. DYKES, FEDERAL INCOME TAX LAW: A LEGAL RESEARCH GUIDE 24 (2d ed. 2021) (stating that commercial databases are the "most practical way" to work with PLRs); Brody, *supra* note d, at 220 ("The easiest way to find specific issues in these letters is to search a commercial electronic database, such as LEXIS or Westlaw.").

[q] Other commercial databases are significantly more limited. Checkpoint requires searching by keyword; results must be manually selected for download; there is no way to export lists of results; results are only displayed in sets of five; search-within-search is extremely limited; and keyword

b. All commercial databases are under- and over-inclusive, and they all have some noise in the datasets. Wherever possible, I tried to exclude non-PLRs, include misclassified PLRs, and assign the proper release number to dataset PLRs.

c. To cross-check Westlaw, I comprehensively compared its PLRs to Checkpoint's for 1977 through 2024.[r] Although discrepancies between them are somewhat random,[s] they generally converge for recent decades, as depicted in the Figures below.

Figure A

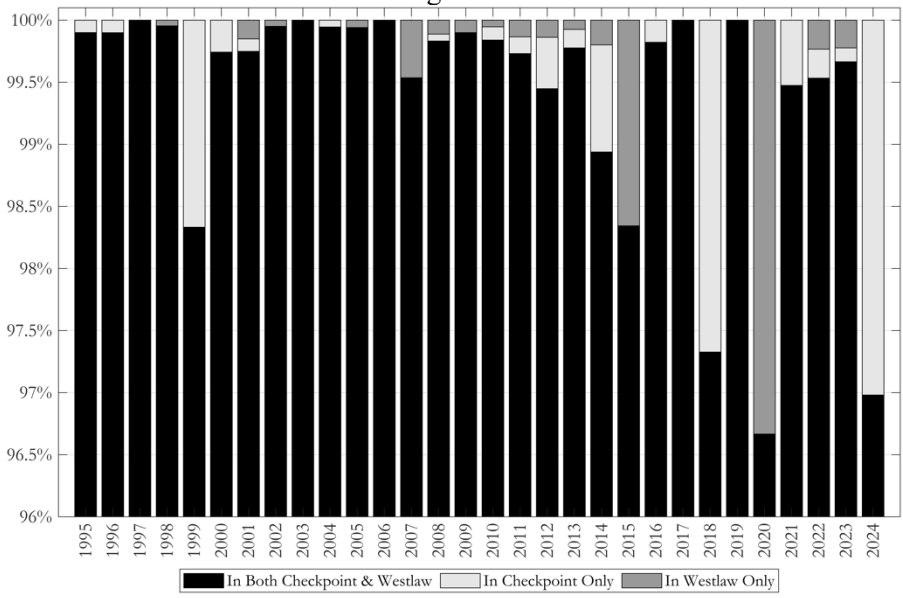


searching includes Checkpoint's editorial annotations. Bloomberg Tax allows only one level of searching (though it does allow downloads of lists of results in increments of 1,000). Lexis limits exports of lists of results to 250 items, selected from the first 1,000 results of any search; downloads are limited to 50 files at a time. Lexis does have comprehensive search-within-search, however, and searches return comprehensive results (Westlaw is capped at 10,000). Tax Notes' research portal offers only simple keyword searching; there is no search-within-search; and there is no way to bulk download. On its main portal, there is limited search-within-search; there is no bulk downloading; only 50 items can be downloaded at a time; there is no ability to download lists of results; and the database has many gaps and duplicates. Most challengingly, exported PLRs do not include their release numbers.

[r] Even though Westlaw and Checkpoint are both owned by Thomson Reuters, their PLR databases are (seemingly) independent.

[s] For example, Westlaw is missing all twenty-one PLRs released in the fifty-third week of 2018.

Figure B



3. Based on review of the commercial databases, with limited checks against the IRS website for PLRs issued in or after 1999, I estimate that the IRS has issued at least 124,500 PLRs from 1977 through 2024.

    a. This takes into account misclassifications in Westlaw and in Checkpoint, encompassing both documents in their PLR databases that are *not* PLRs and documents assigned to their non-PLR databases that *are* PLRs. These were found, among other ways, by comparing PLRs on one database but not the other, and by examining PLRs on the IRS website that are not in one or both databases. None of Westlaw, Checkpoint, or the IRS website is comprehensive.

    b. The underlying data files list these misclassifications.

<u>Excluding Non-Discretionary PLRs</u>

1. PLRs that are mandatory under U.S. tax law cannot be categorically excluded.

2. Any exclusion from the universe of PLRs based on the presence of terms or Code sections risks over-excluding from the dataset. To minimize that risk while maximizing efficiency, I downloaded the Code

sections associated on Checkpoint with all PLRs released from 2013 through August 25, 2023.[t]

3. Using a frequency analysis, I reviewed any Code section attributed to ten or more PLRs. If the Code section included an express requirement that the taxpayer receive IRS approval, I excluded any PLRs containing citations to that Code section.
    a. Where express IRS approval is required, PLRs granting such approval are almost always limited to the question of approval.[u]
    b. I also excluded certain Regulation citations that require PLRs.
4. As a result, I excluded PLRs containing twelve terms:
    a. "9100" and "1362(b)(5)" (relief for missed deadlines)
    b. "1362(f)" and "1362(g)" (elections of S corporation status given inadvertent termination or loss of status within past five years)
    c. "4945(g)" (approval of private foundation grant procedures for grants to individuals)
    d. "402(c)(3)(B)" (hardship exception for retirement withdrawals)
    e. "468A(d)" (amount of deduction for nuclear decommissioning costs)
    f. "408(d)(3)(I)"[v] (waiver of limitations on rollovers)
    g. "exempt status" (denying tax exemption under Section 501(c)(3))[w]
    h. "301.7701-3(c)(1)(iv)" (permission to change entity classification)
    i. "1.1295-3(f)" (consent for retroactive QEF election)
    j. "53.4942(a)-3(b)(2)" (private foundation set-asides)
5. For PLRs before January 1, 1984, I also excluded "367(a)." Before 1984, taxpayers needed PLRs to avoid Section 367(a)'s adverse tax consequences.

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[t] This was derived from UIL numbers.

[u] This approach may over-exclude, but there is no reason to believe that other rulings contained in PLRs containing these phrases are systemically different from the rulings in PLRs that do not contain these phrases.

[v] Given typos, I also excluded "408(d)(3)(l)," "408(d)(3)(L)," and "408(d)(3)(1)."

[w] Excluding citations to "501" or "501(c)(3)" would be quite over-inclusive. Nevertheless, PLRs denying exemption use "exempt status" while other PLRs referencing Section 501(c)(3) generally do not.

a. For post-1984 PLRs involving Section 367(a), I manually reviewed and excluded them if the transaction occurred under pre-1984 law.

6. Furthermore, when manually reviewing PLRs, I carefully examined PLRs where the taxpayer was asking for "consent," "permission," or "waivers." Likewise, PLRs where taxpayers were asking about "minimum funding requirements" (Section 412(c)), "mortality tables" (Section 430(h)(3)(C)), or "excess business holdings" (Section 4943(c)) often were mandatory.

7. I also categorized certain procedural postures as mandatory, such as relief from retroactive application of IRS rules under Section 7805(b), revocations of PLRs, denials of requests for reconsideration, and modifications of PLRs.

Scope of Review

1. Applying the term exclusions discussed above to the commercial databases resulted in a scraped set of approximately 81,000 PLRs.

2. From those 81,000 PLRs, I examined (1) each PLR released in 2015 through 2024 (2,068 PLRs) and (2) 5,000 randomly selected PLRs from the remaining approximately 79,000 PLRs.

3. In addition to these over 7,000 PLRs, I reviewed over 3,000 other PLRs found through various means:

   a. I applied the terms & connectors searches described below (over 2,000 PLRs).

   b. I investigated the prevalence of favorable PLRs begetting nearly identical favorable PLRs. This included review of:

      i. over 150 PLRs involving incomplete grantor trusts;

      ii. over 130 PLRs involving contributions in aid of construction under Section 118;

      iii. over 400 PLRs involving whether a taxpayer is a political subdivision under Regulation Section 1.103-1(b);

      iv. over 170 involving private business use under Section 141(b); and

      v. over forty PLRs involving passive gross income under Section 165(g)(3).

   c. I also reviewed:

i. the over 150 PLRs linked on the IRS website to aid taxpayers; and

ii. myriad PLRs discussed and/or cited in secondary sources that reference the adverse PLRs in my dataset.

Identifying Adverse PLRs

1. Sometimes, PLRs generally grant the taxpayer's requested rulings but include additional statements regarding other legal constraints (likely to avoid the PLR being read too broadly). I did not classify those as adverse PLRs, even though the ruling differed from the request, because the taxpayers' requests did not involve the additional legal constraints, which were likely undisputed.

2. Before 1991, the IRS issued a significant number of PLRs regarding whether a worker was classified as an employee or as an independent contractor for U.S. federal tax purposes. Those PLRs did not typically state the desired classification, and the IRS would solicit information from all parties before making a decision. Accordingly, to avoid muddying the waters, I excluded them from my dataset of adverse PLRs.

3. Before 1997, taxpayers would seek rulings about entity classification. Those PLRs tend not to specify the taxpayer's desired classification. Nevertheless, I used the state law framework under which the entity was formed as a proxy for their preference (for example, it is unlikely someone would seek a PLR that an entity formed under Delaware's limited partnership laws was a corporation for U.S. federal income tax purposes).

    a. Under relevant law, corporation classification was the default, so if state law of formation was unavailable or inconclusive as a proxy, I assumed the taxpayer wanted a PLR to confirm partnership classification.

4. Sometimes, the IRS provided general information about the law rather than ruling on the request. I classified those PLRs as refusing to rule rather than adverse.

5. Where the IRS ruled on some issues and refused to rule on others, I determined whether a PLR was adverse based on the issues on which the IRS ruled.

Terms and Connectors Searches

Below are searches I ran in Westlaw to identify adverse PLRs. To the extent possible, I ran the same searches in Bloomberg, Checkpoint, and Tax Notes (with each database's syntax, etc.).

1. "adverse ruling"
2. adverse /s (determination OR decision OR "letter ruling")
3. ("treasury" OR "service" OR "IRS" OR "secretary") /s (reject! OR deni! OR deny OR refuse!) AND ("letter ruling" OR "PLR")
4. "adverse conference"
5. "7805(b)"
6. revok! /s "rulings"
7. (adverse OR unfavorab!) AND ("PLR" OR "letter ruling" OR "private ruling") AND (negligen! OR mistak! OR stubborn!)
8. "letter ruling" AND reconsider!
9. request! /s reconsider! % doubt! /s change! /s material! /s submit! "9100" "employment tax"
10. fail! /s respond
11. adverse /s ("PLR" OR "private letter ruling" OR "letter ruling") AND mistake OR accident OR "mess up")
12. withdraw! /s ("letter ruling" OR "PLR")
13. "letter ruling" AND "malpractice"
14. "letter ruling" AND withdraw!
15. ("depends on" OR "contingent on" OR "subject to" OR "provided that") /s (obtain! OR issu! OR receiv!) /s "private letter ruling"
16. protest /s "letter ruling"
17. "prior ruling"
18. (mandatory OR required OR requirement OR force! OR "have to" OR need!) /s (adverse! OR unfavorab! OR disagree! OR "ruled against" OR "ruling against") /s ("PLR" OR "P.L.R." OR "LTR" OR "letter")
19. withdraw! /s ("letter" OR "LTR" OR "PLR" OR "P.L.R." OR "ruling")
20. withdraw! AND request AND letter
21. (revok! OR revoc!) AND ("letter ruling" OR "PLR")
22. ("PLR" OR "P.L.R." OR "LTR" OR "letter ruling") /s (criticism OR critique OR controvers! OR criticize)
23. ("PLR" OR "P.L.R." OR "LTR" OR "letter ruling") /p (revoke OR revocation) AND (transaction /s (cancel! OR abandon! OR "not proceed" OR "not go forward" OR "not consummate" OR "not to go forward" OR "not to consummate" OR "not to proceed"))
24. withdraw! /s request /s ("PLR" OR "P.L.R." OR "LTR" OR "letter ruling" OR "ruling")

25. ("PLR" OR "P.L.R." OR "LTR" OR "letter ruling") /s (controvers! OR backlash)
26. ("PLR" OR "P.L.R." OR "LTR" OR "letter ruling") /p (adverse! OR unfavorabl! OR "rule against" OR "ruled against" OR disagree!) /s (notable OR significan!)
27. ("PLR" OR "P.L.R." OR "LTR" OR "letter ruling") /s (odd OR surpris! OR strange OR weird OR bizarre OR rare) AND (adverse OR unfavorable OR (rule! /2 against))

Below is the search I ran against the PLR database to exclude citations and terms associated with mandatory PLRs, resulting in the scraped set of approximately 81,000 PLRs:

> DA(aft[●] & bef [●]) % "exempt status" "9100" "1362(g)" "1362(f)" "4945(g)" "1362(b)(5)" "1.1295-3(f)" "301.7701-3(c)(1)(iv)" "408(d)(3)(I)" "402(c)(3)(B)" "468A(d)" "53.4942(a)-3(b)(2)" ["367(a)"][x]

[x] As applicable.