[COMMITTEE PRINT]

PRIVATE LETTER RULINGS

PREPARED FOR THE USE OF THE

COMMITTEE ON WAYS AND MEANS

BY THE STAFF OF THE

JOINT COMMITTEE ON INTERNAL REVENUE TAXATION

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PRESENT LAW

As a well-established part of the tax system, the National Office of the Internal Revenue Service provides written advice to taxpayers on the tax treatment of their specific transactions. This procedure is available to anyone who wishes to use it and is provided for in the IRS Statement of Procedural Rules and revenue procedures.[1] (Statement of Procedural Rules § 601.201; Rev. Proc., 72–3, 1972–1, Cum. Bul. 698, modified by Rev. Proc. 73–7, 1973–1, Cum. Bul. 776.)

Advice may be issued after a written request from the taxpayer, giving factual details about the transaction, and after the taxpayer answers questions the IRS may have about the transaction. Information provided by the taxpayer to the IRS often contains confidential financial (or personal) information about the taxpayer. Some of this information is repeated in the letter of advice that is issued by the IRS. The letter of advice generally is called a "ruling" and is in the form of a letter to the taxpayer.

The letter ruling to the taxpayer has been treated as "private" in the sense that it is issued in response to the request of the taxpayer and is officially kept confidential. Even if another taxpayer obtains a copy of a private ruling, he cannot use it as precedent in his own case. Private rulings apply only to the taxpayer to whom they are issued.

In addition, the IRS publishes revenue rulings in its official bulletins. Taxpayers and IRS employees may rely on these published rulings as precedent. Often published revenue rulings are based on a private letter ruling or on a series of letter rulings. However, before publication all identifying information is deleted from the proposed revenue ruling, facts may be altered to conceal identity, the position of the Service may be changed, and this sanitized version is subject to extensive administrative review. Consequently, often the published version may not bear much resemblance to any specific private ruling.

In 1974, the Technical Office of the National Office handled 28,346 ruling requests. Approximately one-half of these (14,329) dealt with requests for changes in accounting periods and methods; these requests are handled rapidly and normally do not involve any substantive issue.[2]

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[1] The IRS will not rule on all transactions. For example, the IRS will not rule on whether compensation is reasonable in amount or on whether a taxpayer who advances funds to a charitable organization and receives a promissory note therefore may deduct as contributions amounts of the note forgiven by the taxpayer in later years. Rev. Proc. 72–9, 1972–1 Cum. Bul. 718. In addition, in some cases the IRS has established guidelines describing the form a transaction must take before a favorable ruling will be issued. See, e.g., Rev. Proc. 75–21, 1975–18, I.R.B. 15, which sets out conditions which a transaction must meet before a favorable ruling will be granted that a transaction is a leveraged lease and not a conditional sale.

[2] Under the code, generally a taxpayer who changes his method of accounting must, before computing his taxable income under the new method, secure the consent of the IRS. (Sec. 446(e).)

Of the remaining rulings in 1974, the Technical Office responded to 14,017 taxpayer ruling requests. These ruling requests were on the following general subjects:

Subject	*Taxpayers' requests*
Actuarial matters	1,019
Administrative provisions	42
Employment and self-employment taxes	423
Engineering questions	69
Estate and gift taxes	317
Exempt organizations	4,120
Other excise taxes	421
Other income tax matters	6,196
Pension trusts	1,410
Total	14,017

The National Office of the IRS also will answer requests for advice from the district offices on issues that arise in the course of an audit of a taxpayer's return. This advice is in the form of a technical advice memorandum. Technical advice memoranda are addressed to a field office of the IRS but have an effect similar to that of a private letter ruling in that the technical advice involves a determination of tax questions concerning a particular taxpayer who generally has a right to, and usually does, participate in the technical advice proceeding. In 1974 the IRS handled 1,602 requests for technical advice.

Freedom of Information Act

The Freedom of Information Act (FOIA) (5 U.S.C. § 552) became effective on July 4, 1967. The FOIA requires each agency to make available for public inspection and copying "interpretations which have been adopted by the agency * * * *." (5 U.S.C. § 552(a)(2)(B).) However, there are a number of exceptions from the requirement of disclosure under the FOIA, including matters that are specifically exempted from disclosure by statute; trade secrets and commercial or financial information obtained from a person and privileged or confidential; and personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. (5 U.S.C. § 552(b) (3), (4), (6).)

Recently, the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Sixth Circuit held that private letter rulings were subject to disclosure under the FOIA. *Tax Analysts & Advocates* v. *Internal Revenue Service*,[3] and *Fruehauf Corp.* v. *Internal Revenue Service*.[4] These courts held that private rulings were not privileged "tax returns" the disclosure of which is prohibited by statute (sec. 6103 of the code) and instead held that private rulings are available for inspection under the FOIA.

In addition, in *Fruehauf*, the court held that technical advice memoranda were to be open to inspection to the extent intended for issuance to a taxpayer. However, in *Tax Analysts* the court held that technical advice was not open to inspection, being a part of a tax return and therefore exempt from disclosure under the FOIA (by reason of secs. 6103 and 7213 of the code).

The decisions of these appellate courts both contemplate *in camera*

[3] 505 F. 2d 350 (D.C. Cir. 1974).
[4] 75-2 USTC ¶ 16,189 (6th Cir. 1975).

inspection by the lower courts to determine what material should be deleted or exempt from disclosure under provisions of the FOIA dealing with privileged or confidential commercial information, etc.

In the *Tax Analysts* case, the names of the individual taxpayers involved in the ruling and the full text of the ruling letter (subject to the FOIA exceptions) were ordered to be disclosed. Additionally, background documents submitted by the taxpayer (including the ruling request and all supporting information), along with all communications with outside parties not in the Federal agencies were ordered disclosed. (The *Fruehauf* case is still in the appellate process, so these matters have not been fully resolved in that case.)

Earlier this year, a suit was brought under the FOIA to compel release of all private letter rulings issued by the IRS since July 4, 1967, the effective date of the FOIA. (The suit also asks for all "indices" maintained by the IRS on private rulings issued since that date). *Tax Analysts & Advocates* v. *Internal Revenue Service*, Civil Action No. 75–0650 (D.D.C., filed April 28, 1975). The plaintiffs have moved for summary judgment in that case, but the staff is informed that the matter is not likely to be considered by the court until October 1975.

In this case, the IRS takes the position that most private rulings are tax return information which may not be disclosed under the code (sec. 6103 and 7213) because rulings deal with transactions reported on tax returns and because rulings are associated with tax returns. The Service therefore argues that private rulings are not to be disclosed under the FOIA because they are matters "specifically exempted from disclosure by statute." (5 U.S.C. 552(b)(3).) [5]

Proposed IRS Rules

On December 10, 1974, the IRS issued proposed procedural rules dealing with the publication of private rulings. In general, these proposed rules provide for public inspection beginning approximately 30 days after the issuance of the ruling. (Furthermore, in certain cases, a delay in public inspection may be granted for an additional period not to exceed 13 weeks.) Under proposed rules, the Internal Revenue Service will make available for public inspection the full text of private rulings, including identifying information. However, these proposed rules provide procedures for protecting trade secrets and national defense or foreign policy secrets. (Prop. sec. 601.703.)

On March 25, 1975, the IRS held public hearings on these proposed rules, at which time there was substantial public comment. In addition, with respect to at least one part of the proposed rules (discussed in the Section on Required Rulings below) the IRS was informed by the Justice Department that the proposed rules might be contrary to other principles of law.

PROBLEMS

The ruling procedure is of substantial value to both the IRS and to taxpayers. This procedure gives the IRS advance knowledge of new types of transactions that will be engaged in by taxpayers, and allows

[5] The arguments in the new *Tax Analysts* case include consideration of the effect of a recent Supreme Court decision which held that material withheld from disclosure by the Federal Aviation Administration was exempt from disclosure by statute. *Administrator, Federal Aviation Administration* v. *Robertson*, 43 *U.S. Law Week* 4833 (June 24, 1975).)

the IRS to shape its actions to deal with these new transactions at an early stage. The ruling process also tends to reduce the burden on IRS compliance activity by allowing the IRS to review transactions it otherwise might not have examined and by giving examining agents a benchmark for examining transactions of a taxpayer who has received a ruling. Additionally, rulings encourage voluntary compliance by allowing taxpayers to engage in a transaction while knowing, in advance and with certainty, the effect of complex tax laws on the transaction.

On the taxpayer's side, of course, the advantage of the ruling procedure is to be able to plan a transaction with knowledge of how it will be treated for tax purposes.[6]

Although the private rulings procedure has significant advantages for both the IRS and taxpayers, the system also contains some substantial problems. It has been argued that the private ruling system has developed into a body of secret law known only to a few members of the tax profession. This in turn arguably has reduced public confidence in—and compliance with—the tax laws. Additionally, the secrecy surrounding letter rulings has generated suspicion that the tax laws may be used by the "influential" to their advantage, and that the tax laws are not being applied on an even-handed basis.

These types of concerns led to the lawsuits described above to apply the Freedom of Information Act to private rulings. In two circuits, the United States Courts of Appeals have held that private rulings are to be disclosed under the Freedom of Information Act, subject to the deletion of information that is privileged under the FOIA. (*Tax Analysts & Advocates* v. *IRS*, *supra* and *Fruehauf Corp.* v. *IRS*, *supra.*)

These court decisions have raised other questions with regard to private rulings. These questions deal with the basic relationship between the need to protect taxpayer privacy and the need for openness in government; and the most appropriate ways to protect taxpayer privacy, in view of the goals of the ruling system and the goals of opening rulings to public inspection. In this regard, it has been stated that if taxpayer privacy is not given protection, then the use of the ruling procedure will be substantially curtailed, to the detriment of the tax system as a whole, adversely affecting both the IRS and taxpayers.

Additional questions have been raised since these court decisions. These questions concern the parts of a ruling file that should be published, whether "required" rulings should be treated differently from other types of rulings, whether private rulings should be available as "precedent" for other taxpayers, etc.

The questions generally apply to future as well as to past rulings. There are additional questions concerning past rulings, however. Arguably taxpayers who previously obtained rulings applied for them in reliance on the IRS position that the information submitted to the IRS would be treated as confidential tax information. (See Statement of Procedural Rules § 601.601(d)(2)(iv)(*h*),(v)(*b*).) Also, 160,000 rulings have been issued by the IRS since the FOIA became effective on July 4, 1967. If there are to be any deletions from these rulings to

[6] While an erroneous ruling issued to a taxpayer may be modified or revoked, generally (in the absence of an omission or misstatement of material facts or change in law) an advance letter ruling which is relied upon by the taxpayer in good faith, will not be modified or revoked retroactively if the facts which subsequently develop are not materially different from the facts on which the ruling was based. Statement of Procedural Rules § 601.201(l)(5).

protect taxpayer privacy, this will be a substantial job and will put a significant strain on the existing resources of the IRS.[7]

Additionally, one court has held that technical advice memoranda are to be available for inspection under the FOIA, to the extent intended for inspection by any taxpayer. (*Fruehauf Corp.* v. *IRS*, *supra*.) However, it is argued that technical advice memoranda, which arise out of an audit of taxpayer's returns, are entitled to more confidentiality than private rulings. It is also argued, on the other side, that technical advice memoranda often deal with the most difficult and interesting tax issues and are developed in an adversary situation (with IRS agent and taxpayer each contending for their views, with a resolution by the National Office). Therefore, it has been suggested that technical advice memoranda should be made public, while ensuring the privacy of the taxpayer involved in the audit process.

AREAS FOR COMMITTEE CONSIDERATION

Disclosure of Private Rulings

Generally, the disclosure of private rulings is sought to achieve a number of basic changes in the way the tax law operates.

First disclosure is sought to eliminate a body of "secret" law. While there were approximately 700 rulings published as Revenue Rulings in 1974, still it appears that these did not cover all the rulings considered important by taxpayers. Consequently, some private rulings have been published previously in the American Bar Association tax journal, by commercial tax services, and by the exchange of rulings among practitioners. (However, these instances of "publication" are limited in number and in the people who have access to them.)

Additionally, at least one trade association (the National Association of Real Estate Investment Trusts) has collected and published a significant number of private rulings available in the area, because the private rulings are considered so important.

In one of the areas of tax law generally considered very complex—that of corporation reorganizations—the IRS published 25 rulings in 1974. In that same year, there were approximately 2,000 private rulings issued in the corporate reorganization area.

Also it is believed by many that disclosure will eliminate discrimination against those who do not have access to private rulings. Such access may be gained by an accounting firm or law firm which assists clients in obtaining private rulings. For example, a nationwide accounting firm with offices in Washington may have a library of all the private ruling letters issued to its clients. Such a firm may be in a unique position to advise other clients as to the current IRS ruling position, because of its special position in its access to the rules of law. (Such a firm's library, in fact, may provide a more accurate view of the current ruling position of the National Office of the IRS than is available to an average IRS field agent, who does not have access to such a library of letter rulings.)

Disclosure of rulings also is intended to increase public confidence that the tax system operates fairly and openly and that "influence"

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[7] It has been argued that the FOIA makes all rulings public, not just those issued after July 4, 1967. There are approximately 250,000 rulings issued before that date still in the IRS files (an additional number of old "routine" rulings have been destroyed pursuant to the regular IRS records destruction program).

does not affect the administration of the tax laws. Additionally, disclosure is intended to increase public confidence that transactions as described in ruling requests are the same as the transactions that are ultimately carried out by the taxpayer.

Under proposed IRS rules, private rulings would generally be subject to disclosure.

On the other hand, it appears that there may be "costs" associated with opening private rulings to public inspection. The basic objection usually made is that disclosure would violate taxpayer privacy. Those with this view believe that taxpayers should be able to deal with the IRS in the confidence that their private financial and personal information wil not be made pubblic by the IRS. Public rulings deal with the tax treatment of transactions conducted by specific taxpayers and arguably are entitled to the same confidentiality as a tax return.

It is further suggested that, in the business context, it will be small taxpayers who will lose the most privacy with disclosure of rulings. Large business corporations which are widely held already must make public (under the securities laws) much of the information which will be disclosed by public inspection of rulings.

If the committee decides that rulings are to be open to public inspection it seems clear that one consequence may be some loss of taxpayer privacy. However, as discussed below, the committee can limit any loss of privacy by its decisions with respect to what is to be made public.

There are also said to be administrative costs associated with publicizing private rulings. An important aspect of the ruling system to taxpayers is the relative speed with which the Service will rule on a transaction. There is the concern that as rulings become publicized and have potential consequences beyond the individual taxpayer they may be subject to additional review within the Service, slowing down the ruling process.

Additionally, the cost of modifying rulings to protect taxpayer privacy could be substantial (depending on the decisions taken by the committee in this respect).

If the committee desires, it may be able to reduce these problems through its decisions with respect to, for example, the precedential value that a ruling for a particular taxpayer is to have for another taxpayer, the items which are to be disclosed or protected, etc. In addition, some of these "problems" may turn out to be benefits to the ruling process, such as helping to make rulings more uniform in similar fact situations.

The most significant potential administrative cost applies with respect to previously issued rulings. (This is described in the section below dealing with these rulings.) In this case, too, the committee can reduce costs, depending on its decisions.

Protection of Privacy, in General

Generally, all the alternatives that have been proposed with respect to the disclosure of private rulings would, in some manner, protect the privacy of taxpayers.[8]

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[8] In addition, present law generally provides that rulings (and applications therefor, with supporting documents) with respect to qualified employee benefit plans are to be made public. (Sec. 6104(a)(1)(B).) However, information which would allow the compensation of any individual to be ascertained is not to be made public. Also, there is to be only limited disclosure with regard to plans with less than 26 participants.

A basic dividing line between the various proposals is whether privacy is to be protected by deleting the taxpayer's identity from the disclosed ruling, or whether the identity is to be made public and other information about the taxpayer is to be deleted. The considerations both for and against publicizing the taxpayer's identity are summarized in the next section.

Considerations Regarding Disclosing the Taxpayer's Identity

Generally, the goals that are sought in publicizing private rulings are to make public "secret" law, and to increase the public's confidence that the tax system is evenhanded and that the laws are applied properly. Also, usually these goals are sought in conjunction with ensuring that the benefits of the ruling system to both the IRS and taxpayers are generally maintained and that taxpayer privacy is maintained to the extent possible consistent with the other goals.

Considerations in favor of disclosing the taxpayer's identity.—It would appear that disclosure of private rulings without disclosing the identity of the taxpayer would meet the goal of making public "secret" law.

In addition, it is frequently suggested that opening to inspection the names of taxpayers who obtain rulings is necessary to increase the public's confidence in the evenhandedness of, and proper compliance with, the tax laws.

It is believed that only by making the identity of the taxpayer public can it be determined if undue influence has been brought to bear in the operation of the ruling process. When it is known which rulings are granted to "influential" taxpayers, these rulings can be subject to special scrutiny by the public to determine if the law has been properly applied.

Additionally, where the name of the taxpayer is known, the facts of the transaction as described in the ruling can be compared by the public with the actual transaction to determine if it is entitled to be treated according to the ruling. While admittedly this is an audit function, nevertheless because of time pressures, etc., IRS agents now may tend to rely too heavily on the ruling itself without examining the transaction to see if it is the same as described in the ruling. Public scrutiny then may be available to supplement the auditing done by an agent.

(On the other side, it is noted that there have been few cases where it has been demonstrated that the IRS has given a favorable ruling because of "influence." Additionally, it is argued that it would be a rare case where the public would be able to conduct an audit better than an IRS agent because the agent has access to a company's books and records, but the public generally does not.)

Additionally, if taxpayers' names are deleted, it might be difficult for a third party to challenge a deletion where information has clearly been omitted from a ruling, as not being within the scope of any exemptions allowed. If the taxpayer's name is available, however, this may simplify the process of a third party challenging a deletion and also allow the third party to negotiate directly with the taxpayer about the deletion. (The staff understands this occurred in the first *Tax Analysts* case.)

Under the proposed IRS rules, names and other identifying data are generally subject to disclosure.

Considerations against disclosing the taxpayer's identity.—Those opposed to disclosing the identity of a taxpayer believe that the disclosure of the name represents a substantial invasion of privacy. Additionally, it is feared as privacy is lost fewer taxpayers might be willing to use the ruling system and the ruling system would tend to lose its effectiveness both for the IRS and taxpayers.

It is argued that in many cases, disclosing the taxpayer's name, itself, in connection with a particular type of transaction would disclose confidential financial information. For example, disclosing the names of individual executives who received rulings on the subject of compensation (even with deletion of the amount of compensation) may disclose important facts about that individual's personal financial situation. Also, identifying the "silent partners" of a partnership may disclose information that would otherwise be kept confidential for commerical purposes.

(To resolve this problem, it has been suggested that where the taxpayer's name is confidential commercial, etc., information, the name should be deleted. This might be the result under the FOIA.)

It also is suggested that the IRS can successfully prevent the development of secret law by disclosing letter rulings without names and other identifying information. It is noted that, under its revenue ruling program the IRS has published thousands of rulings without identifying information.

Additionally, it is suggested that if the taxpayer's identity were disclosed but deletions of, for example, confidential commercial information were allowed to protect privacy, these deletions might be extensive enough that some of the value of the ruling would be lost. For example, if the present FOIA protections were applied it is possible that agreements which form the basis of determining whether a transaction was an installment sale or a loan might not be disclosed. (It is not clear under the FOIA that this would be the result.) In this event the ruling might have little meaning for the public. (However, deleting all information that discloses a taxpayer's identity could have a similar result.)

It also is suggested that if the taxpayer's identity is disclosed, disclosure of private rulings might have to be delayed if privacy is to be preserved. For example, if disclosure occurred before the transaction, it could give competitors a significant unfair advantage. On the other hand delay would keep the newest rulings "secret" for some additional time and might tend to maintain the privileged position of a limited number of practitioners for this period. However, the importance of this consideration may vary with the period of delay that the committee might adopt.

Administrative considerations.—It is argued that if taxpayers' names were disclosed but confidential financial, etc., information protected, this could tend to increase the disputes between the taxpayers and the IRS about what constitutes privileged information. However, it is not at all clear that deleting the identity of the taxpayers would decrease the administrative burden. The result might be the opposite.

Deleting only the taxpayer's name, address, and identifying number could be easily done, administratively. However, if only these items are deleted and other factual information is retained which would allow the taxpayer to be identified, in practice his identity would

still be revealed. However, it may be hard to determine exactly which facts would reveal the identity of the taxpayer.[9]

It is possible that so much factual information might be deleted under this type procedure that the ruling might be of little meaning to the public.

Protection of privacy on disclosing the taxpayer's identity.—Generally, the proposals that would provide for disclosure of the taxpayer's identity also would provide for deletion of some material to protect the taxpayer's privacy.

Under the FOIA, the requirement of disclosure does not apply to the following information:[10]

(1) national defense or foreign policy information required by executive order to be kept secret;

(2) information related solely to internal Federal agency personnel rules and practices;

(3) information exempt from disclosure by statute (e.g., tax returns under sec. 6103 of the code);

(4) trade secrets and commercial or financial information that is privileged or confidential;

(5) intra- or inter-Federal agency memoranda and letters not available to a party litigating with the agency;

(6) personnel, medical and similar files the disclosure of which would clearly be an unwarranted invasion of privacy;

(7) investigative files compiled for law enforcement;

(8) information regarding reports for an agency responsible for regulating or supervising financial institutions, and

(9) geological and geophysical information, including maps, concerning wells.

Under S. 2324 (Senator Dole) only a portion of the information protected under the FOIA would not be disclosed.[11] This bill would protect only:

(1) national security information;

(2) trade secret information, and

(3) confidential financial data.[12]

Under the proposed IRS rules, only a portion of the information protected by the FOIA would not be disclosed. The following information would be protected:

(1) national defense and foreign policy information authorized to be kept secret under criteria established by Executive Order, and

(2) trade secrets.

Also, under the proposed IRS rules, delays in publication (but not deletion) would be provided where necessary to:

(1) prevent serious harm to any person, or

(2) prevent a violation of law.

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[9] The standards which might be applied vary. For example, the standard might be whether a reasonably educated person could identify the taxpayer; whether a person familiar with the industry could identify the taxpayer; or whether anyone could identify the taxpayer.

[10] These rules would be applied under H.R. 9735 (Mr. Litton), which would preserve present law regarding publicizing rulings. This also would appear to be the result of H.R. 9599 (Mr. Vanik). Additionally, these rules would be applied, for future rulings, under the administration's legislative proposal in the last Congress (H.R. 17285, 93d. Cong., 2d Sess.)

[11] As noted below, in the section on Require Rulings, the Department of Justice has informed the IRS that the proposed rules may not be in accord with other principles of law, as they apply to required rulings.

[12] In addition, "required rulings" discussed below would not be disclosed under S. 2324.

In order to have uniform standards and to have guidance by the courts in a broad variety of situations, if the committee decides that taxpayer identity should be publicized, it may wish to protect from disclosure the information currently protected under the FOIA. In addition, the committee may wish to consider allowing deletions where disclosure would be a violation of law.

Delay in Disclosure

If the committee decides that the taxpayer's identity is to be disclosed, it may wish to provide that disclosure is to be delayed for an appropriate period to permit the taxpayer to complete his transaction before the ruling is publicized. Such delay could alleviate many problems associated with disclosure because, in many cases, the transaction with respect to which the ruling was obtained (e.g., a corporate acquisition or merger), would be publicly disclosed by other means before the ruling is disclosed.

If delay were not allowed, the taxpayer might find that disclosure of a ruling would put him at a competitive disadvantage. For example, competitors might discover the existence of an otherwise confidential transaction and seek to outbid the taxpayer or to enter into their own competitive transaction at an earlier date than otherwise would have occurred.

The proposed IRS procedural rules provide an automatic 30-day delay in publication of a ruling with an opportunity for the taxpayer to request up to an additional 13 weeks of delay (for a maximum possible delay of 121 days). Delay beyond the initial 30-day period is to be allowed to prevent "serious harm to any person" or where "necessary to prevent a violation of law." (Proposed § 601.201(e)(19).) The proposed rules do not provide for any further delay, regardless of the circumstances. In addition, the proposed rules place the burden on the taxpayer to "establish clearly" that one of the two criteria allowing delay is present.

If the taxpayer's name is to be disclosed, the committee may wish to consider allowing a fixed number of days delay in each case, as under the proposed regulations.[13] Additionally, the committee in the usual case could allow disclosure to be delayed until the transaction has been entered into, with a general maximum time limit of 6 months. The IRS could also provide an additional extension of delayed disclosure, for good cause shown, of up to 90 days, with a maximum of four 90-day extensions.

Parts of the Ruling File to be Publicized

Generally, an IRS ruling file will contain the taxpayer's ruling request and supporting documents; correspondence and other communications with the taxpayer and with third parties; IRS research notes and memos; and the ruling letter itself. The file also will show the name of the taxpayer's representatives and the IRS employees who worked on the ruling request. Also a ruling file generally will show whether the IRS considers the ruling as "routine," or "reference," or whether publication of the ruling as a revenue ruling is recommended. Additionally, the IRS keeps index-digest cards on "reference" rulings. These cards are not part of the ruling file.

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[13] A delay would apply to material that would otherwise be made public, after application of any other standards that the committee might establish to protect a taxpayer's privacy.

Supporting documents.—It is suggested that publication of rulings is enough to dispel "secret" law and that if ruling applications and other documents were to be made public, the IRS would be required to delete confidential financial, etc., information (or identifying information) from what, in some cases, is a very large file. Although a ruling may consist of only a few typed pages, the application and other documents may involve hundreds of pages. Thus, the administrative cost of making the application and other information public could be substantial. Since the ruling itself presents the legal decision in question and it is suggested that disclosure of the ruling would eliminate "secret" law.

On the other side, it is argued that rulings may be terse, based on the ruling application and other documents. Also, it is suggested that applications are important so practitioners can know how to convince the IRS that favorable rulings should be given. However, a terse ruling must at least have enough of a description of the facts and holding to convince a Revenue Agent. Also, it would appear that applications can be properly framed by practitioners when they know what the law is. The proposed IRS rules are unclear concerning disclosure of ruling requests.

As a first step, the committee might consider making the letter rulings public, and review the results in perhaps two or three years.

Identity of taxpayer representative and IRS employees.—If the taxpayer's identity is not disclosed then it would appear that the identity of his representative and the identity of the IRS employees working on the case also should not be disclosed. If the name of the taxpayer is disclosed, some believe the names of the taxpayer's representatives and the IRS employees also should be disclosed. The case for this is that disclosure would provide a person who would challenge a ruling with the means to determine precisely what happened in the case at hand.

However, it would appear that the names of the representative and employees are of value largely if "undue influence" were suspected. It would be difficult, at best, for a private citizen to challenge a ruling on this basis. Probably, this type of a charge is most appropriately pursued by the Attorney General or by a Special Prosecutor. Consequently, it would appear questionable whether the names of the taxpayer's representatives or the IRS employees involved should be made public. The proposed IRS rules do not provide for disclosure of names of IRS employees.

IRS research material.—With respect to IRS research and other agency material, it is arguable that to fully understand whether a ruling was properly issued after consideration of the law, this material should be open to the public. On the other hand, the Freedom of Information Act provides that intra-agency memoranda (and inter-agency memoranda) which would not be available by law to a party (other than an agency in litigation with this agency) are not to be disclosed. 5 U.S.C. § 552(b)(5).) Also, it would appear desirable for the IRS to have a completely free hand in researching a problem and to be able to follow even avenues of research which prove useless, without having this made public. The proposed IRS rules do not provide for disclosure of research material.

Classification as "routine", etc.—Rulings generally are classified as "routine" or as "reference" rulings. Classification generally is based on whether the issue in the ruling has been considered before or whether the ruling presents a new issue. Arguably, whether a ruling is so classified indicates the importance the IRS places on it. However, the staff is informed that, as a practical matter, "reference" rulings are seldom consulted by IRS employees, and so their "precedent" value is of little practical significance. Also, if the committee decides that rulings are not to be precedent for other taxpayers then this internal designation may be of little value to the public. The proposed IRS rules are silent with respect to disclosure of whether a ruling is classified as "routine" etc.

Withdrawal of ruling requests.—Ruling requests are not always acted on by the IRS; in some cases they are withdrawn at the request of the taxpayer. A ruling request may be withdrawn because the taxpayer believes (sometimes on advice of the IRS) he will be given an adverse decision and in that case he would rather have no ruling at all. Requests are also withdrawn because the taxpayer is not going to go through with the transaction or (under the proposed rules) because he may disagree with the decision of the IRS on whether certain information is to be protected from disclosure.

If the withdrawn requests (and IRS communications with the taxpayer) are open to disclosure, the public might be able to determine whether the request was withdrawn because of a potential adverse ruling by the IRS. Additionally, the public might be able to determine if the taxpayer later engaged in the transaction without a ruling, and in this way be able to help the IRS in the audit process. The proposed IRS rules provide for disclosure of the IRS acknowledgment of a request to withdraw a ruling request. (Prop. § 601.703(b)(1).)

However, if a ruling request is withdrawn without action by the IRS then it is argued that publicizing the request does not make public any "secret law" precisely because the Service has not issued a ruling. Consequently, it is argued that the basic reason for making rulings public does not apply in this case. (Also, if the committee decides not to make ruling requests public, a consistent application of this decision would mean that withdrawal requests would not be made public.)

Required Rulings

Present Law.—In some cases a taxpayer must obtain the advance approval of the IRS before he can engage in a specified transaction. For example, a taxpayer who changes his method of accounting cannot compute his taxable income under the new method until he has the consent of the IRS. (Sec. 446(e).) Also, if a taxpayer changes his annual accounting period, this new period will not be treated as the taxpayer's taxable year unless the IRS gives its approval. (Sec. 442.)

In other cases, transactions may occur without tax (if specified conditions are met), but there must be an advance determination by the IRS that the requisite conditions are met before tax-free treatment will be allowed. For example, a transfer of appreciated property to a foreign corporation controlled by the transferor may be tax free only if the IRS determines that the transfer is not part of a plan principally to avoid taxes. (See 367(d). Similarly, the tax on transfers of securities to a foreign trust, etc., does not apply where the transfer is not part of a

plan principally to avoid taxes, as determined by the IRS. (Sec. 1492.) Additionally, the private foundation excise tax on taxable expenditures does not apply to grants to individuals if there is advance approval by the IRS that the grant meets certain specified conditions. (Sec. 4945(g).)

Committee considerations.—Since these situations involve what have been called "required rulings," it is argued that these rulings should be treated differently than other rulings.

In this situation, the taxpayer may effectively have no choice with respect to whether he may ask for a ruling, but is required to ask. This is contrasted to the usual situation involving a ruling where a taxpayer may ask or not ask for a ruling depending upon how certain he wises to be about the tax treatment of a transaction. Arguably, required rulings are no different from required tax returns, and (as with tax returns) the taxpayer's privacy should be wholly protected where the law requires him to disclose information. The proposed rules of the Service, however, generally would make these rulings public, but the Department of Justice has advised the Commisioner that the proposed rules, as they relate to required rulings by the IRS, may not be conditioned upon a waiver by the taxpayer of any statutory right to confidentiality which he may have.

It has also been suggested that disclosure of some required rulings would be subject to the criminal penalties of 18 U.S.C. 1905, relating to disclosure of certain financial information by government employees.

Of course, rulings are often required by practical considerations, rather than by law. For example, in a complex merger, a ruling may be a practical prerequisite for the transaction to occur.

Additionally, with respect to the accounting method rulings, it is suggested that the IRS often tries to encourage taxpayers to voluntarily change to a more appropriate accounting method. If disclosure of the change of accounting method or period rulings would tend to discourage these changes, then arguably disclosure should be limited. The accounting rulings are almost one-half of all private rulings. They generally are *pro forma*, and take very little time for the IRS to process. In this case the committee may wish to generally allow a short synopsis of the rulings to be published, rather than the full ruling, or to allow publication in statistical form.

Since the foreign transaction rulings may require a substantial amount of financial information (to be sure there is no tax avoidance), in this case the committee may wish to consider deleting all identifying information and also deleting all information that would be privileged under the FOIA.

With regard to the private foundation rulings, since they deal with grants to individuals, the committee may wish to consider deleting all identifying information with regard to the grantee.

Technical Advice Memoranda

Present law.—The National Office will respond to requests for advice from the district offices on issues that arise in the course of an audit of a taxpayer's return. This type of advice is called a technical advice memorandum. It is addressed to the IRS field office but generally has the same effect as a private ruling in that it involves the determination of tax questions concerning a particular taxpayer who

has a right to, and usually does, participate in the technical advice process. Technical advice memoranda are issued in two parts. The first part, called the technical memorandum, discusses the facts and issues of the case and a copy is normally given to the taxpayer. The second part, called the transmittal memorandum, serves as a vehicle for providing the district office administrative information or other information, if any, which under the nondisclosure statutes, or for other reasons, may not be discussed with the taxpayer.

The Court of Appeals for the Sixth Circuit has held that technical advice memoranda are to be disclosed under the FOIA but only with respect to "those portions of responses to technical advice request that are or were intended for issuance to taxpayers." *Fruehauf Corp.* v. *Internal Revenue Service* USTC ¶ 16,189 (1975); *contra, Tax Analysts and Advocates* v. *I.R.S.*, 505 F. 2d 350 (D.C. Cir., 1974).

Committee considerations.—Since technical advice memoranda arise out of the audit process, arguably they are more closely associated with tax returns than are private rulings. Additionally, generally when a taxpayer is involved in a case where technical advice is rendered he is under audit, and therefore disclosure of the taxpayer's identity will disclose that fact; however, the fact that a taxpayer is under audit that has previously been treated as confidential tax information. For these reasons, it would appear that there is a strong case for technical advice not being made public. The proposed IRS rules do not provide for the disclosure of technical advice memoranda.

However, technical advice memoranda may deal with the more difficult and interesting cases. Additionally, technical advice memoranda involve arguments presented to the National Office by both the district office and the taxpayer, and the district office argument occurs while an audit is in progress, so the district office may have made an independent evaluation of the facts in the case. Therefore, there may be more of an adversary relationship involved in the technical advice proceeding, leading to a more defined and considered result. Arguably, then, technical advice memoranda should be open to inspection.

If the committee wishes to open technical advice memoranda to inspection, it may wish to consider allowing inspection of technical advice memoranda only where all information that could lead to the identification of the taxpayer has been deleted.

Procedures for protecting privacy

The proposed IRS procedural rules dealing with publication of private rulings would require the taxpayer to waive any right to confidential treatment with regard to the ruling request, all information submitted in connection with the request, and the ruling, except for trade secrets and certain national defense information. Also, if there is a disagreement over the confidentiality of material and the IRS determines it should reject a claim of confidentiality (e.g., of what is claimed to be a trade secret), the taxpayer's only recourse would be to withdraw the ruling request.

The procedure under the proposed IRS rules may tend to reduce administrative costs, since disputes are resolved at the agency level. However, this puts a significant amount of discretion in the hands of the IRS, without any right of appeal in the taxpayer.

The committee therefore may wish to consider providing a mechanism for the taxpayer to appeal an adverse decision by the IRS with respect to claims of confidentiality. If the taxpayer raises the issue, the appeal could be limited to a separate office within the IRS. On the other hand, if there is no dispute between the IRS and the taxpayer on confidentiality but the issue of confidentiality is raised in the courts by a suit against the IRS demanding that information be made public under the FOIA, it may be appropriate to make it clear that the taxpayer is allowed to intervene in the suit to object to disclosure of information about him. Where the identity of the taxpayer is in issue, the traditional *in camera* procedures of the courts might be relied upon the protect the privacy of the taxpayer's name.

Under the proposed IRS rules the confidentiality issue is to be determined before the tax issue is decided. (Prop. § 601.201(j)(2).) However, by waiting until the tax issue has been determined, the IRS may be better able to understand what facts are necessary to explain the ruling. The committee may wish to consider whether the confidentially issue should be determined at that time.

Public Comment

As a general matter, the IRS does not use a procedure that takes into account public comments on rulings. However, recently the IRS invited public comments on a proposed revenue procedure dealing with the adoption of the full absorption accounting method. (Announcement 75–42, 1975–19 I.R.B. 138, published as T.I.R. 1365, April 17, 1975.)

As noted in a previous section, it is arguable that a system of public comment on rulings (and an IRS program of taking this comment into account) might tend to increase the public's confidence in the operation of the tax system. Also, more open discussion of a ruling could tend to improve the result in many cases.

In opposition to this it can be said that public comment—at least prior to the issuance of the ruling—is not possible under a policy of expeditious treatment of a large volume of ruling requests. Also, taxpayers would tend to avoid the ruling process if they had to engage in a full administrative procedure. In this respect, it would appear that relative informality in the rulings procedure is needed to maintain its present value for both the IRS and taxpayers.

Additionally, if public comment is to be allowed before the ruling is issued, then the ruling request would have to be made public before the transaction occurred, and any delay in publication the committee might wish to provide for privacy purposes (discussed above) would be ineffective.

To take account of the timing problem and yet obtain the benefits of a procedure for public comment, it has been suggested that rulings should be published as promptly as possible (within the need to protect privacy) and that the IRS should provide a procedure for public comment after publication. In this situation, the committee may then wish to consider whether, in the general case, if a previously issued ruling is determined, after comment, to be erroneous, it should be allowed to stand. This would generally mean that some wrong decisions would remain in effect. However, it is suggested that this is needed to

allow the ruling system to be creditable. (It would appear that one of the costs of a workable ruling system is some errors, which can be corrected in the future.) [14]

Precedential Value

Under present law, a private ruling cannot be used by a taxpayer other than the person to whom it was issued. (Reg. § 601.201(l)(1).) Additionally, the proposed rules provide that a ruling is only applicable to the person to whom it is issued and may not be relied on, used or cited as precedent in any other case by any person. (Proposed rule § 607.703(e).)

If this policy were to be reversed and letter rulings were to be used as precedent, then it would appear the IRS will be required to give them the same exhaustive review presently accorded revenue rulings, and that this process of review would result in delay and a reduced number of rulings.

If rulings do not have precedential value, they may be issued without exhaustive review because their consequences apply only to one taxpayer. In this way, the system as a whole can withstand errors in publicized rulings, because the effect of the error would be limited to a substantial extent by the fact that the ruling would not be applied by taxpayers generally.

On the other side, to provide that rulings do not constitute precedent could deny taxpayers (and IRS field agents) an important source of guidance regarding IRS policy. However, denying another taxpayer the ability to use a public ruling as precedent in his case may not prevent him from knowing how the IRS rules in cases similar to his, enabling him to request a ruling. Also, while a ruling may not be precedent, frequently a number of rulings will be issued in an area, giving taxpayers knowledge of an IRS ruling policy generally.

In order to maintain the present advantages of the ruling system to both the IRS and taxpayers, the committee may wish to consider explicitly adopting a rule establishing the lack of precedent of private rulings.

Prior Rulings

The Freedom of Information Act first became effective on July 4, 1967. Since that time the IRS has issued 160,000 private rulings. However, not until the decision in *Tax Analysts & Advocates* v. *Internal Revenue Service*, 505 F. 2d 350 (D.C. Cir., August 19, 1974) did the public have notice that rulings would be open to public inspection under the FOLA.[15]

It would appear that people who previously applied for rulings fairly relied on the assumption that, notwithstanding the FOIA, pri-

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[14] Private rulings can be revoked or modified. Usually, a ruling will not be revoked or modified retroactively with respect to the taxpayer to whom the ruling was issued if there has been no misstatement or omission of material facts, the facts subsequently developed are not materially different from the facts on which the ruling was based, there has been no change in the applicable law, the ruling was originally issued with respect to a prospective or proposed transaction, and the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment. (Statement of Procedural Rules § 601.201(l)(5).)

[15] The District Court decision in *Tax Analysts*, which was partially affirmed by the Court of Appeals, was decided on June 6, 1973. 363 F. Supp. 1298 (D.D.C.). In addition, the proposed Internal Revenue Service rules were published on December 10, 1974.

The legislative history of the FOIA could have been read as excluding private rulings from disclosure under the FOIA. See H. Rept. No. 1497 (89th Cong., 2d Sess.) at 7.

vate rulings would be treated as confidential and not open to public inspection. (See Procedural rules § 601.601(d)(2)(v)(*b*).) In addition, these people cannot now withdraw a ruling request because of a disagreement with respect to the confidentiality of submitted material, or because they would forego the ruling rather than have some of it publicized.

For these reasons, it would seem appropriate that past rulings be treated differently than future rulings. Some have advocated that prior rulings be exempt completely from disclosure. For example, this is the position taken by the Treasury in its proposal made in the previous Congress. (H.R. 17285, 93d Cong., 2d Sess.)

The proposed IRS procedural rules do not apply to disclosure of materials relating to requests filed before the new procedural rules are adopted. (Prop. § 601.703(a).)

The committee may wish to consider whether past rulings should be subject to any special protection of privacy. If the committee has decided to open to inspection the name of taxpayers in future rulings, it still could provide that taxpayers' names (and other information that would identify the taxpayers) should not be disclosed with respect to past rulings.

If past rulings are to be disclosed, this will present the IRS with a major administrative burden. At least 160,000 [16] of these rulings will have to be reviewed to determine what parts are to be deleted to preserve taxpayer privacy. (There is a question whether only past rulings issued after July 4, 1967, may be subject to the FOIA, or whether all private rulings ever issued by the IRS must be made public. If the latter is the case, there would be an additional 250,000 [16] rulings that would be in issue.) [17] The committee may wish to consider whether publication should apply to all rulings or only to rulings requested after July 4, 1967.

The committee may wish to consider providing for a limited special office within the Internal Revenue Service solely to deal with past rulings. The office could be separately funded and could terminate when all past rulings have been published.

Several alternative procedures might be used for used by such an office. For example, the office cold delete confidential material from each ruling and send the ruling to the taxpayer for review. In any event, the committee may wish to require that the IRS make areasonable, good faith effort to contact each taxpayer or his representative individually rather than use mass public announcements, which would not reach each taxpayer. (In cases where the taxpayer could not be reached, the good faith best judgment of the IRS with respect to striking confidential material should be sufficient.)

In addition, the committee may wish to provide a special forum for appeal of any disputes over whether information should be deleted. For example, a taxpayer might be able to appeal to the Tax Court, in a proceeding similar to the small claims proceeding, and the Tax Court's decision could be final.

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[16] These figures do not include determination letters.

[17] More than 250,000 rulings have been issued before July 4, 1967, but for the most part the IRS has destroyed the "routine" rulings issued before that date pursuant to its regular records distribution program.

ALTERNATIVE PROPOSALS

Mr. Ullman.—He would provide that private letter rulings would be open to public inspection to the fullest extent possible but with responsible protection of the legitimate interests of ruling applicants to protect the privacy of their financial and personal affairs. For new rulings, procedures would be developed to allow the rulings program to be open to public examination. Procedures would be available to resolve disputes between ruling applicants and the National Office over material to be made public.

For previously issued rulings, a procedure would be devised to allow ruling letters to be made public over a period of time without disruption of the current ruling program. To this end a separate office would be created inside the Internal Revenue Service, with its own budget, with the responsibility to review past rulings under procedures which protect essential personal privacy and keep confidential information which might harm the legitimate business interests of a past ruling recipient.

Mr. Pickle.—He would provide that private letter rulings be published.

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