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# THE TIMING OF TAX TRANSPARENCY

JOSHUA D. BLANK<sup>\*</sup>

## ABSTRACT

*Fairness in the administration of the tax law is a subject of intense debate in the United States. As myriad headlines reveal, the Internal Revenue Service (“IRS”) has been accused of failing to enforce the tax law equitably in its review of tax-exempt status applications by political organizations, international tax structures of multinational corporations, and estate tax returns of millionaires, among other areas. Many have argued that greater “tax transparency” would better empower the public to hold the IRS accountable and the IRS to defend itself against accusations of malfeasance. Mandatory public disclosure of taxpayers’ tax return information is often proposed as a way to achieve greater tax transparency. Yet, in addition to concerns regarding exposure of personal and proprietary information, broad public disclosure measures pose potential threats to the taxing authority’s ability to enforce the tax law.*

*Given the competing values of accountability and enforcement, what tax return information should be observable by the public? This Article considers the role of timing. The IRS continually engages in enforcement actions *ex post*—after taxpayers pursue transactions and claim tax positions—such as by conducting audits or negotiating settlements. But it*

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<sup>\*</sup> Professor of Tax Law, Vice Dean for Technology-Enhanced Education, and Faculty Director of the Graduate Tax Program, New York University School of Law. I am grateful to Anna-Maria Hambre, Ingemar Hansson, Andrew Hayashi, Eleonor Kristoffersson, Sarah Lawsky, Leandra Lederman, Omri Marian, Ruth Mason, Peter Melz, Leigh Osofsky, Roger Persson Österman, Gregg Polsky, Alex Raskolnikov, Deborah Schenk, Richard Schmalbeck, Teresa Simon-Almendal, Ulrik von Essen, Ethan Yale, Lawrence Zelenak, and to participants at faculty workshops and colloquia at the University of Virginia School of Law, Northwestern Pritzker School of Law, Duke University School of Law, Stockholm University Faculty of Law, Queen Mary University of London School of Law, University of California, Irvine School of Law, University of Washington School of Law, and University of Gävle for thoughtful comments on prior drafts. I thank Jake Calvert, Eric Kobet, Bing Le, and Lisa Pan for excellent research assistance. All errors are my own.

*also frequently engages in actions ex ante—before taxpayers pursue transactions and claim tax positions—by issuing advance tax rulings to, and entering into agreements with, specific taxpayers. While current law appears to require public disclosure of certain types of ex ante tax administration, many forms of ex ante tax administration remain concealed from public view. This Article argues that documents related to a specific taxpayer’s tax affairs that reflect ex ante tax administration should be publicly accessible as a means of accountability, but that documents that reflect ex post tax actions should remain private in order to preserve effective tax enforcement. Further, this Article proposes that the public should have access not only to ex ante tax administration actions where the taxing authority grants taxpayers’ requests, but also to those actions where the taxing authority denies such requests, even if it does so without issuing an official written determination, a concept it defines as “dual tax transparency.”*

*The Article then applies this analysis to several types of ex ante tax administration that are currently obscured by the curtain of tax privacy: withdrawn private letter ruling requests, adverse tax-exempt determination letters, and advance pricing agreements. It concludes by exploring approaches to improving the accountability of the IRS regarding its ex post tax enforcement other than public disclosure of tax return information.*

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## INTRODUCTION

Fairness in the administration of the tax law is a subject of intense debate in the United States, as myriad headlines reveal. Recent investigations that exposed the low, or in some cases, nonexistent taxation of earnings achieved through international transfer pricing structures by brand-name corporations such as Google,<sup>1</sup> Apple,<sup>2</sup> General Electric,<sup>3</sup> and Starbucks,<sup>4</sup> among many others,<sup>5</sup> have caused some critics to question why the IRS either has failed to challenge these structures more vigorously or has even offered them its blessings.<sup>6</sup> Likewise, stories in the popular press suggesting that the IRS reduced its audits of federal estate tax returns of millionaires have generated concern that the agency has failed to enforce

1. See Jesse Drucker, *Google 2.4% Rate Shows How \$60 Billion Is Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010), <http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html>.

2. See Memorandum from Carl Levin and John McCain, Senators, Permanent Subcommittee on Investigations, to Members of the Permanent Subcommittee on Investigations (May 21, 2013) (regarding Offshore Profit Shifting and the U.S. Tax Code in relation to Apple, Inc.).

3. See David Kocieniewski, *G.E.'s Strategies Let It Avoid Taxes Altogether*, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/2011/03/25/business/economy/25tax.html>.

4. See, e.g., Edward D. Kleinbard, *Through a Latte, Darkly: Starbucks's Stateless Income Planning*, 139 TAX NOTES 1515 (2013).

5. See, e.g., Jesse Drucker, *U.S. Companies Dodge \$60 Billion in Taxes Even Tea Party Condemns*, BLOOMBERG (May 13, 2010), <https://thewere42.wordpress.com/2010/05/14/companies-dodge-60-billion-in-taxes-even-tea-party-condemns>.

6. See, e.g., David Cay Johnston, *Dell's Multiple Restructurings Aid It in Tax Avoidance*, 138 TAX NOTES 499 (2013); Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX. REV. 699, 708–09 (2011) (criticizing 2006 Advance Pricing Agreement between IRS and Google).

the tax law against those with the greatest ability to pay.<sup>7</sup> And irrespective of whether an ongoing inquiry into the IRS's review of political organizations' applications for tax-exempt status ultimately finds abuse of discretion or worse,<sup>8</sup> critics have nonetheless questioned the impartiality of the agency.<sup>9</sup> In response to these reports, many have argued that greater "tax transparency" would better empower both the public to hold the IRS accountable and the IRS to defend itself against accusations of malfeasance.<sup>10</sup>

While often presented as a panacea for public discontent with the tax

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7. See, e.g., David Cay Johnston, *I.R.S. to Cut Tax Auditors*, N.Y. TIMES (July 23, 2006), <http://www.nytimes.com/2006/07/23/business/23tax.html>; Allen Kenney, *IRS Plans Significant Cuts to Estate Tax Program*, TAX NOTES TODAY (July 24, 2006), <http://www.taxnotes.com/tax-notes-today/estate-gift-and-inheritance-taxes/irs-plans-significant-cuts-estate-tax-program/2006/07/24/5046756?>

8. See TREAS. INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

9. See, e.g., Paul Caron, *The IRS Scandal, Day 738*, TAXPROFBLOG (May 17, 2015), [http://taxprof.typepad.com/taxprof\\_blog/2015/05/the-irs--1.html](http://taxprof.typepad.com/taxprof_blog/2015/05/the-irs--1.html); Fred Stokeld, *IRS Sparks Outrage with Admission It Mistreated Tea Party Groups*, TAX NOTES TODAY (May 13, 2013), <http://www.taxnotes.com/tax-notes-today/exempt-organizations/irs-sparks-outrage-admission-it-mistreated-tea-party-groups/2013/05/13/f319?>; Marc A. Thiessen, *How Obama's IRS Scandal Harms National Security*, WASH. POST: OPINIONS (Aug. 5, 2013), [https://www.washingtonpost.com/opinions/marc-thiessen-how-obamas-irs-scandal-harms-national-security/2013/08/05/9fea9616-fde1-11e2-96a8-d3b921c0924a\\_story.html](https://www.washingtonpost.com/opinions/marc-thiessen-how-obamas-irs-scandal-harms-national-security/2013/08/05/9fea9616-fde1-11e2-96a8-d3b921c0924a_story.html); Molly Wharton, *Issa to IRS Commissioner: 'You Have a Problem Maintaining Credibility,'* NAT'L REV.: THE CORNER (June 24, 2014), <http://www.nationalreview.com/corner/381078/issa-irs-commissioner-you-have-problem-maintaining-credibility-molly-wharton> (quoting Rep. Darrell Issa). But see STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 113TH CONG., IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY (Comm. Print 2014) (concluding that IRS subjected both conservative and liberal groups to "delays, burdensome questions, and mismanagement"). For scholarly discussion of the controversy, see Ellen P. Aprill, *The Section 527 Obstacle to Effective Section 501(c)(4) Regulations*, PITT. TAX REV. (forthcoming); George K. Yin, *Reforming (And Saving) the IRS By Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1162-64 (2014).

10. See, e.g., Reuven S. Avi-Yonah & Ariel Siman, *The 1 Percent Solution: Corporate Tax Returns Should Be Public (and How to Get There)*, TAX NOTES INT'L, Feb. 17, 2014, at 627; Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55, 106 (2014); Allison Christians, *Do We Need to Know More About Our Public Companies?*, TAX NOTES INT'L, May 28, 2012, at 843; Lee A. Sheppard, *Should Corporate Tax Returns Be Disclosed?*, 142 TAX NOTES 1381 (2014); Joseph J. Thorndike, *Show Us the Money*, 123 TAX NOTES 148 (2009) [hereinafter Thorndike, *Show Us the Money*]; Joseph J. Thorndike, *The Thorndike Challenge*, 122 TAX NOTES 691 (2009) [hereinafter Thorndike, *The Thorndike Challenge*]; Yin, *supra* note 9, at 1162-64; Catherine Rampell, *Shareholders, Public Deserve Tax Transparency*, WASH. POST (Aug. 21, 2014), [https://www.washingtonpost.com/opinions/catherine-rampell-shareholders-public-deserve-tax-transparency/2014/08/21/f547d980-296d-11e4-8593-da634b334390\\_story.html](https://www.washingtonpost.com/opinions/catherine-rampell-shareholders-public-deserve-tax-transparency/2014/08/21/f547d980-296d-11e4-8593-da634b334390_story.html).

system, tax transparency—which can be defined broadly as the government’s openness regarding its tax rules, agency interpretations, decisionmaking processes, and enforcement practices—serves two distinct purposes. Tax transparency is first and foremost an essential feature of democratic governance, providing the public with knowledge of the tax laws and policies, both as enacted and as applied, and facilitating informed debate.<sup>11</sup> In addition, tax transparency empowers the public to monitor the taxing authority, the IRS, deterring the agency from pursuing misguided policies or engaging in malfeasance or corruption.<sup>12</sup>

Mandatory public disclosure of taxpayers’ tax return information is often proposed as a way to achieve greater tax transparency. Today, nearly all tax returns are subject to extensive tax privacy protections that prohibit the federal government from publicly releasing any taxpayer’s “returns” or “return information.”<sup>13</sup> In contrast, several scholars, including Joseph Thorndike,<sup>14</sup> Marjorie Kornhauser,<sup>15</sup> Marc Linder,<sup>16</sup> and Laurence Kotlikoff,<sup>17</sup> have advocated for public disclosure of some or all of individual taxpayers’ annual tax returns in order to ensure that the IRS is pursuing adequate investigations<sup>18</sup> and is “free . . . from corrupting influences.”<sup>19</sup> Similarly, scholars such as Reuven Avi-Yonah,<sup>20</sup> Allison Christians,<sup>21</sup> Richard Pomp,<sup>22</sup> and John Braithwaite,<sup>23</sup> among others,<sup>24</sup> have

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11. See *infra* notes 56–60 and accompanying text. See also JOHN RAWLS, A THEORY OF JUSTICE 14–15 (Harvard Univ. Press rev. ed. 1999); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888–910 (2006); Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1348–50.

12. See *infra* notes 61–64 and accompanying text. See also Fenster, *supra* note 11, at 888–910; Schauer, *supra* note 11, at 1348–50; Lawrence B. Solum, *Legal Theory Lexicon 015: Transparency*, LEGAL THEORY LEXICON (Mar. 6, 2016), [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/12/](http://lsolum.typepad.com/legal_theory_lexicon/2003/12/).

13. I.R.C. §§ 6103(a), (b) (2016).

14. See generally Thorndike, *Show Us the Money*, *supra* note 10; Thorndike, *The Thorndike Challenge*, *supra* note 10 (arguing for public access to individuals’ tax returns).

15. Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURIS. 95, 113 (2005).

16. See generally Marc Linder, *Tax Glasnost for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum*, 18 N.Y.U. REV. L. & SOC. CHANGE 951 (1990–91).

17. See Anna Bernasek, *Should Tax Bills Be Public Information?*, N.Y. TIMES (Feb. 13, 2010), <http://www.nytimes.com/2010/02/14/business/yourtaxes/14disclose.html> (quoting Professor Laurence Kotlikoff). See also Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065, 1120–43 (2003); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT’L TAX J. 883, 895–96 (2008).

18. See, e.g., Thorndike, *Show Us the Money*, *supra* note 10.

19. Kornhauser, *supra* note 15, at 98.

20. Avi-Yonah & Siman, *supra* note 10, at 627.

21. Christians, *supra* note 10, at 843.

22. See generally Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data:*

proposed that publicly traded corporations in the United States be required to publicly disclose their annual tax returns in order to achieve “greater accountability not only regarding the taxes paid by multinationals, but also those demanded to be paid by governments.”<sup>25</sup> Since the dawn of the federal income tax in the United States, legislators and others have offered similar proposals out of the concern that secrecy in tax administration gives rise to “favoritism,”<sup>26</sup> “collusion,”<sup>27</sup> and “corruption.”<sup>28</sup>

Despite its potential to shine sunlight upon the taxing authority’s actions, broad public disclosure measures pose several potential threats to the taxing authority’s ability to enforce the tax law effectively.<sup>29</sup> Without tax privacy, individual taxpayers would observe salient examples of the IRS’s tax enforcement weaknesses, which would likely result in shifts in individuals’ perceptions of the agency’s strengths in detecting tax offenses and punishing their perpetrators.<sup>30</sup> Additionally, public disclosure of complete tax returns, as opposed to more targeted measures, would increase the ability of certain actors—shareholders, corporate managers, and even individual taxpayers—to establish benchmarks of aggressiveness in several tax compliance areas and pressure their agents, such as corporate tax directors or personal tax advisors, to pursue more aggressive strategies to keep pace with the tax planning of others.<sup>31</sup> And public disclosure of certain tax return information would enhance the ability of advisors and

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*Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373 (1993).

23. JOHN BRAITHWAITE, *MARKETS IN VICE, MARKETS IN VIRTUE* 161 (2005).

24. See, e.g., Bruce Bartlett, *Can Publicity Curb Corporate Tax Avoidance?*, FIN. TIMES: THE A-LIST (Jan. 31, 2013), <http://blogs.ft.com/the-a-list/2013/01/31/can-publicity-curb-corporate-tax-avoidance>; Editorial Bd., *On Corporate Taxes, Put the Public in Publicly Traded: View*, BLOOMBERG: BLOOMBERGVIEW (Oct. 5, 2011), <https://www.bloomberg.com/view/articles/2011-10-06/on-corporate-taxes-put-the-public-in-publicly-traded-view>; Felix Salmon, *Why Public Companies Should Have Public Tax Returns*, REUTERS (Feb. 18, 2014), <http://blogs.reuters.com/felix-salmon/2013/05/21/why-public-companies-should-have-public-tax-returns/>.

25. Christians, *supra* note 10, at 843.

26. S. REP. NO. 68-398, at 12 (1924) (criticizing secrecy of tax appeals decisions).

27. HARRY EDWIN SMITH, *THE UNITED STATES FEDERAL INTERNAL TAX HISTORY FROM 1861 TO 1871*, at 67 (1914).

28. Bernasek, *supra* note 17 (quoting Sen. Robert Howell).

29. Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 292 (2011) [hereinafter Blank, *Individual Tax Privacy*]; Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31, 72–73 (2014) [hereinafter Blank, *Corporate Tax Privacy*]; Joshua D. Blank, *USA*, in *TAX SECRECY AND TAX TRANSPARENCY: THE RELEVANCE OF CONFIDENTIALITY IN TAX LAW* 1163, 1177 (Eleonor Kristofferson et al. eds., 2013) [hereinafter Blank, *USA*].

30. See Blank, *Individual Tax Privacy*, *supra* note 29, at 287–26.

31. See Blank, *Corporate Tax Privacy*, *supra* note 29, at 62–69.

other third parties to reverse engineer the IRS's detection strategies, impairing its deterrence and enforcement efforts.<sup>32</sup>

Given the competing values of accountability and enforcement, what types of tax return information should be observable by the public? This Article considers the role of timing. The IRS continually engages in enforcement actions ex post—after taxpayers pursue transactions and claim tax positions—such as by conducting audits or negotiating settlements.<sup>33</sup> But it also frequently engages in actions ex ante—before taxpayers pursue transactions and claim tax positions—by issuing advance tax rulings to and entering advance agreements with specific taxpayers.<sup>34</sup> While current law appears to require public disclosure of certain types of ex ante tax administration, many forms of ex ante tax administration remain concealed from public view. This Article argues that documents related to a specific taxpayer's tax affairs that reflect ex ante tax administration should be publicly accessible as a means of accountability, but that documents that reflect ex post tax actions should remain private in order to preserve effective tax enforcement. Further, this Article proposes that the public should have access not only to ex ante tax administration actions where the taxing authority grants taxpayers' requests, but also to those actions where the taxing authority denies such requests, even if it does so without issuing an official written determination, a concept it defines as "dual tax transparency."

Ex ante tax administration, which largely occurs in the form of advance tax rulings issued by the taxing authority, should be publicly accessible for three reasons.

First, non-disclosure of ex ante tax administration presents greater risks to the sociological legitimacy of the IRS—the public's perception of the actions of the IRS as justified and appropriate—than non-disclosure of ex post tax enforcement.<sup>35</sup> Without access to advance tax rulings, the risk of public perceptions that the IRS creates secret tax law when issuing advance tax rulings increases. As a result of its greater bargaining power when considering requests for advance tax rulings, the IRS often has more freedom to express its own interpretation of the tax law in this setting.<sup>36</sup>

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32. *See id.* at 69–73.

33. *See infra* notes 136–148 and accompanying text.

34. *See infra* notes 149–157 and accompanying text.

35. *See infra* Part II.C.1.

36. *See infra* notes 218–229 and accompanying text.

These rulings reflect the IRS's interpretation of the tax law, whereas ex post tax enforcement decisions often involve other factors, such as the administrative costs of pursuing litigation. Moreover, taxpayers have an interest in determining whether the IRS is issuing advance tax rulings on equitable terms to like-situated taxpayers. And given the enormous financial stakes involved, often billions of dollars in potential tax liability,<sup>37</sup> and the IRS's ex ante bargaining position, advance tax rulings pose unique threats to the integrity of the IRS, whether perceived or actual.

Second, public disclosure of ex ante tax administration can promote efficient financial transactions, whereas public disclosure of ex post tax enforcement is more likely to result in wasteful aggressive tax planning.<sup>38</sup> Public disclosure of these rulings would provide taxpayers with greater understanding of the IRS's interpretation of the tax law, potentially preventing transactions or other actions designed to avoid the risk of audit or challenge. Public disclosure of advance tax rulings can also promote efficiency by guiding taxpayers regarding whether they should seek such rulings from the IRS themselves. By contrast, public disclosure of tax return information can encourage increased tax aggressiveness by enabling taxpayers and third parties to conduct reviews of the IRS's ex post audit, settlement, and penalty techniques.

Finally, compared to public disclosure of ex post tax administration, public disclosure of ex ante tax administration does not threaten the IRS's ability to enforce the tax law.<sup>39</sup> There is little risk that public disclosure of ex ante tax administration would adversely affect individual taxpayers' perceptions of the government's tax enforcement strengths, as the IRS retains discretion to issue advance tax rulings.<sup>40</sup> It is also unlikely that public disclosure of ex ante tax administration would result in the development of benchmarks of tax aggressiveness, which could result from public disclosure of ex post tax enforcement. Last, public disclosure of ex ante tax administration would offer taxpayers guidance regarding the factors the IRS views as necessary in order to issue advance tax rulings, but

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37. See, e.g., Amy S. Elliott, *The New Limits on Corporate Letter Rulings Explained*, 134 TAX NOTES 622 (2012); Audrey Nutt, *Glaxo, IRS Settle Transfer Pricing Dispute for \$3.4 Billion*, TAX NOTES TODAY (Sept. 12, 2006), <http://www.taxnotes.com/news-documents/transfer-pricing-and-apportionment-issues/glaxo-us-irs-settle-transfer-pricing-dispute-us-34-billion/2006/09/12/jmsy?>.

38. See *infra* Part II.C.2.

39. See *infra* Part II.C.3.

40. See *infra* notes 256–264 and accompanying text.

it would not enable taxpayers to reverse engineer the agency's approaches to detecting abusive tax positions.

Even though the IRS is required to publicly disclose "written determination[s]"<sup>41</sup> issued in response to taxpayers' requests for advance tax rulings, agreements, and approvals, current law prevents the public from observing many forms of ex ante tax administration.<sup>42</sup> When the IRS publishes advance tax rulings today, it almost always discloses rulings where the agency granted taxpayers' requests.<sup>43</sup> If they anticipate adverse rulings, taxpayers can withdraw their ruling requests, obviating the need for a written determination by the IRS.<sup>44</sup> And certain types of ex ante tax administration are not publicly accessible in *any* form.<sup>45</sup> As a baseline for public disclosure, "dual tax transparency" would enable the public to observe specific instances where the IRS grants *and* denies taxpayers' requests for advance tax rulings or agreements. This Article applies this analysis to several types of ex ante tax administration that are currently obscured by the curtain of tax privacy: withdrawn private letter ruling requests, adverse tax-exempt determination letters, and Advance Pricing Agreements.<sup>46</sup>

While this Article advocates for public disclosure of ex ante tax administration, it does not suggest that the IRS should be unaccountable when it pursues ex post tax enforcement. Rather than proposing mandatory tax return public disclosure, the Article explores several alternative approaches to improving the accountability of the IRS regarding its ex post tax enforcement.<sup>47</sup> These possibilities include changes to oversight, whistleblower, and data access rules and processes.

The remainder of this Article proceeds as follows. Part I presents tax transparency as a way for the public to hold the taxing authority accountable for its actions, considers recent calls for public disclosure of tax return information as a means of accountability, and outlines several of the questionable assumptions underlying these proposals. Part II argues that the timing of the taxing authority's actions should play a role in the determination of whether tax return information is publicly accessible,

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41. I.R.C. § 6110(a) (2016).

42. *See infra* Part III.

43. *See infra* notes 318–319 and accompanying text.

44. *See infra* notes 320–334 and accompanying text.

45. *See infra* notes 372–407 and accompanying text.

46. *See infra* Part III.B.

47. *See infra* Part III.C.

offers the case against public disclosure of ex post tax enforcement and for public disclosure of ex ante tax administration, and considers the cross-jurisdictional application of this analysis, using Sweden as a comparative example. Part III introduces dual tax transparency, applies it to several examples of ex ante tax administration, and offers approaches for preserving accountability regarding ex post tax enforcement. The final Part concludes.

## I. TAX TRANSPARENCY AS ACCOUNTABILITY

Transparency is frequently extolled as an essential element of democracy.<sup>48</sup> Without it, philosophers and legal scholars caution, the governed would possess little opportunity to hold the government accountable for its decisions and actions.<sup>49</sup> In the context of tax administration, scholars, politicians, and popular commentators in the United States have long argued that the taxing authority, the IRS, should strive to conduct its affairs as transparently as possible.<sup>50</sup> This Part presents the rationale for transparency by the government, including in the administration of the tax system, describes calls for public disclosure of individual and business tax return information as a form of tax transparency, and highlights several questionable assumptions underlying arguments of public disclosure proponents.

### A. WHY TRANSPARENCY?

While there is no universal definition of transparency in democratic governance, philosophers and legal scholars have often described it as “publicness of [the] public business,”<sup>51</sup> where the government makes the information it holds “available for examination and scrutiny.”<sup>52</sup> Likewise, tax scholars who advocate increased transparency in tax administration describe the need for “openness,”<sup>53</sup> “accountability,”<sup>54</sup> and “sunshine.”<sup>55</sup> A

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48. See, e.g., Schauer, *supra* note 11, at 1348–50; Jeremy Waldron, *Accountability: Fundamental to Democracy* 11 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-13, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2410812](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812).

49. See, e.g., Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186 (2014).

50. See *infra* notes 79–115 and accompanying text.

51. Waldron, *supra* note 48, at 11.

52. Schauer, *supra* note 11, at 1343.

53. Yin, *supra* note 9, at 1161 n.196.

54. Christians, *supra* note 10, at 843.

broad definition of “tax transparency,” accordingly, is that it is the government’s openness regarding its tax rules, agency interpretations, decisionmaking processes, and enforcement practices. Transparency generally serves two functions, which apply equally in the context of tax administration: democratic governance and accountability.

*Democratic Governance.* Transparency is often described as fundamental to democracy itself because the public’s knowledge of the government’s policies and practices establishes that the people possess power over the government.<sup>56</sup> As Fred Schauer has stated, transparency permits “public control not for the purpose of facilitating better decisions, but instead as the embodiment of public control as an end in itself.”<sup>57</sup> With this control, members of the public can participate in debate and deliberation regarding the government’s rules and actions based on actual knowledge rather than speculation. Legal philosophers have characterized a government that acts transparently as allowing its citizens “to meaningfully participate in democratic self-government”<sup>58</sup> by encouraging the development of an “interested”<sup>59</sup> rather than “suspicious”<sup>60</sup> public. Transparency, thus, is a core democratic value because it establishes the people’s position with respect to the government and allows the people to engage in informed debate that may affect the government’s laws and implementation of these laws.

*Accountability.* An equally important function of transparency is that it allows the public “to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions.”<sup>61</sup> This characterization of transparency predicts that without secrecy, the government will be less likely to engage in bribery, rent-seeking, regulatory capture, and “other forms of governmental misbehavior.”<sup>62</sup> Even when the government adopts policies that may not be readily visible to the public, philosophers such as Immanuel Kant,<sup>63</sup> and later John Rawls,<sup>64</sup>

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55. Avi-Yonah & Siman, *supra* note 10, at 627.

56. See, e.g., Fenster, *supra* note 11, at 888; Schauer, *supra* note 11, at 1347; Waldron, *supra* note 48, at 11; Solum, *supra* note 12.

57. Schauer, *supra* note 11, at 1349.

58. Solum, *supra* note 12.

59. Fenster, *supra* note 11, at 898.

60. See *id.*

61. *Id.* at 899.

62. Schauer, *supra* note 11, at 1349.

63. IMMANUEL KANT, ETERNAL PEACE (1795), reprinted in THE PHILOSOPHY OF KANT 430, 470 (Carl J. Friedrich ed. & trans., 1949).

have added that it should assume hypothetical transparency by pursuing only those policies that it could defend if they were ever exposed publicly. Transparency, consequently, is necessary for the public to ensure accountability of the government for its decisions and actions.

*Principal-Agent Relationship.* In considering the role of transparency in democratic states, philosopher Jeremy Waldron has recently advocated for the adoption of what he describes as “agent-accountability,” which casts the government as an agent of the public, its principal.<sup>65</sup> The concept of accountability under this model describes duties that the agent generally owes to its principal. As an example, Waldron describes a realtor and a client as engaged in an analogous relationship to the government and the public, as the realtor “makes certain arrangements for the purchase of a house on [his client’s] behalf”<sup>66</sup> and “may even have a power of attorney to act in [his client’s] name.”<sup>67</sup> Agent accountability casts the government as accountable to the public rather than to a formal tribunal, which may not investigate many of the government’s actions.

The primary implication of the agent accountability model is that the government should provide information demanded by the public regarding activities conducted on its behalf. The model requires the government to provide sufficient information to the public in order to allow it to question the government’s methodology, request changes to its practices, and even terminate the service of legislators and regulators through elections.<sup>68</sup> Describing the requirement of disclosure, Waldron contends that if the government refuses to meet the public’s demand for an account regarding its activities, the government’s refusal is “simple insolence.”<sup>69</sup>

*Limits.* Despite the view that transparency is crucial for accountability, many philosophers and legal theorists believe that disclosure policies should seek to limit adverse impact on the government’s ability to fulfill its obligations.<sup>70</sup> Some have argued that disclosure requirements should seek

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64. JOHN RAWLS, POLITICAL LIBERALISM 66 (1993).

65. Waldron, *supra* note 48, at 2.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 27.

70. See, e.g., Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 884 (2007); Schauer, *supra* note 11, at 1345 (discussing need “to recognize varying degrees of transparency”); William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12.

to balance the benefits to the public against the costs to the government's operational decisions.<sup>71</sup> For example, few would argue that the government should be required to provide the public with a description of a planned surprise raid of a terrorist compound in advance of the enforcement action. In such cases, proponents of transparency argue that the government should provide the public with a concrete explanation for its decision to withhold information.<sup>72</sup> Others, such as William Stuntz, have argued that the government would operate more efficiently if it were required to provide the public with "bottom lines"<sup>73</sup> regarding its activities, as opposed to detailed accounts. Debates over the optimal level of transparency by the government reveal that there are circumstances where even public disclosure proponents do not believe the government should be required to release information to the public.

#### B. TAX RETURNS IN THE PUBLIC EYE

Tax scholars, politicians, and popular commentators have argued that mandatory public disclosure of tax return information would introduce needed tax transparency in the United States, especially in light of recurrent concerns regarding fair treatment of taxpayers by both the taxing authority and the tax law itself. This Section examines current U.S. tax privacy rules and recent public disclosure proposals regarding individual and corporate tax return information.

*Tax Privacy Today.* Since the enactment of the Tax Reform Act of 1976,<sup>74</sup> which responded to many abuses of the Nixon Administration, the tax law provides that taxpayers' "returns" and "return information" are confidential, unless a specific statutory exception applies.<sup>75</sup> Under Section 6103 of the Internal Revenue Code, "return information" is broadly defined to include "any tax or information return"; any amendments filed with the IRS; and any taxpayer's identity, income, tax deductions and credits, or audit and penalty history, among many other items.<sup>76</sup> The statutory framework contains several exceptions related to tax administration and enforcement, such as provisions that allow sharing of information about

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71. See, e.g., Fenster, *supra* note 11, at 936–37.

72. See Waldron, *supra* note 48, at 7.

73. Stuntz, *supra* note 70, at 15.

74. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

75. I.R.C. § 6103(a) (2016). It is not possible to request tax return information regarding a particular taxpayer under the Freedom of Information Act. 5 U.S.C. § 552(b)(3) (2016).

76. I.R.C. § 6103(b)(1) (2016).

specific taxpayers between federal and state taxing authorities.<sup>77</sup> These exceptions aside, the sweeping protections of tax privacy under current law prevent the public from observing nearly all tax return information and extend equally to individuals *and* corporations.<sup>78</sup>

*Public Disclosure of Individual Tax Returns.* In contrast to the opacity of current law, tax scholars and others have proposed, in varying degrees, to lift the curtain of tax privacy that obscures individual tax returns from public view. Some scholars, such as Joseph Thorndike<sup>79</sup> and Laurence Kotlikoff,<sup>80</sup> and popular commentators<sup>81</sup> have argued that individuals' tax returns should be fully accessible by the public. Others, such as Marjorie Kornhauser, have suggested that only a portion of individual tax return information should be publicly accessible, such as an individual's name, income, capital gains, exclusions, deductions and credits, and marginal and effective tax rates.<sup>82</sup> Finally, some have proposed targeted mandatory public disclosure of individual tax returns that would apply to certain types of taxpayers, such as individuals who earn more than \$1 million per year,<sup>83</sup> members of Congress,<sup>84</sup> and candidates for certain public offices.<sup>85</sup> Opponents have argued that mandatory public disclosure would infringe upon taxpayers' right to tax privacy, confuse the public with information overload rather than enhanced understanding, and expose sensitive personal information.<sup>86</sup> In response, proponents contend that sunlight would aid the IRS in its search for abusive tax positions,<sup>87</sup> subject aggressive and noncompliant taxpayers to public shaming,<sup>88</sup> and educate the public regarding the tax law.<sup>89</sup>

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77. I.R.C. §§ 6103(c)–(o) (2016).

78. I.R.C. § 6103(a) (2016).

79. Thorndike, *Show Us the Money*, *supra* note 10.

80. *See* Bernasek, *supra* note 17 (quoting Professor Laurence Kotlikoff).

81. *See, e.g.*, Andy Rooney, *60 Minutes: Andy's Tip for the IRS* (CBS television broadcast Apr. 19, 2009), <http://www.cbsnews.com/video/watch/?id=4955238n>.

82. Kornhauser, *supra* note 15, at 115–16.

83. Linder, *supra* note 16, at 976–77.

84. *See, e.g.*, Thorndike, *The Thorndike Challenge*, *supra* note 10, at 691.

85. *See id.*

86. For a summary of these arguments, see Blank, *Individual Tax Privacy*, *supra* note 29, at 280–82.

87. *See, e.g.*, Thorndike, *Show Us the Money*, *supra* note 10.

88. *See, e.g.*, Kornhauser, *supra* note 15, at 104; Jay A. Soled & Dennis J. Ventry, Jr., *A Little Shame Might Just Deter Tax Cheaters*, USA TODAY, Apr. 10, 2008, at 11A.

89. *See, e.g.*, Kornhauser, *supra* note 15, at 106.

Significantly, proponents also argue that, if adopted, these measures would enable the public to better hold the IRS accountable and even seek reforms that would improve its ability to administer the tax law fairly. Joseph Thorndike, for example, has asserted that public disclosure would “reveal[] the actual, rather than the theoretical, functioning of the tax system”<sup>90</sup> and would allow the public to effectively double-check the work of the IRS because it would cast “[m]illions of eyes on a tax return.”<sup>91</sup> Thorndike has argued that current tax privacy rules “make the IRS politically vulnerable, contributing to its popular image as an overpowerful, unaccountable federal agency.”<sup>92</sup> Likewise, Marjorie Kornhauser has commented that public disclosure would show whether the administration of the tax system is “free from the corrupting influences of powerful, wealthy, and/or just simply venal individuals or groups.”<sup>93</sup> And some scholars, such as Laurence Kotlikoff, have argued that by revealing “how terrible the system is,”<sup>94</sup> mandatory public disclosure could lead to tax administration reforms. A common theme throughout these recent proposals is that public disclosure of individual tax return information would embolden the ability of the public to monitor the actions of the IRS, or lack thereof, against specific individual taxpayers.

Similar accountability objectives underscore many of the individual tax return public disclosure measures that have been adopted since the dawn of the federal income tax in the United States. For example, soon after enacting the Civil War Income Tax of 1862, Congress required the Commissioner to permit public inspection of complete tax returns and the “proceedings of the assessors.”<sup>95</sup> Journalists at *The New York Times* systematically analyzed the enforcement efforts of specific collection districts. For instance, in criticizing the underperforming “Sixth Collection District” in New York City in 1865, the paper’s reporters accused the office’s chief tax collector of lacking “brain with which to comprehend the mysteries of the law and physique with which to drive work and workmen to secure results.”<sup>96</sup> When Congress later enacted legislation that required

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90. Thorndike, *Show Us the Money*, *supra* note 10.

91. Thorndike, *The Thorndike Challenge*, *supra* note 10, at 691.

92. Joseph J. Thorndike, *The IRS Is Hiding Its History*, WASH. TIMES, Dec. 19, 1997, at A23.

93. Kornhauser, *supra* note 15, at 98.

94. Bernasek, *supra* note 17 (quoting Professor Laurence J. Kotlikoff).

95. Act of June 30, 1864, ch. 173, § 19, 13 Stat. 223, 228.

96. *Our Internal Revenue: The Sixth Collection District in Full*, N.Y. TIMES (July 8, 1865), <http://www.nytimes.com/1865/07/08/news/our-internal-revenue-sixth-collection-district-full-official-lists-assessments.html>.

public disclosure of all individuals' income tax payments, proponents argued that the legislation would prevent tax privacy from serving as "the greatest aid to corruption"<sup>97</sup> between taxpayers and the IRS. Likewise, in 1934, when Congress passed legislation that would have required all individuals to publicly disclose certain tax information on an annual "pink slip," proponents asserted that it would enable the public to monitor whether the IRS offered "special privileges"<sup>98</sup> and "gross favoritism"<sup>99</sup> to wealthy taxpayers.

*Public Disclosure of Corporate Tax Returns.* Similarly, a number of tax scholars and policymakers have argued that publicly traded U.S. corporations should be required to publicly disclose certain tax return information, especially in light of accounts that brand-name U.S. multinational corporations have reported single-digit tax rates,<sup>100</sup> participated in abusive tax shelters,<sup>101</sup> and pursued complex international transfer pricing structures that reduce or even eliminate tax liability.<sup>102</sup> The most common proposal, offered by tax scholars such as Reuven Avi-Yonah,<sup>103</sup> Richard Pomp,<sup>104</sup> John Braithwaite,<sup>105</sup> Joseph Thorndike,<sup>106</sup> Allison Christians,<sup>107</sup> and others,<sup>108</sup> would require corporations to publish their complete tax returns each year. Complete corporate tax returns of a multinational corporation include IRS Form 1120, an annual return setting forth a multinational corporation's gross income, deductions, taxable income, and taxes owed, but also dozens of attached forms, schedules, and explanatory documents that may, in total, amount to tens of thousands of pages.<sup>109</sup> Proponents of public disclosure of corporate tax return

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97. MARK H. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939*, at 67 (1984).

98. 78 CONG. REC. 6529, 6546 (1934) (statement of Sen. La Follette).

99. *Id.* As some scholars have noted, little evidence was presented to corroborate these accusations. See Yin, *supra* note 9, at 1129 n.45.

100. See, e.g., Kocieniewski, *supra* note 3.

101. See DEP'T OF TREASURY, *THE PROBLEM OF CORPORATE TAX SHELTERS: DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS* 30 (1999), <https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Corporate-Tax-Shelters-1999.pdf>.

102. See, e.g., Drucker, *supra* note 1.

103. See Avi-Yonah & Siman, *supra* note 10, at 627.

104. See Pomp, *supra* note 22, at 463.

105. See BRAITHWAITE, *supra* note 23, at 202.

106. See Thorndike, *Show Us the Money*, *supra* note 10.

107. See Christians, *supra* note 10, at 843.

108. See Brauner, *supra* note 10, at 106; Rampell, *supra* note 10; Sheppard, *supra* note 10.

109. See John McCormack, *GE Filed 57,000-Page Tax Return, Paid No Taxes on \$14 Billion in*

information argue that it would lead to public scrutiny of the IRS's dealings with corporations.<sup>110</sup> Other tax scholars have argued in favor of more limited public disclosure of corporate tax return information.<sup>111</sup> In prior work, for example, I have advocated for mandatory public disclosure of public corporations' single-page IRS Form 1120 (without any attachments), IRS Schedule M-3, and a corporate "pink slip" (which would contain only certain tax information).<sup>112</sup>

The public monitoring goals underlying recent public disclosure proposals are nearly identical to the stated rationales for historic measures that required corporations to publicly disclose their tax returns. When Congress first enacted the Corporate Excise Tax of 1909, it provided that corporate tax returns "shall constitute public records and be open to inspection as such."<sup>113</sup> While mandatory corporate tax return public disclosure was short-lived, one of its goals was to "encourage honesty"<sup>114</sup> by both corporations and the tax administration. Similarly, during the 1934 debates over the pink slip measure, which would have required corporations to publicly disclose certain tax return information, advocates argued that the measure would prevent "maladministration of the tax law."<sup>115</sup>

### C. QUESTIONABLE ASSUMPTIONS

Proponents of broad tax transparency measures, such as mandatory public disclosure of complete tax return information,<sup>116</sup> have asserted that

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*Profits*, WKLY. STANDARD (Nov. 17, 2011), <http://www.weeklystandard.com/ge-filed-57000-page-tax-return-paid-no-taxes-on-14-billion-in-profits/article/609137>.

110. See, e.g., BRAITHWAITE, *supra* note 23, at 155; Avi-Yonah & Siman, *supra* note 10, at 627.

111. See, e.g., Peter C. Canellos & Edward D. Kleinbard, *IRS Should Release Schedules M-3, Not Entire Corporate Tax Returns*, 110 TAX NOTES 1485, 1485 (2006) (advocating for public release of IRS Schedule M-3 only); David Lenter, Joel Slemrod & Douglas Shackelford, *Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives*, 56 NAT'L TAX J. 803, 827 (2003) (advocating for limited public disclosure); Daniel N. Shaviro, *The Optimal Relationship Between Taxable Income and Financial Accounting Income: Analysis and a Proposal*, 97 GEO. L.J. 423, 427 n.11 (2009) (advocating for public release of IRS Schedule M-3).

112. Blank, *Corporate Tax Privacy*, *supra* note 29, at 109–20.

113. Tariff Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112 (repealed).

114. Joe Thorndike, *Tax History: Promoting Honesty by Releasing Corporate Tax Returns*, INSURANCE TAX REV.: TAX HISTORY (Aug. 1, 2002).

115. 79 CONG. REC. 4413, 4445 (1935) (quoting Sen. La Follette), *discussed in* Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law*, 73 LAW & CONTEMP. PROBS. 123, 129–30 (2010).

116. See, e.g., Avi-Yonah & Siman, *supra* note 10, at 627; Bruce Bartlett, *Effective Corporate Tax Rates*, N.Y. TIMES (Nov. 26, 2013), <https://economix.blogs.nytimes.com/2013/11/26/effective->

their proposals would enhance the ability of the public to hold the IRS accountable for its actions and, if necessary, seek reforms that would result in more equitable and effective tax administration. The claim that such public disclosure would lead to accountability and reformed tax administration, however, rests on several questionable assumptions.

First, proponents of broad public disclosure of tax return information discount the potential for legislators and others to exploit specific examples of IRS shortcomings for political purposes, rather than to engage in objective review of tax administration. Public disclosure of complete tax return information would enable interested parties, including members of Congress, to highlight specific tax enforcement examples as signs of IRS abuse even though they are not representative of general IRS practices. For example, during the 1998 U.S. Senate Finance Committee hearings that reviewed the IRS's enforcement operations,<sup>117</sup> committee members and the public heard over a dozen "horror stories"<sup>118</sup> from sympathetic taxpayers who claimed abusive treatment by the IRS, including a pastor,<sup>119</sup> single mother,<sup>120</sup> and even a former U.S. Senator.<sup>121</sup> Subsequent investigations revealed that several of these accounts were greatly exaggerated and not indicative of general malfeasance.<sup>122</sup> Public disclosure of all tax return information could lead politicians to seize on any IRS enforcement action against politically involved taxpayers, whether members of Congress or corporations that have made political contributions, as an example of enforcement bias.<sup>123</sup>

Second, some proponents of public disclosure assume that releasing tax return information could motivate Congress to respond to revealed enforcement failures by seeking reforms that would bolster the IRS's enforcement capabilities. For instance, Congress could respond to the

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corporate-tax-rates/; Rampell, *supra* note 10; Salmon, *supra* note 24; Thorndike, *Show Us the Money*, *supra* note 10.

117. *IRS Oversight: Hearings Before the S. Comm. on Fin.*, 105th Cong. (1998).

118. *Id.* at 45 (statement of Sen. Orrin Hatch, Member, S. Comm. on Fin.).

119. *Id.* at 293–97 (statement of Tony Alamo, Pastor, International Coalition for Religious Freedom).

120. *Id.* at 298 (statement of the National Audit Defense Network).

121. *Id.* at 182–85 (statement of Hon. Howard H. Baker, Jr., former U.S. Sen., Tenn.).

122. DAVID CAY JOHNSTON, *PERFECTLY LEGAL* 145–48 (2003).

123. See, e.g., Christine O'Donnell, *Christine O'Donnell: I Was a Victim of the IRS*, N.Y. POST (Feb. 22, 2014), <http://nypost.com/2014/02/22/christine-odonnell-i-was-a-victim-of-the-irs> (describing personal experience with IRS).

revelation that the IRS has failed to audit certain wealthy individuals or corporations by increasing its enforcement funding. If past experience is any guide, however, the revelation that the IRS has failed to enforce the law effectively is just as likely, if not more likely, to result in a blunt response of reduced budgetary resources.<sup>124</sup> For example, in response to a 2015 report that the IRS website allowed computer hackers to gain access to 100,000 taxpayers' tax returns and use this information to request fraudulent refunds,<sup>125</sup> members of Congress responded by proposing legislation that would impose what critics described as "draconian" cuts to the IRS's operating needs, including those related to its cybersecurity efforts.<sup>126</sup> Likewise, following publicity of allegations of political bias by the IRS in the tax-exempt application review process,<sup>127</sup> members of Congress voted to reduce the IRS's overall budget as a response to the IRS's "recent history of inappropriate behavior."<sup>128</sup> Even if public disclosure of tax return information leads to an increased public focus on the IRS, the result would likely be reduced enforcement resources rather than targeted reform.

Third, proponents assume that mandatory public disclosure would enable the public to double-check the IRS's detection of tax avoidance and evasion, especially involving wealthy taxpayers and corporations, and to offer recommendations regarding its audit practices. For instance, Joseph Thorndike has argued that with public access to tax return information, external institutions and parties, including "plenty of expert ones," would "certainly uncover any problems in short order."<sup>129</sup> While the IRS may make a deliberate decision not to pursue certain known cases of tax avoidance as a result of resource constraints or the hazards of litigation, in many cases of unknown tax avoidance, the most valuable information to the IRS rests with the taxpayer and closely-related parties. For this reason, the IRS pays valuable rewards to informants and whistleblowers who

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124. See, e.g., IRS OVERSIGHT BD., FY2011 IRS BUDGET RECOMMENDATION SPECIAL REPORT 9–11 (2010), <http://www.treasury.gov/irsob/reports/2010/IRSOB%20FY11%20BUDGET%20REPORT.pdf>.

125. Jada F. Smith, *Cyberattack Exposes I.R.S. Tax Returns*, N.Y. TIMES (May 26, 2015), <http://nyti.ms/1Hvcdzj>.

126. Eric Yoder, *'Draconian' Cut to IRS Budget Advances*, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/06/11/draconian-cut-to-irs-budget-advances/>.

127. See *supra* notes 8–9.

128. See Yoder, *supra* note 126 (quoting Rep. Ander Crenshaw (R-Fla.)).

129. Thorndike, *The Thorndike Challenge*, *supra* note 10.

provide it with leads on potential individual and corporate avoidance.<sup>130</sup> It is more likely that exposure of otherwise unknown tax avoidance or evasion would result from the actions of a financially incentivized whistleblower, who already has access to information that the IRS cannot observe, than from a public review of tax return documents already in the possession of the IRS. Non-governmental parties would also lack the legal authority to request needed information from a taxpayer to determine whether the IRS has adequately investigated its claimed tax positions.<sup>131</sup>

Finally, proponents of broad public disclosure appear to assume that it would result in IRS accountability without imposing significant costs on the capacity of the IRS to enforce the tax law effectively. Many proponents of public disclosure acknowledge that the release of tax return information could impose costs on taxpayers that should be considered. For example, several proponents concede that in a public disclosure regime, Social Security numbers and other sensitive personal information should be redacted from tax returns before release.<sup>132</sup> Yet in terms of the effect on the IRS, some proponents claim that public disclosure would “not cost the IRS a nickel.”<sup>133</sup> This assumption will be challenged in the next Part.

## II. TIMING AND THE TAXING AUTHORITY

While proponents of mandatory public disclosure of tax return information argue that this approach would empower the public to better monitor the actions of the IRS, they have not addressed the possibility that opening tax returns to “millions of eyes”<sup>134</sup> could also present costs to tax administration and enforcement. Some tax return public disclosure measures would likely hamper the IRS’s efforts to suppress and detect tax avoidance and evasion, causing the principal to interfere with the agent’s capacity to satisfy one of its core responsibilities.<sup>135</sup> From an accountability

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130. I.R.C. §§ 7623(a)–(b) (2016). *See, e.g.*, David Kocieniewski, *Whistle-Blower Awarded \$104 Million by I.R.S.*, N.Y. TIMES (Sept. 11, 2012), <http://nyti.ms/QhqE0Z> (describing \$104 million payment to Bradley Birkenfeld, ex-UBS employee).

131. For recent discussion, see generally Linda Sugin, *Invisible Taxpayers* (Feb. 9, 2015) (unpublished manuscript), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/LindaSugin.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/LindaSugin.pdf).

132. *See, e.g.*, Bernasek, *supra* note 17 (quoting Professor Laurence Kotlikoff).

133. Rooney, *supra* note 81.

134. Thorndike, *The Thorndike Challenge*, *supra* note 10.

135. Blank, *Corporate Tax Privacy*, *supra* note 29, at 72–73; Blank, *Individual Tax Privacy*, *supra* note 29, at 292.

perspective, policymakers should consider potential threats to tax administration and enforcement in their analysis of proposed public disclosure initiatives.

As this Part will argue, threats to tax enforcement vary depending on the type of tax return documentation that would be subject to mandatory public disclosure. The most significant threats would likely occur where taxpayers and advisors could observe the tax avoidance strategies of other taxpayers and the factors that lead the IRS to audit and challenge some of these strategies. These types of observations would be possible if taxpayers and advisors could observe the IRS's enforcement actions that occur *ex post*, after taxpayers have pursued transactions and claimed tax positions, such as the results of audits (or lack thereof) and settlement negotiations. On the other hand, these threats would be less likely to occur, if at all, if taxpayers and advisors could observe the advance tax rulings and agreements that the IRS often provides to taxpayers. These types of actions occur *ex ante*, before taxpayers pursue transactions and claim tax positions.

The primary claim presented in this Part is that documents related to a specific taxpayer's tax affairs that reflect *ex ante* tax administration should be publicly accessible as a means of accountability, but that documents that reflect *ex post* tax actions should remain private in order to preserve effective tax enforcement. This Part details the potential threats to tax enforcement of public disclosure of *ex post* tax enforcement and presents the case for public disclosure of tax return documentation that would reveal *ex ante* tax administration. It concludes by considering the potential for cross-jurisdictional application of this analysis, using the tax transparency regime of Sweden as a case study.

#### A. TYPES OF TAXING AUTHORITY ACTIONS

While proponents of tax transparency seek to hold the IRS accountable for its actions, not all of these actions are of the same stripe. This Section considers the timing of the IRS's actions with respect to specific taxpayers, whether it occurs *ex post* or *ex ante*, and briefly describes the extent to which the public can observe each type of action under current law.

##### 1. Ex Post Tax Enforcement

The IRS's *ex post* tax enforcement actions range from initial audits and investigations that transpire within the administrative structures of the IRS to controversies regarding potential tax deficiencies that take place in federal court.

*Audits and Investigations.* Formal IRS audits, which occur after a taxpayer has filed its tax return, take several forms: “correspondence audits,” which occur entirely in the form of IRS inquiries and requests for information by mail; “office audits,” which require a taxpayer to appear in the local IRS office with copies of any requested additional information; and “field audits,” which take place at the taxpayer’s home or place of business as a result of the location of relevant books and records.<sup>136</sup> Several factors determine whether the IRS chooses to pursue a formal audit, including “red flags” such as inconsistent reporting of information by third parties and the taxpayer, a high Discriminant Function System (“DIF”) score—computer scoring that identifies whether the return is likely to result in a change based on the IRS’s experience with similar tax returns, and randomness due to the IRS’s need to gather data to construct the DIF score and for use in other research programs.<sup>137</sup> For individual taxpayers, the formal audit rate is extraordinarily low—0.86% in 2014.<sup>138</sup> By contrast, certain large corporations that participate in the IRS’s “Coordinated Industry Case” program are under constant IRS audit, in some cases with IRS agents permanently working in their offices.<sup>139</sup>

*Tax Penalties.* Following the review of a taxpayer’s tax return during an audit, the IRS may assert that the taxpayer owes additional tax penalties. Most of these penalties consist of monetary sanctions equal to a percentage of the taxpayer’s underpayment of tax liability, such as delinquency penalties (up to 25% of tax liability for failure to pay taxes on time)<sup>140</sup> or accuracy penalties (up to 20% of tax liability for understatement of tax due to acts such as negligence).<sup>141</sup>

*Settlements.* A critical ex post tax enforcement tool of the IRS is its ability to enter into settlement agreements with taxpayers. At the earliest stage of a potential tax controversy, a taxpayer may pay an asserted tax

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136. See *IRS Audits*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/IRS-Audits> (last updated Mar. 23, 2017).

137. See *The Examination (Audit) Process*, IRS, [http://www.irs.gov/uac/The-Examination-\(Audit\)-Process](http://www.irs.gov/uac/The-Examination-(Audit)-Process) (last updated Aug. 18, 2012) (describing DIF score).

138. INTERNAL REVENUE SERV., 2014 INTERNAL REVENUE SERVICE DATA BOOK 27 tbl.9a (2014), <http://www.irs.gov/pub/irs-soi/14databk.pdf>.

139. See INTERNAL REVENUE MANUAL § 4.46.2.3 (2011), [https://www.irs.gov/irm/part4/irm\\_04-046-002.html](https://www.irs.gov/irm/part4/irm_04-046-002.html).

140. I.R.C. §§ 6651(a)(1)–(2) (2016).

141. I.R.C. §§ 6662(a)–(b) (2016).

deficiency and enter into a settlement agreement with the IRS.<sup>142</sup> Taxpayers who choose to challenge a proposed deficiency may later settle the dispute with the IRS Appeals Division, in which each party signs an agreement that waives the ability of the taxpayer and the IRS to engage in future litigation over the issue.<sup>143</sup> Other forms of ex post IRS settlements include “closing agreements,” where the IRS and the taxpayer enter into a legally binding written agreement to resolve tax liability regarding a specific issue or year “permanently and conclusively,”<sup>144</sup> and “voluntary disclosure initiatives,” where taxpayers disclose past tax abuses, such as the use of offshore bank accounts to avoid federal tax liability, in exchange for reduced tax penalties.<sup>145</sup> The IRS settles over 85% of all disputes regarding proposed tax deficiencies.<sup>146</sup>

*Observability.* Current law characterizes nearly all of the documents that would reveal ex post tax enforcement actions as “return information” that is protected by the curtain of tax privacy.<sup>147</sup> Litigation over contested tax deficiencies, however, occurs in full view of the public. Additionally, the curtain of tax privacy does not apply to anonymous statistical information regarding tax enforcement.<sup>148</sup>

## 2. Ex Ante Tax Administration

In contrast to the examples above, sometimes the IRS acts ex ante, before the taxpayer has pursued a transaction or tax strategy and filed its tax return, in the form of rulings, agreements, and approvals that the IRS issues to specific taxpayers.

*Rulings.* If a taxpayer requests it to do so, the IRS can issue an advance tax ruling to the taxpayer regarding specific issues before the taxpayer files its tax return. The most common form of advance tax ruling is the “private letter ruling,” a written determination issued by the IRS to a

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142. See IRS Form 870.

143. See INTERNAL REVENUE MANUAL § 8.6.4 (2015), [https://www.irs.gov/irm/part8/irm\\_08-006-004.html](https://www.irs.gov/irm/part8/irm_08-006-004.html); IRS Form 870-AD.

144. See INTERNAL REVENUE MANUAL § 32.3.4.3 (2004), [https://www.irs.gov/irm/part32/irm\\_32-003-004.html](https://www.irs.gov/irm/part32/irm_32-003-004.html).

145. See, e.g., *2012 Offshore Voluntary Disclosure Program*, IRS, <https://www.irs.gov/uac/2012-offshore-voluntary-disclosure-program> (last updated Feb. 13, 2017).

146. See, e.g., B. John Williams, Jr., Chief Counsel, Internal Revenue Serv., *Resolving Tax Shelters: By Settlement or Litigation*, Address Before the Chicago Bar Association Federal Taxation Committee (Feb. 25, 2003), <https://www.irs.gov/pub/irs-utl/shelters-feb25.pdf>.

147. See I.R.C. § 6103(b)(2) (2016).

148. See *id.* (excluding data which cannot be associated with or identify an individual taxpayer).

taxpayer in response to the taxpayer's inquiry about the status or the tax effects of the taxpayer's actions or transactions.<sup>149</sup> In a private letter ruling, the IRS interprets the tax laws and applies them to the taxpayer's specific set of facts.<sup>150</sup> In exchange for the ruling, the taxpayer must make numerous representations,<sup>151</sup> provide information to the IRS in response to additional inquiries, and pay the required user fee (\$28,300 for many types of common private letter ruling requests).<sup>152</sup>

*Agreements.* The IRS can also enter into agreements with the taxpayer in advance of the taxpayer's participation in transactions, and these agreements may address a period of years. A common type of ex ante agreement is the Advance Pricing Agreement, which a corporation may seek in order to avoid future transfer pricing disputes with the IRS.<sup>153</sup>

*Approvals.* The IRS can also prevent taxpayers from engaging in certain activities unless it issues ex ante approval to these taxpayers. A common example of such an approval is the tax-exempt determination letter, which the IRS issues to an organization that seeks to be recognized as a charitable organization described in Section 501(c)(3) of the Internal Revenue Code.<sup>154</sup> Other examples of actions that require ex ante approvals occur when the IRS must provide administrative relief, authorized by Sections 301.9100-1 through -3 of the Treasury regulations, in order to allow taxpayers to make certain tax elections—such as an election to be recognized as a partnership for U.S. tax purposes—where the deadline for making these elections has expired.<sup>155</sup>

*Observability.* Current law requires the IRS to open to public inspection “written determinations,” defined as any “ruling, determination letter, technical advice memorandum, or Chief Counsel advice,”<sup>156</sup> including private letter rulings. As Part III will show, however, many forms of ex ante tax administration are hidden from public view.<sup>157</sup>

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149. See Rev. Proc. 2015-1, 2015-1 I.R.B. 7 (defining letter ruling).

150. See *id.*

151. See, e.g., Rev. Proc. 96-30, 1996-19 C.B. 8.

152. See Rev. Proc. 2015-1, 2015-1 I.R.B. 79 (detailing the Schedule of User Fees).

153. For description, see I.R.S. Announcement 2012-13, 2012-16 I.R.B. 805.

154. See, e.g., INTERNAL REVENUE SERV., PUBLICATION 4220, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 10 (2014).

155. See Treas. Reg. §§ 301.9100-1-3 (1997).

156. I.R.C. § 6110(b)(1)(A) (2016).

157. See *infra* Part III.B.

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## B. WHY EX POST TAX ENFORCEMENT SHOULD REMAIN PRIVATE

Broad public disclosure measures, such as those that would require disclosure of complete tax returns, would reveal otherwise unobservable ex post tax enforcement actions of the IRS. Complete tax returns contain many forms and documents that show whether the IRS audited a taxpayer's return, entered into a settlement agreement with the taxpayer, or asserted tax penalties against the taxpayer as a result of a specific offense, among other actions of the IRS. For example, if the IRS audits an individual's tax return and ultimately enters into a settlement with the taxpayer, the taxpayer's return information may include IRS Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment),<sup>158</sup> IRS Form 5701 (Notice of Proposed Adjustment),<sup>159</sup> or IRS Form 4549-E (Income Tax Discrepancy Adjustments),<sup>160</sup> each of which describe elements of the settlement and explain required changes to previously filed tax returns.

To consider the extent to which public disclosure of tax return information would reveal ex post enforcement actions of the IRS, this Section presents a hypothetical alternative legal regime in which complete tax returns of individual and corporate taxpayers would be subject to mandatory public disclosure. Several advocates of tax transparency have argued, knowingly or not, in favor of such expansive mandatory public disclosure.<sup>161</sup> And at different points in U.S. tax history, the complete tax returns of certain taxpayers were indeed open to public inspection.<sup>162</sup>

As I argue, broad public disclosure of ex post enforcement actions of the IRS poses significant threats to the IRS's ability to enforce the tax law effectively. This Section presents three potential tax administration and enforcement threats to the IRS from mandatory public disclosure of complete tax return information: impairment of strategic publicity; benchmarking; and reverse engineering.<sup>163</sup>

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158. IRS Form 870.

159. IRS Form 5701.

160. IRS Form 4549-E.

161. See, e.g., Avi-Yonah & Siman, *supra* note 10, at 627; Bartlett, *supra* note 116; Rampell, *supra* note 10; Salmon, *supra* note 24; Thorndike, *Show Us the Money*, *supra* note 10.

162. See, e.g., Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112 (requiring public disclosure of corporate tax returns); Act of June 30, 1864, ch. 173, § 19, 13 Stat. 223, 228 (requiring public disclosure of "proceeding of the assessors").

163. In presenting this analysis, I build upon my prior work on tax privacy and public disclosure initiatives, Blank, *Corporate Tax Privacy*, *supra* note 29; Blank, *Individual Tax Privacy*, *supra* note 29, in two significant ways. First, I show how the enforcement threats outlined below stem directly from

### 1. Strategic Publicity

By publicly revealing the IRS's ex post enforcement actions, mandatory public disclosure of complete tax return information would diminish the government's ability to strategically publicize its tax enforcement strengths in order to shape the perceptions and compliance behavior of individual taxpayers. As I have shown in prior work, the government deliberately publicizes specific examples of its tax enforcement strengths—audits, tax penalties, and tax litigation victories—without revealing specific examples of its tax enforcement weaknesses.<sup>164</sup> As salient examples involving named individuals have greater potential to affect individuals' perceptions and decisions than anonymous statistics, the government utilizes the "strategic publicity function" of individual tax privacy to encourage an inflated perception of the government's ability to detect tax offenses, punish their perpetrators, and compel all but a few outliers to comply.<sup>165</sup> If the curtain of tax privacy were raised, however, individuals would observe specific examples of weaknesses in the IRS's ex post tax enforcement efforts that would challenge this perception.<sup>166</sup>

The government actively attempts to shape the perceptions of individuals regarding key elements of tax enforcement by placing specific examples of strong tax enforcement actions in front of the curtain of tax privacy. For example, as Daniel Levin and I found in an empirical study covering a seven-year period, during the two weeks leading up to April 15th, "Tax Day," the government issued more than double the number of press releases describing tax enforcement actions against specific named individuals, including many celebrities and other high profile taxpayers, per week than it did during the rest of the year.<sup>167</sup> In addition, individuals may perceive that tax penalties are significantly greater than they actually are, in

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the ex post nature of the IRS actions that mandatory public disclosure would reveal. Second, I examine how and whether each enforcement threat would occur in the context of public disclosure of both individual and corporate tax return information.

164. See Blank, *Individual Tax Privacy*, *supra* note 29, at 328; Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 8 (2010).

165. See Blank, *Individual Tax Privacy*, *supra* note 29, at 328.

166. See *id.*

167. Blank & Levin, *supra* note 164, at 8. For the time window ranging from April 1 to April 15, we found that the government issued 128% more tax enforcement press releases per week than during the rest of the year. *Id.* "The negative binomial regression model's likelihood ratio chi-square [was] 23.48 . . ." *Id.* at 16. The p-value was only .0000013 (meaning a one-in-791,637 chance of randomness). *Id.*

part because their primary exposure to tax penalties today is to memorable examples of specific taxpayers who are sentenced to prison for engaging in tax fraud or who pay high civil tax penalties.<sup>168</sup> And individuals may believe that a challenge from the IRS will lead to a government victory in court because the government wins the overwhelming majority of publicly announced civil tax controversies and nearly all criminal tax cases.<sup>169</sup>

In reality, the IRS lacks the resources to audit all tax returns or even pursue tax penalties and litigation in many of the cases of tax noncompliance that it is able to detect.<sup>170</sup> Public disclosure of individuals' complete tax return information, which would include the settlement forms described earlier, would reveal specific examples of the IRS's ex post enforcement actions. These many examples could alter individuals' perceptions of the IRS's tax enforcement capabilities. In the absence of tax privacy, the media and other intermediaries—and ultimately ordinary citizens—would observe concrete examples of taxpayers who may have engaged in abusive tax activities, yet were not audited by the IRS, or who, if they were audited, paid little or no tax penalties.<sup>171</sup> Without the curtain of tax privacy, the media would likely focus on the many specific tax controversies in which the government regularly chooses to make legal concessions rather than litigate.<sup>172</sup>

Public disclosure of the IRS's ex post enforcement actions poses significant threats to individual tax compliance. Publicity of examples of strong tax enforcement against specific taxpayers can inflate taxpayers' perceptions of the two principal determinants of deterrence: the probability of detection and the expected costs of noncompliance.<sup>173</sup> Survey data reveals that individuals greatly overestimate the actual likelihood of IRS detection. While the audit rate for individual taxpayers is less than 1%,

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168. See, e.g., Press Release, Dep't of Justice, Former UBS Client Pays \$20.8 Million Penalty for Hiding over \$41 Million in Swiss Bank Accounts (Sept. 21, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/September10/robbinsjulessentencingpr.pdf>. See also Blank & Levin, *supra* note 164, at 18.

169. See Blank, *Individual Tax Privacy*, *supra* note 29, at 301. In 2007 and 2010, for instance, the U.S. Department of Justice won 100% of all litigated federal criminal tax cases. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF TREASURY, REFERENCE NO. 2010-30-059, ACCURACY-RELATED PENALTIES ARE SELDOM CONSIDERED PROPERLY DURING CORRESPONDENCE AUDITS 5 (2010).

170. See INTERNAL REVENUE SERV., *supra* note 138, at iii.

171. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 169, at 5 (IRS failed to consider accuracy tax penalties in 92% of cases).

172. See generally Williams, *supra* note 146.

173. See Blank, *Individual Tax Privacy*, *supra* note 29, at 303–13.

studies of taxpayer perceptions of the IRS's audit rate show that some individuals believe it is as high as nearly 50%.<sup>174</sup> In a public access regime, salient examples of weak tax enforcement against specific taxpayers could have the opposite effect on individuals' perceptions and tax compliance decisions. The strategic publicity function also supports the government's efforts to increase confidence among compliant individuals who are motivated by feelings of reciprocity, but who will comply with the tax system only if they believe that other taxpayers are paying their taxes honestly.<sup>175</sup> Without tax privacy, visible examples of the government's failure to catch and penalize noncompliant taxpayers could have negative tax compliance effects on individuals whose compliance is conditional on that of others.<sup>176</sup>

Does tax privacy offer similar strategic publicity advantages to the government when it attempts to increase tax compliance among corporations? An initial intuition may be that the government utilizes the curtain of tax privacy strategically by publicizing specific examples of corporate tax enforcement to influence corporate tax directors' perceptions of the risk of tax audits, tax penalties, and tax controversy losses. Tax directors, after all, are also subject to cognitive biases that can cause them to make seemingly irrational decisions.

As a result of distinctions between individuals and corporate tax directors, however, raising the curtain of tax privacy would likely have little impact on these actors' perceptions of the risk of IRS enforcement in many areas. While the IRS highlights its efforts to detect abuse publicly,<sup>177</sup> corporate tax directors already expect that their corporations will be subject to heightened scrutiny by the IRS.<sup>178</sup> ExxonMobil Corporation, for

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174. See Harold G. Grasmick & Wilbur J. Scott, *Tax Evasion and Mechanisms of Social Control: A Comparison with Grand and Petty Theft*, 2 J. ECON. PSYCHOL. 213, 222 (1982) (finding 37.9% of individuals believed they would be caught if they attempted to evade tax); John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior*, 39 AM. J. POL. SCI. 490, 497-98 (1995) (finding individuals believed that the probability that their tax returns would be audited by the IRS was 48%, were they to file false returns).

175. See Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOS. REV., Dec. 1998-Jan. 1999, at 4; Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 81-83 (2003).

176. See Blank, *Individual Tax Privacy*, *supra* note 29, at 269.

177. See, e.g., Patrick Temple-West, *UPDATE 1-U.S. IRS Forms 'SWAT Team' for Tax Dodger Crackdown*, REUTERS (Mar. 20, 2012), <http://www.reuters.com/article/usa-tax-irs-transfer-idUSL1E8EKHU220120320>.

178. See Amy S. Elliott, *News Analysis: Audit Proof? How Hedge Funds, PE Funds, and PTPs*

example, provides office space at its Houston headquarters to dozens of IRS agents who engage in “full-time audit[s]” of the corporation’s books and tax returns.<sup>179</sup> Moreover, although a public access regime would enable corporate tax directors to observe that the IRS rarely imposes most tax penalties, this revelation would only reinforce corporate tax directors’ current knowledge and beliefs based on their substantial repeat experience in negotiating with the IRS.<sup>180</sup> And while government officials have boasted of overwhelming odds<sup>181</sup> in their favor in corporate tax cases, corporate tax directors know from experience that the government’s ability to win corporate tax abuse controversies is not certain. Over the course of the last decade, the government has lost high-profile corporate tax abuse cases at the trial level, only to win later on appeal, and vice versa.<sup>182</sup>

## 2. Benchmarking

Another potential tax enforcement cost of mandatory public disclosure of tax return information is that it could unintentionally encourage aggressive tax planning. By shielding complete tax returns from public view, the curtain of tax privacy prevents interested parties—shareholders, corporate managers, and even individual taxpayers—from establishing benchmarks of aggressiveness in several tax compliance areas and from pressuring their agents to pursue more aggressive strategies to keep pace with the tax planning of others. Mandatory public disclosure of complete tax returns would reveal information about other taxpayers’ tax positions—and the IRS’s ex post responses to these positions—which, in turn, could encourage benchmarking.<sup>183</sup>

In the corporate context, mandatory public disclosure of complete tax returns would reveal significant information about a corporation’s tax planning and reporting practices that is not observable today. Although the U.S. Securities and Exchange Commission (“SEC”) requires all publicly

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*Escape the IRS*, 136 TAX NOTES 351 (2012).

179. See Charles Riley, *The American Tax Machine*, CNN (May 24, 2011), [http://money.cnn.com/2011/05/24/news/economy/corporate\\_tax\\_reform/](http://money.cnn.com/2011/05/24/news/economy/corporate_tax_reform/).

180. For discussion, see David M. Fogel, *The Inside Scoop About the IRS’s Appeals Division*, 99 TAX NOTES 1503, 1503–04 (2003).

181. Alix Stuart, *Don’t Mess with the IRS*, CFO (July 15, 2008), <http://ww2.cfo.com/accounting-tax/2008/07/dont-mess-with-the-irs/> (quoting then-IRS Chief Counsel Donald Korb).

182. See, e.g., *Compaq Computer Corp. v. Comm’r*, 277 F.3d 778 (5th Cir. 2001); *IES Indus., Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001); *United Parcel Serv. Of Am., Inc. v. Comm’r*, 254 F.3d 1014 (11th Cir. 2001).

183. For additional discussion, see Blank, *Corporate Tax Privacy*, *supra* note 29, at 62–69.

traded corporations to publish detailed non-tax financial information, tax privacy obscures nearly all tax return information from public view.<sup>184</sup> Mandatory public disclosure of complete corporate tax returns, a frequent proposal of tax law scholars and policymakers,<sup>185</sup> would expose documents that could enable shareholders to determine whether competitor corporations had engaged in specific related party transfer pricing strategies<sup>186</sup> or had engaged in tax strategies with uncertain legal outcomes.<sup>187</sup>

Armed with this newly available information, significant shareholders of corporations that have not engaged in these strategies could pressure their corporate managers to consider adopting more aggressive transfer pricing strategies. As another example, public access to corporations' "reportable transaction" disclosure forms, which corporations are required to file with the IRS, could lead activist investors, non-tax managers, significant shareholders, and corporate tax directors to compare their own corporation's tax aggressiveness and tax reporting methods to those of other corporations.<sup>188</sup> An adverse effect of mandatory public disclosure, thus, is that it could lead to increased external pressure that would likely influence the tax planning and reporting of corporate tax directors toward increased tax aggressiveness.

Activist investors, such as private equity and hedge funds, and non-tax managers would be especially likely to scour publicly available corporate tax return information to create intercorporate comparisons of tax planning that could lead to such pressure. In recent years, activist hedge funds have analyzed available information about their own portfolio corporations' tax planning and have often recommended specific actions.<sup>189</sup> Campaigns by private equity investors include efforts to encourage their corporations to engage in conversions to Real Estate Investment Trusts, tax-free split-offs

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184. See, e.g., Blank, *Corporate Tax Privacy*, *supra* note 29, at 45–48; Michelle Hanlon, *What Can We Infer About a Firm's Taxable Income from Its Financial Statements?*, 56 NAT'L TAX J. 831, 832 (2003).

185. See, e.g., Avi-Yonah & Siman, *supra* note 10, at 627; Bartlett, *supra* note 116; Rampell, *supra* note 10; Salmon, *supra* note 24; Thorndike, *Show Us the Money*, *supra* note 10.

186. See, e.g., IRS Form 5471; IRS Form 5472.

187. See DEP'T OF TREASURY, INTERNAL REVENUE SERV., INSTRUCTIONS FOR SCHEDULE UTP (FORM 1120) (2016), <https://www.irs.gov/pub/irs-pdf/i1120utp.pdf>.

188. See Treas. Reg. § 1.6011-4(b) (2014) (describing reportable transactions).

189. See, e.g., Kasmira Jefford, *IHG Shareholder Pushes for Tax Inversion Bid*, CITY A.M. (Aug. 5, 2014), <http://www.cityam.com/1407198172/ihg-shareholder-pushes-tax-inversion-bid>.

of significant businesses,<sup>190</sup> and, most recently, corporate inversion mergers to reduce their U.S. tax liability.<sup>191</sup> A consequence of public disclosure of tax return information of *all* corporations is that these investors would gain the ability to evaluate their own corporation's relative tax aggressiveness in transfer pricing, potentially abusive tax strategies, and methods of disclosure to the IRS, among others.

In addition, third parties, such as tax advisory firms, would have a significant financial incentive to evaluate all publicly available corporate tax return information in order to assist non-tax managers and corporate tax directors in meeting benchmarks of tax aggressiveness. This analysis would likely incorporate whether corporations pursued transactions identified by the IRS as potentially abusive and whether the IRS responded *ex post* to the resulting tax positions. For example, today, each of the major national accounting firms has a "benchmarking department," which aids corporate management in evaluating their own corporation's performance in areas such as executive compensation and staffing costs compared to those of other similar corporations.<sup>192</sup> Mandatory public disclosure of complete corporate tax returns would allow these third parties to provide "tax efficiency" benchmarking services to encourage conservative tax directors to consider strategies exhibited by their more aggressive counterparts.

The threat of benchmarking could also occur in response to mandatory public disclosure of individual tax return information among certain individuals. As a result of their status as wage earners and their inflated perceptions of the IRS's enforcement,<sup>193</sup> many individual taxpayers do not attempt to avoid taxes other than through blatant abuse, such as non-filing,

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190. See, e.g., Michael J. De La Merced, *Hedge Fund Presses Case for Breakup of Darden Restaurants*, N.Y. TIMES (Dec. 17, 2013), <https://dealbook.nytimes.com/2013/12/17/hedge-fund-presses-case-for-breakup-of-darden-restaurants/>; Jim Polson, *Hess Files for Tax-Free Spinoff of Gas-Station Network*, BLOOMBERG (Jan. 8, 2014), <https://www.bloomberg.com/news/articles/2014-01-08/hess-files-papers-for-tax-free-spinoff-of-gas-station-network>.

191. For discussion, see Dana Cimilluca, Dana Mattioli & Joseph Walker, *Medical Merger Part of 'Tax Inversion' Wave*, WALL ST. J. (June 15, 2014), <http://www.wsj.com/articles/medical-merger-part-of-tax-inversion-wave-1402876390>.

192. See *Benchmarking*, KPMG, <https://advisory.kpmg.us/deal-advisory/data-driven-tech/benchmarking-plus.html> (last visited Mar. 28, 2017); *Benchmarking Performance Metrics*, ERNST & YOUNG, <http://www.ey.com/us/en/industries/united-states-sectors/health-care/benchmarking-performance-metrics> (last visited Mar. 28, 2017); *Global Benchmarking Center*, DELOITTE, <http://www2.deloitte.com/us/en/pages/operations/solutions/relevant-benchmarks-data-and-peer-comparisons.html> (last visited Mar. 28, 2017); *PwC Benchmarking*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/us/en/analytics/benchmarking-services.html> (last visited Mar. 28, 2017).

193. See *supra* note 174 and accompanying text.

underreporting, or tax fraud.<sup>194</sup> However, a small group of wealthy and sophisticated individual taxpayers regularly attempt to minimize their tax liabilities through aggressive income tax and estate and gift tax planning techniques.<sup>195</sup> While these individuals do not have shareholders or owners who exert external pressure on them, some of these individuals appear to respond to internal pressure to avoid paying more tax than their peers. This reaction is consistent with reciprocity theory.<sup>196</sup> Public disclosure of complete individual tax returns of others would reveal to some wealthy individuals that their peers have adopted certain tax avoidance strategies which they have not considered, such as estate planning vehicles, Roth IRA conversions, and choices of business entities that limit payroll tax liabilities. Public disclosure of this information could cause wealthy and sophisticated individuals to pressure their accountants and advisors to engage in similar strategies, especially where the IRS has not challenged the tax positions.

When considering public disclosure proposals, policymakers should evaluate whether a proposed measure would reveal specific tax planning information that would encourage benchmarking. Regarding publicly traded corporations, I have argued elsewhere that public disclosure of certain documents, such as the one-page Form 1120, Schedule M-3, and a summary “pink slip” containing basic tax information, would be unlikely to reveal new information that would lead to benchmarking effects if subject to mandatory public disclosure.<sup>197</sup> Yet others, such as proposals to require public disclosure of complete tax returns, would enable granular comparative analyses of tax aggressiveness in specific areas.

### 3. Reverse Engineering

By revealing all ex post tax enforcement decisions of the IRS through the release of certain forms and other documents, mandatory public disclosure of complete tax returns would also enable taxpayers and their advisors to reverse engineer the IRS’s strategies for detecting and

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194. See, e.g., Press Release, Dep’t of Justice, Rhode Island Machine Shop Owners Convicted of Tax Fraud (Mar. 30, 2009), <https://www.justice.gov/opa/pr/rhode-island-couple-sentenced-prison-tax-evasion>.

195. See, e.g., Alexander Arapoglou & Jerri-Lynn Scofield, *10 Tax Dodges that Help the Rich Get Richer*, SALON (Apr. 12, 2013), [http://www.salon.com/2013/04/12/10\\_tax\\_dodges\\_that\\_help\\_the\\_rich\\_get\\_richer\\_partner/](http://www.salon.com/2013/04/12/10_tax_dodges_that_help_the_rich_get_richer_partner/).

196. See *supra* note 175.

197. Blank, *Reconsidering Corporate Tax Privacy*, *supra* note 29, at 109–20.

challenging abusive tax positions. Mandatory public disclosure of complete tax returns would display the IRS's ex post treatment of all taxpayers' tax returns, including the vast majority of tax returns and tax positions that the IRS did not audit or challenge. By exposing the IRS's playbook to taxpayers, advisors, and analysts indirectly, mandatory public disclosure could hinder the IRS's efforts to deter and detect aggressive tax planning.

The potential for reverse engineering in response to public disclosure of complete tax return information is especially relevant among corporate taxpayers, where legal ambiguity often encourages aggressive tax planning. Mandatory public disclosure of complete tax return information would enable sophisticated analysts to observe the details of tax controversies where the IRS asserted tax deficiencies, imposed tax penalties, and agreed to settlements with corporations. Many corporate tax directors and their advisors, for instance, have expressed "uncertainty"<sup>198</sup> and "anxiety"<sup>199</sup> regarding the factors that the IRS uses to determine whether to apply a 40% strict liability tax penalty for transactions that lack "economic substance."<sup>200</sup> With access to complete tax returns, including IRS Form 5701 and IRS Form 4549, corporate tax directors could observe whether corporations' use of specific transfer pricing structures or tax avoidance products cause the IRS to audit and challenge these tax positions or to seek anti-abuse tax penalties ex post. This newfound knowledge—which would stem from the use of quantitative, not solely qualitative, measures—could lead some tax directors to refrain from pursuing strategies likely to draw IRS attention. It also could cause some tax directors to realize that they should adopt more aggressive tax strategies than they have historically, as these strategies do not appear to have resulted in challenges from the IRS.

Public disclosure of complete tax return information could similarly lead to reverse engineering by wealthy and sophisticated individuals who also engage in tax planning that exploits legal ambiguity. For these individuals, the threshold levels of tax avoidance necessary to trigger IRS detection are uncertain in areas such as use of Subchapter S corporations to avoid payroll taxes,<sup>201</sup> charitable contributions of appreciated property like

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198. Jeremiah Coder, *Economic Substance Guidance Should Reassure, Official Says*, 133 TAX NOTES 1318, 1318 (2011).

199. Jodi J. Schwartz, *Economic Substance Doctrine and Subchapter C: What, Me Worry?*, 89 TAXES 113, 133 (2011).

200. I.R.C. § 6662(b)(6) (2016).

201. See, e.g., Peter J. Reilly, *S Corporation SE Avoidance Still a Solid Strategy*, FORBES (Aug. 25, 2013), <http://www.forbes.com/sites/peterjreilly/2013/08/25/s-corporation-se-avoidance-still-a-solid-strategy/>.

artwork,<sup>202</sup> and characterization of household service providers as independent contractors rather than employees.<sup>203</sup> Uncertainty aversion may cause some of these individuals to comply with the tax law.<sup>204</sup> The potential for reverse engineering to alleviate this uncertainty could encourage some of these individual taxpayers to increase their use of aggressive tax avoidance strategies.

With the ability to observe the ex post enforcement actions of the IRS through public disclosure of complete tax return information, tax advisory and data analysis firms would gain increased opportunity to create statistical models that show which types of tax positions are most likely to result in detection and successful challenge by the IRS. For instance, in light of the empirical possibilities offered by public disclosure, corporate tax directors and wealthy individuals could demand predictive models from the major accounting and other tax advisory firms that analyze whether certain tax reporting and filing actions in different circumstances would cause the IRS to utilize audits, deficiency assertions, and tax penalties. The major accounting firms currently do not publicize the use of such models using client data, possibly due to contractual restrictions on using clients' return information or out of concern that this action could attract scrutiny from regulators or Congress.<sup>205</sup> The introduction of mandatory public disclosure of tax return information, however, could provide these firms with an opening to market statistical modeling of IRS behavior. Public availability of tax return data would likely also result in competition from data analysis groups, such as Audit Analytics<sup>206</sup> and others,<sup>207</sup> that do not

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202. See, e.g., Zachary R. Mider, *How Wal-Mart's Waltons Maintain Their Billionaire Fortune: Taxes*, BLOOMBERG BUSINESS (Sept. 12, 2003), <https://www.bloomberg.com/news/articles/2013-09-12/how-wal-mart-s-waltons-maintain-their-billionaire-fortune-taxes> (describing art donations).

203. See, e.g., *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last updated Mar. 23, 2017).

204. See, e.g., Jeff T. Casey & John T. Scholz, *Boundary Effects of Vague Risk Information on Taxpayer Decisions*, 50 ORG. BEHAV. & HUMAN DECISION PROCESSES 360, 363–64 (1991); Mark P. Gergen, *Uncertainty and Tax Enforcement: A Case for Moderate Fault-Based Penalties*, 64 TAX L. REV. 453, 472–74 (2010); Sarah B. Lawskey, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241, 244 (2013).

205. See, e.g., KPMG, GENERAL TERMS OF KPMG FIDUCIAIRE (2011) (on file with author) (“KPMG . . . shall treat all information provided to it either prior to or in the course of delivering the Services as confidential . . .”).

206. *Audit Analytics Peer Reporter*, AUDIT ANALYTICS, <http://www.auditanalytics.com/0002/peer-reporter.php> (last visited Mar. 28, 2017).

207. See generally AMIR D. ACZEL, *HOW TO BEAT THE I.R.S. AT ITS OWN GAME* (1995).

offer tax advisory services currently.

Several examples offer a window into possible uses of publicly disclosed tax return information to produce predictive modeling of tax enforcement. In a recent study, Jacob Thornock and others attempted to examine how the IRS selects taxpayers to examine or what information it uses in its enforcement mission.<sup>208</sup> Their study focused on the IRS's approach to investigating corporate taxpayers by reviewing the timing and frequency of reviews of publicly filed SEC annual reports by IRS agents (the SEC provided the data regarding IRS downloads in response to a Freedom of Information Act request).<sup>209</sup> The researchers then analyzed whether certain firm-specific characteristics, such as changes in net operating losses and cash holdings, were statistically more likely to result in attention by the IRS.<sup>210</sup> As another example, when individuals use TurboTax, a popular tax preparation program, to complete their personal tax returns, the software indicates whether the probability of an IRS audit is high or low using its "Audit Risk Meter."<sup>211</sup> Public disclosure of complete tax returns would enable similar, but more detailed and sophisticated predictions regarding the factors that lead the IRS to pursue audits, deficiency assessments, and tax penalties.

Public disclosure of complete tax returns, thus, raises the same concern as disclosure of factors that contribute to the IRS's DIF score and other mechanisms the IRS uses for selecting tax returns for audit. Congress has recognized the potential enforcement risks of publicizing this information, providing that the IRS shall not be required to disclose to taxpayers "standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards . . . ."<sup>212</sup> Courts have similarly recognized the IRS's need to redact information from legally required public disclosures if they would reveal the "scope, direction, or emphasis of audit activity."<sup>213</sup> Policymakers should apply similar treatment to proposals that would expose information

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(analyzing public information to model IRS behavior).

208. See generally Jacob R. Thornock et al., *IRS Attention* (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2529268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529268).

209. *Id.*

210. *Id.*

211. See *Top Five Ways to Avoid a Tax Audit*, INTUIT TURBO TAX, <https://turbotax.intuit.com/tax-tools/tax-tips/Tax-Planning-and-Checklists/Top-Five-Ways-to-Avoid-a-Tax-Audit/INF19031.html> (last visited Mar. 28, 2017).

212. I.R.C. § 6103(b) (2016).

213. *Tax Analysts v. IRS*, 117 F.3d 607, 619–20 (D.C. Cir. 1997).

critical to the IRS's enforcement strategies through reverse engineering.

### C. WHY EX ANTE TAX ADMINISTRATION SHOULD BE PUBLIC

When evaluating tax return information that could be subject to mandatory public disclosure in service of increased tax transparency, policymakers should consider characteristics that differentiate ex post tax enforcement from ex ante tax administration. From the perspective of a principal that seeks to hold its agent accountable without impeding the agent from completing its assigned responsibilities, there is a more compelling case for mandatory public disclosure of IRS actions that constitute ex ante tax administration than that represent ex post tax enforcement. Three primary justifications for mandatory public disclosure of documents that would reveal ex ante tax administration are discussed below: sociological legitimacy of the IRS; efficiency; and absence of threats to the IRS's enforcement capabilities.

#### 1. Sociological Legitimacy

Sociological legitimacy is a core objective for any administrative agency, including the IRS. Compared to models of legitimacy that depend on moral or legal authority, the sociological legitimacy of an action or institution of the government hinges on whether "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."<sup>214</sup> Some individuals fail to comply with existing tax law when they view the law or the institution that applies it as illegitimate.<sup>215</sup> A lack of sociological legitimacy may also hamper the IRS's attempts to propose new rules and regulations without encountering significant skepticism and delay.<sup>216</sup> And when legislators, on behalf of their constituents, reject the legitimacy of certain actions of the IRS, they may respond by denying the agency's

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214. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005). See also JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10–11 (1978); Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1017–22 (2007).

215. See, e.g., Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259, 259 (Joel Slemrod ed., 1992); John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 AM. J. POL. SCI. 398, 408 (1998).

216. See Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 668 (2011).

budgetary requests.<sup>217</sup> Several features of the absence of tax transparency of ex ante tax administration present a greater threat to the sociological legitimacy of the IRS than preservation of current tax privacy rules for acts of ex post tax enforcement.

*Secret Tax Law.* Without tax transparency, taxpayers may perceive that the IRS lacks legitimacy by creating secret tax law through the issuance of advance tax rulings. In response to this concern, Congress provided in Section 6110 of the Internal Revenue Code that “written determinations,” such as private letter rulings, should be open to public inspection.<sup>218</sup> In enacting this provision, Congress explicitly sought to counter the public perception of the development of secret tax law. Prior to the enactment of this statute, when only the taxpayers and advisors who requested private letter rulings had “special access to these rules of law,”<sup>219</sup> Congress believed that the lack of public disclosure “tended to reduce public confidence in the tax laws.”<sup>220</sup>

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. In a tax deficiency dispute following an audit, the IRS Appeals Division often concedes legal issues to the taxpayer, as illustrated by its high settlement rate.<sup>221</sup> In contrast, when a taxpayer seeks a private letter ruling regarding a proposed transaction, the taxpayer will wait to pursue the transaction until the IRS issues its ruling. For example, in January 2015, Yahoo Inc. announced that it would distribute its stock in Alibaba Group Holding Ltd. in a tax-free spin-off transaction, enabling Yahoo to avoid over \$16 billion in tax liability and that it would seek a private letter ruling.<sup>222</sup> Shortly thereafter, the IRS announced that it would refrain from issuing private letter rulings involving this type of spin-off transaction where the active trade or business of the distributing corporation or the controlled corporation is small compared to other assets.<sup>223</sup> Not only did the Yahoo-

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217. See Yoder, *supra* note 126 and accompanying text.

218. I.R.C. § 6110 (2016).

219. S. REP. NO. 94-938, pt. 1, at 305 (1976), as reprinted in 1976 U.S.C.C.A.N. 3438, 3735.

220. *Id.*

221. See Williams, *supra* note 146.

222. See Press Release, Yahoo, Yahoo Announces Plan for Tax-Free Spin-Off of Remaining Stake in Alibaba Group (Jan. 27, 2015), <https://investor.yahoo.net/releasedetail.cfm?releaseid=893147>.

223. See Vinu Goel & Michael J. de la Merced, *I.R.S. Look at Spinoffs May Affect Yahoo Plan*, N.Y. TIMES (May 19, 2015), <https://www.nytimes.com/2015/05/20/technology/irs-look-at-spinoffs-may-affect-yahoo-plan.html>. The IRS subsequently confirmed this policy by declining to rule on

Alibaba transaction come to a halt, but within minutes of the announcement from the IRS, the stock price of Yahoo plummeted by more than 10%.<sup>224</sup> Eventually, the potential multi-billion dollar tax risk, exacerbated by the absence of a private letter ruling, caused Yahoo to abandon its proposed tax strategy.<sup>225</sup> As a result of its power in exercising discretion to issue a private letter ruling, the IRS can, and often does, require the taxpayer to make representations regarding its future activities that exceed statutory requirements.<sup>226</sup> It can rule without concern that the taxpayer will later challenge the IRS in settlement negotiations or in court. Only public disclosure can allow all taxpayers to observe the IRS's ex ante interpretations of the tax law.

Through public disclosure, the public and policymakers can engage in debate regarding the legal interpretations of the IRS as expressed in ex ante tax administration, which would contradict the perception that the IRS creates tax law in secret and without accountability. For instance, in 2008 and 2009, the IRS issued several notices that applied prospectively and altered the application of Section 382 of the Code, which governs the use of net operating losses following an ownership change, for corporations that participated in the government's Troubled Asset Relief Program.<sup>227</sup> Following the public issuances of these notices, members of Congress held hearings, requested additional information from the IRS, and even introduced legislation that sought to nullify the notices.<sup>228</sup> While some questioned whether the IRS acted in a manner that was consistent with the relevant statutory tax law or any grant of authority from Congress,<sup>229</sup> the

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Yahoo's ruling request regarding the spin-off of Alibaba. See Yahoo! Inc., Current Report (Form 8-K) (Sept. 2, 2015), <https://www.sec.gov/Archives/edgar/data/1011006/000119312515314494/d35793d8k.htm>.

224. See Brian Womack & Richard Ruben, *Yahoo Sticks to Spinoff Plan as IRS Triggers Share Slump*, BLOOMBERG BUSINESS (May 19, 2015), <https://www.bloomberg.com/news/articles/2015-05-19/yahoo-shares-drop-on-potential-changes-to-irs-s-spinoff-rules>.

225. See Press Release, Yahoo, Yahoo Provides Update on Planned Spin Off of Remaining Stake in Alibaba Group (Dec. 9, 2015), <https://investor.yahoo.net/releasedetail.cfm?releaseid=946231>.

226. See, e.g., Rev. Proc. 96-30, 1996-19 C.B. 8 (detailing the required taxpayer representations).

227. See I.R.S. Notice 2008-76, 2008-39 I.R.B. 768; I.R.S. Notice 2008-84, 2008-41 I.R.B. 855; I.R.S. Notice 2008-100, 2008-44 I.R.B. 1081; I.R.S. Notice 2010-2, 2010-2 I.R.B. 251.

228. See, e.g., A Bill to provide that Internal Revenue Service Notice 2010-2 shall have no force and effect and to amend the Internal Revenue Code of 1986 to restrict the authority of the Secretary of the Treasury to prescribe regulations under section 382 of such Code, S. 2916, 111th Cong. (2009).

229. See, e.g., Eric Rasmusen & J. Mark Ramseyer, *Can the Treasury Exempt Companies It Owns from Taxes? The \$45 Billion General Motors Loss Carryforward Rule*, in THE CATO PAPERS ON PUBLIC POLICY 20-22 (Jeffrey Miron ed., 2011).

ability of all taxpayers to observe these rulings through public disclosure spurred Congress to engage in this debate. If, on the other hand, tax privacy had prevented taxpayers from learning of these legal rulings until years later, if at all, public distrust of the IRS could have grown.

*Equity.* Without tax transparency, the public may perceive that the IRS treats taxpayers inequitably when issuing advance tax rulings and approvals. Because the IRS dictates the issues upon which it will deliver advance tax rulings, requires taxpayers to follow uniform guidelines in submitting representations and supporting information, and reviews *all* ruling requests, taxpayers are justified in expecting the IRS to treat similarly situated taxpayers equally.

Mandatory public disclosure enables taxpayers to determine whether the IRS has met this equity standard. Some courts have even held that while taxpayers are restricted from relying on private letter rulings issued to other taxpayers as precedent,<sup>230</sup> they can introduce private letter rulings as evidence that the IRS has abused its discretion in issuing different rulings to two directly competing taxpayers. For example, in the 1960s, IBM and its main competitor, Remington Rand, requested private letter rulings from the IRS regarding identical products within weeks of one another.<sup>231</sup> The IRS issued a favorable ruling to Remington Rand, but did not issue a favorable ruling to IBM.<sup>232</sup> The Court of Claims allowed IBM to introduce this disparity as evidence and recover taxes that it paid from the IRS.<sup>233</sup> Without public disclosure, taxpayers could suspect that even though the IRS has defined the requirements for requesting and obtaining a private letter ruling in as uniform a manner as possible, it uses the curtain of tax privacy as a way to apply the tax law differently to similar facts.

There is a lower risk of public perception of inequitable treatment in the case of ex post tax enforcement. Just as a police officer stops only a small subset of drivers who exceed the posted speed limit,<sup>234</sup> the IRS audits only a sliver of all tax returns.<sup>235</sup> Taxpayers who are aware of the existence of an “audit lottery” know that the IRS will not apply the tax law equally to similarly situated taxpayers simply because it will not audit all tax returns.

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230. I.R.C. § 6110(k)(3) (2016).

231. *IBM Corp. v. United States*, 343 F.2d 914, 916 (Ct. Cl. 1965).

232. *Id.* at 916–17.

233. *Id.* at 924.

234. See Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 427 n.13 (2002).

235. See Internal Revenue Serv., *supra* note 138.

And in contrast to advance tax rulings, where the IRS requires uniform representations and supporting evidence from taxpayers on a narrowly defined set of issues, ex post audits are more likely to involve divergent facts, especially where the IRS has selected a tax return for audit as a result of multiple instances of tax noncompliance. Some fact patterns will make it more likely that the IRS can prevail in court than others. For these reasons, courts have consistently held that the IRS does not owe taxpayers a “duty of consistency” when selecting tax returns for audits or entering into settlement agreements.<sup>236</sup>

*Integrity.* Non-disclosure of ex ante tax administration also threatens the sociological legitimacy of the IRS by causing the public to question the agency’s integrity. Private letter rulings and Advance Pricing Agreements are frequently characterized as “tax deals.”<sup>237</sup> The use of the term “deals” implies that the IRS acts as a partner with the taxpayer by facilitating its tax strategies prospectively. Private letter rulings and Advance Pricing Agreements function in the same manner as tax insurance, but taxpayers can obtain this insurance with significantly less expense from the IRS than from third-party insurers.<sup>238</sup> Despite the IRS’s relatively strong bargaining power compared to taxpayers when negotiating advance tax rulings and agreements, the public may perceive that, under these circumstances, the IRS makes costly concessions or, worse, engages in impropriety. Mandatory public disclosure of ex ante tax administration, consequently, is essential to protecting the integrity of the IRS in the eyes of the public.

Lack of transparency in the advance ruling context can also encourage suspicions of impropriety, as taxpayers may perceive that IRS officials favor specific taxpayers. For example, in 2013, the Treasury Inspector General for Tax Administration (“TIGTA”) issued a report criticizing the IRS for failing to create policies that prevent taxpayers from directing their

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236. See *Vons Companies, Inc. v. United States*, 51 Fed. Cl. 1, 10 (2001). For discussion, see Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 318; Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. CIN. L. REV. 531 (2005).

237. See, e.g., Jeremy Scott, *Shedding Light on Advance Pricing Agreements*, HUFFINGTON POST (Sept. 22, 2013), [http://www.huffingtonpost.com/jeremy-scott/shedding-light-on-advance\\_b\\_3639306.html](http://www.huffingtonpost.com/jeremy-scott/shedding-light-on-advance_b_3639306.html) (referring to “deals that heavily favor corporate taxpayers”); Lisa Nadal, *Who Killed the Senate APA Report?*, TAX NOTES TODAY (Jan. 15, 2008), <http://www.taxnotes.com/worldwide-tax-daily/transfer-pricing-and-apportionment-issues/news-analysis-who-killed-senate-apa-report/2008/01/15/7929031> (referring to “sweeter deal” negotiated by IRS).

238. See Rev. Proc. 2015-1, 2015-1 I.R.B. 79, *supra* note 152.

private letter ruling requests to specific reviewing IRS attorneys.<sup>239</sup> Under policies in effect at the time, an IRS attorney that received multiple requests for private letter rulings from a specific law firm could retain up to two-thirds of these letter ruling requests.<sup>240</sup> While TIGTA reported no evidence of malfeasance or corruption, it warned the IRS that this policy could create the appearance that “practitioners could possibly manipulate the letter ruling process” by seeking “inappropriate favorable rulings.”<sup>241</sup> At least one tax practitioner defended the strategy of requesting particular IRS attorneys to review private letter ruling requests “not because he’s your buddy, but because he’s going to get to the right answer.”<sup>242</sup> Without public disclosure, public perceptions of impropriety between tax officials and taxpayers involving ex ante tax administration would likely increase.

The public is less likely to perceive the IRS has engaged in favoritism toward specific taxpayers or acts of impropriety during audits and negotiations over settlement agreements. In ex post tax enforcement situations, the transaction has already occurred. The IRS does not facilitate the transaction prospectively by assuring desired tax benefits. The consequences of the taxpayer’s uncertain tax positions may also have already had an effect in the taxpayer’s financial statements even before an audit by the IRS has occurred,<sup>243</sup> reducing the stakes of a tax controversy compared to an advance tax ruling request. Further, increased levels of review involved in ex post tax enforcement situations, including by officials within the IRS Appeals Division, the Joint Committee on Taxation, and the U.S. Tax Court,<sup>244</sup> reduce potential appearances of impropriety between taxpayers engaged in tax controversies and IRS officials.

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239. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2013-10-081, CHIEF COUNSEL SHOULD TAKE STEPS TO MINIMIZE THE RISK OF OUTSIDE INFLUENCE ON ITS LETTER RULINGS (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310081fr.html>.

240. *See id.* (describing two-thirds rule).

241. *Id.*

242. Amy S. Elliott, *TIGTA Says Chief Counsel Offices at Risk for Outside Influence on Letter Rulings*, TAX NOTES (Sept. 19, 2013), <http://www.taxnotes.com/tax-notes-today/corporate-taxation/tigta-says-chief-counsel-offices-risk-outside-influence-letter-rulings/2013/09/19/t75c?> (quoting anonymous tax practitioner).

243. *See* 2 ACCOUNTING STANDARDS CODIFICATION § 740-10-55-3 (FIN. ACCOUNTING STANDARDS BD. 2009) (preventing recognition of tax benefits unless they are “more likely than not” to be upheld if audited by the IRS and subject to judicial review).

244. For discussion, see *supra* notes 137–146 and accompanying text.

## 2. Efficiency

In addition to preserving sociological legitimacy of the IRS, public disclosure of advance tax rulings and agreements supports a core rationale of these devices: to alleviate legal uncertainty and encourage efficient transactions. Some taxpayers forego business transactions as a result of tax uncertainty. By obtaining *ex ante* tax administration, such as a private letter ruling, a taxpayer generally can pursue its transaction without fear that the IRS will subsequently challenge the tax treatment of the transaction.

Mandatory public disclosure of advance tax rulings encourages other taxpayers to seek these rulings themselves, which ultimately leads them to execute transactions free of distortions caused by tax law uncertainty. By publicly disclosing an advance tax ruling received by a taxpayer, the IRS reveals to other similarly situated taxpayers the specific legal issues and fact patterns on which it will rule.

The IRS, for example, issues private letter rulings regarding “significant issues” in tax-free spin-off transactions, which are legal issues “the resolution of which is not essentially free from doubt and that is germane to determining the tax consequences of the transaction.”<sup>245</sup> As discussed earlier, in January 2015, Yahoo Inc. announced its decision to distribute its stock in Alibaba Group Holding Ltd. in a multi-billion dollar tax-free spin-off transaction.<sup>246</sup> Even though Yahoo’s proposed spin-off transaction involved significant legal uncertainty regarding the “active trade or business” requirement, Yahoo announced the transaction and requested a private letter ruling after a competitor corporation, Liberty Interactive, participated in a similar transaction involving TripAdvisor, a portfolio corporation.<sup>247</sup> As one commentator noted at the time of the Yahoo-Alibaba announcement, “Yahoo likely would not have pursued its planned transaction in the first place had it not been bolstered by a recent letter ruling . . . blessing what is believed to be the spinoff by Liberty Interactive Corp. of TripAdvisor Inc.”<sup>248</sup>

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245. Rev. Proc. 2013-32, 2013-28 I.R.B. 55.

246. See Yahoo, *supra* note 222.

247. For discussion, see Michael J. de la Merced, *How Yahoo’s Spinoff of Its Alibaba Stake Will Work*, N.Y. TIMES (Jan. 27, 2015), <http://dealbook.nytimes.com/2015/01/27/how-yahoos-spinoff-of-its-alibaba-stake-will-work/>.

248. Amy S. Elliot, *IRS Announces Spinoff Ruling Pause; Yahoo Implicated?*, 147 TAX NOTES 857 (2015) (quoting Robert Willens).

Even if taxpayers do not request advance tax rulings or enter into advance tax agreements, public disclosure of these actions alleviates legal uncertainty and can encourage efficient transactions. While taxpayers cannot rely on other taxpayers' private letter rulings as binding precedent,<sup>249</sup> they can look to these rulings for guidance regarding the IRS's own interpretation of ambiguous tax law issues. For instance, in 2014, the IRS announced that it would suspend its private letter ruling program regarding activities that are "qualifying income" by master limited partnerships, which would be necessary in order for these entities to retain partnership status for tax purposes.<sup>250</sup> Taxpayers commented that the lack of private letter rulings would deter efficient business transactions, especially in the oil and gas industry.<sup>251</sup> When the IRS resumed issuing private letter rulings on this issue in 2015, taxpayers and their advisors were eager to observe the IRS's "workable standards" as applied in rulings, even if they did not plan to request the rulings themselves.<sup>252</sup>

Additionally, the representations that the IRS requires taxpayers to submit before receiving a private letter ruling, which are currently open to public inspection, often reduce legal ambiguity by becoming the default interpretation that taxpayers rely on in pursuing transactions. For instance, the IRS's required representation regarding the "substantially all" requirement of certain tax-free reorganizations has become the *de facto* legal rule that taxpayers seek to satisfy.<sup>253</sup> Without public disclosure of these representations in private letter rulings, the legal uncertainty surrounding this issue, and many others, could prevent taxpayers from pursuing certain forms of corporate mergers and acquisitions.

Contrary to the increased efficiency that results from public disclosure of advance tax rulings, public disclosure of documents that reveal the IRS's ex post tax enforcement could encourage wasteful tax planning. Public disclosure of complete tax return information, as discussed earlier, would enable taxpayers to determine the IRS's tax enforcement approaches, rather than reveal issues on which the IRS will provide an advance tax ruling that

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249. I.R.C. § 6110(k)(3) (2016).

250. See Patrick Temple West & Anna Driver, *IRS Puts Damper on Newer Types of Energy Partnerships*, REUTERS (Apr. 8, 2014, 5:55 PM), <http://www.reuters.com/article/us-investment-energy-irs-idUSBREA371I320140408>.

251. See *id.*

252. ERNST & YOUNG, IRS ENDS MLP PRIVATE LETTER RULING "MORATORIUM" (Mar. 2015), [http://www.ey.com/Publication/vwLUAssets/EY-master-limited-partnership-alert-march-2015/\\$FILE/EY-master-limited-partnership-alert-march-2015.pdf](http://www.ey.com/Publication/vwLUAssets/EY-master-limited-partnership-alert-march-2015/$FILE/EY-master-limited-partnership-alert-march-2015.pdf).

253. Rev. Proc. 77-37, 1977-2 C.B. 568.

could facilitate a non-tax motivated transaction.<sup>254</sup> The consequence of such reverse engineering is that taxpayers may pursue tax avoidance strategies that do not result in IRS detection or challenge, a distortion of taxpayer behavior. Moreover, public disclosure of ex post tax enforcement would reduce legal uncertainty in situations where Congress deliberately enacted legally ambiguous standards in order to deter taxpayers from pursuing aggressive tax planning. For instance, public disclosure of complete tax return information would reveal circumstances under which the IRS applies the 40% economic substance tax penalty, undermining the efficacy of this particular tax penalty.<sup>255</sup> As this example illustrates, public disclosure should be utilized as a means of reducing tax law uncertainty, but only where this effect is desirable from an efficiency perspective.

### 3. Absence of Enforcement Risk

Mandatory public release of documents that would expose ex ante tax administration do not pose the same threats to tax enforcement and administration—such as interference with the IRS’s strategic publicity efforts, initiation of benchmarking by taxpayers, and facilitation of reverse engineering by taxpayers, their advisors, and financially incentivized third parties—as mandatory public disclosure of documents that would show ex post enforcement actions.

*Strategic Publicity.* While public release of complete tax return information would offer specific examples of the IRS’s failure to audit certain taxpayers, apply tax penalties, and pursue litigation in most tax controversies,<sup>256</sup> public disclosure of advance rulings, agreements, and approvals would not offer comparable examples of these weaknesses.

Advance tax rulings affect a narrow set of legal issues on which the IRS consents to provide rulings in advance, which bear little relationship to factors that influence many individuals’ tax compliance decisions.<sup>257</sup> It is highly unlikely, for instance, that an individual taxpayer’s perceptions regarding whether the IRS will pursue civil or criminal fraud tax penalties cases involving small offshore bank accounts is affected in any meaningful way by the public release of a private letter ruling that states that a

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254. See *supra* notes 198–213 and accompanying text.

255. I.R.C. § 6662(b)(6) (2016).

256. See *supra* notes 164–182 and accompanying text.

257. See Rev. Proc. 2015-3, 2015-1 I.R.B. 144 (describing when IRS will and will not rule).

corporation can engage in a tax-free reorganization under Section 368(a)(1)(F) of the Code even though shareholders will sell stock of the corporation immediately after the reorganization.<sup>258</sup> Unlike public disclosure of complete tax return information, including the results of settlements involving offshore bank accounts and other forms of tax avoidance and evasion,<sup>259</sup> public disclosure advance tax rulings would not reveal the IRS's capacity to audit tax returns or apply tax penalties.

Second, unlike ex post tax controversies, the IRS retains discretion to refrain from issuing advance tax rulings or entering into advance tax agreements. Because the IRS lacks the resources to litigate every instance of tax avoidance it identifies, it deploys mass settlement programs, such as the Offshore Voluntary Disclosure Program,<sup>260</sup> that allows many taxpayers to obtain favorable terms compared to the possible results of litigation. Public disclosure of complete tax returns would reveal the results of these settlements involving specific taxpayers, including many highly salient examples.<sup>261</sup> On the other hand, if the IRS does not consider the facts of a specific taxpayer's proposed transaction to merit a publicly accessible advance tax ruling, including taking into account the effects on the tax planning of other taxpayers, the IRS can decline to issue the ruling.<sup>262</sup>

Last, unlike mandatory public disclosure of the terms of tax deficiency settlement agreements with specific taxpayers, public disclosure of advance tax rulings explicitly state that taxpayers have complied with the relevant tax law. After reciting the taxpayers' representations, many private letter rulings conclude with approving language from the IRS, such as "we have determined that you fulfilled the requirements"<sup>263</sup> or "we conclude that the proposed modifications comply."<sup>264</sup> Compared to public disclosure of ex post IRS settlements that highlight taxpayers' noncompliance, public disclosure of private letter rulings bolster the perception that the taxpayers

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258. For discussion, see *IRS Rules that "F" Reorganization Can Be Used to Strip Retained Assets Before Sale*, MCGUIREWOODS (Mar. 15, 2011), <https://www.mcguirewoods.com/Client-Resources/Alerts/2011/3/IRS-Rules-that-F-Reorganization-Can-Be-Used-to-Strip-Retained-Assets-Before-Sale.aspx>

259. See *supra* notes 170–172 and accompanying text.

260. See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014*, IRS, <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers-2012-revised> (last updated Feb. 9, 2017).

261. See *id.*

262. See Rev. Proc. 2015-1, 2015-1 I.R.B. 1.

263. I.R.S. Priv. Ltr. Rul. 201528001 (July 10, 2015).

264. I.R.S. Priv. Ltr. Rul. 201521003 (May 22, 2015).

requesting the ruling will engage in *de facto* tax compliance rather than illegitimate tax avoidance.

*Benchmarking.* Mandatory public release of the IRS's advance tax rulings and agreements also poses little risk of encouraging taxpayers to increase their use of tax avoidance strategies in order to meet benchmarks of tax aggressiveness.<sup>265</sup> Unlike the tax positions that trigger audits and tax controversies over deficiency assertions, the issues that are the subject of advance tax rulings are not aggressive tax positions that rely on questionable interpretations of the tax law. Instead, private letter rulings often feature transactions where taxpayers seek assurance that they have satisfied the requirements of statutes that explicitly provide tax benefits, such as deferral of tax liability in tax-free reorganizations.<sup>266</sup> Taxpayers seek private letter rulings when they claim conservative tax positions, especially because when doing so, they knowingly subject themselves to increased IRS scrutiny and multiple requests for voluminous information.<sup>267</sup>

*Reverse Engineering.* Finally, public disclosure of advance tax rulings would not enable taxpayers, advisors, and other third parties to reverse engineer IRS's enforcement strategies.<sup>268</sup> Private letter rulings, advance tax agreements, and approvals do not offer indicia of the IRS's methodology in selecting tax returns for audit, asserting tax deficiencies, or pursuing tax penalties. Instead of leading taxpayers and their advisors to attempt to determine the probability of enforcement by the IRS, including by developing statistical models, public disclosure of documents showing ex ante forms of tax administration would offer taxpayers and their advisors greater insights into whether their own circumstances are likely to result in a successful request for an advance tax ruling from the IRS.<sup>269</sup>

#### D. CROSS-JURISDICTIONAL APPLICATION

A potential reaction to the analysis presented above is to question whether it can be generalized to jurisdictions other than the United States.

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265. See *supra* notes 183–197 and accompanying text.

266. See Rev. Proc. 2015-3, 2015-1 I.R.B. 129.

267. See Jay Starkman, *Applying for a Private Letter Ruling*, J. OF ACCT., Jan. 2010, at 21.

268. See *supra* notes 198–213 and accompanying text.

269. See, e.g., PWC, ISSUE 10, M&A TAX RECENT GUIDANCE 2 (Oct. 2013), <http://www.pwc.com/us/en/washington-national-tax/newsletters/mergers-and-acquisitions/assets/pwc-this-month-m-october-2013.pdf> (describing “much anticipated” I.R.S. Priv. Ltr. Rul. 201337007 (Sept. 13, 2013)).

Most countries do not permit public access to tax return and payment information of specific individual and business taxpayers.<sup>270</sup> Like the United States, some countries, such as Japan, have experimented with mandatory public disclosure of tax return information for limited periods.<sup>271</sup> Several Scandinavian jurisdictions, however, have long maintained expansive tax transparency policies, in which significant amounts of individual and business tax return information, as well as administrative actions of the taxing authority, are publicly accessible.<sup>272</sup> This Section briefly examines the public disclosure policies of one such country, Sweden, and draws from this example several factors that suggest when public disclosure of ex post tax information is unlikely to result in threats to tax enforcement and compliance.

*Tax Transparency in Sweden.* For centuries, transparency by the government has been a hallmark trait of the Swedish legal system. Dating back to 1766, Swedish constitutional law provides that “every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information.”<sup>273</sup> The default rule provides Swedish citizens with the right “to freely access almost all documents relating to the administration of justice and public administration” other than certain restricted information, such as documents that affect national security or criminal law enforcement.<sup>274</sup>

Swedish law requires public disclosure of ex ante tax administration,

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270. See generally TAX SECRECY AND TAX TRANSPARENCY: THE RELEVANCE OF CONFIDENTIALITY IN TAX LAW (Eleonor Kristoffersson et al. eds., 2013) (describing the tax confidentiality policies of a variety of countries).

271. For discussion, see generally Makoto Hasegawa et al., *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan*, 66 NAT'L TAX J. 571 (2013) (analyzing the behavioral response to the Japanese policy of public disclosure of tax returns).

272. See, e.g., 1346/1999 Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information] (Fin.), translated in <http://www.finlex.fi/en/laki/kaannokset/1999/en19991346.pdf>; *Skattelister for inntektsåret 2015* [Tax Lists for Fiscal Year 2015], SKATTEETATEN, <https://tjenester.skatteetaten.no/> (last visited Feb. 2, 2017) (Nor.); 27 ch. 6 § OFFENTLIGHETS- OCH SEKRETESSLAG [PUBLIC ACCESS TO INFORMATION AND SECRECY ACT] (Svensk författningssamling [SFS] 2009:400) (Swed.). For further discussion, see Erlend E. Bø, Joel Slemrod & Thor O. Thoresen, *Taxes on the Internet: Deterrence Effects of Public Disclosure*, 7 AM. ECON. J.: ECON. POL'Y 36, 36–62 (2015).

273. 2 ch. 1 § TRYCKFRIHETSFÖRORDNING [FREEDOM OF THE PRESS ACT] (Svensk författningssamling [SFS] 1949:105) (Swed.).

274. Anna-Maria Hambre, *Tax Confidentiality in Sweden and the United States – A Comparative Study* 122, 129 (unpublished manuscript) (on file with author).

such as advance tax rulings issued regarding specific taxpayers.<sup>275</sup> Both the taxpayer and the Swedish Tax Agency can request advance tax rulings from the Council for Advance Tax Rulings regarding the tax effects of proposed transactions.<sup>276</sup> These advance tax rulings are published without information that identifies the taxpayer that requested them.<sup>277</sup>

Yet unlike the United States, Sweden also mandates significant public disclosure of information that reveals ex post tax enforcement and decisions. Every year, the Swedish Tax Agency publishes the taxable income and tax liability of all Swedish taxpayers, both individuals and businesses, which are identified by name in its publicly accessible *taxeringskalender* (tax calendar).<sup>278</sup> To protect taxpayers' personal and proprietary information, Swedish law does not require public disclosure of tax returns themselves, which indicate sources of income, or the tax deductions that affect the calculation of taxable income, such as business expenses.<sup>279</sup> More importantly, all ex post audits and adjustments of a taxpayer's tax liability by the Swedish Tax Agency are publicly observable. Swedish law requires every "decision" of the taxing authority to be open to public inspection.<sup>280</sup> If, for instance, the Swedish Tax Agency determines that a taxpayer has improperly claimed a tax deduction, this decision must be publicly disclosed.<sup>281</sup>

There are several plausible hypotheses that explain how Sweden maintains such an expansive approach to tax transparency without appearing to threaten its taxing authority or its standing as a country with one of the highest tax compliance rates in the world.<sup>282</sup>

*Limited Opportunity to Exploit Public Information.* Swedish taxpayers

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275. 27 ch. 1 § OFFENTLIGHETS (Svensk författningssamling [SFS] 2009:400) (Swed.) For further discussion, see ROGER PERSSON OSTERMAN, FORHANDSBESKED I SKATTEFRAGOR 43 (2013).

276. See Gustaf Lindencrona, *Unique Features in Swedish Tax Law*, 50 SCANDINAVIAN STUD. L. 163, 166 (2007).

277. SKATTEVERKET, OFFENTLIGT ELLER HEMLIGT [PUBLIC OR SECRET] 169 (2009), *as discussed in* Hambre, *supra* note 274, at 150.

278. See TAXERINGSKALENDERN, <http://www.taxeringskalender.com/> (last visited Mar. 28, 2017).

279. See Hambre, *supra* note 274, at 21.

280. 27 ch. 6 § OFFENTLIGHETS- OCH SEKRETESSLAG [PUBLIC ACCESS TO INFORMATION AND SECRECY ACT] (Svensk författningssamling [SFS] 2009:400) (Swed).

281. *Id.* See also Hambre, *supra* note 274, at 21.

282. See SWEDISH TAX AGENCY, TAXES IN SWEDEN 2012, at 39 (2012), <https://www.skatteverket.se/download/18.3684199413c956649b57c0a/1361442608341/10413.pdf> (reporting tax compliance rate of 90%).

have a lower ability to exploit information in publicly available decisions of the taxing authority than would be possible in the United States if taxpayers could review complete tax return information. In contrast to the IRS, which settles almost all tax disputes,<sup>283</sup> the Swedish Tax Agency is prohibited by law from entering into any settlement negotiations or special agreements with taxpayers following an audit of the taxpayers' returns.<sup>284</sup> Public disclosure of these decisions, consequently, poses a lower risk of encouraging taxpayers to pursue more aggressive tax strategies in order to match the approaches of taxpayers who received more favorable tax decisions from the taxing authority than others regarding the same type of transaction. And as the Swedish Tax Agency must treat all similarly situated taxpayers equally when reaching decisions, it does not have the same incentive as U.S. government officials to highlight certain tax enforcement actions over others in order to influence taxpayers' perceptions of the consequences of tax noncompliance.

*Limited Opportunity for Tax Aggressiveness.* Features of Swedish tax law create fewer opportunities for taxpayers to pursue aggressive and abusive tax strategies, generally, than in the United States. Under the U.S. self-assessment income tax system, individual taxpayers determine whether to pursue actions such as: filing a tax return, reporting income that is not subject to third-party reporting, paying self-employment taxes, paying household employee taxes, reporting other individuals as dependents, claiming special tax credits, among many other tax compliance acts.<sup>285</sup> Similarly, as U.S. corporations can claim valuable tax losses and other tax benefits that reduce their taxable income and tax liability without reducing their earnings for financial accounting purposes, corporate tax directors often face pressure, from shareholders and non-tax management, to pursue tax avoidance strategies.<sup>286</sup>

Swedish taxpayers possess significantly less tax compliance discretion. The Swedish Tax Agency provides individual taxpayers with pre-completed income tax declaration forms, which most taxpayers simply confirm, often by sending a text message from their smart phones.<sup>287</sup> In

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283. See Williams, *supra* note 146 and accompanying text.

284. See Eleonor Kristoffersson et al., *Sweden*, in *TAX SECRECY AND TAX TRANSPARENCY: THE RELEVANCE OF CONFIDENTIALITY IN TAX LAW PART 1 AND 2*, at 1079, 1081–83 (Eleonor Kristoffersson et al. eds., 2013).

285. See DEP'T OF TREASURY, INTERNAL REVENUE SERV., PUBL'N. 17, *TAX GUIDE 2014 FOR INDIVIDUALS* (2014), <https://www.irs.gov/pub/irs-prior/p17--2014.pdf>.

286. See *supra* notes 184–188 and accompanying text.

287. David Wiles, *Why Swedes Are Okay with Paying Taxes*, SWEDEN, <https://sweden.se/society/>

addition, over 90% of Swedish individual income taxes are paid through a non-voluntary, third-party withholding system,<sup>288</sup> and over 30% of Sweden's tax revenue is attributable to a national value-added tax,<sup>289</sup> which is significantly more difficult to evade than an income tax. For Swedish corporations, taxable business income is calculated using the same rules for calculation of income for financial accounting purposes, generally accepted accounting principles ("GAAP").<sup>290</sup> Uniformity of tax and financial accounting thus lessens the incentives of tax directors to reduce taxable income. As design of the tax system and choice of tax base limit the ability of Swedish taxpayers to increase tax aggressiveness and engage in tax noncompliance compared to taxpayers in the U.S., public disclosure of ex post tax decisions of the taxing authority poses less of a threat to tax enforcement in Sweden than in the U.S.

*Public Attitudes Toward Taxation and Taxing Authority.* Finally, differences in public attitudes toward taxation and the taxing authority may partly explain why broad public disclosure of tax information in Sweden has not resulted in adverse tax compliance effects. By design, the U.S. voluntary compliance system is adversarial: taxpayers complete their own tax returns, can submit written justifications for not paying certain taxes, and can refrain from paying tax deficiencies until receiving a decision by the U.S. Tax Court.<sup>291</sup> Taxpayers regularly express the sentiment best captured by Judge Learned Hand's famous quote, that "any one may so arrange his affairs that his taxes shall be as low as possible . . . there is not even a patriotic duty to increase one's taxes."<sup>292</sup> A significant number of U.S. taxpayers are also suspicious of the IRS, as recent surveys show that the IRS is the least popular federal government institution other than Congress.<sup>293</sup> Public disclosure of complete tax return information would likely embolden some taxpayers' distrust of the IRS, as specific examples of the agency's weaknesses would attract significant media attention.

Public attitudes toward taxation and the taxing authority are markedly

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why-swedes-are-okay-with-paying-taxes (last updated Jan. 8, 2016).

288. SWEDISH TAX AGENCY, *supra* note 282, at 22.

289. *Id.* at 25.

290. *Id.* at 31.

291. *See supra* notes 136–146 and accompanying text.

292. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934).

293. Drew Desilver, *IRS Among Least Popular Federal Agencies*, PEW RES. CTR. (May 16, 2013), <http://www.pewresearch.org/daily-number/irs-among-least-popular-federal-agencies>.

different in Sweden, even as ex post decisions of the Swedish Tax Agency are publicly accessible. In a 2015 survey, 83% of Swedish citizens reported that they have a favorable perception of the Swedish Tax Agency.<sup>294</sup> In describing its citizens' attitudes toward tax compliance, the Swedish government reports on its official website,

Swedes are not naturally anti-tax . . . unlike in some countries where paying tax is seen as something negative, many Swedes tolerate – and even welcome – high taxes. In fact, the Swedish word for tax – *skatt* – has another meaning: treasure. There can't be many languages in which the word for tax has such positive connotations.<sup>295</sup>

Many factors may explain the differing attitudes toward taxation and the taxing authority in Sweden and the United States. Swedish citizens enjoy substantial government benefits in exchange for their tax dollars, such as universal healthcare, free public education, and generous retirement benefits.<sup>296</sup> Additionally, Sweden's status as a unitary state, compared to the federal system in the United States, supports citizens' perception that their payment of tax dollars to the national government directly funds the government benefits they receive.<sup>297</sup> Moreover, as the Swedish Tax Agency is required to treat taxpayers more uniformly than the IRS, and the Swedish tax system results in greater compliance by design,<sup>298</sup> public disclosure of tax information itself may even bolster positive attitudes toward the taxing authority and the tax system.

As this discussion illustrates, public disclosure of tax payment information and taxing authority decisions in Sweden does not appear to provoke a reaction of increased tax aggressiveness or evasion from taxpayers. From this case study, we can extract several attributes of a tax system that may limit the potential for public tax return information disclosure to impede tax enforcement: (1) low potential for disclosed tax information to be exploited by taxpayers in establishing benchmarks of tax aggressiveness or reverse engineering; (2) limited opportunities for taxpayers to engage in tax avoidance or evasion, irrespective of whether tax information is publicly disclosed; and (3) strong positive attitudes toward taxation and the taxing authority. None of these features are apparent in the

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294. Wiles, *supra* note 287.

295. *Id.*

296. *Id.*

297. For discussion, see PAUL LEVIN, DIR., STOCKHOLM UNIV. INST. FOR TURKISH STUDIES, SWEDEN: INTRODUCTION TO A DECENTRALIZED UNITARY STATE (Oct. 8, 2013), [http://www.tepav.org.tr/upload/files/haber/1381998105-8.Paul\\_T\\_Levin\\_in\\_Sunumu.pdf](http://www.tepav.org.tr/upload/files/haber/1381998105-8.Paul_T_Levin_in_Sunumu.pdf).

298. See *supra* notes 284–290.

tax system of the United States, where the taxing authority lacks the necessary resources to audit most tax returns and does not face legal obligations to resolve similar deficiency disputes with taxpayers on equal terms.<sup>299</sup>

### III. WHAT EX ANTE TAX ADMINISTRATION SHOULD BE PUBLIC?

After embracing the justifications for mandatory public disclosure of acts of ex ante tax administration, policymakers should next consider the precise types of documents and information that should be subject to such a policy. There are numerous possibilities. The IRS could be required to publicly disclose any “written determination” regarding a specific taxpayer.<sup>300</sup> Or the policy could be limited to advance tax rulings involving certain types of taxpayers, such as business entities and not individuals. Release of the documents showing ex ante tax administration could also include or exclude the taxpayers’ identities. Alternatively, public disclosure could be mandated only when the IRS addresses a first impression issue.

In contrast to current law, which only requires the IRS to publicly disclose instances in which it reaches an ex ante ruling regarding a specific taxpayer,<sup>301</sup> this Part proposes that the IRS should be required to satisfy a new standard of openness in tax administration: “dual tax transparency.” Under this standard, in addition to being required to release written determinations,<sup>302</sup> such as private letter rulings that often satisfy taxpayers’ requests,<sup>303</sup> the IRS should also be obligated to publicly disclose information about situations where it declines to issue such rulings or enter into such agreements. Even if denials occur in forms other than written determinations, such as preliminary decisions or oral communication, dual tax transparency demands that these denials be accessible by the public.

After explaining why dual tax transparency is necessary in order to achieve openness by the IRS regarding its ex ante legal interpretations and review processes, this Part shows how, in many cases, current statutory law and administrative procedures impede dual tax transparency.

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299. See *Vons Companies, Inc. v. United States*, 51 Fed. Cl. 1, 10 (2001).

300. I.R.C. § 6110(a) (2016).

301. See *id.*

302. I.R.C. § 6110(b)(1)(A) (2016).

303. See *infra* note 319 and accompanying text.

## A. DUAL TAX TRANSPARENCY

Dual tax transparency is critical to ensuring openness by the IRS regarding its ex ante legal interpretations and decisionmaking processes. If the public only observes advance rulings where the IRS agrees with the taxpayer's requested treatment, it will gain a limited, and possibly distorted, understanding of the IRS's interpretation of the tax law. An accurate understanding is important not only for taxpayers that may be considering submitting a request for a private letter ruling or agreement, but also to the public that desires to hold the IRS accountable for its actions.<sup>304</sup> Dual tax transparency could also stimulate legislators to consider changes to statutes that are either so complex or so unintentionally uncertain that the IRS is unable to reach ex ante legal conclusions. And given the high economic, even existential, value of certain types of advance tax rulings and approvals, dual tax transparency is necessary to assure the public that the IRS is not unreasonably discriminating against any particular taxpayers in declining to issue such rulings and approvals.

To consider why dual tax transparency is essential to an understanding of the IRS's behavior in the ex ante tax administration context, consider the following hypothetical. Imagine that a group of researchers is attempting to identify the factors that influence high school students' chances of gaining college admission to Hypo University, a prestigious national research institution.<sup>305</sup> The researchers are specifically interested in pinpointing features of successful "personal statements," written essays that students must submit to Hypo University as part of their applications. The researchers seek to analyze the personal statements among groups of applicants with otherwise identical characteristics, such as SAT scores, student activities, and class rank. If the researchers only examine the personal statements of high school students who were admitted to Hypo University, their findings will be highly questionable. The researchers might conclude, for instance, that personal statements that include references to historical political figures tend to lead to admission to Hypo University. But what about the unsuccessful personal statements? If the researchers review these personal statements as well, they could determine, for example, that statements that include references to favorite family pets are less likely than statements that discuss historical political figures to

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304. See *supra* notes 218–220 and accompanying text.

305. See also Joshua D. Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641, 1668–69 (2012).

correlate with admission. To identify trends, the researchers must review the personal statements of both successful *and* unsuccessful applicants.

Empirical researchers consider selection bias in the collection of data to present the risk of creating distorted conclusions.<sup>306</sup> When a researcher only reviews cases in which “outcome[s] of interest” have been achieved in order to attempt to determine the independent variables that affect the outcomes, the results are inconclusive.<sup>307</sup> For this reason, empirical researchers do not select data based only on the dependent variable, the outcome.<sup>308</sup> For example, in prior work, Nancy Staudt and I reviewed all corporate tax abuse cases decided by the U.S. Supreme Court between 1909 and 2011 in an effort to understand the factors that result in a legal victory for the government in these cases.<sup>309</sup> Rather than consider only cases where the Court agreed with the government, we reviewed all cases where the government alleged corporate tax abuse in its briefs filed with the Court.<sup>310</sup> This strategy allowed us to review the entire collection of cases in which the Court *could have* found abuse in order to fully understand the outcomes.<sup>311</sup> Without including both cases where the outcome of interest occurred and did not occur, the conclusions of our study, like the hypothetical study of college personal statements described above, would have been biased.

Dual tax transparency is necessary in order to ensure that taxpayers and policymakers do not draw biased conclusions from limited samples of documents showing *ex ante* tax administration. In order to enable a comprehensive and accurate understanding of the IRS’s behavior when issuing advance tax rulings and approvals or entering into advance tax agreements, a public disclosure policy should mandate disclosure of the following types of information:

*Request.* The policy should require public disclosure of the initial request for *ex ante* tax administration submitted by the taxpayer. In the private letter ruling context, for instance, this document is the private letter

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306. See, e.g., PETER KENNEDY, A GUIDE TO ECONOMETRICS 286–87 (5th ed. 2003); Barbara Geddes, *How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics*, 2 POL. ANALYSIS 131, 131 (1990).

307. See Geddes, *supra* note 306, at 134.

308. See *id.* at 133.

309. See Blank & Staudt, *supra* note 305, at 1646.

310. See *id.* at 1645 n.14.

311. See *id.* at 1668.

ruling request.<sup>312</sup> Whether the IRS should be required to disclose the identity of the requesting taxpayer depends on the objective of the specific public disclosure measure. In some cases, accountability objectives may necessitate public disclosure of the taxpayer's identity. In other cases, the goal of fostering public understanding of the IRS's legal interpretations may be possible without disclosure of the taxpayer's identity.

*Outcome.* Second, the policy should mandate public disclosure of the outcome of the taxpayer's request. Possible outcomes are that the IRS grants the request, the IRS denies the request, or the taxpayer withdraws the request prior to a decision by the IRS.<sup>313</sup>

*Reasoning.* Last, the policy should require the IRS to explain its analysis in reaching a decision. This information is necessary in order to enable the public to understand the IRS's legal interpretation of the tax law, whether the IRS agrees or disagrees with the taxpayer's proposed treatment.

## B. APPLICATION

While the tax law appears to require the IRS to publicly release documents showing ex ante tax administration,<sup>314</sup> in many cases it does not mandate dual tax transparency, or any tax transparency at all. This Section considers whether dual tax transparency occurs in the IRS's public disclosure practices regarding private letter ruling requests that taxpayers withdraw after submission to the IRS, tax-exempt status determinations where the IRS reaches an adverse decision, and Advance Pricing Agreements, irrespective of whether the IRS accepts the taxpayer's proposed terms.

### 1. Withdrawn Private Letter Ruling Requests

Based on a reading of current law, one might reasonably conclude that the IRS considers private letter ruling requests and issues rulings to specific taxpayers openly and transparently. Not only can the public access any private letter ruling,<sup>315</sup> but any individual can submit a request to the IRS to review another taxpayer's "background file" regarding an issued private letter ruling, which contains the taxpayer's written private letter ruling

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312. See *supra* notes 149–152 and accompanying text.

313. See *infra* notes 320–339 and accompanying text.

314. See I.R.C. § 6110(a) (2016).

315. See *id.*; Treas. Reg. § 301.6110-2(d) (as amended in 2012).

request, any written material submitted by the taxpayer in support of its request, and any written communication between the IRS and the taxpayer regarding the request.<sup>316</sup> The publicly available private letter ruling information does not reveal the identity of the taxpayer that requested the ruling or any information that could allow others to identify the taxpayer.<sup>317</sup>

*Dual Tax Transparency.* Current law, however, obscures from public view most private letter rulings where the IRS concludes that it will issue an adverse ruling to the taxpayer.

A minuscule fraction of publicly released private letter rulings contain adverse rulings. For instance, in conducting research for this Article, I reviewed all 1,735 private letter rulings issued and publicly released by the IRS in 2006.<sup>318</sup> I coded rulings as adverse where the IRS ruled the taxpayer's proposed transaction or actions violated a statutory or regulatory requirement or where the IRS explicitly stated that it denied the taxpayer's requested treatment. I found that the IRS reached adverse determinations in only 145 out of 1,735 (8.36%) of these rulings.<sup>319</sup>

While taxpayers predominantly seek rulings from the IRS in situations where they have strong legal support, they also withdraw their private letter ruling requests if they conclude that the IRS will issue an adverse ruling.<sup>320</sup> Every taxpayer that submits a private letter ruling request to the IRS is entitled to at least one conference of right with representatives of the IRS Associate Chief Counsel's office with subject matter jurisdiction over a particular area of the tax law.<sup>321</sup> Following this conference, the IRS will indicate to the taxpayer if it will rule adversely and, if so, it will provide the

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316. Treas. Reg. § 301.6110-2(g) (as amended in 2012).

317. See I.R.C. § 6110(c)(1) (2016).

318. To conduct this analysis, I reviewed all 1,735 private letter rulings issued and publicly released in 2006 using the RIA Checkpoint Database and coded the rulings with the assistance of research assistants. I coded private letter rulings as adverse where the IRS ruled the taxpayer's proposed transaction or actions violated a statutory or regulatory requirement, *see, e.g.*, I.R.S. Priv. Ltr. Rul. 200649037 (Dec. 8, 2006) (tax-exempt status revoked where earnings inured to private benefit of individuals), or where the IRS explicitly stated that it denied the taxpayer's requested treatment, *see, e.g.*, I.R.S. Priv. Ltr. Rul. 200604003 (Jul. 28, 2006) (taxpayer denied request to extend time to make Section 754 election). Nearly half of the 145 adverse private letter rulings (69 out of 145) involved revocation or denial of tax-exempt status under Section 501 of the Code. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200605012 (Feb. 3, 2006) (organization not operated exclusively for exempt purposes).

319. *See id.*

320. For the IRS's procedures regarding withdrawal of private letter ruling requests, see Rev. Proc. 2015-1, 2015-1 I.R.B. 35.

321. Rev. Proc. 2015-1, 2015-1 I.R.B. 55.

taxpayer with the option to withdraw the private letter ruling request.<sup>322</sup> In Revenue Procedure 2015-1, the IRS's own written policies and procedures regarding private letter ruling requests, the IRS states:

Generally, after the conference of right is held but before the letter ruling is issued, the branch representative will orally notify the taxpayer or the taxpayer's representative of the Associate office's conclusions . . . If the Associate office is going to rule adversely, the taxpayer will be offered the opportunity to withdraw the letter ruling request.<sup>323</sup>

The IRS's own written procedures explicitly permit the taxpayer to withdraw the ruling request following *oral notification* of a potentially adverse private letter ruling.<sup>324</sup> According to current and former employees of the IRS Office of Chief Counsel, "[a]s a practical matter, taxpayers withdraw their requests for rulings in virtually all situations in which the IRS indicates that an adverse ruling will be issued."<sup>325</sup> The ability of taxpayers to withdraw private letter ruling requests upon learning of potentially adverse rulings from the IRS prevents the IRS from issuing an official written determination, the document which is required by law to be open to public inspection.

While the IRS appears to have created procedures for public disclosure of situations where a taxpayer has withdrawn a private letter ruling request, significant exceptions enable the IRS to refrain from public disclosure in most cases. If a taxpayer withdraws a private letter ruling request, the IRS Associate Chief Counsel's representatives who reviewed the original ruling request may prepare a memorandum to IRS officials with jurisdiction over the taxpayer's tax return describing the withdrawal, which may constitute publicly accessible Chief Counsel Advice.<sup>326</sup> However, two significant exceptions can prevent the submission and public disclosure of this memorandum. Under the IRS's own procedures, the memorandum only constitutes publicly accessible Chief Counsel Advice if it "provides *more than the fact* that the request was withdrawn and that the Associate office was tentatively adverse."<sup>327</sup> Additionally, the IRS Associate Chief Counsel's representatives will not prepare the memorandum if the taxpayer withdraws its private letter ruling request and

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322. Rev. Proc. 2015-1, 2015-1 I.R.B. 39.

323. *Id.*

324. *Id.*

325. Donald E. Osteen et al., *Obtaining Private Guidance from the Internal Revenue Service*, in U.S.C. LAW SCHOOL TAX INSTITUTE 17-1, 17-19 (2002).

326. Rev. Proc. 2015-1, 2015-1 I.R.B. 35.

327. *Id.* (emphasis added).

submits a written statement that its proposed transaction “has been, or is being, abandoned.”<sup>328</sup> Put differently, after learning of the possibility of an adverse private letter ruling, a taxpayer can represent to the IRS that it will not pursue the proposed transaction. In this case, the IRS will not publicly disclose the taxpayer’s withdrawal of its ruling request.

Examination of recent private letter ruling requests by taxpayers reveals that the IRS rarely discloses instances in which a taxpayer has withdrawn a private letter ruling request. While this Article does not present a comprehensive multi-year empirical study of the IRS’s private letter ruling practice, a preliminary review of the IRS’s publicly disclosed Chief Counsel Advice memoranda regarding withdrawn private letter ruling requests presents striking results. During 2002–2006, the IRS received, on average, 1,652 private letter ruling requests from taxpayers each year.<sup>329</sup> In this time period, the IRS issued, on average, 1,332 private letter rulings to taxpayers.<sup>330</sup> These figures show that the average number of withdrawn private letter ruling requests each year was 320.<sup>331</sup> To conduct a preliminary review of the IRS’s public disclosure of withdrawn private letter ruling requests, I reviewed all 534 Chief Counsel Advice memoranda issued during the 2002–2006 period.<sup>332</sup> I found that during this period, the IRS publicly released 2.4 Chief Counsel Advice memoranda in which it described a withdrawal of a private letter ruling request by a taxpayer each year, on average.<sup>333</sup> This amounts to 2.4 memoranda out of 320 instances, on average, in which taxpayers withdrew their private letter ruling requests, or in 0.75% of the withdrawal cases.<sup>334</sup> Put differently, in over 99% of the instances where taxpayers withdrew private letter ruling requests during the test period, the IRS did not publicly release a

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328. *Id.*

329. Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 150–51 n.48 (2009).

330. *Id.*

331. *Id.*

332. To conduct this analysis, I reviewed all Chief Counsel Advice (“CCA”) memoranda issued during 2002–2006 using the RIA Checkpoint Database.

333. The number of CCA memoranda issued during 2002–2006 that address withdrawn private letter ruling requests are as follows: 2 in 2002 (CCA 200213015; CCA 200223022); 2 in 2003 (CCA 200318026; CCA 200339047); 0 in 2004; 1 in 2005 (CCA 200515019); and 7 in 2006 (CCA 200604023; CCA 200628018; CCA 200629028; CCA 200629029; CCA 200641005; CCA 200644020; CCA 200646001).

334. This figure is calculated by dividing 2.4 (average number of CCA memos) by 320 (average number of withdrawn private letter rulings).

memorandum describing the withdrawal.<sup>335</sup>

As adverse private letter rulings are nearly always obscured from public view, dual tax transparency regarding this form of ex ante tax administration is absent. For instance, private letter rulings regarding tax-free spin-offs almost exclusively provide taxpayers and their advisors with examples of transactions that the IRS views as complying with the provisions of Section 355 of the Code. It is highly unlikely that taxpayers will observe an instance of private letter rulings where the IRS rules that a transaction violates Section 355 of the Code, as the taxpayers that requested rulings in such cases likely withdrew them after learning of the IRS's potential adverse ruling. Without dual tax transparency, taxpayers are unable to gain a complete understanding of the IRS's legal interpretation of the tax law as expressed in private letter rulings. Further, Congress, acting on behalf of the public, cannot confirm whether the IRS, as its agent, has interpreted and applied the tax law consistently with its intent when issuing private letter rulings. Consequently, the lack of dual tax transparency regarding private letter rulings creates the potential for the development of "secret tax law," the concern that initially motivated Congress to enact mandatory public inspection of written determinations.<sup>336</sup>

For a contrasting approach, consider the IRS's release of revenue rulings, which are the IRS's official interpretations of the tax law. The IRS issues revenue rulings as "published guidance," meaning that, unlike private letter rulings, all taxpayers can rely upon them.<sup>337</sup> When the IRS

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335. A possible response to this analysis is that a taxpayer could voluntarily disclose its receipt of an adverse private letter ruling from the IRS or its own withdrawal of a private letter ruling. For example, in 2015, when the IRS informed Yahoo Inc. that it would not issue certain private letter rulings regarding the active trade or business requirement of tax-free spin-off transactions, Yahoo Inc. publicly disclosed this information. *See* Yahoo Inc., Current Report (Form 8-K) (Sept. 2, 2015), <https://www.sec.gov/Archives/edgar/data/1011006/000119312515314494/d35793d8k.htm> (showing the IRS declined to issue the ruling, but informed Yahoo that it "had not concluded that the proposed spin-off transaction was taxable and therefore was not ruling adversely on the request"). Voluntary disclosure of the taxpayer, however, does not ensure dual tax transparency. Taxpayers, such as public corporations, may not publicly disclose withdrawal of a private letter ruling request if they have not announced the underlying transaction publicly or if the withdrawal is not a "material" event. *See* SEC Regulation S-K, 17 C.F.R. § 229.103 (2016). Additionally, even if the taxpayer discloses the withdrawal of a ruling request or receipt of an adverse private letter ruling, the taxpayer may not disclose the ruling request submitted to the IRS or the reasons for the withdrawal or adverse ruling. Last, voluntary disclosure of withdrawals or adverse private letter ruling requests are unlikely to occur in the case of private corporations, business entities not subject to mandatory public disclosure rules, or individuals.

336. *See supra* notes 218–229 and accompanying text.

337. *See* Rev. Proc. 89–14, 1989-1 C.B. 814; IRM 32.2.2.10 (Sept. 16, 2011).

issues a revenue ruling, it usually includes a fact pattern that it concludes complies with the tax law *and* a fact pattern that it concludes does not comply with the tax law. For example, in Revenue Ruling 2007-42, the IRS issued guidance that addresses whether a corporation that owns a membership interest in a limited liability company is engaged in an “active trade or business” under Section 355 of the Code.<sup>338</sup> In this ruling, the IRS provided a set of facts under “Situation 1” and a set of facts under “Situation 2.” It concluded that the hypothetical corporation in Situation 1 was engaged in an active trade or business and that the hypothetical corporation in Situation 2 was not so engaged.<sup>339</sup> While the IRS appears to appreciate the need to provide taxpayers with converse outcomes in revenue rulings, current law does not require the IRS to meet a dual tax transparency standard when publicly releasing private letter rulings.

*Alternatives.* To achieve dual tax transparency, the law should be revised to require greater public disclosure from the IRS regarding private letter ruling requests from taxpayers. First, every private letter ruling request to the IRS from a taxpayer should be open to public inspection, not just those requests where the IRS issues a written determination.<sup>340</sup> Second, while the IRS should continue to publicly release all private letter rulings where it makes a written determination, it should also be required to publicly disclose any instance in which a taxpayer withdraws a private letter ruling request prior to the issuance of a written determination. Third, the IRS should be required to disclose the timing of the taxpayer’s withdrawal of the private letter ruling request, specifically noting whether the withdrawal occurred following a conference with officials from the IRS Associate Chief Counsel’s office that reviewed the ruling request.<sup>341</sup> Last, the IRS should also be required to include in the publicly accessible background file all communication, whether written or oral, with taxpayers regarding their private letter ruling requests, even if the taxpayers ultimately withdraw the request.<sup>342</sup> In each case, if policymakers desire to protect privacy and proprietary interests, they can continue to require the IRS to delete all identifying information from publicly released documents.

The probable objections to this alternative public disclosure policy for

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338. Rev. Rul. 2007-42, 2007-2 C.B. 44.

339. *Id.*

340. See I.R.C. § 6110(a) (2016).

341. See Rev. Proc. 2015-1, 2015-1 I.R.B. 39.

342. See *id.* at 55.

private letter ruling requests are not persuasive. One objection is that this approach will not result in dual tax transparency because taxpayers may withdraw their ruling requests for reasons other than the knowledge that the IRS will issue an adverse ruling.<sup>343</sup> The requirement that the IRS publicly disclose the timing of the withdrawal and the substance of any written or oral communications would provide the public with enough information to draw realistic conclusions about the IRS's view of the taxpayer's requested tax treatment. Another objection is that this approach would restrict the flexibility of the IRS in negotiating with taxpayers during private letter ruling discussions. A response is that the IRS already operates under similar disclosure rules, as all written communications regarding private letter rulings that it ultimately issues are open to public inspection as part of the background file.<sup>344</sup> A credible justification for the exceptions for oral communications and communications in situations where the IRS will issue an adverse ruling is lacking. A final objection is that greater public disclosure will deter taxpayers from participating in the private letter ruling program. This concern, however, is unrealistic as a result of the high economic value of the private letter ruling compared to the costs,<sup>345</sup> the conservative tax positions at issue in most private letter ruling requests, and the continuation of the deletion of identifying characteristics.

## 2. Tax-Exempt Determination Letters

No form of *ex ante* tax administration has been the subject of as much attention or controversy in recent years as the IRS's approval of organizations seeking tax-exempt status. In May 2013, the head of the IRS Tax Exempt and Government Entities Division commented at the annual meeting of the American Bar Association Tax Section that in reviewing applications by organizations to receive Section 501(c)(4) tax-exempt status as "social welfare" organizations, her division had especially scrutinized organizations with terms such as "Tea Party" or "Patriot" in their title (Section 501(c)(4) organizations are only permitted to engage in limited political activities).<sup>346</sup> Days later, a report issued by TIGTA found that the IRS used "inappropriate criteria" based on political affiliation to screen Section 501(c)(4) applicants, delay processing of applications, and

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343. *See id.* at 39.

344. Treas. Reg. § 301.6110-2(g) (as amended in 2012).

345. *See supra* notes 149–152 and accompanying text.

346. *See Stokeld, supra* note 9.

submit “unnecessary information requests” to applicants.<sup>347</sup> Critics accused the IRS of discriminating against organizations with conservative political ideology,<sup>348</sup> while defenders of the IRS responded that the IRS also screened for terms in organization titles such as “Occupy” and “ACORN,” terms often associated with liberal organizations.<sup>349</sup> The resulting firestorm caused multiple IRS officials to resign, led members of Congress to succeed in seeking cuts to the IRS budget, and “roiled the [IRS] for years.”<sup>350</sup>

This controversy shows that where the IRS holds the power to deliver required approval for an organization to operate in tax-exempt form, a lack of public disclosure can create the perception that the IRS issues these approvals in an inconsistent, even discriminatory, manner. Surveys found that immediately following the 2013 Section 501(c)(4) controversy, less than a third of taxpayers reported that they trust the IRS to apply fair enforcement of the tax law.<sup>351</sup> Due to the statutory requirements for various types of tax-exempt status,<sup>352</sup> some applications lead the IRS to seek additional information, and others fail in securing IRS approval. When commenting on the incident, former President Barack Obama conceded that “you want to make sure everybody is being treated fairly.”<sup>353</sup> Dual tax transparency, which is not required by the IRS’s current legal obligations, would assuage such public concerns regarding tax-exempt applications.

*Dual Tax Transparency.* Current law requires public disclosure of instances where organizations have successfully obtained tax-exempt status from the IRS. When granting an organization’s request for tax-exempt status, the IRS issues to the organization a “determination letter.”<sup>354</sup> If an

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347. TREAS. INSPECTOR GEN. FOR TAX ADMIN., *supra* note 8, at 3.

348. For examples, see sources cited *supra* note 9.

349. See, e.g., STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 113TH CONG., IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY (Comm. Print 2014).

350. Jackie Calmes, *Senate Report Cites I.R.S. Mismanagement in Targeting of Tea Party Groups*, N.Y. TIMES (Aug. 5, 2015), <http://nyti.ms/1ImpJsq>. See also Aprill, *supra* note 9, at 1162–64; Caron, *supra* note 9; Thiessen, *supra* note 9; Wharton, *supra* note 9; Yin, *supra* note 9, at 1116.

351. *Just 31% Trust the IRS*, RASMUSSEN REPS. (Mar. 27, 2015), [http://www.rasmussenreports.com/public\\_content/business/taxes/march\\_2015/just\\_31\\_trust\\_the\\_irs](http://www.rasmussenreports.com/public_content/business/taxes/march_2015/just_31_trust_the_irs).

352. See I.R.C. §§ 501(c)(3), (4) (2016). For further discussion, see Aprill, *supra* note 9, at 1162–64.

353. *The Daily Show* (Comedy Central broadcast July 22, 2015), <https://www.youtube.com/watch?v=L88H2HWEXrw> (interviewing former President Barack Obama).

354. Rev. Proc. 2015-4, 2015-1 I.R.B. 149.

organization obtains a favorable tax-exempt determination letter, both the IRS and the organization must make the determination letter and the organization's original application for exemption available for public inspection.<sup>355</sup> The primary rationales underlying these rules are that these organizations benefit from public funding, donors may need to confirm that the organization has obtained certain tax-exempt status, and public disclosure may embolden the IRS's efforts to ensure that these organizations pursue activities consistently with their applications for tax-exempt status.<sup>356</sup> For these reasons, when the documents are publicly disclosed, they bear the name of the tax-exempt organization.<sup>357</sup>

In contrast, when the IRS issues an adverse determination letter, it publicly discloses its decision without revealing the organization's identity.<sup>358</sup> The IRS is required by statute to delete the names, addresses, and any other information that might identify the taxpayer prior to publicly disclosing the adverse determination letter.<sup>359</sup> An applicant that fails to obtain tax-exempt status generally will have no reason to reveal its adverse determination letter publicly. For instance, an organization that seeks Section 501(c)(3) status, but that does not obtain a favorable determination letter from the IRS as a result of its failure to satisfy statutory requirements or for other reasons, may not seek tax-deductible contributions from donors.<sup>360</sup> As publicly accessible adverse tax-exempt determination letters do not contain identifying information, the public has little-to-no ability to conclude that a specific adverse tax-exempt determination letter replies to a specific organization's application.

Current law prevents dual tax transparency by mandating publicity of the identities of organizations that obtain favorable tax-exempt determination letters, but not of the organizations that receive unfavorable determination letters.<sup>361</sup> The 2013 Section 501(c)(4) controversy occurred precisely because an oversight institution, legislators, and many members of the public perceived that the IRS screened tax-exempt applicants based on political affiliation of the applicant.<sup>362</sup> Without public disclosure of the

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355. I.R.C. § 6104(a)(1)(A) (2016); Treas. Reg. § 301.6104(a)-1(a) (2012).

356. For discussion, see Yin, *supra* note 9, at 1148–52.

357. I.R.C. § 6104(a)(1)(A) (2016).

358. See I.R.C. § 6110(a) (2016).

359. I.R.C. § 6104(c) (2016). For examples, see IRM 7.28.4-1 (Sept. 22, 2015).

360. INTERNAL REVENUE SERV., PUBL'N. 557, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION (2016), <https://www.irs.gov/pub/irs-pdf/p557.pdf>.

361. I.R.C. §§ 6104(a)(1)(A), 6110(a) (2016).

362. See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC.

identity of the organizations seeking tax-exempt status, the public cannot observe whether the IRS systematically applies different treatment to applications for exemption depending on the organizations' political, religious, educational, or other characteristics. An organization that has received an unfavorable determination letter or experienced a delay in receiving a determination letter may also unilaterally accuse the IRS of inappropriate discrimination in public. For instance, when Crossroads Grassroots Policy Strategies, an organization founded by Republican strategist Karl Rove, did not obtain a favorable determination letter from the IRS after several years since applying, it publicly charged that the IRS discriminates against Republican-affiliated organizations.<sup>363</sup> Without dual tax transparency, however, the public could not verify the claims of organizations like Crossroads.

*Alternatives.* Public confidence and trust in the IRS would be enhanced if the tax law required the IRS to publicly disclose the tax-exempt applications and ultimate determination letters, whether favorable or unfavorable, of all organizations without deleting their names and identifying information. By identifying the recipients of both types of determination letters, this change would enable the public to determine whether the IRS discriminates against groups with certain political and other characteristic affiliations. To respond to the current ability of organizations to accuse the IRS of unduly delaying its tax-exempt applications,<sup>364</sup> the IRS could be required to publicly disclose the filing of an application for tax-exempt status, including all identifying information, at the time the IRS receives the application. This feature would enable the public to determine whether certain types of organizations systematically experience greater delays than others in obtaining a determination letter. Each of these changes, which would require acts of Congress, would enable the IRS to defend itself against accusations of bias in its review of tax-exempt applications.

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& GOV'T AFFAIRS, 113TH CONG., IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY (Comm. Print 2014); Aprill, *supra* note 9.

363. See Paul C. Barton, *Crossroads GPS Changing Skins, Watchdog Says*, TAX NOTES (June 5, 2015), <http://www.taxnotes.com/exempt-organizations/exempt-organizations/crossroads-gps-changing-skins-watchdog-says/2015/06/05/14660846?>; Richard Rubin, *IRS May Be Trying to Stop Tax Exemption of Karl Rove's Crossroads GPS*, BLOOMBERG (Apr. 30, 2015, 2:32 P.M.), <https://www.bloomberg.com/politics/articles/2015-04-30/irs-may-be-trying-to-stop-tax-exemption-of-rove-s-crossroads-gps>.

364. See Rubin, *supra* note 363.

These proposed changes present limited threats to taxpayers' privacy interests. Organizations that apply to the IRS for tax-exempt status under current law assume that, if the IRS issues a favorable determination letter, both their application and determination letter will be publicly accessible.<sup>365</sup> The IRS issues a warning to taxpayers regarding public disclosure before they submit their applications, and this warning could be adjusted to explicitly address the possibility of public disclosure of identifying information in the event of an adverse ruling.<sup>366</sup> It is, thus, difficult to argue that the potential for public disclosure of an adverse determination would threaten an applicant's privacy interests or discourage them from applying for tax-exempt status.

In response to recent controversies, some have advocated for even greater public disclosure of taxpayer-specific information in the tax-exempt organization area. Some scholars, for instance, have argued that all tax-exempt applications and determination letters and the results of all audits, closing agreements, and other written determinations involving tax-exempt organizations should be open to public inspection, without redaction of taxpayers' identities.<sup>367</sup> Even in the tax-exempt organization area, public disclosure of documents showing such ex post tax enforcement offers the potential for benchmarking and reverse engineering.<sup>368</sup> For example, as tax-exempt organizations are currently legally required to publish their annual tax return, IRS Form 990,<sup>369</sup> donors and watchdog organizations, such as the Better Business Bureau, regularly focus on "efficiency ratios" that can be calculated using information on certain lines of this form regarding the organizations' expenses, including fundraising expenses.<sup>370</sup> Empirical investigations have shown that managers of tax-exempt organizations often engage in "opportunistic cost shifting" by over-reporting expenses related to program services and under-reporting those related to fundraising expenses to avoid generating less attractive efficiency ratios than those of their peers.<sup>371</sup> Public disclosure of the IRS's closing

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365. See INTERNAL REVENUE SERV., *supra* note 360, at 5.

366. *Id.* at 18 ("An exempt organization must also make available for public inspection without charge its application for tax-exempt status . . .").

367. See, e.g., Yin, *supra* note 9, at 1158–59.

368. See *supra* notes 183–213 and accompanying text.

369. I.R.C. § 6104(b) (2016).

370. See, e.g., BBB WISE GIVING ALLIANCE, <http://www.bbb.org/us/charity/> (last visited Mar. 28, 2017).

371. Ranjani Krishnan, Michelle H. Yetman & Robert J. Yetman, Financial Disclosure Management by Nonprofit Organizations 1 (July 19, 2002) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=319581](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319581). See also Elizabeth K. Keating et al.,

agreements with tax-exempt organizations could encourage influential donors to pressure managers to pursue more aggressive fundraising strategies, such as by participating in profit-generating ventures. And comprehensive public disclosure of the IRS's audit practices would enable managers of tax-exempt organizations and third-party advisors, through reverse engineering, to determine whether particular tax positions or activities are likely to result in an IRS audit. By contrast, mandatory public disclosure of tax-exempt applications and determination letters can achieve dual tax transparency without presenting threats to the IRS's ongoing responsibility to monitor and possibly audit these organizations.

### 3. Advance Pricing Agreements

Advance Pricing Agreements are among the most economically valuable forms of ex ante tax administration. Transfer pricing is a method of allocating profits from a multinational corporation among the various jurisdictions where the corporation and its subsidiaries are engaged in business.<sup>372</sup> Transfer pricing itself is not abusive. Yet transfer pricing arrangements create the potential for tax abuse because they involve transactions between related parties that may not feature market prices.<sup>373</sup> Abuse potential is especially pronounced in situations involving unique intellectual property that does not have an established market price.<sup>374</sup> When U.S. corporations shift significant amounts, or even all, of their profits to non-U.S. subsidiaries in low-tax jurisdictions, the IRS can re-allocate income using the "arm's-length standard," where, ex post, it attempts to replicate the prices that would be paid had the transactions occurred between two unrelated corporations.<sup>375</sup> In order to alleviate legal uncertainty for taxpayers and potential litigation for the IRS, the IRS has

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*Misreporting Fundraising: How Do Nonprofit Organizations Account for Telemarketing Campaigns?*, 83 ACCT. REV. 417, 418 (2008); Ranjani Krishnan, Michelle H. Yetman & Robert J. Yetman, *Expense Misreporting in Nonprofit Organizations*, 81 ACCT. REV. 399, 400 (2006) (finding zero fundraising expense reporting by certain tax-exempt organizations due to inappropriate reporting).

372. I.R.C. § 482 (2016); I.R.C. § 1.482-1(a)(2) (2016). For further general description, see MARC M. LEVEY ET AL., TRANSFER PRICING RULES AND COMPLIANCE HANDBOOK ¶100 (2006).

373. For discussion, see STAFF OF J. COMM. ON TAXATION, 111TH CONG., PRESENT LAW AND BACKGROUND RELATED TO POSSIBLE INCOME SHIFTING AND TRANSFER PRICING, J. DOC. NO. JCX-37-10, at 56–58 (2010); Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 VA. TAX REV. 89, 90 (1995); Ilan Benshalom, *Rethinking the Source of the Arm's-Length Transfer Pricing Problem*, 32 VA. TAX REV. 425, 430 (2013).

374. See STAFF OF J. COMM. ON TAXATION, *supra* note 373, at 109.

375. I.R.C. § 482 (2016).

allowed corporations to seek to enter an Advance Pricing Agreement.<sup>376</sup> Once executed, an Advance Pricing Agreement represents a binding written contract that ensures that for the period of the contract, which is typically three to five years, the IRS will not challenge the corporation's transfer pricing structure under the arm's length standard.<sup>377</sup>

One characterization of Advance Pricing Agreements is that they effectively represent permission by the IRS for the largest U.S. multinational corporations, such as Google, Apple, and Amazon, to structure their global affairs in ways that will avoid billions of dollars of future potential tax liability.<sup>378</sup> The corporations that enter into Advance Pricing Agreements are often publicly traded, meaning they are already subject to substantial financial public disclosure obligations by non-tax agencies.<sup>379</sup> Despite these features, Advance Pricing Agreements are not observable by the public.<sup>380</sup>

*Dual Tax Transparency.* When the IRS first instituted the Advance Pricing Agreement program in 1991, it treated the agreements and all background documents as "return information" protected by tax privacy.<sup>381</sup> Following several lawsuits under the Freedom of Information Act,<sup>382</sup> in January 1999, the IRS conceded that Advance Pricing Agreements were, in fact, "written determinations," much like private letter rulings, and, consequently, would be subject to mandatory public disclosure.<sup>383</sup> The IRS then informed all taxpayers who were awaiting Advance Pricing Agreements and those who had obtained them previously that it would soon publicly release all of the agreements in redacted form.<sup>384</sup> Intense lobbying on behalf of U.S. multinational corporations ensued.<sup>385</sup> Several

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376. See I.R.S. Announcement 2012-13, 2012-16 I.R.B. 805.

377. See *id.*

378. See, e.g., Drucker, *supra* note 1 ("The IRS gave its consent in a secret pact known as an advanced pricing agreement.")

379. See, e.g., *Fast Answers: Form 10-K*, SEC, <http://www.sec.gov/answers/form10k.htm> (last modified June 26, 2009).

380. I.R.C. § 6103(b)(2)(C) (2016).

381. See Rev. Proc. 91-22, 1991-1 C.B. 526.

382. *Bureau of Nat'l Affairs, Inc. v. Internal Revenue Serv.*, 24 F. Supp. 2d 90 (D.D.C. 1998) (consolidating three separate Freedom of Information Act lawsuits: No. 1:96-CV-376, No. 1:96-CV-2820, and No. 1:98-CV-1473).

383. Press Release, Internal Revenue Serv., IRS to Make Advance Pricing Agreements Public (Jan. 11, 1999), <http://www.irs.gov/pub/irs-news/ir-99-05.pdf>.

384. See Richard C. Stark et al., *Consistency, Sunshine, Privacy, Secret Law, and the APA Program*, 130 TAX NOTES 655 (2011).

385. See, e.g., Sheryl Stratton, *Corporate Taxpayers Object to Disclosure of APAs*, TAX NOTES (Mar. 8, 1999), <http://www.taxnotes.com/tax-notes-today/information-disclosure/corporate-taxpayers->

months later, Congress enacted a new statute that explicitly states that Advance Pricing Agreements and all background information related to the agreements are confidential tax return information.<sup>386</sup>

No tax transparency, let alone dual tax transparency, regarding Advance Pricing Agreements exists under current law.<sup>387</sup> Since the program was instituted, only one Advance Pricing Agreement, between the IRS and a predecessor of pharmaceutical corporation GlaxoSmithKline, has been made public (in that case, as a result of publicly observable litigation).<sup>388</sup> More importantly, even if all Advance Pricing Agreements were subject to mandatory public disclosure, dual tax transparency would still not occur. If the IRS is not satisfied that a corporation's proposed valuation of its assets is supported by economic analysis, it can exercise its discretion to refuse to enter into an Advance Pricing Agreement.<sup>389</sup> In order to obtain dual tax transparency, the public would need access to all finalized Advance Pricing Agreements and requests for Advance Pricing Agreements where the IRS rejected the corporations' proposed terms.

The lack of public disclosure of Advance Pricing Agreements has generated suspicion that the IRS has facilitated U.S. and global tax avoidance by U.S. multinational corporations. In response to recent popular press news stories regarding the low effective U.S. tax rates of major U.S. corporations, some have branded Advance Pricing Agreements as "generous dealmaking,"<sup>390</sup> where the "IRS loses revenue by cutting deals for substantially less than would result from a transfer pricing adjustment."<sup>391</sup> For example, in 2013, Lynnley Browning, an investigative journalist, reported that Oracle, a global computer technology corporation, reduced its U.S. tax bill by "nearly half" as a result of entering into several

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object-disclosure-apas/1999/03/03/5486356?.

386. I.R.C. § 6103(b)(2)(C) (2016).

387. *See id.*

388. *Text of 1993 SmithKline Beecham APA Available*, TAX NOTES (Sept. 18, 2006), <http://www.taxnotes.com/news-documents/transfer-pricing-and-apportionment-issues/text-1993-smithkline-beecham-apa-available/2006/09/18/jpv4?>

389. *See* I.R.S. Notice 2013-79, 2013-50 I.R.B. 653.

390. Lee A. Sheppard, *Draft Senate Finance APA Report Shows Incompetent IRS*, TAX NOTES (June 27, 2005), <http://www.taxnotes.com/news-documents/corporate-taxation/news-analysis-draft-senate-finance-apa-report-shows-incompetent-irs/2005/06/22/js08?>

391. Lisa M. Nadal, *Who Killed the Senate APA Report?*, TAX NOTES (July 22, 2013), <http://www.taxnotes.com/news-documents/transfer-pricing-and-apportionment-issues/news-analysis-who-killed-senate-apa-report/2008/01/15/jrtl?>

Advance Pricing Agreements with the IRS.<sup>392</sup> Browning relied on this example to portray the agreements as “the tax break that corporate America wants kept secret.”<sup>393</sup> Despite the intimation of collusion between the IRS and taxpayers, the IRS is prohibited from addressing the accusations publicly as a result of general tax privacy rules.<sup>394</sup> More importantly, the public also has no ability to review details of Oracle’s Advance Pricing Agreements, where the IRS ultimately accepted the taxpayer’s proposed terms, or to compare them to instances where the IRS declined to enter into Advance Pricing Agreements with other taxpayers.<sup>395</sup>

*Alternatives.* To preserve the sociological legitimacy of the IRS and to enable all taxpayers to observe the IRS’s interpretations and policies in reviewing ex ante requests for legal assurance regarding proposed transfer pricing structures, the curtain of tax privacy on Advance Pricing Agreements should be lifted. Under current law and policies, to seek an Advance Pricing Agreement, a corporation must submit an application to the IRS, allow the IRS to perform extensive due diligence, allow the IRS to analyze the corporation’s proposed transfer pricing methodology, negotiate

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392. Lynnley Browning, *The Tax Break that Corporate America Wants Kept Secret*, FORTUNE (July 22, 2013), <http://fortune.com/2013/07/22/the-tax-break-that-corporate-america-wants-kept-secret/>.

393. *Id.*

394. I.R.C. § 6103 (2016).

395. Public distrust of the IRS’s participation in Advance Pricing Agreements parallels similar concerns in other jurisdictions. For example, in 2014, journalists in Europe publicly leaked hundreds of otherwise unobservable advance tax rulings issued by the Luxembourg taxing authority to multinational corporations, which enabled the corporations to dramatically reduce their global tax liabilities, including those owed to their home countries. See *Luxembourg Leaks: Global Companies’ Secrets Exposed*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <http://www.icij.org/project/luxembourg-leaks> (last visited Mar. 28, 2017). In 2015, European Union officials responded by initiating deliberations over whether the advance tax rulings issued by Luxembourg and other European Union countries should be subject to mandatory public disclosure. See, e.g., Simon Bowers, *Luxembourg Tax Files: How Junker’s Duchy Accommodated Skype and the Koch Empire*, GUARDIAN (Dec. 9, 2014), <https://www.theguardian.com/business/2014/dec/09/sp-luxembourg-tax-files-how-junkers-duchy-accommodated-skype-and-the-koch-empire>. In 2016, the European Commission concluded that, over a period of years, Ireland provided illegal state aid to Apple worth over \$14 billion by issuing two favorable advance tax rulings to the corporation. Press Release, European Comm’n, *State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion* (Aug. 30, 2016), [http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm). The European Commission has reached similar preliminary decisions in cases involving Starbucks, Fiat, and Amazon. See U.S. DEP’T OF TREASURY, *THE EUROPEAN COMMISSION’S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS* (2016), <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf>. Subsequently, the U.S. government objected, stating that the European Commission’s approach is “inconsistent with international norms and undermines the international tax system.” *Id.* at 17. For further discussion of the European Commission state aid cases, see Omri Marian, *The State Administration of International Tax Avoidance*, 6 HARV. BUS. L. REV. (forthcoming 2017).

the terms of the agreement with the IRS, and, finally, execute the agreement.<sup>396</sup> Congress should revise the current tax privacy and public inspection statutes<sup>397</sup> to mandate that the IRS publish both taxpayers' requests for Advance Pricing Agreements and any final Advance Pricing Agreements between the IRS and taxpayers. Similar to the prior proposals regarding private letter rulings and tax-exempt determination letters,<sup>398</sup> mandatory public disclosure of both requests and outcomes in the Advance Pricing Agreement context would provide dual tax transparency.

The most significant objection to this proposal is that public disclosure would expose sensitive proprietary information of U.S. multinational corporations to public eyes. A response is that, prior to public disclosure, an Advance Pricing Agreement or a request for an agreement could be redacted to remove all proprietary information, such as trade secrets and future business plans, as well as identifying information about the corporation that requested the agreement.<sup>399</sup> Advance Pricing Agreements, thus, could be treated similarly to private letter rulings and other written determinations under current law.<sup>400</sup> A counter to this argument is that Advance Pricing Agreements address a multinational corporation's operations in their entirety and in tremendous detail, making redaction much more difficult than in the private letter ruling context, where the IRS issues guidance to one taxpayer regarding a discrete legal issue.<sup>401</sup> However, in 1999, when the IRS announced its decision to publish Advance Pricing Agreements, it embarked on the process of redacting all previously executed agreements, implying that publication with redaction is possible.<sup>402</sup> Even in redacted form, such public disclosure would alleviate perceptions that the IRS makes "secret deals"<sup>403</sup> when entering into Advance Pricing Agreements.

Another potential concern is that public disclosure could interfere with

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396. See KPMG, United States, in *GLOBAL TRANSFER PRICING REVIEW* 289, 289–93 (2015).

397. I.R.C. §§ 6103(b)(2)(C), 6110(a)(1)(A) (2016).

398. See *supra* Part III.B.1–2.

399. See Stark, *supra* note 384.

400. See I.R.C. § 6110(a)(1)(A) (2016).

401. See, e.g., Anthony Infanti et al., *APA Disclosure: Can the Process Survive?*, 47 *CAN. TAX J.* 1048, 1051 (1999).

402. See Internal Revenue Serv., *supra* note 383.

403. Jeremy Scott, *Shedding Light on Advance Pricing Agreements*, *HUFFINGTON POST* (July 23, 2013), [http://www.huffingtonpost.com/jeremy-scott/shedding-light-on-advance\\_b\\_3639306.html](http://www.huffingtonpost.com/jeremy-scott/shedding-light-on-advance_b_3639306.html).

the IRS's attempts to enforce the tax law regarding transfer pricing.<sup>404</sup> At first glance, a publicly accessible Advance Pricing Agreement would provide a corporate manager with information about the transfer pricing structure of her peer corporations and would also provide insights into the IRS's approach to transfer pricing issues. On the other hand, a corporation that seeks an Advance Pricing Agreement approaches the IRS affirmatively and voluntarily provides the IRS with extensive information in order to obtain the IRS's ultimate approval. Because corporations voluntarily choose to seek Advance Pricing Agreements, and in doing so, agree to expose themselves to intense scrutiny by the IRS,<sup>405</sup> these corporations are not likely to be engaged in abusive transfer pricing strategies. There is a low risk that by reviewing the Advance Pricing Agreement of a competitor, a conservative corporate tax manager would conclude that she needs to engage in more aggressive tax planning. In addition, Advance Pricing Agreements, if published, would not reveal the IRS's detection and enforcement strategies. Rather, they would simply reveal the limits of the IRS's bargaining positions in Advance Pricing Agreement negotiations.

A final objection is that mandatory public disclosure could reduce corporations' willingness to participate in the Advance Pricing Agreement program. Ultimately, the answer to this question could be obtained by tracking corporations that have already decided to pursue Advance Pricing Agreements and noting their responses after public disclosure is implemented. In the months following the IRS's 1999 announcement that it would publish Advance Pricing Agreements in redacted form, the program did not experience a significant decrease in participation from corporations.<sup>406</sup> One reason for this reaction is that corporate managers may assume it is possible that, at some point, their Advance Pricing Agreements and supporting materials could become open to public inspection in the same manner as private letter rulings. As this sample of taxpayer reactions shows, there is significant reason to doubt that corporations would abandon the Advance Pricing Agreement program.<sup>407</sup>

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404. See *supra* notes 185–192 and accompanying text.

405. For discussion, see LEVEY, *supra* note 372, at 127.

406. See Letter from Paul Wojcik, President, BNA, to Bill Archer, Chair, House Ways and Means Comm. (May 12, 1999), *discussed in* Stark et al., *supra* note 384.

407. See *id.*

### C. ACCOUNTABILITY AND EX POST TAX ENFORCEMENT

Although this Article has argued that the IRS should be required to publicly disclose instances of ex ante tax administration, it does not assert that the IRS should be free to enforce the tax law ex post without accountability to the public. Rather, policymakers should consider alternative approaches for enhancing the accountability of the IRS regarding its ex post tax enforcement actions that do not require public disclosure of tax return information. This Section concludes by briefly suggesting three such possibilities: changes to oversight, whistleblower and data access rules, and processes.

#### 1. Oversight

Increased congressional oversight should be explored as a potential mechanism for improving the accountability of the IRS to the public regarding its ex post enforcement actions. The IRS is currently required to report to the Joint Committee on Taxation any refund payment that exceeds a threshold amount (\$2 million for individuals, \$5 million for corporations) and to allow the Joint Committee thirty days to review the report prior to issuing the refund to the taxpayer.<sup>408</sup> The Joint Committee on Taxation is a nonpartisan group of ten members of Congress, each of whom is a member of the tax writing committee of each house, with a full-time staff of tax experts.<sup>409</sup> By statute, the IRS is only required to notify the Joint Committee and wait for the thirty-day period to expire.<sup>410</sup> In practice, however, the IRS does not issue refunds until it resolves any objections that the Joint Committee staff raises.<sup>411</sup> Congress enacted the refund reporting rule in 1928 in response to suspicions that the Treasury Department, headed by then-Secretary Andrew Mellon, had paid sizeable, unwarranted refunds to businesses related to Mellon's oil ventures.<sup>412</sup> The explicit motivation for the rule, therefore, was to increase the ability of Congress to hold the IRS accountable for refunds.

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408. I.R.C. §§ 6405(a)–(b) (2016).

409. See I.R.C. §§ 8000–05, 8021–23 (2016).

410. I.R.C. § 6405(a) (2016).

411. See IRM 4.36.2 (Sept. 22, 2015).

412. See, e.g., 68 CONG. REC. 2297 (1927) (accusing corruption regarding refunds). For further discussion, see generally George K. Yin, *James Couzens, Andrew Mellon, the 'Greatest Tax Suit in the History of the World,' and Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787 (2013).

To further enhance the accountability of the IRS, the Joint Committee review requirement could be expanded to include settlements of certain tax deficiency disputes. Specifically, in addition to its current reporting obligation, the IRS could be required to deliver a report to the Joint Committee whenever it proposes to settle a tax deficiency dispute with a specific taxpayer where the final proposed tax deficiency reflects a reduction from the IRS's initial asserted tax deficiency in excess of a threshold amount (\$2 million for individuals, \$5 million for corporations). For example, if the IRS initially proposes that a corporation owes an additional \$100 million in tax liability for the 2013 tax year (as noted in a Revenue Agent Report)<sup>413</sup> and ultimately agrees to settle the dispute for \$92 million in tax liability, the IRS would be required to file a report with the Joint Committee on Taxation before finalizing the settlement (the \$8 million difference exceeds the \$5 million reporting threshold for corporations). There is little economic difference between a refund of \$2 million and a reduction in tax deficiency of \$2 million, making it difficult to justify different reporting requirements for settlements that result in a refund of taxes, on the one hand, and a reduction in the IRS's initial deficiency assessment, on the other. Without requiring any public disclosure of tax return information, this proposal would enable Congress to exercise greater oversight by reviewing settlements where the IRS makes significant concessions to the taxpayer.

Several likely objections to this proposed expansion should be considered. One potential concern is that the expansion of the Joint Committee's role could politicize and delay the IRS's ability to enter into settlements.<sup>414</sup> The same concern exists under current law, even though the Joint Committee completes its review of the vast majority (over 75%) of proposed refunds within 30 days and rarely questions the IRS.<sup>415</sup> If politicization is a concern, adjustments to both current law and the proposed expansion could emphasize that the Joint Committee's role is one of review rather than approval. Another likely objection is that the IRS and taxpayers could respond by designing settlements that avoid the reporting requirement. Yet the same concern occurs today, where, for instance, a

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413. See IRM 4.10.8.3 (Sept. 12, 2014).

414. Cf. Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 615 (1995).

415. See Meg Shreve, *Barthold Suggests Raising C Corporation Refund Review Level to \$5 Million*, TAX NOTES (Apr. 10, 2013), <http://www.taxnotes.com/tax-notes-today/corporate-taxation/barthold-suggests-raising-c-corporation-refund-review-level-5-million/2013/04/10/fltn?>

taxpayer can avoid Joint Committee reporting by offsetting a refund (such as one due to a net operating loss)<sup>416</sup> with a tax deficiency for the same year.<sup>417</sup> A final objection is that the proposed expansion raises constitutional separation-of-powers concerns. Several commentators have raised this objection in response to the current reporting requirement regarding refund payments by arguing that current law empowers the Joint Committee (the legislative branch) to engage directly in a function of the IRS (the executive branch) by reviewing proposed refund payments.<sup>418</sup> One response is that the current statute<sup>419</sup> and the proposed expansion could be adjusted to explicitly state that the IRS is not obligated to seek approval from the Joint Committee during the thirty-day review period. Another possibility is that the proposal could be adjusted to simply require the IRS to inform the Joint Committee of the settlements described above within 30 days *after* they have been finalized, rather than while they are still pending. In any case, the constitutional objections and potential remedies should apply equally to current law regarding refunds and to the proposed expansion to tax deficiency settlements.

## 2. Whistleblowers

An additional accountability measure could be to encourage employees of the IRS to file whistleblower reports not just with internal review bodies, but with external review bodies as well. The IRS repeatedly instructs its employees to report malfeasance by IRS managers and other employees to TIGTA.<sup>420</sup> Several commentators have suggested that fear of retaliation has dissuaded some IRS employees from filing whistleblower claims with TIGTA.<sup>421</sup> Under current law, if an IRS employee commits a

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416. I.R.C. § 6405(b) (2016).

417. For discussion, see Thomas J. Callahan et al., *Joint Committee Refund Review: Twelve Questions to Consider*, 10 J. OF TAX PRAC. & PROC. 19, 20 (2008).

418. Amandeep S. Grewal, *The Congressional Revenue Service*, 2014 U. ILL. L. REV. 693, 700–18. See also JASPER L. CUMMINGS JR., *THE SUPREME COURT, FEDERAL TAXATION, AND THE CONSTITUTION* 590 (2013).

419. I.R.C. § 6405(a) (2016).

420. See, e.g., IRM 13.1.15.3 (Jan. 6, 2009); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §1203, 112 Stat. 685, 720–22 (1998).

421. See, e.g., Amy Hamilton, *Newspapers Link “10 Deadly Sins” to IRS Enforcement Figures Drop*, 83 TAX NOTES 1119 (1999); Ann Murphy & David Higer, *The 10 Deadly Sins: A Law With Unintended Consequences*, 96 TAX NOTES 871 (2002); Warren Rojas, *Agent Says IRS Used Disclosure, Circular Referrals to Block Audit*, TAX ANALYSTS (Aug. 10, 2004), [http://www.taxanalysts.com/www/freefiles.nsf/Files/Whistle-Blower.pdf/\\$file/Whistle-Blower.pdf](http://www.taxanalysts.com/www/freefiles.nsf/Files/Whistle-Blower.pdf/$file/Whistle-Blower.pdf).

“Section 1203” violation,<sup>422</sup> otherwise known as one of the “Ten Deadly Sins,”<sup>423</sup> such as willfully failing to file his own tax return correctly and on time, the employee can be terminated. As one IRS employee has commented when addressing this possibility, “It’s real easy to make a small mistake on a return, even for someone who knows taxes. So that gives [IRS managers] a real instrument of terror, so to speak.”<sup>424</sup> Whether or not this specific allegation is supported and can be generalized, the comment highlights the possibility that some IRS employees refrain from reporting abuse to an internal review body, such as TIGTA.

To enhance its ability to monitor potential abuses, Congress could revise current law to encourage IRS whistleblowers to file reports with certain external review bodies in Congress. In 1998, Congress enacted an amendment to the tax privacy statute that provides that any person with access to confidential tax return information, such as an IRS employee, who believes that the information relates to “misconduct, maladministration or taxpayer abuse” may disclose this information to the House Ways and Means Committee, the Senate Finance Committee, or the Joint Committee on Taxation.<sup>425</sup> Yet IRS employees have received little notice of this provision in IRS official communications (the Internal Revenue Manual contains only one reference, compared to 47 references to Section 1203 violations and TIGTA reporting procedures).<sup>426</sup>

Congress could strengthen this statute by enacting several adjustments. Congress could clarify the specific types of potential abuses that should be reported. Specific acts by IRS officials could include: unjustified deviations from established audit procedures (such as by entering into a closing agreement prematurely);<sup>427</sup> consideration of inappropriate factors in reaching audit or settlement decisions (such as political affiliation or personal relationships with the taxpayer);<sup>428</sup> and failure to follow clearly established law and procedures (such as imposition of certain tax penalties).<sup>429</sup> Even though other legal protections may be

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422. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §1203, 112 Stat. 685, 720–22 (1998).

423. Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 981 (2003).

424. Rojas, *supra* note 421, at 8 (quoting Bill Henck, Senior Attorney, IRS LMSB).

425. I.R.C. § 6103(f)(5) (2016); H.R. REP. NO. 105-599, at 98 (1998) (Conf. Rep.).

426. See IRM 11.3.4.3(5) (May 20, 2005).

427. See, e.g., Rojas, *supra* note 421, at 3.

428. See *supra* notes 346–353.

429. See, e.g., Rojas, *supra* note 421, at 5.

available to IRS employees,<sup>430</sup> Congress could affirmatively clarify within this statute that IRS employees may not be subject to retaliation or punishment for providing information to the authorized congressional committees. Finally, Congress could explicitly direct the IRS to publicize this statute to its employees in numerous media.

Elevation of the congressional whistleblowing process raises several potential concerns, such as that it could increase politicization of tax administration, threaten taxpayer confidentiality, and fail to result in review that is as comprehensive as that of TIGTA. Rather than politicization, however, greater emphasis on congressional whistleblowing could enhance the public's perception that the IRS cannot engage in maladministration of the tax law without answering to the public's representative, Congress. Further, the authorized congressional committees have the power to request tax return information from the IRS and hold hearings under current law.<sup>431</sup> Prevention of violations of taxpayer privacy should be addressed in both current law and any expansion of the congressional whistleblowing statute. Last, congressional whistleblowing should not supersede or replace the role of TIGTA. IRS whistleblowers could file reports with this office and with the authorized congressional committees simultaneously. Alternatively, in the event that a whistleblower files a complaint with an authorized congressional committee exclusively, that committee would retain the ability to request TIGTA to conduct further investigation of the alleged abuse.

### 3. Data

Finally, increased public disclosure by the IRS of anonymous tax data and greater access to this data by academic researchers would advance tax transparency without requiring public disclosure of specific taxpayers' tax return information. Every year, the IRS publishes data that shows audit rates for individuals and businesses within different income brackets and describes, in aggregate dollars, the amount of civil tax penalties assessed and abated for various types of tax offenses, among many other items.<sup>432</sup>

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430. For discussion, see, e.g., U.S. OFFICE OF SPECIAL COUNSEL, KNOW YOUR RIGHTS WHEN REPORTING WRONGS (2015), <https://osc.gov/Resources/Know%20Your%20Rights%20When%20Reporting%20Wrongs.pdf>.

431. See I.R.C. § 6103(f) (2016).

432. INTERNAL REVENUE SERV., *supra* note 138. For statutory requirement, see I.R.C. § 6108(a) (2016).

The IRS publishes only macro data without any information that could identify any taxpayer. The 2014 IRS Data Book states, for instance, that, in 2014, the IRS audited 271,574 income tax returns for individuals with income under \$200,000 and conducted 37,501 field audits and 234,073 correspondence audits.<sup>433</sup> Despite the publication of this information, critics and academic researchers report that it does not allow for sophisticated analysis given its macro form. As Emmanuel Saez,<sup>434</sup> Raj Chetty,<sup>435</sup> and others<sup>436</sup> have written, access to micro data, involving detailed information often revealed on tax returns, “is critical for cutting-edge empirical research.”<sup>437</sup>

Without revealing enough detailed tax return information to enable analysts to reverse engineer the IRS’s audit and related enforcement strategies, the IRS could increase the specificity of its published aggregate tax enforcement statistics. Consider several examples from the 2014 IRS Data Book. While the IRS reports that it assessed \$1,072,236,000 in “accuracy penalties,”<sup>438</sup> it could distill this figure into the multiple tax penalties that the IRS concedes fall into this broad category, such as tax penalties for negligence, substantial understatement of income tax, substantial valuation misstatements, substantial overstatement of pension liabilities, and understatement of reportable transactions, among others.<sup>439</sup> The IRS also notes that it abated \$417,858,000 of assessed accuracy tax penalties,<sup>440</sup> but it explains that it abated them for numerous reasons including IRS error, reasonable cause, and “administrative and collection costs not warranting collection of penalty.”<sup>441</sup> Instead, the IRS could describe the specific amounts of tax penalty abatement attributable to each of these reasons. As another example, the IRS reports that it collected

433. See INTERNAL REVENUE SERV., *supra* note 138, at 23 tbl.9a.

434. EMMANUEL SAEZ ET AL., EXPANDING ACCESS TO ADMINISTRATIVE DATA FOR RESEARCH IN THE UNITED STATES (2010).

435. Shamik Trivedi, *Increased Microdata Accessibility Will Aid Policymakers*, 134 TAX NOTES 931 (2012) (quoting Raj Chetty).

436. See, e.g., Am. Econ. Ass’n, Report on the State of Publicly Available Data and Statistics For the Study of Public Economics (Dec. 15, 2005) (unpublished manuscript) (on file with author).

437. SAEZ ET AL., *supra* note 434, at 1. Members of the American Economic Association have reported that the “tax model,” a stratified random sample of anonymized tax returns released by the IRS, prevents them from linking tax return data to demographic factors. Am. Econ. Ass’n, *supra* note 436, at 3.

438. INTERNAL REVENUE SERV., *supra* note 138, at 44 tbl.17.

439. *Id.* at 44 tbl.17, n.4.

440. *Id.* at 44 tbl.17.

441. *Id.* at 44 tbl.17, n.2.

\$1,905,254,000 in taxes attributable to delinquent tax returns.<sup>442</sup> In more refined data reporting, it could disclose the extent to which this amount is attributable to delinquencies of different time periods, such as more than one year or more than five years. These are just a few of many examples of refinements to the IRS's current anonymous data reporting practices that could enhance the IRS's openness to policymakers and the public.

Additionally, with increased funding, the IRS could improve access to anonymous micro tax data by academic researchers. The IRS currently allows a small number of academic researchers to analyze this information in anonymized form, and only on the premises of secure IRS facilities.<sup>443</sup> The IRS Statistics of Income Division annually selects several research proposals that require access to tax return data and allows IRS officials to work directly with academic researchers on these analyses.<sup>444</sup> IRS officials and researchers alike report that the IRS simply lacks "sufficient resources and bandwidth to accommodate many simultaneous research projects."<sup>445</sup> Congress could foster such sophisticated analysis by increasing funding for collaborative research projects between IRS officials and academic researchers. Another possibility for increasing such collaborations, suggested by Alan Krueger and others,<sup>446</sup> is that the home research institutions of the academic researchers seeking access to tax return information could bear a significant portion of the associated costs (similar to research arrangements involving the U.S. Census Bureau).<sup>447</sup>

While increased public and academic access to anonymous tax return information presents genuine concerns, these concerns are not insurmountable.

In response to taxpayer confidentiality concerns, the public disclosure of such data in aggregate form would prevent others from deciphering specific taxpayers' identities. Also, if more academic researchers gain access to anonymized tax return data, they would be subject to the same

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442. *Id.* at 43 tbl.16.

443. For discussion, see Trivedi, *supra* note 435.

444. See *Statistics of Income – Joint Statistical Research Program*, IRS, <http://www.irs.gov/pub/irs-soi/14jsrppapplication.pdf> (last visited Mar. 28, 2017).

445. SAEZ ET AL., *supra* note 434, at 3.

446. See Jeffrey Mervis, *How Two Economists Got Direct Access to IRS Tax Records*, SCIENCE (May 22, 2014), <http://www.sciencemag.org/news/2014/05/how-two-economists-got-direct-access-irs-tax-records> (quoting Alan Krueger).

447. See *id.*

statutory tax privacy rules as IRS employees,<sup>448</sup> and the IRS would retain the ability to review final research projects to ensure that taxpayer confidentiality is preserved.

Another potential concern is that increased access to tax return information, even in anonymous form, would increase the risk that analysts may reverse engineer the IRS's enforcement strategies, potentially weakening tax compliance. The tax enforcement dangers discussed previously in this Article<sup>449</sup> would materialize if the IRS were to publicly disclose micro tax data, such as complete tax returns, the results of tax audits, and the filing of reportable transaction disclosures by taxpayers. If the IRS only increases the specificity of publicly disclosed aggregate data, such as the aggregate dollar amount of certain tax penalties assessed in a particular year, this information would not enable taxpayers and analysts to determine, using either statistical or qualitative methods, the reasons why the IRS applied these tax penalties in specific cases. The IRS could also use currently available legal mechanisms to review academic researchers' final analysis involving micro tax data and could prevent public dissemination of any analysis that would reveal the IRS's approach to selecting tax returns for audit or its other tax enforcement strategies.<sup>450</sup>

Increased public disclosure of anonymous aggregate tax data and academic access to anonymous tax return data, thus, could further the public's "understanding of the important functions of the IRS"<sup>451</sup> without threatening the IRS's tax enforcement efforts.

## CONCLUSION

Proponents of greater tax transparency frequently suggest sunlight in the form of public disclosure of tax return information as a means of enabling the public to review the actions of the IRS. By considering the timing of the actions of the IRS that mandatory public disclosure would expose, this Article has made three unique contributions to perennial debates regarding tax privacy and tax transparency.

First, the Article has argued that *ex ante* tax administration actions present more compelling justifications for public disclosure than *ex post* tax enforcement actions. By retaining existing tax privacy rules for certain

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448. I.R.C. § 6103(j)(4) (2016).

449. *See supra* Part II.B.

450. I.R.C. § 6103(b) (2016).

451. INTERNAL REVENUE SERV., *supra* note 138, at iii.

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tax return documentation, such as complete tax returns of individuals and corporations, policymakers would avoid several adverse tax enforcement and compliance effects. Yet by ensuring broad public access to the IRS's advance tax rulings, advance tax agreements, and approvals regarding specific taxpayers, policymakers would enhance the accountability of the IRS to the public without interfering with the agency's ability to deter and detect avoidance and abuse.

Second, the Article has proposed that when requiring public disclosure of ex ante tax administration, policymakers should strive to achieve "dual tax transparency," where the public has access to instances where the IRS grants *and* denies taxpayers' requests for advance tax rulings or agreements, even without an official written determination. It has provided several examples of ex ante tax administration where current law impedes dual tax transparency—withdrawn private letter ruling requests, adverse tax-exempt determination letters, and Advance Pricing Agreements—and has suggested specific public disclosure reforms.

Last, this Article has proposed legal mechanisms other than public disclosure that would enhance the accountability of the IRS regarding its ex post enforcement. Possibilities include increasing oversight of certain IRS settlements by Joint Committee on Taxation, encouraging IRS whistleblowers to file reports with authorized congressional committees, and expanding public and academic access to anonymous tax data.

By considering significant distinctions between different types of actions of the IRS, this Article has argued that some actions should occur in sunlight while others should remain in the shade. This analysis should have important implications for legislators, scholars, and taxpayers who seek to empower the public to monitor whether the IRS is enforcing the tax law fairly, efficiently, and effectively.