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Simplexity: Plain Language and the Tax Law

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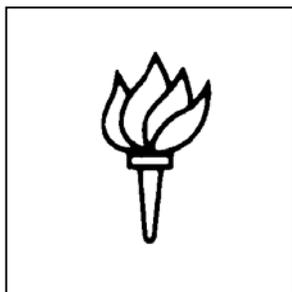
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Simplexity

Joshua D. Blank & Leigh Osofsky

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SIMPLEXITY: PLAIN LANGUAGE AND THE TAX LAW

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ABSTRACT

In recent years, federal government agencies have increasingly attempted to use plain language in written communications with the public. The Plain Writing Act of 2010, for instance, requires agencies to incorporate “clear and simple” explanations of rules and regulations into their official publications. In the tax context, as part of its “customer service” mission, the Internal Revenue Service bears a “duty to explain” the tax law to hundreds of millions of taxpayers who file tax returns each year. Proponents of the plain language movement have heralded this form of communication as leading to simplicity in tax compliance, more equitable access to federal programs, and increased open government.

This Article casts plain language efforts in a different light. As we argue, rather than achieving simplicity, which would involve reform of the underlying law, the use of plain language to describe complex legal rules and regulations often yields “simplicity.” As we define it, simplicity occurs when the government presents clear and simple explanations of the law without highlighting its underlying complexity or reducing this complexity through formal legal changes. We show that in its numerous taxpayer publications, the IRS frequently uses plain language to transform complex, often ambiguous tax law into seemingly simple statements that: (1) present contested tax law as clear tax rules, (2) add administrative gloss to the tax law, and (3) fail to fully explain the tax law, including possible exceptions. Sometimes these plain

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language explanations benefit the government; at other times, they benefit taxpayers.

Having introduced the concept of simplicity to the legal literature, we show how the IRS's use of simplicity poses a trade-off between representing the tax law accurately and making it understandable to the public. We offer approaches for preserving some of the benefits of simplicity while also responding to some of its drawbacks. We also forecast the likely emergence of simplicity in potential future tax compliance measures, such as government-prepared tax returns, interactive tax return filing, and increased third-party reporting.

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INTRODUCTION

Imagine it is April 15th, “Tax Day,” and as the sole owner of a local pizza shop, you are racing to complete your annual tax return before the U.S. Post Office closes. Specifically, you are trying to decide whether you can claim a tax deduction for a \$6000 expense you paid last winter to fix your restaurant’s copper piping, which was damaged as a result of a flood. (Your expenses for plumbing are usually around \$3000 annually.) You understand from the owner of the barbecue restaurant next door that his accountant recently told him he could not deduct expenses for “improvements.”¹ Now imagine that you read the following two statements, the first of which is from Treasury regulations and the second of which is from an IRS publication regarding business expenses:

Statement 1: “*Requirement to capitalize amounts paid for improvements.* Except as provided in paragraph (h) or paragraph (n) of this section or under § 1.263(a)-1(f), a taxpayer generally must capitalize the related amounts (as defined in paragraph (g)(3) of this section) paid to improve a unit of property owned by the taxpayer.”²

Statement 2: “*Improvements.* Improvements are generally major expenditures. Some examples are new electric wiring, a new roof, a new floor, new plumbing, bricking up windows to strengthen a wall, and lighting improvements.”³

¹ I.R.C. § 263(a)(1) (2012).

² Treas. Reg. § 1.263(a)-3(d) (as amended in 2014).

³ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 535, BUSINESS EXPENSES 3 (2016).

As you struggle to make a decision about whether to deduct the copper piping expense, which of these two statements is more helpful to you?

If you are like most people, you will most likely find Statement 2 to be far more helpful than Statement 1. After reading Statement 2, you may decide that your expense was a “major expenditure”—it was double your usual expense—and, as a result, you cannot claim the deduction. This conclusion, however, is not necessarily correct. The “major expenditure” standard in Statement 2, from the IRS publication,⁴ does not appear anywhere in the Internal Revenue Code or Treasury regulations. Further, the provisions that Statement 1, from the Treasury regulations,⁵ references contain specific examples that provide support for allowing you to deduct the expense immediately.⁶ While Statement 2 may help you to make a decision regarding the deduction, this decision may not be consistent with the tax law.

As this hypothetical illustrates, the IRS often attempts to explain tax law that consists of complex, ambiguous statutory rules and administrative regulations using terms that are “[c]lear and simple”⁷ to most taxpayers. While the IRS assesses and collects over three trillion dollars in tax liability annually as a tax enforcement agency,⁸ the agency also assists hundreds of millions of taxpayers each year⁹ in its dual role as a customer service organization.¹⁰ In this latter capacity, the IRS bears a duty to explain the tax law to taxpayers,¹¹ and taxpayers, likewise, possess the right to be informed by the IRS about the tax law.¹² Further, as a result of the implementation of the Plain Writing Act of 2010, spearheaded by Cass Sunstein in his role as Administrator of the Office

⁴ *Id.*

⁵ Treas. Reg. § 1.263(a)–3(d).

⁶ See, e.g., Treas. Reg. § 1.263(a)–3(k)(7) ex. 23 (as amended in 2014).

⁷ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM NO. M-11-15, FINAL GUIDANCE ON IMPLEMENTING THE PLAIN WRITING ACT OF 2010 (2013).

⁸ See *The Agency, Its Mission and Statutory Authority*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/the-agency-its-mission-and-statutory-authority> (last updated July 27, 2016).

⁹ NAT’L TAXPAYER ADVOCATE, 1 ANNUAL REPORT TO CONGRESS 5 (2014), <http://www.TaxpayerAdvocate.irs.gov/2014AnnualReport>.

¹⁰ See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1205, 112 Stat. 685, 722–23 (1998); see also Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. 971, 980 (2003) (describing congressional efforts to make the IRS more “‘customer’-friendly”).

¹¹ See, e.g., I.R.S. News Release IR-98-59, New IRS Mission Statement Emphasizes Taxpayer Service (Sept. 24, 1998), <https://www.irs.gov/pub/irs-news/ir-98-59.pdf>; *Fact Sheet FS-2015-3, Taxpayer Bill of Rights #1, The Right to Be Informed*, INTERNAL REVENUE SERV. [hereinafter BILL OF RIGHTS], <https://www.irs.gov/uac/newsroom/taxpayer-bill-of-rights-number-1-the-right-to-be-informed> (last updated Jan. 2015); see also *infra* Part II.A.

¹² See Plain Writing Act of 2010, Pub. L. No. 111-274, § 2, 124 Stat. 2861, 2861 (2010).

of Information and Regulatory Affairs,¹³ the IRS must use plain language to convey the tax law in “easily understandable language on all of [its] forms, publications, documents and notices.”¹⁴ Sunstein and others have heralded initiatives like the Plain Writing Act as increasing “simplicity,”¹⁵ which they argue enables taxpayers to self-assess their own tax liability, ensures equal access to information about government programs and services, and increases government transparency.¹⁶ As Sunstein has noted, the introduction of plain language in government communications should “promote clarity, because it is designed to ensure that when government communicates with citizens, it does so in a way that people can easily understand.”¹⁷

This Article casts plain language efforts in a different light. As we argue, rather than achieving simplicity, which would involve reform of the underlying law,¹⁸ the use of plain language to describe complex legal rules and regulations often yields “simplicity.” As we define it, simplicity occurs when the government presents clear and simple explanations of the law without highlighting its underlying complexity or reducing this complexity through formal legal changes. Outside of law, simplicity is a concept that has emerged in recent years in diverse fields, including chemistry¹⁹ and biology,²⁰ cognitive psychology,²¹ literary analysis,²² and even computer-animated feature films.²³ We show that in its numerous taxpayer publications, the IRS frequently uses plain language to transform complex, often ambiguous tax law into seemingly simple statements that: (1) present contested tax law as clear tax rules, (2) add

¹³ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 185 (2013).

¹⁴ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 5206, *PLAIN WRITING ACT COMPLIANCE REPORT 2* (2015).

¹⁵ SUNSTEIN, *supra* note 13, at 185 (2013); *see also* OFFICE OF MGMT. & BUDGET, *supra* note 7.

¹⁶ *See infra* Part II.C.

¹⁷ SUNSTEIN, *supra* note 13, at 185.

¹⁸ *See* OFFICE OF THE SEC’Y, DEP’T OF TREASURY, 1 *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH* 16 (1984); *infra* notes 96–101 and accompanying text.

¹⁹ *See, e.g.*, Philippe Compain, *Le pari de la simplicité: Le simple et le complexe en synthèse organique* [*The Challenge of Simplicity: The Simple and the Complex in Organic Synthesis*], 265 *L’ACTUALITÉ CHIMIQUE*, Apr.–May 2003, at 129, 129.

²⁰ *See, e.g.*, JEFFREY KLUGER, *SIMPLEXITY: WHY SIMPLE THINGS BECOME COMPLEX (AND HOW COMPLEX THINGS CAN BE MADE SIMPLE)* (2008).

²¹ Serge Galanian, *Is Modeling the Primary Activity of the Human Brain?*, 3 *PSYCHOL. RES.* 175, 184 (2013).

²² *See, e.g.*, ALAIN BERTHOZ, *SIMPLEXITY: SIMPLIFYING PRINCIPLES FOR A COMPLEX WORLD* 208 (Giselle Weiss trans. 2012).

²³ TIM HAUSER, *THE ART OF UP* 18 (2009) (quoting Pixar animator Ricky Nierva as stating, “[Simplicity] is the art of simplifying an image down to its essence. . . . ‘Simplicity’ is about selective detail”).

administrative gloss to the tax law, and (3) fail to fully explain the tax law, including possible exceptions. We refer to these descriptions as “IRS simplifications.” Sometimes IRS simplifications benefit the government; at other times, they benefit taxpayers. In either case, simplicity offers a powerful platform from which the government can shape taxpayers’ perceptions and understanding of the tax law.

Having introduced the concept of simplicity, we explain how the IRS’s use of simplicity poses a trade-off between representing the tax law accurately and making it understandable to the public. There is no single way this trade-off should be resolved. Rather, resolving the trade-off will depend on value judgments as to whether the right balance of accuracy and understandability has been reached in a given case. The trade-off is animated by offsetting benefits and costs from simplicity. In particular, while simplicity offers a number of potential tax administration benefits, it can also threaten vital values of democratic governance and fairness.²⁴ On the one hand, IRS simplifications explain otherwise complex tax law in terms that are comprehensible for a large swath of taxpayers. They also reveal the IRS’s own interpretation of the tax law and its likely auditing or litigating position in the event of a tax controversy. And where taxpayers respond to government-favorable IRS simplifications by refraining from claiming aggressive tax positions, they enable the IRS to increase collection of tax revenue. On the other hand, by describing the tax law in seemingly straightforward terms, IRS simplifications can have the unintended effect of obscuring individuals’ knowledge of the underlying tax law, as it exists in the Internal Revenue Code, Treasury regulations, and case law. In addition, IRS simplifications can impose unequal benefits and burdens on different types of taxpayers. Sophisticated taxpayers possess the ability to reject IRS simplifications that benefit the government, while all taxpayers, sophisticated and unsophisticated, will follow IRS simplifications that favor taxpayers. Further, administrative law does not offer an adequate solution to the problems posed by IRS simplifications, leaving significant threats of opacity and inequity largely unchecked.²⁵

This Article does not contend that the IRS should abandon plain language. Rather, we offer several strategies for maximizing the tax administration and compliance benefits of simplicity while minimizing its drawbacks.²⁶ First, we

²⁴ See *infra* Parts III.A and III.B.

²⁵ *Id.*

²⁶ See *infra* Part III.D.

explore the possibility of mandating that the IRS either annotate or red-flag its own simplifications in IRS publications.²⁷ As we demonstrate, in addition to reducing opacity, these methods still allow the IRS to speak in plain language to taxpayers and set forth its own views, and even allow the IRS to continue to maximize revenue collection to the extent that conservative taxpayers follow the IRS's positions. Next, we discuss how the IRS may rely on institutions or interest groups outside of the IRS, such as the Government Accountability Office, or the tax law bar, to review IRS simplifications and accompanying annotations and red-flagging.²⁸ Last, we consider potential structural reform of the IRS, including the creation of an independent taxpayer service organization.²⁹

Finally, we forecast the likely emergence of simplicity in the future of tax administration.³⁰ Tax scholars and policymakers have made a variety of suggestions for how tax administration can and should change in the coming decades. For example, scholars and policymakers have suggested that the government should prepare individuals' tax returns (using information it already possesses),³¹ develop interactive tax return filing programs,³² and continue to expand the role of third party information reporting,³³ all suggestions that have begun to be implemented in the tax system in varying degrees.³⁴ Simplicity is likely to arise in each of these innovations. As a result, our suggestions for minimizing the threats while maintaining the benefits of simplicity will become increasingly important.

The remainder of this Article proceeds as follows. Part I discusses the IRS's customer service obligations, including its duty to explain the tax law,

²⁷ See *infra* Part III.D.1.

²⁸ See *infra* Part III.D.2.

²⁹ See *infra* Part III.D.3.

³⁰ See *infra* Part III.E.

³¹ See, e.g., Joseph Bankman, *Simple Filing for Average Citizens: The California ReadyReturn*, 107 TAX NOTES 1431 (2005); AUSTAN GOOLSBEE, BROOKINGS INST., THE 'SIMPLE RETURN': REDUCING AMERICA'S TAX BURDEN THROUGH RETURN-FREE FILING (2006); Rodney P. Mock & Nancy E. Shurtz, *The TurboTax Defense*, 15 FLA. TAX REV. 443, 528–29 (2014); Dennis J. Ventry Jr., *Americans Don't Hate Taxes, They Hate Paying Taxes*, 44 U.B.C. L. REV. 835, 842 (2011).

³² See, e.g., Joseph Bankman, Clifford Nass & Joel Slemrod, *Using the "Smart Return" to Reduce Tax Evasion* (Stanford Pub. Law, Working Paper No. 2578432, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578432; Mock & Shurtz, *supra* note 31; Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 IND. L.J. (forthcoming).

³³ For a list of current information-reporting requirements, see *Information Return Reporting*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/information-return-reporting> (last updated May 17, 2016).

³⁴ See *infra* Part III.E.

and examines the rationale underlying the plain language movement in the tax context. Part II introduces the concept of simplicity to the legal literature and offers examples of IRS simplifications that fall into several common categories. Part III examines the benefits and drawbacks of simplicity, offers suggestions for reform, examines potential simplicity in future tax administration initiatives, and is followed by the Conclusion.

I. THE DUTY TO EXPLAIN THE TAX LAW

Among its core functions, the IRS seeks to promote voluntary compliance with the tax law, reviews hundreds of millions of tax returns, and assesses and collects over three trillion dollars in tax revenue annually.³⁵ In recent years, the IRS has faced criticism regarding its exercise of tax enforcement discretion, such as that the agency fails to enforce the tax law in certain cases (e.g., refraining from taxing employees on frequent flyer miles accumulated through business travel),³⁶ under-enforces the tax law (e.g., declining to audit large partnerships and small cash businesses),³⁷ and enters into secret deals with taxpayers (e.g., advance pricing agreements that enable multinational corporations to reduce their global tax liability by billions of dollars).³⁸ In response, several scholars have called for new institutional oversight and judicial review of the IRS's exercise of discretion in enforcing the tax law.³⁹

In addition to its tax enforcement obligations, the IRS is also required to provide "customer service"⁴⁰ assistance to taxpayers. The IRS bears an affirmative duty to assist both individuals and businesses in complying with their tax calculation and payment obligations, specifically by explaining the tax law to taxpayers in plain language that is clear and easy to understand. In

³⁵ See *The Agency, Its Mission and Statutory Authority*, *supra* note 8.

³⁶ See Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 831 (2012).

³⁷ See, e.g., Joseph Bankman, *Eight Truths About Collecting Taxes from the Cash Economy*, 117 TAX NOTES 506, 514 (2007); Amy S. Elliott, *Audit Proof? How Hedge Funds, PE Funds, and PTPs Escape the IRS*, 136 TAX NOTES 351, 351-52 (2012).

³⁸ See, e.g., Lee A. Sheppard, *Draft Senate Finance APA Report Shows Incompetent IRS*, 2005 TAX NOTES TODAY, at 119-1; see also Leigh Osofsky, *Some Realism About Responsive Tax Administration*, 66 TAX L. REV. 121 (2012).

³⁹ See, e.g., Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 254-55 (2013); Richard C. Stark, Hartman E. Blanchard Jr. & Saul Mezei, *Consistency, Sunshine, Privacy, Secret Law, and the APA Program*, 2011 TAX NOTES TODAY 26-3; Zelenak, *supra* note 36, at 851-53.

⁴⁰ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1205, 112 Stat. 685, 722-23 (1998).

comparison with their extensive focus on the IRS's role as a tax enforcement organization, policymakers, tax scholars, and other commentators have devoted far less attention to the IRS's role as a customer service organization, including the IRS's approaches to fulfilling its duty to explain the tax law.⁴¹

This Part discusses the IRS's customer service obligations, reviews the agency's multiple approaches to explaining the tax law to taxpayers, and considers the rationale for imposing a duty to explain upon the IRS.

A. *The IRS as Customer Service Organization*

In its customer service capacity, the IRS has a central duty to explain the tax law to taxpayers. As the IRS describes it, its mission is to “help the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share.”⁴² Notably, this mission statement references helping taxpayers comply *before* referencing tax enforcement.⁴³ Explaining the tax law to taxpayers has become an important way in which the IRS fulfills this service mission. The IRS's customer service obligations arise from several legislative and executive mandates.

The 1998 IRS Reforms. In 1998, largely in response to perceived abuses of enforcement discretion by IRS officials,⁴⁴ Congress enacted major reforms to heighten the IRS's emphasis on “customer service.”⁴⁵ Following the enactment of these changes, the IRS adopted a new mission statement: “[P]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness

⁴¹ Some commentators have focused on the importance of IRS guidance generally. *See, e.g.*, NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS: EXECUTIVE SUMMARY: PREFACE AND HIGHLIGHTS 44 (2013). Some recent work has focused on taxpayers' legal ability to rely on IRS publications in support of their tax positions. *See, e.g.*, Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421; Dashiell C. Shapiro, *Can Taxpayers Rely on IRS Form Instructions?*, 149 TAX NOTES 945 (2015).

⁴² *The Agency, Its Mission and Statutory Authority*, *supra* note 8.

⁴³ *See* I.R.S. News Release IR-98-59, New IRS Mission Statement Emphasizes Taxpayer Service (Sept. 24, 1998), <https://www.irs.gov/pub/irs-news/ir-98-59.pdf>.

⁴⁴ *See, e.g.*, *IRS Oversight: Hearings Before the S. Comm. on Fin.*, 105th Cong. 1 (1998) (statement of Sen. William V. Roth, Jr., Chairman, S. Comm. on Finance); Ryan J. Donmoyer, *Three Days of Hearings Paint Picture of Troubled IRS*, 76 TAX NOTES 1655, 1655–66 (1997). Later investigations revealed many of these stories to be exaggerated. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-82, TAX ADMINISTRATION: ALLEGATIONS OF IRS EMPLOYEE MISCONDUCT 3, 19 (1999).

⁴⁵ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1205, 112 Stat. 685, 722–23; *see also* Lederman, *supra* note 10, at 992–93.

to all.”⁴⁶ The IRS implemented its new mission by shifting personnel and other resources away from tax enforcement and toward taxpayer service, making service of taxpayers a major part of the IRS’s role,⁴⁷ a change that has lasted well past the 1998 IRS restructuring.⁴⁸

Plain Writing Act of 2010. Statutory developments since 1998 reinforce and expand the IRS’s duty to explain the tax law to taxpayers. The IRS, like other federal agencies, is subject to the requirements of the Plain Writing Act of 2010, a statutory framework that seeks “to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.”⁴⁹ Under this statute, the IRS must use “plain writing” in its communication with taxpayers, meaning that it must provide written explanations and instructions that are “clear, concise, well-organized, and follow[] other best practices appropriate to the subject or field and intended audience.”⁵⁰ Congress specifically applied its plain writing framework to documents related to “filing taxes,” including IRS publications.⁵¹ Following enactment of the Plain Writing Act, IRS officials indicated that the agency would “communicate in clear, easily understandable language on all of our forms, publications, documents and notices.”⁵²

Taxpayer Bill of Rights. In 2014, at the urging of the National Taxpayer Advocate, the IRS adopted a “Taxpayer Bill of Rights,” a clear description of ten categories of existing rights to which taxpayers are entitled under various

⁴⁶ I.R.S. News Release IR-98-59, New IRS Mission Statement Emphasizes Taxpayer Service (Sept. 24, 1998), <https://www.irs.gov/pub/irs-news/ir-98-59.pdf>.

⁴⁷ Numerous scholars have suggested that this change has had a negative impact on the IRS’s enforcement capacity. See, e.g., Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 117–28 (2004); Lederman, *supra* note 10, at 982–90; see also DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 293–95 (2003) (criticizing 1998 reforms); U.S. GEN. ACCOUNTING OFFICE, GAO-02-674, TAX ADMINISTRATION: IMPACT OF COMPLIANCE AND COLLECTION PROGRAM DECLINES ON TAXPAYERS, 10–30 (2002) (detailing post-1998 reductions in tax enforcement).

⁴⁸ Service remains a major part of the IRS’s mission today. See *The Agency, Its Mission and Statutory Authority*, *supra* note 8.

⁴⁹ Plain Writing Act of 2010, Pub. L. No. 111-274, § 2, 124 Stat. 2861, 2861 (2010); see also Exec. Order No. 13,563, 3 C.F.R. § 13563 (2011).

⁵⁰ Pub. L. No. 111-274, § 3(3) (2010).

⁵¹ Pub. L. No. 111-274, § 3(2)(A)(i).

⁵² INTERNAL REVENUE SERV., *supra* note 14, at 2.

provisions of the Internal Revenue Code and other statutory authorities.⁵³ Starting in 2014, the IRS publicized the Taxpayer Bill of Rights on its website and in a special publication, *Your Rights as a Taxpayer*. The first of the ten enumerated rights is that all taxpayers possess “[t]he [r]ight to [b]e [i]nformed.”⁵⁴ In describing this right, the IRS states that taxpayers have the right to “clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence.”⁵⁵

A significant way in which the IRS helps taxpayers “understand and meet their tax responsibilities”⁵⁶ is through the issuance of IRS publications to the general public. IRS publications are the primary documents that the agency uses to describe the tax law to individuals, small businesses, and tax professionals, and, as a result, they exemplify the IRS’s provision of guidance in service of taxpayers. IRS publications often include a variety of explanatory information, general guidance, definitions for important terms, and examples intended to show taxpayers how the law applies.⁵⁷

B. Explanation Approaches

To satisfy its duty to explain the tax law, the IRS adopts several communication approaches in IRS publications. These methods result from the IRS’s own policies and from guidance implementing the Plain Writing Act (Plain Language Guidelines) issued by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.⁵⁸

Tailoring Explanations for a Specific Audience. The IRS openly acknowledges that when drafting IRS publications, the agency adjusts its language depending on whether members of the general public or tax professionals are potential audience members.⁵⁹ For publications that it intends to direct to the general public, the IRS states that the “plain language [it] use[s]

⁵³ I.R.S. News Release IR-2014-72 (June 10, 2014), <https://www.irs.gov/uac/newsroom/irs-adopts-taxpayer-bill-of-rights-10-provisions-to-be-highlighted-on-irsgov-in-publication-1>.

⁵⁴ INTERNAL REVENUE SERV., PUB. NO. 1, YOUR RIGHTS AS A TAXPAYER: THE TAXPAYER BILL OF RIGHTS (2014), <http://www.irs.gov/pub/irs-pdf/p1.pdf>.

⁵⁵ *Id.*

⁵⁶ I.R.S. News Release, *supra* note 11.

⁵⁷ *See Forms & Publications*, INTERNAL REVENUE SERV., <http://www.irs.gov/forms-pubs> (last updated June 28, 2016).

⁵⁸ OFFICE OF MGMT. & BUDGET, *supra* note 7; PLAIN LANGUAGE ACTION & INFO. NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES, (Mar. 2011, revised May 2011), <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf>.

⁵⁹ *See* INTERNAL REVENUE SERV., *supra* note 14, at 3.

for this group is clear, simple and meaningful” because “this group does not have a need to understand technical regulatory language.”⁶⁰ When addressing tax professionals, such as tax accountants, tax return preparers or tax lawyers, the IRS includes more specialized terminology than in publications intended for the general public.⁶¹

Eliminating Complexity. As part of its efforts to help taxpayers understand the tax law and to comply with the Plain Writing Act, the IRS attempts to avoid complexity in drafting IRS publications. According to the Plain Language Guidelines, the IRS should “translate complicated provisions into more manageable language”⁶² by avoiding discussion of complex details and discussions in these documents. For example, the guidelines state that the IRS should avoid emphasizing exceptions to the tax law because

[w]hen you start a sentence with an introductory phrase or clause beginning with “except,” you almost certainly force the reader to re-read your sentence. . . . The audience must absorb the exception, then the rule, and then usually has to go back to grasp the relationship between the two.⁶³

In contrast, rather than restating the tax law precisely as it appears in statutes or regulations, the guidelines instruct the IRS to rewrite sentences to “emphasize the positive.”⁶⁴ Following enactment of the Plain Writing Act, the IRS has reported that it has rewritten and redesigned dozens of IRS publications in order “to improve comprehension.”⁶⁵

Evaluating the Impact on the Taxpayer and the IRS. IRS officials also consider the potential impact of the language they use in IRS publications on different parties, including the IRS itself. The Plain Language Guidelines suggest that when drafting IRS publications for the general public or tax professionals, IRS officials should ask, “What’s the best outcome for our audience? What do I need to say to get this outcome?”⁶⁶ Likewise, the IRS is also instructed to consider how the text in any IRS publication may benefit the

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² PLAIN LANGUAGE ACTION & INFO. NETWORK, *supra* note 58, at 50.

⁶³ *Id.* at 56.

⁶⁴ *Id.* at 55.

⁶⁵ *See* INTERNAL REVENUE SERV., *supra* note 14, at 4.

⁶⁶ PLAIN LANGUAGE ACTION & INFO. NETWORK, *supra* note 58, at 2.

IRS. The guidelines instruct IRS officials to ask themselves: “What’s the best outcome for *my agency*? What do I need to say to get this outcome?”⁶⁷

While the IRS is not the only federal agency with a duty to explain the law through clear communication,⁶⁸ several aspects of the IRS’s responsibilities make this duty both more challenging and impactful in the tax context than in other areas. First, compared to other agencies, the IRS must address more individuals and businesses on a regular basis through its publications.⁶⁹ According to the IRS, the agency designs its publications to be comprehensible to a mass audience, 150 million taxpayers annually.⁷⁰ As commentators have observed, more U.S. citizens pay taxes each year than vote in presidential elections.⁷¹ Second, the tax law is arguably more complex than many other areas of the law. As the Joint Committee on Taxation has concluded, unique complexity in the federal tax law “make[s] it more difficult for the IRS to explain the law to taxpayers in a concise and understandable manner”⁷² Last, no other federal agency requires as many individuals to self-assess their own compliance with the law and then file an annual report of this assessment with the federal government as the IRS.⁷³ Scholars and policymakers have long noted that the requirement to file the annual Form 1040, the individual income tax return, is perhaps the most significant burden that the government imposes on individuals.⁷⁴ The IRS thus faces a uniquely challenging and significant task in attempting to satisfy its duty to explain the tax law to taxpayers using plain language.

⁶⁷ *Id.* (emphasis added).

⁶⁸ See SUNSTEIN, *supra* note 13 (regarding Plain Writing Act of 2010); see also David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 296–97 (2006) (discussing extensive use of “best practices” by federal agencies).

⁶⁹ See, e.g., *Dobson v. Comm’r*, 320 U.S. 489, 494–95 (1943) (“No other branch of the law touches human activities at so many points.”).

⁷⁰ INTERNAL REVENUE SERV., *supra* note 14, at 4.

⁷¹ See Joshua D. Rosenberg, *A Helpful and Efficient IRS: Some Simple and Powerful Suggestions*, 88 KY. L.J. 33, 37 (1999); see also JOINT COMM. ON TAXATION, JCS-3-01, STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986, at 4 (2001).

⁷² JOINT COMM. ON TAXATION, JCX-26-01, TESTIMONY OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION CONCERNING A STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION 5 (2001). For further discussion, see MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 49 (1997) (addressing complexity of income tax system); Mock & Shurtz, *supra* note 31, at 524–25; Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 123 (1989).

⁷³ See NAT’L TAXPAYER ADVOCATE, *supra* note 9, at 8–10.

⁷⁴ See, e.g., *id.* at 8; see also Thomas, *supra* note 32, at 19.

C. *In Praise of Plain Language*

The effort to mandate that the IRS, among other federal agencies, use plain language in communications with taxpayers in general publications has received widespread praise.⁷⁵ Proponents of the legislation characterized it as representing “common-sense change”⁷⁶ that could be “implemented at low cost.”⁷⁷ Others predicted that efforts such as this would force federal government agencies to replace “bureaucratic gobbledegook”⁷⁸ with “easy-to-understand language”⁷⁹ throughout their communications. The Plain Writing Act was enacted with overwhelming bipartisan support in 2010. While some scholars have begun to study the efficacy of the Plain Writing Act empirically,⁸⁰ and others have questioned whether such policies will indeed make the law more “understandable,”⁸¹ there has been limited, if any, opposition to the primary objectives motivating these plain language initiatives. Each of the objectives is described briefly below.

Simplicity and Self-Assessment. The primary rationale for mandating that the IRS communicate with taxpayers using plain language is that the approach will result in simplicity, which, in turn, will assist taxpayers in self-assessing their tax liability and filing their tax returns. Cass Sunstein, the primary architect of the Plain Writing Act in his role as head of OIRA, has argued that “[c]lear and simple communication . . . makes it easier for members of the public to understand and to apply for important benefits and services for which they are eligible.”⁸² Sunstein describes the primary rationale for this initiative as follows: “Simply put, the principle is this: Avoid ambiguity and be specific about the favored path.”⁸³ In the tax context, Sunstein has further noted that the IRS should provide plain language explanations and instructions in order to

⁷⁵ See, e.g., Joe Davidson, *Hiring Officials Have Finally Heard the Magic Word: Résumés*, WASH. POST, May 12, 2010, at B3.

⁷⁶ Press Release, Office of Rep. Bruce Braley, Braley Introduces “Plain Language in Health Insurance Act” to Lower Costs, Cut Confusion, June 25, 2009, <http://www.plainlanguage.gov/news/index.cfm?topic=ysnHealth>.

⁷⁷ *Id.*

⁷⁸ Katy Steinmetz, *Government Officials May Be Using Less Mumbo Jumbo*, TIME (Jan. 27, 2015), <http://time.com/3685016/government-plain-writing-2014/>.

⁷⁹ Press Release, Office of Rep. Bruce Braley, *supra* note 76.

⁸⁰ See, e.g., Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358 (2015) (finding mixed success of the Plain Writing Act).

⁸¹ See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 122 (2014).

⁸² OFFICE OF MGMT. & BUDGET, *supra* note 7.

⁸³ SUNSTEIN, *supra* note 13, at 78.

“assist the public in complying with applicable requirements simply because people better understand what they are supposed to do.”⁸⁴ An undisputable objective of the plain language movement is to make this burden of tax compliance as simple and “painless as possible.”⁸⁵ Indeed, the IRS has expressed Sunstein’s sentiments in the first words of the Taxpayer Bill of Rights, stating that “[t]axpayers have the right to know what they need to do to comply with the tax laws.”⁸⁶ Plain language is central to the IRS’s commitment that taxpayers enjoy this right.

Equity. The plain language movement also seeks to reduce the potential for vague tax laws to result in inequitable distribution of tax benefits and burdens among taxpayers. Without clear explanations of the tax law, plain language advocates argue, some taxpayers may fail to take advantage of government benefits for which they may be eligible, such as the Earned Income Tax Credit⁸⁷ or the Child Tax Credit.⁸⁸ As Sunstein has suggested, “[a] lack of clarity may prevent people from becoming sufficiently aware of programs or services, and . . . may discourage participation.”⁸⁹ Conversely, plain language advocates suggest that without clear instructions from the IRS, some sophisticated taxpayers may attempt to exploit ambiguities in the tax law to claim tax benefits that Congress never intended. For example, Nina Olson, National Taxpayer Advocate, has reported that without clear guidance, “sophisticated taxpayers often find loopholes that enable them to reduce or eliminate their tax liabilities.”⁹⁰ Equity concerns, consequently, have played a significant role in motivating the IRS’s duty to explain the tax law to the public.

Transparency. A final impetus for the IRS to use plain language is that this approach may strengthen government transparency. With access to plain language descriptions of the tax laws, plain language advocates suggest, citizens can better understand the actions of Congress, the Treasury, and the

⁸⁴ OFFICE OF MGMT. & BUDGET, *supra* note 7.

⁸⁵ NAT’L TAXPAYER ADVOCATE, *supra* note 9, at 5.

⁸⁶ BILL OF RIGHTS, *supra* note 11.

⁸⁷ I.R.C. § 32 (2012).

⁸⁸ I.R.C. § 24 (2012).

⁸⁹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM M-11-05, PRELIMINARY GUIDANCE FOR THE PLAIN WRITING ACT OF 2010 (2010).

⁹⁰ Michelle Singletary, *Congress Should Resolve to Simplify the Tax Code*, WASH. POST, Jan. 8, 2009, at D2 (quoting Nina Olson, National Taxpayer Advocate).

IRS.⁹¹ They can react to this enhanced knowledge either by accepting or by questioning the tax laws through public discussion and debate. As Sunstein noted following the enactment of the Plain Writing Act in 2010, plain language “should be seen as an essential part of open government.”⁹²

II. SIMPLEXITY IN IRS PUBLICATIONS

There is another side to plain language. While proponents of plain language argue that it will lead to greater simplicity and administrability of the tax system,⁹³ the initiative does not make substantive changes to the myriad complexities of the tax law—technical details, exceptions (and exceptions to exceptions), and ambiguous statutory and judicial language. In this Part, we argue that the IRS’s efforts to incorporate plain language into its communications with taxpayers result not in greater simplicity, but instead in simplicity. Whereas simplicity eliminates complexity, simplicity offers only the *appearance* of simplicity.

As we show, following an extensive review of IRS publications, the IRS routinely offers descriptions of the tax law that exhibit simplicity. IRS publications transform complex, often ambiguous tax law into seemingly simple, straightforward statements (which we describe as “IRS simplifications”). Sometimes IRS simplifications benefit the government. At other times, they benefit taxpayers. In any event, the mandate to describe the tax law using plain language provides the IRS with a unique and influential ability to shape taxpayers’ and tax practitioners’ perceptions and understanding of the tax law.

This Part introduces the concept of simplicity to the tax literature, provides examples in IRS publications that fall into several common categories, and shows how taxpayers who complete their tax returns in various different ways are repeatedly exposed to simplicity.

⁹¹ See, e.g., OFFICE OF MGMT. & BUDGET, *supra* note 89 (“Transparency, public participation, and collaboration cannot easily occur without plain writing.”); see also SUNSTEIN, *supra* note 13; Joel Siegel, *Obama Signs ‘Plain Writing’ Law*, ABCNEWS (Oct. 17, 2010), <http://abcnews.go.com/WN/obama-signs-law-understand/story?id=11902841> (quoting Rep. Bruce Braley, D-Iowa, as stating that “plain language will increase government accountability”).

⁹² OFFICE OF MGMT. & BUDGET, *supra* note 89.

⁹³ See SUNSTEIN, *supra* note 13, at 185.

A. *What Is Simplicity?*

While there is no universal definition of simplicity, representative descriptions include “the process of simplifying something by obscuring the more complex aspects of the original goal”⁹⁴ and “an idea, or concept that appears to be simple to understand, yet is very complex in it’s [sic] true description.”⁹⁵ In this subpart, we distinguish simplicity from simplicity, provide several examples of simplicity in non-legal contexts, and define our usage of the term in this Article.

Before defining simplicity, it is necessary to consider simplicity. The dictionary definition of simplicity refers to the “state of being simple, uncomplicated, or uncompounded.”⁹⁶ In his recent book, *Simpler: The Future of Government*, Cass Sunstein notes that the overarching goal of the “large-scale transformation in American government”⁹⁷ that occurred as a result of initiatives such as the Plain Writing Act was to “increase simplicity”⁹⁸ through the government’s communications with the public. In the context of fundamental tax reform, government officials have defined simplicity in the negative by stating that it is “not reflected in [taxpayers] . . . computing dozens of deductions and credits, and wondering all the while whether other means of saving tax might have been missed through ignorance of the laws.”⁹⁹ Simplicity, according to this description, occurs when the government reforms or designs the tax law by “eliminat[ing] and avoid[ing] provisions that would unduly complicate tax administration and compliance for most taxpayers.”¹⁰⁰ Simplicity is, thus, the antithesis of complexity, or, as Sunstein has posited, “simplicity is friendly, and complexity is not.”¹⁰¹

Simplicity is distinct from simplicity in that simplicity refers to a concept that appears to be simple, but that nonetheless retains underlying complexity. As neurophysiologist Alain Berthoz has written, “[s]implicity is not simplicity. It is fundamentally linked with complexity, with which it shares

⁹⁴ *Simplicity*, COLLINS DICTIONARY, <http://www.collinsdictionary.com/submission/1290/Simplicity> (last updated July 20, 2012).

⁹⁵ *Simplicity*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=Simplicity> (last updated Nov. 19, 2006).

⁹⁶ *Simplicity*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/simplicity> (last visited Sept. 29, 2016).

⁹⁷ SUNSTEIN, *supra* note 13, at 2.

⁹⁸ *Id.*

⁹⁹ *See* OFFICE OF THE SEC’Y, *supra* note 18, at 15–16.

¹⁰⁰ *Id.* at 16.

¹⁰¹ SUNSTEIN, *supra* note 13, at 1.

common roots.”¹⁰² A few examples illustrate the appearance of simplicity outside of law. Scientists have used the term to describe the appearance of phenomena whose simplicity obscures underlying complexity, such as a seemingly simple houseplant, whose simple green leaves obscure its underlying “microhydraulics and fine-tuned metabolism and dense schematic of nucleic acids.”¹⁰³ Similarly, psychology researchers have referred to simplicity as a “cognitive process that compresses information and synthesizes it without losing its complexity.”¹⁰⁴ Commentators have noted that certain literary forms, such as metaphors and fables, are simplex as their accessible narrative conceals deeper, underlying meaning.¹⁰⁵ For instance, Berthoz has argued that simplicity occurs in characters such as the seven dwarves, for “Dopey is not as dopey as he seems” because he is “not a village idiot but a witness and wise presence”¹⁰⁶ In another artistic setting, simplicity has become a foundational principle of Pixar Animation Studios, producer of acclaimed computer-animated feature films.¹⁰⁷ As one of its lead animators has stated, the studio’s artists strive to achieve simplicity by “simplifying an image down to its essence,”¹⁰⁸ which causes complexity of texture, design and detail to be “masked by how simple the form is.”¹⁰⁹

We now offer our definitions of terms that we apply throughout the remainder of this Article. While tax scholars frequently discuss “simplification” as a normative goal of tax design and reform,¹¹⁰ we define simplification as resulting in two distinct possibilities, “simplicity” and “simplicity.” We define “simplicity” as occurring when policymakers reform the law by eliminating specific complex provisions or procedures through enactment of statutory changes or issuance of regulations. For instance, we would consider a tax system that repeals specific complex deductions or statutory exceptions or that exempts millions of low-income taxpayers from filing tax returns at all as one that exhibits simplicity. In contrast, we define

¹⁰² BERTHOZ, *supra* note 22, at x.

¹⁰³ KLUGER, *supra* note 20, at 11.

¹⁰⁴ Gelalian, *supra* note 21, at 185.

¹⁰⁵ See, e.g., BERTHOZ, *supra* note 22, at 208 (“Metaphor . . . is a wonderful way of shortcutting language.”).

¹⁰⁶ *Id.*

¹⁰⁷ See HAUSER, *supra* note 23, at 18.

¹⁰⁸ *Id.* (quoting Pixar animator Ricky Nierva).

¹⁰⁹ *Id.*

¹¹⁰ See Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1 (1974); Joel Slemrod, *The Return to Tax Simplification: An Econometric Analysis*, 17 PUB. FIN. REV. 3, 3 (1989); *supra* note 99 and accompanying text.

“simplicity” as resulting when the government offers clear and simple explanations of the law without highlighting its underlying complexity or reducing this complexity through formal legal changes. We refer to such explanations and descriptions as “IRS simplifications.”

B. Categories and Examples

Simplicity pervades IRS publications. The IRS frequently attempts to describe the tax law in simplified terms in IRS publications, which are intended for both the general public and tax professionals, after considering likely effects on taxpayers and the IRS itself. As this subpart shows, IRS simplifications can be grouped into three categories, based on descriptions that: (1) present contested tax law as clear tax rules, (2) add administrative gloss to the tax law, and (3) fail to fully explain the tax law, including possible exceptions.

1. Presenting Contested Tax Law as Clear Tax Rules

As tax lawyers, accountants, and law students are well aware, the judiciary plays an important role in interpreting the tax law.¹¹¹ The judiciary’s involvement in interpreting the tax law often underscores, and, at times, even increases the ambiguity regarding the tax law’s meaning. The examples below illustrate how the IRS often presents tax positions that are the subject of judicial ambiguity as if they are unambiguous tax rules.

a. Deductibility of Ordinary and Necessary Business Expenses

A classic example of an ambiguous tax law provision is the deduction for “ordinary and necessary” trade or business expenses incurred during the taxable year.¹¹² In order to determine whether a taxpayer can deduct expenses as trade or business expenses, the taxpayer must determine that such expenses are both “ordinary” and “necessary.”¹¹³ Explaining what, exactly, these terms mean is a famously difficult task. For example, in attempting to articulate the standard for deductibility of business expenses, Justice Cardozo stated that

¹¹¹ See Leandra Lederman, *What Do Courts Have to Do With It?: The Judiciary’s Role in Making Federal Tax Law*, 65 NAT’L TAX J. 899, 899 (2012).

¹¹² I.R.C. § 162(a) (2012); Treas. Reg. § 1.162-1(a) (2016).

¹¹³ *Deputy v. Du Pont*, 308 U.S. 488, 497 (1940); *Welch v. Helvering*, 290 U.S. 111, 113 (1933).

“[o]ne struggles in vain for any verbal formula that will supply a ready touchstone.”¹¹⁴

IRS Simplification. Despite this inherent legal ambiguity, the IRS uses an IRS publication as a vehicle for providing a ready, albeit overly clear, touchstone to taxpayers. The IRS presents taxpayers with a straightforward summary of the test for deductibility of business expenses in IRS Publication 535 (Business Expenses).¹¹⁵ In this publication, the IRS states that “a business expense must be both ordinary and necessary” to be deductible.¹¹⁶ With respect to the “ordinary” prong, Publication 535 instructs taxpayers that “[a]n ordinary expense is one that is common and accepted in your industry.”¹¹⁷ This definition imposes on taxpayers the obligation to determine whether other taxpayers operating similar businesses—the taxpayer’s “industry”—incur the expense at issue in their business practices (i.e., whether the expense is “common and accepted”).¹¹⁸

Tax Law. In contrast to the clear rule expressed in the IRS publication, courts have exhibited differing approaches to what satisfies the “ordinary” requirement. Several courts have adopted the view expressed in IRS Publication 535 by asking whether other similarly-situated taxpayers have incurred the business expense at issue.¹¹⁹ Yet other courts have stated explicitly that taxpayers may treat business expenses as ordinary even if few or no other similarly-situated taxpayer in the relevant industry incurs this expense.¹²⁰ As one court held, a taxpayer “should not be penalized taxwise for his business ingenuity in [incurring business expenses] which do not conform to the practices of one whom he is naturally trying to surpass in profits.”¹²¹ Some courts have similarly looked askance, finding that the percentage of taxpayers in an industry that has incurred a specific expense is irrelevant to whether an expense is ordinary.¹²² And in internal memoranda, even IRS

¹¹⁴ *Welch*, 290 U.S. at 115.

¹¹⁵ INTERNAL REVENUE SERV., *supra* note 3, at 3.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.,* *Reffett v. Comm’r*, 39 T.C. 869, 878–89 (1963) (considering whether other coal operators paid same contingent witness fees as taxpayer).

¹²⁰ *See, e.g.,* *United Title Ins. v. Comm’r*, 55 T.C.M. (CCH) 34, 45 (1988) (holding that even if taxpayer were only one to incur certain expenses, “that in itself would not mean the expenses were not ordinary within the meaning of section 162(a)”).

¹²¹ *Poletti v. Comm’r*, 330 F.2d 818, 822 (8th Cir. 1964).

¹²² *Brizell v. Comm’r*, 93 T.C. 151, 158–59 (1989) (“We reject the suggestion that a given percentage of an industry must pay or incur a certain expense in order for the expense to be ordinary.”).

officials have concluded that expenses may satisfy the ordinary prong despite the fact that they are not common practice because “[t]hat which today is a novel method of generating business may be commonplace tomorrow.”¹²³

In even starker conflict with the IRS’s characterization of the “ordinary” prong in Publication 535, some courts have held that the “ordinary” prong is simply meant to clarify that, even though an expense may be necessary, it may not be deductible in the year in question because the expense may relate to the production of income in future tax years.¹²⁴ For instance, in one decision, the Supreme Court found that the “principal function of the term ‘ordinary’ in § 162(a) is to clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures”¹²⁵ Citing this language, other courts have refrained from considering whether an expense is “common and accepted” in the taxpayer’s industry.¹²⁶

Taxpayer Effects. Despite the differing judicial interpretations of the term ordinary under § 162(a) of the Code, Publication 535 presents the taxpayer with an unequivocal definition of an ordinary expense as one that is common and accepted in the taxpayer’s industry.¹²⁷ Taxpayers who apply the clear rule stated in IRS Publication 535 may reasonably conclude they are not entitled to claim business expense deductions, even if they would have been entitled to do so under one of the alternative judicial interpretations. For example, assume a baker pays legal fees to retain an attorney to defend the baker against claims of food poisoning by customers. Under IRS Publication 535, if the baker cannot identify other owners of bakeries who have paid similar legal fees, the baker should conclude that this expense does not satisfy the ordinary standard and, consequently, should forego a business expense deduction.¹²⁸ A more comprehensive understanding of potentially applicable case law may have encouraged the baker to claim the deduction.¹²⁹ The forgone deduction would most likely increase the tax liability of the baker.

¹²³ I.R.S. Field Service Advisory, 1996 WL 33320948 (Sept. 18, 1996).

¹²⁴ See, e.g., *Comm’r v. Tellier*, 383 U.S. 687, 689–70 (1966).

¹²⁵ *Id.* at 689.

¹²⁶ See, e.g., *Raymond Bertolini Trucking Co. v. Comm’r*, 736 F.2d 1120 (6th Cir. 1984).

¹²⁷ See INTERNAL REVENUE SERV., *supra* note 3, at 3.

¹²⁸ *Id.*

¹²⁹ See *supra* notes 120–23 and accompanying text.

b. Deductibility of Home Mortgage Refinancing Points

The IRS publication regarding the deductibility of home mortgage “refinancing points” provides another example of an IRS simplification that presents contested tax law as a clear tax rule.¹³⁰ Homeowners with mortgages may pay “points” to their lenders in order to reduce their mortgage interest rate.¹³¹ When these homeowners pay points, they may wonder whether they can deduct them in the year of payment. After all, such points essentially represent prepaid interest, and home mortgage interest is tax deductible, subject to various limitations. Further, the Code explicitly allows taxpayers to claim a tax deduction for “points paid in respect of any indebtedness incurred in connection with the purchase or improvement of, and secured by, the principal residence of the taxpayer”¹³² Yet the statutory language does not offer the taxpayer guidance regarding the deductibility of points that are incurred purely to refinance an existing mortgage rather than to purchase a new home or improve an existing one.¹³³

IRS Simplification. To fill this statutory void, the IRS provides clear guidance to taxpayers regarding whether and when refinancing points are deductible. In IRS Publication 936 (Home Mortgage Interest Deduction), the IRS states:

Generally, points you pay to refinance a mortgage are not deductible in full in the year you pay them. This is true even if the new mortgage is secured by your main home.

However, if you use part of the refinanced mortgage proceeds to improve your main home and you meet the first 6 tests listed under *Deduction Allowed in Year Paid*, you can fully deduct the part of the points related to the improvement in the year you paid them with your own funds.¹³⁴

In other words, the IRS advises taxpayers that they are not entitled to claim current-year tax deductions for refinancing points, unless the taxpayer uses proceeds from the refinancing to improve the home. Rather than deduct

¹³⁰ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION 7 (2015).

¹³¹ *Id.* at 5 (“The term ‘points’ is used to describe certain charges paid, or treated as paid, by a borrower to obtain a home mortgage.”). For an example of refinancing points, see *Buying Points to Lower Your Refinance Rate*, BANK OF AMERICA, <https://www.bankofamerica.com/home-loans/refinance/understanding-your-new-payment/buying-points-lower-interest-rate.go> (last visited Aug. 13, 2016).

¹³² I.R.C. § 461(g)(2) (2012).

¹³³ *Id.*

¹³⁴ INTERNAL REVENUE SERV., *supra* note 130, at 7.

refinancing points, the IRS states that taxpayers must amortize them over the life of the loan.¹³⁵

Tax Law. While the IRS presents the tax law as an unambiguous rule, the case law regarding this issue is not as clear. The description in IRS Publication 936 is the IRS's own position.¹³⁶ However, the IRS's view is not necessarily correct. For instance, in *Huntsman v. Commissioner*, the Eighth Circuit Court of Appeals held that refinancing points were immediately deductible in a situation in which the refinancing was an integrated step in obtaining permanent financing.¹³⁷ The IRS expressed its disagreement with this conclusion and its intention not to follow the Eight Circuit's decision outside the Eighth Circuit.¹³⁸

The IRS does not signal the existence of this contrary court authority to the taxpayer in IRS Publication 936, instead simply setting forth the IRS's own position as the rule. The IRS does preface its description of the rule with the word "generally."¹³⁹ However, the word "generally" does not provide any indication of the controversy surrounding the IRS's position, or the IRS's defeat in pressing the issue in court.¹⁴⁰ Rather, the word "generally" seems to introduce the unrelated set of exceptions in the following sentence.¹⁴¹ Even if the word "generally" is meant to signal some sort of exception to the general rule that the IRS sets forth in the first sentence, it is an oblique reference at best. To anything but the most trained eye, this IRS simplification presents the IRS's contested view as the rule.

Taxpayer Effects. For taxpayers who are questioning whether to deduct refinancing points, the relevant IRS publication provides straightforward guidance: such points are not deductible in the year paid unless the refinancing proceeds are used to improve the home. Taxpayers, therefore, may forego current deductions, even though some courts may respect such deductions under certain conditions. Alternatively, a taxpayer may choose to spend the proceeds of a home mortgage refinancing on home improvement expenses in

¹³⁵ *Id.*

¹³⁶ See Rev. Rul. 87-22, 1987-1 C.B. 146 (setting forth the IRS's position).

¹³⁷ 905 F.2d 1182, 1185-86 (8th Cir. 1990).

¹³⁸ *Hunstman v. Comm'r*, 905 F.2d 1182 (8th Cir. 1990), *action on dec.*, 1991-02 (Feb. 11, 1991).

¹³⁹ INTERNAL REVENUE SERV., *supra* note 130, at 7.

¹⁴⁰ See *Huntsman v. Comm'r*, 91 T.C. 917 (1988), *rev'd*, 905 F.2d 1182 (8th Cir. 1990). For further discussion, see James E. Tierney, *Pointing the Way Through Section 461(g): The Deductibility of Points Paid in Connection with the Acquisition or Improvement of a Principal Residence*, 71 NEB. L. REV. 1095 (1992).

¹⁴¹ INTERNAL REVENUE SERV., *supra* note 130, at 7.

order to ensure immediate deductibility of the refinancing points. If the taxpayer would not otherwise pursue the home improvement, the IRS publication would distort the taxpayer's behavior, resulting in inefficiency. Taxpayers who forego immediate deductions of the home mortgage refinancing points may still deduct the refinancing points over the term of the loan.¹⁴² But, for many taxpayers, immediate, full deductibility is more beneficial than prolonged, partial deductibility over a period of years.¹⁴³ As a result, this IRS simplification may have adverse tax consequences for many taxpayers.

c. Tax Characterization of Leveraged Leases

The IRS's description of "leveraged leases" provides a final example of an IRS simplification that turns contested tax law into a clear rule.¹⁴⁴ Leveraged leases are a common form of financing business assets that typically involves three actors: a lessee (an operating business such as a manufacturer or airline), a lessor (such as an investment fund), and a creditor (a bank).¹⁴⁵ The lessor purchases business assets using heavy debt financing from the creditor. The lessor then leases the business assets to the lessee. The motivation for the lessor to purchase the business assets is that the lessor will claim tax deductions for depreciation of the business assets. The central legal question raised by this transaction is whether the lessor is properly characterized as the owner of the leased business assets for tax purposes, which would entitle it to the depreciation tax deductions.¹⁴⁶

IRS Simplification. To address this question, in IRS Publication 535 (Business Expenses), the IRS warns taxpayers that "[l]everaged lease transactions may not be considered leases."¹⁴⁷ As a result, it suggests that

¹⁴² See *supra* note 135 and accompanying text.

¹⁴³ See William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1152 (1974); Daniel I. Halperin, *Interest in Disguise: Taxing the "Time Value of Money"*, 95 YALE L.J. 506 (1986); Alvin C. Warren, Jr., *The Timing of Taxes*, 39 NAT'L TAX J. 499 (1986).

¹⁴⁴ INTERNAL REVENUE SERV., *supra* note 3, at 9.

¹⁴⁵ See James C. Ahlstrom, Iris C. Engelson & Victor Sirelson, *The Economics of Leveraged Leasing*, in 1 EQUIPMENT LEASING—LEVERAGED LEASING 6-2 (Ian Shrank & Arnold G. Gough, Jr., eds., 4th ed. 2008).

¹⁴⁶ For examples of judicial controversy over whether a lease should be respected, see *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978); *BB&T Corp. v. United States*, 523 F.3d 461 (4th Cir. 2008); *Transamerica Corp. v. United States*, 7 Cl. Ct. 441 (1985). For further discussion, see Charles I. Kingson, *The Continued Confusion over Tax Ownership*, 93 TAX NOTES 409 (2001); Alex Raskolnikov, *Contextual Analysis of Tax Ownership*, 85 B.U. L. REV. 431 (2005); Bernard Wolfman, *The Supreme Court in Lyon's Den: A Failure of Judicial Process*, 66 CORNELL L. REV. 1075 (1981) (criticizing *Frank Lyon Co.*).

¹⁴⁷ INTERNAL REVENUE SERV., *supra* note 3, at 9.

taxpayers should consider seeking a private letter ruling from the IRS addressing the tax treatment of the leveraged lease.¹⁴⁸ The IRS states that taxpayers must meet several requirements to secure a ruling that the transaction is, in fact, a lease: (1) “[t]he lessor must maintain a minimum unconditional ‘at risk’ equity investment in the property,” which the IRS defines as at least 20% of the property’s cost, (2) “[t]he lessee may not have a contractual right to buy the property from the lessor” at a discounted price, (3) “[t]he lessee may not invest in the property, except as provided” in other IRS guidance, (4) “[t]he lessee may not lend any money to the lessor to buy the property,” and (5) “[t]he lessor must show that it expects to receive” an economic profit, absent tax consequences, from the transaction.¹⁴⁹

Tax Law. While the IRS publication presents taxpayers with clear guidelines, the issue of whether a lease should be respected for tax purposes is highly contestable and fact-specific. In several cases, courts have rejected the IRS’s argument that the taxpayer failed to enter into a true lease merely because the taxpayer did not meet the guidelines described in IRS Publication 535. For instance, in *Estate of Thomas v. Commissioner*, the Tax Court rejected the IRS’s application of the 20% equity investment guideline.¹⁵⁰ In another decision, the Tax Court stated explicitly that it was not “obligated to adhere” to the IRS’s guidelines.¹⁵¹ Other judicial decisions have disregarded the IRS’s guideline that lessees may not lend money to the lessor without threatening the lessor’s ability to claim ownership of property.¹⁵² Indeed, summarizing courts’ reactions to the guidelines, one commentator has stated, courts “have not accorded [them] much significance either as a body of logic or as a viable summary of legal precedents.”¹⁵³

Taxpayer Effects. One could argue that IRS Publication 535 merely catalogues what the IRS requires in order to offer taxpayers a private letter ruling that the IRS will, in fact, treat a transaction as a lease. But by describing its own guidelines in Publication 535 without mentioning any of the judicial doubt about such guidelines, IRS Publication 535 creates a belt-and-suspenders

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 84 T.C. 412, 440 & n.51 (1985).

¹⁵¹ *Boyce v. Comm’r*, T.C. Summ. Op. 2010-100, at 4 (2010).

¹⁵² *See, e.g., Lansburgh v. Comm’r*, 54 T.C.M. 691, 697 (1987) (respecting lease where lessee provided loan to lessor); *L.W. Hardy Co. v. Comm’r*, 52 T.C.M. (CCH) 1540, 1552 (1987) (respecting lease where lessee provided loan to lessor); *see also* I.R.S. Tech. Adv. Mem. 8046013 (Aug. 8, 1980) (respecting lease where lessee agreed to reimburse lessor under certain circumstances).

¹⁵³ Toby Cozart, *Equipment Leasing: Substance and Form*, TAX MGMT. PORTFOLIO (BNA) 544 (2009).

type of advantage for the IRS's own view of the law. Specifically, the IRS uses Publication 535 to highlight its own guidelines as a distillation of the relevant factors that taxpayers should consider, despite conflicting case law. While some savvy taxpayers may go on to research judicial alternatives, many others may simply accept the IRS's view. This IRS simplification, thus, can shape some taxpayers' and advisors' perceptions of the tax law in ways that are consistent with the IRS's views.

2. *Adding Administrative Gloss to the Tax Law*

Another example of simplicity occurs when the IRS adds its own administrative gloss to the tax law as it describes the applicable tax law. As the examples below demonstrate, these additions of administrative gloss can result in representations of the tax law that deviate from relevant provisions of the Code, Treasury regulations, and case law.

a. *Capitalization of Improvements*

The IRS's description of the rules regarding capitalization of improvements is an illustration of the IRS's propensity to add administrative gloss to the tax law.¹⁵⁴ If a taxpayer incurs an expense "for new buildings or for permanent improvements or betterments made to increase the value of any property or estate," current law provides that the taxpayer may not deduct this expense currently, but instead must capitalize the expense and claim depreciation tax deductions, which reflect the decline in value of this capitalized expense each year, in accordance with a fixed schedule.¹⁵⁵ On the other hand, if the taxpayer incurs an expense merely to maintain or repair property, the taxpayer may be entitled to claim a full deduction immediately.¹⁵⁶ While the relevant statute directly addresses certain expenditures, such as costs incurred to construct a new building, it does not directly address the deductibility of most business expenses.¹⁵⁷

IRS Simplification. In its publication regarding capitalization, the IRS provides a general standard and several specific examples to assist taxpayers. The IRS states in Publication 535 (Business Expenses) that improvements,

¹⁵⁴ INTERNAL REVENUE SERV., *supra* note 3, at 3.

¹⁵⁵ I.R.C. § 263(a) (2012); *see also* I.R.C. §§ 167, 168 (2012) (depreciation).

¹⁵⁶ Treas. Reg. § 1.162-4(a) (2014) (allowing the taxpayer to deduct amounts paid for "repairs and maintenance to tangible property").

¹⁵⁷ I.R.C. § 263(a) (referring only to items for which "no deduction shall be allowed").

which must be capitalized, are “generally major expenditures.”¹⁵⁸ After providing this general standard, the IRS then says that “[s]ome examples are new electric wiring, a new roof, a new floor, new plumbing, bricking up windows to strengthen a wall, and lighting improvements.”¹⁵⁹

Tax Law. This example represents an addition of administrative gloss because the “major expenditure” standard does not appear in the tax law itself. Whether a taxpayer’s purchase or investment represents an improvement has historically been the subject of significant judicial controversy, with little uniformity in the decisions.¹⁶⁰ In 2013, in order to “reduce the controversy in this area,” the Treasury issued final regulations that directly address whether a taxpayer’s purchase of services or property is an improvement.¹⁶¹ Rather than setting forth a general standard for identifying an improvement, the regulations state that one must consider “all of a taxpayer’s particular facts and circumstances.”¹⁶² Specifically, the regulations provide that in order to determine whether an expense is necessitated by normal wear and tear, which is deductible, or a permanent improvement, which is subject to capitalization, the taxpayer should consider the condition of the property at issue immediately prior to and after its repair.¹⁶³ The regulations focus on whether the expenditure enables the taxpayer to keep its asset in normal operating condition, but do not apply the “major expenditure” standard of IRS Publication 535.¹⁶⁴

In addition, the examples that the IRS provides in Publication 535 elide the complexity of the underlying law. For instance, IRS Publication 535 describes “new electric wiring” as an example of the general standard that “[i]mprovements are generally major expenditures.”¹⁶⁵ This example is curious

¹⁵⁸ INTERNAL REVENUE SERV., *supra* note 3, at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g.*, *Moss v. Comm’r*, 831 F.2d 833 (9th Cir. 1987) (allowing business deduction for expenses incurred in conjunction with improvement plan); *Cinergy Corp. v. United States*, 55 Fed. Cl. 489 (2003) (allowing business deduction for encapsulation and removal of asbestos); *Norwest Corp. v. Comm’r*, 108 T.C. 265 (1997) (disallowing business deduction for asbestos removal); *Oberman Mfg. Co. v. Comm’r*, 47 T.C. 471 (1967) (allowing business deduction for roof removal, replacement, and expansion). As the Treasury has acknowledged, this area has “resulted in considerable controversy between taxpayers and the IRS over many years.” T.D. 9636, 2013-43 I.R.B. 331, 332.

¹⁶¹ T.D. 9636, 2013-43 I.R.B. 331, 332.

¹⁶² *Id.*

¹⁶³ Treas. Reg. § 1.263(a)-3(j)(2)(iv) (2016).

¹⁶⁴ A review of the final § 263 regulations does not show use of the term “major expenditure.” We confirmed our reading of the regulations with a Westlaw search for the terms: “major expenditure” or “major expenditures” w/20 improvement!.

¹⁶⁵ INTERNAL REVENUE SERV., *supra* note 3, at 3.

because there is a specific example in the regulations, which provides that replacement of as much as 30% of a building's electrical wiring does not represent a non-deductible restoration.¹⁶⁶ As another illustration, while IRS Publication 535 broadly states that "new plumbing" is an example of the general standard that "[i]mprovements are generally major expenditures,"¹⁶⁷ a specific example in the regulations describes how a taxpayer's replacement of eight out of twenty sinks in bathrooms does not constitute an improvement.¹⁶⁸ Indeed, several of the specific examples of business expenses that IRS Publication 535 describes as improvements that must be capitalized are also presented in specific examples in the applicable regulations as repairs that may be deducted immediately.¹⁶⁹

Taxpayer Effects. By adding administrative gloss to the tax law in its taxpayer publication regarding capitalization, the IRS may lead taxpayers to claim tax positions that are different from the treatment required by current law.

Returning to the example at the beginning of this Article, assume a chef, who owns his own restaurant, normally incurs a \$10,000 annual expense to repair copper piping in his restaurant. In one year, the chef incurs a \$20,000 expense to repair the pipes as a result of a global shortage of copper. Applying the IRS's standard in IRS Publication 535, the chef may reasonably conclude that as a result of its magnitude, the \$20,000 expense should be treated as a "major expenditure," which therefore is not deductible. However, applying the Treasury regulations' actual before-and-after approach, if the expense simply enables the chef to repair normal wear and tear to his business assets, the chef should be entitled to deduct the \$20,000 expense, even if it is substantially higher than the expense to repair the pipes in prior years.¹⁷⁰

Alternatively, assume the chef pays \$5000 to completely replace a brick oven in his restaurant, a small amount compared to all of his annual business expenses of \$200,000. Applying the "major expenditure" standard, it is possible that the chef would claim a deduction for this amount currently, as the amount only represents 2.5% of his annual business expenses.¹⁷¹ A review of the Treasury regulations, however, shows that this expense does not represent

¹⁶⁶ Treas. Reg. § 1.263(a)-3(k)(7) ex. 21 (2016).

¹⁶⁷ INTERNAL REVENUE SERV., *supra* note 3, at 3.

¹⁶⁸ Treas. Reg. § 1.263(a)-3(k)(7) ex. 23.

¹⁶⁹ *See, e.g.*, Treas. Reg. § 1.263(a)-3(k)(7) ex. 21 (wiring), ex. 23 (plumbing).

¹⁷⁰ Treas. Reg. § 1.263(a)-3(j)(2)(iv) (2016).

¹⁷¹ INTERNAL REVENUE SERV., *supra* note 3, at 3.

mere maintenance, and instead, should be capitalized rather than deducted currently.¹⁷²

As these scenarios show, the administrative gloss regarding capitalization in IRS Publication 535 can cause taxpayers to forego business expense deductions that may be allowable under the relevant regulations or, alternatively, to claim tax deductions for expenses that must be capitalized under the relevant regulations. In either case, applying the IRS's simplification may cause taxpayers to deviate from the applicable tax law.

b. Exclusion of Gain from Sale of Principal Residence

The IRS's guidance to taxpayers regarding the exclusion from taxable income of gain from the sale of a principal residence is another example of the IRS's addition of administrative gloss to the text of a statute or Treasury regulation.¹⁷³ Under current law, individual taxpayers can exclude a portion of their realized gains upon selling their principal residence (up to \$250,000 for single individuals and \$500,000 for married couples), if they meet certain requirements.¹⁷⁴ Namely, taxpayers must have owned and occupied the residence as their principal residence for at least two years during the five-year period immediately prior to the sale.¹⁷⁵ If taxpayers cannot meet this ownership and occupancy requirement, however, they can still receive partial gain exclusion if they can show that the reason for the sale is due to a "change in place of employment, health, or . . . [such other] unforeseen circumstances."¹⁷⁶ Based on this statutory language alone, taxpayers may have difficulty determining whether their reason for selling their home qualifies as any of the prescribed circumstances.

IRS Simplification. To assist taxpayers in making the determination of whether their sale is due to a "change in place of employment, health, or . . . [such other] unforeseen circumstances," the IRS points to important factors that can help taxpayers make the determination.¹⁷⁷ In IRS Publication 523 (Selling Your Home), for example, the IRS states that a sale may meet the statutory standard if the taxpayer faced "*significant* financial difficulty

¹⁷² See Treas. Reg. § 1.263(a)-3(d) (2016) (requirement to capitalize improvements).

¹⁷³ INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 523, SELLING YOUR HOME 5 (2015).

¹⁷⁴ I.R.C. §§ 121(a), (b) (2012).

¹⁷⁵ I.R.C. § 121(a).

¹⁷⁶ I.R.C. § 121(c)(2)(B).

¹⁷⁷ INTERNAL REVENUE SERV., *supra* note 173, at 4–5.

maintaining the home.”¹⁷⁸ As another important factor, the IRS describes that the sale may meet the statutory standard if the home “became *significantly* less suitable as a main home for [the taxpayer and the taxpayer’s] family for a specific reason.”¹⁷⁹ The IRS’s repeated use of the term “significant” in describing the important factors provides taxpayers with a mental shortcut for determining whether their reasons for selling their home meet the statutory standard of a sale due to a “change in place of employment, health, or . . . [such other] unforeseen circumstances.”¹⁸⁰

Tax Law. In creating this mental shortcut, however, the IRS has made a subtle, but potentially noteworthy, change to the relevant tax law. While IRS Publication 523 refers to “significant financial difficulty” and a “significantly less suitable” main home, the applicable Treasury regulations instead use the term “material” to describe these events.¹⁸¹ For instance, in the Treasury regulations that form the basis of the IRS’s statements in IRS Publication 523, the Treasury provides that a taxpayer may claim the partial gain exclusion if the “taxpayer’s financial ability to maintain the property is *materially* impaired.”¹⁸² Likewise, these regulations offer taxpayers the ability to claim the exclusion if the “suitability of the property as the taxpayer’s principal residence *materially* changes.”¹⁸³ By substituting the word “significantly” in the taxpayer publication for the word “materially,” the IRS has added its own gloss to factors that otherwise appear almost verbatim in the Treasury regulations.

Taxpayer Effects. The IRS’s substitution of the word “significantly” for the word “materially” could have different effects on taxpayers’ decisions. Whether the substitution causes taxpayers to be more likely to forego or claim the principal residence gain exclusion likely depends on the taxpayer’s sophistication with the tax law and whether the taxpayer is relying on a tax advisor.

For some taxpayers, especially those who do not have a sophisticated legal background, the change of terms may discourage them from claiming the principal residence gain exclusion. For example, a basic dictionary definition

¹⁷⁸ *Id.* at 5 (emphasis added).

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ I.R.C. § 121(c)(2)(B).

¹⁸¹ Treas. Reg. § 1.121-3(b) (2016).

¹⁸² Treas. Reg. § 1.121-3(b)(3) (emphasis added).

¹⁸³ Treas. Reg. § 1.121-3(b)(2) (emphasis added).

of “material” includes terms such as “relevant,”¹⁸⁴ while the definition of “significant” includes terms such as “momentous.”¹⁸⁵ It is possible that a taxpayer may perceive that a higher standard must be met in order to claim the principal residence gain exclusion than if the IRS had adopted the Treasury regulations’ “materially” language. The IRS publication may discourage such a taxpayer from claiming exclusions that the taxpayer may have taken based on the regulations.

On the other hand, taxpayers with a sophisticated legal background (or who have tax advisors) could conclude that the word “significantly” in the taxpayer publication creates a *lower* standard than the word “materially.” When addressing corporations’ internal financial reporting controls, the U.S. Securities & Exchange Commission has defined “significant deficiencies” as lesser problems than “material weaknesses.”¹⁸⁶ Similarly, in merger agreements, parties can exit signed deals if they discover a material, as opposed to a significant, adverse change, signifying again that, for corporate law purposes, material is a higher standard than significant.¹⁸⁷ Using this knowledge, taxpayers with a sophisticated legal background (or their advisors) may assume a lower standard is required by the taxpayer publication, relative to the standard set forth in regulations.

As this example illustrates, by substituting its own administrative gloss for the text in the applicable statute or regulations, the IRS may influence taxpayers’ views of the law in ways that may not be consistent with the actual tax law. Whether this causes taxpayers to be more or less likely to claim a tax benefit, the outcome may be different from that which Congress or the Treasury intended.

c. Multiple Individual Retirement Account Rollovers

When adding administrative gloss to the tax law in taxpayer publications, the IRS can also make changes that unambiguously benefit taxpayers, as revealed by a publication regarding individual retirement account (IRA) rollovers. Under current law, holders of IRAs, which are tax-favored savings

¹⁸⁴ *Material*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/material> (last visited Oct. 28, 2016).

¹⁸⁵ *Significant*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (5th ed. 2014).

¹⁸⁶ 17 C.F.R. § 240.12b-2 (2016); Definition of the Term Significant Deficiency, Release No. 33-8829, 72 Fed. Reg. 44924 (Aug. 9, 2007).

¹⁸⁷ See Andrew A. Schwartz, A “Standard Clause Analysis” of the Frustration Doctrine and the Material Adverse Change Clause, 57 UCLA L. REV. 789, 829–30 (2010).

accounts, can withdraw amounts from these accounts before reaching age 59 1/2 without triggering tax liability and a 10% early withdrawal tax penalty as long as the taxpayer deposits the withdrawn amounts directly into another IRA within sixty days (an “IRA rollover”).¹⁸⁸ While the statute clearly states that a taxpayer may complete this rollover process only once each year with respect to a particular IRA, it does not address whether a taxpayer who holds more than one IRA may complete multiple tax-free rollovers using multiple IRAs each year.¹⁸⁹

IRS Simplification. Starting in 1984, the IRS addressed this ambiguity by adding its own administrative gloss to the statutory language.¹⁹⁰ For thirty years in IRS Publication 590 (Individual Retirement Arrangements (IRAs)), the IRS stated that multiple IRA rollovers in a single tax year were permissible without resulting in tax or an early withdrawal tax penalty, even though this language did not appear in the statute itself.¹⁹¹ In stating this rule, the IRS parroted language from a proposed, but never finalized, Treasury regulation issued in 1981.¹⁹²

Tax Law. The Tax Court ultimately disagreed with the rule the IRS had set forth in Publication 590. In *Bobrow v. Commissioner*,¹⁹³ a prominent New York City tax lawyer, Alvan Bobrow, applied the tax treatment suggested by the IRS in IRS Publication 590.¹⁹⁴ Bobrow and his wife made multiple IRA rollovers in 2008.¹⁹⁵ Following the IRS’s description of the tax law at the time, the taxpayers treated these transactions as tax-free rollovers.¹⁹⁶ The Tax Court rejected the taxpayers’ tax treatment, ruling that the “plain language” of the relevant statute only permits taxpayers to participate in a single tax-free IRA rollover each year.¹⁹⁷

Following *Bobrow*, the IRS revised the taxpayer publication to match the Tax Court’s interpretation.¹⁹⁸ However, the IRS also announced that it would

¹⁸⁸ I.R.C. § 408(d)(3) (2012).

¹⁸⁹ I.R.C. § 408(d)(3)(B).

¹⁹⁰ See, e.g., INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 590, INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAs) 25–26 (2014).

¹⁹¹ *Id.* at 25.

¹⁹² Prop. Treas. Reg. § 1.408-4(b)(4)(ii), 46 Fed. Reg. 36,206 (July 14, 1981).

¹⁹³ No. 7022-11, T.C.M. 2014-21 (2014).

¹⁹⁴ *Id.* at 3–5.

¹⁹⁵ *Id.* at 4–5.

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.* at 12–13.

¹⁹⁸ I.R.S. Announcement 2014-15, 2014-16 I.R.B. 973, 973.

“not apply the *Bobrow* interpretation . . . to any rollover that involves an IRA distribution occurring before January 1, 2015.”¹⁹⁹ Consequently, the IRS will not challenge taxpayers who participated in multiple IRA rollovers in a single tax year prior to Publication 590’s revision in 2015.²⁰⁰

Taxpayer Effects. This example demonstrates how, at times, the IRS’s administrative gloss in taxpayer publications may be taxpayer favorable. Without question, the administrative gloss in IRS Publication 590 was advantageous to taxpayers, relative to the reading of the statute ultimately adopted by the *Bobrow* court. Moreover, as *Bobrow* exemplifies, taxpayer-favorable administrative gloss in IRS publications can even influence the tax planning and reporting decisions of sophisticated taxpayers, such as corporate tax lawyers.²⁰¹ This example also shows that when the IRS issues a taxpayer-favorable proposed Treasury regulation, it may restate this regulation in an IRS publication.²⁰² For most individuals, the restatement appears as though it is current law, because the IRS publication provides no indication that its source is merely a proposed Treasury regulation.²⁰³

3. *Failing to Fully Explain the Tax Law*

A final category of simplicity consists of descriptions of the tax law in IRS publications that omit discussion of relevant exceptions or that otherwise fail to fully explain the tax law. Several examples of these types of statements are described below.

a. *Bartering Deductions*

One example of an IRS description that fails to fully explain the tax law can be found in the context of bartering transactions. A bartering transaction involves paying for a good or service with another good or service. For instance, if a dentist requires the services of an electrician in order to maintain equipment in her office, she may pay for the electrician’s services by providing

¹⁹⁹ *Id.* at 974.

²⁰⁰ *Id.*; see also *IRA One-Rollover-Per-Year Rule*, INTERNAL REVENUE SERV., <http://www.irs.gov/Retirement-Plans/IRA-One-Rollover-Per-Year-Rule> (last updated Jan. 22, 2016).

²⁰¹ *Bobrow*, T.C.M. 2014-21, at 3 (explaining the taxpayer is “an attorney specializing in tax law”).

²⁰² INTERNAL REVENUE SERV., *supra* note 190, at 25–26; see also Janet Novack, *Gotcha! Tax Court Penalizes IRA Rollover that IRS Publication Says Is Allowed*, FORBES (Mar. 25, 2014, 11:47 AM), <http://www.forbes.com/sites/janetnovack/2014/03/25/gotcha-tax-court-penalizes-ira-rollover-that-irs-publication-says-is-allowed/#1b2deefc22a3> (noting restatement of text in Prop. Treas. Reg. § 1.408-4(b)(4)(ii) in IRS Publication 590 prior to 2014).

²⁰³ INTERNAL REVENUE SERV., *supra* note 190, at 25–26.

\$1000 worth of dental services (a molar root canal) to the electrician. Taxpayers engaged in bartering transactions such as these face two tax questions: (1) Must they include in income the goods or services that they have received; and (2) may they deduct from income the goods or services that they have provided?

IRS Simplification. The IRS addresses bartering exchanges in several taxpayer publications.²⁰⁴ Regarding the first question, inclusion in income, in IRS Publication 525 (Taxable and Nontaxable Income), the IRS states that taxpayers who receive property or services in a barter exchange “must include in [their] income, at the time received, the fair market value of property or services . . . receive[d] in bartering.”²⁰⁵ In other words, this statement clearly says that property or services received must be included in income. Regarding the second question, deductibility, the IRS provides an equally clear statement of the tax law. Specifically, in IRS Publication 535, the IRS states:

Payments in kind. If you provide services to pay a business expense, the amount you can deduct is limited to your out-of-pocket costs. *You cannot deduct the cost of your own labor.*²⁰⁶

This statement unambiguously informs taxpayers that they may not claim any tax deduction for the fair market value of their own labor in a barter exchange. Applying this description of the tax law to the earlier example, the dentist would have to include in income the \$1000 of electrical services received, but would not be entitled to claim an ordinary and necessary business expense for the \$1000 worth of dental services she provides, since the dental services she provides would be the “cost of [her] own labor.”

Tax Law. The IRS’s statement regarding a taxpayer’s obligation to include in income the fair market value of services received in a barter exchange is correct. Taxpayers are required to include in income not only cash received, but also “services, meals, accommodations, stock, or other property.”²⁰⁷ For this reason, the dentist who receives electrical services clearly must include the \$1000 of electrical services received in income.

The IRS’s statement regarding a taxpayer’s inability to deduct the cost of her own labor would be correct *if the taxpayer did not include the value of*

²⁰⁴ See INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 525, TAXABLE AND NONTAXABLE INCOME 20 (2015) [hereinafter PUBLICATION 525]; INTERNAL REVENUE SERV., *supra* note 3, at 4.

²⁰⁵ PUBLICATION 525, *supra* note 204, at 20.

²⁰⁶ INTERNAL REVENUE SERV., *supra* note 3, at 4 (emphasis added).

²⁰⁷ Treas. Reg. § 1.61-1(a) (2016).

services received in income. For instance, imagine that the dentist and electrician exchanged labor of equal value. The dentist also had to purchase some materials to provide the electrician with the molar root canal. Imagine further that, despite the clear tax law regarding including the electrical services in income, the dentist fails to include in income the electrical services received. In this case, the dentist's deduction should be limited to her out-of-pocket material costs, which, when added onto the value of the services she provided, exceeded the value of the electrical services received. Put differently, *if the dentist ignored the inclusion of labor income*, she should have to ignore the deduction of labor costs as well.

However, when discussing the deduction question, the IRS fails to explain that as long as (1) the dentist includes in gross income the \$1000 fair market value of the electrical services that she receives, and (2) the electrical services are ordinary and necessary expenses for her trade or business as a dentist, she should be able to deduct \$1000 for the fair market value of the dental services she provides to the electrician (on top of any out-of-pocket costs). To illustrate the reasoning underlying this result, if the electrician and the dentist had each performed their respective services for one another and also exchanged checks for \$1000, the dentist would be required to include the \$1000 received from the electrician and would be entitled to an ordinary and necessary business expense deduction for the \$1000 provided to the electrician even though the exchange of checks of equivalent amounts would have been meaningless.

Both judicial decisions and internal IRS memoranda support the deduction for the value of bartered services when the taxpayer includes the fair market value of services received. When addressing barter exchanges in Taxpayer Advice Memoranda, upon the request of an IRS director or area director, the IRS Office of Chief Counsel has stated that “[w]hen a taxpayer engages in a barter transaction, the transaction should be treated as if the taxpayer sold its own product or services at fair market value and then paid fair market value for the product or services of the other party.”²⁰⁸ In support of this rule, the memorandum cites several judicial decisions, including *United States v. General Shoe Corp.*²⁰⁹ and *Estate of Wood v. Commissioner.*²¹⁰ Applying this treatment to the example at hand, the dentist should be treated as selling her dental services to the electrician, resulting in an inclusion in income of \$1000,

²⁰⁸ I.R.S. Tech. Adv. Mem. 200147032 (Nov. 23, 2001).

²⁰⁹ 282 F.2d 9 (6th Cir. 1960).

²¹⁰ 39 T.C. 1 (1962).

and then using the proceeds of this hypothetical sale to purchase the electrician's electrical services, resulting in an ordinary and necessary business expense deduction of \$1000.

Taxpayer Effects. The IRS's presentation of the tax law regarding bartering exchanges nonetheless suggests to taxpayers that they are not entitled to ordinary and necessary business expense deductions for the value of their services provided. Many tax advice websites, popular press stories, and other taxpayer resources simply restate the IRS's unqualified statement from Publication 535 that taxpayers are not entitled to deduct the value of their own labor.²¹¹ By failing to more fully address the deductibility question in conjunction with an inclusion in income, as the IRS has done in internal memoranda,²¹² the IRS publications present a potentially misleading description of the tax law. While this omission has not received substantial public attention, some accountants have noted that the IRS's description of bartering transactions reveals that the IRS will "fully disclose . . . when to report income," but will leave it "up to [taxpayers] . . . to discover [their] deductions."²¹³ Moreover, the importance of this IRS simplification, if unchanged, is only likely to grow as more taxpayers turn to barter websites, such as TaskRabbit,²¹⁴ Tradeaway,²¹⁵ and other social media services to use bartering in order pay for business expenses.²¹⁶

b. Early Individual Retirement Account Distributions

Another example of an IRS description that does not fully explain the tax law can be found in the IRS publication regarding early distributions from IRAs.²¹⁷ As discussed earlier, if taxpayers under age 59 1/2 withdraw funds from an IRA, such as a § 401(k) plan, they must pay tax on the withdrawn amount plus a 10% early withdrawal tax penalty, unless certain exceptions

²¹¹ See *infra* note 256 and accompanying text.

²¹² I.R.S. Gen. Counsel Mem. 200411042 (Feb. 6, 2004); I.R.S. Tech. Adv. Mem. 200147032 (Nov. 23, 2001).

²¹³ William Brighenti, *Tax Deductions of Barter Exchanges: Barterer Beware of IRS's Posture on Barter Tax Deductions*, ACCOUNTANTS CPA HARTFORD, CONNECTICUT, LLC, <http://www.cpa-connecticut.com/barter-tax-deductions.html> (last visited Oct. 2, 2016).

²¹⁴ TASKRABBIT, <https://www.taskrabbit.com/> (last visited Oct. 2, 2016).

²¹⁵ TRADEAWAY, <http://www.tradeaway.com/> (last visited Oct. 2, 2016) ("The World's Largest Barter Site! Where CASH is NOT always King!").

²¹⁶ For further discussion, see Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989 (2016).

²¹⁷ INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 590-B, DISTRIBUTIONS FROM INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) 24–25 (2015).

apply.²¹⁸ One such exception is that the taxpayer receives distributions from an IRA in the form of an annuity. Specifically, current law provides that the 10% early withdrawal tax penalty does not apply to “part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of such employee and his designated beneficiary.”²¹⁹ Taxpayers who desire to withdraw funds from an IRA using an annuity arrangement, therefore, must determine whether they will satisfy the distribution requirements for such an annuity.

IRS Simplification. In providing guidance to taxpayers regarding this issue, the IRS states in IRS Publication 590-B:

You can receive distributions from your traditional IRA that are part of a series of substantially equal payments over your life (or your life expectancy), or over the lives (or the joint life expectancies) of you and your beneficiary, without having to pay the 10% additional tax, even if you receive such distributions before you are age 59 1/2. *You must use an IRS-approved distribution method and you must take at least one distribution annually for this exception to apply.*²²⁰

The IRS then goes on to describe three distribution methods, which the IRS previously approved as distribution methods in IRS Notice 89-25.²²¹ Moreover, the taxpayer publication clearly implies that these are the only IRS-approved distribution methods. The publication does so by describing one of the three methods, and then explaining that there are “two other IRS-approved distribution methods that you can use,” followed by a short discussion of them.²²² By negative implication, there would appear to be no other IRS-approved distribution methods. As a result, the publication clearly implies to taxpayers that, in order to meet the statutory annuity exception, they must use one of these three distribution methods.

Tax Law. While the IRS publication references three distribution methods that it has pre-approved and implies that taxpayers must use one of these to meet the statutory annuity exception, in reality, the IRS has allowed taxpayers to use additional distribution methods. In several private letter rulings, the IRS

²¹⁸ I.R.C. §§ 72(t)(1), 408(d)(1) (2012).

²¹⁹ I.R.C. § 72(t)(2)(A)(iv).

²²⁰ INTERNAL REVENUE SERV., *supra* note 217, at 25 (emphasis added).

²²¹ *Id.*

²²² *Id.*

has approved alternative distribution methods proposed by taxpayers.²²³ Further, in more technical guidance than IRS publications, the IRS has conceded that taxpayers may use distribution methods other than these three methods. In this technical guidance, the IRS states that the three methods of distribution “do not represent the only distribution methods which will satisfy the requirements of section 72(t)(2)(A)(iv) of the Code.”²²⁴ This concession, of course, is in direct contravention of IRS Publication 590-B.

Taxpayer Effects. This example illustrates how the IRS may create safe harbors in administrative guidance and then later, in taxpayer publications, imply—or explicitly state—that these safe harbors represent the only possible methods for complying with the tax law. By omitting discussion of other distribution possibilities and including the words “you must,”²²⁵ the IRS dramatically limits the potential distribution options that most taxpayers will consider. Many taxpayers will only participate in annuity distributions that use one of the “IRS-approved” distribution methods. Others may choose not to participate in annuity arrangements if they do not comply with one of the IRS-approved methods. And some taxpayers who participate in IRA annuities that do not match one of the IRS-approved distribution methods may pay the 10% early withdrawal tax penalty, even though they are not necessarily required to do so under the tax law.²²⁶

c. *Characterization of Activity as Profit-Seeking*

A final example of an IRS simplification that does not fully explain the tax law is the IRS’s description of factors that determine whether an activity represents a profit-seeking activity.²²⁷ Taxpayers are entitled to claim deductions for ordinary and necessary expenses of their profit-seeking activities.²²⁸ However, if taxpayers pursue activities that are “not engaged in for profit,” such as hobbies and other recreational pursuits, they may only deduct expenses to the extent of any income actually generated by these activities.²²⁹ A key question a taxpayer faces when determining whether to claim ordinary and necessary expenses, consequently, is whether the

²²³ See, e.g., I.R.S. Priv. Ltr. Rul. 201030038 (May 5, 2010); I.R.S. Priv. Ltr. Rul. 200943044 (Jul. 28, 2009); I.R.S. Priv. Ltr. Rul. 9008073 (Nov. 30, 1989).

²²⁴ I.R.S. Priv. Ltr. Rul. 9008073 (Nov. 30, 1989).

²²⁵ E.g., INTERNAL REVENUE SERV., *supra* note 217, at 25.

²²⁶ I.R.C. § 72(t) (2012).

²²⁷ INTERNAL REVENUE SERV., *supra* note 3, at 5.

²²⁸ I.R.C. § 162(a) (2012).

²²⁹ I.R.C. § 183(a) (2012); Treas. Reg. § 1.183-2(b) (2016).

taxpayer's activity constitutes a profit-seeking activity, or, alternatively, an activity "not engaged in for profit."²³⁰

IRS Simplification. The IRS advises taxpayers that a variety of factors affect whether an activity should be classified as profit seeking. In IRS Publication 535 (Business Expenses), the IRS includes a list of relevant factors that taxpayers should consider, such as whether: "[y]ou carry on the activity in a businesslike manner"; "[y]ou depend on the income for your livelihood"; "[y]our losses are due to circumstances beyond your control (or are normal in the start-up phase of your type of business)"; "[y]ou change your methods of operation in an attempt to improve profitability"; and "[y]ou were successful in making a profit in similar activities in the past."²³¹

Tax Law. Several of the factors in the IRS's taxpayer publication differ from those listed in the applicable Treasury regulations. For example, the IRS lists as a factor in IRS Publication 535 whether "[y]ou depend on the income for your livelihood."²³² The Treasury regulations' discussion of this factor is more nuanced. The Treasury regulations label this factor as "[t]he financial status of the taxpayer," and describe, for instance, that:

Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved.²³³

Compared to this more nuanced approach, the taxpayer publication's simpler summary is a much starker inquiry.

Taxpayer Effects. By not fully explaining the factors in the Treasury regulations, the IRS may cause some taxpayers to conclude that an activity represents a hobby, while the Treasury regulations may provide the taxpayer with greater latitude to characterize it as a business.

For instance, imagine that a stay-at home father has recently started a class for children at the local town center. The class will guide children in how to launch their own, self-designed initiatives (such as recycling programs or even money-making businesses). While parents will pay for their children to attend the class, this activity still results in various expenses, which the father will pay

²³⁰ I.R.C. § 183(c) (2012).

²³¹ INTERNAL REVENUE SERV., *supra* note 3, at 5.

²³² *Id.*

²³³ Treas. Reg. § 1.183-2(b)(8) (2016).

for out of pocket. On a net basis, the father hopes he will make a little profit from the class, but, regardless, almost all of his family's income will still come from his wife's job.

If the father looks solely to IRS Publication 535 to determine whether his expenses from running this class are deductible, he may conclude they are not. He does not "depend" on the income from the class for his "livelihood."²³⁴ He expects to make only a small amount from the class, and his wife's salary will continue to provide for his family's needs. However, if the father applied the more nuanced inquiry from the Treasury regulations, he may reach a different conclusion. While he does have substantial sources of income from other activity (his wife's job), the expenses from the activity are not generating substantial tax benefits.²³⁵ There is also a strong argument that the class does not have substantial personal or recreational elements involved.²³⁶ Many people provide classes (such as tutoring or music lessons) to local children as a source of additional income, rather than as a form of personal recreation. Applying the Treasury regulation's fuller explanation, therefore, the father may be more likely to conclude that running the class is a profit-seeking activity, yielding more beneficial tax treatment for his expenses. In terms of aggregate impact, especially in light of the vast number of activities that taxpayers could potentially claim to be "engaged in for profit," IRS descriptions that cause taxpayers to conclude their activities are hobbies can yield substantial revenue savings for the government and reduced tax enforcement and litigation costs for the IRS.

C. *Taxpayer Exposure to Simplicity*

Individuals regularly encounter the types of simplicity described above when making decisions regarding whether and how to comply with the tax law. According to the IRS, approximately 56% of individuals retain the assistance of third-party advisors to prepare their tax returns and 34% of individuals use tax preparation software.²³⁷ The remaining 10% of individuals prepare their annual tax returns without assistance.²³⁸ As this subpart demonstrates, both

²³⁴ INTERNAL REVENUE SERV., *supra* note 3, at 5.

²³⁵ Treas. Reg. § 1.183-2(b)(8).

²³⁶ *Id.*

²³⁷ *Protecting Taxpayers from Incompetent and Unethical Return Preparers: Hearing Before the S. Comm. on Fin.*, 113th Cong. (2014) (testimony of John A. Koskinen, Comm'r of Internal Revenue Service), <http://www.finance.senate.gov/imo/media/doc/Koskinen%20Testimony.pdf>.

²³⁸ *Id.*

individuals who prepare their annual tax returns without assistance *and* those who rely on third-party advisors or other sources for assistance are exposed to simplicity in IRS publications.

Taxpayers who prepare their own individual income tax returns rely extensively on IRS publications, and IRS simplifications embedded within them. Individuals who do not wish to pay an accountant or purchase software often rely on IRS publications “to assist [them] in meeting their tax obligations.”²³⁹ For example, the instructions that accompany most IRS forms, such as IRS Form 1040, frequently refer taxpayers to IRS publications that address the content of the forms using plain language.²⁴⁰ Further, in 2014, 83% of taxpayers reported that IRS publications were “very or somewhat valuable” as a source of tax advice or information.²⁴¹ Indeed, taxpayers vocally criticized the IRS’s 2015 announcement that, as a result of budget cuts, the agency would no longer deliver printed copies of IRS publications to public libraries.²⁴²

Likewise, taxpayers who rely on other individuals or services to prepare their tax returns are also affected by the IRS simplifications. These taxpayers consult sources such as commercial tax preparation software, tax accountants and tax return preparers, secondary source publications, and the IRS itself. As the following examples illustrate, taxpayers who receive advice from these sources are often indirectly exposed to the simplicity of IRS publications.

Tax Preparation Software. Each year, over forty million U.S. taxpayers use commercial tax preparation software, such as Intuit’s TurboTax, to complete and file their tax returns.²⁴³ In addition to noting that “IRS publications can help fill in the gaps and ease your frustrations when preparing your tax return,”²⁴⁴ TurboTax provides users with access to more than 700 tax

²³⁹ TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2011-40-070, THE INTERNAL REVENUE SERVICE PROVIDES HELPFUL AND ACCURATE TAX LAW ASSISTANCE, BUT TAXPAYERS EXPERIENCE LENGTHY WAIT TIMES TO SPEAK WITH ASSISTORS 21 (2011).

²⁴⁰ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CATALOG NO. 24811V, 1040 INSTRUCTIONS 18 (2015) (“For details, see Pub. 501.”).

²⁴¹ IRS OVERSIGHT BOARD, 2014 TAXPAYER ATTITUDE SURVEY 15 (2014).

²⁴² See *Tax Forms Outlet Program (TFOP)*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/tax-forms-outlet-program-tfop> (last updated Oct. 3, 2015). While taxpayers may still print copies of the IRS publications themselves at public libraries for a per-page fee, some critics responded that the change in policy will result in an “unfair burden” and “inconvenien[ce].” James Niedzinski, *IRS Cuts Back on Distribution of Tax Forms*, EAGLE-TRIBUNE (Jan. 23, 2015), http://www.eagletribune.com/news/new_hampshire/irs-cuts-back-on-distribution-of-tax-forms/article_a13fc21f-68d8-5507-9653-5c544fec3eea.html.

²⁴³ See *Protecting Taxpayers*, *supra* note 237.

²⁴⁴ Video: *What Are IRS Publications?*, INTUIT TURBOTAX, <https://turbotax.intuit.com/tax-tools/tax-tips/IRS-Tax-Forms/Video—What-Are-IRS-Publications-/INF14668.html> (last visited Oct. 2, 2016).

professionals who frequently restate the IRS simplifications through online and telephone advice.²⁴⁵ For instance, just as the IRS notes that refinancing points related to a home mortgage must be amortized without acknowledging contradictory case law,²⁴⁶ TurboTax advisors inform users that “you can deduct the points you pay to get the new loan *over the life of the loan*.”²⁴⁷ As another example, TurboTax advisors repeat the IRS’s administrative gloss that an ordinary and necessary business expense is one that is “common and accepted” in the taxpayer’s industry, despite the lack of uniform judicial treatment of this issue.²⁴⁸ TurboTax states that users’ expenses “must be what the IRS calls ‘ordinary and necessary.’ This means the item or service is common and accepted in your line of work and is appropriate and helpful to your job.”²⁴⁹ The reference to the IRS leaves little doubt that, in crafting this description of the test for the deductibility of business expenses, TurboTax advisors have drawn directly on IRS Publication 535, discussed earlier.²⁵⁰ As these examples reveal, taxpayers who use TurboTax often receive advice that reiterates IRS simplifications.

The fact that commercial tax preparation software, like TurboTax, often reiterates IRS simplifications is not surprising. The firms that sell such software have incentives to encourage their customers to adopt the IRS’s approach. Intuit, for instance, provides purchasers of TurboTax with an “[a]udit [s]upport [g]uarantee.”²⁵¹ The TurboTax user agreement provides that if the user is subject to an IRS audit, Intuit will provide free audit guidance from a trained tax professional, who will answer all audit-related questions.²⁵² If the user is not satisfied with this audit support guidance, Intuit will refund the user’s purchase price paid for the TurboTax software.²⁵³ As a result of this guarantee, increased IRS audits of TurboTax users pose a threat to Intuit’s

²⁴⁵ See Margaret Collins, *TurboTax Offers Live Tax Advice to Lure Clients from H&R Block*, BLOOMBERG TECH. (Feb. 14, 2012, 12:01 AM), <http://www.bloomberg.com/news/articles/2012-02-14/turbotax-army-of-tax-guides-offers-free-aid-to-lure-clients-from-h-r-block>.

²⁴⁶ See *supra* notes 136–41 and accompanying text.

²⁴⁷ *Deducting Mortgage Interest FAQs*, INTUIT TURBOTAX, <https://turbotax.intuit.com/tax-tools/tax-tips/Home-Ownership/Deducting-Mortgage-Interest-FAQs/INF12051.html> (last visited Oct. 2, 2016) (emphasis added).

²⁴⁸ See *supra* notes 119–26 and accompanying text.

²⁴⁹ Jeremy Vohwinkle, *What Are Job-Related Tax Deductions?*, INTUIT TURBOTAX (Apr. 9, 2012), <http://blog.turbotax.intuit.com/tax-deductions-and-credits-2/what-are-job-related-tax-deductions-9307/>.

²⁵⁰ See *supra* notes 115–18 and accompanying text.

²⁵¹ *Audit Support Guarantee*, INTUIT TURBOTAX, <https://turbotax.intuit.com/corp/guarantees.jsp> (last visited Oct. 2, 2016).

²⁵² *Id.*

²⁵³ *Id.*

bottom line. Since taxpayers who adopt the IRS's approach likely face a lower risk of IRS audit, Intuit has a strong economic motivation to encourage its users to adopt these positions, even when they are less taxpayer-favorable than the underlying tax law.

Tax Accountants and Return Preparers. While certified public accountants and other tax return preparers are more knowledgeable than individuals with no tax expertise, they are nonetheless also affected by the simplicity in IRS publications. For example, while some accountants have questioned²⁵⁴ the IRS's statement in IRS Publication 535 that taxpayers "cannot deduct the cost of [their] own labor"²⁵⁵ in bartering exchanges, many have repeated this statement in their advice to current and prospective clients. Some rephrase the IRS simplification (e.g., "[t]he cost of your own labor is not a business expense—because you did not pay anyone for it"²⁵⁶). Others repeat the IRS's own language that deductions are limited to out-of-pocket expenses rather than labor.²⁵⁷ As another illustration, some tax accountants reiterate the IRS's statement in IRS Publication 523, described earlier,²⁵⁸ that taxpayers may only claim the principal residence gain exclusion if they have experienced a "significant financial difficulty."²⁵⁹ These advisors' use of the term "significant," rather than the Treasury regulations' use of "material," confirms that they have parroted the language from the IRS publication in their advice to clients.²⁶⁰ And certified public accountants regularly define terms and explain issues by referring clients to specific IRS publications.²⁶¹ Third-party tax advice, especially from accountants and tax return preparers, thus frequently reinforces the simplicity of IRS publications.

²⁵⁴ See, e.g., Brighenti, *supra* note 213.

²⁵⁵ *Supra* note 206 and accompanying text.

²⁵⁶ *Where Do I Deduct All My Business Expenses?*, IRS HELP—MICHAEL PLAKS, EA (Mar. 23, 2016), <http://www.michaelplaks.com/business-taxes/business-expenses>.

²⁵⁷ See, e.g., Rachel Brenke, *Tax Issues with Bartering Photography Services*, THELAWTOG (Mar. 24, 2015), <http://www.thelawtog.com/tax-issues-with-bartering-photography-services/>; *Tips for Bartering*, TAXACT, <https://www.taxact.com/tax-information/tax-topics/tips-for-bartering.asp> (last visited Oct. 2, 2016).

²⁵⁸ See *supra* notes 173–80 and accompanying text.

²⁵⁹ INTERNAL REVENUE SERV., *supra* note 173, at 5; see, e.g., WillMc1, *Comment to Would My Work Situation Qualify for House Sale Tax Exemption?*, H&R BLOCK: THE COMMUNITY (Aug. 16, 2015, 1:18 PM), http://community.hrblock.com/t5/All-Things-Tax/Would-my-work-situation-qualify-for-House-Sale-tax-exemption/td-p/67789#.Vg3UQ_IvHx.

²⁶⁰ See *supra* notes 177–80 and accompanying text.

²⁶¹ See, e.g., Jason Blumeron, *What Expenses Can I Deduct in My Business (Per the IRS)?, Part 1 of 3*, BLUMER (Jun. 24, 2014), <https://www.blumerpcas.com/blog/what-expenses-can-i-deduct-in-my-business-per-the-irs-part-1-of-3> ("These are define[d] in Publication 535 from the IRS.").

Structural causes also explain why many accountants and tax return preparers rely on IRS publications. Accountants and tax return preparers receive professional training that relies heavily on IRS publications. The certification exam for certified public accountants frequently includes questions regarding specific IRS publications.²⁶² Likewise, in creating a “return preparer competency exam” for individual tax return preparers, the IRS recently announced that it would allow individuals taking this exam to have “electronic access to IRS Publication 17, *Your Federal Income Tax*, during the proceedings.”²⁶³ And every IRS-enrolled agent, the highest credential awarded by the IRS, must demonstrate extensive knowledge of IRS publications. Individuals who seek this special status must pass a three-part comprehensive exam prepared by the IRS.²⁶⁴ The IRS advises individuals taking this examination to review several IRS publications, including IRS Publication 17 (*Your Federal Income Tax*) and IRS Publication 535 (*Business Expenses*), among several others.²⁶⁵ As a result of their training and certification requirements, accountants and tax return preparers regularly consult IRS publications as a source of the tax law.

Secondary Sources. Taxpayers are also indirectly exposed to the IRS’s statements in IRS publications through secondary source tax advice publications. For example, *J.K. Lasser’s Your Income Taxes*, one of the best-selling annual tax return preparation publications, contains dozens of references to specific IRS publications in support of the guidance described.²⁶⁶ Other popular tax return preparation publications contain direct references to the IRS simplifications (e.g., “According to IRS Publication 535 . . . , a business expense must be . . .”).²⁶⁷ And even the secondary resources that tax accountants and lawyers use restate IRS simplifications as though they are law. As an example, Bloomberg BNA’s *Tax Management Portfolios*, which are often consulted by tax professionals, contain statements such as “given the IRS

²⁶² See, e.g., *CPA CPE Tax Courses*, PLATINUM PROF. SERVS., <https://www.platinumcourses.com/course/category.php?id=1> (last visited Oct. 2, 2016) (“Using actual IRS Publications, a series of 145 questions will guide you through each tax subject . . .”).

²⁶³ Michael Beller, *IRS Will Hold Off on Preparer Fingerprinting Requirements*, 133 TAX NOTES 808, 809 (Nov. 14, 2011).

²⁶⁴ *Enrolled Agent Information*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information> (last updated Apr. 22, 2016).

²⁶⁵ See INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 1470, PACKAGE FOR THE SPECIAL ENROLLMENT EXAMINATION 7 (1993).

²⁶⁶ J.K. LASSER’S YOUR INCOME TAX 2014 (Prof’l ed. 2013).

²⁶⁷ MARTHA MAEDA, HOW TO OPEN & OPERATE A FINANCIALLY SUCCESSFUL INDEPENDENT RECORD LABEL 84 (2012).

position announced in IRS Pub. 936, caution is warranted in deducting capitalized points where the same lender provides the new financing.”²⁶⁸ The simplicity that originates in IRS publications thus spreads to individuals through influential secondary source publications.

IRS Taxpayer Assistance. Finally, IRS representatives who directly assist individuals in preparing their annual tax returns reiterate descriptions from IRS publications. IRS representatives who assist taxpayers at taxpayer assistance centers and over the IRS help line receive special training in the “publication method.”²⁶⁹ When individuals approach these representatives with a question about their tax returns, the publication method requires the representatives to “obtain the appropriate publication, discuss specific information related to the topic, ask appropriate questions to obtain facts, and respond to the taxpayer’s issue or question.”²⁷⁰ When addressing individual taxpayers’ requests, these representatives quote from or refer individuals to IRS publications that contain IRS simplifications.²⁷¹ Further, in the past, if so requested by taxpayers, IRS representatives at taxpayer assistance centers would complete qualified individual taxpayers’ returns for them.²⁷² When completing such returns, the IRS required its taxpayer assistance representatives to use existing IRS publications when determining taxpayers’ eligibility for various deductions and credits.²⁷³

As this discussion illustrates, individual taxpayers are continually exposed to the simplicity in IRS publications, whether they prepare their tax returns directly, utilize tax return preparation software, or seek assistance from accountants and professional tax return preparers. This pervasive exposure means that the IRS has significant power to shape taxpayers’ views of the tax law through IRS publications. Whether and how the IRS should possess and exercise this power is an important question that the next Part will address.

²⁶⁸ *Tax Implications of Home Ownership*, TAX MGMT. PORTFOLIO (BNA) 594 (2013).

²⁶⁹ See TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2004-40-025, IMPROVEMENTS ARE NEEDED TO ENSURE TAX RETURNS ARE CORRECTLY PREPARED AT TAXPAYER ASSISTANCE CENTERS 11 (2003).

²⁷⁰ *Id.*

²⁷¹ See TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 239, at 21.

²⁷² *Id.*

²⁷³ *Id.* Budget cuts have caused the IRS to suspend such programs temporarily. I.R.S. News Release IR-2015-97 (July 15, 2015), <https://www.irs.gov/pub/irs-news/IR-15-097.pdf>.

III. IS SIMPLEXITY SOUND?

Should the IRS use plain language to explain complex, often ambiguous tax law to the public? As this Part argues, while simplicity offers a number of potential tax administration and compliance benefits, it can also threaten vital values of democratic governance and fairness. Fundamentally, unearthing the concept of simplicity lays bare a trade-off between understandability and accurate representation of the law. While there is no simple way to resolve this trade-off, recognizing that it exists makes it possible to evaluate whether simplicity is too high or too low in a given situation. After highlighting the trade-off at stake, this Part considers several strategies for making simplicity more apparent (thereby making it easier to evaluate it in a given case), which can also help maximize the benefits of simplicity while minimizing its drawbacks. This Part then concludes by predicting the likely emergence of simplicity in several oft-discussed future tax compliance initiatives: government-prepared tax returns, interactive tax return filing, and increased third-party reporting.

A. *Benefits*

Simplicity offers a number of potential tax compliance and administration benefits: it enables the IRS to summarize complex tax law in understandable terms for many taxpayers, reveals the IRS's likely litigating positions to the public, and supports the government's efforts to raise tax revenue.

1. *Tax Law in Plain Language*

Where they describe the tax law accurately, IRS simplifications can help taxpayers understand the tax law as it exists in the Internal Revenue Code, Treasury regulations, case law, and other authorities. For example, if an individual receives a cash dividend from a public corporation, the individual will need to determine whether he has held the stock long enough to receive a preferential tax rate on "qualified dividend income."²⁷⁴ A review of the Internal Revenue Code will cause him to read multiple provisions in search of the answer and to insert figures from one statutory provision into the text of another provision.²⁷⁵ In IRS Publication 17 (Your Federal Income Tax), however, the taxpayer will read a clear distillation of the law, which states simply that he must have "held the stock for more than 60 days during the 121-

²⁷⁴ I.R.C. § 1(h)(11) (2012).

²⁷⁵ I.R.C. § 1(h)(11)(B)(iii) (2012) (directing taxpayers to I.R.C. § 246(c)).

day period that begins 60 days before the ex-dividend date.”²⁷⁶ This shortcut can enable the taxpayer to complete his tax return more efficiently than if he consulted the Internal Revenue Code directly, assuming he could even access the text. Further, this IRS simplification can streamline the inquiry for third parties who may be assisting taxpayers with their tax return filings, thereby reducing taxpayers’ costs of filing.

2. *Visibility into the IRS’s Views of the Tax Law*

IRS simplifications also reveal the IRS’s views of the tax law to taxpayers and their advisors. Despite their limited status as legal authority,²⁷⁷ IRS simplifications provide taxpayers with an advance view of how the IRS would likely respond to a specific tax position during audits or litigation. Especially in situations where the statutory text is ambiguous, such as the meaning of “ordinary” business expenses under § 162(a) of the Code,²⁷⁸ IRS simplifications provide insights about the IRS’s probable reactions before taxpayers file their tax returns. Taxpayers can respond to IRS simplifications by foregoing the tax position at issue, and the potentially resulting tax controversy, or conversely, by claiming the tax position and preparing to contest the IRS’s interpretation.

IRS simplifications can mirror and help amplify the IRS’s duty to disclose information about the tax system in other contexts. Under § 6110 of the Code, the IRS is required to publicly disclose all “written determination[s],” such as private letter rulings, tax-exempt determination letters, and technical advice memoranda, among others.²⁷⁹ Congress enacted this provision to prevent the IRS from creating “secret law” in internal communications and in private letter rulings, which would only be accessible to “a few major tax practitioners” who frequently interacted with IRS officials.²⁸⁰ IRS simplifications can be seen as an extension of Congress’s desire to prevent the IRS from shielding its own

²⁷⁶ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 17, TAX GUIDE 2014, 65 (2015).

²⁷⁷ Taxpayers cannot rely on these statements as legal authority (though they may raise their reliance as a defense to certain tax penalties, *see* Treas. Reg. § 1.6664-4(a) (2014)). *See* Adler v. Comm’r, 330 F.2d 91, 93 (9th Cir. 1964); Miller v. Comm’r, 114 T.C. 184, 195 (2000); Zimmerman v. Comm’r, 71 T.C. 367, 371 (1978). For a recent discussion, *see* Cauble, *supra* note 41. *But see* Shapiro, *supra* note 41 (offering contrary arguments).

²⁷⁸ *See supra* notes 112–26 and accompanying text.

²⁷⁹ I.R.C. § 6110 (2012).

²⁸⁰ OFFICE OF TAX POL’Y, DEP’T OF THE TREASURY, 1 REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS 27 (2000); *see also* S. REP. NO. 94-938, at 305 (2d Sess. 1976).

legal interpretations from public view. While many forms of written determinations, such as Chief Counsel Advice memoranda, state the IRS's view of the tax law in technical terms understandable to tax lawyers and experienced accountants,²⁸¹ IRS simplifications present the IRS's views to the public.

IRS simplifications can also help ensure that the IRS's own employees administer the law in accordance with high level, centralized views of it. As scholars have argued, agencies function more effectively "when central officials can advise responsible bureaucrats how they should apply agency law."²⁸² The IRS has nearly 90,000 employees²⁸³ and IRS publications explain the agency's view of the tax law to many of its employees who must administer the tax law. Whether the employees provide taxpayer service through the IRS help line or review returns in field offices, the IRS regularly directs these employees to IRS publications rather than the Internal Revenue Code or Treasury regulations.

3. Administration and Revenue Benefits

Last, IRS simplifications can reduce the cost of tax administration and potentially result in increased tax revenue. As discussed previously, some IRS simplifications can cause taxpayers to forego certain tax benefits or to refrain from pursuing aggressive tax positions. For example, taxpayers who follow some of the IRS simplifications discussed earlier may alter their tax planning behavior by foregoing deductions for ordinary and necessary business expenses,²⁸⁴ amortizing mortgage refinancing points,²⁸⁵ capitalizing certain expenditures,²⁸⁶ declining to enter into leveraged leases,²⁸⁷ forfeiting the principal residence gain exclusion,²⁸⁸ paying the 10% IRA early withdrawal tax penalty,²⁸⁹ foregoing deductions on barter exchanges,²⁹⁰ and refraining

²⁸¹ See *About IRS Written Determinations*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/About-IRS-Written-Determinations> (last updated Dec. 4, 2015).

²⁸² Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001).

²⁸³ See Jonathan H. Adler, *How the IRS Has Changed Since 1974*, WASH. POST: VOLOKH CONSPIRACY (Apr. 2, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/02/how-the-irs-has-changed-since-1974/?utm_term=.e68b3f0d395a (discussing former IRS Chief Counsel Don Korb's speech).

²⁸⁴ See *supra* notes 127–29 and accompanying text.

²⁸⁵ See *supra* notes 142–43 and accompanying text.

²⁸⁶ See *supra* notes 165–72 and accompanying text.

²⁸⁷ See *supra* note 153 and accompanying text.

²⁸⁸ See *supra* notes 184–87 and accompanying text.

²⁸⁹ See *supra* notes 217–26 and accompanying text.

from claiming losses by characterizing an activity as a hobby rather than a business,²⁹¹ among others. To the extent that these IRS simplifications and others encourage taxpayers to adopt the IRS's interpretations of the tax law despite the existence of contrary legal authority, simplicity bolsters the IRS's ability to raise revenue and reduces its need to expend resources contesting alternative taxpayer positions.

In addition, some commentators have theorized that the IRS's customer service efforts, including IRS simplifications, could generate feelings of reciprocity toward the IRS among individual taxpayers, resulting in increased voluntary compliance. Scholars such as Kathleen DeLaney Thomas have contended that by providing taxpayers with increased guidance and other "user-friendly" taxpayer services, the IRS may encourage taxpayers to report and pay their tax liability correctly.²⁹² Further, government officials have reported that if the IRS fails to provide adequate taxpayer service, including in IRS publications and other sources, individual voluntary compliance will erode over time.²⁹³ These assertions suggest that the IRS's use of plain language, an act of taxpayer service, could cause some individual taxpayers to reciprocate the IRS's service by increasing their own tax compliance.²⁹⁴

B. Threats

Despite the potential tax administration benefits of simplicity, it can also promote opacity rather than transparency regarding the tax law and lead to inequitable benefits and burdens among different taxpayers who act on IRS simplifications in ways that, in each case, are unlikely to be policed effectively by administrative law.

1. Reduced Tax Transparency

In contrast to the objective of Sunstein and others of using plain language to increase open government,²⁹⁵ simplicity can diminish, rather than promote, tax transparency. Tax transparency can be defined broadly as the government's

²⁹⁰ See *supra* notes 211–16 and accompanying text.

²⁹¹ See *supra* note 236 and accompanying text.

²⁹² Thomas, *supra* note 32.

²⁹³ NAT'L TAXPAYER ADVOCATE, *supra* note 9, at 36.

²⁹⁴ See, e.g., Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 *FORDHAM L. REV.* 961 (2006); Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 *CONN. L. REV.* 431 (2008). For a contrasting view, see Osofsky, *supra* note 38.

²⁹⁵ See *supra* notes 75–92.

openness to the public regarding its tax rules, agency interpretations, decision-making processes, and enforcement practices.²⁹⁶ Simplicity can result in opacity rather than transparency of the tax law and tax administration in two ways. First, in terms of process, as a result of inadequate signaling of changes, explanations, and disclosure, the public cannot easily observe whether and why the IRS has used simplifying language to recast the tax law. Second, in terms of effect, ironically, simplicity may obscure individuals' knowledge of the underlying tax law, as it exists in the Internal Revenue Code, Treasury regulations, and case law.

Changes. When the IRS simplifies the tax law in IRS publications, it provides virtually no signal to the reader that it has made changes to the underlying tax law or that it has described its own view of the applicable tax law. For example, the IRS does not indicate in IRS Publication 525 that its explanation regarding bartering deductions directly contradicts applicable tax law or the IRS's own internal memoranda on the topic.²⁹⁷ The absence of signals of changes to the underlying tax law in IRS publications differs starkly from government transparency in other areas. In both houses of Congress, bills that amend the law must provide a "comparative print," which highlight how the bills strike out existing text and insert new text.²⁹⁸ As one legislative official has described the rationale for these rules, the "comparative print can be of great aid in ascertaining the intended effect of amendatory legislation."²⁹⁹ Similarly, when issuing final regulations, the Treasury explicitly describes changes made to "previously issued guidance," including prior proposed regulations.³⁰⁰ Because these types of overt signals are not present in IRS publications, many readers cannot observe that the IRS has made changes to the tax law.

Explanation. In addition to failing to highlight when it has used an IRS simplification to recharacterize the tax law, the IRS also fails to provide an

²⁹⁶ See JOHN RAWLS, A THEORY OF JUSTICE 14–15 (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; Jeremy Waldron, *Accountability: Fundamental to Democracy* 11 (N.Y. Univ. 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.

²⁹⁷ See *supra* notes 208–10 and accompanying text.

²⁹⁸ See RICHARD S. BETH, CONG. RESEARCH SERV., HOW BILLS AMEND STATUTES (2003), <https://fas.org/sgp/crs/misc/RS20617.pdf> (describing House Rule XIII, cl. 3(e)(1) (the "Ramseyer Rule") and Senate Rule XXVI, ¶ 12 (the "Cordon Rule")).

²⁹⁹ *Id.* at 2.

³⁰⁰ See, e.g., T.D. 9655, 2014-9 I.R.B. 541, 541–42 (2014) (Shared Responsibility for Employers Regarding Health Coverage).

explanation for the IRS simplification to the reader. The lack of an explanation again differs from the government's actions in other tax contexts. For instance, following the enactment of tax legislation, the Joint Committee on Taxation issues a report that describes present law, the newly enacted provision, and, importantly, the reasons for change to existing tax law.³⁰¹ The IRS also provides significantly more explanation for its change in legal interpretations and new policies in other publicly disclosed documents. When announcing a new legal interpretation through the issuance of a Revenue Ruling, the IRS not only identifies the change, but also explains the rationale. For example, when adopting a new interpretation of the terms "married" and "marriage" in Revenue Ruling 2013-17, the IRS explained that its motivation for the change was to apply "the most natural reading" of the terms in light of the Supreme Court's decision in *United States v. Windsor*.³⁰² Similarly, when the IRS determines that it will *not* follow a particular judicial decision, it publicly announces its "nonacquiescence" and its rationale for this position in an Action on Decision.³⁰³ While most individuals have far more direct contact with IRS publications than with Revenue Rulings or Actions on Decision, IRS publications offer no comparable explanation for the IRS's interpretations that differ from underlying tax law or judicial decisions.

Disclaimer. Most IRS simplifications are unaccompanied by explicit disclaimers from the IRS. The IRS provides a statement on the cover of IRS Publication 17 (Your Federal Taxes) that "the information given [by the IRS] does not cover every situation and is not intended to replace the law or change its meaning."³⁰⁴ However, this disclaimer is not sufficient to alert taxpayers to potential changes to the tax law in many cases. First, the disclaimer quoted above appears on the cover of IRS Publication 17, but does not appear in any of the other IRS publications. As illustrated in Part II, such publications contain numerous IRS simplifications.³⁰⁵ Instead, these other publications contain introductory language such as the following from IRS Publication 535 (Business Expenses): "This publication discusses common business expenses

³⁰¹ See, e.g., JOINT COMM. ON TAXATION, JCS-2-13, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 112TH CONGRESS (2013).

³⁰² Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (2013).

³⁰³ See, e.g., Actions Relating to Decisions of the Tax Court, 2013-32 I.R.B. (Aug. 5, 2013).

³⁰⁴ INTERNAL REVENUE SERV., *supra* note 276, at 1.

³⁰⁵ See INTERNAL REVENUE SERV., *supra* note 3 (no disclaimer); INTERNAL REVENUE SERV., *supra* note 130 (no disclaimer); INTERNAL REVENUE SERV., *supra* note 173 (no disclaimer); INTERNAL REVENUE SERV., *supra* note 190 (no disclaimer); PUBLICATION 525, *supra* note 204 (no disclaimer); INTERNAL REVENUE SERV., *supra* note 217 (no disclaimer).

and explains *what is and is not* deductible.”³⁰⁶ Second, even though the IRS provides a disclaimer in one IRS publication, it still fails to signal to the reader that a specific statement deviates from the tax law or relevant case law. Indeed, even IRS Publication 17, which is 286 pages in length, contains only one disclaimer that is not associated with any specific text.³⁰⁷ By contrast, when the IRS issues an Action on Decision, it refers to the relevant judicial decision in order to focus the reader’s attention on the issue in controversy.³⁰⁸ Additionally, when various secondary sources adopt IRS simplifications, they provide no disclaimer. As a result, the single disclaimer on the cover of IRS Publication 17 does little to illuminate specific IRS simplifications.

The effect of such opacity is that IRS simplifications can ironically *decrease* taxpayers’ knowledge of the actual tax law, as it exists in the Internal Revenue Code, Treasury regulations, and case law. While taxpayers could theoretically reject statements in IRS publications and research the underlying tax law, the purpose of these statements is to ensure that many taxpayers and advisors need not access the underlying tax law to determine tax liability or answer questions. Indeed, the lack of notice or explanation of the changes, and limited disclosure, means that most taxpayers do not know that the IRS simplifications differ from the underlying law.

Public knowledge of the government’s actions in enacting and applying the law—including the tax law—is an essential feature of democracy.³⁰⁹ By diminishing the public knowledge of the tax law and tax administration, simplicity threatens two attributes of democratic governance: public debate of the government’s laws and actions and accountability of the government to the public.

Simplicity inhibits the readiness of the public to debate the actual tax law. For example, while Congress included the terms “ordinary and necessary” in § 162(a) to describe a broad group of expenses that may be deducted immediately, the IRS’s presentation of the definition of the term “ordinary” significantly narrows the meaning of the law.³¹⁰ Yet it is possible that Congress

³⁰⁶ INTERNAL REVENUE SERV., *supra* note 3, at 1 (emphasis added).

³⁰⁷ See INTERNAL REVENUE SERV., *supra* note 276, at 1.

³⁰⁸ See *Actions Relating to Decisions of the Tax Court*, *supra* note 303 (statement of nonacquiescence regarding *Media Space, Inc. v. Comm’r*, 135 T.C. 424 (2010), *vacated*, 477 Fed. Appx. 857 (2nd Cir. 2012)).

³⁰⁹ See, e.g., Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816) (“[I]f a nation expects to be ignorant & free, in a state of civilisation, it expects what never was & never will be.”); see also RAWLS, *supra* note 296; Schauer, *supra* note 296.

³¹⁰ See *supra* notes 115–18 and accompanying text.

intended to create ambiguity in enacting this statute in order to enable the IRS and courts to consider many types of expenses as qualifying for deductibility. As a result of the IRS simplification, public discussion and debate over the meaning of the terms in § 162(a) may start from a baseline of false clarity created by the IRS rather than one of intentional ambiguity created by Congress.

Simplexity also prevents the public from holding Congress accountable for its tax laws, an important function of tax transparency.³¹¹ When the IRS presents a seemingly clear depiction of complex tax law, the public may not urge Congress to revisit flawed statutes. For instance, one could argue that the vague standard set forth by Congress regarding what expenses must be capitalized may simply be inadministrable.³¹² The extensive debate over the capitalization rules and the voluminous regulations on the topic may suggest as much.³¹³ However, by offering taxpayers mental shortcuts and rules of thumb, IRS simplifications create an end-run around such discussion. As a result, simplexity may prevent Congress from being held accountable for overly complex tax law.

Additionally, there are few opportunities for the public to hold the IRS accountable for its role in creating IRS simplifications. Courts only focus on them in litigation if a taxpayer claims reliance on a statement in an IRS publication and the IRS disowns the statement. Even in such instances, courts routinely hold that the IRS cannot be held to its statements in IRS publications, and therefore do not evaluate them.³¹⁴ Oversight institutions, such as congressional committees, are unlikely to question IRS simplifications because the lack of public knowledge about them prevents the public scrutiny necessary to engender outside review of the IRS.³¹⁵ And, unlike with Treasury regulations,³¹⁶ no law requires the IRS to provide the public with a notice and comment period for IRS publications.

³¹¹ For discussion of the accountability function, see Waldron, *supra* note 296. See also Fenster, *supra* note 296, at 899 (framing transparency as empowering the public to “monitor government activity”).

³¹² See I.R.C. § 263 (2012) (disallowing a deduction for “[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate”).

³¹³ See *supra* notes 160–61.

³¹⁴ See *supra* note 277.

³¹⁵ For a contrasting example, see Robert Costa & Jose A. DelReal, *Hearings Floated as Hill Republicans Seize on Gruber Obamacare Comments*, WASH. POST (Nov. 12, 2014, 1:30 PM), <https://www.washingtonpost.com/news/post-politics/wp/2014/11/12/hearings-floated-as-hill-republicans-seize-on-gruber-obamacare-comments/>.

³¹⁶ 5 U.S.C. § 553(b), (c) (2012).

A potential response to this criticism of simplicity is that its costs are justified because it enables taxpayers to complete and file their tax returns. For example, scholars such as Michael Graetz,³¹⁷ Kathleen DeLaney Thomas,³¹⁸ and Lawrence Zelenak³¹⁹ have argued that the tax law must not be so complex that it prevents individuals from embracing their civic duty to report and pay their taxes correctly. Yet when the IRS offers simplifying descriptions of the tax law, it may relieve other institutions, namely Congress or the Treasury, of their obligation to simplify and improve the actual tax law and to do so through participatory and accountable processes. Simplicity thus often clashes with democratic values of transparency, accountability, and participation.

2. *Unequal Benefits and Burdens*

Advocates of plain language have argued that this form of communication will ensure that taxpayers have equal access to government programs and services.³²⁰ Yet simplicity can have the opposite effect in the context of tax planning. As discussed above, some IRS simplifications benefit the government, while others benefit the taxpayer.³²¹ As this subpart will show, sophisticated taxpayers can reject IRS simplifications that benefit the government, while all taxpayers, sophisticated and unsophisticated alike, will generally follow IRS simplifications that favor taxpayers. As a result, simplicity creates unequal benefits and burdens.

Most taxpayers can and will adopt pro-taxpayer IRS simplifications. For reasons discussed previously, most taxpayers will not realize that IRS simplifications deviate from the underlying tax law, and therefore will unwittingly follow them.³²² Sophisticated taxpayers may identify certain IRS simplifications.³²³ However, even for such taxpayers, following pro-taxpayer IRS simplifications will be a safe option. While taxpayers cannot rely upon these statements as a legal matter in court,³²⁴ most tax returns are never audited, much less litigated.³²⁵ As a result, most taxpayers who follow pro-taxpayer IRS simplifications will enjoy the benefit of them without any IRS

³¹⁷ GRAETZ, *supra* note 72.

³¹⁸ Thomas, *supra* note 32.

³¹⁹ Zelenak, *supra* note 36.

³²⁰ See *supra* notes 87–90 and accompanying text.

³²¹ See *supra* Part III.B.

³²² See *supra* Part III.B.1.

³²³ See *infra* text accompanying notes 328–34.

³²⁴ See *supra* note 277 and accompanying text.

³²⁵ See Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241, 249–50 (2013).

challenge. As examples such as *Bobrow*³²⁶ reveal, even in the rare instance in which the IRS challenges a taxpayer for following a pro-taxpayer IRS simplification and wins, the IRS will only face pressure to concede the issue as to other taxpayers until the publication is changed.³²⁷ As a result, it is rare for the IRS to audit and challenge a taxpayer's adoption of a pro-taxpayer IRS simplification. Sophisticated and unsophisticated taxpayers alike therefore will generally follow and get the benefit of pro-taxpayer IRS simplifications.

Sophisticated taxpayers, however, possess the unique ability to reject IRS simplifications that benefit the government. Sophisticated taxpayers have greater access to sound tax guidance, and are therefore less likely to follow taxpayer-unfriendly guidance offered by the IRS.³²⁸ While a wide swath of taxpayers, even sophisticated taxpayers and their advisors, are exposed to IRS simplifications,³²⁹ sophisticated taxpayers (or their advisors) are more likely to look beyond IRS publications and examine the underlying Internal Revenue Code, Treasury regulations, and case law. They are also more likely to have access to a broader set of IRS administrative guidance, which may provide taxpayers with support to reject an IRS simplification that benefits the government.

Consider the example of the IRS simplification regarding annuity distributions that avoid the early IRA distribution penalty.³³⁰ As discussed previously, in technical guidance, the IRS has conceded that the three methods of distribution set forth in the IRS publication “do not represent the only distribution methods which will satisfy the requirements of Section 72(t)(2)(A)(iv) of the Code.”³³¹ Indeed, the IRS has issued private letter rulings allowing particular taxpayers to use distribution methods other than those set forth in the IRS publication.³³² However, this more technical guidance is not equally accessible to all taxpayers. Private letter rulings are expensive and difficult to obtain, and therefore unlikely to be sought by or granted to the average taxpayer.³³³ More generally, both private letter rulings and IRS

³²⁶ No. 7022-11, T.C.M. 2014-21.

³²⁷ See, e.g., *supra* text accompanying note 199.

³²⁸ Cauble, *supra* note 41, at 427, 429, 451, 463–65; see also Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 264 (2009).

³²⁹ See *infra* Part III.C.

³³⁰ See *supra* text accompanying notes 217–22.

³³¹ I.R.S. Priv. Ltr. Rul. 9008073 (Nov. 30, 1989).

³³² See *supra* note 223 and accompanying text.

³³³ See Rev. Proc. 2015-1, 2015-1 I.R.B. 1 (listing requirements for private letter rulings, as well as list of fees).

Notices are part of a panoply of technical guidance that the IRS issues, which experienced practitioners routinely access to advise sophisticated clients.³³⁴ In contrast, less sophisticated taxpayers or advisors are unlikely to access (or know about) such guidance.³³⁵ Less sophisticated taxpayers therefore access a much smaller set of choices offered by the simplification in the IRS publication, such as the simplification that taxpayers must use one of the three distribution methods set forth in the IRS publication to avoid a penalty.³³⁶ Sophisticated taxpayers therefore enjoy the best of both worlds: the ability to use taxpayer-favorable IRS simplifications and the ability to reject pro-government IRS simplifications.

Sophisticated taxpayers, with greater awareness of the underlying tax law, may decide to reject both pro-government and pro-taxpayer IRS simplifications. To the extent that such IRS simplifications exist in almost equal measure, the effect on taxpaying may simply net out. However, this potential netting is unlikely. First, to the extent that pro-government IRS simplifications are more frequent than pro-taxpayer IRS simplifications, sophisticated taxpayers rejecting all IRS simplifications would still put themselves at an advantage relative to the majority of taxpayers who follow IRS simplifications. Second, by recognizing the more complex rules, sophisticated taxpayers have the opportunity to reject pro-government IRS simplifications and embrace pro-taxpayer IRS simplifications, whether or not they actually do so. This choice is a valuable option, whether or not sophisticated taxpayers exercise it.³³⁷

Scholars have presented a number of scenarios under which the IRS should screen taxpayers to determine whether they belong to different types, and to impose different costs on each type. For instance, some scholars have argued that from an optimal tax theory perspective, the government should require screening of high- and low-ability taxpayers and impose higher costs on higher ability taxpayers in order to redistribute most efficiently.³³⁸ Separately, Alex

³³⁴ See BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 110.6 (2015) (describing extensive IRS guidance in treatise).

³³⁵ Cauble, *supra* note 41, at 423.

³³⁶ See *supra* text accompanying note 220.

³³⁷ Heather M. Field, *Choosing Tax: Explicit Elections as an Element of Design in the Federal Income Tax System*, 47 HARV. J. ON LEGIS. 21, 31–32 (2010) (exploring the consequences of allowing choice in tax planning).

³³⁸ See, e.g., George A. Akerlof, *The Economics of “Tagging” as Applied to the Optimal Income Tax, Welfare Programs, and Manpower Planning*, 68 AM. ECON. REV. 8 (1978); Kyle D. Logue & Joel Slemrod, *Genes as Tags: The Tax Implications of Widely Available Genetic Information*, 61 NAT’L TAX J. 843, 847–49

Raskolnikov has argued that the government should screen between taxpayers based on their dispositions toward tax compliance and impose different costs on different taxpayers based on such dispositions.³³⁹ For instance, by screening to distinguish between taxpayers who are inclined to comply with the tax system as long as the government offers helpful service and taxpayers who are inclined to comply only if the tax penalties are high enough, Raskolnikov suggests that the government can target helpful taxpayer service toward the former group and higher tax penalties toward the latter.³⁴⁰

However, the inadvertent screening created by IRS simplifications is the precise opposite of the screening suggested by tax scholars. Sophisticated taxpayers are generally better off, as a group, relative to other taxpayers. And yet, because of the enhanced choice not to follow pro-government IRS simplifications, sophisticated taxpayers will tend to bear less of a burden from simplicity. In other words, simplicity likely imposes the lowest costs on the best-off taxpayers. As for Raskolnikov's screening proposal in the tax compliance context, the opacity of IRS simplifications means that it is not possible to conclude that taxpayers are choosing to follow them or reject them, as the case may be, due to their underlying tax compliance dispositions. Rather, IRS simplifications likely impose greater burdens on less informed taxpayers, an inequitable result that is not justified by any existing screening theory.

3. *Inadequacy of Administrative Law to Police Threats*

Can administrative law address the threats to tax transparency and the inequitable distribution of benefits and burdens that can result from simplicity? Administrative law, after all, creates a rulemaking framework designed to ensure that procedures apply to infuse agency pronouncements regarding the law with public participation and, therefore, democratic legitimacy. However, despite this promise, administrative law does not adequately resolve the adverse effects of simplicity.

The administrative law framework, established under the Administrative Procedure Act (APA), divides agency pronouncements into different

(2008); N. Gregory Mankiw & Matthew Weinzierl, *The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution*, 2 AM. ECON. J.: ECON. POL'Y 155 (2010); David A. Weisbach, *Toward a New Approach to Disability Law*, 2009 U. CHI. LEGAL F. 47, 71–82.

³³⁹ Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689 (2009).

³⁴⁰ *Id.*

categories, which are designed to reflect different levels of influence over the law. Principally, the APA divides agency pronouncements into legislative rules and nonlegislative rules.³⁴¹ Legislative rules can create new legal rights and duties that bind the agency and the public.³⁴² Accordingly, agencies must issue legislative rules through demanding notice and comment procedures, which are designed to ensure meaningful public participation in the rulemaking process and judicial review of it.³⁴³ Nonlegislative rules, which are comprised of interpretive rules and policy statements, cannot create new legal rights and duties that are binding on the public.³⁴⁴ Instead, interpretive rules set forth the agency's own interpretation of existing law,³⁴⁵ and policy statements indicate how the agency intends to exercise its discretion with respect to the law.³⁴⁶ Given their more limited functions, nonlegislative rules do not have to be issued through notice and comment procedures.³⁴⁷ Consequently, regulated parties should not be compelled to comply with an agency's pronouncement of new legal rights and duties unless, among other things,³⁴⁸ the pronouncement is issued through notice and comment procedures.³⁴⁹

³⁴¹ The APA does not apply the terms "legislative rules" and "nonlegislative rules." For discussion, see, for example, Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473 n.26 (2013); Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 (1940). The APA also exempts other rules, such as procedural rules, from notice and comment procedures. 5 U.S.C. § 553(b) (2012).

³⁴² See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("[P]roperly promulgated, substantive agency regulations have the 'force and effect of law.'"); *Prof'l's & Patients for Customized Care v. Shalala*, 56 F.3d 592, 602 (5th Cir. 1995) ("[L]egislative rules' are those which create law" (quoting *Brown Express v. United States*, 607 F.2d 695, 700 (5th Cir. 1979))).

³⁴³ See 5 U.S.C. § 553 for the requirements set forth in the APA for issuance of legislative rules. Courts have elaborated on these requirements significantly. See RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.1, at 407 (5th ed. 2010).

³⁴⁴ See, e.g., *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984) ("[N]onlegislative rules do not have the force of law").

³⁴⁵ See, e.g., *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) ("Interpretive rules' . . . clarify or explain existing law or regulations"); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985).

³⁴⁶ *Pacific Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A policy statement announces the agency's tentative intentions for the future."); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

³⁴⁷ 5 U.S.C. § 553(b).

³⁴⁸ Issuance of a legislative rule also must occur pursuant to a congressional grant of power. See, e.g., *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956). Moreover, in order to be upheld, a legislative rule must withstand "hard look" review. *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins.*, 463 U.S. 29 (1983).

³⁴⁹ See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1314, 1379 (1992); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 573–74 (1977) (asserting that notice and comment procedures "facilitate democratic participation").

There are several obstacles to applying this rulemaking framework to IRS simplifications. First, despite the theoretical clarity of the categories of rules set forth above, such categories, as applied, have “been described . . . as ‘tenuous,’ ‘fuzzy,’ ‘blurred,’ and, perhaps most picturesquely, ‘enshrouded in considerable smog.’”³⁵⁰ These general difficulties apply with at least equal force in the case of IRS simplifications.³⁵¹

One could make plausible arguments that various IRS simplifications could fit into any one of the three categories of rules. In terms of nonlegislative rules, one could plausibly argue that at least some IRS simplifications merely represent the IRS’s own interpretation of the statute, regulations, or judicial doctrine,³⁵² therefore comfortably fitting in the interpretive rules category.³⁵³ Alternatively, to the extent that an IRS simplification goes beyond merely interpreting existing law, one could argue that it explains how the IRS intends to exercise its enforcement discretion and, as such, it is merely a policy statement.³⁵⁴ However, relying on various judicial tests for distinguishing between nonlegislative and legislative rules, one could make a reasonable argument that at least some IRS simplifications are, in reality, procedurally invalid legislative rules, rather than either interpretive rules or policy statements. For instance, one could argue that IRS simplifications (such as the

³⁵⁰ *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted); *see also* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007) (referring to “[t]he distinction between legislative rules and nonlegislative rules” as “one of the most confusing in administrative law”).

³⁵¹ Courts have obliquely addressed IRS simplifications, albeit in cases that were not focused on administrative law. *Adler v. Comm’r*, 330 F.2d 91, 93 (9th Cir. 1964); *Miller v. Comm’r*, 114 T.C. 184, 195 (2000) (“Administrative guidance contained in IRS publications is not binding on the Government”); *Zimmerman v. Comm’r*, 71 T.C. 367, 371 (1978) (“[A]uthoritative sources of Federal tax law are . . . not in . . . informal [IRS] publications.”). Other courts have held that “IRS publications, though ‘aimed at explaining existing tax law to taxpayers,’ do not have the force of law.” *United States v. Josephberg*, 562 F.3d 478, 498 (2d Cir. 2009) (quoting *Taylor v. United States*, 57 Fed. Cl. 264, 266 (2003)).

³⁵² *See, e.g.*, Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1046 (2000).

³⁵³ The disclaimer at the beginning of IRS Publication 17 states that “[t]he explanations and examples in this publication reflect the interpretation by the Internal Revenue Service (IRS) of: Tax laws enacted by Congress, Treasury regulations, and Court decisions.” INTERNAL REVENUE SERV., *supra* note 276. However, as discussed earlier, the disclaimer only appears on the cover of Publication 17, creating ambiguity about whether or not it should carry any weight in characterizing other IRS publications. Moreover, many courts have concluded that the label an agency uses certainly is not dispositive. *See, e.g.*, *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980) (concluding that an agency’s label is “indicative but not dispositive”).

³⁵⁴ *See, e.g.*, *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (holding that the Secretary of Labor’s enforcement guidelines were mere policy statements). *But see, e.g.*, *Cnty. Nutrition Inst.*, 818 F.2d at 947–49 (holding that FDA aflatoxin action levels were procedurally invalid legislative rules).

IRS's description of capitalization requirements)³⁵⁵ that appear to "effectively amend[] a prior legislative rule" (such as the capitalization regulation)³⁵⁶ are procedurally invalid legislative rules.³⁵⁷ Relying on another line of authority, one could argue that IRS simplifications that transform broad standards into detailed rules (such as the IRS's specification of required distribution methods for early IRA distributions)³⁵⁸ may be procedurally invalid legislative rules.³⁵⁹ Finally, as another theory, one could rely on a line of judicial authority to argue that if the IRS treats its descriptions in IRS publications as "for all practical purposes 'binding,'"³⁶⁰ then they could be procedurally invalid legislative rules, even if the IRS does not actually claim that they are legally binding.³⁶¹ At bottom, exactly what IRS simplifications are under the APA depends on which statement is being analyzed and what authority is being applied.³⁶²

Even if it were clear what IRS simplifications are under the APA framework, it is unlikely that the APA framework would actually be applied in practice. Imagine, for instance, that IRS simplifications are clearly mere policy statements. Does this mean that taxpayers will not be compelled to comply with them? As a legal matter, the answer to this question should be yes. However, in order to answer yes to this question from a practical perspective,

³⁵⁵ See *supra* notes 158–59 and accompanying text.

³⁵⁶ See *supra* notes 161–68.

³⁵⁷ *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

³⁵⁸ See *supra* notes 217–22 and accompanying text.

³⁵⁹ *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010); see also *Hector v. USDA*, 82 F.3d 165, 171 (7th Cir. 1996). But see, e.g., *Mora-Meraz v. Thomas*, 601 F.3d 933, 942–43 (9th Cir. 2010) (holding that the Bureau of Prison's twelve-month rule for meeting a "drug abuse problem" was an interpretive rule).

³⁶⁰ See, e.g., *Appalachian Power v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). This analysis can easily swallow up the policy statement category. For this reason, many commentators have critiqued the practically binding test. See, e.g., *PIERCE*, *supra* note 343, § 6.3, at 426.

³⁶¹ The IRS, at times, treats its statements in IRS publications not only as interpretations or triggers for enforcement, but as the law itself. In briefs, the IRS cites to IRS publications to support its arguments regarding the law. See, e.g., Answering Brief for the Appellee at 24, *Mingo v. Comm'r*, 773 F.3d 629 (5th Cir. 2014) (No. 13-60801), 2014 WL 1664220, at *24; Opening Brief for Respondent, *Ostrow v. Comm'r*, 122 T.C. 378 (2004) (No. 6325-03), 2004 WL 1514961, at *18 n.6; Brief for Respondent at 23, *Green Forest Mfg., v. Comm'r*, 85 T.C.M. (CCH) 1020 (2003) (No. 1596-01), 2002 WL 34358358, at *23. Further, the IRS has argued that a taxpayer's failure to consult IRS publications, or the taxpayer taking a position in conflict with relevant IRS publications, justifies imposition of an accuracy-based penalty. See, e.g., Brief for the Appellee, *Au v. Comm'r*, 482 Fed. App'x 289 (9th Cir. 2012) (No. 11-70270), 2011 WL 2679983, at *3, *15–16; Brief for Appellee at 47–48, *Tavano v. Comm'r*, 986 F.2d 1389 (11th Cir. 1993) (No. 91-4078), 1992 WL 12135722 at *47–48; Respondent's Brief in Answer at 13, 30, *Bernard v. Comm'r*, 104 T.C.M. (CCH) 136 (2012) (No. 5787-10), 2012 WL 5494629.

³⁶² Cf. Anthony, *supra* note 349, at 1331.

taxpayers who access IRS publications to complete their tax returns would have to actually know that they are mere policy statements. This is unlikely to be the case for the vast majority of taxpayers, who not only are unlikely to know what IRS simplifications are from an APA perspective, but also that they even diverge from applicable tax law.

Some might argue that this compelled compliance as a practical matter simply means that IRS simplifications are actually procedurally invalid legislative rules. As a result of this procedural invalidity, this argument would go, taxpayers could challenge the IRS's failure to use notice and comment procedures. However, this argument suffers from the flawed assumption that most taxpayers will be alert to the administrative law categorizations. As discussed earlier, while a small percentage of well-advised taxpayers may be prepared to make an APA challenge, the vast majority of taxpayers who access IRS publications are unlikely to know what the rules are from an administrative law perspective, much less challenge them as a result of a purported procedural invalidity.³⁶³

Even if a taxpayer challenged an IRS simplification in a tax controversy, the IRS still would not be compelled to revise the IRS simplification for other taxpayers. The IRS could concede the issue as to the taxpayer in the case privately, without litigation.³⁶⁴ Even if the taxpayer successfully litigated the case, the IRS could arguably preserve the IRS simplification unchanged on the grounds that it represents the IRS's own view of the law.

In sum, most taxpayers will comply with IRS simplifications with no consideration of what they are from an administrative law perspective. As a result, the administrative law rulemaking framework offers an inadequate solution to the threats of simplicity.³⁶⁵

³⁶³ A Westlaw search on July 7, 2015 for "IRS /p publication /p (APA or "administrative law")" revealed no administrative law challenges to IRS publications. The search did reveal a handful of (rejected) appeals of criminal tax fraud convictions, in which the defendants claimed that the IRS's failure to subject various tax forms (such as Form 1040) to notice and comment meant that taxpayers had no duty to file tax returns. *See, e.g., United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir. 1991). That APA challenges to IRS forms by taxpayers fighting criminal convictions are quite rare underscores the low likelihood of challenges to IRS publications. In addition, it is difficult for taxpayers to bring a pre-enforcement challenge. *See, e.g., Kristin E. Hickman, A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008).

³⁶⁴ *See* I.R.C. § 6103 (2012).

³⁶⁵ One possibility might be to subject all IRS simplifications to notice and comment procedures. *See, e.g., Anthony, supra* note 349, at 1315 (suggesting expansive use of notice and comment procedures). We address, and reject, this possibility. *See infra* notes 387–93 and accompanying text.

C. *The Trade-Off*

Fundamentally, simplicity poses a trade-off between representing the tax law accurately and presenting it in accessible and understandable terms. In the context of lawmaking, scholars have examined the optimal complexity, or precision, of the law.³⁶⁶ They have argued that making the law more complex can have benefits, in terms of allowing for more fine-grained distinctions, which may better capture underlying values.³⁶⁷ However, making the law more complex can also have costs, including making it less comprehensible and more expensive to administer.³⁶⁸ Simplicity poses a similar trade-off. Greater simplicity results in a less complex presentation of the law. This makes the law more understandable (and therefore more administrable), but at the cost of a less accurate reflection of the underlying law. To the extent the underlying law reflects congressional preferences, greater simplicity may result in less adherence to the law's underlying preferences.

There is no universal answer to the question of how this trade-off should be resolved.³⁶⁹ Whether greater or less simplicity should exist depends both on: (1) how one values accuracy vs. understandability, and (2) whether the existing level of simplicity is too high or low, given the value placed on accuracy and understandability. Imagine, for instance, that, instead of explaining the possibility of claiming itemized deductions, and explaining all such deductions, the IRS simply states, “[y]ou must take a standard deduction of \$X in the current taxable year.” Most would agree that this IRS simplification overvalues understandability, in that it ignores and obscures a whole slew of available deductions. In this case, simplicity would be too high. On the other hand, imagine that the IRS simply copies and pastes the entirety of the capitalization rules into the relevant IRS publication. Most would agree that this act would undervalue understandability, in that it would be impossible for nearly all taxpayers to understand their taxpaying obligations. In this case,

³⁶⁶ See, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995); Richard A. Epstein, *The Optimal Complexity of Legal Rules* (Univ. of Chi. John M. Olin Program in Law and Econ., Working Paper No. 210, 2004).

³⁶⁷ See, e.g., Kaplow, *supra* note 366, at 150 (positing that more complex rules are more closely tailored, thereby allowing for better control of behavior).

³⁶⁸ See, e.g., Diver, *supra* note 366, at 70–71 (discussing, among other things, the trade-off between accessibility and congruence); Kaplow, *supra* note 366, at 151 (discussing compliance and enforcement costs of complex rules).

³⁶⁹ Cf. Diver, *supra* note 366, at 76 (“The degree of precision appropriate to any particular rule depends on a series of variables peculiar to the rule’s author, enforcer, and addressee. As a consequence, generalizations about optimal rule precision are inherently suspect.”).

simplicity would be too low. Simplicity, therefore, is a characteristic of descriptions of the tax law, which can be too high or low in a given circumstance.

Moreover, the benefits and costs of simplicity will vary in different contexts.³⁷⁰ For instance, the value of simplicity may be lower (and the potential costs more pernicious) when describing provisions relevant only to sophisticated taxpayers, who are least in need of the seemingly simple explanations, and who will be most capable of manipulating the simplicity. On the other hand, the value of simplicity may be higher when addressing provisions likely relevant to particularly unsophisticated taxpayers. Such taxpayers may have the most to gain from seemingly simple explanations and may be least likely to manipulate the simplicity. The case for simplicity may be highest still to the extent that the provisions are unlikely to be relevant to sophisticated taxpayers at all, thereby eliminating the concern that the understandability benefits to unsophisticated taxpayers will come with the cost of differential abilities to manipulate. Other factors may also affect the value of simplicity. For instance, simplicity may be more problematic when Congress deliberately intended the complexity of the underlying law to capture important values. On the other hand, simplicity may be more desirable when the complexity of the underlying law reflects poor drafting, rather than a desire to delineate subtle differences in tax treatment.

In short, recognizing the concept of simplicity and its pervasive presence in IRS Publications opens the door for evaluating whether a desirable amount of simplicity exists. But determining whether a desirable amount of simplicity exists must occur through a case-by-case analysis.

D. Potential Responses

As the prior discussion illustrates, simplicity creates a trade-off between greater understandability and less accuracy. This subpart offers approaches for making simplicity more apparent. Doing so will make it easier to evaluate simplicity in a given case, as well as preserve some of the benefits of simplicity while responding to its drawbacks.

³⁷⁰ Cf. *id.* at 72–79 (fleshing out how various aspects of rule precision may matter more or less in different contexts).

1. *Red-Flagging*

A strategy for making simplicity more apparent and maintaining many of the benefits of simplicity while minimizing its threats is to require the IRS not only to offer government-favorable IRS simplifications, but also to: (1) red-flag IRS simplifications explicitly (through footnotes, notations, interactive online links, appendices, or other means), (2) explain that they represent safe-harbor positions,³⁷¹ and (3) briefly identify other reasonable interpretations of the tax law. The red-flagging approach has the benefits of allowing the IRS to explain the tax law in plain language and reveal the agency's view of the tax law, or at least the view most favorable to the IRS. To the extent that conservative taxpayers follow the IRS-favorable view, the IRS can still maximize revenue. Indeed, requiring the IRS to begin by routinely simplifying in the government's favor may prevent giveaways to taxpayers in the form of unwarranted pro-taxpayer IRS simplifications. Most importantly, this approach reduces opacity and may help level the playing field between different types of taxpayers.

The red-flagging approach should go beyond mere placement of a disclaimer on each IRS publication regarding the possibility that the publication contains IRS simplifications. Such disclaimers, even if placed on all IRS publications, would be inadequate. First, as cognitive bias research has demonstrated, individuals regularly ignore disclaimers and focus instead on easily accessible explanations and examples.³⁷² Drawing from empirical research conducted in other areas, there are significant reasons to suspect that general disclaimers would not cause taxpayers to significantly discount the description of the tax law in all IRS publications.³⁷³ Moreover, even if a general disclaimer on each publication made taxpayers wary of the guidance in the publications, the disclaimer would provide taxpayers with no roadmap

³⁷¹ See Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385 (2016).

³⁷² See, e.g., Nick Ellis, *Word Meaning and the Links Between the Verbal System and Modalities of Perception and Imagery or In Verbal Memory the Eyes See Vividly, but Ears Only Faintly Hear, Fingers Barely Feel and the Nose Doesn't Know*, in MENTAL IMAGES IN HUMAN COGNITION 313, 314 (Robert H. Logie & Michel Denis eds., 1991); Philip J. Mazzocco & Timothy C. Brock, *Understanding the Role of Mental Imagery in Persuasion: A Cognitive Resources Model Analysis*, in CREATING IMAGES AND THE PSYCHOLOGY OF MARKETING COMMUNICATION 65 (Lynn R. Kahle & Chung-Hyun Kim eds., 2006) (describing the importance of the "vividness" of a story to the salience of images).

³⁷³ For behavioral analysis in other areas, see, for example, Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014); W. Kip Viscusi & Richard J. Zeckhauser, *Hazard Communication: Warnings and Risk*, in 545 ANNALS AM. ACAD. POL. & SOC. SCI. 106 (1996) (reporting inadequacy of prescription drug warnings). For a general discussion, see BEN-SHAHAR & SCHNEIDER, *supra* note 81.

regarding what guidance amounted to an IRS simplification and what the various, possible interpretations of the tax law actually are. As a result, general disclaimers would, at best, cause taxpayers to disregard IRS publications entirely, without providing any specific path forward for taxpayers who need guidance to fill out their tax returns. In contrast, a red-flagging system, with explanations of the various possibilities in footnotes, notations, interactive online links, or appendices, could provide constructive, transparent guidance for sophisticated and unsophisticated taxpayers alike.

The red-flagging approach may have additional benefits. Requiring the IRS to make different interpretations of the tax law apparent (and highlighting the pro-government IRS simplification) could create the opportunity to screen to distinguish between different taxpayers based on which version they choose. For instance, the IRS—or return preparation software developers³⁷⁴—could present taxpayers with the option of applying the safe harbor version of the law represented by IRS simplifications, or a more pro-taxpayer version of the law set forth in the alternatives presented. The IRS may then be able to require taxpayers to reveal which version of the law they are applying.³⁷⁵ This information would provide the IRS with valuable information regarding compliance profiles, which is lost absent the explicit choice by taxpayers to follow (or not to follow) simplifications.

The red-flagging approach is not without potential weaknesses. First, red-flagging would impose an additional requirement on a resource-constrained IRS. However, imposing this cost on the IRS may be merited in light of the resulting increased transparency. Moreover, in drafting IRS simplifications currently, the agency is presumably already researching the law enough to reveal both IRS simplifications and the other possibilities. As a result, while revealing the information already in the IRS's possession would impose some additional cost, this cost may not be insurmountable.

³⁷⁴ Tax return preparation software companies already charge different amounts for different products based on the level of tax return complexity. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-297, TAX ADMINISTRATION: MANY TAXPAYERS RELY ON TAX SOFTWARE AND IRS NEEDS TO ASSESS ASSOCIATED RISKS 3–4 (2009), <http://www.gao.gov/assets/290/286461.pdf>. One could imagine tax preparation software companies developing different products, which reflect the different versions of the law set forth by the IRS, and an accompanying insurance market developing based on the version of the law the taxpayer chooses, thereby resulting in different prices for the different versions.

³⁷⁵ For another proposed screening strategy, see, for example, Raskolnikov, *supra* note 339, at 718–19, 737–38.

Some might also object that the red-flagging approach would reduce the simplicity, and therefore usability, of the IRS's guidance.³⁷⁶ However, red-flagging could be designed in a way that minimizes the increased burden it imposes. Online versions of IRS publications could have interactive links that identify IRS simplifications and other possibilities, where applicable. Printed versions could contain such information in separate supplements.

Red-flagging would create a new screening dynamic, but rather than screening based simply on how well-advised the taxpayer already is, the new red-flagging system would screen based on how much the taxpayer cares about reducing tax liability. Those taxpayers who seek to minimize tax liability can bear the additional costs of reading interactive links and supplements. Those taxpayers who wish to avoid added complexity can still do so by not clicking the interactive links or reading the supplements.

Moreover, while it is easy to criticize red-flagging as increasing complexity, it is important to remember that the complexity and ambiguity of the underlying tax law is truly at fault. Maintenance of the status quo is unlikely to result in simplicity through reform of the actual underlying tax law.³⁷⁷ Red-flagging could provide the impetus needed to encourage policymakers to address the complexity and ambiguity of the tax law.³⁷⁸

An additional concern, however, is that red-flagging may inadvertently introduce informational differences between taxpayers who can understand the information provided by a red-flagging system and those who cannot.³⁷⁹ As Joe Bankman has pointed out, more than 20% of the population lacks the ability to engage in tasks such as reading food labels or reading a simple story.³⁸⁰ For such taxpayers, the potential benefits of the red-flagging system would be minimal. Red-flagging may thereby present a new, problematic screening dimension.

However, this concern is not unique to the red-flagging system. Any tax system that offers tax planning opportunities is going to uniquely burden those

³⁷⁶ See, e.g., GRAETZ, *supra* note 72, at 82 (1997).

³⁷⁷ Cf. Austan Goolsbee, *The TurboTax Revolution: Can Technology Solve Tax Complexity?*, in *THE CRISIS IN TAX ADMINISTRATION* 124, 128 (Henry J. Aaron & Joel Slemrod eds., 2004).

³⁷⁸ For example, with mixed success, some countries have created initiatives to rewrite the underlying tax law in plain language, rather than just creating a veneer of simplifications that overlays an unchanged set of complex laws. *JOINT COMM. ON TAXATION*, *supra* note 71, at 115–17.

³⁷⁹ This can be characterized as a horizontal equity problem, whereby reducing inequity between two sets of taxpayers can often increase inequity relative to a third set.

³⁸⁰ Bankman, *supra* note 31, at 1431.

taxpayers who are least capable of understanding it. For example, research regarding flexible spending accounts reveals that these tax savings vehicles are more likely to be used by taxpayers with higher education and higher capacity to make complex assessments.³⁸¹ Moreover, that some taxpayers will not have the capacity to understand or use the red-flagging system cannot justify continuing to maintain the opacity of IRS simplifications.

Another reasonable objection to red-flagging is that it may create a road map for taxpayers to be aggressive. However, it is not clear that taxpayers will respond to red-flagging by being more aggressive. To the extent that pro-taxpayer IRS simplifications currently exist, taxpayers may unknowingly be following them already. If the default is set to pro-government IRS simplifications in the red-flagging system, many taxpayers may simply follow the default. The red-flagging system will make both the pro-government simplifications and the other possibilities apparent. However, it is not clear whether taxpayers will choose such other possibilities or follow the pro-government IRS simplifications. As scholars have noted, taxpayers comply with the tax law for all sorts of different reasons.³⁸² Many taxpayers may simply desire to adopt conservative tax positions and may appreciate the government's presentation of these positions.³⁸³

Finally, even if a taxpayer would not ordinarily claim an aggressive tax position, some may argue that red-flagging would highlight the complexity and ambiguity of the tax law, leading some taxpayers to believe that others are exploiting it to claim aggressive tax positions.³⁸⁴ This belief may undermine confidence in the tax system, thereby encouraging taxpayers to take aggressive positions in anticipation of others doing so as well (a backlash effect).³⁸⁵ This concern, however, is overstated. It is no secret that the tax system is complex.

³⁸¹ Roger Feldman & Jennifer Schultz, *Who Uses Flexible Spending Accounts: Effects of Employee Characteristics and Employer Strategies*, 39 MED. CARE 661, 661 (2001); Barton H. Hamilton & James Marton, *Employee Choice of Flexible Spending Account Participation and Health Plan*, 17 HEALTH ECON. 793, 803–04 (2008).

³⁸² See Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111, 112 (2009); Raskolnikov, *supra* note 339, at 696–97; Joel Slemrod, *Introduction to WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* (Joel Slemrod ed., 1992).

³⁸³ See, e.g., Doran, *supra* note 382, at 137–38 (examining how convictions about duty, honesty, and citizenship may compel compliance for certain taxpayers); Raskolnikov, *supra* note 339, at 719 (positing that some taxpayers want to take the conservative tax reporting position).

³⁸⁴ JOINT COMM. ON TAXATION, *supra* note 71, at 109.

³⁸⁵ *Id.*; Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1290 (“[P]erception of hopelessly complex and inequitable tax laws . . . leads some potentially honest taxpayers to attitudes of noncompliance.”).

Red-flagging simply may provide a more coherent road map of some of the complexity and ambiguity.

Alternatively, if red-flagging provides too much information regarding potential, aggressive positions, an alternative would be to have the IRS simply annotate its publications with links to all the sources of law that the IRS is relying upon. These links would also create greater transparency and create less additional information for taxpayers to read. However, it would also serve as a less clear source of guidance regarding what, exactly, the alternative potential tax positions are. Whether red-flagging or annotation is the preferable approach depends on how easily one wants to allow less-sophisticated taxpayers to find alternative, more aggressive positions. If putting taxpayers on equal footing is a particularly important value, then red-flagging should be preferred over annotation. However, if providing a greater measure of transparency while making it less likely that taxpayers will take more aggressive tax positions is more important, annotation should be preferred.

2. *Review of IRS Publications*

The exclusive application of a red-flagging system or an annotation system, however, may not be enough to address the adverse effects of simplicity. Without oversight or review, the IRS may lack the proper incentives or even ability to create and maintain a sufficiently robust red-flagging system.³⁸⁶ Indeed, in some cases the IRS may not fully realize that there are other available legal positions. In such cases, the IRS would not be able to offer meaningful red-flagging or annotation. A complementary reform would subject the IRS's process to outside review.

One possibility for review of IRS simplifications would be to require all IRS publications to undergo notice and comment procedures. Requiring notice and comment procedures for all IRS publications, regardless of whether they are actually interpretive rules or policy statements, could sidestep the difficult administrative law classification questions discussed previously, and ensure that the purported democratic legitimacy offered by notice and comment apply in any event.

³⁸⁶ The IRS's informal mechanisms for receiving feedback regarding its publications do not necessarily produce meaningful comments. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-95-34, TAX ADMINISTRATION: IRS EFFORTS TO IMPROVE FORMS AND PUBLICATIONS 8 (1994). IRS publications are not subject to more formal processes, such as OMB review. *Id.* at 3.

However, this form of review should be rejected. Even within the administrative law paradigm, many scholars question how much notice and comment procedures really do ensure democratic legitimacy, and question whether the benefits are worth the costs.³⁸⁷ As applied to IRS Publications, notice and comment is a costly and likely ineffective means of ensuring this transmission of information from the IRS to the public. However, it may be useful to enlist the tax law bar and other tax professionals in a less formal process whereby they can create crowd-sourced (wiki-type) annotations on IRS Publications. The IRS can review such annotations for accuracy. But, the annotating process may alert the IRS to various sources of authority of which it was not aware and help create more accurate simplifications.

As an alternative, a separate organization charged with monitoring the IRS could review the IRS's red-flagging of its own publications and seek to ensure that sufficient information is transmitted to the public. A plethora of organizations is charged with monitoring the IRS, including the IRS Oversight Board, the Treasury Inspector General for Tax Administration (TIGTA), the Government Accountability Office (GAO), and the Taxpayer Advocate Service.³⁸⁸ Of such organizations, either the TIGTA, or the GAO, or both would be well suited to review the red-flagging of IRS simplifications.³⁸⁹ Indeed, both the TIGTA and the GAO have reviewed the IRS's provision of taxpayer assistance by telephone, the IRS's preparation of low-income tax returns, and other taxpayer services to assess the quality of the IRS's

³⁸⁷ See, e.g., E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992). Common critiques include that the public generally has very little engagement with such procedures. See, e.g., Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006). Another oft-cited concern is that imposing the extensive procedures on an agency may simply discourage the agency from issuing guidance altogether. See, e.g., David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 284 (2010). As applied to IRS simplifications, requiring notice and comment could reduce the volume of the IRS's publications, leaving taxpayers with less useful guidance.

³⁸⁸ See, e.g., NAT'L TAXPAYER ADVOCATE, *supra* note 9, at 23–24.

³⁸⁹ In contrast, the Taxpayer Advocate Service and the IRS Oversight Board are unattractive possibilities. The Taxpayer Advocate Service is charged principally with protecting taxpayers from the IRS. This charge is at least somewhat in conflict with objective analysis of IRS publications designed to ensure that both pro-government and pro-taxpayer IRS simplifications are identified. Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 252–53 (2013). The IRS Oversight Board faces severe resource issues, with six of its nine seats unfilled. Robert M. Tobias, *Effective January 1, 2015, There Are Six Open Seats for IR Oversight Board Members*, IRS OVERSIGHT BOARD, <http://www.treasury.gov/IRSOB/about/Pages/default.aspx> (last visited Oct. 2, 2016). Moreover, the IRS Oversight Board may not engage in tax policy decisions. I.R.C. § 7802(C)(ii) (2012).

performance as well as to help the IRS develop a sound methodology to evaluate its own service.³⁹⁰

Review of IRS publications should be searching to be effective. In the early 1990s, the GAO reviewed IRS publications and such review did not identify the need for any substantive changes.³⁹¹ However, the GAO methodology in this review was quite limited, in that it reviewed only four IRS publications.³⁹² Moreover, it is unclear whether the GAO was looking for IRS simplifications.³⁹³ If the GAO were charged with identifying not only clearly incorrect statements of the law, but also IRS simplifications, and ensuring that such IRS simplifications are appropriately red-flagged—with reasonable, alternative possibilities clearly identified—then the GAO review may serve as a useful backstop to the IRS's own red-flagging.

3. *Structural Reform*

In some cases, red-flagging of IRS simplifications, backstopped by review, may not be a viable option. Aside from IRS publications, the IRS makes simplifying statements in real-time interactions with taxpayers in other fora. For instance, the IRS provides extensive advice to taxpayers over the telephone and in Taxpayer Assistance Centers.³⁹⁴ While the IRS can, and does, prescribe what types of questions it will answer in certain contexts³⁹⁵ and trains its employees to answer such questions,³⁹⁶ the IRS cannot constrain its employees to stay within these boundaries in all cases, nor can the IRS provide a prepared

³⁹⁰ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-225, 2009 TAX FILING SEASON: IRS MET MANY 2009 GOALS, BUT TELEPHONE ACCESS REMAINED LOW, AND TAXPAYER SERVICE AND ENFORCEMENT COULD BE IMPROVED (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-782, TAX ADMINISTRATION: IRS NEEDS BETTER STRATEGIC PLANNING AND EVALUATION OF TAXPAYER ASSISTANCE TRAINING (2005); U.S. GEN. ACCOUNTING OFFICE, GAO-01-189, IRS TELEPHONE ASSISTANCE: QUALITY OF SERVICE MIXED IN THE 2000 FILING SEASON AND BELOW IRS' LONG-TERM GOAL 2 (2001).

³⁹¹ U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-93-72, TAX ADMINISTRATION: SELECTED IRS FORMS, PUBLICATIONS, AND NOTICES COULD BE IMPROVED (1993).

³⁹² *Id.* at 1, 4, 16.

³⁹³ *Id.* at 1, 16.

³⁹⁴ *Contact Your Local IRS Office*, INTERNAL REVENUE SERV., <https://www.irs.gov/help-resources/contact-your-local-irs-office> (last updated July 1, 2016); *Let Us Help You*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/telephone-assistance> (last updated June 21, 2016).

³⁹⁵ TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2005-40-021, CUSTOMER SERVICE AT THE TAXPAYER ASSISTANCE CENTERS IS IMPROVING BUT IS STILL NOT MEETING EXPECTATIONS 4 (2004).

³⁹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-782, TAX ADMINISTRATION: IRS NEEDS BETTER STRATEGIC PLANNING AND EVALUATION OF TAXPAYER ASSISTANCE TRAINING 5 (2005).

script that will apply to all fact patterns presented.³⁹⁷ For the same reasons that it is impossible for the IRS to provide a prepared answer to every real-time question in advance, it is also impossible for the IRS to provide red flags for every answer provided. In the absence of red flags, it would be problematic for the employee to believe her role is either pro-government or pro-taxpayer. Such a view would tend to skew simplifications in one direction or the other.

As a result, employees who provide real-time advice to taxpayers may best be placed in a new independent taxpayer service organization, which has an identity as a neutral provider of tax information. For the same reasons that the Taxpayer Advocate Service's independence from the IRS has been seen as essential to the institution's ability to advocate on behalf of taxpayers,³⁹⁸ creating a neutral identity for taxpayer service employees who provide tax advice to the public may be essential to ensure fair, reasonable advice in the absence of any of the previously prescribed red flags.

Creating a separate unit of employees either within or apart from the IRS is certain to impose additional costs, as a result of increasing the infrastructure of the agency, and the inevitable organizational costs of segregating certain employees from others. To the extent that the IRS is able to red-flag most ambiguity that will arise in advance or limit IRS employees' answers to only situations that do not require simplifications, this last strategy should be avoided. But separation may be necessary in certain situations. It should serve as a limit on the types of questions that IRS employees, in the given structure, should answer. This strategy is likely to become more relevant if the IRS increases interactivity with taxpayers during the tax return preparation process in the future, a potential development that is discussed below.

E. The Future of Tax Administration

The IRS's use of plain language to explain otherwise complex tax law is not restricted to IRS publications, such as those discussed in this Article. Rather, IRS simplifications appear across the spectrum of taxpayer services. And if the IRS applies new innovations to aspects of tax administration over the coming decades, simplicity is only likely to increase. In anticipation of these possible developments, this subpart briefly forecasts possible emergence

³⁹⁷ U.S. GEN. ACCOUNTING OFFICE, GAO-01-189, IRS TELEPHONE ASSISTANCE: QUALITY OF SERVICE MIXED IN THE 2000 FILING SEASON AND BELOW IRS' LONG-TERM GOAL 13-15 (2001); TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 395, at 2, 7.

³⁹⁸ See Camp, *supra* note 47, at 96.

of simplicity in some of the most prominent tax administration tax reform proposals: government-prepared tax returns, interactive tax return filing, and third-party reporting.

Government-Prepared Tax Returns. In recent years, numerous government officials and scholars have advocated for the adoption of government-prepared tax returns to promote increased tax compliance and alleviate individuals' filing costs.³⁹⁹ Under this approach, which has been implemented in California⁴⁰⁰ and outside the United States,⁴⁰¹ the taxing authority would prepare portions of an individual's tax return by inserting information that it has already received through third-party information reporting, such as salary and interest payments and family status.⁴⁰² Taxpayers would have the right to make revisions to the information contained in the government-prepared tax return,⁴⁰³ though there is a high likelihood that many would confirm the IRS's pre-filled return rather than face an increased risk of audit.

In addition to reducing the return-filing burden on many individual taxpayers, government-prepared tax returns would also present powerful opportunities for the IRS to apply simplified versions of the tax law directly to individuals' own personal tax circumstances. For instance, the IRS could create a default that automatically designates a wage earner's receipt of additional income that is less than a certain amount, such as \$600, as income earned from a hobby rather than a business activity. This default would serve a similar role as the IRS's discussion of whether the taxpayer's "livelihood" depends on the income in the hobby determination rules of IRS Publication 535.⁴⁰⁴ As another example, the IRS could automatically allocate a set percentage of a restaurant's gross receipts, such as 10%, to the gross income of all waiters who work at the restaurant.⁴⁰⁵ This default would not be based on statutory or regulatory authority, but would communicate the IRS's presumption regarding the restaurant's total tip income. By incorporating

³⁹⁹ See, e.g., Bankman, *supra* note 31; Goolsbee, *supra* note 31; Mock & Shurtz, *supra* note 31; Ventry, *supra* note 31.

⁴⁰⁰ See STATE OF CAL. FRANCHISE TAX BD., READYRETURN PILOT: TAX YEAR 2004 STUDY RESULTS (2006), <http://www.ftb.ca.gov/readyReturn/TY04RRFinalReport.pdf>.

⁴⁰¹ See, e.g., David Wiles, *Why Swedes Are Okay with Paying Taxes*, SWEDISH INST., <https://sweden.se/society/why-swedes-are-okay-with-paying-taxes/> (last updated Jan. 8, 2016).

⁴⁰² See STATE OF CAL. FRANCHISE TAX BD., *supra* note 400.

⁴⁰³ See *id.*

⁴⁰⁴ See *supra* notes 231–36 and accompanying text.

⁴⁰⁵ Current law contains a similar feature, calculated at 8% of total gross income. I.R.C. § 6053(c) (2012); Treas. Reg. § 31.6053-3(d) (2012).

defaults and presumptions in the government-prepared tax return, the IRS could signal legal outcomes to taxpayers, even if these outcomes are not necessarily required by the applicable tax law.

Interactive Tax Return Filing. Several scholars have recommended that the IRS create interactive online mechanisms to assist taxpayers with their tax return filing obligations and provide them with tailored guidance.⁴⁰⁶ Currently, taxpayers who consult IRS publications and tax return forms receive uniform guidance even though their personal circumstances differ. As Joseph Bankman, Clifford Nass, and Joel Slemrod have noted, once taxpayers identify as part of a particular group, such as taxpayers who must file IRS Form 1040 with Schedule A, “each member receives the identical form with the identical questions.”⁴⁰⁷ In response, these scholars argue that the IRS should incorporate “conversational agents” into e-filing software, which ask specific questions based on the taxpayer’s type of employment, answers to prior questions, and other factors.⁴⁰⁸ They suggest that the conversational agent could also assume the role of auditor by adjusting the questions to uncover potential tax noncompliance.⁴⁰⁹ Likewise, in response to the length and density of current IRS publications, Kathleen DeLaney Thomas suggests that the IRS could create user-friendly websites that provide thematically-linked information on a specific topic, such as tax obligations related to household employees.⁴¹⁰

Each of these suggestions would reduce procedural complexity associated with tax return filing, but would also provide the IRS with enhanced opportunities to shape the tax law through simplicity. The IRS already directs its taxpayer assistance employees to answer all “in scope” questions from taxpayers by restating text from particular IRS publications.⁴¹¹ The proposals described above would amplify IRS simplifications through more technologically advanced means. For example, under Thomas’s approach, the IRS could use the household employee website to provide taxpayers with its own interpretation of otherwise ambiguous legal issues, such as whether an individual who provides childcare services should be treated as an employee for tax purposes.⁴¹² Similarly, under the Bankman, Nass, and Slemrod

⁴⁰⁶ See, e.g., Bankman, Nass & Slemrod, *supra* note 32; Mock & Shurtz, *supra* note 31; Thomas, *supra* note 32.

⁴⁰⁷ Bankman, Nass & Slemrod, *supra* note 32, at 17.

⁴⁰⁸ *Id.* at 18.

⁴⁰⁹ *Id.*

⁴¹⁰ See Thomas, *supra* note 32.

⁴¹¹ TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 395.

⁴¹² See Thomas, *supra* note 32, at 37–40.

proposal, the conversational agent could ask taxpayers questions about items that may not necessarily be subject to tax, such as certain employer reimbursements, in a way that nevertheless leads the taxpayer to include the amounts in income out of caution.⁴¹³

Third-Party Reporting. The government has increasingly instituted third-party information reporting requirements as a means of assessing tax liability.⁴¹⁴ In recent years, and often as a result of legislation, the IRS has expanded information-reporting requirements to apply to topics as diverse as offshore bank accounts,⁴¹⁵ health insurance,⁴¹⁶ basis in securities,⁴¹⁷ and transactions that involve virtual currencies.⁴¹⁸ Studies of individual tax reporting have found consistently that third-party information reporting correlates with high levels of tax compliance.⁴¹⁹ As technological progress continues to enhance the ability of third parties, such as banks or individuals with children, to comply with information reporting requirements, the government is likely to increase its use of this tax enforcement device.

While third-party information reporting is an important feature of modern tax administration, it also provides an outlet for IRS simplifications. Third-party information reporting requirements enable the IRS to implicitly advise taxpayers that they should not engage in specific transactions. For instance, the “reportable transaction” rules, which require taxpayers and their advisors to file information reports with the IRS whenever a taxpayer engages in certain transactions, can signal to taxpayers that they should not engage in these transactions, even though they are not necessarily inconsistent with applicable tax law.⁴²⁰ Further, the IRS could use information reporting instructions to third parties to add administrative gloss to the underlying tax law. For example, by providing non-U.S. banks with new indicia of customers who should be subject to information reporting to the U.S., the IRS could create

⁴¹³ Bankman, Nass & Slemrod, *supra* note 32, at 18.

⁴¹⁴ For list of current information-reporting requirements, see *supra* note 33.

⁴¹⁵ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, CATALOG NO. 59612Q, 2015 INSTRUCTIONS FOR FORM 8966 (2015).

⁴¹⁶ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, FORM 1095-C, EMPLOYER-PROVIDED HEALTH INSURANCE OFFER AND COVERAGE (2015).

⁴¹⁷ INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, FORM 8949, SALES AND OTHER DISPOSITIONS OF CAPITAL ASSETS (2015).

⁴¹⁸ I.R.S. Notice 2014-21, 2014-16 I.R.B. 938.

⁴¹⁹ See INTERNAL REVENUE SERV., TAX GAP ESTIMATES FOR TAX YEARS 2008–2010, at 2 (2016), <https://www.irs.gov/PUP/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf>.

⁴²⁰ See Treas. Reg. §§ 1.6011-4(a), (b) (2016); see also Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629 (2009).

information-reporting rules that extend beyond the requirements of applicable tax law.⁴²¹ An underexplored feature of the information reporting approach, consequently, is how it can serve as an enhanced platform for IRS simplifications.

Each of these examples illustrates how the IRS could extend its current approaches to simplifying the tax law to new tax enforcement and collection techniques. Simplicity in tax administration will likely only grow as the IRS increases its interaction with taxpayers through a variety of new initiatives and technological advances. The potential growth of simplicity underscores the need for policymakers to consider the strategies of red-flagging, oversight, and, if necessary, structural reform,⁴²² when considering whether and how to implement these tax administration proposals in the future.

CONCLUSION

This Article has explored a previously unexamined consequence of mandating that the government communicate with the public using plain language that is easy to understand. Plain language advocates assert that initiatives such as the Plain Writing Act and the IRS's duty to explain will lead to "simplicity rather than obfuscation."⁴²³ In contrast, we have argued that, rather than achieving simplicity, the government's use of clear and simple terms to describe complex legal rules and regulations often yields simplicity. By examining this effect of the use of plain language, this Article has made four primary contributions.

First, this Article has introduced the concept of simplicity to the legal literature. As we have defined it, simplicity occurs when the government presents clear and simple explanations of the law without highlighting its underlying complexity or reducing this complexity through formal legal changes. Conversely, simplicity—a perennial goal of policymakers and scholars—results when policymakers reform the law by eliminating specific complex provisions or procedures through the enactment of statutory changes or issuance of regulations.

Second, this Article has shown that in its numerous taxpayer publications, the IRS frequently uses plain language to transform complex, often ambiguous

⁴²¹ For current law, see Treas. Reg. §§ 1.1471-3(b), (c) (2015).

⁴²² See *supra* Part III.D.

⁴²³ SUNSTEIN, *supra* note 13, at 16.

tax law into seemingly simple statements that: (1) present contested tax law as clear tax rules, (2) add administrative gloss to the tax law, and (3) fail to fully explain the tax law, including possible exceptions. While IRS simplifications often result in restatements of the tax law that benefit the government, at other times they appear as recharacterizations that benefit taxpayers.

Third, this Article has considered the normative implications of simplicity. Simplicity offers a number of tax administration benefits, such as making the tax law understandable, revealing IRS interpretations of the tax law, and even bolstering the IRS's ability to collect tax revenue. At the same time, we have argued that simplicity can also promote opacity rather than transparency regarding the tax law and lead to inequitable benefits and burdens among different taxpayers who act on IRS simplifications. Further, administrative law is unlikely to address each of these threats. Evaluating whether the level of simplicity is too high or low requires balancing the competing values of understandability and accuracy in a given context.

Last, rather than advocating for the rejection of plain language in government communications, we have presented several strategies for maximizing the tax administration and compliance benefits of simplicity while minimizing its potential threats. While these possibilities are not exhaustive, we have outlined three potential approaches: red-flagging or annotating IRS simplifications, outside review of IRS simplifications, and accompanying red-flagging or annotating with structural reform of taxpayer service functions of the IRS.

While we have argued that simplicity occurs in IRS communications with taxpayers, and is likely to increase in the future, this concept has broad application. Administrative agencies throughout the federal government are now required to use plain language in their official communications with the public.⁴²⁴ When agencies meet this mandate by offering simple explanations for otherwise complex law, they too exhibit simplicity. As a result, the analysis and prescriptions presented in this Article should have important implications not only for government officials and scholars specializing in tax law, but for those in other legal areas as well.

⁴²⁴ Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010); SUNSTEIN, *supra* note 13.