Literature on PLRs

The IRS normally processes ruling requests in the order received. A taxpayer with a "compelling need" to have a request processed ahead of the regular order may request "expedited handling," but such a request is granted only in "rare and unusual

cases." The IRS looks most favorably on such a request if "a factor outside a taxpayer's control creates a real business need to obtain a letter ruling or determination letter before a certain date to avoid serious business consequences." Priority is not granted to meet a date for a closing or shareholders' meeting that was set "without regard" to the time required to obtain a ruling. Possible fluctuations in the market price of stocks are also not a basis for priority.

In order to speed things up, a taxpayer with a ruling request raising two or more issues may request that the issues be considered separately if, for example, one issue is more urgent than others. Under an elective two-part procedure for rulings on prospective transactions, the full statement required in all requests can be accompanied by a summary statement of the facts, which the IRS may use in issuing the ruling. The summary statement may reduce the time required to process the request by limiting the material that the IRS must consider in evaluating the request. Also, the taxpayer may request that the IRS send the ruling and other documents related to the ruling request to the taxpayer or a representative by fax, electronic facsimile, or encrypted email attachment. Ruling requests under the jurisdiction of an Associate Office may be sent by fax, electronic facsimile, or encrypted email attachment.

*5 A ruling request may include a request for a conference. The IRS normally schedules a conference only if it considers a conference helpful or is contemplating an adverse decision on the request, but a taxpayer is entitled to one conference as a matter of right. The IRS will offer a taxpayer an additional conference if, after the conference of right, it proposes to rule adversely to the taxpayer "on a new issue" or on an issue discussed at the first conference "but on different grounds." Following a withdrawal, however, the Associate office to which the ruling request was assigned "generally" notifies, "by memorandum, the appropriate Service official in the operating division that has examination jurisdiction of the taxpayer's tax return."

On concluding that an adverse ruling will be issued (and if, in the case of a prospective transaction, that the transaction cannot be reformulated to elicit favorable action), taxpayers often withdraw rulings requests. Following a withdrawal, however, the Associate Chief Counsel to which the ruling request was assigned "generally" notifies, "by memorandum, the appropriate Service official in the operating division that has examination jurisdiction of the taxpayer's tax return."

Letter rulings and determination letters are open to public inspection, but names, addresses, and identifying numbers are deleted before public disclosure, and other deletions may be allowed in particular cases. A ruling request must identify any information other than automatically deleted items that the taxpayer believes should be deleted from the public disclosure. Procedures are also provided for protesting public disclosure of information after a ruling is issued.

2. Fees. Congress decided in 1987 that "the relatively small number of persons that request letter rulings, determination letters, and opinion letters should pay for the benefit of these services." It directed the IRS to develop a schedule of fees for its

services in responding to the requests. Pursuant to this directive, the IRS generally charges user fees for requests for letter rulings, determination letters, advance pricing agreements (APAs), renewals of APAs, reconsiderations of letter rulings and determination letters, prefiling agreements, and closing agreements requested before the relevant returns are filed. The fee, as of February 4, 2021, is generally $38,000, but lower fees are provided for most accounting changes, and the fee for a determination letter is usually $275.

3. Guidelines for requests on recurring subjects. To guide taxpayers requesting rulings on particular subjects, the IRS issues numerous special instructions, including checklists, questionnaires, and percentage and other quantitative benchmarks. The principal areas include the following:

*6 • a. Section 302: distributions to redeem stock.
• b. Section 302(b)(4): partial liquidations.
• c. Section 331: liquidations generally.
• d. Section 332: liquidation by parent corporations of 80-percent-or-more owned subsidiaries.

• e. Section 351: transfers to controlled corporations.

• f. Section 355: spin-offs and similar transactions.
• g. Section 368(a): meaning of "substantially all" in C reorganizations.
• h. Whether a liquidating trust is properly classified as a trust or a corporation.
• i. Whether leveraged leases are properly classified as leases or as sales.
• j. Tax-exempt status.
• k. Private foundation status.
• l. Qualification of pension, annuity, profit-sharing, and stock bonus plans.
• m. Nonqualified deferred compensation.
• n. Whether co-ownership of real property is considered a partnership for purposes of § 1031.

4. No-ruling areas. Except when required by the Code or regulations, the IRS issues rulings as a matter of discretion "[w]henever appropriate in the interest of sound tax administration." As a matter of policy, however, the IRS will not issue rulings on some issues and will not ordinarily rule on certain others, either because of the inherently factual nature of the problem or for other reasons. It will not, for example, rule on (1) whether "the economic substance doctrine is relevant to any transaction," (2) a transaction lacking in bona fide business purpose or having tax reduction as its principal purpose, (3) alternative plans for a proposed transaction or hypothetical situations, (4) a matter as to which a judicial decision adverse to the government has been handed down if the IRS has not yet decided whether to follow the decision or litigate the issue further, (5) whether a proposed transaction would subject a person to criminal penalties, (6) whether, for purposes of procedural or penalty rules, there is reasonable cause, due diligence, good faith, or clear and convincing evidence, (7) any "matter involving" Circular

230, (8) whether a completed transaction can be rescinded, or (9) any frivolous issue. Rulings are "not ordinarily" issued on matters of fact, such as the market value of property, whether an interest in a corporation is, in substance, debt or equity, or whether property is held for sale to customers in the ordinary course of business. The IRS also does not ordinarily rule on transactions to be consummated at an indefinite future time or transactions that are the subject of pending litigation between the

parties. Morever, the IRS will not rule on issues that are "clearly and adequately addressed by statute, regulations, decisions of a court, revenue rulings, revenue procedures, notices, or other authority published in the Internal Revenue Bulletin."

*7 The exclusion of factual issues does not preclude determination of a related legal issue. For example, the market value of property can be assumed for purposes of a ruling, subject to verification when the return is audited. Indeed, the IRS often conditions rulings on subsequent determinations by examining agents that payments or other transfers are reasonable in amount and are what they purport to be. Moreover, the policy against ruling on "alternative plans of proposed transactions" does not preclude a taxpayer from modifying a proposed transaction to eliminate or modify a feature on discovering that it may elicit an adverse ruling. The policy against ruling on "hypothetical situations" does not, for example, preclude a ruling on a transaction that will be consummated only if blessed by a favorable ruling.

In addition to the general areas described above, the IRS annually provides a list of particular issues on which it either will not or "ordinarily" will not rule, most of which involve factual questions that are better handled "by an agent examining the taxpayer's return than by a tax law specialist sitting at a desk in Washington." The no-ruling list includes, for example, whether compensation is reasonable in amount, whether the cost of an item usually used for personal pleasure (e.g., a swimming pool) can be deducted as a medical expense, and whether an acquisition was made to evade or avoid tax within the meaning of

269. The qualified embargo ("will not ordinarily rule") covers many questions that to the outsider differ only imperceptibly from those covered by the absolute embargo, including the ownership of property where title is in a person other than the alleged true owner and whether indebtedness is incurred or carried to purchase or continue an investment in tax-exempt bonds.

Finally, rulings typically conclude with a disclaimer similar to the following:

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

5. Oral advice. The IRS does not issue oral rulings or accept oral requests for rulings, but IRS personnel do discuss with taxpayers and their representatives the availability of IRS rulings in particular situations and other procedural questions relating to rulings requests. Also, at the IRS's "discretion" and "as time permits," IRS personnel may discuss substantive issues, but statements made in these discussions are not binding on the IRS, and taxpayers may not rely on them, even as a basis for relief from retroactive effect of an inconsistent written ruling later issued to the taxpayer. The IRS "does not respond to letters seeking to confirm the substance of oral discussions, and the absence of a response to such a letter is not a confirmation."

More generally, oral "guidance is advisory only, and the Service is not bound by it, for example, when examining the taxpayer's return."

Below is some more literature on PLR:

Second, the paradigmatic PLR is a situation where a taxpayer faces uncertainty, they voluntarily request a PLR to resolve the uncertainty, and the IRS voluntarily issues a PLR doing so. But in certain instances, the Code or Regulations require taxpayers to obtain a PLR to take a certain action or obtain a particular status. For example, taxpayers cannot mitigate missed deadlines without applying to the IRS for a PLR granting relief.[1] When the law requires taxpayers to obtain a favorable PLR to proceed, it is unsurprising that sometimes they end up with adverse PLRs.[2] To focus on the puzzle of *voluntary* adverse PLRs, I excluded mandatory PLRs using both term exclusions and manual review, as detailed in Appendix A. Applying these term exclusions results in a set of approximately 81,000 PLRs.[3]

***

Appendix A
Excluding Non-Discretionary PLRs

1. PLRs that are mandatory under U.S. tax law cannot be categorically excluded.
2. Any exclusion from the universe of PLRs based on the presence of terms or Code sections risks being over-inclusive. To minimize that risk while maximizing efficiency, I downloaded the Code sections associated on Checkpoint with all PLRs released from 2013 through August 25, 2023.[4]
3. Using a frequency analysis, I reviewed any Code section attributed to ten or more PLRs. If the Code section included an express requirement that the taxpayer receive IRS approval, I excluded any PLRs containing citations to that Code section.
    a. Heuristically, where express IRS approval is required, PLRs granting such approval are limited to the question of approval.
    b. I also excluded certain Regulations citations that require PLRs.
4. As a result, I excluded PLRs containing 12 terms:
    a. "9100" and "1362(b)(5)" (relief for missed deadlines)
    b. "1362(f)" and "1362(g)" (elections of S corporation status given inadvertent termination or loss of status within past five years)
    c. "4945(g)" (approval of private foundation grants to individuals)
    d. "402(c)(3)(B)" (hardship exception for retirement withdrawals)
    e. "468A(d)" (amount of deduction for nuclear decommissioning costs)
    f. "408(d)(3)(I)"[5] (waiver of limited on rollovers)
    g. "exempt status" (denying tax exemption under Section 501(c)(3))[6]
    h. "301.7701-3(c)(1)(iv)" (permission to change entity classification)
    i. "1.1295-3(f)" (consent for retroactive QEF election)
    j. "53.4942(a)-3(b)(2)" (private foundation set-asides)
5. For PLRs before January 1, 1984, I also excluded "367(a)." Before 1984, taxpayers needed PLRs to avoid its adverse tax consequences.
    a. For post-1984 PLRs involving Section 367(a), I manually reviewed and excluded them if the transaction occurred under pre-1984 law.
6. Furthermore, when manually reviewing PLRs, I carefully examined PLRs where the taxpayer was asking for "consent," "permission," or "waivers." Likewise, PLRs where taxpayers were asking about "minimum funding requirements" (Section 412(c)), "mortality tables" (430(h)(3)(C)) or "excess business holdings" (Section 4943(c)) often were mandatory.
7. I also categorized certain procedural postures as mandatory, such as relief from retroactive application of IRS rules under Section 7805(b), revocations of PLRs, denials of requests for reconsideration, and modifications of PLRs.

[1] *See* Treas. Reg. § 301.9100-3(e)(5).

[2] If the taxpayer needs a PLR to proceed, the marginal cost of an adverse PLR versus withdrawing the request is minimal. Furthermore, in certain situations where obtaining a PLR is mandatory, taxpayers must receive a PLR to challenge the adverse decision. *See, e.g.*, Section 7478(b)(2); Rev. Proc. 2021-10 § 3.02; Rev. Proc. 2023-5 § 9.

[3] For simplicity, references in the remainder of this article to "adverse" PLRs refer to PLRs that are adverse and are discretionary under federal tax law, unless context specifies otherwise.

[4] This was derived from UIL numbers.

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

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

Third, I needed to decide whether a PLR is adverse or favorable. PLRs are written through a decentralized process within the IRS Office of the Chief Counsel that, as described above, is also collaborative with the requesting taxpayer. Accordingly, beyond the high-level approach of describing facts, summarizing applicable law, and applying law to facts, there is little consistency between PLRs in structure or format. Often, PLRs specify exactly the rulings the taxpayer requested and the rulings the PLR contains, making it easy to identify adverse ones.[1] To exclude complicating variables,[2] I only treated a PLR as adverse if it was entirely adverse (i.e., I excluded PLRs where the IRS was adverse on one or more, but not all, of the taxpayer's requests).[3]

Sometimes, however, PLRs just state that the taxpayer requested a PLR regarding "certain tax consequences" of a given situation. Since the taxpayer's requested ruling was not explicit, to determine if a PLR was adverse, I had to work from certain assumptions: I assumed that requesting taxpayers want to avoid taxes, and short of avoiding taxes they'd like to defer taxes.[4]Likewise, I assumed that they would want to have tax statuses that achieve those goals (e.g., that they'd want to be an S corporation) and that they would want to avoid filing obligations.[5] At the same time, I compared the facts and representations in the PLR to those assumptions, and revised them when they did not appear to be accurate. For example, PLR 200946023 just states that the taxpayer "requested rulings" under Sections 301 and 305. The PLR holds that, where a real estate investment trust (REIT) gave shareholders a choice to receive a distribution of stock or of cash (of equal value), the total value of the distribution would be treated as a distribution of property with respect to stock under Section 301, as a result of Section 305.[6] Given that REITs receive a deduction for dividends paid,[7] I could infer that PLR 200946023 was not adverse.[8]

And, when even after making those assumptions and confirming them to the extent possible, it was still unclear whether a PLR was adverse or not, I erred on the side of not adverse. This ensures that the adverse PLRs included in my dataset would focus on the precise puzzle and minimize complicating variables. For example, in PLR 9034004, the taxpayer requested a ruling "concerning whether and to what extent" a trust beneficiary was treated as the owner of trust assets for income tax purposes. The PLR specifies the ratio that applies to determine the portion of the trust assets the beneficiary owns for income tax purposes.[9] However, without more indications about relative tax rates and desires, there was no basis to confidently classify it as adverse, so I classified it as not adverse.

Appendix A

Identifying Adverse PLRs

1. In addition to the considerations described in Part II.C above, a few particular circumstances are worth noting.
2. Sometimes, PLRs generally grant the taxpayer's requested rulings, but include additional statements regarding other legal constraints (likely to avoid the PLR being read too broadly). I did not classify those as adverse PLRs, even though the ruling differed from the request, because the taxpayers' requests did not involve the additional legal constraints, which were likely undisputed.

3. Before 1991, the IRS issued a significant number of PLRs regarding whether a worker was classified as an employee or as an independent contractor for U.S. federal tax purposes. Those PLRs did not typically state the desired classification, and the IRS would solicit information from all parties before making a decision. Accordingly, to avoid muddying the waters, I excluded them from my dataset of adverse PLRs.
4. Before 1997, taxpayers would seek rulings about entity classification. Those PLRs tend not to specify the taxpayer's desired classification. However, I used the state law framework under which the entity was formed as a proxy for their preference (i.e., it is unlikely someone would seek a PLR that an entity formed under Delaware's limited partnership laws was a corporation).
    a. Under relevant law, corporations were the default status, so if that proxy was unavailable or inconclusive, I assumed the taxpayer wanted a PLR to confirming partnership classification.
5. Sometimes, the IRS provided general information about the law rather than ruling on the request. I classified those PLRs as refusing to rule, not adverse.
6. Where the IRS ruled on some issues and refused to rule on others, I classified a PLR as adverse based on the issues on which the IRS ruled.

[1] I classified the PLR as adverse even if the request was for a sub-optimal tax outcome and the PLR held that a seemingly more tax-favorable outcome applied. *See, e.g.*, PLR 201943020 (taxpayer requesting adverse rulings; IRS declined to provide them); *see also* Jeffrey N. Pennell, Lawrence P. Katzenstein, Stephanie Loomis-Price, and Kathleen R. Sherby, *Advanced Estate Planning Practice Update: Winter 2020* (ALI-CLE Feb. 26, 2020) (discussing PLR); PLR 201543001 (Oct. 23, 2015) (taxpayer requesting ruling that property was depreciable over seven years; IRS ruled it was depreciable over five); *see also Section 168 – Accelerated Cost Recovery System: Storage Device Used to Provide Frequency Regulation Services is Five-Year Property*, Tax Management Weekly Report (Nov. 2, 2015) (discussing PLR).

[2] Partially adverse PLRs could be explained by a taxpayer's calculation that the favorable rulings outweigh the adverse consequences of the unfavorable rulings. *Cf. Transcript of the May 6, 2016 Meeting of the ABA Tax Section's Exempt Organizations Committee: Part I*, 76 Exempt Org. Tax Rev. 95 (2016) (statement of IRS official) ("You may see an adverse one item of a bucket, but usually taxpayers will even withdraw those single items.").

[3] The exception to this was where a taxpayer had one independent request and then requested that, if the IRS's response was adverse, they receive relief from retroactive effect of the ruling pursuant to Section 7805(b). This pattern appeared in [30] of my dataset PLRs. Xref 213(d).

[4] PLRs regarding corporate reorganizations under Section 368 often fit into this pattern. *See, e.g.*, PLR 202339009 (Sept. 29, 2023). While taxpayers typically ask for PLRs confirming that a transaction constitutes a tax-free reorganization under Section 368 to avoid recognizing gain, that is not always the case (e.g., where a taxpayer has losses that they want to recognize). *See generally, e.g.*, Lawrence Zelenak, The Story of Seagram: The Step Transaction Doctrine on the Rocks, in Business Tax Stories 263 (Steven A. Bank & Kirk J. Stark eds., 2005) (describing one such situation); CCA 200515019 (discussing another). For these PLRs, I looked at the structure of the transaction to see if it included steps that would be unnecessary if the taxpayer did not want tax-free treatment. For example, PLR 202339009 holds that a transaction was a reorganization under Section 368(a)(1)(F). The corporation in question wanted to redomicile, and to do so it formed a new corporation in the target jurisdiction, transferred its assets to it, and then ultimately elected to be a disregarded entity. If the company had wanted the transaction to be taxable to its shareholders, none of these steps would have been necessary. Accordingly, PLR 202339009 is not adverse.

[5] *See* Joshua D. Blank, *The Timing of Tax Transparency*, 90 So. Cal. L. Rev. 449, 504 n.318 (2017) ("I coded private letter rulings as adverse where the IRS ruled the taxpayer's proposed transaction or actions violated a statutory or regulatory requirement or where the IRS explicitly stated that it denied the taxpayer's requested treatment." (citations omitted)).

[6] *See* Section 305(b)(1); Treas. Reg. §§ 1.305-1(b)(2) & 1.305-2(b) Ex. 2.

[7] *See* Sections 561(a)(1), 562(a), 316(a).

[8] This requires parsing because taxpayers often request PLRs ruling that Section 305(b) does not apply and Section 302, rather than Section 301, applies to a distribution. *See, e.g.*, PLR 201918009 (May 3, 2019); PLR 200801038 (Jan. 4, 2008).

[9] Specifically, the PLR dealt with lapses of *Crummey* powers. *See* BNA TM Portfolio 819-2nd: Grantor Trusts (Sections 671–679), X. Section 678: Persons Other Than Grantor Treated as Substantial Owners, X. Section 678: Persons Other than Grantor Treated as Substantial Owners (discussing these rules).