

DETRIMENTAL RELIANCE ON IRS GUIDANCE

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The IRS issues different types of guidance to taxpayers, and the extent to which taxpayers can rely on IRS guidance depends on the form in which it was offered. For instance, taxpayers generally cannot rely on oral advice provided over the phone but can rely on more formal types of advice. The current state of the law harms unsophisticated taxpayers who disproportionately obtain informal advice—the least reliable type of IRS guidance.

Existing literature lacks a thorough discussion of why, as a policy matter, we allow taxpayers to rely on some forms of IRS guidance more than others. This Article fills that gap by suggesting and critically evaluating potential justifications for this practice.

As the analysis in this Article reveals, while a number of potential justifications are ultimately unconvincing, others are persuasive. Given the existence of several satisfactory justifications, the practice of disallowing reliance on informal guidance ought to be continued with some critical modifications. In particular, this Article proposes specific reform options that would assist unsophisticated taxpayers without undermining any compelling justifications for generally forbidding reliance on informal advice.

Introduction	422
I. How Reliable Is IRS Guidance?	431
A. Phone Calls	431
B. IRS Publications	438
C. Private Letter Rulings	439
D. Revenue Rulings	442
E. Summary	443
II. Potential Justifications for Different Degrees of Reliability	443
A. How Thoroughly Did the IRS Consider the Guidance?	444
B. If the Guidance Were Binding, Would the IRS Issue Less of It?	447
C. Is the Taxpayer’s Reliance on the Guidance Reasonable?	449
D. Is the Taxpayer Committed to Following the Advice?	451

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E. Is the Guidance Generalizable?	453
F. Do Evidentiary Considerations Play a Role?	454
G. How Much Harm Would the Taxpayer Suffer as a Result of Relying on the Guidance if the Guidance Were Unreliable?.....	455
H. Would Taxpayers Seek This Form of Guidance on Questions to Which They Already Know the Answer?	461
I. Summary	461
III. Proposed Reforms	463
A. Warning Callers.....	466
B. Penalty Relief	467
C. Granting More Flexibility to Amend Returns.....	469
D. Treatment of IRS Publications	471
Conclusion.....	474

INTRODUCTION

The IRS provides guidance to taxpayers through a multitude of different channels. Some guidance is provided informally. For instance, the IRS answers many questions received by phone.¹ Other guidance is more formal. For example, if a taxpayer plans to engage in a transaction and the tax consequences of the transaction are unclear based on available legal authority, the taxpayer may request a private letter ruling from the IRS.² If guidance provided by the IRS is accurate, all goes well. If IRS guidance proves to be inaccurate, the taxpayer may end up in a very unfortunate situation, and the taxpayer's misfortune will be more severe if the guidance received was informal. A taxpayer faces consequences that are more dire when the inaccurate advice was informal because taxpayers generally cannot rely on informal guidance, such as oral advice provided over the phone, but can rely on more formal types of guidance.³

Although sophisticated taxpayers benefit from ready access to formal types of IRS guidance, as a practical matter, unsophisticated taxpayers who lack financial resources must depend disproportionately on informal, unreliable IRS advice. For instance, because the process for preparing a private letter ruling request is onerous and because the taxpayer must pay a filing fee, generally only sophisticated taxpayers

1. *Telephone Assistance*, I.R.S., <http://www.irs.gov/uac/Telephone-Assistance> (last updated Jan. 30, 2015).

2. Rev. Proc. 2014-1, 2014-1 I.R.B. 7.

3. *See infra* Part I.A–D.

request private letter rulings.⁴ In order to contrast the plight of taxpayers who receive incorrect informal advice with the benefits accruing to taxpayers who receive formal guidance, consider the following three hypothetical illustrations.⁵

Consider, first, the predicament faced by Ms. Kennedy, a taxpayer who receives incorrect, informal advice. During the 2014 tax return filing season, Ms. Kennedy attempts to determine her eligibility for the earned income tax credit (EITC). The EITC provides economic relief for the working poor.⁶ To seek advice, she calls the IRS helpline, and she reaches an IRS representative. The information provided by the IRS employee leads her to believe that she is not entitled to claim the EITC for 2013.⁷ As a result, Ms. Kennedy claims no EITC on her 2013 tax

4. See *infra* Part I.C.

5. The next three examples provided in the Introduction are hypothetical illustrations. For discussion of actual cases in which taxpayers were led astray by informal IRS advice, see *infra* Part I.A.

6. A full discussion of the EITC is beyond the scope of this Article. For further discussion of the EITC, see Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351 (2002) [hereinafter Book, *Taxpayers Caught in the Net*]; Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103 [hereinafter Book, *Preventing the Hybrid from Backfiring*]; Michelle Lyon Drumbly, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113 (2014); Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461; Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719 (2012); Jonathan P. Schneller, Adam S. Chilton & Joshua L. Boehm, *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176 (2012); Susannah C. Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 797–803 (2014); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 997–1012 (2004); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867 (2005).

7. Assume that, during 2013, Ms. Kennedy's earned income amounted to \$30,000. Ms. Kennedy is no longer married. She lives with one person, her son Brian. Brian is 27 years old and disabled. When she calls the IRS helpline, Ms. Kennedy does not volunteer information about Brian's disability, and the IRS employee does not make any inquiries about Brian besides asking for his age. The employee advises Ms. Kennedy that Brian is not a "qualifying child" for purposes of the EITC based on his age because an individual who is not disabled cannot be a qualifying child unless the individual is younger than 19 or a student and younger than 24. See I.R.C. § 32(c)(3) (2013); *id.* § 152(c)(3)(A)–(B). Based on her resulting understanding that Brian is not a qualifying child, Ms. Kennedy claims no EITC for 2013 because an individual with no qualifying children and earned income of at least \$14,430 is not entitled to the EITC in 2013. I.R.S. PUB. 596, EARNED INCOME CREDIT (EIC) 4 (2013). Given that a limited number of factors affect the determination of whether an individual is a "qualifying child," the IRS employee ought to have inquired about whether Brian was disabled. An IRS helpline

return. Four years later, at tax time, Ms. Kennedy utilizes the services of a professional tax return preparer or a Volunteer Income Tax Assistance (VITA) site.⁸ From the preparer, Ms. Kennedy learns that she could have claimed an EITC of \$1254 in 2013.⁹ Unfortunately for Ms. Kennedy, she does not discover the mistake in time to amend her 2013 tax return and claim the \$1254 credit to which she would have been entitled if she had claimed it earlier.¹⁰ If she argues that the limitations period for filing an amended return ought to be extended because her error was induced by reliance on advice from an IRS employee, her argument will almost certainly fail.¹¹

Ms. Kennedy is not the only taxpayer led astray by informal IRS advice. Mr. Walsh calls the IRS helpline to ask a question about his ability to claim the Child Tax Credit.¹² In Ms. Kennedy's case, the IRS representative incorrectly informed her that she was *not* entitled to a benefit. In Mr. Walsh's case, the IRS representative incorrectly informs him that he *is* entitled to a benefit. In particular, the IRS representative informs him that he can claim a Child Tax Credit for his 12-year-old daughter, Alice. The IRS employee neglects to ask probing questions

representative is in a much better position than an unsophisticated caller to know what factors can affect the determination of whether an individual is a "qualifying child." If the IRS representative had made proper inquiries and learned about Brian's disability, the representative could have properly informed Ms. Kennedy that Brian is a "qualifying child" because an individual who is permanently and totally disabled can be a qualifying child at any age. *See* § 32(c)(3); *id.* § 152(c)(3)(B).

8. *See Free Tax Return Preparation for Qualifying Taxpayers*, I.R.S., <http://www.irs.gov/Individuals/Free-Tax-Return-Preparation-for-You-by-Volunteers> (last updated Sept. 29, 2014).

9. This is based on the assumptions, mentioned in note 7 above, that Ms. Kennedy's earned income amounted to \$30,000 and that Brian is a qualifying child. With earned income of \$30,000 and one qualifying child, an individual can claim an EITC of \$1254 in 2013. I.R.S. PUB. 596, *supra* note 7, at 31.

10. Per I.R.C. § 6511(a), she is generally required to file the amended return within three years of the time when she filed the original return. § 6511(a). Further, given that the EITC is a refundable credit, she would have benefited from the EITC even if she owed no income taxes in 2013 without the credit. *See, e.g.*, JOSEPH BANKMAN ET AL., FEDERAL INCOME TAXATION 384 (16th ed. 2012) ("The EITC is a 'refundable' credit, which means that it does not just offset any tax liability but, far more important, results in a payment from the government to the extent that the credit exceeds tax liability."). In particular, if she owed no taxes without the credit, as a result of the credit, Ms. Kennedy would have received a payment of \$1254. *See supra* note 9. If a credit is refundable and if the amount of the credit exceeds a taxpayer's tax liability, the credit will reduce tax owed to \$0, and the taxpayer will receive a payment from the government in the amount of the excess of the credit over the taxpayer's precredit tax liability. *See, e.g.*, BANKMAN ET AL., *supra*, at 384.

11. *See infra* Part I.A.

12. Under the Child Tax Credit, a taxpayer can claim a credit of up to \$1000 for a "qualifying child," and the amount of the credit is reduced and eventually eliminated for taxpayers whose incomes exceed certain threshold amounts. I.R.C. § 24(a)-(c).

about Alice's living situation, and Mr. Walsh does not spontaneously volunteer this information because he is unaware of its relevance to the determination of the Child Tax Credit. If the IRS employee had inquired further, he or she would have uncovered facts that warranted advising Mr. Walsh to not claim the credit.¹³ Relying on the IRS employee's advice, Mr. Walsh claims the credit, reducing his tax liability by \$1000.

Two years later, the IRS sends Mr. Walsh a letter notifying him that he improperly claimed the Child Tax Credit and now owes the IRS \$1000 plus interest. In the interim, Mr. Walsh made financial decisions relying on the assumption that he did not owe a large sum to the IRS. Perhaps, for instance, he used his tax refund to make a security deposit on a new apartment. Owing \$1000 plus interest to the IRS causes Mr. Walsh financial difficulties and may negatively affect his credit rating. Mr. Walsh can, at best, expect to succeed in using reliance on IRS advice to avoid any penalties the IRS assesses, if he can prove reasonable reliance on the advice.¹⁴ Any attempt to assert reliance on the advice as a basis for not paying the tax owed will almost certainly fail.¹⁵

Finally, consider Computer Corp., a large corporation that manufactures and sells computers. Like Ms. Kennedy and Mr. Walsh, Computer Corp. receives faulty advice from the IRS. However, unlike Ms. Kennedy and Mr. Walsh who receive their misleading instructions from an IRS employee providing free advice via the IRS helpline, Computer Corp. receives its incorrect advice in the form of a private letter ruling. Assume Computer Corp. requests and receives a private letter ruling indicating that the tax consequences of a contemplated transaction will be favorable. Computer Corp. engages in the transaction and reports tax consequences consistent with the ruling. Two years later, the IRS decides that the ruling's conclusion was based on an incorrect interpretation of the applicable statutes, and the IRS revokes the ruling. However, as is consistent with typical IRS practice, the revocation applies prospectively only.¹⁶ Thus, although Computer Corp. might be subject to less favorable tax consequences in future years (if the transaction has ongoing tax effects), Computer Corp. retains the benefit of favorable tax treatment in prior years.

13. Assume Alice's mother, who separated from Mr. Walsh during the year, also would have been entitled to claim the Child Tax Credit with respect to Alice. Furthermore, Alice spent a greater portion of the year living with her mother. Assume that both Mr. Walsh and Alice's mother claim the Child Tax Credit with respect to Alice. Under those circumstances, the IRS can disallow Mr. Walsh's claim. *See* § 24(a); *id.* § 151(c); *id.* § 152(c)(4)(B).

14. *See infra* Part I.A.

15. *See infra* Part I.A.

16. *See infra* Part I.C.

As these examples illustrate, the IRS issues different types of guidance to taxpayers, and the extent to which taxpayers can rely on IRS guidance depends on the form in which it is offered. Oral advice via the IRS helpline and private letter rulings are only two of many different types of instruction disseminated by the IRS. Other varieties include revenue rulings, IRS publications, tax forms and accompanying instructions, and many more communications that make up the assortment of direction provided by the IRS.¹⁷

The IRS provides these different types of advice with frequency, subject to resource constraints. For instance, in 2012, the IRS received approximately 109 million phone calls, and only 61% of callers seeking to reach a customer service representative succeeded in doing so.¹⁸ The IRS issued 1,460 private letter rulings over the same time period.¹⁹ Periodically, citing to limited resources or other factors, the IRS announces that it will no longer issue private letter rulings on certain topics.²⁰

IRS guidance provided via the IRS helpline is not immune from error. In July 2005, the United States General Accounting Office (GAO) provided a report to Congress on the quality of service provide by the IRS.²¹ This report indicated that, for the 2005 filing season, IRS telephone assistance accuracy was estimated at 87%.²² According to the same report, this 13% error rate represented an improvement over the

17. For further discussion of other types of guidance issued by the IRS, see Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (2008).

18. NAT'L TAXPAYER ADVOCATE, I.R.S., 2013 ANNUAL REPORT TO CONGRESS 20 (2013), available at <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/>.

19. This information is based on a Westlaw search for all private letter rulings issued in 2012.

20. Rev. Proc. 2014-1, 2014-1 I.R.B. 14.

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

22. *Id.* at 1. The report does not describe the methodology for measuring IRS accuracy. However, an earlier report explains that the IRS measures accuracy by placing anonymous calls to the IRS telephone assistance line and monitoring the answers provided by IRS employees to a number of test questions. U.S. GENERAL ACCOUNTING OFFICE, GGD-90-36, TAX ADMINISTRATION: MONITORING THE ACCURACY AND ADMINISTRATION OF IRS' 1989 TEST CALL SURVEY 1 (1990). This earlier report notes some initial disagreement between the IRS and the GAO regarding how to measure accuracy. *Id.* at 8. In particular, at least initially, the IRS categorized certain responses as correct even when they were incomplete and potentially misleading because the IRS representative had not asked sufficient questions to obtain all information necessary to provide a correct answer. *Id.* at 6-8.

prior year's 24% error rate.²³ In April 2001, the GAO provided a similar report stating that, in 2000, the IRS estimated that it provided correct answers to questions about tax law received by phone 73% of the time.²⁴ This 27% error rate, in turn, was lower than the error rate in earlier years.²⁵ There is no predicting what the future will hold. However, recent cuts to the IRS's resources available for training employees do not bode well.²⁶

Although sophisticated taxpayers benefit from access to formal IRS advice, unsophisticated taxpayers disproportionately obtain IRS advice through informal channels.²⁷ Therefore, concern for unsophisticated taxpayers warrants analysis of why taxpayers are not allowed to rely on informal IRS guidance. Existing literature discusses the question of how much weight ought to be given to different forms of IRS guidance, as a matter of administrative law, when the IRS takes a position in litigation that is consistent with its own guidance.²⁸ However, existing literature

23. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-782, TAX ADMINISTRATION: IRS NEEDS BETTER STRATEGIC PLANNING AND EVALUATION OF TAXPAYER ASSISTANCE TRAINING 1 (2005).

24. U.S. GENERAL 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).

25. *Id.* These statistics provide a sense of the frequency with which taxpayers may receive incorrect advice from the IRS helpline. They do not, however, indicate how often taxpayers, in fact, follow incorrect advice when completing their tax returns. Measuring the frequency of that occurrence is difficult because, given the current state of the law, raising reliance on the advice is a futile exercise so, in most instances, the issue will not be litigated. Nevertheless, the issue has arisen in some cases as discussed below in Part I.A.

26. NAT'L TAXPAYER ADVOCATE, *supra* note 18, at 21 ("The IRS training budget has been slashed from about \$172 million in FY 2010 to about \$22 million, a staggering 87 percent reduction."). More effective training of IRS employees will be a necessary component of any solution that addresses the plight of unsophisticated taxpayers who receive faulty advice from the IRS helpline. However, given that some mistakes will inevitably be made, this Article's proposals are also essential to protect unsophisticated taxpayers who are misled by IRS advice. As one recent indicator of the quality of service provided by the IRS helpline, the *Wall Street Journal* reported that, in the current tax filing season, "[t]axpayers are facing the worst service from the Internal Revenue Service since at least 2001, with more than half of callers unlikely to get through to the agency and average hold times of 30 minutes or more." See John D. McKinnon, *IRS Woes Keeping Taxpayers on Hold; More Than Half of Those Calling with Questions Won't Get Through, Report Says*, WALL ST. J. (Jan. 14, 2015, 6:32 PM), <http://www.wsj.com/articles/coming-filing-season-to-strain-irs-vex-taxpayers-report-says-1421248607>.

27. See *infra* notes 220–25 and accompanying text.

28. See, e.g., Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637 (1996); Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037 (1995); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013); Steve R. Johnson, *Preserving Fairness in Tax Administration*

lacks a thorough discussion of why, as a policy matter, we allow taxpayers to rely on some forms of IRS guidance more than others when the IRS later espouses a view that is inconsistent with its own initial guidance. This Article fills that gap by suggesting and critically evaluating potential justifications for this practice.

As the analysis in this Article demonstrates, some of the potential justifications are unconvincing. For instance, evidentiary concerns could be addressed by recording phone calls.²⁹ Also unpersuasive is the notion that the IRS ought to allow greater reliance on private letter rulings because taxpayers change their behavior more significantly in response to private letter rulings than in response to phone calls.³⁰

Several of the potential justifications, however, are more compelling. First, if phone calls were binding on the IRS, the IRS might curtail the volume of advice provided by phone, which could result in, overall, less accurate tax reporting.³¹ Second, because the IRS reviews advice provided in private letter rulings more thoroughly than advice provided by phone, unlike an answer provided by phone, a ruling that proves to be incorrect is likely to, nevertheless, represent at least a reasonably close approximation of what the law, in fact, provides.³² Third, making phone call advice binding on the IRS might encourage taxpayers to behave strategically by calling the IRS repeatedly until they receive unjustifiably beneficial answers.³³ Fourth, holding the IRS to advice provided by phone might facilitate corruption and favoritism given that the advice is not publicly available.³⁴ Fifth, if advice provided by phone were binding, the IRS might receive more phone calls from taxpayers who do not genuinely need IRS guidance but are merely seeking assurances that their claimed results will be unchallenged.³⁵ One remaining justification is not always persuasive but can be depending on the particular facts. Specifically, the notion that a taxpayer's reliance on phone call advice is unreasonable is true only in the case of certain taxpayers.³⁶

in the *Mayo Era*, 32 VA. TAX REV. 269, 320–22 (2012); Leandra Lederman, *The Fight over “Fighting Regs” and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 664–68 (2012); James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. 349, 373 (2013); Irving Salem, Ellen P. Aprill & Linda Galler, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 104 TAX NOTES 1231 (2004).

29. See *infra* Part II.F.

30. See *infra* Part II.G.

31. See *infra* Part II.A–B.

32. See *infra* Part II.A.

33. See *infra* Part II.D.

34. See *infra* Part II.E.

35. See *infra* Part II.H.

36. See *infra* Part II.C.

Ultimately, given that some convincing justifications exist, the practice of disallowing reliance on IRS guidance provided by phone ought to be continued. Nevertheless, three measures can and should be adopted that would ameliorate the unfairness of the outcomes for taxpayers like Ms. Kennedy and Mr. Walsh. These three reforms would be entirely consistent with any convincing justification for prohibiting reliance on informal IRS advice.

To implement reform, first, the IRS ought to warn callers that they cannot rely on advice provided by phone. Second, the IRS ought to refrain from assessing penalties against unsophisticated taxpayers (perhaps using income as a proxy for sophistication) when they report items consistently with IRS advice provided by phone. The IRS ought to do this on its own initiative rather than waiting for the taxpayer to raise the phone call as a penalty defense. The IRS could put this policy into practice if it recorded phone calls and indexed them by social security number or taxpayer identification number. Third, Congress should extend the limitations period for filing an amended return for a taxpayer whose failure to file a correct return results from reasonable reliance on any form of advice provided by the IRS. In the context of guidance made generally available to taxpayers, scholars have noted that sophisticated taxpayers' incentives to challenge unfavorable advice effectively eliminate any possibility that the IRS or Treasury could issue guidance that is inconsistent with applicable law in a taxpayer-unfavorable manner.³⁷ To that discussion, this Article adds the key observation that, in the case of advice provided to an unsophisticated taxpayer, the taxpayer likely will rely on the advice even if it is incorrect in a taxpayer-unfavorable manner. Ms. Kennedy's predicament illustrates this possibility. Luckily, in such a case, granting an extension of time to file an amended return provides a potential remedy. Furthermore, this solution is unobjectionable because concerns that would arise if taxpayers could rely on IRS advice that is unduly taxpayer-favorable do not plague a proposal that grants relief to a taxpayer who has relied on unduly unfavorable advice, as discussed in more detail below.³⁸

In addition to revealing opportunities for reforms that would assist unsophisticated taxpayers, the analysis in this Article sheds light on the merits of a recent Tax Court decision that has received attention from the popular press. Recently, the popular press expressed indignation on behalf of a taxpayer who incurred penalties as a result of reporting the tax consequences of IRA distributions in a manner that was inconsistent

37. See, e.g., Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 245 (2004); Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 833 (2012).

38. See *infra* Part III.C.

with applicable statutory language but consistent with guidance contained in an IRS tax publication (a document intended to provide taxpayers with information relevant to preparing their tax returns).³⁹ In *Bobrow v. Commissioner*,⁴⁰ the Tax Court denied the taxpayer's defense against penalties based on the IRS publication because the taxpayer did not raise the defense in time.⁴¹ However, in dicta, the Tax Court's order also stated that the IRS publication is "not binding precedent."⁴² Further, the order stated, "[T]axpayers rely on IRS guidance at their own peril."⁴³ Popular news stories have latched onto and criticized these statements.⁴⁴ The analysis in this Article suggests that the statements are not as unfair as they may first appear, at least in the context of the case in which they arose. The taxpayer in the case, Alvan Bobrow, is no unsophisticated taxpayer; rather, he is a partner in Mayer Brown's tax transactions group and was formerly the general tax counsel for CBS, Inc.⁴⁵

Finally, although this Article focuses on the question of reliance on IRS guidance, many of the issues that arise in this context arise any time agencies provide guidance to unsophisticated parties. Issues that plague unsophisticated individuals in the tax context plague individuals attempting to comply with a wide variety of laws. Thus, although this Article makes specific recommendations in the tax context, the evaluation of reasons for allowing individuals to rely more on some forms of guidance than others has relevance beyond the tax field and provides a theoretical foundation that can inform specific recommendations in those areas as well.

This Article proceeds as follows. Part I describes the extent to which taxpayers can rely on different forms of IRS guidance. Part II suggests and assesses potential policy justifications for the current state of the law. Based on the analysis in Part II, Part III recommends ways in which the IRS ought to amend its current practices, proposes that Congress should extend the limitations period for filing an amended return for a taxpayer whose failure to file a correct return results from reasonable reliance on any form of advice provided by the IRS, and assesses the extent to which taxpayers ought to be able to rely on IRS

39. See, e.g., Janet Novack, *Taxpayers Rely on IRS Guidance at Their Own Peril*, *Tax Judge Rules*, FORBES (Apr. 18, 2014 5:53 PM) <http://www.forbes.com/sites/janetnovack/2014/04/18/taxpayers-rely-on-irs-guidance-at-their-own-peril-tax-judge-rules/>.

40. 107 T.C.M. (CCH) 1110 (2014).

41. Order at 2–3, *Bobrow*, 107 T.C.M. (CCH) 1110 (No. 7022-11).

42. *Id.* at 2.

43. *Id.*

44. See, e.g., Novack, *supra* note 39.

45. *Id.*

publications, the issue discussed in the recent *Bobrow v. Commissioner* case.

I. HOW RELIABLE IS IRS GUIDANCE?

The IRS issues a multitude of different forms of guidance.⁴⁶ This Part describes four different forms—oral advice provided by phone, IRS publications, private letter rulings, and revenue rulings—and discusses the extent to which taxpayers can rely on each of these four forms.

A. Phone Calls

The IRS takes the position that taxpayers cannot rely on oral advice that it provides.⁴⁷ Indeed, Treasury Regulation Section 601.201(k)(2) states: “A taxpayer may . . . seek oral technical assistance from a district office in the preparation of his return. . . . Such oral advice is advisory only and the Service is not bound to recognize it in the examination of the taxpayer’s return.”⁴⁸ Clear warnings to this effect are provided in written IRS materials.⁴⁹ However, curiously, taxpayers hear no standard warning when they actually call the IRS, and the website that provides information about how to call the IRS contains no cautionary language.⁵⁰ Therefore, a taxpayer will be adequately warned only if he or she happens to be in the unusual position of sifting through written IRS guidance for information about the reliability of advice provided by phone but decides to call the IRS for information about how to prepare a return.

It is clear that Treasury Regulation Section 601.201(k)(2) prevents a taxpayer from being able to rely on oral advice to avoid paying tax due. There may be some leeway, however, for taxpayers to use reliance on oral advice as the basis for a defense against penalties assessed by the

46. For further discussion of other types of guidance issued by the IRS, see Korb, *supra* note 17.

47. See, e.g., *id.* at 373. Similarly, taxpayers can also receive oral advice in person from IRS representatives at Taxpayer Assistance Centers. For a description of these centers, see *Contact Your Local IRS Office*, I.R.S., <http://www.irs.gov/uac/Contact-Your-Local-IRS-Office-1> (last updated Mar. 10, 2015). For a list of the types of tax law questions that the IRS will answer at one of these sites, see *Tax Topics*, I.R.S., <http://www.irs.gov/uac/Tax-Topics> (last updated Jan. 23, 2015).

48. Treas. Reg. § 601.201(k)(2) (2012).

49. Revenue Procedure 2014-1 states: “A taxpayer may seek oral technical guidance from a taxpayer service representative in a Field office or Service Center when preparing a return Oral guidance is advisory only, and the Service is not bound by it, for example, when examining the taxpayer’s return.” Rev. Proc. 2014-1, 2014-1 I.R.B. 8.

50. *Telephone Assistance*, *supra* note 1.

IRS.⁵¹ The Internal Revenue Manual provides that the IRS “may provide penalty relief based on a taxpayer’s reliance on erroneous oral advice” received from the IRS.⁵² In determining whether to grant such relief, the IRS considers, among other factors, whether the taxpayer exercised “ordinary business care and prudence in relying on [the] advice,” whether the IRS provided correct information by other means (such as through tax forms), and the type of supporting documentation provided by the taxpayer.⁵³ Providing supporting documentation or even successfully raising reliance on oral advice as a penalty defense can be difficult tasks, especially for an unsophisticated taxpayer who is not represented by counsel and might accept any penalties assessed without raising mitigating factors.

If an individual were to challenge the IRS’s position on oral advice, the individual would almost certainly find no relief from the courts. From time to time, individuals have attempted to assert the doctrine of equitable estoppel against the IRS or another government agency, generally without success.⁵⁴ In a case between two private parties, this doctrine applies when one party (A) makes a misrepresentation to the other party (B) upon which the other party (B) reasonably relies. In such a situation, the first party (A) can be estopped from later asserting that the statement was false if such an assertion would harm the other party (B).⁵⁵ For example, assume that, prior to loaning money to Jack and taking a security interest in Jack’s car, a bank receives a letter from an insurance company describing an insurance policy it has issued to Jack, stating that Jack has prepaid all required premiums for the year and that the bank is entitled to insurance proceeds up to the amount of the loan if the car is damaged by an event covered by the policy. During the year, Jack’s car is destroyed by an event that would be covered by the policy but for one fact: Jack has not paid his insurance premiums. The bank

51. For additional discussion regarding the issue of whether advice provided by phone can be used as the basis for a defense against penalties, see L. Harold Levinson, *The Legitimate Expectation that Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549, 566–67 (Supp. 1998).

52. I.R.M. 20.1.1.3.3.4.2 (Dec. 11, 2009).

53. *Id.*

54. For further discussion, see, for example, Fred Ansell, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026 (1986); Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 333–34; Ann K. Wooster, Annotation, *Taxpayer’s Assertion of Equitable Estoppel Against IRS Based on Representations of IRS or Non-IRS Employees*, 176 A.L.R. FED. 33 (2002) (summarizing existing case law); see also Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 FORDHAM L. REV. 707 (1987).

55. See, e.g., Ansell, *supra* note 54, at 1026.

sues the insurance company for payment under the policy. If the insurance company asserts the fact that Jack has not paid the insurance premiums to defend against the bank's claim, the bank may argue that the insurance company should be estopped from raising this issue because the bank reasonably relied on the insurance company's earlier statement that Jack had paid his insurance premiums.

Courts, understandably, are hesitant to apply the doctrine of equitable estoppel against the government when a government employee provides an individual with incorrect information about applicable law, and the Supreme Court has yet to decide a case in which it has held that the doctrine can so apply.⁵⁶ Courts and commentators have offered a number of justifications for courts' reluctance to apply the doctrine. First, applying the doctrine could raise separation of powers concerns.⁵⁷ Consider, for instance, the example involving Mr. Walsh in the Introduction. If Mr. Walsh were able to utilize the doctrine of equitable estoppel to avoid paying \$1000 in taxes, then he would receive more favorable treatment than what Congress specified in the statutory provisions regarding the Child Tax Credit, and he would receive this more favorable treatment as a result of the actions of an employee of an executive agency.⁵⁸ Second, applying the doctrine might encourage government favoritism or corruption.⁵⁹ When a government employee who feels no strong attachment to his or her government position is approached by an influential individual for advice, the employee may be inclined to give overly favorable advice, particularly if doing so will bind his or her government employer.⁶⁰ Third, applying the doctrine in some cases could result in a windfall to the individual who received the advice at the expense of the public at large.⁶¹ For instance, if the IRS advises an

56. See, e.g., *id.* at 1027. For a more recent observation along these lines, see *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), in which the Supreme Court stated, "Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed." *Id.* at 422.

57. See, e.g., Ansell, *supra* note 54, at 1037; Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 551 (1979).

58. The Supreme Court has also held that permitting estoppel to apply so as to require the government to make a payment not authorized by statute would violate the Appropriations Clause of the Constitution. *Office of Pers. Mgmt.*, 496 U.S. 414.

59. See, e.g., Ansell, *supra* note 54, at 1034; John A. MacArthur & Philip Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281, 1301-02 (1935); Note, *Equitable Estoppel of the Government*, *supra* note 57, at 554.

60. For description of a similar scenario, see MacArthur & Zimet, *supra* note 59, at 1301-02.

61. See, e.g., Ansell, *supra* note 54, at 1033 ("The most common justification for special treatment of the government in estoppel decisions is to protect the public fisc."); Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law*

individual that he or she does not owe a tax liability that is, in fact, due under applicable law, binding the government to that advice would result in the individual receiving a windfall at the expense of the public treasury. As discussed in more detail below, however, these same concerns would not arise if we provided relief to a taxpayer who received unduly unfavorable advice from the IRS.⁶²

For an example of a case in which the court refused to apply the doctrine of equitable estoppel against the IRS, consider *Clarke v. Commissioner*.⁶³ In *Clarke*, the taxpayers claimed that an IRS employee informed them, via the IRS telephone helpline, that distributions from an IRA would not be taxable if they used the funds to purchase a home.⁶⁴ The advice was incorrect, and the IRS later assessed additional tax liability.⁶⁵ If the taxpayers had known the distributions were taxable, they would not have purchased the home because they lacked the financial resources to both pay the tax owed and acquire the home.⁶⁶ The court upheld the tax liability assessed by the IRS and stated, “[The taxpayers] were truthful and credible witnesses, and their position is one that elicits compassion. The relief [taxpayers] seek, however, is not an alternative that is statutorily available”⁶⁷

Another example is provided by *Tallon v. United States*.⁶⁸ In that case, the taxpayers could have claimed a tax refund for the 1976 tax year.⁶⁹ In early 1978, the taxpayers realized that they had not filed a tax return for 1976 and called the IRS to inquire about filing a late return.⁷⁰ The IRS employee stated, “[I]f you have money coming back you can file your return any time.”⁷¹ The taxpayers did not file a return until 1981, and they subsequently received a letter denying their refund request because the return was filed more than three years after the year in which the excess taxes were paid.⁷² The court upheld the IRS’s denial of the refund request, ruling against the taxpayers on their claim that the

Making and a Proposed Legislative Solution, 77 TENN. L. REV. 563, 598–99 (2010) (discussing windfall concerns that would arise if the IRS were held to a duty of consistency).

62. See *infra* Part III.C.

63. 68 T.C.M. (CCH) 398 (1994).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Tallon v. United States*, No. 83-1349, 1984 WL 1359 (C.D. Ill. Sept. 28, 1984).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

doctrine of equitable estoppel prevented the IRS from disallowing the refund request.⁷³ As in *Clarke*, the court expressed some sympathy for the taxpayers' situation, stating:

There is a sense of logic and fairness which suggests that if the Government sets up a toll free number and urges you to call that number for assistance with your tax questions, you should be able to act on their advice freely and without suspicion that your legal positions are being undermined.⁷⁴

However, the court noted that it was bound by precedent that does not allow waiver of the statute of limitations for claiming a refund when a taxpayer has received incorrect advice from an IRS employee.⁷⁵

For a case outside the tax context, consider *Schweiker v. Hansen*.⁷⁶ In *Hansen*, a Social Security Administration (SSA) representative orally informed an individual, in June 1974, that she was not entitled to social security benefits.⁷⁷ Relying on this advice, which ultimately proved to be incorrect, the individual did not file a written application until she learned that she was, in fact, eligible for benefits.⁷⁸ Because of the delay in filing, she was unable to receive benefits for the year leading up to June 1974, despite the fact that she would have received benefits for that time period if she had filed an application at the time of her meeting with the SSA representative.⁷⁹ The Supreme Court held that the SSA would not be estopped from denying benefits to the individual based on her failure to comply, in time, with the applicable filing requirements.⁸⁰

The courts, however, have not completely rejected equitable estoppel arguments raised by taxpayers, and some lower courts have applied the doctrine against the IRS.⁸¹ However, the courts have required more than a mere negligent misstatement of law by an IRS employee.⁸²

73. *Id.*

74. *Id.*

75. *Id.*

76. 450 U.S. 785 (1981).

77. *Id.* at 786.

78. *Id.* at 786–87.

79. *Id.*

80. *Id.* at 788–89.

81. *See, e.g.,* Wooster, *supra* note 54.

82. Furthermore, it is unclear whether the Tax Court has jurisdiction to consider claims of equitable estoppel or equitable tolling. *See, e.g.,* Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357 (2001); Theodore S. Lynn & Mervyn S. Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487, 516–18 (1964).

For instance, many courts have stated that the IRS employee must engage in “affirmative misconduct.”⁸³

For an example of a case in which the court concluded that the actions of an IRS employee rose to the level of “affirmative misconduct,” consider *Fredericks v. Commissioner*.⁸⁴ In *Fredericks*, the IRS, in 1992, assessed \$28,361 of additional tax liability and \$158,000 of interest against the taxpayer as a result of disallowing a deduction claimed on the taxpayer’s 1977 income tax return.⁸⁵ The IRS assessed the additional tax well after the expiration of the normal three-year statute of limitations, based on the fact that the taxpayer had signed a consent agreement extending the time for the IRS to assess additional tax.⁸⁶

More specifically, in 1980, the IRS began investigating the deduction and asked the taxpayer to sign a consent form, which extended the statute of limitations indefinitely.⁸⁷ This form provided, however, that the taxpayer could file another form to terminate consent to the extended statute of limitations.⁸⁸ The taxpayer signed the form extending the limitations period, as requested, and the form was received and retained by the IRS.⁸⁹

Subsequently, an IRS employee informed the taxpayer that the IRS never received this form, and the employee requested that the taxpayer sign a form that extended the limitations period for only one year.⁹⁰ This occurred on two more occasions, and the last consent to extend the limitations period by one year expired in 1984.⁹¹

When the IRS ultimately assessed additional tax liability in 1992, it did so based on the initial form granting consent to an indefinite extension of time.⁹² If the taxpayer had known that the IRS received this form, however, the taxpayer would have sent another form to revoke the taxpayer’s consent to the extension.⁹³ The taxpayer did not do so because IRS employees led the taxpayer to believe that they never received the initial consent form, and the IRS never alerted the taxpayer to the fact

83. See, e.g., Ansell, *supra* note 54, at 1027 (describing the Supreme Court’s requirement of affirmative misconduct); Hoffer, *supra* note 54, at 333–34; Wooster, *supra* note 54, § 2.

84. 126 F.3d 433 (3d Cir. 1997).

85. *Id.* at 435.

86. *Id.*

87. *Id.* at 436.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 436–37.

92. *Id.* at 436–37, 440.

93. *Id.* at 440–41.

that they discovered this form and intended to use it to continue investigating the 1977 income tax return.⁹⁴

The court held that the IRS was estopped from utilizing the initial consent form signed by the taxpayer because the taxpayer relied on the IRS's statements that the form was never received.⁹⁵ Moreover, the court found that the IRS's actions rose to the level of "affirmative misconduct."⁹⁶

The court's holding may have been informed by the fact that the taxpayer relied on statements by the IRS employee about forms received by the IRS rather than statements about tax law. Assuming he or she has effective access to other legal guidance, a taxpayer can independently verify statements about tax law, but a taxpayer has no means of verifying the IRS's statements about whether it received a given form. As the court stated in *Fredericks*, "The IRS was the only party with knowledge of all the facts in this case."⁹⁷ Thus, courts may be more inclined to hold the IRS to its employees' statements about facts known only by the IRS.

Finally, with this overview of the current state of the law in mind, we can return to the examples from the Introduction to this Article. In Ms. Kennedy's case, given that the IRS employee's statement was a negligent misstatement about tax law, Ms. Kennedy cannot argue successfully that the IRS is estopped from denying her claim based on the expiration of the limitations period for filing an amended return.⁹⁸ Likewise, Mr. Walsh will not succeed if he argues that the IRS is estopped from denying his claim to the Child Tax Credit based on the IRS employee's incorrect advice about tax law.

94. *Id.* at 436–37, 440.

95. *Id.* at 440–41.

96. *Id.* at 440.

97. *Id.* at 441.

98. Ms. Kennedy also would not succeed by invoking the doctrine of equitable tolling. Under this doctrine, courts have held that the running of time under a statute of limitations will be suspended to serve the goal of fairness if something beyond an individual's control prevented the individual from acting within the required time period. *See, e.g., United States v. Brockamp*, 519 U.S. 347, 348–49 (1997) (discussing the doctrine of equitable tolling). Taxpayers' attempts to invoke this doctrine in the context of Section 6511 have failed. In *Brockamp*, the Supreme Court held that the equitable tolling doctrine does not apply to Section 6511's time limitations for filing tax refund claims. *Id.* at 348–49, 354. Following *Brockamp*, Congress enacted Section 6511(h) to provide relief to some taxpayers. I.R.C. § 6511(h) (West 2014). Section 6511(h) provides that the limitations period will be tolled during any period of time when the taxpayer is unable to manage his or her financial affairs by reason of a proven, medically determinable physical or mental impairment. *Id.* This provision, however, is of no use to a taxpayer like Ms. Kennedy whose failure to file a timely refund request is attributable to reliance on erroneous IRS advice. For further discussion of equitable tolling and the adoption of Section 6511(h), see T. Keith Fogg & Rachel E. Zuraw, *Financial Disability for All*, 62 CATH. U. L. REV. 965, 976–83 (2013).

B. IRS Publications

The IRS issues a number of publications that contain information intended to assist taxpayers in preparing their tax returns. For instance, the IRS's *Publication 17* includes guidance regarding the preparation of federal income tax returns for individuals.⁹⁹ In most cases, these publications summarize and translate into layperson's terms information that is available in other more authoritative sources (such as statutes, regulations, court decisions, and revenue rulings).¹⁰⁰ In some cases, a publication might offer an answer to a question of tax law that is not addressed elsewhere.¹⁰¹

The IRS and the Tax Court have taken the position that taxpayers cannot rely on these publications.¹⁰² Although a taxpayer cannot cite to an IRS publication to assert successfully that the taxpayer owes less in tax liability than what he or she, in fact, owes under applicable law, depending on the other circumstances, the IRS might consider the fact that a taxpayer relied on an IRS publication when determining whether to assess penalties against the taxpayer.¹⁰³

99. DEP'T OF TREASURY, I.R.S., PUBLICATION 17: YOUR FEDERAL INCOME TAX (2014), available at <http://www.irs.gov/pub/irs-pdf/p17.pdf>.

100. For an example of a publication, see *id.* For a discussion of the role of publications, see, for example, Korb, *supra* note 17, at 371–72 (“The Service also publishes over one hundred publications providing detailed information on key topics to help taxpayers prepare their returns. Examples include Publication 17, *Your Federal Income Tax*, which explains the rules for individuals The sources of authoritative tax law are the relevant statutes, regulations, and judicial decisions, not the Service's informal publications.”).

101. For an example, see RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 337–39 (3d ed.) (2011) (describing the IRS's use of a publication to describe its approach to addressing a technical mistake in tax legislation regarding the tax treatment of gain from sale of a home).

102. See, e.g., Korb, *supra* note 17, at 372.

103. See Treas. Reg. § 1.6664-4(a) (as amended in 2014). If a taxpayer acts with reasonable cause and in good faith, the taxpayer will not be subject to certain penalties. *Id.* The Treasury Regulations provide:

The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer.

Id. § 1.6664-4(b)(1).

C. Private Letter Rulings

When a taxpayer plans to engage in a transaction with uncertain tax consequences, the taxpayer can seek a private letter ruling from the IRS.¹⁰⁴ In order to seek a ruling, the taxpayer must submit a ruling request that describes all of the relevant facts, the questions on which the taxpayer seeks a ruling, relevant legal authority, and how the authority applies to the taxpayer's facts.¹⁰⁵ In addition, the taxpayer must pay a filing fee.¹⁰⁶ The fee charged varies somewhat based on the type of request,¹⁰⁷ and the fees are generally designed to cover the costs incurred by the IRS in considering and issuing the ruling.¹⁰⁸ The taxpayer must also comply with a number of detailed procedural requirements when submitting the request.¹⁰⁹ In addition, the taxpayer must sign a declaration that states, "Under penalties of perjury, I declare that I have examined . . . this request, including accompanying documents, and, to the best of my knowledge and belief, . . . the request . . . contains all the relevant facts relating to the request, and such facts are true, correct, and complete."¹¹⁰

The IRS will not provide a private letter ruling to address certain questions. For instance, the IRS will not produce "comfort rulings," meaning the IRS will not rule on an issue that is "clearly and adequately addressed" by statute, regulations, court decisions, revenue rulings, or other forms of guidance that are similar to revenue rulings.¹¹¹ In addition, the IRS will not rule on certain specified topics for a variety of reasons including concern that, in the case of some topics, determinations are too uncertain given the "factual nature" of the matter involved.¹¹² The list of topics on which the IRS will not rule expands periodically as the IRS appends other topics to the list, citing to resource constraints or other factors.¹¹³

Once the IRS issues a ruling, the taxpayer to whom it is issued generally can rely upon it if the taxpayer carries out the transaction consistently with the facts described in the ruling request.¹¹⁴ If the IRS later discovers that the private letter ruling reached an incorrect result

104. Rev. Proc. 2014-1, 2014-1 I.R.B. 1, 7-8.

105. *Id.* at 18-21.

106. *Id.* at 55.

107. *Id.* at 55-56.

108. *See, e.g.,* Korb, *supra* note 17, at 347.

109. *See* Rev. Proc. 2014-1, 2014-1 I.R.B. 1.

110. *Id.* at 24.

111. *Id.* at 18.

112. *Id.* at 15.

113. *Id.*

114. *See, e.g.,* Korb, *supra* note 17, at 348.

because the taxpayer did not accurately and completely disclose relevant facts, the IRS will readily revoke the ruling retroactively.¹¹⁵ However, if the IRS later discovers that the private letter ruling reached an incorrect result because it was based upon the IRS's incorrect interpretation of a statute, regulation, or other legal authority, the IRS's general practice is to not revoke the ruling retroactively.¹¹⁶ Therefore, although the taxpayer might be subject to less favorable tax consequences in future years (if the transaction has ongoing tax effects),¹¹⁷ for prior years, the taxpayer retains the benefit of tax treatment that is more favorable than what a correct interpretation of tax law would have allowed. As the affected taxpayer has no reason to object to receiving this windfall and as other parties generally lack standing to challenge the IRS's position, the IRS's decision to allow the taxpayer unwarranted favorable treatment will prevail.¹¹⁸

If the IRS wanted to do so, it could revoke the ruling retroactively. In particular, Internal Revenue Code Section 7805(b)(8) grants to the IRS the discretion to determine "the extent, if any, to which any ruling . . . relating to the internal revenue laws shall be applied without retroactive effect."¹¹⁹ If the taxpayer attempted to assert equitable estoppel against the IRS to prevent it from revoking the ruling retroactively, the taxpayer's claim would likely fail for the same reason that this claim is doomed in the context of advice provided over the phone.¹²⁰ Although some of the courts that have refrained from applying equitable estoppel have emphasized the fact that the advice given was

115. Treas. Reg. § 601.201(1)(5)(i) (as amended in 2014).

116. See *id.* § 601.201(1)(5). In particular, Treasury Regulation Section 601.201(1)(5) provides:

Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued . . . if (i) there has been no misstatement or omission of material facts, (ii) the facts subsequently developed are not materially different from the facts on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling was originally issued with respect to a prospective or proposed transaction, and (v) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.

Id.

117. If the transaction does have ongoing tax consequences, a change in tax treatment that affects future years only can, nonetheless, have a significant effect on the taxpayer. See, e.g., Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 58–59, 63 (1977); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 515–16 (1986).

118. For further discussion of lack of standing by other parties, see, for example, Polsky, *supra* note 37, at 245; Zelenak, *supra* note 37, at 847–53.

119. I.R.C. § 7805(b)(8) (West 2014).

120. See *supra* notes 54–97 and accompanying text.

oral and therefore, in the view of the court, inherently unreliable,¹²¹ it is not certain that those courts would have reached a different result if the mistaken advice was written. Courts have required something more egregious than a negligent misstatement of law by the IRS.¹²² Thus, the IRS's decision to revoke the ruling retroactively likely would stand, subject to judicial review for abuse of discretion.¹²³ Despite having the ability to do so, the IRS rarely decides to revoke a ruling retroactively.¹²⁴ Therefore, as a practical matter, taxpayers can place greater reliance on private letter rulings than on advice received over the phone.

Private letter rulings issued by the IRS are made available to the general public in redacted form.¹²⁵ However, although the taxpayer to whom the ruling was issued may generally rely on it, other taxpayers cannot do so.¹²⁶ In particular, Internal Revenue Code Section 6110(k)(3) provides that "a written determination may not be used or cited as precedent."¹²⁷ The term "written determination" is defined to include private letter rulings and other similar forms of guidance.¹²⁸ Furthermore, boilerplate language at the end of every private letter ruling cautions, "This document may not be used or cited as precedent."¹²⁹ Thus, in theory at least, a private letter ruling issued to one taxpayer is of no use whatsoever to another taxpayer. The potential practical significance of private letter rulings issued to other taxpayers is open to some debate. For instance, some scholars have argued that the IRS ought to owe taxpayers a duty of consistency and that a taxpayer should be able to introduce a private letter ruling issued to another taxpayer to prove that the IRS is shirking this duty if the taxpayer is denied the same favorable tax treatment granted by the private letter ruling.¹³⁰ The courts

121. See, e.g., *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 65 (1984); *United States v. Guy*, 978 F.2d 934, 938 (6th Cir. 1992).

122. See *supra* notes 54–97 and accompanying text.

123. For a discussion of review for abuse of discretion in the context of retroactive revocation of revenue rulings, see, for example, Benjamin J. Cohen & Catherine Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAX LAW. 675, 688–90 (1998) and Paul Gordon Hoffman, Comment, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion Under Section 7805(b)*, 23 UCLA L. REV. 529 (1976).

124. See *supra* note 116 and accompanying text.

125. I.R.C. § 6110(a) (West 2014). The Internal Revenue Code requires that private letter rulings are made publicly available. *Id.*

126. *Id.* § 6110(k)(3).

127. *Id.*

128. *Id.* § 6110(b)(1)(A).

129. See, e.g., I.R.S. Priv. Ltr. Rul. 201419015 (May 9, 2014).

130. See, e.g., Hoffer, *supra* note 54; Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to Be Consistent?*, 40 TAX L. REV. 411 (1984–85).

have not wholeheartedly embraced this concept,¹³¹ although from time to time courts have issued decisions that are somewhat compatible with this idea.¹³² Along similar lines, courts have used private letter rulings issued to other taxpayers for other purposes, citing them as persuasive authority, for instance.¹³³ However, although these additional issues muddy the waters to some degree, it is clear that the taxpayer to whom a private letter ruling is issued stands on surer ground than other taxpayers.

D. Revenue Rulings

Unlike a private letter ruling, a revenue ruling is not directed to any particular taxpayer.¹³⁴ In a revenue ruling, the IRS describes how tax law would be applied to the specific facts contained in the ruling but does so with the aim of setting forth a more generalizable rule.¹³⁵ Donald Korb, former Chief Counsel for the IRS, described some of the relevant differences between revenue rulings and private letter rulings as follows:

A [private] letter ruling essentially consists of a detailed recital of the relevant facts followed by a statement of conclusions. . . . [N]o attempt is made to formulate specified decisions into a stated principle or rule. Revenue rulings, on the other hand, detail all relevant facts in generic terms, and consideration is given to all of the possible situations which might fall within the basic framework of the ruling.¹³⁶

If the IRS issues a revenue ruling and later determines that the ruling's conclusion represents an incorrect interpretation of statutes, regulations, court decisions, or other applicable law, the IRS may revoke the ruling.¹³⁷ However, similar to private letter rulings, the IRS's general

131. See, e.g., Hoffer, *supra* note 54, at 338–39; Zelenak, *supra* note 130, at 413–14; Judy S. Kwok, Note, *The Perils of Bright Lines: Section 6110(k)(3) and the Ambiguous Precedential Status of Written Determinations*, 24 VA. TAX REV. 863 (2005).

132. See, e.g., Hoffer, *supra* note 54, at 338–39; Zelenak, *supra* note 130, at 413–14; Kwok, *supra* note 131, at 891–92.

133. For a discussion of some of these uses and whether they are appropriate, see, for example, Kwok, *supra* note 131; Caron, *supra* note 28, at 669; and Zelenak, *supra* note 130, at 412.

134. See, e.g., Korb, *supra* note 17, at 331 (“The emphasis of the revenue ruling program is centered upon uniformity of interpretation, rather than on the problem of the individual taxpayer.”).

135. *Id.* at 332 (“Revenue rulings, on the other hand, detail all relevant facts in generic terms, and consideration is given to all of the possible situations which might fall within the basic framework of the ruling.”).

136. *Id.*

137. See, e.g., Cohen & Harrington, *supra* note 123, at 688–90.

practice is to revoke revenue rulings on a prospective basis only.¹³⁸ Furthermore, unlike private letter rulings, reliance on a revenue ruling is not limited to any particular taxpayer.¹³⁹

E. Summary

A taxpayer cannot rely on oral advice provided by the IRS over the phone except, perhaps, to avoid penalties but only if the taxpayer can prove that he or she reasonably relied on the advice.¹⁴⁰ Likewise, a taxpayer cannot rely on IRS publications.¹⁴¹ A taxpayer generally can rely on a private letter ruling issued to that taxpayer but not on a private letter ruling issued to a different taxpayer.¹⁴² Finally, all taxpayers generally can rely on revenue rulings issued by the IRS.¹⁴³

II. POTENTIAL JUSTIFICATIONS FOR DIFFERENT DEGREES OF RELIABILITY

In this Part, I will consider and assess potential justifications that might explain why a taxpayer generally cannot rely on informal IRS advice, such as advice provided by phone, despite the fact that, as a practical matter, a taxpayer generally can rely on a private letter ruling issued to that taxpayer and on a revenue ruling provided to the public at large. Ultimately, my purpose is not to propose that, for instance, phone calls should bind the IRS. However, as discussed in Part III, a critical evaluation of potential rationales has several important policy implications.

As detailed in this Part, eight potential justifications might explain why taxpayers can rely on some forms of guidance more than others. First, the IRS considers the content of some forms of guidance more thoroughly than the content of other forms. Second, the IRS might be particularly likely to curtail issuance of informal guidance if it were

138. See, e.g., Korb, *supra* note 17, at 335 (“[I]t is the practice of the Service to make revocation or modification of revenue rulings prospective only.”).

139. See, e.g., *id.* at 330–31 (“[Revenue Rulings] are intended to inform both the taxpayers and the personnel of the Service as to the Commissioner's position with respect to a particular issue thus ensuring that this issue will be handled uniformly throughout the country. The published revenue ruling program tends to provide many of the same benefits as the letter ruling program. The emphasis of the revenue ruling program is centered upon uniformity of interpretation, rather than on the problem of the individual taxpayer. By informing the taxpayers of the Service's position in a published ruling, the need for taxpayers to request a letter ruling on the same subject is eliminated.”).

140. See *supra* notes 52–53 and accompanying text.

141. See *supra* note 102 and accompanying text.

142. See *supra* note 126 and accompanying text.

143. See *supra* note 139 and accompanying text.

binding on the IRS. Third, taxpayer reliance on IRS advice may be more reasonable when that advice is offered through particular channels. Fourth, binding the IRS to guidance may be more appropriate when the guidance is also binding on taxpayers. Fifth, some types of guidance are more generalizable than others, and allowing one taxpayer to rely on guidance may be more justifiable when other taxpayers can rely on it as well. Sixth, evidentiary considerations may play a role in the differential treatment of various forms of IRS guidance. Seventh, the extent to which a taxpayer would suffer harm as a result of relying on guidance, if the guidance were revoked, may vary depending on the form of the guidance. Eighth, if certain types of guidance were binding on the IRS, taxpayers might be particularly likely to seek those types of guidance on questions to which taxpayers already know the answers merely to obtain assurances that their positions will be unchallenged. Each of these rationales is discussed and evaluated, in turn, below.

A. How Thoroughly Did the IRS Consider the Guidance?

Legislative history surrounding the adoption of Section 6110(k)(3)—which provides that private letter rulings may not be “used or cited as precedent”¹⁴⁴—suggests that allowing different degrees of reliance may be warranted by the varying amounts of diligence exercised by the IRS when crafting the guidance. In particular, the Senate Finance Committee Report accompanying the adoption of this provision stated:

If all publicly disclosed written determinations were to have precedential value, the IRS would be required to subject them to considerably greater review than is provided under present procedures. The committee believes that resulting delays in the issuance of determinations would mean that many taxpayers could not obtain timely guidance from the IRS and the rulings program would suffer accordingly.¹⁴⁵

It is, no doubt, true that the IRS considers revenue rulings more thoroughly than private letter rulings and considers private letter rulings more thoroughly than advice provided over the phone. Revenue rulings are typically subject to more levels of review than private letter rulings,¹⁴⁶ and, in any given situation, only one employee proffers advice

144. I.R.C. § 6110(k)(3) (West 2014).

145. S. REP. NO. 94-938, at 311 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3438, 3740.

146. *See* Korb, *supra* note 17, at 332 n.32.

extended over the phone.¹⁴⁷ Thus, this justification comports with current IRS practices in that guidance that receives more consideration is more likely to bind the IRS.¹⁴⁸ This rationale has also been discussed by commentators.¹⁴⁹

This justification appears to be based on certain judgments about how the IRS should use its limited resources. The IRS lacks sufficient resources to provide fully vetted answers to all questions that taxpayers might pose. If it can provide hasty advice—which it may only do if it will not be held to that advice—the IRS can answer a greater number of questions. If the IRS provides perfunctory advice in response to more questions, more individuals might apply tax law accurately, even if the IRS is sometimes wrong, as long as the answers provided by the IRS are more likely to be correct than what taxpayers would surmise on their own or with the help of paid professionals.

Two assumptions are implicit in this line of reasoning. The first of these assumptions is that the IRS would no longer provide as many answers to tax questions if those answers were binding on the IRS. This very well may be true. However, the extent to which the IRS would withhold advice is uncertain, as discussed in more detail in Part II.B below. The second of these assumptions is that hasty advice provided by the IRS is more likely to be accurate than advice taxpayers would obtain

147. Of course, the employee can consult material that was reviewed more thoroughly.

148. The extent to which the IRS has considered guidance is also relevant to the question of how much weight ought to be given to the guidance as a matter of administrative law. For discussion of this issue, see *supra* note 28 and accompanying text.

149. See, e.g., Hoffer, *supra* note 54, at 339 (discussing the rationale offered by Congress for providing that private letter rulings may not be used as precedent); Johnson, *supra* note 61, at 570 (“Not all utterances and actions by personnel of the Treasury Department or the IRS are of equal weight. Some are subject to elaborate, multi-level reviews before issuance, while others are reviewed with less scrutiny or none at all The argument for holding the IRS accountable to a duty of consistency is stronger when it pertains to high-level actions as opposed to low-level guidance.”); Korb, *supra* note 17, at 325 (discussing the reliability of different forms of IRS guidance and stating that “[s]ome of the other work products may represent only the views of a particular Office of Chief Counsel attorney and/or that attorney’s reviewer, while still others may represent a reaction to a time-sensitive problem that was based on limited information and facts, which may not even be apparent from the publicly available work product. Needless to say, these kinds of work products have a very limited value in predicting the Service’s future responses to similar situations, and taxpayers and their advisers should be extremely careful about drawing any conclusions from them”); *id.* at 346 (discussing how limiting the scope of private letter rulings made it so that the task of issuing private letter rulings “could be delegated to lesser officials”).

through other channels.¹⁵⁰ A strong believer in individuals' abilities to evaluate the competency of IRS employees compared to the individuals' other sources of information might assert that the 109 million phone calls received in 2012 by the IRS prove this assumption to be true.¹⁵¹ This assertion, however, suffers from two flaws. One, the IRS provides advice free of charge,¹⁵² whereas a taxpayer's alternative source of tax law information might involve visiting a paid preparer. Therefore, 109 million taxpayers might prefer IRS advice to other alternatives even if the IRS advice may be less likely to be accurate merely because the IRS advice is funded by the public at large rather than by the particular taxpayers to whom it is provided. Two, many taxpayers may be unaware of the fact that IRS advice comes with no guarantee. If they mistakenly believe the advice is guaranteed, then they have no reason to evaluate its accuracy relative to other channels of information. To cure this second problem, taxpayers who call the IRS ought to be warned on the phone that they cannot rely on the advice provided so that they can make an informed decision about whether to verify the advice independently.

Another distinct notion might underlie the idea that taxpayers ought to be able to place more reliance on more thoroughly considered advice. In particular, holding the IRS to guidance that was thoroughly vetted may not raise issues that are as troubling as the issues that would arise if we bound the IRS to hastily provided advice. Consider a situation in which the IRS initially believes that a statute means X and later decides it actually means Y. If the initial opinion was based on thorough consideration, then it is likely that X is not an unreasonable interpretation of the statute. Thus, if the IRS allows a taxpayer to benefit from the X interpretation, it might not raise significant separation of powers concerns, as the IRS is effectively enforcing a reasonable interpretation of the statute, or windfall concerns, as the taxpayer's treatment follows from a reasonable interpretation of applicable law, a treatment that many other taxpayers might also claim successfully. By contrast, if the X interpretation was, instead, based on hasty decision making, then the X interpretation might be entirely inconsistent with the applicable statute. In that case, binding the IRS to the X interpretation awakens more serious misgivings.

Finally, although this rationale might explain resistance to allowing taxpayers to rely on unduly favorable advice received by phone, it does

150. For additional discussion of this assumption, see Michael Braunstein, *In Defense of a Traditional Immunity – Toward an Economic Rationale for Not Estopping the Government*, 14 RUTGERS L.J. 1, 34 (1982).

151. See *supra* note 18 and accompanying text.

152. *IRS Offers Free Tax Help*, I.R.S., <http://www.irs.gov/uac/IRS-Offers-Free-Tax-Help-1> (last updated Jan. 22, 2015).

not justify withholding relief from a taxpayer, like Ms. Kennedy from the Introduction, who obtains unduly unfavorable IRS advice by phone.¹⁵³ If anything, the fact that the advice is given hastily and could undercut benefits provided by Congress bolsters the case for granting relief to such a taxpayer.¹⁵⁴

B. If the Guidance Were Binding, Would the IRS Issue Less of It?

As discussed above, if it is held to its advice, the IRS might feel compelled to evaluate that advice more thoroughly. If the IRS spends more time deliberating before issuing guidance, it will necessarily issue less of it, given resource constraints. This concern has been uttered by courts¹⁵⁵ and echoed by commentators¹⁵⁶ in the context of considering the application of equitable estoppel to the government generally.

153. For further discussion, see *infra* Part III.C.

154. For further discussion, see *infra* Part III.C.

155. In a case regarding social security benefits, for instance, the Supreme Court expressed concern that holding an agency to informal guidance might cause the agency to create less informal guidance. *Schweiker v. Hansen*, 450 U.S. 785, 790 n.5 (1981). In another case outside of the tax context, the Supreme Court stated:

The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information in order to limit liability. Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice.

Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 433–34 (1990). The Supreme Court cited a law review article by Professor Braunstein. *Id.* at 434. In the article, Professor Braunstein speculates that the government would provide less informal advice if it were bound to follow its advice, a result that would be particularly harmful for individuals of limited means. Braunstein, *supra* note 150, at 31–33, 37. Professor Braunstein writes, “If the Government reduces the flow of information available concerning its programs, the benefits it provides and the penalties it inflicts, the wealthy may turn to accountants, lawyers and other professionals for this information. The poor do not have these options.” *Id.* at 37. In the tax context, this special concern for low income individuals would be more persuasive if callers to the IRS were warned that they could not rely on the advice so that they could make an informed decision about whether or not to verify the advice independently. Although obtaining professional advice may be particularly burdensome for low income taxpayers, they are not entirely without alternatives. For instance, in 2001, 67 percent of lower income taxpayers claiming the EITC used paid preparers. See *infra* note 220. In addition, low-income taxpayers can seek advice from VITA sites. See *Free Tax Return Preparation for Qualifying Taxpayers*, *supra* note 8.

156. See, e.g., Ansell, *supra* note 54, at 1045–46 (“Allowing estoppel . . . may also deter government officials from giving needed advice in the first place.”); Braunstein, *supra* note 150, at 32–33; Hoffer, *supra* note 54, at 334, 348 (discussing this concern but concluding that holding the IRS to its advice—at least in the private letter ruling context—might cause the IRS to issue better advice); Johnson, *supra* note 61, at 599–600 (observing that imposing a consistency requirement in the context of private

If it were held to all advice provided, the IRS may be more likely to abate advice provided over the phone than more formal types of advice for at least two reasons. First, the IRS already may be vetting formal guidance (such as revenue rulings) as thoroughly as it reasonably can such that, even if this guidance were fully binding on the IRS, the IRS would spend little incremental time on it. As a result, even if the IRS were always held to its formal guidance, it might issue the same amount of it. By contrast, the IRS clearly could spend more time considering each answer given by phone, and, if it did so, the volume of questions answered would decline. Second, the types of questions received by the IRS over the phone differ from the types of questions it will answer in a private letter ruling, for instance. The IRS will not issue “comfort rulings,” meaning it will not issue a ruling that merely confirms the answer to a tax question that is addressed by already available sources.¹⁵⁷ By contrast, doubtlessly, many of the questions answered by phone are routine questions that lend themselves to clear answers that exist in already available statutes, regulations, or other sources of tax law.¹⁵⁸ If the IRS were held to every statement made by an employee via the phone, it might instruct employees to no longer answer questions by phone given that, in the best case scenario, an answer would merely confirm information that can be found elsewhere (and, therefore, provide no new information to the taxpayer) and, in the worst case scenario, an answer would bind the IRS to a result that is inconsistent with applicable law.

That said, a consideration of the type of questions answered by phone might cut the other way in the IRS’s assessment of whether to continue to provide such advice, suggesting that the concern that this type of guidance would evaporate may be exaggerated. In particular, because the answers to many questions received by phone are clear, an IRS employee—given proper training, experience, and access to the relevant manual or other publications—ought to arrive at the correct

letter rulings might cause the IRS to issue fewer private letter rulings); Levinson, *supra* note 51, at 567 (“[T]he only way to eliminate the risk [of the IRS providing incorrect advice by phone] entirely is to stop giving advice over the telephone. Arguably society is better off if the telephone advice program continues, even though it is error-prone, than if the program is discontinued.”).

157. See *supra* note 111 and accompanying text.

158. The questions that the IRS is willing to answer by phone are likely limited to routine questions with clear answers similar to the types of questions that the IRS will answer orally at a Taxpayer Assistance Center. For a list of the types of questions that the IRS will answer orally at a Taxpayer Assistance Center, see *Tax Topics*, I.R.S. (Jan. 23, 2015), <http://www.irs.gov/uac/Tax-Topics>.

answer, so the risk of incorrect advice is fairly low.¹⁵⁹ Furthermore, even if the answer merely confirms information available elsewhere, providing the answer still has value—it ensures that the caller has access to the information and increases the chances that the caller will properly report his or her tax liability, a goal for which the IRS strives.¹⁶⁰ IRS employees would need to steer away from answering more complex questions (and, indeed, they may already do so).¹⁶¹ This is true because, as discussed in more detail below, if guidance by phone bound the IRS, sophisticated taxpayers might try to game the system by calling the helpline to ask more complex questions in the hopes of receiving an answer that was more favorable than what tax law, in fact, allows.¹⁶²

C. Is the Taxpayer's Reliance on the Guidance Reasonable?

As discussed above, typically taxpayers cannot successfully invoke the doctrine of equitable estoppel against the IRS.¹⁶³ Nevertheless, the same principles that underlie the availability of this doctrine in other contexts might explain why, as a policy matter, certain forms of guidance ought to provide more protection to taxpayers than others. For instance, if taxpayers' reliance on guidance is more reasonable, then binding the IRS to that guidance may be warranted because it comports with notions of fairness—the same notions that undergird the doctrine of equitable estoppel.¹⁶⁴ Thus, the current hierarchy of IRS guidance might be justified if taxpayers' reliance on advice provided by phone, for instance, was unreasonable.

In the context of discussing the doctrine of equitable estoppel, courts have made statements to the effect that reliance on oral advice is

159. Of course, given resource constraints faced by the IRS and other factors, some level of inaccuracy may be unavoidable as suggested by the studies of the IRS telephone line's accuracy rate. *See supra* notes 21–26 and accompanying text.

160. *See Kwok, supra* note 131, at 913–14 (stating that even if private letter rulings had a more binding effect on the IRS “it would still be in the Service’s interest to continue issuing some basic number of PLRs: the more taxpayer uncertainty about the tax law, the more tax infractions will sap the Service’s limited resources”); *see also Braunstein, supra* note 150, at 32 (“Clearly the Government has some incentive to give informal advice. For example, to the extent that the Government advises individual taxpayers how to complete their tax returns properly, the difficulty of the Government’s task in reviewing those returns is lessened, and the incidence of tax evasion borne of exasperation is reduced.”).

161. For a list of the types of questions that the IRS will answer orally at a Taxpayer Assistance Center, *see Tax Topics, supra* note 158.

162. *See infra* Part II.D.

163. *See supra* Part I.A.

164. *See, e.g., Ansell, supra* note 54, at 1027 (“In the words of Justice Cardozo, the purpose of the doctrine of equitable estoppel is to insure that no one will be permitted ‘to found any claim upon his own inequity or take advantage of his own wrong.’”).

unreasonable merely because the advice is oral and the recipient should understand that it was informal advice provided hastily.¹⁶⁵ This line of reasoning, however, is not particularly persuasive because whether reliance on advice is reasonable depends on multiple factors. It depends on the formality of the advice and the degree to which the IRS considered the advice, as these courts have suggested.¹⁶⁶ However, it also depends on the sophistication of the taxpayer receiving the advice. Therefore, whether reliance on oral advice is reasonable cannot be determined categorically across all taxpayers.¹⁶⁷ For sophisticated taxpayers, the notion that reliance is unreasonable rings true. As someone who has had the experience of calling the IRS on behalf of clients on a number of occasions to verify receipt of various documents, I can attest to the fact that I came away from the conversations without a great sense of confidence that I had received the correct answer, especially when I was patched through to multiple representatives, each of whom provided slightly different answers to the same question. For unsophisticated taxpayers, however, the idea that the IRS's advice comes with no guarantee might come as an unpleasant surprise. If the IRS provided callers with a warning that they cannot rely on the advice, then the categorical claim that relying on the advice is unreasonable would be more convincing.

Reliance on advice provided by phone might also be deemed unreasonable for another reason, related to the type of questions answered by phone.¹⁶⁸ As discussed above, many of the answers

165. For examples of cases in which courts have made this observation, see *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984); *United States v. Guy*, 978 F.2d 934 (6th Cir. 1992); see also Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 TEX. L. REV. 1, 55 (1985) ("In a government that works overwhelmingly by paper, private reliance on oral representations by government officials will often be unreasonable . . .").

166. See *Heckler*, 467 U.S. 51; *Guy*, 978 F.2d 934.

167. Moreover, unless and until the IRS provides a warning to callers, there is no reason to believe that even the majority of taxpayers who call the IRS understand that the advice is unreliable, so it is not at all obvious that the categorical assumption that reliance on oral advice is unreasonable is right even most of the time.

168. Reliance on advice provided by phone also could be considered less reasonable because, based on IRS practice, private letter rulings are generally more reliable because of the IRS's tendency to not revoke private letter rulings retroactively. See *supra* note 116 and accompanying text. However, this line of reasoning is circular. See Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1823 (1985) ("Fairness, the argument runs, requires compensation or grandfathered effective dates to protect people who might have altered their conduct 'in reliance' upon the continued existence of a tax benefit (or burden). This expectation-based argument, however, is circular. In short, the argument asserts that people have a right to protection merely because either they now expect such protection or they expected such protection when they entered into a transaction; their expectations allegedly create a right and their asserted rights legitimate their expectations."); Kaplow, *supra* note 117, at 522-25

provided by phone are likely clear answers to fairly straightforward questions.¹⁶⁹ In that case, answers to the questions could be found in other, more authoritative sources. By contrast, because of the IRS's policy against issuing comfort rulings, the answers to questions addressed by a private letter ruling cannot be found in other sources upon which the taxpayer could rely.¹⁷⁰ For this reason, reliance on phone calls may be viewed as unreasonable because the taxpayer could independently verify the information—not so with a private letter ruling. This argument, however, suffers from the same flaw as the earlier one—whether or not reliance is reasonable depends on the taxpayer in question. On the one hand, for sophisticated taxpayers who have ready access to other sources of information about tax law, relying on IRS phone calls is unreasonable (at least when the question asked is one related to tax law that the taxpayer could independently verify—not when, for instance, the caller is seeking factual information about whether certain forms have been received).¹⁷¹ On the other hand, it is unreasonable to expect that unsophisticated taxpayers—who, as a practical matter, lack access to other sources of information—will second-guess advice provided by the IRS, especially if they have not been warned that the advice is unreliable.

D. Is the Taxpayer Committed to Following the Advice?

Unless the IRS records and indexes phone calls, an individual could call the IRS and claim reliance on the IRS's advice only if it was what the individual wanted to hear but otherwise ignore the advice with impunity. A particularly unscrupulous taxpayer conceivably could do this multiple times, repeatedly asking the same question, in the hopes of eventually hitting the jackpot by finding a not particularly savvy IRS representative who provided advice that was more favorable than what tax law actually allows.¹⁷² Assuming the IRS does not record and index phone calls, calling the IRS does nothing to increase the chances of audit and detection if the individual decides not to heed the IRS's advice. In

(discussing the circularity of reliance arguments but also noting that “[a]lthough the reliance argument favoring protection of investment interests is circular, the counter-argument that legal change should always be expected—which would eliminate any ground for compensation—is similarly flawed”). Furthermore, this line of reasoning also presupposes that taxpayers are or should be familiar with IRS practice.

169. See *supra* note 158 and accompanying text.

170. See *supra* note 111 and accompanying text.

171. Further, as discussed above, this line of reasoning may guide courts' decisions regarding equitable estoppel. See *supra* note 97 and accompanying text.

172. This concern does not arise in the context of incorrect advice that is less favorable than what the law allows. See *infra* Part III.C.

other words, if phone calls were binding on the IRS but in no way binding on the taxpayer, taxpayers could game the system.¹⁷³ This is particularly true given the fact that the IRS does not thoroughly consider advice provided by phone so the taxpayer would benefit from fairly good odds of eventually reaching an unsavvy IRS representative. Of course, even if phone calls had a binding effect on the IRS, this potential for gaming could be reduced if phone calls were recorded and indexed by social security number or taxpayer identification number.¹⁷⁴

A taxpayer who seeks a private letter ruling describing the tax consequences of a contemplated transaction cannot use the same strategy. If the IRS declines to issue a favorable ruling in response to the ruling request, the taxpayer can, nonetheless, implement the transaction as planned and claim favorable tax consequences because the taxpayer would be free to challenge the IRS's position in court. However, given that the taxpayer has identified itself to the IRS and flagged the potential tax issues inherent in a contemplated transaction, the chances of IRS detection are much higher than they would otherwise have been. Thus, the taxpayer's chances of succeeding merely by winning the audit lottery are much lower. Furthermore, along the lines of the saying that it is better to beg forgiveness than ask permission, a taxpayer might be wary that the IRS's denial of a ruling could indicate that the taxpayer is more likely to owe penalties if the taxpayer does not convince a court regarding the merits of his or her position on the underlying tax liability. Indeed, taxpayers sometimes hesitate to request private letter rulings for similar reasons.¹⁷⁵ Potential for gaming is further limited because, at the

173. For a discussion of a similar concern in the context of sophisticated taxpayers' use of the Compliance Assurance Process (CAP), see Leigh Osofsky, *Some Realism About Responsive Tax Administration*, 66 TAX L. REV. 121, 150 (2012) ("[T]he lack of meaningful failure-to-disclose penalties creates a test-drive effect. Taxpayers can use CAP as an opportunity to test-drive the Service's ability to detect tax issues.").

174. That said, rather than requiring the IRS to use its limited enforcement resources to police this type of behavior by monitoring recorded phone calls, it might be preferable to maintain the current system in which taxpayers cannot rely on advice provided by phone as a preventative measure. Recording and monitoring phone calls to police this type of behavior would be costlier than the more limited recommendation, described in Part III.B below, that the IRS record phone calls so that unsophisticated taxpayers could rely on them for penalty protection. To guard against the possibility that taxpayers would game the system, the IRS would need to review a sample of all phone calls that was large enough to provide a sufficiently high likelihood of detecting strategic behavior by taxpayers. The more limited recommendation described below in Part III.B requires the IRS to only review phone calls with a given taxpayer if the IRS is considering assessing penalties against that taxpayer and that taxpayer's income is below a certain threshold.

175. See, e.g., Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Readings*, 29 VA. TAX REV. 137, 140 (2009) ("By applying for an

time the taxpayer requests the ruling, the taxpayer must, under penalties of perjury, sign a statement indicating that the facts in the ruling request are true, correct, and complete.¹⁷⁶ This discourages taxpayers from submitting requests that omit or gloss over certain key facts in the hopes of tricking the IRS into granting a favorable ruling, and, of course, if the IRS later discovers that facts were incorrect, the IRS can revoke the ruling retroactively.¹⁷⁷

In the case of revenue rulings, a taxpayer's ability to pick and choose—following the guidance only when it is favorable—is also constrained. Failure to follow a revenue ruling opens a taxpayer up to penalties.¹⁷⁸ It is questionable whether this result is appropriate given the process by which revenue rulings are adopted.¹⁷⁹ Nevertheless, as a matter of practice, the IRS can assess penalties when taxpayers disregard revenue rulings.¹⁸⁰ The taxpayer can challenge the correctness of the revenue ruling and the assessment of penalties but only if the taxpayer is willing to litigate.

E. Is the Guidance Generalizable?

Advice provided by phone is functionally only available to the taxpayer who receives it, given that the advice is not publicly available. Guidance provided in a private letter ruling is, theoretically, only of use to the taxpayer to whom it is issued given that other taxpayers may not rely on the ruling.¹⁸¹ However, the ruling is at least made available for the public to view,¹⁸² and other taxpayers might be able to use the ruling for certain limited purposes.¹⁸³ For instance, other taxpayers could use the ruling to support an argument that the IRS is neglecting whatever

advance tax ruling the taxpayer 'red flags' the ambiguous legal issues, guaranteeing Service consideration.").

176. See *supra* note 110 and accompanying text.

177. See *supra* note 115 and accompanying text.

178. Subject to certain exceptions, I.R.C. Sections 6662(a) and 6662(b)(1) impose a penalty equal to 20 percent of the amount of underpaid taxes when the underpayment is attributable to "negligence or disregard of rules or regulations." I.R.C. § 6662(a), (b)(1) (2015). Treasury Regulation Section 1.6662-3(b)(2) defines "rules or regulations" to include revenue rulings. 26 C.F.R. § 1.6662-3(b)(2) (2014). However, Treasury Regulation Section 1.6662-3(a) does provide that, if the rule that is disregarded is a revenue ruling, the penalty will not be imposed if the position taken by the taxpayer has "a realistic possibility of being sustained on its merits." *Id.*

179. See Hickman, *supra* note 28, at 528–32.

180. See *supra* note 178.

181. See *supra* note 126 and accompanying text.

182. See *supra* note 125 and accompanying text.

183. See *supra* notes 130–33 and accompanying text.

duty of consistency it might owe towards taxpayers.¹⁸⁴ Revenue rulings are fully generalizable. They are not issued to any particular taxpayer, and they are couched in generic terms.¹⁸⁵

Commentators have expressed concern that applying equitable estoppel against the government could encourage favoritism and corruption.¹⁸⁶ If a government employee can bind the government by issuing unduly favorable advice to certain individuals so that those individuals receive treatment superior to what is granted to the general public, government employees might do precisely that intentionally—in order to gain favor with influential individuals—or inadvertently.¹⁸⁷ Sometimes, commentators have expressed this concern by referring to the danger of creating “secret law.”¹⁸⁸ The potential for favoritism and corruption increases if the statements that are binding on the government are issued to only some individuals and remain undisclosed to the general public. For this reason, advice by phone—if it were binding—would raise more serious concerns than advice provided by other means.

F. Do Evidentiary Considerations Play a Role?

The concern that a taxpayer will falsify claims about advice provided by phone or misremember or mischaracterize the advice might offer a partial explanation for the practice of not allowing taxpayers to assert reliance on a phone call as the basis for receiving more lenient tax treatment.¹⁸⁹ Of course, this concern would be blunted if the IRS recorded and indexed phone calls.

184. See *supra* notes 130–32 and accompanying text.

185. See *supra* note 136 and accompanying text.

186. See *supra* note 59 and accompanying text. Professor Hoffer also suggests that, in order to mitigate concerns about favoritism, we ought to require the IRS to observe a more robust duty of consistency so that it could not issue more favorable private letter rulings to only some taxpayers. See Hoffer, *supra* note 54, at 348.

187. This concern does not arise in the context of incorrect advice that is less favorable than what the law allows. See *infra* Part III.C.

188. See, e.g., Kwok, *supra* note 131, at 870 (stating that one of the reasons for making private letter rulings public “was the fear that this enormous body of tax knowledge and interpretation would result in a secret law, the limited accessibility of which would undermine the private ruling system’s credibility”); see also Kristin E. Hickman, *Should Advance Pricing Agreements Be Published?*, 19 NW. J. INT’L L. & BUS. 171, 174 (1998) (mentioning that those who have advocated for public disclosure of advance pricing agreements have expressed “concern that a secret body of law is being developed with respect to transfer pricing, and that similarly situated taxpayers may be treated unfairly as a result”).

189. This concern has been discussed in the context of the equitable estoppel doctrine. See, e.g., Frank C. Newman, *Should Official Advice Be Reliable? – Proposals*

To be clear, for other reasons, I am not recommending that the IRS should allow taxpayers to rely on phone calls to avoid paying tax owed. These reasons include, among others, concerns about potential gaming by sophisticated taxpayers and concerns related to the extent to which the advice is considered by the IRS.¹⁹⁰ However, the IRS ought to record and index phone calls for a different reason—namely, so that the IRS can implement one of the proposals discussed below in Part III that involves immunizing unsophisticated taxpayers from penalties when they rely on advice provided by phone.

G. How Much Harm Would the Taxpayer Suffer as a Result of Relying on the Guidance if the Guidance Were Unreliable?

As discussed above, taxpayers generally cannot assert the doctrine of equitable estoppel against the IRS.¹⁹¹ However, as hypothesized above, the same notions of fairness that inform the doctrine of equitable estoppel may guide our current system in which some types of IRS guidance are more reliable than others.¹⁹² Even in a case between private parties, equitable estoppel cannot be successfully invoked unless applying the doctrine is necessary to prevent one party from suffering a *detriment* as a result of reasonably relying on the other party's statement.¹⁹³ Presumably, only in that case do fairness considerations necessitate resorting to the doctrine.

Former Chief Counsel for the IRS, Donald Korb, has stated that allowing greater reliance on certain types of guidance is warranted because, in the case of some guidance, the detriment suffered by the taxpayer if the IRS revokes the guidance is potentially more severe.¹⁹⁴ In particular, when describing why determination letters covering certain topics, unlike determination letters covering other topics, will be retroactively revoked, Korb writes:

The rationale for retroactive revocation of determination letters in the income, estate, and gift tax areas is simply that such a determination letter is only issued as to a completed transaction. Therefore, taxpayers could not have relied upon

as to Estoppel and Related Doctrines in Administrative Law, 53 COLUM. L. REV. 374, 379 (1953); Raven-Hansen, *supra* note 165, at 54–55.

190. For further discussion of the justifications that warrant disallowing reliance on IRS phone calls, see *infra* Part II.I.

191. See *supra* Part I.A.

192. See *supra* note 164 and accompanying text.

193. For discussion of the doctrine of equitable estoppel, see for example, BRUCE W. FRIER & JAMES J. WHITE, *THE MODERN LAW OF CONTRACTS* 68 (3d ed. 2012).

194. Korb, *supra* note 17, at 352.

the determination letter in entering into the transaction initially. Determination letters as to exempt status, however, are relied upon by taxpayers in connection with prospective transactions, and this accounts for the difference in treatment.¹⁹⁵

In other words, allowing more reliance on some types of determination letters than others is justified, according to Korb, because some determination letters are issued before a taxpayer decides to engage in various transactions while others are issued only after the fact.¹⁹⁶

This same line of reasoning might be used to justify allowing taxpayers to rely on private letter rulings but not on advice provided by phone. Typically, a private letter ruling advises a taxpayer about the consequences of a contemplated transaction.¹⁹⁷ If the private letter ruling indicates that a transaction will have favorable consequences, the taxpayer might implement a transaction in which the taxpayer would not have engaged without the favorable ruling. Thus, if the ruling were revoked retroactively, the taxpayer would suffer a clear detriment. By contrast, most, if not all, of the answers provided by phone relate to the more mundane question of how taxpayers should report the tax consequences of events that have already transpired.¹⁹⁸ Such information, perhaps, is less likely to cause the taxpayer to change his or her behavior in a significant way.

This line of reasoning, however, is based upon an overly narrow view of detrimental reliance.¹⁹⁹ Consider, for instance, Ms. Kennedy's

195. *Id.* For similar comments to this effect, see, for example, Lynn & Gerson, *supra* note 82, at 495 (discussing how refraining from applying estoppel against the IRS sometimes results in no detriment because "there has been no damage to anything other than expectations"); Richard deY. Manning, *The Application of the Doctrine of Estoppel Against the Government in Federal Tax Cases*, 30 N.C. L. REV. 356, 373 (1952) ("As to past transactions, a better reason seems to be that it would be difficult for the taxpayer to show any damage from his reliance . . . his liability will be no greater than it would have been had the agent ruled correctly in the first instance.").

196. See Korb, *supra* note 17, at 352.

197. Rev. Proc. 2014-1, 2014-1 I.R.B. 7.

198. For a discussion of the types of questions that the IRS is willing to answer by phone, see *supra* note 158.

199. Although this view is overly narrow as a matter of policy and logic if we are indeed concerned with true economic detriment suffered, this view has been espoused by courts in the context of equitable estoppel cases. For example, in *Heckler v. Community Health Services of Crawford County, Inc.*, the Supreme Court's refusal to apply equitable estoppel against the government resulted in an organization losing Medicare funding, 467 U.S. 51 (1984). The Supreme Court indicated that the detriment suffered by the organization was limited, stating:

"Its detriment is the inability to retain money that it should never have received in the first place. Thus, this is not a case in which the respondent has lost any legal right, either vested or contingent, or suffered any adverse

situation described in the Introduction. Because Ms. Kennedy relies on the IRS's advice, she suffers a \$1254 economic detriment. If she had not relied on the IRS's advice, she might have sought assistance from a paid preparer, visited a VITA site, or otherwise obtained an answer to her question. If she had done so, she could have learned about her entitlement to the EITC and claimed it in time to receive a \$1254 economic benefit.

Consider, also, Mr. Walsh's situation described in the Introduction. As a result of relying on IRS advice, Mr. Walsh suffers a detriment made up of two components. First, if the IRS assesses penalties in addition to the \$1000 tax owed and if Mr. Walsh is unable to prove reliance on IRS advice as a defense against those penalties, Mr. Walsh suffers a detriment equal to the amount of the penalties. The second component of Mr. Walsh's detriment, which could be labeled "liquidity costs," is more difficult to quantify, but it exists nonetheless.²⁰⁰ Because Mr. Walsh was led to believe, incorrectly, that he had earned \$1000 more in after-tax income, he may have entered into transactions or otherwise rearranged his financial affairs in ways that cannot easily be undone once he learns that his after-tax income is \$1000 lower than expected. Perhaps, for instance, he signed a lease for a new apartment that he can no longer afford given the loss of income. Now, he faces the prospect of eviction, which will negatively affect his credit rating and ability to make alternative living arrangements.²⁰¹

Depending on the facts, compensating Mr. Walsh for these liquidity costs may not necessitate restoration of the entire sum of \$1000 to his after-tax income. Perhaps he would need less than \$1000 to cover the costs of unwinding any financial decisions he made in reliance on the expected \$1000 increase to his after-tax income. However, in some

change in its status There is no doubt that respondent will be adversely affected by the Government's recoupment of the funds that it has already spent. It will surely have to curtail its operations and may even be forced to seek relief from its debts through bankruptcy Respondent may need an extended period of repayment or other modifications in the recoupment process if it is to continue to operate, but questions concerning the Government's method of enforcing collection are not before us."

Id. at 61–62.

200. Courts have tended to ignore this type of detriment in the context of equitable estoppel cases, perhaps because this component is difficult to quantify. *See supra* note 199.

201. For a similar discussion of the ways in which taxpayers in Mr. Walsh's position can suffer harm as a result of owing an unexpected amount to the IRS, see, for example, Schneller, *supra* note 6, at 785–86; Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391, 399 (1969) ("[E]ven though he could have paid the higher tax originally, by relying on the government advice he may have altered his financial position so that he is no longer able to pay the tax.").

cases, the costs of unwinding his decisions may not be less than \$1000, and, in such cases, compensating him for the detriment suffered would require a sum of \$1000. Moreover, the same observation could be made about a taxpayer who undertakes a transaction after receiving a favorable private letter ruling—compensating the taxpayer for the detriment that the taxpayer would suffer as a result of relying on the ruling might not require giving the taxpayer the entire benefit promised by the ruling.²⁰² In order to demonstrate, consider the following example.

Example 1: A taxpayer contemplates engaging in a transaction that will generate a pretax profit of \$10,000. Given the risk involved and other factors, the taxpayer will opt to undertake the transaction as long as it generates an after-tax profit of at least \$7000 (the after-tax profit that the taxpayer could earn from a comparable, alternative transaction). The taxpayer obtains a private letter ruling that describes the tax consequences of the transaction in such a way that the tax owed will be \$500, leading to a \$9500 after-tax profit. The taxpayer undertakes the transaction. The IRS later determines that the conclusion reached in the private letter ruling was incorrect so that the taxpayer should have paid \$1000 in additional tax liability. The IRS revokes the ruling retroactively and assesses \$1000 of additional tax liability. As a result, the transaction generates an after-tax profit of \$8500.

In Example 1, the detriment suffered by the taxpayer parallels the detriment suffered by Mr. Walsh. First, consider the transaction covered by the private letter ruling. Even if the taxpayer had known ahead of time that the transaction would generate an after-tax profit of only \$8500, the taxpayer nevertheless would have undertaken the transaction because \$8500 is greater than the \$7000 after-tax profit required by the taxpayer. Therefore, with respect to that particular transaction, the taxpayer did not alter his or her behavior as a result of receiving the incorrect ruling, or, stated differently, the taxpayer has not incurred any “opportunity costs” as a result of receiving the incorrect ruling. The taxpayer does experience

202. Furthermore, although the dollar amount at stake in the case of a transaction for which a taxpayer seeks a private letter ruling could dwarf the dollar amount at issue in the case of reporting by an unsophisticated individual, when measured *relative to the taxpayer's income*, the potential harm suffered by an unsophisticated individual could be every bit as significant as the potential harm suffered by a sophisticated taxpayer seeking a private letter ruling. In addition, in a situation like Example 1, a wealthy taxpayer can likely borrow funds to avoid much of the detriment resulting from an unexpected loss of after-tax income. By contrast, a taxpayer who lacks financial resources and does not own significant assets may not be able to mitigate the loss suffered by borrowing funds.

an unexpected \$1000 decrease to his or her after-tax income, and, like Mr. Walsh, the taxpayer may have taken other actions based on the belief that his or her income would include this \$1000 sum. Thus, like Mr. Walsh, the taxpayer may face liquidity costs. However, as was the case with Mr. Walsh, if the cost of unwinding these other actions is less than \$1000, compensating the taxpayer for his or her reliance on the ruling would require a sum less than \$1000.

Consider now the facts of a slightly different example.

Example 2: The facts are the same as Example 1 except that, based on the incorrect private letter ruling, the taxpayer believes the transaction will generate an after-tax profit of \$7800. When the IRS revokes the ruling retroactively and assesses \$1000 of additional tax liability, the taxpayer discovers that the transaction, in fact, generated an after-tax profit of only \$6800.

In Example 2, the detriment suffered by the taxpayer differs analytically from that suffered by Mr. Walsh. However, it is still true that less than \$1000 might adequately compensate the taxpayer. First, consider the transaction covered by the private letter ruling. If the taxpayer had known ahead of time that the transaction would generate an after-tax profit of only \$6800, the taxpayer would not have undertaken the transaction because \$6800 is less than the \$7000 after-tax profit required by the taxpayer. However, a sum of only \$200 (which would increase the after-tax profit to the \$7000 amount required by the taxpayer) would adequately compensate the taxpayer for the harm resulting from relying on the ruling with respect to this transaction. This \$200 would compensate the taxpayer for his or her opportunity costs given that the alternative transaction in which the taxpayer could have engaged would have generated \$200 more in after-tax profit. The taxpayer does experience an additional, unexpected \$800 decrease to his or her after-tax income, and, like Mr. Walsh, the taxpayer may have taken other actions based on the belief that his or her income would include this \$800 sum. Thus, like Mr. Walsh, the taxpayer faces potential liquidity costs. However, as was the case with Mr. Walsh, if the cost of unwinding these other actions is less than \$800, compensating the taxpayer would require an additional sum less than \$800, for a total amount less than \$1000.

Finally, consider the facts of a third example.

Example 3: The facts are the same as Examples 1 and 2 except that, based on the incorrect private letter ruling, the taxpayer believes the transaction will generate an after-tax profit of \$7000. When the IRS revokes the ruling retroactively and assesses \$1000 of additional tax liability, the taxpayer discovers that the transaction, in fact, generated an after-tax profit of only \$6000.

In Example 3, the detriment suffered by the taxpayer differs analytically from that suffered by Mr. Walsh, and the entire \$1000 sum is necessary to adequately compensate the taxpayer. If the taxpayer had known ahead of time that the transaction would generate an after-tax profit of only \$6000, the taxpayer would not have undertaken the transaction because \$6000 is less than the \$7000 after-tax profit required by the taxpayer (given that the taxpayer would have earned a \$7000 after-tax profit from an alternative transaction). Moreover, a sum of \$1000 (which would increase the after-tax profit to the \$7000 amount required by the taxpayer) is necessary to adequately compensate the taxpayer for the opportunity costs incurred as a result of relying on the ruling with respect to this transaction.

Despite the fact that the detriment suffered by the taxpayer in Example 3 differs analytically from the detriment suffered by Mr. Walsh (in that it involves entirely opportunity costs rather than liquidity costs), it is not necessarily true that the detriment suffered by the taxpayer in Example 3 is greater than the detriment suffered by Mr. Walsh. In particular, if \$1000 is less than the amount Mr. Walsh would spend in order to unwind any decisions he made in reliance on earning \$1000 in additional after-tax income, then the amount required to adequately compensate Mr. Walsh is \$1000, the same amount required to compensate the taxpayer in Example 3.²⁰³

In summary, individuals who rely on advice received by phone can suffer if the advice proves to be inaccurate, and, in many cases, the harm suffered by such individuals is analytically comparable to, and not lesser than, the harm suffered by individuals who rely on advice received in a private letter ruling. Consequently, although the extent of detriment may,

203. If the amount that Mr. Walsh would spend to unwind these decisions would be more than \$1000, only \$1000 is needed to adequately compensate Mr. Walsh because, if he receives the \$1000 in additional after-tax profit that he expected, he will not need to unwind the decisions (or, at least, he will not need to unwind them because his tax liability was higher than expected).

at first, appear to offer an additional way to distinguish different forms of IRS guidance, ultimately it proves to be an unconvincing distinction.²⁰⁴

H. Would Taxpayers Seek This Form of Guidance on Questions to Which They Already Know the Answer?

As discussed above, the IRS will not issue so-called “comfort rulings,” private letter rulings that address issues that are already covered by other available sources of tax law.²⁰⁵ Thus, a taxpayer cannot seek a private letter ruling to address a question to which the taxpayer already knows the answer. No similar rule limits the topics that the IRS will address by phone.²⁰⁶ Therefore, if advice provided by phone were binding, a taxpayer who already knew the answer to his or her tax question nevertheless might call the IRS merely to obtain certainty that the IRS will not challenge the results claimed by the taxpayer.²⁰⁷ As a result, the volume of phone calls received by the IRS could increase, and the IRS would be able to address a smaller percentage of the calls received, which could result in neglecting questions from some taxpayers who genuinely need guidance.

I. Summary

As discussed above, various rationales might be offered to justify allowing taxpayers to rely on some forms of IRS guidance, such as private letter rulings and revenue rulings, more than others, such as advice received via the IRS helpline. Some of these rationales are unconvincing. For instance, concerns related to problems of proof if taxpayers make false claims about phone conversations could be

204. This rationale may be unconvincing for an additional reason. In particular, taxpayers’ detrimental reliance on existing tax law does not prevent Congress from changing the law. Given that, why should it prevent the IRS from correcting a mistaken statement about existing tax law? For discussion of detrimental reliance as an unconvincing rationale for protecting taxpayers from changes to tax law, see, for example, Graetz, *supra* note 168, at 1823–24. That said, protecting taxpayers from changes to tax law and protecting taxpayers from mistaken statements about existing tax law are not the same.

205. See *supra* note 111 and accompanying text.

206. Moreover, a similar rule could not apply in the context of phone calls without eliminating the usefulness of the IRS helpline entirely. The questions that the IRS is willing to answer by phone are likely limited to routine questions with clear answers. For a list of the types of questions that the IRS will answer orally at a Taxpayer Assistance Center, for instance, see *Tax Topics*, *supra* note 158.

207. To the extent that taxpayers mistakenly believe that the IRS guarantees advice provided by phone, this could occur already.

addressed by recording phone calls.²⁰⁸ Also unpersuasive is the notion that taxpayers change their behavior and transactions more significantly in response to private letter rulings than in response to phone calls, so that taxpayers would suffer more severely if private letter rulings were unreliable.²⁰⁹

Several of the rationales, however, are more compelling. First, if phone calls were binding on the IRS, the IRS might cut back on the volume of questions answered by phone.²¹⁰ Ultimately, whether this would occur and whether this effect would be undesirable are empirical questions and depend on a number of underlying empirical questions, such as whether the advice provided by phone is more accurate than what taxpayers would obtain through other channels.²¹¹ It is at least conceivable, however, that increasing the extent to which taxpayers can rely on this type of advice would cause the amount of advice provided to dwindle which might result in, overall, less accurate tax reporting. Second, given that the IRS does not thoroughly review an answer provided by phone, an incorrect answer provided by phone could diverge greatly from the correct answer under applicable tax law.²¹² By contrast, given that private letter rulings are carefully vetted, a ruling that proves to be incorrect is likely to, nevertheless, represent at least a reasonably close approximation of what the law, in fact, provides.²¹³ Allowing a taxpayer to benefit from an unduly favorable tax result is less disconcerting when that result is based on a reasonable interpretation of tax law than when that result is nowhere near the treatment accorded by law.²¹⁴ Third, given that taxpayers can freely disregard advice provided by phone, making the advice binding on the IRS would provide a taxpayer with an avenue for using advice strategically by, for instance, calling the IRS repeatedly until the taxpayer receives an unjustifiably beneficial answer.²¹⁵ Fourth, the fact that advice provided by phone is not publicly available would raise concerns about corruption and favoritism if the advice were binding.²¹⁶ Finally, if advice provided by phone were binding, the IRS might have less opportunity to address questions presented by taxpayers who genuinely needed IRS guidance and were

208. *See supra* Part II.F.

209. *See supra* Part II.G.

210. *See supra* Part II.A–B.

211. *See supra* Part II.A–B.

212. *See supra* Part II.A.

213. *See supra* Part II.A.

214. *See supra* Part II.A.

215. *See supra* Part II.D.

216. *See supra* Part II.E.

not merely seeking assurances that their claimed results would be unchallenged.²¹⁷

One remaining rationale is not always persuasive but can be depending on the particular facts. Specifically, the notion that a taxpayer's reliance on phone call advice is unreasonable cannot be true categorically across all taxpayers but surely is true in the case of certain taxpayers.²¹⁸ Reliance is unreasonable if the taxpayer is sophisticated and if the question asked by phone is one that is addressed in other, more authoritative sources. For an unsophisticated taxpayer who lacks, as a practical matter, access to other sources of tax law, reliance seems quite reasonable, especially if the taxpayer is not warned that he or she cannot rely on the phone call.

Ultimately, given that some convincing justifications exist for disallowing reliance on IRS guidance provided by phone, this practice ought to be continued. However, as discussed below in Part III, the IRS and Congress should implement certain reforms in order to ameliorate the unfair results that could befall taxpayers such as Ms. Kennedy and Mr. Walsh from the Introduction to this Article.

III. PROPOSED REFORMS

As discussed in Part I, a taxpayer generally cannot rely on informal IRS advice—such as advice provided by phone—despite the fact that, as a practical matter, a taxpayer generally can rely on a private letter ruling issued to that taxpayer and on a revenue ruling provided to the public at large.²¹⁹ As Part II described, good reasons exist for not allowing a taxpayer to use advice provided by phone as a basis for avoiding paying tax liability owed under applicable law. Thus, allowing taxpayers to rely on informal advice for that purpose is not feasible.

Unfortunately, unsophisticated taxpayers who lack financial resources likely disproportionately seek informal types of IRS guidance.²²⁰ When an unsophisticated taxpayer faces uncertainty,

217. *See supra* Part II.H.

218. *See supra* Part II.C.

219. *See supra* Part I.

220. The IRS, of course, is not the only source of guidance about tax law. Taxpayers may also seek assistance from tax experts. Unfortunately, unsophisticated taxpayers also suffer from a lack of access to equally good tax expertise. Many unsophisticated taxpayers do turn to paid professionals or VITA sites for aid in preparing their tax returns. For instance, in 2001, 67% of lower income taxpayers claiming the EITC used paid preparers. *See* Book, *Preventing the Hybrid from Backfiring*, *supra* note 6, at 1115. However, the advice provided by these experts is not immune from error. For instance, Professor Leviner studied compliance rates with respect to various items reported on tax returns. Sagit Leviner, *The Role Tax Preparers Play in Taxpayer Compliance: An Empirical Investigation with Policy Implications*, 60 *BUFF. L. REV.* 1079

obtaining a private letter ruling may be prohibitively expensive.²²¹ Furthermore, the types of questions faced by such a taxpayer may not be the types of questions that the IRS will answer in a private letter ruling, given that the IRS refrains from issuing “comfort rulings,” and already available sources of tax law may adequately address the questions faced by an unsophisticated taxpayer.²²² Thus, private letter rulings, as a practical matter, provide little assistance to unsophisticated taxpayers. In addition, although revenue rulings are, in theory, available to the general public, functionally they are only available to taxpayers who are sufficiently sophisticated, or who are represented by sufficiently sophisticated experts, because only these taxpayers will be informed about the content of revenue rulings. Thus, unsophisticated taxpayers may disproportionately seek the least reliable forms of IRS guidance.²²³

Available data supports this intuition. For instance, in a 2013 Taxpayer Attitude Study conducted by the IRS Oversight Board, 90% of taxpayers with incomes lower than \$15,000 reported that they were

(2012). When examining adjustments made to the amount of EITC claimed, Leviner found that the IRS adjusted the EITC claimed by taxpayers 51% of the time when the return was prepared by the taxpayer, 45.2% of the time when the return was prepared by a certified public accountant or attorney, 46.3% of the time when the return was prepared by a large tax preparation chain, and 46.9% of the time when the return was prepared by a VITA program or similar volunteer site. *Id.* at 1111 tbl. 5. Furthermore, sophisticated taxpayers may obtain transactional tax risk insurance that provides protection against penalties and underlying tax liability. *See, e.g.*, Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 388 (2005). However, a similarly robust option does not exist in the case of unsophisticated taxpayers. Large commercial tax return preparers do offer some insurance either for an additional charge or as part of their standard service package. *See, e.g.*, Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 CONN. L. REV. 161, 176–77 (2008). Typically, the insurance offered covers penalties and interest if the IRS challenges the return because of a mistake made by the return preparer. Logue, *supra*, at 377. However, unlike transactional tax risk insurance, the insurance does not cover the additional underlying tax liability assessed by the IRS. *Id.* Furthermore, the tax return preparers may not always stand behind the insurance provided. For instance, Jackson Hewitt, a company that provides services to many lower income taxpayers, offers audit insurance as part of its standard service package. Lawsky, *supra*, at 176–77. Better Business Bureau complaints and class action lawsuits suggest that Jackson Hewitt may not always be responsive to customers when they are audited and seek Jackson Hewitt’s assistance under the terms of the audit insurance. *Id.* at 178. Unsophisticated taxpayers are also not immune from IRS audit. For instance, during 2000 to 2003, about half of all individual income tax audits focused on EITC issues, even though returns on which taxpayers claim the EITC constituted less than 20% of all individual income tax returns. Zelenak, *supra* note 6, at 1884–85.

221. For a discussion of filing fees and other costs of requesting a private letter ruling, see *supra* Part I.C.

222. *See supra* note 111 and accompanying text.

223. *See Braunstein, supra* note 150, at 37–38 (speculating that low-income individuals may disproportionately rely on informal guidance).

likely to use the IRS toll-free telephone service, and 81% of taxpayers with incomes equal to \$75,000 or more reported that they were likely to use this service.²²⁴ Regarding informal advice provided by IRS walk-in centers, the disparity was even greater in that 86% of taxpayers with incomes lower than \$15,000 reported that they were likely to use this service compared to only 61% in the case of taxpayers with incomes equal to \$75,000 or more.²²⁵ Private letter rulings, by contrast, are likely issued almost exclusively to high-income taxpayers.²²⁶

Luckily, steps can be taken to mitigate the harsh consequences that currently plague unsophisticated taxpayers who disproportionately seek informal IRS advice, and these steps would be entirely consistent with the rationales for limiting reliance on informal advice discussed above in Part II. In order to lessen the burdens borne by unsophisticated taxpayers, the IRS or Congress should implement three specific reforms. First, the IRS should warn callers that they cannot rely on advice provided by phone.²²⁷ Second, the IRS should refrain from assessing penalties against an unsophisticated taxpayer who reports tax consequences consistently with the IRS's record of advice provided to that taxpayer by phone. The IRS could use income as a proxy for sophistication and apply this new system only for taxpayers with incomes below a certain threshold.²²⁸ Third, Congress should allow taxpayers to amend tax returns beyond the normal limitations period when the failure to file a correct return earlier results from reasonable reliance on any form of IRS guidance. Each of these proposals is discussed in more detail below. After discussing each of these proposals, this Article will turn to a proposal that addresses the question of whether taxpayers should be able to rely on IRS publications—an issue discussed in the recent *Bobrow v. Commissioner* case.

224. IRS OVERSIGHT BOARD, 2013 TAXPAYER ATTITUDE SURVEY 13 fig.17 (Feb. 2014).

225. *Id.* at 12 fig.16.

226. This is likely true given the issues addressed by private letter rulings and the onerous process required to obtain a private letter ruling. For further discussion, see *supra* Part I.C.

227. Professor Levinson also recommended that the IRS should provide a warning to callers. See Levinson, *supra* note 51, at 574 (“[P]erhaps a short recorded statement on reliability and its limits should greet anyone who calls IRS for advice.”).

228. Income level is not a perfect proxy for sophistication. Individuals might be unsophisticated with respect to tax law even if they earn substantial amounts of income. Nevertheless, in a world of limited IRS resources, it may be advisable to adopt a bright-line test for sophistication. If the IRS warns callers that the advice received by phone is unreliable, an individual with financial resources can seek guidance elsewhere to compensate for any deficiencies in IRS guidance and in the individual's personal expertise.

A. Warning Callers

The IRS should provide a standard warning to each caller explaining that the advice provided by phone could prove to be inaccurate and, in the event that it is inaccurate, the caller cannot rely on the advice. The warning should also inform each caller that, if the advice is incorrect, the caller could owe additional tax liability plus interest and potentially penalties (subject to the recommendation below regarding penalties); alternatively, in some cases, incorrect advice could lead the caller to report and pay more tax liability than necessary. Such a warning would allow taxpayers to make an informed decision as to whether or not they should independently verify the guidance received. Furthermore, to inform lower income taxpayers about available methods for independently verifying the guidance, the standard warning could include information about how to locate VITA sites.²²⁹ Issuing warnings would also strengthen some of the arguments that might justify not allowing taxpayers to rely on informal advice received by phone. For instance, one potential justification for not allowing reliance on informal guidance is that such reliance may be unreasonable.²³⁰ This claim is much stronger if taxpayers are aware of the fact that the guidance is unreliable.

Implementing this measure would make the system fairer for the individual taxpayers who call the IRS. Indeed, private letter rulings, which are likely to be read only by sophisticated taxpayers, contain a disclaimer to the effect that taxpayers cannot use them as precedent.²³¹ The same courtesy ought to be extended to taxpayers who call the IRS, many of whom are likely unsophisticated.

Not only would this practice be fairer to the callers than current practice, but improving the procedural fairness of the tax system might serve the interests of the public at large by improving tax compliance and, thereby, increasing tax revenue collected.²³² Studies suggest that if an individual perceives that tax law is implemented in a procedurally fair manner, the individual is more likely to report that noncompliance with

229. Congress might have to take action to assure the IRS that it is allowed to refer taxpayers to specific VITA sites given that the IRS espouses the view that government ethics rules prevent it from doing so. *See, e.g.*, Schneller, Chilton & Boehm, *supra* note 6, at 193–94.

230. *See supra* Part II.C.

231. *See supra* note 129 and accompanying text.

232. For similar concerns about the effects of not allowing individuals to rely on agency guidance, see, for example, Raoul Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 688 (1954) (“The fact is, however, that tax collection is not accomplished with the aid of thumbscrews, but rests for the most part on mutual trust between the government and the taxpayers. Repudiation of tax rulings and interpretations damages that trust and therefore impairs our voluntary tax payment system.”).

tax law is unacceptable.²³³ Conversely, when certain individuals perceive procedural *unfairness* in the tax system as a result of stories relayed by others who have had contacts with the IRS, those individuals are more likely to indicate that they intend to not comply with tax law in the future.²³⁴ Whether an improved attitude towards tax compliance will translate into an actual increase in tax compliance, however, is an issue that these studies do not address definitively.²³⁵

B. Penalty Relief

To further assist unsophisticated taxpayers, the IRS, on its own initiative, should refrain from assessing penalties against any unsophisticated taxpayer who reports tax consequences consistently with the IRS's record of advice provided to that taxpayer by phone.²³⁶ The IRS could use income as a proxy for sophistication and apply this new system only for taxpayers with incomes below a certain threshold.²³⁷

For unsophisticated taxpayers, it is crucial that the IRS refrain from assessing penalties on its own initiative because such taxpayers may simply accept whatever penalties the IRS assesses without raising the phone call as a defense.²³⁸ Implementing this measure would require the

233. See, e.g., Kent W. Smith, *Reciprocity and Fairness: Positive Incentives for Tax Compliance*, in *WHY PEOPLE PAY TAXES* 223, 223–34 (Joel Slemrod ed., 1992). For a summary of the studies, see Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 1000–02 (2003).

234. Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in *WHY PEOPLE PAY TAXES*, *supra* note 233, at 260–61.

235. See, e.g., Lederman, *supra* note 233, at 1000–01; Osofsky, *supra* note 173, at 141.

236. This record of advice would include all calls received from the taxpayer, and taxpayers could not obtain penalty relief if, based on all of the calls received, it appeared that the taxpayer called the IRS multiple times with the same question, and reported tax consequences in a way that was more favorable than advice received on one or more of the calls. In addition, to the extent that interest assessed against a taxpayer is also punitive (because it exceeds a market rate of interest), the same considerations that warrant abatement of penalties could also justify relief from interest.

237. Limiting the scope of the new procedure in this way would also prevent sophisticated taxpayers from gaming the system by calling the IRS merely to receive free penalty protection. Furthermore, given that the IRS only provides answers by phone to certain routine questions, it is unlikely that sophisticated taxpayers would attempt to use the system in this way. For a discussion of the types of questions addressed by phone, see *supra* note 158 and accompanying text.

238. For a discussion of the difficulties that EITC recipients face when they are unrepresented and become subject to an IRS correspondence audit, see, for example, Book, *Taxpayers Caught in the Net*, *supra* note 6, at 355; Drumbl, *supra* note 6, at 136–39; Schneller, Chilton & Boehm, *supra* note 6, at 186–94. For a discussion of the tendency of unsophisticated taxpayers to simply accept penalties assessed by the IRS without raising available defenses, see Drumbl, *supra* note 6, at 147 (“[I]f one is

IRS to record phone calls and index them by taxpayer identification number.²³⁹ Prior to assessing penalties against a taxpayer with income below a certain threshold, the IRS could search for recordings of calls from that taxpayer and review their content to determine whether the taxpayer's error was consistent with advice provided by the IRS.

This measure would lead to the IRS incurring the costs of recording and storing numerous phone calls. One factor, however, limits the cost of the new procedure. In particular, the IRS would only need to search for and review a subset of all phone calls received. Specifically, the IRS would only review a phone call as a step in the process of auditing and potentially assessing a penalty against a taxpayer whose income was below a certain threshold.

Alleviating taxpayers of penalties does not raise the same concerns that would follow from forgiving the underlying tax liability. Forgiving the underlying tax liability would bestow a windfall upon the taxpayer at the expense of the public treasury.²⁴⁰ By contrast, refraining from assessing a penalty does not raise the same windfall concerns, especially because heeding IRS guidance—at least for an unsophisticated taxpayer who lacks access to other channels of information—is reasonable and, therefore, not the type of behavior intended to be penalized.²⁴¹

inexperienced, has little to no knowledge of tax law, and has relatively little formal education, how would that person know to invoke the reasonable cause defense?"). Furthermore, it is not the case that the IRS refrains from assessing penalties against low income taxpayers. *See, e.g., id.* at 148 (quoting NAT'L TAXPAYER ADVOCATE, FY 2001 ANNUAL REPORT TO CONGRESS 90 (2001)) (citing the statistic that, in the year 2000, the IRS "issued approximately 17,300 EITC deficiency notices involving accuracy-related penalties").

239. Professor Levinson also recommended that the IRS should record phone calls but would leave it up to the taxpayer to raise the phone call as a penalty defense. *See* Levinson, *supra* note 51, at 574 ("Next, if the cost is not prohibitive, IRS should consider maintaining tape recordings of all conversations regarding tax advice, and giving the caller a confirmation number so that the recording can be readily accessed in the future if necessary. If this system can be designed, a 'confirmed' telephone conversation should perhaps be deemed equivalent to a written communication, for purposes of waiver of penalties."). One potential downside to recording calls is that it might discourage some individuals from calling the IRS to seek assistance, which could prevent some individuals from receiving guidance that would allow them to prepare their returns correctly. To address this concern, a caller could be presented with a choice at the beginning of the call to either (i) have the call recorded so that the taxpayer could rely on it for penalty relief if the taxpayer's income was below a given threshold or (ii) not have the call recorded in which case the taxpayer could not rely on it for penalty relief. If the taxpayer is required to make this decision at the beginning of the call before the taxpayer discovers the answer that the IRS representative will provide, taxpayers could not game the system by only claiming reliance when advice is unduly favorable towards the taxpayer.

240. *See supra* note 61 and accompanying text.

241. For a similar observation, see Levinson, *supra* note 51, at 566–67 ("As regards the tax deficiency, the taxpayer's expectation . . . does not qualify for protection, since it is outweighed by the public interest in requiring [the] IRS to collect all taxes

Finally, like issuing warnings to callers, this measure would improve the procedural fairness of the tax system. Improving the tax system's procedural fairness could increase tax compliance.²⁴²

C. Granting More Flexibility to Amend Returns

In order to further alleviate the unforgiving consequences that ensue when unsophisticated taxpayers rely on informal IRS advice, Congress should adopt a new exception to the general limitations period for filing an amended return.²⁴³ Specifically, Congress should provide that, if a taxpayer fails to file a correct tax return within the limitations period otherwise specified in Internal Revenue Code Section 6511 because the taxpayer reasonably relied on advice provided by the IRS, in any form, then the time period for filing an amended return will be extended.²⁴⁴ Congress could prescribe the exact length of the extension; perhaps, they could require the taxpayer to file an amended return by the earlier of a specified number of years after the taxpayer discovers the IRS's error or a specified number of years later than the time period otherwise determined under Internal Revenue Code Section 6511. The tax statutes already grant extensions motivated by equitable considerations. In particular, Internal Revenue Code Section 6511(h) provides that the limitations period will be tolled during any period of time when the taxpayer is unable to manage his or her financial affairs by reason of a proven, medically determinable physical or mental impairment.²⁴⁵ The new exception proposed by this Article would merely broaden the circumstances in which equitable considerations factor into the analysis.

Extending the limitations period for amending a tax return in this manner would mitigate the severe consequences suffered by taxpayers like Ms. Kennedy from the Introduction but, at the same time, would not precipitate the same problems that would follow from allowing taxpayers

required by law, in order to protect the public fisc. But as regards the penalty, the taxpayer's expectation is arguably sufficient to outweigh the public interest, since there seems to be little if any public interest in punishing a taxpayer for filing an incorrect return in good faith reliance on the erroneous advice of IRS's staff member.").

242. See *supra* notes 232–35 and accompanying text.

243. Given the Supreme Court's rejection of equitable tolling as a judicially created exception to Section 6511, instituting this reform likely requires Congressional action. For discussion of equitable tolling, see *supra* note 98.

244. For another proposal that the scope of Section 6511(h) should be broadened so that events that would suspend the running of time under a statute of limitations would include the taxpayer's receipt of misleading statements or guidance from the IRS, see Fogg & Zuraw, *supra* note 98, at 996, 998–99.

245. I.R.C. § 6511(h) (West 2014). For a discussion of the legislative history surrounding the adoption of Section 6511(h), see Fogg & Zuraw, *supra* note 98, at 976–78.

to rely on phone call advice more generally. A taxpayer who could make use of the extended limitations period in order to claim more favorable tax consequences must have received incorrect advice from the IRS that was unduly *unfavorable* towards to the taxpayer.²⁴⁶ Upon discovering the error, the taxpayer seeks to obtain the more favorable tax consequences to which he or she was, in fact, entitled. In such a case, it is difficult to characterize the taxpayer as receiving a windfall if the taxpayer merely receives the treatment specified by applicable tax law.²⁴⁷ If Ms. Kennedy is allowed to file an amended return, for instance, she simply receives the benefit of the EITC that she would have had an unquestionable right to receive if she had claimed it earlier. Her situation is different from that of a taxpayer like Mr. Walsh from the Introduction who received incorrect IRS advice that was unduly *favorable* to the taxpayer. Allowing Mr. Walsh to hold the IRS to its advice would result in a taxpayer receiving more favorable tax treatment than tax law, in fact, prescribes.

In addition, allowing a taxpayer more time to file an amended return when the taxpayer received unduly *unfavorable* advice from the IRS does not open an avenue for sophisticated taxpayers to game the system. A sophisticated taxpayer never ends up in Ms. Kennedy's position because, if a sophisticated taxpayer receives incorrect IRS advice that is unfavorable, he or she simply disregards the advice and claims the correct, favorable treatment on his or her initial return.²⁴⁸ Likewise, the proposal does not lend itself to exploitation by corrupt IRS officials who want to provide special treatment to influential taxpayers. This is true because, again, the proposal is only relevant when the IRS provided incorrect *unfavorable* advice, and providing unfavorable advice is not a

246. The only situation in which the new extension might apply even though the advice was not unduly unfavorable is when the advice relates to the filing deadline itself. For an example of such a case, see *supra* notes 68–75 and accompanying text. Allowing the taxpayer an extension for filing a return in such a case also would not raise the same concerns that would arise as a result of forgiving the underlying tax liability. For instance, the taxpayer would not receive a windfall but rather would merely pay the amount of tax required by applicable tax law. In addition, sophisticated taxpayers would not use reliance on this type of advice as a means to game the system; a sophisticated taxpayer who is entitled to a tax refund would file a claim as soon as possible.

247. For a similar discussion along these lines, see, for example, Ansell, *supra* note 54, at 1034 (“[I]n many cases the plaintiff seeking estoppel would be statutorily entitled to the benefit but for the misconduct by a government official. . . . In these cases, because the payment to the beneficiary has been statutorily authorized, there is no danger of depleting the public fisc”); and see also Johnson, *supra* note 61, at 564, 613 (suggesting that an appropriate balance between fairness and the correct legal result could be struck by requiring taxpayers to pay the underlying tax liability but not interest when taxpayers rely on revenue rulings and other similar forms of guidance that the IRS subsequently withdraws or decides not to follow).

248. For a similar discussion, see, for example, Polsky, *supra* note 37, at 245; Zelenak, *supra* note 37, at 833.

means for granting special treatment. Another reason to hesitate before allowing taxpayers to rely on advice provided by phone is that the advice is not thoroughly vetted by the IRS. This observation, however, only strengthens the case for adopting the proposed extension to the limitations period for filing an amended return because, without this extension, hastily provided IRS advice can prevent taxpayers from obtaining benefits that Congress intended them to receive.²⁴⁹ Finally, regarding the concern that taxpayers' reliance on advice provided by phone may be unreasonable, the extension would only apply when a taxpayer's reliance on IRS advice was reasonable, a matter that depends on the circumstances of the particular taxpayer.

D. Treatment of IRS Publications

Examining the rationales for allowing taxpayers to rely only on some types of guidance is a useful exercise because it reveals how the IRS and Congress could mitigate the harsh consequences faced by unsophisticated taxpayers who disproportionately seek the least reliable forms of IRS guidance. Examining these rationales is also useful because it provides a framework for critically evaluating the Tax Court's statements in the recent *Bobrow v. Commissioner*²⁵⁰ case and for considering more generally the extent to which taxpayers ought to be able to rely on IRS publications.

In *Bobrow*, the taxpayer, a current partner in Mayer Brown's tax transactions group and formerly the general tax counsel for CBS,²⁵¹ reported the tax consequences of IRA distributions in a manner that was consistent with an IRS publication (specifically IRS Publication 590—a

249. Indeed, as the Supreme Court observed in *Office of Personnel Management, Congress can prevent executive officials from interfering with benefits that Congress intends to confer by enacting provisions like the one proposed in this Article. Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428–29 (1990). For instance, as the Supreme Court observed in that case, following the *Hansen* case discussed above, Congress enacted the following provision:

In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of [the date on which the misinformation was given or the date upon which the applicant became eligible for benefits apart from the application requirement].

Id. at 429. For discussion of *Hansen*, see *supra* notes 76–80 and accompanying text.

250. *Bobrow v. Comm'r*, 107 T.C.M. (CCH) 1110 (2014).

251. Alvan L. Bobrow, *People*, MAYER BROWN, <http://www.mayerbrown.com/people/Alvan-L-Bobrow/> (last visited Mar. 21, 2015).

document that provides taxpayers with information about IRAs to use when preparing their tax returns).²⁵² However, the tax consequences reported by the taxpayer were inconsistent with applicable statutory language.²⁵³ The IRS assessed \$51,298 in additional income tax liability and \$10,260 in penalties.²⁵⁴ Ultimately, the IRS and the taxpayer entered into a settlement.²⁵⁵ After the Tax Court entered the settlement as a stipulated judgment, the taxpayer filed a motion for reconsideration, arguing that the IRS publication provided a basis for a defense against penalties.²⁵⁶ The Tax Court denied the motion because the issue was raised too late.²⁵⁷ However, in dicta, the Tax Court stated that the IRS publication was not “binding precedent” and that, “[t]axpayers rely on IRS guidance at their own peril.”²⁵⁸

These statements by the Tax Court are consistent with the IRS’s and the Tax Court’s position on IRS publications generally, as discussed above.²⁵⁹ The rationales discussed in Part II shed some light on whether or not this position is justified. On the one hand, some factors suggest that taxpayers ought to be able to place greater reliance on IRS publications than phone calls. In particular, the IRS may devote more time and attention to considering the content of publications.²⁶⁰ As a result, there is less risk that a publication will be inaccurate, and perhaps the IRS would be less inclined to cease issuing this form of guidance if it were binding on the IRS. In addition, IRS publications are generalizable²⁶¹ so the IRS is unlikely to use them as a means of granting more favorable treatment to only certain taxpayers.

On the other hand, some factors suggest that IRS publications are similar to phone calls. In particular, given that a taxpayer is not bound to follow a publication if it provides incorrect information that is unfavorable to the taxpayer, allowing reliance on publications that provide unduly favorable information could raise some of the same gaming considerations that arise in the context of phone calls.²⁶²

252. See Order, *supra* note 41, at 1.

253. *Id.*

254. *Bobrow*, 107 T.C.M (CCH) at 1111.

255. See Order, *supra* note 41, at 2.

256. *Id.*

257. *Id.*

258. *Id.*

259. See *supra* Part I.B.

260. This is likely true given that the guidance is written and distributed widely so there is more opportunity for review.

261. See, e.g., *Korb*, *supra* note 17, at 371 (describing the role of IRS publications).

262. See *supra* Part II.D.

One additional fact that is generally true of advice provided by phone is often, but not always, true of advice contained in IRS publications. Like phone calls, IRS publications often include answers to questions that are addressed elsewhere in more authoritative sources, such as statutes, regulations, case law, and revenue rulings.²⁶³ This fact, when it applies, suggests that a taxpayer's reliance on the IRS publication may be unreasonable, at least if the taxpayer has effective access to the other sources and is sufficiently sophisticated to be aware of the IRS's position on the reliability of IRS publications.²⁶⁴ In some cases, however, an IRS publication offers an answer to a tax law question that is not addressed elsewhere.²⁶⁵ In those cases, reliance on the publication seems quite reasonable, even in the case of sophisticated taxpayers.

Ultimately, this analysis leads to the conclusion that the proper treatment of an IRS publication depends on the facts of the particular case—including whether the tax law question at issue is addressed by other more authoritative sources, the sophistication of the taxpayer, and whether the facts suggest that the taxpayer, in fact, relied on the publication. Several facts suggest that the Tax Court's statement that taxpayers "rely on IRS guidance at their own peril" was justified in the context of the facts presented in *Bobrow*.²⁶⁶ The tax law question at issue was addressed by other sources, the taxpayer was quite sophisticated, and the taxpayer raised the argument about the IRS publication late in litigation which might suggest that the taxpayer did not, in fact, rely on the publication.²⁶⁷

By contrast, if a case involved more taxpayer-favorable facts, the IRS and the Tax Court ought to take a different position. For instance, if the question addressed by the publication were not addressed by other sources, the taxpayer was less sophisticated, and the taxpayer could more convincingly demonstrate reliance on the publication, then the taxpayer would have a much stronger case for relief from penalties.

263. For an example of a publication, *see, e.g.*, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS (2014), available at <http://www.irs.gov/pub/irs-pdf/p17.pdf>. For a discussion of the role of publications, *see, for example*, Korb, *supra* note 17, at 371–72 (“The Service also publishes over one hundred publications providing detailed information on key topics to help taxpayers prepare their returns. Examples include Publication 17, *Your Federal Income Tax*, which explains the rules for individuals The sources of authoritative tax law are the relevant statutes, regulations, and judicial decisions, not the Service's informal publications.”).

264. As was true with phone calls, the universe of taxpayers who are aware of the IRS's position would expand if IRS publications included warnings to the effect that taxpayers may not rely on statements in the publications that are inconsistent with more authoritative sources of tax law.

265. *See supra* note 101 and accompanying text.

266. *See Order, supra* note 41, at 2.

267. *Id.*

CONCLUSION

Unsophisticated taxpayers who lack financial resources disproportionately seek the least reliable form of IRS guidance—answers provided by the IRS over the phone. Sound policy considerations dictate the result that taxpayers cannot hold the IRS to advice provided by phone. Therefore, we cannot remedy the plight of unsophisticated taxpayers by simply requiring that the IRS guarantee advice provided through that channel. However, the IRS ought to amend its current practices so as to mitigate the harsh consequences that currently plague unsophisticated callers. In particular, the IRS should warn callers that they cannot rely on guidance received by phone. In addition, the IRS should refrain from assessing penalties against lower income taxpayers who report items incorrectly but consistently with advice received by phone. Furthermore, Congress should grant taxpayers more time to amend tax returns when the failure to file a correct tax return earlier is induced by reasonable reliance on any form of IRS advice. Finally, reliance on IRS publications raises some of the same issues surrounding reliance on informal advice received by phone, and, depending on the facts of a particular case, reliance on IRS publications may also justify relief from penalties.