

**STATE BAR OF CALIFORNIA
TAXATION SECTION
TAX POLICY, PRACTICE & LEGISLATION COMMITTEE
2012 WASHINGTON, D.C. DELEGATION PAPER**

**FAQs: PROBLEMS WITH THE PROCESS OF INFORMAL GUIDANCE
FROM THE INTERNAL REVENUE SERVICE**

This proposal was prepared by Robert Horwitz and Annette Nellen, members of the Executive Committee of the State Bar of California's Taxation Section.¹ The authors wish to thank reviewers Mark Hoose, University of San Diego School of Law, and LaVonne Lawson, Attorney at Law, for their helpful comments.²

Contact Information: Robert S. Horwitz
 Law Offices of A. Lavar Taylor
 6 Hutton Centre Drive, Suite 880
 Santa Ana, CA 92707-0516
 (714) 546-0445
 rhorwitz@taylorlaw.com

 Annette Nellen
 San José State University
 One Washington Square
 San Jose, CA 95192-0066
 (408) 924-3508
 annette.nellen@sjsu.edu

¹ The comments contained in this paper are the individual views of the authors who prepared them, and do not represent the position of the State Bar of California or the Los Angeles County Bar Association.

² Although the participants on this project might have clients affected by the rules applicable to the subject matter of this paper and have advised such clients on applicable law, no such participant has been specifically engaged by a client to participate on this project.

EXECUTIVE SUMMARY

Over the past several years, the IRS has increasingly relied on the use of Frequently Asked Questions (“FAQs”) to provide information and guidance to taxpayers and tax professionals. A recent search of the phrase “frequently asked questions” on the IRS website returned almost 1,400 results. Many of the IRS FAQs briefly summarize the law on run-of-the-mill topics, such as filing requirements, filing status, IRAs and claiming a child as a dependent. These types of FAQs often link to IRS forms and publications.

FAQs have also been used increasingly to provide guidance on technical and compliance issues in an expedited fashion. In some instances FAQs are the only guidance available from the IRS on an issue. A major problem facing the IRS in issuing guidance is the lack of adequate funding, particularly at a time when its delegated tasks have expanded under FATCA and the Patient Protection and Affordable Care Act. Using FAQs as a streamlined method for providing guidance is, therefore, a practical way of quickly reaching the public and can represent a net benefit to taxpayers and tax practitioners.

Despite some benefits, the use of FAQs to provide guidance raises a number of concerns. These include: (1) the lack of transparency, (2) the lack of accountability, (3) the lack of input by the public, (4) the difficulty in finding specific FAQs on the IRS website, (5) whether FAQs are binding on IRS personnel, and (6) the extent to which FAQs can be relied upon by taxpayers and tax practitioners.

This paper discusses the background of the evolution of the IRS’s website and its use of FAQs to provide information and guidance. It then discusses the types of FAQs that are available at irs.gov and the reasons for the increasing use of FAQs. It then addresses (1) problems for both taxpayers and tax practitioners that are presented by the IRS’s use of FAQs, particularly as guidance, (2) where FAQs fit into the spectrum of IRS guidance, and (3) whether FAQs can be considered “authority.”

There are ways to address the concerns and make the use of FAQs more reliable. These changes include (1) archiving past versions of FAQs and linking them to current versions of FAQs, (2) creating indices so that FAQs are more readily accessible, (3) publishing the procedures used in developing different types of FAQs, and (4) according FAQs the same status as Notices and Announcements,

which, like FAQs, are used when guidance is needed expeditiously (such as when there is not enough time between a statutory law change and its effective date to issue regulations).

DISCUSSION

I. INTRODUCTION

The Internal Revenue Service (IRS) should reconsider and revise its use of "frequently asked questions" or FAQs posted on its website.

The ability to disseminate information broadly and continuously through the use of websites has led to their proliferation, including use by government agencies. A common feature of many websites is "frequently asked questions" or FAQs. The use of FAQs enables commonly asked questions to be answered once. Visitors to a website may find the information they seek by reviewing the FAQs. Appropriate use of FAQs can serve website visitors and prevent the website owner from having to individually address common questions.

For basic information about due dates, location of IRS offices, mailing addresses, how to find forms and publications, how to find primary authority, and other standard non-interpretative questions, FAQs are appropriate. However, use of FAQs to provide information that goes beyond restating or explaining the Internal Revenue Code, regulations, IRS rulings, court cases and other primary tax authority in simpler terms can be misleading for taxpayers and tax practitioners, as well as for IRS personnel.

A. Approach of this Paper

This paper provides background on modern forms and delivery of information including via the IRS website, examples of the IRS use of FAQs, real and potential problems with the use of FAQs, and the guidance process to help illustrate problems with some FAQs. It then offers suggestions for improvement.

A significant issue that exists with the posting of items on the IRS website for use by taxpayers and tax practitioners is that they are not "authority" (per Treas. Reg. §1.6662-4), yet some FAQs appear to be posted to provide guidance when there is no other "authority" or such "authority" is not complete.

This paper focuses on FAQs, although the problems noted also exist with some other types of information posted on the IRS website. The number of FAQs seems to have increased in recent years, particularly when information needs

to be issued quickly on new statutory provisions, particularly ones added as stimulus that exist for a limited period of time.

Problems with FAQs include:

- FAQs sometimes serve as the only information to explain an IRS procedure or a statutory change made by Congress. Yet, they are not listed in the regulations as authority that could prevent imposition of a penalty on a taxpayer or tax return preparer.
- It is not clear how FAQs are derived and who authors them. There are no posted procedures on how taxpayers can ask questions to be answered.
- There is a lack of history regarding changes and deletions of FAQs. Users need to check FAQs often because new ones are added and existing ones modified or deleted. Unlike the process for modifying or revoking a revenue ruling, there is no history of what happens to FAQs that are modified or deleted; the original text disappears.
- It is not clear whether FAQs are binding on IRS personnel.

The balance of this introduction reviews the evolution of the IRS website, the use of FAQs in general, and the meaning of "authority."

Part II of this paper provides examples of types of IRS FAQs in terms of topics covered, how they appear to be modified, and why they are used. Part III explains the problems that exist for taxpayers, tax practitioners and IRS personnel from FAQs. Part IV explains the process of issuing "authority" in order to contrast it with the FAQ process. Finally, Part V offers suggestions for reducing the use of FAQs, increasing transparency in their usage, and making them constitute "authority."

B. Evolution and Content of the IRS Website

Since the IRS launched its website in 1996,³ it has continued to use the website in many ways similar to how businesses use websites. The IRS website provides interactive tools, links to many types of information, materials needed for compliance, social media and "frequently asked questions" or FAQs.



Welcome to the Internal Revenue Service's new home on the World Wide Web. As part of our continuing efforts to provide broad and immediate access to IRS tax information and services, we are presenting our latest electronic publication.  So pour yourself a cup of coffee, **open your mailbox** and enjoy our premiere issue! By the way, please send us your comments and let us know what you think. Also tell us what you find useful and what you'd like to see in future issues.

IRS website (http://www.irs.ustreas.gov/prod/index_javascript.html) at December 10, 1997 as obtained from the Internet Wayback Machine (<http://wayback.archive.org/>).

³ Diane M. Dixon, "IRS Seeks to Develop New Web-Based Measurement Indicators for IRS.gov," 2003, page 1; available at <http://www.irs.gov/pub/irs-soi/03dixon.pdf>.

PRINTED
DAILY AND
IT'S FREE!

DEPARTMENT OF THE TREASURY
Presenting The Fastest, Easiest



INTERNAL REVENUE SERVICE
Tax Publication On The Planet

AND YOU
DON'T HAVE
TO RECYCLE!

THE DIGITAL DAILY

FASTER THAN A SPEEDING 1040-EZ ... AUG 15, 2000 (243 DAYS UNTIL APRIL 15TH).
You get an extra day to file your 2000 income tax return; it's due April 16, 2001

[\[Text Only Version\]](#)

IN TODAY'S ISSUE

**Not Happily
Ever After?**



**Check Out Our
Spousal Tax Relief
Eligibility Explorer**

**IRS Hiring
Hundreds
Now!**

**Filing Form 941
Electronically
Has Never
Been Easier!**



BACK ISSUES

**Review Our Security
and Privacy Policy**



Department of the Treasury
Internal Revenue Service

Teenager Tanya Taylor Tries To Tackle Taxation Training... Interactively



TYLER, TX. High school junior, Tanya Taylor, took home her first paycheck from her first summer job today, and she was one of the few new part-time workers who *was not* surprised by what it contained. "Many of my friends thought they got to keep *all* of their pay.", Tanya chuckled. "Boy, were they shocked to see all of the deductions! Fortunately, my boss gave me a heads-up of what to expect."

"Tyler is the *Rose Capital of the World*", boasts Tanya's employer, Rosa Rosario, owner of *Rosa's Roses*, "but it wouldn't be if we didn't take care of our roses *and* our employees. Teaching our summer help how taxation works is an important part of that, so I insist that all of my new employees visit the TAX *interactive* web site."

Tanya recommends that all teens entering the workforce "wake up and smell the roses, and visit the [TAX *interactive*](#) web site."

[Tax Stats](#) | [Tax Info For You](#) | [Tax Info For Business](#)

[Electronic Services](#) | [Taxpayer Help & Ed](#) | [Tax Regs In English](#)

[IRS Newsstand](#) | [Forms & Pubs](#) | [What's Hot](#) | [Meet The Commissioner](#)

[Comments & Help](#) | [How to Contact Us](#) | [Site Tree](#) | [IRS Jobs](#)



Previous



Next



Home



Search



Help!

August 15, 2000 (from Wayback Machine)



Search IRS Site for:

Search Forms and Publications for:

[Tips for successful searching Forms and Publications](#)



Where's My Refund?

You survived the tax season. You filed your return and are expecting a refund. You need that money and want to get your hands on it. So, where is it? And when will you have it? Find out here. With secure access anytime from anywhere, get the lowdown on your tax refund!

information for:

- [Individuals](#)
- [Businesses](#)
- [Charities & Non-Profits](#)
- [Government Entities](#)
- [Tax Professionals](#)
- [Retirement Plans](#)

Settlement Offer for Tax Shelter Investors

Taxpayers who invested in an abusive tax shelter known as "Son of Boss" have until June 21 to accept an IRS offer to resolve their tax issues.

Free File Still Going Strong

Got an extension? Free File is still an online option. See if you qualify.

Grants for Low Income Taxpayer Clinics

Grants up to \$100,000 a year awarded to develop, expand or continue low income tax clinics.



Electronic payment options.

Phony Tax Arguments

Don't get taken ... Get the truth.



Online options -- fast, free



Most Requested Forms and Publications

1. [Form W-4](#)
2. [Form W-9](#)
3. [Form SS4](#)
4. [Form 8822](#)
5. [Publication 15](#)

[More Forms and Publications](#)

Online Tools

- [Where's My Refund?](#)
It's quick, easy and...
- [Search for Charities](#)
Find an eligible charity.
- 
Online options -- fast,...
- 
Electronic payment options.

[More Online Tools](#)



Help for Hurricane Victims

Review the IRS tax relief extended to victims of this record hurricane season, which now includes Wilma. Want to help? Check out a special Leave...

Catch a Sneak PreView of the New IRS.gov!

The IRS.gov web site is being redesigned. Find out what you can expect of the new site.

Enforcement, Services Improve

IRS enhances audit rates and services to taxpayers, data show. Enforcement efforts net record...

Returned to Sender

IRS holding 84,000 undelivered refunds. Make sure we have your correct address.

Information About

- [Careers](#)
- [Contracting Opportunities](#)
- [Frequently Asked Questions](#)
- [Newsroom](#)
- [Tax Stats](#)
- [Taxpayer Advocate](#)

I need to...

<Select One>

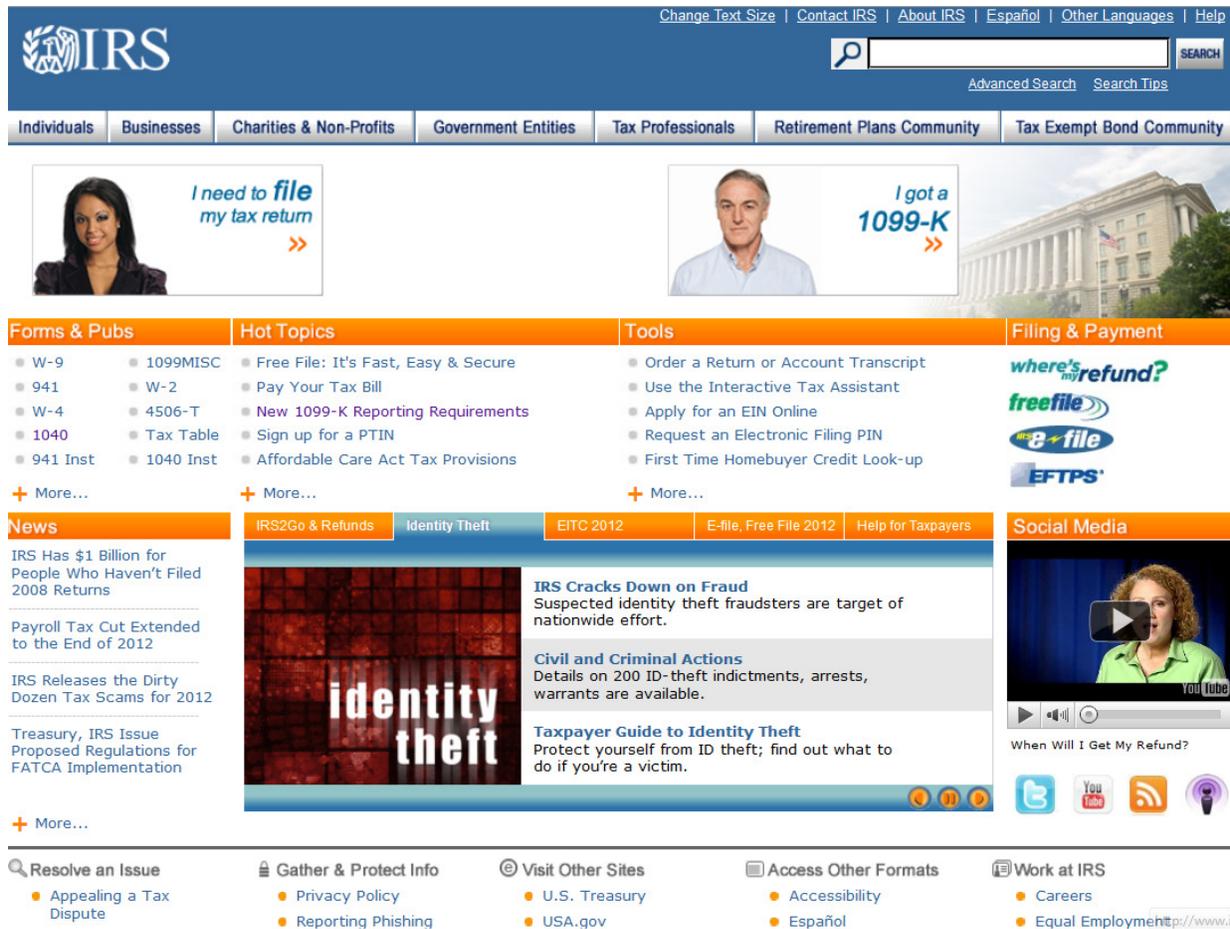


Free Online Tools For Your Small Business

Help is at your fingertips. Order small business tax products online or view them now

November 17, 2005 (from the Wayback Machine)

Per screen shots from the Wayback Machine, the IRS website changed the week of November 14, 2005. Note the addition of a link for Frequently Asked Questions. The link goes to an extensive list of websites with questions and answers.



February 25, 2012

This is the new format launched September 27, 2011.⁴

As the IRS website has evolved, the amount of information provided has grown, as evidenced by the number of links just on the main page from 1997 through 2012, as illustrated by the sample pages above. Today, users can find such items as the following at <http://www.irs.gov>:

- Forms and instructions
- Publications
- Fact sheets
(<http://www.irs.gov/newsroom/article/0,,id=108500,00.html>)
- Summertime tax tips
(<http://www.irs.gov/newsroom/article/0,,id=172746,00.html>)

⁴ TaxProfBlog, 9/27/11; http://taxprof.typepad.com/taxprof_blog/2011/09/irs-launches.html.

- General information on numerous websites within "irs.gov" (such as <http://www.irs.gov/individuals/article/0,,id=118506,00.html>)
- Interactive tax assistants (<http://www.irs.gov/ita/>)
- "New media" such as YouTube videos, Facebook and more (<http://www.irs.gov/newsroom/article/0,,id=227226,00.html?portlet=109>)
- LB&I Industry Directives (<http://www.irs.gov/businesses/corporations/article/0,,id=96915,00.html>)
- Audit Technique Guides (<http://www.irs.gov/businesses/small/article/0,,id=108149,00.html>)
- Various sets of Frequently Asked Questions (FAQs)
- Links to "primary authority" in the Internal Revenue Bulletins as well as individual links to revenue rulings, revenue procedures, notices, and more. For example, many items on the Electronic Reading Room website are primary authority (<http://www.irs.gov/foia/article/0,,id=110353,00.html>).

A 2011 report by the Government Accountability Office (GAO) notes that the number of visits to and searches of the IRS website increased from 2007 to 2011 as follows:

	2007	2011
Visits (millions)	168	250
Searches (millions)	106	312

The report notes that IRS officials believe the increase in the number of searches is partially due to the difficulty users have in finding information on the IRS website. "IRS acknowledged that the existing manner in which IRS manages content on its website contributes to more searches because of duplicative and outdated information." The report further notes that the IRS website content is developed by approximately 300 employees located throughout the IRS with oversight provided by Content Area Administrators.⁵

⁵ GAO, *2011 Tax Filing: Processing Gains, But Taxpayer Assistance Could Be Enhanced by More Self-Service Tools* (December, 2011), pps. 20-21.

C. Tools to Help Website Users: FAQs and Real Time Interaction

FAQs for Internet purposes have been in use since at least the 1980's. Despite the name, some questions posted and answered on websites as "FAQs" are not frequently asked.⁶

Some web designers question the value of FAQs, observing that a well designed website will enable users to find the information without the need for a special set of questions. That is, if there are common questions that lead people to visit a website, the website should be providing an answer on its regular pages.⁷ As one website designer observes:

An FAQ page provides *answers*, not *solutions*. And while answering user questions is the right thing to do, an even better thing to do is take this information and build a solution so that the next user never has *that* question to begin with.⁸

FAQs have been replaced or supplemented on many websites with tools that allow for personal attention to the visitor's question. For example, the Microsoft support website includes the following statement and link:⁹



D. Authority

Not all of the items on the IRS website are considered "authority" as defined in Treas. Reg. §1.6662-4(d)(3)(iii). This regulation defines "authority" as follows:

⁶ Wikipedia, FAQ; <http://en.wikipedia.org/wiki/Faq> (retrieved Feb. 27, 2012). Six Revisions, "Designing Effective FAQ Pages" by Mohammad Moradi, May 24, 2011; <http://sixrevisions.com/user-interface/designing-effective-faq-pages/> (retrieved Feb. 28, 2012).

⁷ The Website Architects, "Why Your Search Form & FAQs Page are Lame Substitutes for Real Usability," July 18, 2011; <http://www.thewebsitearchitects.com/website-search-form-faqs-page-website-usability/> (retrieved Feb. 28, 2012). Six Revisions, "Stop the FAQ Page Bandage," by Jason Gross, Nov. 19, 2010; <http://sixrevisions.com/user-interface/stop-the-faq-page-bandage/> (retrieved Feb. 28, 2012). Six Revisions, "Designing Effective FAQ Pages" by Mohammad Moradi, May 24, 2011; <http://sixrevisions.com/user-interface/designing-effective-faq-pages/> (retrieved Feb. 28, 2012).

⁸ Six Revisions, "Stop the FAQ Page Bandage," by Jason Gross, Nov. 19, 2010; <http://sixrevisions.com/user-interface/stop-the-faq-page-bandage/> (retrieved Feb. 28, 2012).

⁹ Microsoft, Microsoft Support; <http://support.microsoft.com/?LN=en-us&x=16&y=12> (retrieved Feb. 27, 2012).

Types of authority. Except in cases described in paragraph (d)(3)(iv) of this section concerning written determinations, only the following are authority for purposes of determining whether there is substantial authority for the tax treatment of an item: applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item. Notwithstanding the preceding list of authorities, an authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority. In the case of court decisions, for example, a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district. However, a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals. Similarly, a private letter ruling is not

authority if revoked or if inconsistent with a subsequent proposed regulation, revenue ruling or other administrative pronouncement published in the Internal Revenue Bulletin.

Thus, not all of the items posted at the IRS website can be relied on to avoid a substantial understatement of tax penalty (Section 6662) or a preparer penalty (Section 6694). For many of the items posted at the IRS website, this is not a problem because the item either has a disclaimer on it noting it cannot be relied upon to avoid a penalty,* or it is information, such as found in IRS publications, that summarizes primary authority (that is, it is not an interpretation or rule created by the IRS).**

* An example of a disclaimer is found on the following Audit Technique Guide:

Artists and Art Galleries - Audit Technique Guide

NOTE: This document is not an official pronouncement of the law or the position of the Service and cannot be used, cited, or relied upon as such. This guide is current through the publication date. Since changes may have occurred after the publication date that would affect the accuracy of this document, no guarantees are made concerning the technical accuracy after the publication date.

Publication date: January 2012

- [Chapter 1 - Introduction](#)
 - [Introduction to Art Industry](#)
 - [Introduction on Art Galleries](#)
 - [Common Potential Audit Issues of Art Galleries](#)
- [Chapter 2 - Examination Techniques for Art Galleries](#)
 - [Pre-Audit Considerations](#)
 - [Initial Interview](#)
 - [Information Document Request](#)
 - [Typical Books and Records](#)
 - [Package Audit](#)
 - [Audit Procedure](#)
 - [Income](#)
 - [Inventory of Art Galleries](#)
 - [Cost of Goods Sold](#)
 - [Expenses](#)
 - [Exhibit 2-1 Sample Initial Interview](#)
 - [Exhibit 2-2 Sample Information Document Request Items](#)
 - [For Partnership Return \(Form 1065\)](#)
 - [For S Corporation Return \(Form 1120\)](#)
 - [For Individual Return \(Form 1040\)](#)
- [Chapter 3 - Issues](#)
 - [Trades](#)
 - [Business Use of the Home, I.R.C. § 280A\(c\)](#)
 - [Charitable Donation Of Artwork Issues](#)
 - [Other Areas](#)
 - [Non Resident Alien Issue](#)

<http://www.irs.gov/businesses/small/article/0,,id=254019,00.html>

An IRS webinar of January 11, 2012, included a disclaimer by the narrator at the start as well as a statement on the first slide that the information is only

current as of the date presented and that it does not constitute "official guidance."¹⁰

** An example of a summary of primary authority that does not add any new interpretation or rule is Publication 936, *Home Mortgage Interest Deduction* (<http://www.irs.gov/pub/irs-pdf/p936.pdf>). At page 2, it provides:

Qualified Home

For you to take a home mortgage interest deduction, your debt must be secured by a qualified home. This means your main home or your second home. A home includes a house, condominium, cooperative, mobile home, house trailer, boat, or similar property that has sleeping, cooking, and toilet facilities.

The interest you pay on a mortgage on a home other than your main or second home may be deductible if the proceeds of the loan were used for business, investment, or other deductible purposes. Otherwise, it is considered personal interest and is not deductible.

Main home. You can have only one main home at any one time. This is the home where you ordinarily live most of the time.

Second home. A second home is a home that you choose to treat as your second home.

This excerpted text from Publication 936 summarizes Section 163(h) and Treas. Reg. §1.163-10T.

II. FREQUENTLY ASKED QUESTIONS (FAQs) ON THE IRS WEBSITE

This section describes the types of FAQs provided on the IRS website and why FAQs are used.

¹⁰ IRS webinar: Small Business Tax Compliance – Priorities for 2012, Jan. 11, 2012; <http://www.irsvideos.gov/SBTaxCompliancePriorities2012/> (retrieved March 7, 2012).

A. Types of FAQs

The many sets of FAQs posted on the IRS website seem to serve a variety of purposes. To outside observers, such as the authors of this paper, the purposes might be classified as follows:

1. Restate the Internal Revenue Code to help explain the law to users.
2. Serve as a source of information and interpretation of a Code section.
3. Serve as the source to explain IRS initiatives and procedures that taxpayers are required to follow.

Examples follow of each of the three types of FAQs.

(1) FAQs that restate the Internal Revenue Code (IRC).

The IRS website has a list of FAQs that fall into this category of ones that restate the IRC. The following website provides a list:

Frequently Asked Tax Questions and Answers

To search the Frequently Asked Questions (FAQs), enter your search terms or questions in the box below.

FAQ Search

Top Frequently Asked Questions

1. [What are the tax changes for this year?](#)
 2. [Is there an age limit on claiming my child as a dependent?](#)
 3. [How much does an unmarried dependent student have to make before he or she has to file an income tax return?](#)
 4. [If I claim my daughter as a dependent because she is a full-time college student, can she claim herself as a dependent when she files her return?](#)
 5. [Can I receive a tax refund if I am currently making payments under an installment agreement or payment plan for a prior year's federal taxes?](#)
 6. [For head of household filing status, do you have to claim a child as a dependent to qualify?](#)
 7. [What is the American Recovery and Reinvestment Act \(ARRA\) of 2009?](#)
 8. [What should I do if I made a mistake on my federal return that I have already filed?](#)
 9. [What is a split refund?](#)
 10. [How do I know if I have to file quarterly individual estimated tax payments?](#)
-

Frequently Asked Question Categories

1. [IRS Procedures](#)
2. [Filing Requirements/Status/Dependents/Exemptions](#)
3. [Itemized Deductions/Standard Deductions](#)
4. [Interest/Dividends/Other Types of Income](#)
5. [Retirement Plans](#)
6. [Social Security Income](#)
7. [Child Care Credit/Other Credits](#)
8. [Earned Income Tax Credit](#)
9. [Estimated Tax](#)
10. [Capital Gains, Losses/Sale of Home](#)
11. [Sale or Trade of Business, Depreciation, Rentals](#)
12. [Small Business/Self-Employed/Other Business](#)
13. [Aliens and U.S. Citizens Living Abroad](#)
14. [Electronic Filing \(e-file\)](#)
15. [Electronic Filers](#)
16. [Other \(Alternative Minimum Tax, Estates, Trusts, Tax Shelters, State Tax Inquiries\)](#)
17. [Individual Retirement Arrangements \(IRAs\)](#)

<http://www.irs.gov/faqs/index.html> (Feb. 28, 2012)

Some of the links on the above FAQ website provide a short answer with links to IRS publications for further information. Other links lead to webpages with more detailed topics to pursue. For example, item (6) in the above list leads to this page:

Filing Status

Question: For head of household filing status, do you have to claim a child as a dependent to qualify?

Answer: In certain circumstances, you do not have to claim the child as a dependent to qualify for head of household filing status; for example, a custodial parent may be able to claim head of household filing status even if he or she released a claim to exemption for the child.

Additional Information:

- [Publication 501, Exemptions, Standard Deduction, and Filing Information](#)

Category: [Filing Requirements/Status/Dependents/Exemptions](#)

Subcategory: [Filing Status](#)

Please provide your feedback.

1. Was it easy to find your information within the above Frequently Asked Question?
 Easy Somewhat Easy Somewhat Difficult Difficult
2. How satisfied are you with the information provided within the above Frequently Asked Question?
 Satisfied Somewhat Satisfied Somewhat Dissatisfied Dissatisfied
3. If you still need help from the IRS, what would your next step be?
 No additional help is needed Continue to search IRS.gov web site Call Write Visit

The OMB number for this study is 1545-1432.
If you have any comments regarding this study, please write to:
IRS, Tax Products Coordinating Committee
SE:W:CAR:MP:T:T:SP
1111 Constitution Avenue NW
Washington, DC 20224

<http://www.irs.gov/faqs/faq/0.,id=199703.00.html> (Feb. 28, 2012)

(2) FAQs that are the main source of information and interpretation of a Code section.

An example consists of a set of questions and answers released for the American Recovery and Reinvestment Act (P.L. 111-5; 2/17/09) provision that added IRC Section 36A, *Making work pay credit*. Beyond the Code section and legislative history, the only guidance for this provision was a set of questions on the IRS website.

<http://www.irs.gov/newsroom/article/0,,id=205921,00.html> (Feb. 28, 2012)

The first four links on the above website lead to other websites with several questions and answers. For example, an excerpt from the "General issues" website includes the following:

Making Work Pay Questions and Answers: General Issues

Q1. What is the Making Work Pay Credit?

A. In tax years 2009 and 2010, the Making Work Pay provision will provide a refundable tax credit of up to \$400 for individuals and up to \$800 for married taxpayers filing joint returns.

Q2. How will taxpayers get this credit?

A. For people who receive a paycheck and are subject to withholding, the credit will typically be handled by their employers through automated withholding changes to be made in early spring 2009. These changes may result in an increase in the amount of take-home pay. The amount of the credit will be reported on the 2009 income tax return. Taxpayers who do not have taxes withheld by an employer during the year can also claim the credit on their 2009 tax return filed in 2010.

Q3. How will the self-employed (those who do not receive Social Security, Veterans Affairs or Railroad Retirement Board income) claim this credit?

A. Self-employed taxpayers can claim the Making Work Pay credit on their 2009 return filed in 2010. Self-employed individuals should evaluate their expected income tax liability and determine whether they want to make any adjustments in their estimated tax payments.

Q4. Can private pensioners (those who do not receive Social Security, Veterans Affairs or Railroad Retirement Board income) claim this credit?

A. Private pension recipients are not eligible for the Making Work Pay credit unless they have earned income. However, because the new withholding tables reduce the taxes withheld from all taxpayers, pension recipients may not have enough tax withheld from their pension benefits to cover their tax liability on those payments. The IRS recommends that pension recipients evaluate their expected tax liability for the year and consider whether they need to make estimated tax payments or adjust their withholding on [Form W-4P](#), Withholding Certificate for Pension or Annuity Payments.

Q5. Are employees required to have a valid Social Security number (SSN) to be eligible for the Making Work Pay tax credit?

A. Yes, eligibility for this credit is conditioned upon providing a valid SSN.

<http://www.irs.gov/newsroom/article/0,,id=205922,00.html> (Feb. 28, 2012)

(3) FAQs that explain IRS initiatives and procedures which taxpayers are required to follow.

A set of FAQs on IRC Section 475 answers questions regarding an Industry Director Directive (IDD).¹¹

Frequently Asked Questions for I.R.C. § 475

#	Questions	Answers
1.	<p>Is a taxpayer eligible for the I.R.C. § 475 Industry Director Directive related to Mark-to-Market Valuation (IDD) if:</p> <p>i) the taxpayer uses the same mark-to-market values reported on its qualified financial statements for all securities and/or commodities that are subject to the tax valuation requirement of I.R.C. § 475, but</p> <p>ii) the taxpayer has made Schedule M adjusting entries or other book to tax adjusting entries, or has reported deferred tax assets, deferred tax liabilities, or valuation allowances (under FAS 109/ASC 740) with respect to such securities and/or commodities?</p>	<p>A taxpayer is eligible for the IDD if:</p> <p>i) the taxpayer uses the same mark-to-market values reported on its qualified financial statements for all securities and/or commodities that are subject to the tax valuation requirement of I.R.C. § 475, and</p> <p>ii) the taxpayer has made Schedule M adjusting entries or other book to tax adjusting entries, or has reported deferred tax assets, deferred tax liabilities, or valuation allowances (under FAS 109/ASC 740), with respect to such securities and/or commodities that are not related to any inconsistencies in value between the mark-to-market values reported on its qualified financial statements and the I.R.C. § 475 mark-to-market values reported for Federal income tax purposes.</p>
2.	<p>Is a taxpayer eligible for the IDD if the taxpayer does not have mark-to-market values reported on its qualified financial statements for some of its securities and/or commodities?</p>	<p>Yes. The taxpayer is eligible for the IDD for all other securities and/or commodities that are subject to the tax valuation requirement of I.R.C. § 475 and for which mark-to-market values are reported on its qualified financial statements, as long as the mark-to-market values of those other securities and/or commodities reported on the taxpayer's qualified financial statements are used for securities and/or commodities that are subject to the tax valuation requirement of I.R.C. § 475. For those securities and/or commodities that the taxpayer does not have mark-to-market values reported on the qualified financial statements, traditional valuation audit procedures will apply.</p>
3.	<p>Is a taxpayer required to use the same mark-to-market values reported on its qualified financial statements for all of its securities and/or commodities that are subject to the tax valuation requirement of I.R.C. § 475 to be eligible for the IDD?</p>	<p>Yes. If the taxpayer has mark-to-market values for securities and/or commodities reported on its qualified financial statements and does not use those values for some of its securities and/or commodities that are subject to the tax valuation requirement of I.R.C. § 475, then the taxpayer is ineligible for the IDD for all of its securities and/or commodities and traditional valuation audit procedures will apply.</p>

Page Last Reviewed or Updated: September 02, 2011

<http://www.irs.gov/businesses/article/0,,id=245053,00.html> (Feb. 28, 2012)

The Section 475 FAQ (see above) was mentioned in a January 2012 *Tax Notes* article. Roland Barral, area counsel for the financial services industry in the IRS Large Business and International Division was quoted: "The FAQ is absolutely guidance to the field." Per Mr. Barral, FAQs are "intended to be a live

¹¹ The Industry Director Directive (LB&I Control No: LB&I-4-1110-033) dated April, 14, 2011, can be found at <http://www.irs.gov/businesses/article/0,,id=238507,00.html>.

product and will be updated as needed." The article also states that Mr. Barrel observed that the FAQ approach allowed taxpayers to ask questions and that the FAQs could be altered.¹²

Some FAQs have later been published as official guidance. For example, FAQs at September 30, 2010, on the IRS initiative to regulate paid return preparers included FAQ7:

**7. Is there an age requirement for obtaining a PTIN?
(posted 9/30/10)**

Yes, applicants must be at least 18 years of age.¹³

Proposed regulations issued February 15, 2012 (REG-124791-11) provide that certain applicants for a Preparer Tax Identification Number (PTIN) must be at least age 18.¹⁴

Some revisions to the PTIN FAQs in February 2012 included a revision that expanded upon guidance included in Circular 230. One of the new questions added on February 27, 2012 follows:

7. How much tax advice can registered tax return preparers give to clients? (posted 2/27/12)

Section 10.3(f)(3) of Circular 230 provides that a registered tax return preparer's authorization to practice "does not include the authority to provide tax advice to a client or another person except as necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service." The IRS received comments after the final regulations were published suggesting that this language is ambiguous. To clarify, the IRS interprets this provision to permit registered tax return preparers to provide advice to a client that is reasonably necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the

¹² Marie Sapirie, "Increase in Informal Guidance Unlikely to Stop Soon," *Tax Notes*, Vol. 134, No. 4, Jan, 23, 2012, page 399.

¹³ IRS, Frequently Asked Questions: Do I Need a PTIN? under "a. General Guidance"; available at <http://www.irs.gov/taxpros/article/0,,id=239678,00.html> (retrieved Feb. 15, 2012). Note: At Feb. 28, 2012, because of revisions to this website, the age 18 FAQ was listed as FAQ 6.

¹⁴ Note: Circular 230 (August 2011) does not mention that a paid preparer must be age 18.

Internal Revenue Service for a current or future tax period, regardless of whether the client has engaged the registered tax return preparer to prepare the tax return, claim for refund or other document for the tax period.

Circular 230, Section 10.3(f)(3) on the practice rights of Registered Tax Return Preparers (RTRP) provides:

A registered tax return preparer's authorization to practice under this part also does not include the authority to provide tax advice to a client or another person except as necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service.

The FAQ on advice by an RTRP seems to go beyond what Circular 230 calls for. While Circular 230 is "authority", the FAQ is not. As is the case for many FAQs (discussed more in Section III) it is not clear why the clarification was published as an unofficial FAQ, rather than as a revision to Circular 230 or a Notice.

Additional examples of sets of FAQs on IRS initiatives include:

- Uncertain Tax Positions - <http://www.irs.gov/businesses/article/0,,id=237538,00.html>
- Offshore Voluntary Disclosure Initiative - <http://www.irs.gov/businesses/international/article/0,,id=235699,00.html>
- Voluntary Classification Settlement Program (VCSP) - <http://www.irs.gov/businesses/small/article/0,,id=246014,00.html>

There are a few instances where a Notice (which does constitute "authority") refers readers to FAQs on the IRS website. For example, Notice 2011-26 (<http://www.irs.gov/pub/irs-drop/n-11-26.pdf>) on e-filing includes the following statement:

Further Information. Further information, including Frequently Asked Questions, on the electronic filing requirement, administrative exemptions, and undue hardship waiver requests, is posted on www.irs.gov.

Unlike Notice 2011-26, the FAQs are not "authority."

B. Why FAQs Are Used

There appears to be no official policy on why and when the IRS issues FAQs rather than other guidance. Some of the reasons likely are similar to those of other website operators. That is, to issue information quickly and to be able to modify that information quickly.

IRS Deputy Chief Counsel – Technical, Erik Corwin provided some insights on the use of FAQs at a session offered at the Fall 2011 Tax Division meeting of the American Institute of Certified Public Accountants (AICPA). As reported by Commerce Clearing House (CCH), Mr. Corwin noted that FAQs are "an attempt to help the most people in a timely fashion." CCH also summarized Mr. Corwin's comments as: "some FAQs are well-thought-out attempts to help taxpayers comply with the law."¹⁵

III. PROBLEMS WITH FREQUENTLY ASKED QUESTIONS (FAQs)

This section describes key problems with some IRS FAQs including lack of transparency and accountability,

A. Lack of Transparency

Unlike formal guidance,¹⁶ there is no transparency regarding FAQs. The IRS has not made public the procedure by which FAQs are prepared, reviewed and posted on the IRS website.¹⁷ Individual FAQs do not identify which office within the IRS prepared or reviewed the FAQs. With the exception of some FAQs on IRS initiatives, there is often no information given as to whom to contact with

¹⁵ Brant Goldwyn, CCH Federal Tax Day, "AICPA Fall Tax Division Meeting: FAQs, Other Informal Guidance Represent Effort to Get Guidance Out Quickly, IRS Official Indicates," Wolters Kluwer, Nov. 10, 2011.

¹⁶ See, Treas. Reg. §601.601, setting out the general procedure followed by the Service in issuing Treasury regulations and decisions, revenue rulings and revenue procedures, and the first revenue procedure issued each year, which sets out the procedure for requesting letter rulings and the division within Office of Chief Counsel having jurisdiction over specific issues. When the IRS issues a revenue ruling, it lists the principal author of the ruling and the person to contact in the Office of Chief Counsel for further information regarding the ruling.

¹⁷ The National Taxpayer Advocate has expressed concern over the lack of transparency and omission of taxpayer input. See "Olson Says Informal IRS Guidance Lacks Transparency," 2011 TNT 206-11, Oct. 25, 2011. See, also, "News Analysis: How Do FAQs Fit Into the Guidance Puzzle?," 2011 TNT 64-1 (April 4, 2011) (Noting "the perceived lack of ground rules governing the process of issuing and maintaining FAQs on the IRS website.").

questions or comments. The FAQs for the 2009 Offshore Voluntary Disclosure Initiative contained the following information concerning questions:¹⁸

If practitioners have questions about the terms of the voluntary disclosure program, they should contact the IRS Voluntary Disclosure Hotline at (215) 516-4777, visit www.irs.gov, or [contact their nearest CI office](#) with questions.

In contrast, the FAQs for the IRC Section 475 Industry Director Directive, which is the only guidance on that topic, does not contain information on whom to contact with either questions or comments. See <http://www.irs.gov/businesses/article/0,,id=245053,00.html>, (retrieved February 28, 2012). General informational FAQs also do not contain any contact information. This is to be contrasted with regulations, revenue rulings, revenue procedures and notices, which all contain a contact name and phone number. For example, the proposed regulations¹⁹ on foreign base company sales income provide the following contact information:

ADDRESSES:

Send submissions to: CC:PA:LPD:PR (REG-150066-08), room 5203 Internal Revenue Service, PO Box 7604 Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-150066-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, taxpayers may submit electronic comments via the Federal eRulemaking Portal at www.regulations.gov (IRS-REG-150066-08).

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Ethan Atticks, (202) 622-3840; concerning submissions of comments, hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at Richard.A.Hurst@irs.counsel.treas.gov or (202) 622-7180 (not toll-free numbers).

¹⁸ 2009 Voluntary Disclosure: Questions & Answers at <http://www.irs.gov/newsroom/article/0,,id=210027,00.html>.

¹⁹ T.D. 9438 and REG-150066-08 (12/29/08).

B. Lack of Accountability

The National Taxpayer Advocate has noted the lack of opportunity for the public to comment on FAQs and “the lack of high-level policy input” into FAQs.²⁰ There is no information included with FAQs concerning the process under which the FAQ was prepared, the author, the reviewer, the official who authorized the FAQ to be posted on the IRS website, and why the FAQ approach was used.²¹ While approximately 300 IRS employees develop content for the IRS website,²² there is no publicly available information on which office within the IRS prepares website content or what role, if any, they play in developing FAQs. Treasury’s Office of Tax Policy apparently plays no role in the development or issuance of FAQs.²³

C. Lack of Access to Prior Versions of FAQs

The IRS often updates or amends FAQs. Prior versions of FAQs are not archived on the IRS website and the IRS does not have links to prior versions of FAQs. In some cases, there is no information on whether the FAQ has been amended or updated. See, for example, the FAQ on 1099-DIV Dividend Income available at <http://www.irs.gov/faqs/faq/0,,id=199737,00.html>.

²⁰ CCH Federal Tax Day (1/26/2012). See also “Olson Says Informal IRS Guidance Lacks Transparency,” 2011 TNT 206-11, Oct. 25, 2011; “Tax Analysts’ Roundtable on ‘Taxes and the Guidance Problem,’” 2011 TNT 142-100 (July 25, 2011) (Armando Gomez commented that “one of the problems with the informal non-guidance guidance process in the form of directives and FAQs is the lack of opportunity for public comment and sunshine on them.”).

²¹ Thomson Reuters Checkpoint, “The Weight of IRS Rulings and Other Documents, and What Constitutes ‘Substantial Authority,’” *Federal Taxes Weekly Alert Newsletter*, Vol. 57, No. 27 (July 7, 2011) (noting that it is uncertain “who exactly writes FAQs or the type of vetting process” they undergo....).

²² GAO, *2011 Tax Filing: Processing Gains, But Taxpayer Assistance Could Be Enhanced by More Self-Service Tools* (December, 2011) at p. 21.

²³ “Olson Says Informal IRS Guidance Lacks Transparency,” 2011 TNT 206-11, Oct. 25, 2011.

1099-DIV Dividend Income

Question: How do I report this 1099-DIV from my mutual fund?

Answer:

- Enter the ordinary dividends from [Form 1099-DIV](#) (PDF), box 1a, on line 9a of [Form 1040](#) (PDF), *U.S. Individual Income Tax Return*.
- Enter any qualified dividends from [Form 1099-DIV](#), box 1b, on line 9b of Form 1040.
- If you have an amount entered in other boxes of your 1099-DIV refer to [Form 1040, Schedule D Instructions](#) (PDF) to see where to report them.
- If your only capital gains and losses are from capital gain distributions, refer to [Form 1040 Instructions](#) (PDF).

Category: [Interest/Dividends/Other Types of Income](#)

Subcategory: [1099-DIV Dividend Income](#)

In other cases, the IRS will provide the date the FAQ was last reviewed or updated, without any information about what changes, if any, were made as a result. See, for example, Frequently Asked Questions for IRC §475, available at <http://www.irs.gov/businesses/article/0,,id=245053,00.html> and included earlier in this paper (noting that the FAQ was “*Last Reviewed or Updated: September 02, 2011*”).

Finally, in some cases the FAQ lists the portions that were updated or amended, but without providing any information on the changes made. See, for example, 2011 Voluntary Disclosure Initiative Frequently Asked Questions and Answers, available at <http://www.irs.gov/businesses/international/article/0,,id=235699,00.html>, which provides the following information on amendments:

FAQ Updates:

A24 revised 3/5/12

Updated dates in Q1, 11, 15, 17, 18, and 38 posted 8/29/11

Q&A 24.1 posted 8/26/11

Q&A 25.1 revised 8/26/11

A51.2 Updated 8/19/11

Q&A 25.1 posted 6/2/11

Q&A 51.1 Posted 6/2/11

Q&A 51.2 Posted 6/2/11

Q&A 51.3 Posted 6/2/11

A32 Updated 6/2/11

A35 Updated 6/2/11

A51 Updated 6/2/11

A52 Updated 6/2/11

A47 - Updated 3/14/11

FAQ 5 & 50 - Updated 2/14/11

FAQ 8 - Updated 2/10/11

FAQ 1-53 - Posted 2/8/11

Many practitioners view “the lack of an archived, searchable format for past FAQs as an inexcusable flaw in the IRS’s approach.”²⁴

D. FAQs May Not Be Binding on IRS Personnel

It is not clear whether FAQs that are meant as guidance, such as the FAQs on Section 475 or the FAQs on the procedures to be followed in IRS initiatives, such as the 2011 OVDI program, are intended to be binding on IRS personnel. There are also questions about the extent to which IRS personnel are familiar with the FAQs containing procedures to be followed in IRS initiatives.

As an example, the 2011 Offshore Voluntary Disclosure Initiative webpage had a link to documents that taxpayers were required to submit with their OVDI package. Included was a Form 872, *Consent to Extend Time to Assess Tax*. The form on the IRS website lists 2003 through 2008 as the years for which the statute is to be extended. The Form 872 for the 2011 OVDI package is on the IRS website at <http://www.irs.gov/pub/irs-utl/f872ovdi.pdf> (viewed on Feb. 28, 2012). One of the authors of this paper was informed by a revenue agent who was

²⁴ Jeremiah Coder, “News Analysis: How Do FAQs Fit Into the Guidance Puzzle?,” 2011 TNT 64-1 (April 4, 2011).

reviewing an OVDI package that the Form 872 contained on the website was invalid since it included years for which the three-year statute had expired.

E. Taxpayer Rights and Practitioner Problems Where FAQs Are the Only Guidance

Given the increasing number of visits to and searches of the IRS website,²⁵ it is clear that taxpayers and tax professionals are turning more frequently to the IRS website for information and guidance. Nonetheless, there are no caveats or disclaimers accompanying FAQs on the IRS website to make it clear to users that the application of FAQs that summarize law (and the publications to which some FAQs link) often depends on a taxpayer's individual circumstances. Indeed, often a taxpayer can be lead to believe that the information contained in FAQs and publications are authoritative statements and, thus, binding on the IRS. The FAQs on filing requirements for dependent students has a link to Publication 501, which contains the following statement:

Tax questions. If you have a tax question, check the information available on IRS.gov or call 1-800-829-1040.

These types of statements can lead a taxpayer to mistakenly believe that she need do nothing more than follow the IRS website to prepare a correct tax return that is acceptable to the IRS and that reliance on an FAQ will, in any event, ensure that there are no penalties.

In contrast, the U.S. Department of Labor, has a disclaimer on its webpage that references its FAQs (see below). This disclaimer reminds readers that the Federal Register and Code of Federal Regulations are the "official source" for the Department's information.

²⁵ Between 2007 and 2011, the number of visits increased from 168 million in 2007 to 250 million, while the number of searches increased three-fold, from 106 million to 312 million. GAO, *2011 Tax Filing: Processing Gains, But Taxpayer Assistance Could Be Enhanced by More Self-Service Tools* (December, 2011) at p. 20.

Frequently Asked Questions (FAQs)

Find answers to questions on various labor topics by selecting a category below. The Federal Register and the Code of Federal Regulations are the official source for regulatory information published by DOL.

By Topic

- [About DOL](#)
- [Disaster Relief](#)
- [Grants & Contracts](#)
- [Health Plans & Benefits](#)
- [Jobs & Training](#)
- [Laws & Regulations](#)
- [People with Disabilities](#)
- [Posters](#)
- [Other Labor Issues](#)
- [Retirement Plans & Benefits](#)
- [Statistics](#)
- [Veterans](#)
- [Wages & Work Hours](#)
- [Women](#)
- [Workers' Compensation](#)
- [Workplace Safety & Health](#)
- [Youth](#)

Search FAQs

Type a keyword or phrase in the box below and hit "Go."

People Are Asking

- [When is overtime due?](#)
- [When must breaks and meal periods be given?](#)
- [What is the Fair Labor Standards Act?](#)

For additional information on the information and services provided by the Department of Labor, please consult the following online resources:

- [Search / A-Z Index](#). Browse an alphabetical listing of topics on this site and locate documents via a keyword search.
- [Find It! Interfaces](#). Provide links to information sorted [by Topic](#), [by Organization](#), [by Form](#), [by Audience](#), [by Location](#) and [by Top 20 Requested Items](#).
- [eLaws Advisors](#). Interactive tools that provide information about federal employment laws.
- [Compliance Assistance](#). Assistance in complying with major DOL laws and regulations.

<http://webapps.dol.gov/dolfaq/dolfaq.asp> (March 19, 2012)

One of the authors of this paper submitted a suggestion to the National Taxpayer Advocate's Systemic Advocacy Management System in late 2010 (control number 19481). The concern raised was with the increased use of unofficial guidance in the form of FAQs that were being relied upon by taxpayers and tax return preparers. The suggestion was to designate the FAQs as official guidance and questioned whether penalties would be imposed against a taxpayer who relied on FAQs. The Advocate provided the following response and closed the submission:

In your submission, you question whether Frequently Asked Questions (FAQs) can be designated as official guidance, and if the guidance provided in FAQs can be used to avoid penalties. FAQs are intended to offer timely information to the general

public. The IRS abates penalties on a case-by-case basis and considers all of the facts and circumstances of a taxpayer's unique situation when making an individual penalty abatement determination. FAQs do not consider the taxpayer's individual facts and circumstances, and as such, FAQs do not meet the standard of reliance for court cases. Therefore, taxpayers would most likely not be able to avoid penalties based on FAQ reliance. More information explaining what constitutes 'authority' for the accuracy-related penalty on underpayments is published in the Treasury Regulation §1.6662-4(d)(3)(iii).²⁶

Although many tax return preparers and practitioners are unlikely to turn to FAQs that summarize the law to help interpret the Code, given the increasing use of FAQs (1) to set out the IRS's views in areas where there is no other guidance, and (2) to detail IRS initiatives, practitioners are faced with a problem of whether they can rely on FAQs in advising clients.

F. Challenges in Finding FAQs

A 2011 report on tax filing by the Government Accountability Office (GAO)²⁷ points out that one reason for the increase in searches on the IRS website is the difficulty people have in locating the information they are seeking.²⁸ This is true of FAQs. The IRS website has a link to FAQs, but the only FAQs listed in the link are the following:²⁹

Top Frequently Asked Questions

1. [What are the tax changes for this year?](#)
2. [Is there an age limit on claiming my child as a dependent?](#)
3. [How much does an unmarried dependent student have to make before he or she has to file an income tax return?](#)
4. [If I claim my daughter as a dependent because she is a full-time college student, can she claim herself as a dependent when she files her return?](#)
5. [Can I receive a tax refund if I am currently making payments under an installment agreement or payment plan for a prior year's federal taxes?](#)
6. [For head of household filing status, do you have to claim a child as a dependent to qualify?](#)

²⁶ The Advocate reply is posted at the 21st Century Taxation website; post available at <http://tinyurl.com/43t2133>.

²⁷ GAO, *Processing Gains, but Taxpayer Assistance Could Be Enhanced by More Self-Service Tools*, GAO-12-176, 12/15/11; <http://www.gao.gov/products/GAO-12-176> (retrieved Feb. 28, 2012).

²⁸ GAO, *supra* pp. 20-21.

²⁹ See <http://www.irs.gov/faqs/index.html> (retrieved Feb. 27, 2012).

7. [What is the American Recovery and Reinvestment Act \(ARRA\) of 2009?](#)
8. [What should I do if I made a mistake on my federal return that I have already filed?](#)
9. [What is a split refund?](#)
10. [How do I know if I have to file quarterly individual estimated tax payments?](#)

Frequently Asked Question Categories

1. [IRS Procedures](#)
2. [Filing Requirements/Status/Dependents/Exemptions](#)
3. [Itemized Deductions/Standard Deductions](#)
4. [Interest/Dividends/Other Types of Income](#)
5. [Retirement Plans](#)
6. [Social Security Income](#)
7. [Child Care Credit/Other Credits](#)
8. [Earned Income Tax Credit](#)
9. [Estimated Tax](#)
10. [Capital Gains, Losses/Sale of Home](#)
11. [Sale or Trade of Business, Depreciation, Rentals](#)
12. [Small Business/Self-Employed/Other Business](#)
13. [Aliens and U.S. Citizens Living Abroad](#)
14. [Electronic Filing \(e-file\)](#)
15. [Electronic Filers](#)
16. [Other \(Alternative Minimum Tax, Estates, Trusts, Tax Shelters, State Tax Inquiries\)](#)
17. [Individual Retirement Arrangements \(IRAs\)](#)

Numerous other sets of FAQs are not indexed on the above page although the webpage appears to be an index of FAQs.

IV. OFFICIAL GUIDANCE – PROCESS AND TYPES

A. Guidance Issuance Process

1. *Statutory Authority*

IRC Section 7805(a) authorizes the Secretary to prescribe “all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.” Unless expressly stated otherwise, proposed, temporary and final regulations are not given retroactive effect,³⁰ unless the regulation is issued within 18 months of the enactment of the statute to which it relates.³¹ The

³⁰ I.R.C. § 7805(b); Treas. Reg. §301.7805-1(b).

³¹ I.R.C. § 7805(c).

Commissioner can prescribe the extent to which revenue rulings, other administrative determinations or judicial decisions apply retroactively.³²

2. *Regulations*

Per Treas. Reg. §601.601, the Office of Chief Counsel drafts Regulations and Treasury Decisions. After approval by the Commissioner, they are transmitted to the Secretary of the Treasury's Office for further consideration and final approval.³³ Generally, pursuant to 5 U.S.C. §553 (part of the Administrative Procedure Act), the IRS publishes proposed regulations with a notice of proposed rulemaking in the Federal Register. The notice includes: 1) the time, place and nature of public proceedings, and 2) reference to the authority under which the rule is proposed.³⁴ Persons interested in the regulation can submit comments, either at a public hearing or in writing.³⁵ After consideration of any comments received, a final regulation will be published in the Federal Register and the Code of Federal Regulations.³⁶ The IRS often issues a temporary regulation when it issues a proposed regulation.³⁷ Regulations are entitled to *Chevron* deference.³⁸

3. *Revenue Rulings and Revenue Procedures*

A Revenue Ruling is an “official interpretation” by the IRS that is published in the Internal Revenue Bulletin (I.R.B.). A Revenue Procedure is a “statement of procedure that affects the rights or duties of taxpayers ... under the Code...”³⁹ Associate Chief Counsels are responsible for the preparation and referral for publication of revenue rulings in Internal Revenue Bulletins and Cumulative Bulletins.⁴⁰ Chief Counsel and Assistant Commissioners are responsible for determining whether specific procedures established by the IRS should be published as revenue procedures.⁴¹

³² I.R.C. § 7805(b)(8).

³³ Treas. Reg. §601.601(a)(1).

³⁴ Treas. Reg. §601.601(a)(2).

³⁵ Treas. Reg. §601.601(a)(3), (b).

³⁶ Treas. Reg. §§601.601(d)(1), 601.702(a)(1)

³⁷ I.R.C. § 7805(e).

³⁸ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S.Ct. 704 (2011).

³⁹ Treas. Reg. §601.601(d)(2).

⁴⁰ Rev. Proc. 89-14 at Section 8.

⁴¹ Rev. Proc. 89-14 at Section 8.

A taxpayer can rely on revenue rulings to the extent that the facts and circumstances in his or her case are substantially the same as those in the ruling. In determining whether reliance on a revenue ruling is appropriate, the taxpayer, the IRS and others are to consider the effect of subsequent legislation, regulations, court decisions and other revenue rulings.”⁴²

The courts are split on the weight to be afforded to a revenue ruling.⁴³ The Tax Court (and several circuit courts), has held that revenue rulings merely “represent the position of one of the parties” before the court.⁴⁴ Other courts hold that revenue rulings, while not binding, are entitled to some weight as a “body of experienced and informed judgment.”⁴⁵ Finally, several court have held that revenue rulings “have the force of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code.”⁴⁶

4. Notices and Announcements

Notices and Announcements are issued by the Service when “expeditious guidance is needed.”⁴⁷ Notices are public announcements issued by the Internal Revenue Service. Announcements are public pronouncements on matters of general interest, such as effective dates of temporary regulations, clarification of rulings and form instructions. They are issued when guidance of a substantive or procedural nature is needed quickly.⁴⁸ Notice and Announcements

⁴² Treas. Reg. §601.601(d)-(e) (2001). See, also, *Dixon v. United States*, 381 US 68, 72-73 (1965) (holding that the IRS is not bound by a revenue ruling containing a mistake of law and may correct such a mistake by retroactively revoking the ruling, “even where a taxpayer may have relied to his detriment.”); *Commissioner v. Schleier*, 515 U.S. 323, 336, n.8 (1995) (rejecting the taxpayer’s reliance on a revenue ruling, the Court emphasized that “the Service’s interpretive rulings do not have the force and effect of regulations,” and they may not be used to overturn the plain language of a statute.”.)

⁴³ See Linda Galler, “Judicial Deference to Revenue Rulings: Reconciling Divergent Standards,” 56 Ohio St. L.J. 1037, 1038 (1995).

⁴⁴ See, e.g., *Browne v. Commissioner*, 73 T.C. 723, 731 (1980) (Hall, J. concurring); see also *Stubbs, Overbeck & Assoc., Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971) (“A ruling is merely the opinion of a lawyer in the agency and must be accepted as such.”).

⁴⁵ *Ricards v. United States*, 683 F.2d 1219, 1224 n. 12 (9th Cir. 1981); see also *Foil v. Commissioner*, 920 F.2d 1196, 1201 (5th Cir. 1990) (revenue rulings are “to be given weight as expressing the studied view of the agency whose duty it is to carry out the statute”).

⁴⁶ See *Dunn v. United States*, 468 F.Supp. 991, 993 (S.D.N.Y. 1979); see also *In re Kaplan*, 104 F.3d 589, 599 (3d Cir. 1997).

⁴⁷ Rev. Rul. 87-138.

⁴⁸ I.R.M. 4.10.7.2.4.1 (01-01-2006).

published in the I.R.B. “are considered authority and may be relied upon to the same extent as a revenue ruling or revenue procedure.”⁴⁹

Occasionally, a Notice may include a set of questions and answers, such as with Notice 2012-17, "Frequently-Asked-Questions From Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods" (<http://www.irs.gov/pub/irs-drop/n-12-17.pdf>).

5. Private Letter Rulings, Technical Advice Memorandums and Information Letters

A private letter ruling is a written statement issued by an Associate Chief Counsel’s Office to a taxpayer or a taxpayer’s representative, at the taxpayer’s request, that interprets and applies federal tax law to a particular set of facts.⁵⁰ The procedure by which a taxpayer can request a ruling is set out in the first annual revenue procedure issued each year. The taxpayer to whom a ruling is issued can, generally, rely on the ruling with respect to the specific transaction addressed in the ruling.⁵¹

A Technical Advice Memorandum is issued by an Associate Chief Counsel’s Office to provide written guidance in response to a technical or procedural question requested by a director or an area appeals director.⁵² The procedure by which a technical advice memorandum can be requested is set out in the second annual revenue procedure each year.⁵³

Rulings and technical advice memoranda may not be used or cited as precedent.⁵⁴ While recognizing this, the Supreme Court has cited rulings to illustrate the Service’s inconsistent treatment of a statutory provision.⁵⁵ In addition, letter rulings issued after October 31, 1976 are considered "authority" for

⁴⁹ Rev. Rul. 90-91, modifying Rev. Rul. 87-138. See also *Hall v. Commissioner*, T.C. Memo 1998-336 at n. 8 (“Taxpayers are entitled to rely on and the Internal Revenue Service states that it will be bound by substantive and procedural guidance provided by notices or announcements.”)

⁵⁰ Treas. Reg. §601.201(a)(2); Section 1 of the first annual revenue procedure.

⁵¹ Treas. Reg. §601.201(l); Sections 11.01, 11.02 of the first annual revenue procedure.

⁵² Treas. Reg. §601.105(b); Sections 1.01 of the second annual revenue procedure.

⁵³ Section 13.04 of the second annual revenue procedure.

⁵⁴ I.R.C. § 6110(k)(3); Treas. Reg. §301.6110-7(b); *United States v. Hill*, 506 US 546 n.12 (1993). Courts have generally refused to consider letter rulings and T.A.M.s as precedent. See, *Vons Companies, Inc. v. United States*, 51 Fed. Cl. 1 (2001).

⁵⁵ *Rowan Cos., Inc. v. United States*, 452 US 257 n.17 (1981). In *IBM Corp. v. United States*, 343 F.2d 914, 924 (Ct. Cl. 1965), the court stated that letter rulings could be used as evidence that the Service abused its discretion by issuing rulings that treated competing taxpayers differently.

purposes of determining whether "substantial authority" exists for purposes of taxpayer and preparer penalties under Sections 6662 and 6694, respectively.⁵⁶

Information Letters are issued by either the IRS National Office or the District Director. An Information Letter is a statement that "calls attention to a well-established interpretation or principle of tax law (including a tax treaty) without applying it to a specific set of facts." Information letters appear to be appropriate where the relevant law is certain. Per Rev. Proc. 2012-1: "An information letter may be issued if the taxpayer's inquiry indicates a need for general information or if the taxpayer's request does not meet the requirements of this revenue procedure and the Service concludes that general information will help the taxpayer. An information letter is advisory only and has no binding effect on the Service."⁵⁷

The IRS maintains a website where the full text of Information Letters can be obtained. That website notes: "Information letters are furnished by the IRS National Office in response to requests for general information by taxpayers, by congress-persons on behalf of constituents, or by congress-persons on their own behalf. The release of information letters is intended to increase public confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers." A review of a sample of Information Letters posted on the IRS website indicates that many are for constituents of particular members of Congress who asked the question.⁵⁸

The IRS Information Letter website does not explain how to obtain a letter. It also makes no reference to the revenue procedure where information letters are explained. That revenue procedure is the first one issued each year and the bulk of the text explains how to apply for a letter ruling. It does not readily provide the information on how to obtain an Information Letter. These revenue procedures are usually quite long; Revenue Procedure 2012-1, as printed in Internal Revenue Bulletin 2012-1, is 91 pages long. There is no user fee for obtaining an Information Letter.⁵⁹

⁵⁶ Treas. Reg. §1.6662-4(d)(3)(iii).

⁵⁷ Rev. Proc. 2012-1, 2012-1 IRB 1, Section 2.04.

⁵⁸ IRS, Information Letters; <http://www.irs.gov/app/picklist/list/informationLetters.html> (retrieved March 7, 2012).

⁵⁹ Rev. Proc. 2012-1, 2012-1 IRB 1, Section 15.03.

6. *Instructions and Forms*⁶⁰

The IRS issues over 1,000 forms and instructions. Forms and instructions “explain the requirements of the Internal Revenue Code and regulations. ... [and] to help taxpayers comply with the law.”⁶¹ While some forms are for taxpayers to complete and return with their payment,⁶² other forms and instructions are meant to “lead the taxpayer step-by-step through data needed to accurately report information required by law.”⁶³ The Commissioner, under the direction of the Secretary of Treasury, is authorized to prepare and distribute forms and instructions.⁶⁴

Generally, IRS publications, instructions and forms are not legal authority and do not bind the IRS or the courts.⁶⁵ Taxpayers who rely solely on IRS forms and instructions may be liable for penalties.⁶⁶

There have been occasions where new information was published in IRS publications or form instructions without issuance of official guidance. For example, the procedures for how Registered Domestic Partners and same-sex couples in community property states are to file their federal returns is provided in the instructions to Form 1040 and IRS Publication 555, *Community Property*. The 2010 Form 1040 instructions were different from the 2009 instructions as illustrated below.⁶⁷

⁶⁰ Treas. Reg. §601.602.

⁶¹ Treas. Reg. §601.602(a).

⁶² Treas. Reg. §601.602(a).

⁶³ Treas. Reg. §601.602(b).

⁶⁴ Treas. Reg. §301.7805-1(c); see, also, “News Analysis: How Do FAQs Fit Into the Guidance Puzzle?,” 2011 TNT 64-1 (noting that forms and publications “receive a final sign-off from Treasury’s Office of Tax Policy”).

⁶⁵ *Manocchio v. Commissioner*, 710 F.2d 1400 (9th Cir. 1983); *Zimmerman v. Commissioner*, 71 T.C. 367, 371 (1978), affd. without published opinion 614 F.2d 1294 (2d Cir. 1979); *James v. Commissioner*, T.C. Memo. 1999-160.

⁶⁶ See e.g., *Campbell v. Commissioner*, T.C. Memo 2001-118; *Pohoski v. Commissioner*, T.C. Memo. 1999-17.

⁶⁷ The 2010 instructions state that registered domestic partner in one of the three states generally must report half of the combined community income. In contrast, the 2009 instructions say they cannot report half of such income.

Community Property States

Community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. If you and your spouse lived in a community property state, you must usually follow state law to determine what is community income and what is separate income. For details, see Pub. 555.

Nevada, Washington, and California domestic partners. A registered domestic partner in Nevada, Washington, or California (or a person in California who is married to a person of the same sex) generally must report half the combined community income earned by the individual and his or her domestic partner (or same-sex spouse). See Pub. 555.

2010 Form 1040 instructions, page 19.

Community Property States

Community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. If you and your spouse lived in a community property state, you must usually follow state law to determine what is community income and what is separate income. For details, see Pub. 555.

California domestic partners. A registered domestic partner in California must report all wages, salaries, and other compensation received for his or her personal services on his or her own return. Therefore, a registered domestic partner cannot report half the combined income earned by the individual and his or her domestic partner as a married person filing separately does in California.

2009 Form 1040 instructions, page 21.

The only explanation for the change in the instructions was in informal guidance: Private Letter Ruling 201021048, Chief Counsel Advice 201021049 and Chief Counsel Advice 201021050. This type of guidance is not followed by laypersons and not even by all tax practitioners. A set of questions and answers on this topic was added to the IRS website subsequent to the issuance of the 2010 Form 1040 instructions.⁶⁸

B. Definition of "Authority"

1. Sections 6662 and 6694

Section 6662 imposes a 20% accuracy related penalty on underpayment due, *inter alia*, to a substantial understatement of tax. The substantial underpayment does not apply to any portion of an underpayment if there is or was "substantial authority" for the taxpayer's treatment.⁶⁹ Under Section 6664(c)(1), the negligence and fraud penalties imposed under Sections 6662 and 6663 do not apply to the extent that the taxpayer's underpayment was due to reasonable cause and the taxpayer acted in good faith. With respect to a reportable transaction, this exception does not apply unless the taxpayer disclosed the relevant facts in accordance with Section 6662, there was substantial authority for the taxpayer's position and the taxpayer believed that the treatment was more likely than not proper.⁷⁰

2. Treas. Reg. §1.6662-4

The rules for determining whether there is substantial authority, including the weight to be given various types of authority, are contained in Treas. Reg. §1.6662-4(d). The types of authority that are considered substantial authority used to determine whether penalties apply are:

"applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official

⁶⁸ IRS, "Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California," <http://www.irs.gov/newsroom/article/0,,id=245869,00.html> (retrieved March 7, 2012).

⁶⁹ I.R.C. § 6662(d)(2)(B)(1).

⁷⁰ I.R.C. § 6664(d)(2).

explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin. ... Notwithstanding the preceding list of authorities, an authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority... a private letter ruling is not authority if revoked or if inconsistent with a subsequent proposed regulation, revenue ruling or other administrative pronouncement published in the Internal Revenue Bulletin.

V. SUGGESTED SOLUTIONS

As described in this report, there are several problems with the current manner in which many sets of FAQs are used by the IRS. These problems can lead to compliance errors and to the assessment of penalties upon taxpayers and tax return preparers despite the fact that they believe they have followed IRS guidance. FAQs can present taxpayer rights issues when authoritative guidance is not issued.

Listed below are some suggestions for addressing the problems described in this report.

1. The IRS should avoid using FAQs that merely restate the Internal Revenue Code and regulations. Instead publications should be used. Often, the FAQ information is also in a publication. In such cases, rather than duplicating the

information (which also can make it confusing and time consuming for users of the website), the IRS should find a way to highlight key points in publications.

2. To make it easier for taxpayers, practitioners and other interested parties to find FAQs, the IRS website should contain a topical index of FAQs and an index of FAQs by Code section.
3. Each FAQ that is meant to summarize the law should contain a disclaimer to notify taxpayers that it is intended to be a generalized summary of the law and that the taxpayer should consult a qualified tax professional to determine how the law applies to his or her individual case.
4. Where an FAQ has been amended or modified, archive the earlier versions of the FAQ and provide links from the current version to the earlier version.
5. Like Notices and Announcements, FAQs that interpret the Code or explain initiatives or procedures are an expeditious way of providing guidance. The Service should, therefore, accord such FAQs the same status as Notices and Announcements and publish them in the weekly Internal Revenue Bulletin (I.R.B.) and note the authors and their contact information.
6. FAQs that interpret the Code or explain initiatives or procedures should list the primary author of the FAQ and information on the person(s) within the Service to contact concerning the issues covered by the FAQ.
7. The Service should publish the procedures by which FAQs are drafted, approved and posted to the IRS website, including information on which divisions within the Service have jurisdiction to issue FAQs on various topics and how questions can be submitted.
8. One reason for the increasing use of FAQs for substantive guidance is the lack of resources to prepare and issue traditional forms of official guidance. The National Taxpayer Advocate has identified inadequate funding as the most severe problem facing the IRS.⁷¹ The Service should seek funding from Congress so that it has the resources to issue official guidance.

⁷¹ See IR-2012-6 (Jan. 11, 2012) announcing the release of the National Taxpayer Advocate's annual report to Congress. Per the information release: "The overriding challenge facing the IRS is that its workload has grown significantly in recent years, while its funding is being cut," Olson said in releasing the report. "This is causing the

VI. CONCLUSION

FAQs provide a convenient way for the IRS to readily disseminate information and provide guidance on an expedited basis. The IRS, however, needs to do more to ensure that taxpayers and tax practitioners (1) understand the procedure for drafting, reviewing and posting FAQs, (2) can readily access FAQs on specific topics, and (3) can link to an archive with prior versions of an FAQ. As proposed by this paper, where an FAQ is being used for purposes similar to Notices and Announcements, the IRS should give them the same status. This will allow tax practitioners and taxpayers to be able to rely on the FAQ for guidance, without risk of penalty. Although some guidance from the IRS is better than none, tax practitioners and taxpayers need guidance that they can rely on in managing their affairs. And while FAQs are useful in providing guidance in an emergency, they should not become a substitute for other, more formal, types of guidance.

IRS to resort to shortcuts that undermine fundamental taxpayer rights and harm taxpayers – and at the same time reduces the IRS’s ability to deliver on its core mission of raising revenue.”” Available at <http://www.irs.gov/newsroom/article/0,,id=252284,00.html> (retrieved March 6, 2012).