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# NTA Blog Post On “Protecting the Rights of Taxpayers Who Rely on FAQs” Is Timely and Welcome, But Doesn’t Go Far Enough

July 9, 2020 by [Guest Blogger](#) [2 Comments](#)

*We welcome first time guest bloggers Alice G. Abreu and Richard K. Greenstein, both Professors of Law at Temple’s Beasley School of Law in Philadelphia. They offer their reactions to the recent blogpost in which the National Taxpayer Advocate, Erin Collins, addresses the issue of taxpayer reliance on frequently asked questions (FAQs) and makes several recommendations. The issue of taxpayer reliance on FAQs specifically, and subregulatory guidance more generally, is not new, but it has received increased attention given the accelerated pace of tax legislation in response to the COVID-19 pandemic and the IRS’s need to provide prompt guidance. Professors Abreu and Greenstein have spoken and are writing on the subject and here they not only offer their reactions to National Taxpayer Advocate’s recent post but also their own recommendations.*

*We have touched on this issue before [here](#) with an excellent post in May by Monte Jackel and PT Contributor Nina Olson [blogged](#) on this topic when she was the National Taxpayer Advocate. Keith*



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Kudos to NTA Erin Collins for taking on the issue of taxpayer reliance on IRS written guidance. Her [blogpost](#), released on July 7, is spot-on in identifying an important problem. We particularly liked that she began by framing the issue clearly and persuasively: she described the plight of a taxpayer who goes to the IRS website for guidance on the deductibility of a particular item, finds a Frequently Asked Question (FAQ) on point, and takes the deduction, only to be audited and denied the deduction because the IRS changed its position, and is subjected to the 20 percent accuracy related penalty to boot. To make matters worse, the taxpayer can no longer access the FAQ because the IRS has removed it from its website, and no archive of removed FAQs exists.

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In "Taxpayer advocate"

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## Comments

Robert Kantowitz says

[July 9, 2020 at 10:46 am](#)

I agree, subject to four comments:

1. There are rare times when the issue is genuinely up in the air, and when the DO NOT RELY note is fair warning.



### Leslie Book



Professor Book is a Professor of Law at the Villanova University Charles Widger School of Law.

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### Keith Fogg



T. Keith Fogg is a Clinical Professor of Law at Harvard Law School where he started a tax clinic in 2015. Prior to joining the faculty at Harvard, he began his academic career at Villanova Law School in 2007 after working for over 30 years with the Office of Chief Counsel, IRS. [Read More...](#)

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### Christine Speidel



Christine Speidel is Assistant Professor and Director of the Federal Tax Clinic at Villanova University Charles Widger School of Law. Prior to her appointment at Villanova she

2. On the other hand, where the only effect of the change in guidance is to increase the amount of tax due, and, as if the NTA recommends, the IRS is not seeking penalties, interest should be waived and a taxpayer should be given more time to pay. It is only where the taxpayer can show detrimental reliance, for example reporting an item in one year rather than in another year that then becomes closed, or making a commercial decision that he would not have made had the revised guidance been available, that it is compelling to allow the taxpayer to rely on the original guidance for the substantive tax calculation. An example might be if the IRS had announced that a particular fact pattern qualified under the QOZ program or for a tax credit, the taxpayer made the investment, and then the IRS changed its mind.

3. The original guidance, if relied upon, should be accorded whatever level of deference the IRS would seek if it were defending the interpretation (Skidmore, Auer, Chevron). For the record, I personally do not believe that any of these deference doctrines should exist, but as long as they do exist, the Supreme Court has the authority to direct that taxpayers be allowed to invoke them.

4. Taxpayers should take a case out of the Never-Trumper play book, and consistently challenge any changes of position as having failed full-blown APA review.

[Reply](#)

Nando Breiter says

[July 10, 2020 at 8:50 am](#)

“Guidance Regarding the Transition Tax Under Section 965 and Related Provisions” published in the Federal Register (Vol. 83, No. 154 / Thursday, August 9, 2018) offered the following advice on page 39537:

“For the 2017 tax year, instructions for how and when to properly report section 965-related amounts and file returns reporting such amounts, as well as instructions for how and when to make payments with respect to a net tax liability under section 965, were provided in Frequently Asked Questions (FAQs) that are available at the IRS website. The FAQs were posted on March 13, 2018, and updated on April 13, 2018, and June 4, 2018.”

I believe this was inserted because at the time, for the 2017 tax year, which was the first year the transition tax was implemented, there were no instructions available until 2019,



practiced law at Vermont Legal Aid, Inc. At Vermont Legal Aid Christine directed the Vermont Low-Income Taxpayer Clinic and was a staff attorney for Vermont Legal Aid's Office of the Health Care Advocate. [Read More...](#)

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## Stephen Olsen



Stephen J. Olsen's practice includes tax planning and controversy matters for

individuals, businesses and exempt entities for the law firm [Gawthrop Greenwood, PC](#).

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## Contributors

### Nina Olson



Nina E. Olson is the Executive Director of the Center for Taxpayer Rights, a 501(c)(3)

organization dedicated to advancing taxpayer rights in the US and internationally. She served as the National Taxpayer Advocate from March 2001 through July 2019. [Read More...](#)

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well after returns were due.

The URL to that FAQ page is here: <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> . It has been substantially changed since it was published (earlier versions can be found using the Wayback Machine). The instructions given here are woefully incomplete. And the disclaimer at the bottom says:

“These FAQs are not included in the Internal Revenue Bulletin, and therefore may not be relied upon as legal authority. This means that the information cannot be used to support a legal argument in a court case.”

So in this case, the guidance published in the Federal Registry directs taxpayers to use an FAQ page, and the FAQ page says the information on this webpage cannot be relied upon.

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**Comment Policy:** While we all have years of experience as practitioners and attorneys, and while Keith and Les have taught for many years, we think our work is better when we generate input from others. That is one of the reasons we solicit guest posts (and also because of the time it takes to write what we think are high quality posts). Involvement from others makes our site better. That is why we have kept our site open to comments.

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## Speak Your Mind

### Carlton Smith

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Carlton M. Smith worked (as an associate and partner) at Roberts & Holland LLP in Manhattan

from 1983-1999. From 2003 to 2013, he was the Director of the Cardozo School of Law tax clinic. In his retirement, he volunteers with the tax clinic at Harvard, where he was Acting Director from January to June 2019.

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### Designated Order Authors

#### Samantha Galvin

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Samantha Galvin is an Associate Professor of the Practice of Taxation and the Director of the

Low Income Taxpayer Clinic (LITC) at the University of Denver. Professor Galvin has been teaching full-time at the University of Denver since October of 2013 and teaches courses in tax controversy representation, individual income tax, and tax research and writing. In the LITC, she teaches, supervises and assists students representing low income taxpayers with controversy and collection issues. [Read More...](#)

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#### William Schmidt

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William Schmidt joined Kansas Legal Services in 2016 to manage cases for the Kansas Low Income Taxpayer Clinic and became Clinic Director January 2017.

Previously, he worked on pro bono tax cases for the 3 Kansas City metro area Low Income Taxpayer Clinics. He records and edits a tax podcast called Tax Justice Warriors and is now an adjunct professor for Washburn University School of Law. [Read More...](#)

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### Caleb Smith

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Caleb Smith is Visiting Associate Clinical Professor and the Director of the Ronald M.

Mankoff Tax Clinic at the University of Minnesota Law School. Caleb has worked at Low-Income Taxpayer Clinics on both coasts and the Midwest, most recently completing a fellowship at Harvard Law School's Federal Tax Clinic. Prior to law school Caleb was the Tax Program Manager at Minnesota's largest Volunteer Income Tax Assistance organization, where he continues to remain engaged as an instructor and volunteer today. [Read More...](#)

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### Patrick Thomas

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Patrick W. Thomas is the founding director of Notre Dame Law School's [Tax Clinic](#), in which he trains and supervises law students representing low-income clients in disputes with the Internal Revenue Service. Prior to joining the law school faculty in 2016, he received an ABA Tax Section Public Service Fellowship to work as a staff attorney for the LITC at the Neighborhood Christian Legal Clinic in Indianapolis. [Read More...](#)

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[Effectively Representing Your Client](#)

(ABA's book on practice before the Service, which is edited by Keith).

[Leslie Book's SSRN Page](#) (Les' other scholarly work).

[Keith Fogg's SSRN Page](#) (Keith's other scholarly work).

[NTA Blog](#) (National Taxpayer Advocate's tax analysis blog).

[Tax Prof Blog](#) (Prof. Paul Caron's blog on all things tax).

[Federaltaxcrimes.blogspot.com/](#) (Great criminal tax blog by Jack Townsend).

[Federal Tax Procedure Blogspot](#) (Jack Townsend's excellent tax procedure blog).

[Appellatetax.com/](#) (Good appellate tax blog by the law firm Miller and Chevalier).

[Gawthrop Greenwood, PC](#) (Stephen's law firm, which handles various types of tax matters).

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