

MSP #2 **TRANSPARENCY OF THE OFFICE OF CHIEF COUNSEL: Counsel Is Keeping More of Its Analysis Secret, Just When Taxpayers Need Guidance More than Ever**

RESPONSIBLE OFFICIAL

William M. Paul, Acting Chief Counsel

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

The IRS Office of Chief Counsel (OCC) provides advice to headquarters employees, which is called Program Manager Technical Advice (PMTA). PMTA must be disclosed to the public pursuant to a settlement with Tax Analysts.² Moreover, taxpayers need prompt guidance now more than ever, due to the recently enacted Tax Cuts and Jobs Act (TCJA).³ Thus, the National Taxpayer Advocate is concerned that the OCC:

- (1) Has been disclosing fewer PMTAs (as shown on Figure 1.2.1);
- (2) Allows its attorneys to avoid disclosure by issuing advice as an email, rather than a memo;
- (3) Has not issued written guidance to its attorneys describing what must be disclosed as PMTA; and
- (4) Has no systems to ensure all PMTAs are timely identified, processed as PMTAs, and disclosed.

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 *Tax Analysts v. IRS*, Stipulation of Decision, CA No. 1:96-2285-CKK (July 23, 2007).

3 Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017). We are referencing the short title of the bill, H.R. 1, rather than the law.

ANALYSIS OF PROBLEM

Background

The *right to be informed* is the first right listed in the Taxpayer Bill of Rights for good reason. If taxpayers do not know the rules and why the IRS has adopted them, they cannot determine if they should exercise their other rights (e.g., the *right to challenge the IRS's position and be heard* or the *right to appeal an IRS decision in an independent forum*).⁴

However, the OCC does not acknowledge that a function of its advice is “to inform taxpayers or practitioners about how it interprets the law,” and says its failure to do so “is not a problem that taxpayers have” and “is not a serious problem encountered by taxpayers.”⁵ Consistent with this view, the OCC has sometimes adopted strained legal interpretations to avoid transparency. For example, in addition to PMTA, the IRS is required to disclose certain advice issued to employees in field offices under IRC § 6110 (called Chief Counsel Advice (CCA)).⁶ In 2004, the OCC declined to disclose CCA rendered in less than two hours (generally emails).⁷ A court found there was no legal basis for this “two-hour rule.”⁸

IRC § 6110 does not apply to the advice the OCC provides to headquarters employees, such as PMTA issued to program managers, but such advice may still have to be disclosed under the Freedom of Information Act (FOIA).⁹ In 2006, to investigate the IRS's compliance with the disclosure rules, TAS requested a sample of nonpublic legal memos. The OCC initially refused to provide any memos to TAS, citing pending litigation with Tax Analysts in which it had argued the memos could be withheld under the “deliberative process” privilege. It received considerable criticism for its refusal, and ultimately gave TAS the memos.¹⁰ Tax Analysts subsequently reopened its stalled litigation.¹¹

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- 4 For prior discussions of transparency, see, e.g., National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 43-50 (Area of Focus: *The Offshore Voluntary Disclosure (OVD) Programs Still Lack Focus Transparency, Violating the Right to Be Informed*); National Taxpayer Advocate 2011 Annual Report to Congress 380-403 (Most Serious Problem: *The IRS's Failure to Consistently Vet and Disclose its Procedures Harms Taxpayers, Deprives It of Valuable Comments, and Violates the Law*); National Taxpayer Advocate 2010 Annual Report to Congress 71-84 (Most Serious Problem: *IRS Policy Implementation Through Systems Programming Lacks Transparency and Precludes Adequate Review*); National Taxpayer Advocate 2007 Annual Report to Congress 124-139 (Most Serious Problem: *Transparency of the Office of Professional Responsibility*); National Taxpayer Advocate Fiscal Year 2008 Objectives Report to Congress xxi-xxvii (Area of Emphasis: *Update on Transparency of the IRS*); National Taxpayer Advocate 2006 Annual Report to Congress 10-30 (Most Serious Problem: *Transparency of the IRS*).
- 5 Office of Chief Counsel (OCC) response to TAS information request (Sept. 11, 2018) (hereinafter, “OCC response,” reprinted in the Appendix).
- 6 See also Treas. Reg. § 301.6110-1 et seq. IRC § 6110 was expanded by the IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3509, 112 Stat. 685 (1998) to ensure “all taxpayers can be assured of access to the ‘considered view of the Chief Counsel’s national office on significant tax issues.’” Joint Committee on Taxation (JCT), JCS-6-98, General Explanation of Tax Legislation Enacted in 1998, 120 (Nov. 24, 1998) (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997)).
- 7 Chief Counsel Notice 2004-012 (Feb. 19, 2004).
- 8 See *Tax Analysts v. IRS*, 495 F.3d 676 (D.C. Cir. 2007), *aff’g* 416 F. Supp. 2d 119 (D.D.C. 2006). See, e.g., Sheryl Stratton, *Court Rejects Two-Hour Rule for Withholding Chief Counsel Advice*, 110 TAX NOTES 1015 (Mar. 6, 2006); Jeremiah Coder, *Something for Everyone in Initial Batch of Two-Hour Rule Advice* 119 TAX NOTES 30 (Apr. 7, 2008).
- 9 5 U.S.C. § 552 et. seq.
- 10 National Taxpayer Advocate Fiscal Year 2007 Objectives Report to Congress xxi-xxvii; Allen Kenney, *Uncooperative Counsel Irks Olson, Confuses Crowd*, 114 TAX NOTES 278 (Jan. 22, 2007) (reporting that former Senator Bob Kerrey recommended that former IRS Commissioner Everson “intercede” on the advocate’s behalf and that Congress “back the advocate up for fear that Olson’s position would lose its ‘teeth.’”).
- 11 See Sheryl Stratton and Lisa M. Nadal, *ABA Tax Section Meeting: Olson Discusses Chief Counsel’s Undisclosed Legal Advice*, 114 TAX NOTES 401 (Jan. 29, 2007).

The *right to be informed* is the first right listed in the Taxpayer Bill of Rights for good reason. If taxpayers do not know the rules and why the IRS has adopted them, they cannot determine if they should exercise their other rights (e.g., the *right to challenge the IRS's position and be heard* or the *right to appeal an IRS decision in an independent forum*).

The IRS settled with Tax Analysts in July 2007, agreeing to disclose PMTA dated or prepared after 1994 “on the basis of the standards announced by” the U.S. Court of Appeals for the District of Columbia Circuit in its June 14, 2002 opinion in *Tax Analysts v. IRS*, “as applied by the district court” in its February 7, 2007 opinion.¹²

These cases generally permit the OCC to withhold deliberative and pre-decisional communications, but not OCC’s final legal positions. The Circuit Court explained “[i]t is not necessary that the TAS [advice] reflect the final *programmatic* decisions of the program officers who request them. It is enough that they represent OCC’s final *legal* position....”¹³ Only legal conclusions issued to other attorneys within the OCC or to the Commissioner of Internal Revenue (*i.e.*, the Chief Counsel’s supervisor under IRC § 7803(b)(3)(A)) could be withheld.

Advice to other decision makers with words like “we suggest” could be withheld as pre-decisional, whereas those indicating “we conclude” generally could not.¹⁴ Documents with both deliberative and non-deliberative material were released with redactions so that the OCC’s final legal positions and underlying analyses could be disclosed.¹⁵ Notably, neither court decision authorized the OCC to withhold advice simply because it contained the analysis underlying the OCC’s final legal conclusions, even if those conclusions would be released in another form.

The OCC Is Disclosing Fewer PMTAs

Although one might expect the TCJA to increase the need for PMTA, the number posted on IRS.gov is substantially below its historical average, as shown in Figure 1.2.1.

¹² *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *remanded*, 483 F. Supp. 2d 8 (D.D.C. 2007).

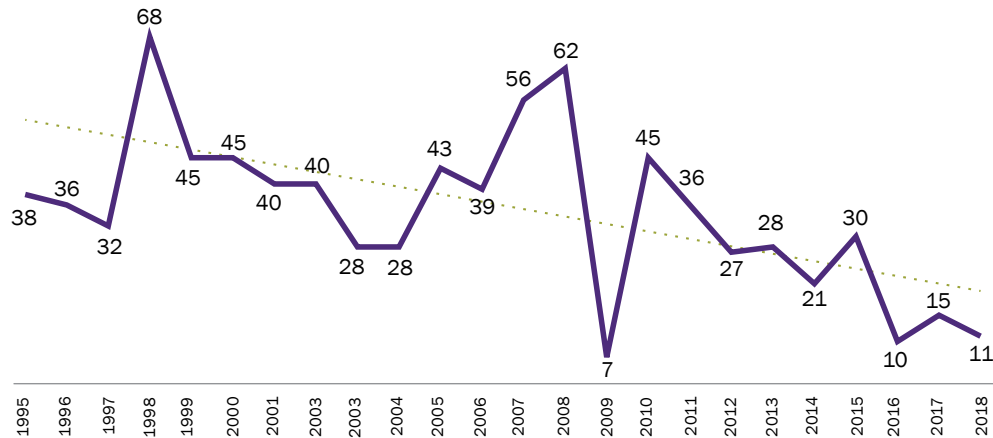
¹³ *Tax Analysts v. IRS*, 294 F.3d at 81.

¹⁴ *Id.*

¹⁵ See *Tax Analysts v. IRS*, 294 F.3d at 75 (citing *Tax Analysts v. IRS*, 97 F. Supp. 2d 13, 17-18 (D.C. Cir. 2000) (approving the practice of redacting only the “portions of LMs that reflect the opinions and analysis of the author and did not ultimately form the basis of the final revenue ruling.”).

FIGURE 1.2.1¹⁶

**Program Manager Technical Advice Posted Items on IRS.gov
by Calendar Year of Issuance**



Following tax legislation enacted in 1998, the IRS issued 68 PMTAs, but there has been no similar uptick in PMTAs following the TCJA. As of this writing, only 11 PMTAs were issued and released in 2018 (*i.e.*, PMTA 2018-11 to -20), and only one of these related to the TCJA (*i.e.*, PMTA 2018-16, as discussed below).¹⁷ Moreover, the OCC has suggested that it was not even required to release the TCJA-related PMTA.¹⁸

The OCC Does Not Disclose Email as PMTAs

PMTAs may be declining because, according to the OCC, it is not required to disclose advice as PMTA unless it is in “*memorandum form*.”¹⁹ In other words, any OCC attorney can avoid disclosing PMTA by copying the memo’s analysis into an email.

The OCC says that it “does not encourage its attorneys to provide legal advice in a manner that circumvents” the disclosure rules.²⁰ Most attorneys, however, are not going to want to disclose their advice lest the public spot an error. The OCC has historically opposed transparency (as illustrated by the Tax Analysts litigation), and this “form over substance” loophole gives OCC attorneys an easy way to avoid disclosure. Unlike the two-hour rule, which was based on the reasonable assumption that quick

16 TAS analysis of Program Manager Technical Advice (PMTA) posted on IRS.gov. The number of a PMTA reflects the date it was released, rather than the date it was issued. For example, ten PMTAs have numbers beginning with “2017-”, suggesting that they were *released* in 2017, but 15 were *issued* in 2017, as shown on the chart. Nine of the PMTA issued in 2017 have numbers beginning with “2018-”, suggesting they were not released until 2018. The figures in the chart reflect the number issued each year, provided they were later released. For a few PMTAs that did not have an issue date, TAS either omitted them or estimated the year they were issued based when the casefile was closed and the date of memos the OCC posted before and after them. Some PMTAs that were issued in 2018 may not have been released.

17 See IRS, *Legal Advice Issued to Program Managers*, <https://www.irs.gov/privacy-disclosure/legal-advice-issued-to-program-managers> (last updated Nov. 16, 2018).

18 OCC response to TAS information request (Sept. 11, 2018) (reprinted in the Appendix) (Q12: “Does the Tax Analysts settlement require the OCC to release the memo underlying the IRS’s position in section 965 FAQ 14?” A12: “The Office of Chief Counsel published this memorandum at the request of the Division Commissioner, LBI.”).

19 OCC response (A5). Emails have been released as PMTA, which suggests the OCC has changed its position. See, e.g., PMTA 2008-01567 (Sept. 28, 2007); PMTA 2007-01190 (Aug. 14, 2007); PMTA 2007-01186 (June 11, 2007).

20 OCC response (A21).

Following tax legislation enacted in 1998, the IRS issued 68 Program Manager Technical Advice (PMTAs), but there has been no similar uptick in PMTAs following the Tax Cuts and Job Act.

responses are not as well thought out as those that take longer, this email loophole has no basis in law. Nor is it a rational policy. The form of the advice has no bearing on how much thought went into the analysis or how it will be used.

The OCC Has Not Provided Its Attorneys With Written Guidance Describing What Must Be Disclosed as PMTA, and Its Oral Guidance Is Inadequate

OCC: TRANSPARENCY IS NOT OUR JOB, WE AVOID WRITING THINGS DOWN, AND THAT'S NOT A PROBLEM

The OCC does not acknowledge that a function of its advice is “to inform taxpayers or practitioners about how it interprets the law,” and says its failure to do so “is not a problem that taxpayers have” and “is not a serious problem encountered by taxpayers.”²¹ Consistent with this view, the OCC has no written training materials to explain what needs to be disclosed as PMTA,²² and the Chief Counsel Directives Manual (CCDM) provides no specific guidance on how its attorneys should determine whether advice to program managers needs to be disclosed.²³

ORAL EXPLANATION AND TRAINING: CLEAR AS MUD?

OCC attorneys orally explained to TAS that if advice is not adopted by the IRS, then it does not need to be disclosed, and if it is adopted and incorporated into another document, it also does not need to be disclosed.²⁴ Because positions the IRS adopts are incorporated into public documents, this logic seems to suggest the OCC does not believe *any* PMTA must be disclosed. The OCC attorneys also said advice to some headquarters employees, including the National Taxpayer Advocate, does not need to be disclosed because the employees are not program managers.²⁵ They did not identify any category of advice that would have to be disclosed as PMTA.

The OCC says it has provided oral training to about 207 attorneys since 2015 (*i.e.*, less than 40 percent of those employed in Washington DC).²⁶ However, the attorneys were not given written materials, and there is no way to know if their oral training was any more illuminating than these statements.

21 OCC response (preamble).

22 OCC response (A24) (no written training).

23 OCC response (A22 and A23).

24 TAS meeting with OCC concerning disclosure issues (July 9, 2018).

25 TAS received conflicting information in subsequent meetings with OCC management, but the OCC declined to clarify its position in its formal response, which referred to this meeting. See OCC response (A6). As noted below, the OCC has often provided advice to the National Taxpayer Advocate that was disclosed as PMTA.

26 OCC response (A24). There were an average of about 566 OCC attorneys in Washington, DC during this period. IRS Human Resources Reporting Center, *POD and Building Reports, Counts by State, City and Building* (Nov. 2, 2018) (showing 580, 558, 538, and 587 at the end of FYs 2015-2018, respectively).

OCC: WE WON'T VERIFY OUR ORAL EXPLANATION, EXCEPT FOR THE HUGE LOOPHOLE

The OCC declined to verify its oral explanation of the PMTA rules in writing. In its formal response (reprinted in the Appendix), the OCC described what must be disclosed as “advice [that] is in *memorandum form* and otherwise meets the standards announced by the circuit court in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), and as applied by the district court in *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007).” [Emphasis added.]²⁷ It described what can be withheld as anything that “is properly determined to be privileged under the standard described” by the circuit court’s decision.²⁸ The only specific item that this written response verified was that the OCC can avoid disclosure by issuing the advice as an email, rather than in “memorandum form.”²⁹

The OCC Has No Systems to Ensure All PMTA Are Timely Identified, Processed as PMTA, and Disclosed

The OCC’s written response also revealed that it has no system to determine whether the attorneys who issue PMTAs have provided them to the function responsible for making disclosure determinations (*e.g.*, OCC attorneys assigned to Procedure & Administration (P&A)).³⁰ Further, the OCC has no guidelines for how quickly PMTA must be sent to this function and posted, saying only that they are generally processed quarterly.³¹ As a result, PMTAs may be posted long after the IRS has implemented the advice—and long after it could benefit taxpayers and their representatives (*e.g.*, by avoiding positions that would incur penalties or ensnare them in audits or litigation). Moreover, the lack of any timeliness goals makes it difficult to determine whether a particular PMTA was withheld or whether its disclosure was merely delayed.

OCC Seems to Release PMTAs Because the Program Managers Want It To, Rather Than Because of the Settlement

Although the settlement seems to require the OCC to release some PMTAs that the program manager would probably not want to release, it is not clear that the IRS has released any such documents in recent years. Moreover, the effort that TAS has expended in trying get a few memos released—memos that the National Taxpayer Advocate believes should have been released under the settlement without any advocacy by TAS—confirms what OCC’s oral explanation and written response suggest—that OCC believes almost nothing needs to be disclosed as PMTA under the settlement. In these recent cases, the OCC agreed to release advice only upon request of the program manager (*e.g.*, by asking that the advice be issued as a memo, rather than as an email). The proposition that advice is released only when an agency affirmatively wants to release it makes a mockery of the Tax Analysts settlement and the FOIA.

EXAMPLE 1: “CALLS” NEEDED TO COMPLY WITH THE TAX CUTS AND JOBS ACT

Following enactment of the TCJA, IRS program managers and other headquarters employees asked the OCC to make “calls” about what the new law required so that they could update hundreds of tax forms, instructions, and publications, and issue “soft guidance,” such as FAQs and Fact Sheets.³² It would have been helpful for the public—including tax advisors and companies that write tax software—to see OCC’s final legal calls, which were made long before they were incorporated into items that would be

27 OCC response (A5).

28 OCC response (A6, A13, A14).

29 OCC response (A5).

30 OCC response (A27).

31 OCC response (A28).

32 IRS, *Tax Reform Implementation Office (Q&As), Frequently Asked Questions: Implementing the New Tax Law* (Feb. 8, 2018).

released to the public. Even when the OCC's conclusions were incorporated into other guidance, the reasons for the conclusions generally remained undisclosed. TAS urged the IRS and the OCC to post more of the OCC's legal calls as PMTA, but they declined.³³

The District Court in *Tax Analysts* said that “[e]ven if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”³⁴ This raises questions about why the OCC seemed to believe it could withhold the OCC's calls once they were adopted or incorporated into other documents, such as instructions, publications, and FAQs, particularly if the calls explained why the agency adopted the positions and the documents the IRS disclosed did not.

Along the same lines, the Circuit Court in *Tax Analysts* allowed the IRS to redact *only* the portions of Legal Memoranda (LM) (the successor to General Counsel Memoranda) that reflected the opinions and analysis of the author and that did not ultimately form the basis for the final revenue ruling.³⁵ There was no suggestion in the *Tax Analysts* decisions that the IRS could publish conclusions and withhold the underlying analysis in its entirety.

EXAMPLE 2: ADVICE CONCERNING POST-PROCESSING MATH ERROR ADJUSTMENTS

In early 2018, TAS asked the OCC about the legality of plans by the Wage & Investment Division (W&I) to use math error authority (MEA) to disallow tax credits long after the IRS had processed the returns (*i.e.*, post-processing) and issued refunds.³⁶ The OCC responded by issuing a memo on April 10, 2018, approving the practice. The OCC released the memo during the week of September 10, 2018, only because “[t]here was an agreement between the W&I Commissioner and the National Taxpayer Advocate to release this memorandum,” and not because of the settlement.³⁷ It is unclear why the OCC thought it needed *IRS permission to release* this memorandum as opposed to being *required to disclose* it under the settlement. Moreover, it is unclear why its release was delayed for five months.

EXAMPLE 3: ADVICE CONCERNING THE TRANSITION TAX UNDER IRC § 965³⁸

The TCJA imposed a new transition tax under IRC § 965, which had to be reported on 2017 returns but that could be paid over an eight-year period without interest under IRC § 965(h). The IRS issued an FAQ in March 2018 that directed taxpayers to separately designate estimated tax payments to cover

33 In separate internal meetings, employees from the Tax Reform Implementation Office (TRIO) and the OCC discussed a legend that would be affixed to any advice OCC provided to the TRIO so that the advice would not have to be disclosed, but the OCC denied it was using any such legend in its formal response to TAS. See OCC response (A28).

34 *Tax Analysts v. IRS*, 483 F. Supp. 2d at 13.

35 *Tax Analysts v. IRS*, 294 F.3d at 75.

36 National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 114-118 (Area of Focus: *The IRS Has Expanded Its Math Error Authority, Reducing Due Process for Vulnerable Taxpayers, Without Legislation and Without Seeking Public Comments*).

37 See OCC response (responding to question 11, “Does the Tax Analysts settlement require the OCC to release as PMTA the memo about post-processing math error, which was issued to the W&I Commissioner and the NTA on April 10, 2018? If the answer is no, please explain.”); Christine Speidel, *Retroactive Math Error Notices May Be on the Horizon*, PROCEDURALLY TAXING BLOG (Sept. 13, 2018), <http://procedurallytaxing.com/retroactive-math-error-notices-may-be-on-the-horizon/> (noting PMTA 2018-17 was released “earlier this week”).

38 For a more detailed discussion of this issue, see National Taxpayer Advocate, *IRS Administration of the Section 965 Transition Tax Contravenes Congressional Intent and Imposes Unintended Burden on Taxpayers*, NTA BLOG (Aug. 16, 2018), [https://taxpayeradvocate.irs.gov/news/nta-blog-irs-administration-of-the-section-965-transition-tax-contravenes-congressional-intent-and-imposes-unintended-burden-on-taxpayers?category=Tax News](https://taxpayeradvocate.irs.gov/news/nta-blog-irs-administration-of-the-section-965-transition-tax-contravenes-congressional-intent-and-imposes-unintended-burden-on-taxpayers?category=Tax%20News) (hereinafter “NTA 965 Blog”).

The District Court in *Tax Analysts* said that “[e]ven if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”

section 965 liabilities (e.g., by writing “Section 965 payment” on a check).³⁹ That led some taxpayers who had already paid sufficient estimated tax to make another payment. On Friday, April 13, 2018—a few business days before the filing and payment due date—the IRS issued FAQ 14, which said any excess estimated tax payments could not be refunded or credited to other liabilities unless they exceeded the entire 2017 liability, including transition taxes payable in subsequent years.⁴⁰

Perhaps due to its narrow view of what needs to be disclosed as PMTA and when, the IRS did not timely release the legal analysis underlying FAQ 14. Had its legal analysis been released before the extra transition tax payments were made, it would have been clear that the OCC did not believe the IRS had the legal authority to refund or credit these excess amounts. The IRS’s lack of transparency, thus, encouraged taxpayers to make unnecessary payments.

After the IRS issued FAQ 14, some corporate taxpayers scrambled to file Form 4466, *Corporation Application for Quick Refund of Overpayment of Estimated Tax*, so that they could recover excess estimated tax payments before their returns were due and the tax was assessed—a situation not addressed by the FAQs.⁴¹ Stakeholders, including the American Institute of Certified Public Accountants (AICPA) and the U.S. Chamber of Commerce, argued that FAQ 14 was inconsistent with the purpose of IRC § 965(h).⁴² Others suggested the IRS had no authority to deny pre-assessment refund requests on Form 4466.⁴³ TAS immediately elevated these concerns to the Tax Reform Implementation Office (TRIO). The TRIO explained that the OCC had written a detailed memo,

39 IRS, *Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns*, <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> (FAQ 10, issued on Mar. 13 and amended on Apr. 13, 2018).

40 IRS, *Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns*, <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> (FAQs 13 and 14, posted Apr. 13, 2018). Due to computer problems, the due date was extended to April 18. IR-2018-100 (Apr. 17, 2018).

41 KPMG, *IRS updates FAQs, “transition tax” under Code section 965* (Apr. 14, 2018), <https://home.kpmg.com/us/en/home/insights/2018/04/tnf-irs-updates-faqs-transition-tax-section-965.html>.

42 Letter from American Institute of Certified Public Accountants (AICPA) to Acting IRS Commissioner and Large Business and International (LB&I) Commissioner, *Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns - IRS Update of April 13, 2018* (Apr. 29, 2018), <https://www.aicpa.org/advocacy/cpaadvocate/2018/aicpa-urges-irs-action-on-section-965.html>; Letter from U.S. Chamber of Commerce to Commissioner of Internal Revenue (Oct. 9, 2018), https://www.uschamber.com/sites/default/files/u.s._chamber._s._corp_coalition_965_letter_mnuchinrettigkautter.pdf. In some cases, the IRS stretches the plain language of the law to harm taxpayers. See, e.g., *Summa Holdings, Inc. v. Comm’r*, 848 F.3d 779, 785 (6th Cir. 2017) (rejecting the IRS’s argument that it should be permitted “to recharacterize the meaning of statutes—to ignore their form, their words, in favor of [its] perception of their substance” in order to deny tax benefits that Congress may have intended). In others, it does so when a technical reading would be difficult to administer. See, e.g., Alice G. Abreu and Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295 (2011) (discussing how IRS has avoided technical applications of the law to frequent flier miles, home run balls and other situations where doing so would be controversial or difficult to administer). Thus, stakeholders may have been surprised at the OCC’s inability to reach the result seemingly intended by Congress in connection with IRC § 965(h).

43 Tom Greenaway and Mike Zima, *Unlucky Friday the 13th: No Refunds this Year for Taxpayers Who Defer Paying Mandatory Repatriation Tax?*, PROCEDURALLY TAXING BLOG (Jul. 19, 2018), <http://procedurallytaxing.com/unlucky-friday-the-13th-no-refunds-this-year-for-taxpayers-who-defer-paying-mandatory-repatriation-tax/>.

which said the IRS was legally required to retain the payments—a document (probably an email) that has never been disclosed to TAS or the public.

When TAS requested the transition tax memo, the TRIO referred us to the OCC. The OCC initially said the memo was pre-decisional and would not be released to the public *or to TAS*. The OCC eventually released a new memo (digitally signed on August 1) to TAS on the same day it was released to the public.⁴⁴ As with the PMTAs discussed above, it only released this memo because of a “request” by the Large Business and International Division (LB&I), and not because of the settlement or TAS’s request.⁴⁵

However, neither this memo nor any of the IRS’s FAQs addressed whether the IRS could grant applications on Form 4466 for refunds of excess estimated tax payments pursuant to IRC § 6425, before any tax had been assessed for 2017. Accordingly, TAS asked the OCC for legal advice about whether the IRS was authorized to pay these refunds.⁴⁶ The OCC said it would only answer this question if the business owner (LB&I) requested it.⁴⁷ LB&I said it did not want the OCC to issue the advice, and OCC did not provide the advice to TAS.⁴⁸

Lacking access to the legal support necessary to help taxpayers, TAS issued several Taxpayer Assistance Orders (TAOs) and a proposed Taxpayer Advocate Directive (TAD) to prevent W&I from processing and rejecting Forms 4466 before TAS could elevate these decisions to the IRS Commissioner.⁴⁹ The OCC and the IRS’s active efforts to avoid disclosing its legal analysis to TAS and the public undermined taxpayer rights, including the *right to pay no more than the correct amount of tax*. They also undermined TAS’s ability to assist taxpayers as well as to identify the problem and propose administrative or legislative changes to address it, as required by IRC § 7803.⁵⁰

44 See PMTA 2018-16 (Aug. 2, 2018), https://www.irs.gov/pub/lanoa/pmta_2018_16.pdf.

45 OCC response (A12).

46 See, e.g., IRC § 7803(c)(2)(A) (requiring TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers have such problems, and to propose legislative and administrative changes to mitigate the problems). Stakeholders raised the same questions. See, e.g., Letter from AICPA to Secretary of the Treasury and Assistant Secretary for Tax Policy, *Application of 2017 Estimated Tax Payments to Section 965(h) Installment Obligations* (Sept. 17, 2018), <https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20180917-aicpa-comments-on-965-overpayments.pdf>.

47 For an example of the types of questions TAS asked OCC to answer, see *NTA 965 Blog*.

48 On August 8, TAS formally asked the OCC for the advice by August 31, 2018. On August 20, 2018, the Commissioner of Large Business and International Division informed TAS that he did not want the OCC to issue the advice.

49 See IRC § 7811 (Taxpayer Assistance Order authority); Internal Revenue Manual (IRM) 1.2.50.4, Delegation Order 13-3 (formerly DO-250, Rev. 1) (Jan. 17, 2001) (Taxpayer Advocate Directive authority). Although OCC has still not issued the formal opinion TAS requested, those at the highest levels of the IRS, the OCC, and Treasury considered the matter and informed TAS that, in their view, the IRS was not authorized to pay the refunds. In that way, the IRS complied with the TAOs.

50 The IRS Commissioner subsequently clarified that the National Taxpayer Advocate has the right to request and receive legal advice analysis from the OCC and to review the legal analysis that the OCC issues to other business units, unless the IRS Commissioner determines that she should not have access to the analysis. IRS response to TAS (Dec. 18, 2018). On November 26, 2018, Congress proposed IRC § 965(h) to fix the problem, but the legislation could have been proposed sooner if the IRS had been more transparent about the reason for the problem. See House Amendment to the Senate Amendment to H.R. 88, Division A, *The Retirement, Savings, and Other Tax Relief Act of 2018* § 501 (Nov. 26, 2018).

The Office of Chief Counsel does not acknowledge that a function of its advice is “to inform taxpayers or practitioners about how it interprets the law.” This view explains why it has interpreted the settlement narrowly, created a huge loophole for emailed advice, avoided writing down what needs to be disclosed under the settlement, and avoided establishing systems to ensure Program Manager Technical Advice (PMTA) are identified and timely disclosed.

CONCLUSION

The taxpayers’ *right to be informed* includes the right to “clear explanations of the laws and IRS procedures.”⁵¹ However, the OCC does not acknowledge that a function of its advice is “to inform taxpayers or practitioners about how it interprets the law.” This view explains why it has interpreted the settlement narrowly, created a huge loophole for emailed advice, avoided writing down what needs to be disclosed under the settlement, and avoided establishing systems to ensure PMTA are identified and timely disclosed. The National Taxpayer Advocate respectfully disagrees with OCC’s cramped interpretation of the disclosure requirements.

RECOMMENDATIONS

The National Taxpayer Advocate recommends the OCC:

1. Develop clear written guidance that defines when advice constitutes PMTA that must be disclosed.
2. Require disclosure of any advice that is, in substance, PMTA. For example, the OCC’s guidance should not permit attorneys to withhold advice because of its form or mode of transmission (*e.g.*, email), because of the title of the recipient, or because a business unit does not want the advice to be disclosed.
3. Establish a written process to monitor whether advice that should be disclosed as PMTA is being identified and disclosed to the public in a timely manner. For example, consider aiming to disclose PMTAs no later than when the IRS issues guidance (*e.g.*, FAQs, Publications, News Releases, IRMs, etc.) that reveals the agency’s position.
4. Incorporate the new PMTA guidance and monitoring procedures into the Chief Council Directives Manual, distribute it at PMTA training classes, and release it to the public.

51 IRS, Pub. 1, *Your Rights as a Taxpayer* (2016).

Appendix: OCC response to TAS information request (Sept. 11, 2018)⁵²

Basic Description of Project:

While the OCC has an interest in protecting documents from disclosure under the deliberative process privilege, taxpayers and practitioners also need timely details about how the OCC interprets the law, such as recent changes made to the Internal Revenue Code by the Tax Cuts and Jobs Act (TCJA) that are not purely deliberative. As an advocate for taxpayers, the National Taxpayer Advocate has been urging the IRS to release to the public more of the guidance it receives from the OCC (*e.g.*, guidance referred to as OCC “calls” that the IRS has immediately adopted and used to create forms, instructions, publications, news releases, fact sheets, and FAQs (called “soft guidance”)).

TAS discussed the parameters under which the National Taxpayer Advocate and TAS can receive legal advice from the OCC with CC:P&A on July 9, and again on July 30, and on August 2, 2018. In addition, TAS discussed at those meetings what constitutes Program Manager Technical Advice (PMTA), who is a Program Manager (PM), and what procedures OCC attorneys follow to ensure adherence to the terms of the settlement with Tax Analysts. Most of the questions below are intended to confirm information discussed at these three meetings, and some require only a Yes/No answer.

Information Requested:

[**Preamble to OCC response**] Section 7803(b) established in the Department of the Treasury the Chief Counsel for the Internal Revenue to serve as an independent legal advisor to the Commissioner and to his officers and employees. The Chief Counsel reports both to the General Counsel and to the Commissioner with respect to legal advice and interpretation of the tax law not relating solely to tax policy. The Chief Counsel reports solely to the General Counsel with respect to legal advice and interpretation of the tax law relating solely to tax policy. As an independent legal advisor, the Office of Chief Counsel is not subject to the direction of or oversight by the National Taxpayer Advocate. The function of the legal advice provided by the Office of Chief Counsel is not to inform taxpayers or practitioners about how it interprets the law, but to assist the Commissioner and his officers and employees in administering the Internal Revenue Code. The Office of Chief Counsel releases certain legal advice because decisions of the courts have interpreted the Freedom of Information Act to require the release of certain types of legal advice it provides. The Office of Chief Counsel takes seriously its responsibility to comply with the FOIA and the decisions of the courts interpreting that law. The issue of whether the Office of Chief Counsel is releasing advice in compliance with court decisions interpreting the FOIA and the process for performing that function is not a problem that taxpayers have with the Internal Revenue Service and it is not a serious problem encountered by taxpayers. We are nonetheless responding to these questions in the spirit of transparency and cooperation.

[**TAS comment:** IRC § 7803(c)(2)(B)(ii) says the National Taxpayer Advocate’s annual report must “contain recommendations for such administrative and legislative action as may be appropriate to resolve problems encountered by taxpayers,” as well as “such other information as the National Taxpayer Advocate may deem advisable.” The statute does not empower the OCC to determine whether an issue

⁵² TAS’s questions are in black, OCC’s answers and comments are in green boxes, and TAS’s comments to OCC’s answers are in [brackets]. TAS has generally removed the portions of this document that discuss the National Taxpayer Advocate’s access to legal advice for the reasons described in footnote 50.

is a problem for taxpayers. The first provision in the Taxpayer Bill of Rights is the *Right to Be Informed*, and the *Right to Be Informed* encompasses the right to understand the IRS's legal reasoning. One cannot accept or challenge an agency's legal position without understanding what it is and the basis for it. Therefore, we believe OCC's policy of keeping legal advice secret from the taxpaying public to the maximum extent possible does, indeed, constitute a serious problem for taxpayers. In addition, we note that the authorizing statute charges the National Taxpayer Advocate with identifying the most serious problems encountered by taxpayers. The statute does not empower the OCC to determine which issues to designate as problems, nor does it limit what other information the National Taxpayer Advocate may include in her report.]

- (5) Would advice the OCC drafted for the National Taxpayer Advocate concerning a program that the National Taxpayer Advocate does not directly administer be released under the Tax Analysts settlement as PMTA, assuming it is not pre-decisional or subject to another privilege?

[A5] Yes, if the advice is in memorandum form and otherwise meets the standards announced by the circuit court in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), and as applied by the district court in *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007).

[TAS Comment: A5 suggests the OCC does not disclose advice unless it is in “memorandum form.”]

Questions Concerning the Public's Access to OCC's Advice

- (6) Can the OCC withhold advice (that would otherwise be characterized as PMTA and posted) on the basis that it is issued to a headquarters employee who is not a PM?

[A6] The Office of Chief Counsel will withhold advice when it is properly determined to be privileged under the standard described by the D.C. Circuit Court of Appeals in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002).

- (7) Are all the individuals listed in this chart under the “HQ” heading, including the Operating Division Commissioners and the National Taxpayer Advocate, considered PMs for purposes of the disclosure rules? <http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/PA/CCA%20Check/FIELD%20VS%20HQ.htm>. If not, please identify those who are not.

[A7] Yes.

- (8) Does the Tax Analysts settlement require the OCC to release advice to PMs concerning options not taken because they are not permissible as a legal matter (e.g., advice that the IRS does not have legal authorization to use math error authority under a specific set of circumstances)?

[A8] The Office of Chief Counsel releases advice in accordance with *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007), and the settlement reached subsequent to those decisions. As noted by the D.C. Circuit Court of Appeals, the distinction between deliberative technical assistance memoranda (TAs) and TAs that represent Counsel's considered legal

conclusions is not amenable to a categorical formula. It can turn on the subject matter of the TA, on its recipient, on its place in the decision-making process, and even on its tone. This question suggests the resolution of this issue is susceptible to a categorical approach, an approach that the D.C. Circuit specifically rejected.

[TAS Comment: The OCC attorneys who administer the PMTA program informed TAS that advice concerning options that the IRS did not adopt would always be withheld. Questions 8 and 9 were aimed at identifying OCC’s reasons for withholding such advice.]

- (9) Does the Tax Analysts settlement require the OCC to release advice to PMs concerning options not taken because it concludes they are policy calls (*e.g.*, advice that the IRS is legally authorized to use math error authority under a specific set of circumstances, but the IRS decides not to use this authority)?

[A9] Counsel releases advice in accordance with *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007), and the settlement reached subsequent to those decisions. As noted by the D.C. Circuit Court of Appeals, the distinction between deliberative technical assistance memoranda (TAs) and TAs that represent Counsel’s considered legal conclusions is not amenable to a categorical formula. It can turn on the subject matter of the TA, on its recipient, on its place in the decision-making process, and even on its tone. This question suggests the resolution of this issue is susceptible to a categorical approach, an approach that the D.C. Circuit specifically rejected.

- (10) If the answer to either of the prior two questions is no, please reconcile the OCC’s position with the statement by the Circuit Court in *Tax Analysts* (on p. 81) that “[i]t is not necessary that the TAs [advice] reflect the final *programmatic* decisions of the program officers who request them. It is enough that they represent OCC’s final legal position”

[A10] N/A.

- (11) Does the Tax Analysts settlement require the OCC to release as PMTA the memo about post-processing math error, which was issued to the W&I Commissioner and the National Taxpayer Advocate on April 10, 2018? If the answer is no, please explain.

[A11] There was an agreement between the W&I Commissioner and the National Taxpayer Advocate to release this memorandum, and it was released in accordance with that agreement.

- (12) Does the Tax Analysts settlement require the OCC to release the memo underlying the IRS’s position in section 965 FAQ 14? If the answer is no, please explain.

[A12] The Office of Chief Counsel published this memorandum at the request of the Division Commissioner, LBI.

- (13) Will the OCC withhold advice as pre-decisional solely because its legal conclusions will be disclosed later by the IRS as soft guidance?
- a. If yes, please reconcile the OCC's position with the rationale of the Circuit Court in *Tax Analysts* (see p. 75), which suggests that memoranda (not just the conclusions) which form the basis for the agency's conclusions should be disclosed (*i.e.*, the court cited *Tax Analysts v. IRS*, 97 F. Supp. 2d 13, 17-18 (D.C. Cir. 2000), which approved the practice of redacting only the portions of memos "that reflect the opinions and analysis of the author and did not ultimately form the basis" for the conclusions adopted by the agency).

[A13] The Office of Chief Counsel will withhold advice when it is properly determined to be privileged under the standard described by the D.C. Circuit Court of Appeals in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002).

[TAS Comment: The OCC attorneys who administer the PMTA program informed TAS that advice the IRS adopted and incorporated into any kind of guidance or published product (*e.g.*, soft guidance, a form, or the IRM) would always be withheld. They reasoned that although the IRS's conclusion had to be disclosed, if those conclusions would be incorporated into a product that would be disclosed, then the OCC's underlying legal analysis could be withheld. A13 says that the OCC will withhold advice "when it is properly determined to be privileged" under the *Tax Analysts* decision. The response states the obvious and provides no useful information. The purpose of our question—which the response avoids answering—was to elicit information regarding which factors go into determining how that decision is made, so the public is not effectively told "trust us."]

- (14) If the OCC's advice is pre-decisional when issued, does the *Tax Analysts* settlement require the OCC to disclose it as PMTA later if the IRS ultimately adopts the positions taken in the advice (*e.g.*, the IRS adopts the positions in soft guidance)?
- a. If not, please reconcile OCC's position with the statement of the District Court in the *Tax Analysts* case (on p. 13) that "[E]ven if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." (Quotation omitted.)

[A14] The Office of Chief Counsel will withhold advice when it is properly determined to be privileged under the standard described by the D.C. Circuit Court of Appeals in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002).

[TAS Comment: The OCC attorneys who administer the PMTA program informed TAS that once advice was withheld as pre-decisional, it would never be disclosed.]

- (15) Will the OCC withhold advice to a PM in its entirety (rather than disclosing a redacted version) if the advice is "primarily" pre-decisional?
- a. If so, please reconcile the OCC's position with the Circuit Court's approval in *Tax Analysts* of the District Court's decision to allow the IRS to withhold documents covered by the attorney work product privilege, but to require it to disclose redacted documents that were primarily pre-decisional.

[A15] The Office of Chief Counsel will release legal advice under the standard described by the D.C. Circuit Court of Appeals in *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), as well as any other relevant court opinions requiring the release of agency working law that is not otherwise privileged.

[TAS Comment: The OCC attorneys who administer the PMTA program told TAS that OCC could withhold in its entirety, any advice that was “primarily” pre-decisional.]

- (16) What legend does the OCC put on tax reform advice issued to the TRIO and why?

[A16] The Office of Chief Counsel does not put a legend on legal advice to TRIO, because legends are not determinative of whether or not advice is privileged.

[TAS Comment: TAS representatives attended meetings with both the IRS and OCC where such a legend was discussed. On July 9, 2018, we were even told the legend had been approved by the Chief Counsel.]

- (17) Who determines whether OCC advice to PMs is pre-decisional or otherwise privileged?

[A17] The Office of Chief Counsel.

[TAS Comment: A17 does not indicate whether the person who determines whether OCC’s advice is privileged is the OCC attorney(s) issuing the advice or the OCC attorneys who administer the PMTA program.]

- (18) Our understanding is that a document released as PMTA is generally considered to be “agency working law” that is not “pre-decisional.” Is that accurate?
- a. If yes, please describe what “agency working law” is. If not, please define PMTA.

[A18] The Office of Chief Counsel releases as PMTA non-privileged legal advice according to the standards announced by *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007), and the settlement reached subsequent to those decisions.

- (19) If advice is PMTA does that mean it must be released?

[A19] The Office of Chief Counsel releases as PMTA non-privileged legal advice according to the standards announced by *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007), the settlement reached subsequent to those decisions, and any other court opinions requiring the release of legal advice.

[TAS Comment: A18 and A19 do not define PMTA or acknowledge that when something constitutes PMTA, then it must be released.]

(20) How many documents that constitute PMTA have been withheld in full in each of the last 5 years?

[A20] We do not keep this statistic, but we have reviewed the information we have, which covers nearly four years (October 2014 - August 2018). During that time, one PMTA document was withheld in full, and it was withheld as tax convention information under section 6105.

[TAS Comment: Because the OCC response does not define PMTA or indicate whether something classified as PMTA must be released, A20 is impossible to interpret.]

(21) Is email advice subject to disclosure as PMTA?

[A21] The Office of Chief Counsel releases as PMTA non-privileged legal advice according to the standards announced by *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007), and the settlement reached subsequent to those decisions.

- a. Can legal analysis that must be disclosed as PMTA if it is transmitted by memo be shielded from disclosure by transmitting the same analysis in the body of an email?

[A21a] Legal advice that is sent by email is released under the provisions of section 6110. Contrary to what is implied by this question, the Office of Chief Counsel does not encourage its attorneys to provide legal advice in a manner that circumvents our obligations under the Code and case law to release legal advice. In fact, our recent training sessions have begun by emphasizing that employees should treat compliance with the disclosure of legal advice requirements as seriously as they take compliance with the tax laws, noting that the obligation to release CCA is a part of Title 26.

[TAS Comment: A5 acknowledges the OCC does not disclose advice unless it is in “memorandum form.” Our concern is that OCC attorneys can defeat the PMTA disclosure requirements entirely if, once PMTA has been written, an attorney transmits it by email rather than by memo. A21a says the OCC does not encourage its attorneys to provide legal advice in a manner that circumvents the disclosure requirements of IRC § 6110. A21a is unresponsive to Q21a because IRC § 6110 does not apply to PMTA. The disclosure of PMTA is governed by the FOIA and the settlement with Tax Analysts, rather than Title 26. A21a does not address whether the OCC encourages its attorneys to circumvent the rules that apply to PMTA.]

(22) Is there a definition of PM or PMTA anywhere in the CCDM?

[A22] No. Technical Assistance Memoranda are described in historical parts of the IRM (Part 39.8).

(23) Please identify the sections of the CCDM that provide the standards that OCC attorneys are supposed to apply when determining whether to forward memos to the PMTA mailbox for posting to the FOIA library at <https://www.irs.gov/privacy-disclosure/legal-advice-issued-to-program-managers>?

[A23] Legal Advice is covered in Part 33 of the CCDM.

[**TAS Comment:** Although CCDM 33.1.2.2.4 references PMTA, it does not provide any specific guidance about when PMTA should be disclosed. Thus, A22 and A23 confirm that the CCDM contains no specific guidance that OCC attorneys can use to determine whether advice should be disclosed as PMTA.]

- (24) Please provide the dates of any training conducted within the last 5 years addressing the disclosure of PMTA and identify the group of attorneys who were invited.
- a. For each of these training sessions, approximately how many attorneys attended?
 - b. Please provide any written training materials distributed to attendees at each of the training sessions identified in response to this question.

[**A24**] We do not keep this data in one location but have reviewed our recent records and found the following training discussing the disclosure of PMTA (and there may be others):

- Training was held in October 2015 for about 20 ACCI attorneys and managers.
- Training was held in December 2015 for about 15 new national office hires as part of New Attorney Orientation.
- Training for FIP was held in 2015 for approximately 20-30 attorneys and managers.
- Training was held in October 2015 for about 5 new attorneys.
- Training was held in February 2016 for about 5 new attorneys.
- Training for ACCI was held in FY 2017 for about 20 attorneys and managers.
- Training was held in December 2016 for about 15 new national office hires as part of New Attorney Orientation.
- Training was held for P&A in FY 2017 for about 25 attorneys and managers.
- Training was held for Corporate in FY 2017 for about 20 attorneys and managers.
- Training for ACCI was held in August 2017 for about 20 attorneys and managers.
- Training was held in September 2017 for about 7 new attorneys.
- Training was held in November 2017 for about 25 new national office hires as part of New Attorney Orientation.

No written training materials were distributed.

- (25) Is it accurate that CC:P&A is responsible for developing, teaching, and administering the disclosure standards and OCC managers generally are responsible for ensuring compliance with those standards?
- a. If yes, have written standards been provided to all OCC managers? Please provide copies of any standards they are given.

[**A25**] P&A has subject matter responsibility for interpreting the requirements imposed by FOIA and section 6110, and administers the release of legal advice identified as subject to release under the procedures in the CCDM. P&A regularly provides training as outlined above.

- (26) Are all items that are forwarded to the PMTA mailbox posted as PMTA?
- a. If the answer is no, please explain what criteria is used to decide whether to post the advice.

[A26] The Office of Chief Counsel releases as PMTA non-privileged legal advice according to the standards announced by *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *Tax Analysts v. IRS*, 483 F. Supp. 2d 8 (D.D.C. 2007), and the settlement reached subsequent to those decisions.

- (27) How does the OCC know if all PMTA that are required to have been disclosed have been identified and timely posted to the FOIA library at <https://www.irs.gov/privacy-disclosure/legal-advice-issued-to-program-managers>?

[A27] P&A emails the redacted PMTAs to F&M for posting on the website. Once the F&M employee has posted the documents to the Electronic Reading Room, she lets P&A know. We are not aware of any failure in the posting of documents identified and processed as PMTA.

[TAS Comment: A27 does not address how the OCC knows whether its attorneys are timely and properly forwarding PMTA to P&A or whether P&A attorneys are timely and properly forwarding them to F&M to be posted.]

- (28) How quickly after PMTA is issued do OCC guidelines require it be made public?
- a. In practice, how quickly after PMTA is issued is it made public?

[A28a] PMTA is generally processed quarterly and posted in groups. If an office had a need to have publication of a particular document expedited, the offices would accommodate that request.

[TAS Comment: A28a suggests the OCC has no guidelines regarding how quickly a PMTA must be made public.]